

Malaysian Federal Constitution from Constitutional Sociology Contexts

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Abstract: The constitution is the highest source of the law for a country and every individual has to adhere to the nobleness. The purpose of its existence is to serve as the guidance in arranging and coordinating national administration. Malaysian Federal Constitution was formulated by the 1956 Reid Commission which requested for the suggestion and opinion of not only the political parties but also the public, individuals and Malay rulers. During the formulation of the constitution both the Malays and non-Malays agreed on several very important things to the national stability which referred to the social contract. In the context of ethnic relations in Malaysia, several things that are thought to be of benefit to the Malays in the Federal Constitution were balanced by other allocations that also benefit non-Malay ethnic groups. The determination of Islam as the federal religion is balanced by the freedom for every individual to embrace and practise any religion in peace and harmony. The same applies to the determination of the Malay language as the national language which is also balanced by the allocation that there is not one person that can be prohibited from using (other than for official purposes) or teach or learn any other languages. The same goes for the determination of Malay and the Sabah and Sarawak native's special position, balanced with the fact that the government cannot revoke withdraw or lead to the termination of rights of other races. These have been considered in the formulation of the Federal Constitution which is maintaining the elements of locality referring to the special position, federal administration that refers to the ruling power in Negeri Sembilan, the socio-economic position that refers to Malay specialty in economy and education, the administration of Constitutional monarchy that refers to the position of the Institutional Monarchy's and the position of Islam that refers to Islam as the federal religion.

Key words: Federal Constitution, Islam, Malay, federal, social contract, ethnic, ruling power

INTRODUCTION

The Federal Constitution of Malaya was formulated by Reid Commission that was founded in 1956. This commission was led by Lord Reid and it had received 131 written memorandum and it met from June to October 1956 (FMCC., 1957). This constitution has become strong and practical and respected as the commission had asked for opinions and suggestions from not only the political parties but also the public, individuals and Malay rulers. This explains that the Federal Constitution that we have today has obtained the agreement and consensus of Malaysians.

When formulating the constitution, both the Malays and non-Malays agreed on several very important things to the national stability that refer to the social contract. Through this social contract the non-Malays were given very flexible rights of citizenship based on jus soli. Meanwhile, the Malays were given the allocation in the

constitution about Islam as the federal religion, the Malay language as the national language and the special position of the Malays and kings or what is called the traditional elements in the constitution. The proposal in the Reid Commission was revised by the Alliance Party, Malay rulers and the British to be agreed upon. Finally, the draft of the Malaya Federal Constitution was accepted and declared as the Federal Constitution on 31 August 1957. This study will discuss from sociology contexts how Federal Constitution of Malaysia created through Bargaining and Negotiation (BN) concept and the basic framework of the formulation.

MATERIALS AND METHODS

Bargaining and Negotiation (BN); The basis of the constitution formulation: Looking into the formulation of the constitution it can be concluded that the people and leadership at the time applied the BN concept or

Bargaining and Negotiation. This statement is clear from the history of the formulation of the constitution starting from the founding of the Reid Commission to the declaration of the constitution on 31 August 1957 and the entrance of the Sabah dan Sarawak into Malaysia. Looking back at the path to independence every ethnic group in Malaysia plays their own role and there is the involvement of every ethnic in the effort to demand for independence. This is clear through the establishment of the Ethnic Relations Committee 1949 that motivates the effort towards creating the feeling of harmony and cooperation among ethnic. This is followed by the introduction of the member system 1951 that seeks to give an exposure and training to local leaders in the country's administrative affairs also participated by leaders of various ethnic groups. Strong cooperation and understanding is evident when UMNO dan MCA had officially affiliated in the Kuala Lumpur City Council Election leading to the Round Table Negotiation three times in the effort to seek for understanding, respect and cooperation to demand for independence until, the Alliance was established in 1953.

One fascinating fact during the 1955 Federal Election was when they had rejected the racist sentiment of the Malays. If the Malays are racist they can set up Malay government and formulate a constitution for independent Malays. Definitely, the constitution will ensure on the continuous Malay supremacy. In July 1954, the Alliance and British had agreed to hold a Federal Legislative Council that had 98 members, 52 of them selected and 46 appointed. From the 46 members appointed, five of them were nominated by the political parties that obtained the majority in the election. In the 1955 election, Malay voters constituted the majority which is 50 from 52 election areas where 84% from the voters were from the voters all over the country. Other than that, 9 members from 46 members appointed were Malay or specifically nine (Wahid, 1996).

Therefore, if the Malays had a racist sentiment they could win 50 seats contended and they would nominate five more Malay members from the 46 members appointed. Thus, the Malays will get 65 members including one Native representative. The 65 members is more than two-third from the total number of members from the Legislative Council. This also means that the Malays had enough majority to revise the constitution or formulate a new constitution that will be of benefit to the Malays. However, the Malay people did not use this opportunity for the sake of relationship and unity among ethnic groups. The sacrifice made by the Malays at the time was very big and this spurred the spirit of tolerance among ethnic groups.

There were two major memorandums scrutinised in the formulation of the constitution namely the memorandum from the Alliance and the Royal Council also views from the Reid Commission itself. However, the most complicated issue during the formulation of the constitution is one that is related to the issue of citizenship special rights of the Malays and the status of Islam. Reid Commission had made a comment with regard to the memorandums accepted:

“we have considered carefully all the proposals that we have accepted. We have come to a consensus concerning this issue that the best suggestion that can be executed to resolve the current issue is as proposed by the Alliance. The Alliance Party has given close attention with regard to this issue. Briefly put other than the small details they have come to an agreement. They are satisfied with this agreement and they will see it as reasonable tolerance between the views of the races in the party. Every suggestion also receives strong support from other races represented. We are also satisfied that this agreement is one of the best measures of giving justice to the ethnic groups, here, from other suggestions that we have received (FMCC., 1957)”.

In the discussion about citizenship, the commission has accepted the Alliance's suggestions about the citizenship according to its original form because it was supported by the position of the Alliance as the government and the commission found that the suggestion had been the best. Although, in the Alliance itself there was a complication and serious argument that caused the party to be under heavy pressure, finally, it could be done on the basis of tolerance and harmony. This memorandum was delivered to Reid Commission by an Alliance envoy comprising of Datuk Abdul Razak, En. Mohamad Khir Johari, En. Senu Abdul Rahman, V.T. Sambanthan, Bong Pang Hwa, Ng Ek Tiong and Ramanathan and led by Tunku Abdul Rahman on 27 September, 1956.

Upon the harmony and tolerance, the principle of *jus soli* has been accepted in the issue of citizenship (Mahmood, 1981). The same goes with things that touch on the special position of the Malays that need to be resolved harmoniously. No one questions the need for Malays to be protected, so that, they can achieve an economic rank at par with other ethnic groups. Tunku Abdul Rahman himself had declared that in this issue, it would not be revoked. Furthermore, the memorandum proposed that part of the land, scholarship, positions in service and business permits must be made specific to the Malays without affecting or reducing the existing rights and opportunities for the non-Malays.

Issues related to the special rights of the Malays also invited heated debate. UMNO had been sceptical towards the suggestion of the commission that the entire issue was revised in 1972 which is after 15 years of independence. According to the commission, the special position of the Malays must be endorsed with regard to the Malay land reserves, the allocation of the number of people entering public services the number of such people with issuance of approval letters or licenses and with regard to education incentives, financial assistance and other kinds of assistance for studies. The special consideration given to the Malays today must be retained but cannot go further than that. The commission has proposed for this to be revised after 15 years (Ibrahim, 2004).

UMNO felt that there was no need to have a time frame for the Malay special position to be revised and at the same time it agreed that any kind of revision did not necessarily lead to the reduction or elimination of these special rights (Fernando, 2002). Through the memorandum involving the Alliance, UMNO, MCA and MIC they agreed that all citizens were equal except for Malays who have certain advantages such as scholarships, business permits, positions in service. However, this special position did not reduce the significance of the non-Malays.

About Islamic allocation, the Alliance has agreed that the religion for the Federation was Islam. The declaration of the policy will impose any injunction on the non-Muslims to embrace and practise their respective religion and this does not imply that the state is not secular (Ibrahim, 2004). The demographic position of Malaya at the time due to the emergence of immigrants and the increasing number of non-Malays is felt to be a threat to the Malays also the commitment towards Islam is the bargaining factor voiced by UMNO with regard to Islam as the federal religion (Ahmad, 1998).

Other than the Alliance memorandum, Malay rulers also submitted their own memorandum. They proposed that the independent Federation must have a head of the country named the Royal Highness Yang di-Pertuan Agong. He has to be chosen by the monarchy based on who is the next in line as the sultan in their respective state. If the Royal Highness is not willing to accept any terms of appointment or not qualified based on age or the lack of willingness his name will put at the bottom of the list and the second king in line as a sultan has to be accounted for.

The same case with the Malay land reserve that the commission suggested that there should not be any more

Malay land reserve but every state has to reduce the span of the land in their respective state at certain times. UMNO asserted that every Malay land reserve should be retained. Malay areas will continue to exist in every state, including Penang and Melaka. Regarding the position of Islam, upon the request of kings, the commission did not make any suggestion with regard to the official religion of the country. However, the commission had accepted the Alliance's suggestion to include Islam as the official religion in the constitution. This is done with the condition that it does not affect the position of the kings as the head of Islam in their respective state.

Going into the issue of the special position of the Malays, UMNO had been able to fulfill its ambition where the Yang di-Pertuan Agong was tasked to be in control of this aspect and there was no provision done to revise the aspect. Reviewing this issue, Tan Siew Sin stated in the 1957 Federal Council:

“The special position of the Malays has been dictated in the Malaya Federal Treaty. Thus, it was not expected that the Malays would let go of everything that they owned, similar to how they did not expect that the rest of the society would let go of their existing rights (Fernando, 2002)”.

RESULTS AND DISCUSSION

The basic framework of the formulation of the constitution: In the history of the formulation of the Federal Constitution, several things will be seen especially the discussion about ethnic cooperation in formulating the constitution until it was finally, accepted and agreed upon by the three largest ethnic groups in Malaysia comprising of the Malays, Chinese and Indians. This goes to show that the locals were involved in the formulation of the constitution that we have today. The history of the formulation is important to be analysed because through it we get to study the spirit and the purpose as to why a provision is in the agenda. The constitution cannot be understood accurately without referring to the history and the main characteristics also the background of the formulation (Abdul Samat, 2006). Clearly, a provision such as Islam, Monarchy system and the special position of the Malays had long existed even before the arrival of the British. Meanwhile the presence of the immigrants also influenced the development of the constitution (Harding, 1996).

Thus, it is important to see the position of the law before and during British occupation in Malaya before an emphasis was given to the history of the formulation of

the Federal Constitution involving all ethnic groups at the time. The position of the law before and during the occupation had given a great deal of influence and was accounted for in the formulation of the Federal Constitution as found in the Johor Constitution also Terengganu Constitution especially with regard to Islam and the Malays.

For instance, the position of Islam, Malays, the Institutional Monarchys known as *Tiang Seri* had existed 100 years before the constitution was created in 1957. It plays the role of stabilising the national political system and the report made by Reid Commission stressed on the importance of the constitution considering the factors of history, tradition, economy and social that existed before 1957 (Bin Abas, 1985). This shows the importance of the aspect that it is protected under the incitement act that it is regarded as a sensitive issue that cannot be made into a public discussion. For Malaysians, especially the Malays this main pillar is vital because it has become the national identity and the nation's stability depends on the identity a great deal.

The main pillar is also the pre-requisite and the agreement of both the Malays and non-Malays. This means that the special rights of the Malays, Islam as the federal religion and Malay language as the national language as the pre-requirement for the acceptance of the citizenship rights of non-Malays were retained and strengthened. This pre-requirement indicates that the previous leaders had accepted a formula to resolve the issue that existed without involving the conflicts between ethnic groups in Malaya at the time. The jurisdiction of the commission appointed under the name of the queen and Malay rulers is as follows:

“To look into the position of the existing constitution all across the Malaya Federation by accounting for the queen and Malay ruler's position and nobility and to propose a federal constitution for all of the states as a single independent, self-governing unit in the common wealth based on the parliamentary democracy that has a bicameral legislative body (FMCC., 1957)”.

The London Treaty has also stipulated that the constitution that is to be formulated has to account for these aspects:

- The formation of a federation with a strong central government
- The preservation of the position, specialty, nobility and rights of the Malay rulers

- The existence of the position of the head of the state known as the *Yang di-Pertuan Agong*
- The preservation of the special rights of the Malays also the valid rights of people of other races
- The formation of a uniform citizenship system for the entire Malaya Federation (FMCC., 1957).

This commission also carries two objectives in providing the new constitutional framework:

- There must be full opportunity for the growth of a united, independent and democratic country
- There must be complete facilities to develop the country's resources and retain and elevate the people's life quality (FMCC., 1957).

In the contexts of the ethnic relations in Malaysia, the aspects deemed beneficial to the Malays in the Federal Constitution were balanced with other provisions that also gave an advantage to the non-Malays. The item stipulating that Islam is the religion for the federation is balanced by the provision of freedom for every citizen to embrace and practise any religion in peace and harmony. As is the case with the stipulation that the Malay language as the national language balanced by the provision that there is not one person who can be prohibited from using (other than official purposes) or teach or learn any other languages. The same thing happens to the item that stipulates the special position of the Malays and the Sabah dan Sarawak Bumiputera is balanced by the allocation that the government cannot revoke withdraw or cause other race's rights to be reduced.

Thus, this main pillar is very important to be discussed because it has become an important factor to create the Malaysian identity and inculcate the understanding towards unity. It is also a social contract that has been agreed upon during the formulation of the constitution and which is needed for stability and progress and to play an important role in the running of the constitution. The main pillar has also existed for 100 years prior to the constitution in 1957 and the role is to stabilise the national political system. This is stated by the Reid Commission Report which stresses on the importance of the constitution to take into account the factors of history, tradition, economy and social in 1957.

Other than the role as the political stabilizer, the areas that involve the special position of the Malays, Islam and Malay language and the position of the Malay rulers are also protected under the incitement act and will be regarded as sensitive issues that

cannot serve as public discussion issues. This is as stated by Tun Abdul Razak, Malaysian Prime Minister during the presentation of the 1971 Constitutional Law which is:

“Let us all bear in mind the lessons that can be learned from the 13 May incident, let’s not discuss and debate about anything that triggered the incident and how it started because this can make us forget about these irresponsible parties whose intention is to plant the seeds of doubts and worry among races and to use sensitive issues to incite racial sentiment when the electoral campaigns started in April and Mei 1969. They purposefully created the feelings of fear and anger by asking and mocking the prerequisites in the constitution about Bahasa Malaysia and the special positions of the Malays, so, much, so that, it created this feeling of insecurity among the Malays when they see the big differences between them and the non-Malays especially in the fields of economy and education. (JPM., 1972)”.

Islam: In Malaysia, before the existence of the Melaka code of law written in the time of Sultan Muzaffar Shah (1446-1456) by Hang Sidi Ahmad (Liaw, 2003) and Melaka Sea Law (Winstedt *et al.*, 1956), the Islamic legislation was practised much earlier through Terengganu Inscription dated 14 Rejab 702H or 22 February 1303 (Al-Atas, 1970). Terengganu Inscription allocated several rules and regulation in relation to crime, business and administration. This is followed by the Pahang Law arranged during the reign of Sultan Abdul Ghafur Mahaiyuddin Shah (1592-1614) (Kempe *et al.*, 1948), Kedah Law (1650 Port Law), Tembera Dato’ Seri Paduka Tuan (1078H/1666M), Dato’ Star Code Law (t.t), Kedah Law (1199H/1784M) (Winstedt, 1928) and Perak 99 Laws brought into Perak from Hadramaut during the time of Sultan Ahmad Tajuddin Shah (1577-1584) showing that there were written laws in Malaya which at the time, concentrated more on the laws of Islam. This indicates that the Shara’ Law has been used by the Malay community for affairs involving religion, inheritance, marriage and local issues.

The earliest written constitution produced in Malaya was in 1895 which is Johor Constitution. In the constitution it is provided that the King or Sultan must be a Malay of a royalty from the royal descendency a male and a Muslim. Meanwhile, in item VII it is provided that the state religion for Johor is Islam. It must directly and

forever be the religion for the state of Johor (uhamad Arifin, 1999). Item VII of the constitution allocated that:

“What is called the State Religion for this territory and Johor is Islam and the same with the fact that Islam must directly be and forever become and admitted and stated as the state religion where any other religion cannot become or stated as state religions although, all other religions are allowed and always understood as something that can be practised harmoniously by the people who embrace them in every part and territory in Johor”.

After that or in 1911 there was the Terengganu Constitution providing that the king who rules Terengganu must be a Muslim and Malay and he must have the descendency of Terengganu sultans. Ministers must also be Muslims a citizen of Terengganu. In Chapter 51, it is noted that Islam is the religion of the state. The basic of the written constitution shown by the Johor and Terengganu Constitutions, pioneered the existence of other state constitutions in Malaya (Ahmad, 1987). In this matter had the opinion that there was no formal and written constitution in the states of Malaysia before 1948 other than Johor and Terengganu. This is in line with the view of Abdul Samat who stated that modern written constitution began with the Johor constitution followed by the Terengganu Constitution. However, after the British occupation in Malaya, obviously the British law was more prominent and the existing laws were put aside, including the constitution in the Malay states at the time.

Starting in Penang, British had introduced the Charter of Justice (1807), followed by the 2nd Charter of Justice (1826) and the Third Charter of Justice in 1855. With the charters being executed, the laws of Islam that were previously executed as the local laws were neglected and a large part of their credibility lost (Majid, 1997). The introduction of the Islamic marriage in 1880 by the British had officially separated the Islamic laws from the normal legislative system by limiting its application in marital affairs. The segregation of Islamic laws not only in family affairs but by creating laws specific for Islamic administrative affairs had narrowed the jurisdiction of the Islamic judiciary institutions. Among the earliest Islamic administrative laws created under the British influence was the 1880 order in council seeking to arrange the issue of Zakat collection in perak followed by the registration of muhammadian marriages and divorce 1885 about marriage and divorce.

The provision of Islam is outlined in item 3 (1) where islam is the federal religion. The acceptance of this item is carefully revised by looking at Malaya residents

comprising of various ethnic groups. This is because during the British colonialisation they also brought in Christianity while other immigrants like Chinese and Indians also brought in Hinduism dan Buddhism (Bin Abas, 1985). Therefore, item 3 provides a balanced policy whereby other religions can be practised peacefully and harmoniously in any parts of the federation. The freedom of religion is assured in the constitution towards all religions where everyone has the right to embrace and practise his or her religion and every religion has the right to manage their own religion. The institution has to be established and maintained for religious purpose and the assets organised and administered according to the law.

Islam is also accepted as federal religion because it is apt for the Malay definition whereby in Article 160 Malay is defined as someone who is a Muslim, naturally speaking in Malay Language and practising Malay culture. As it was in the era of colonialisation through peace treaties and friendships with Malay rulers, although, they successfully obtained the right to give consultation related to the country's administration, Islam was never exempted. For instance, Article 2 of the agreement between straits settlements and the dignitaries who ruled Negeri Sembilan dated 20 June 1895 agreed that they would adhere with the advice of the British Resident in all administrative affairs, other than the issues related to Islam.

The same thing happened to Allied Malay States and non-Allied Malay states which is the agreement sealed with the British, agreeing that Malay monarchy must accept the advice from British in state administration, except customary and islamic affairs. As was the case with the Second World War which was through the Malayan Union Constitution in 1946 and the Malaya Federation Treaty in 1948 which transformed the role of the British from being an advisor to a direct administrator of Malaya Federation ye the customs of the Malays and Islam were never intervened by the British. The same provision was found in all other treaties agreed by Malay rulers and Great Britain. In a letter dated 24 August 1888, Sultan Ahmad Muathan Shah (sic) from Pahang wrote to Sir Cecil Smith, the Governor of the Straits Settlements at the time:

“In this request we are confident that the British government will give us and our predecessors the assurance of our special position and our actual authority following our own government system and will promise that they will not intervene in our customs under reasons deemed good and reasonable and concerning affairs related to our religion (Maxwell and Gibson, 1924)”.

The same applies when four Malay states were unified and formed a Federation known as the Allied

Malay States in July, 1895 for the purpose of obtaining British protection. Under this agreement, every government of Allied Malay States will be administered under British Government and the kings agreed to accept a British officer called General Resident. His advice must be abided by the kings in all administrative affairs other than those pertaining to Islam.

As at the Federal level it did not have a perfect organisation that can be regarded as central government, so, an agreement was signed in 1909 to create a Federal Council to endorse all laws that would be made effective throughout the federation or in more than one state. With the council established all laws endorsed by the state council will be effective except for those not deemed appropriate to any of the law provisions endorsed by the federal council. However, the priority of the law endorsed by the federal council and the legislative power of the council are restricted to questions related to Islam, the mosque, political pension, local heads and chiefs and other questions with regard to the rights and sovereignty of any one of the four kings. All these issues are specific to the state council and all stay outside the scope of British advisory.

The position of the king in five non-Allied Malays states is also similar. All the kings of the states were not required to receive British advice on things concerning their rights and sovereignty, Malay customs and Islam, although, they are required to follow British advice in other aspects. The same thing happen after the Second World War when the British changed their role from being an advisor to an administrator by introducing the Malayan Union Constitution in 1946 and the Malaya Federal Treaty in 1948, Malay customs and Islam also not within their jurisdiction. From the historical sequence it is clear that, although, Malaya was conquered by the colonial power, the rights on Islam were not tampered with by the British to respect the power of the monarchy. What is fascinating is that in the Malayan Union Constitution opposed by the Malays it also did not touch on the rights of the monarchy and also Islam.

This shows that Islam was accepted as the federal religion for the pluralistic society that lived in Malaysia from the Melaka Sultanate right to the British colonial era. The constitutional provision about Islam was another tradition and its historical development was part of the concept of a monarchy. Islam is also synonymous with Malays. It was hard to accept the fact that the Malays were not Muslim. The close connection between Malays and Islam to the point that they were defined as Malays in the constitution. Relating religion fully to race would be fundamental to the thinking of Malays, so, much, so that, Islam has become an important element in the definition of “Malay” according to the law and the constitution.

Since, the Malays embraced Islam on the 14th century which refers to the Malay Melaka Sultanate era

they rebelled against the European colonial powers like Portuguese and Dutch, aiming to retain and defend their state and religion. Not only that these colonial powers intended to dominate trade and business but they were also determined to convert Islam to Christianity. They failed to do, so because at the time, Malay community had long been holding on to Islam. Thus, the provision for Article 3 Federal Constitution declaring that Islam is the Federal religion, implies the subject of defence among the Malays throughout the time, even before British made their way into Malaysia.

The freedom of religion is assured towards Islam and other faiths that everyone has the right to embrace and practise their religion and it is confined to clause 4 for expansion. However, behind the freedom of religion there are three limitations of freedom. First of all, the freedom to embrace religion is limited by the need to preserve public wellbeing, public health and morality. Thus, the laws endorsed by the parliament for that purpose do not go against the constitution, although, it might influence the freedom of religion. Secondly, the freedom of religion does not mean that anyone can be imposed to pay any kinds of taxes if all or part of it for religion any other than his or her own. Thirdly, one's right to expand religion can be controlled or curbed by the State laws or Federal laws in the federal territory cases if the expansion is done among those already embracing Islam. This limitation is thought to be reasonable because it serves as a substantial effect that proves on the reality that Islam is the federal religion.

Malay: The special position of the Malays is one of the pillars of the constitution. Through Article 153, it is the responsibility of the Royal Highness Yang di-Pertuan Agong to preserve the special position of the Malays and Bumiputera of Sabah and Sarawak and valid interests of other races (Muslim and Samian, 2018). The special position of the Malays is not absolute because it needs to be balanced with the valid interests of other races. Among them are the rights to gain citizenship the right to embrace and practise their religions the right to use the mother tongue and most importantly, the right to be treated equally.

Before the Second World War, matters related to the provision to prioritise Malay ethnic did not surface. This was clear in several agreements between Malay rulers and the British Government where the provision to prioritise Malay residents was unnecessary because this country is a Malay country no one at the time would question the rights and special position enjoyed by the Malays. British officers like R.J. Wilkinson, A.H. Haynes, R.O. Winstedt and C.W. Harrison had the tendency to sympathise with

the Malays. They opined that the Malays are the natural inheritors of this country. Thus, they had put forth the interests of the Malays in the political landscape of Malaya (Wah, 1982).

Obviously after the Second World War, following several agreements with the British Government in all affairs, except Malay customs and Islam, the rights and positions of the Malays had been reduced little by little. The opening of tin mines, rubber estates and immigration open door policy in early 20th century had caused the Malays to lag behind in the surge of national development and stayed in the agricultural field centered in the suburbs. This was added by the British policy that started to be in charge of and responsible for the immigrants residing in Malaya.

The responsibility of the Royal Highness of the Yang di-Pertuan Agong is to ensure the special position of the Malays and it began from the date of the founding of Malaysia, including the Bumiputera in Sabah dan Sarawak. This special position is divided into three aspects, namely in the public service in scholarships and assistance or other study facilities and permit as well as license needed for business and trade. Yang di-Pertuan Agong is given the power to issue orders to the right authority to ensure that this policy is obeyed following the advice of the Cabinet. However, in executing the issue, it cannot be done, if it leads to the termination of any public position or the revoking of scholarships or specialties enjoyed or the removal or termination of permit and the license held.

Other than Article 153 there are several other allocations that explain about the special position of Malays which is in Article 89 and 90. This is in relation to the Malay Land Reserve where it gives the authority of the constitutional law to the existing law with regard to protecting Malay land reserve from being maintained by non-Malays. The entry of service of Malays into the Malay Army Regiment with the exemption of the non-Malays was made effective by Item 8 (5) and with that it can be regarded as part of the special position of the Malays.

There are several factors that caused British to retain the specialty to Malays especially before the Second World War. The British thought that their main task is for Malays and their descendents who have been around in this country for far too long before the arrival of the Chinese and Indians. Additionally, among the Chinese immigrants there is crime that creates problems to the British evident through the formation of triads. From the economic level, the Malays, unlike the Chinese counterparts were not that great competitor to the British. When the nationalist sentiment in China and India became

stronger in the 1920's through the influence of the Kuomintang and Congress Party, the British administrators were hesitant to abolish the policy that consolidated the Malays through several advantages. (Bauer, 1946). It clearly shows that the factor of locality was applied to the inclusion of Article 153 in the Federal Constitution.

The institutional monarchy: The monarchy was already established in the social system in Malay states for centuries. Through the system of monarchy, the king has an absolute power in every administration and ruling assisted by dynamic dignitaries specially appointed before the colonialization of British. Before the 2nd World War (1939-1945) despite being under the British administration, the sultans were sovereign rulers and they had full authority in their respective state. At the same time in several treaties with the British, the sultans have to accept advice from British officers appointed as Resident or British Advisor except for those in regard of Islam (Muslim and Umar, 2017). This went on continuously when Malayan Union was introduced in 1946 where the Sultan had the power and authority in the Malay customs and Islam only and the state administrative power by the Governor. Following the opposition by the Malays, the Malayan Union constitution was abolished and replaced by the Malaya Federation in 1948. Through this new constitution, the rights of the sultan were returned to them. They were given the right to know issues related to law-making.

When Malaya Federation achieved the independence in 1957, the Institutional Monarchy continued with several amendments, so that, it can be adapted to the concepts of parliament democracy and constitutional monarchy. According to the concept of the Constitutional Monarchy they were required to accept the advice of the Minister and acted upon the advice. For example, at the central level, Yang di Pertuan Agong, in performing his tasks, must act upon the advice of the Government Meeting Council. However, in this matter, the advice given must be guided by the constitutional provision and spirit.

At the Federal level, Yang di Pertuan Agong must be appointed among the sultans chosen from the Kings from nine Malay states. Based on the concept of the constitutional monarchy, Yang di-Pertuan Agong was given the power to rule the Federation where the Royal Highness was asked to act upon the advice given by the Cabinet. Yang di Pertuan Agong is also the Highest Ruler of the Federal army and he has the power to forgive and defer the punishment for the people charged by the army court of justice and for offences committed in the Federal

Territory of Kuala Lumpur. He is one of the three main elements of the federal legislative body, namely the Parliament. As the main individual in the constitution he has the power to make important appointments not only according to the constitution but also according to the Acts of the Parliament (Muslim, 2015).

Malay language: The national language is mentioned in the constitution according to Article 152 which allocates national language or the Malay language (following the required implication that must be used for official means). However, this policy also protects other languages and so on to allocate that there is no one who can be forbidden or prevented from using (other than official means) or teach or learn other languages. The national language is created as a medium of communication or general spoken language and national official language to unite people from various ethnic groups (Umar *et al.*, 2018). From the constitutional solidarity, Bahasa Melayu or the Malay language is accepted as the national language in Article 152 Federal Constitution.

Understanding has made the Malay language the national language and it will not affect the use of other mother tongues and this is assured by the Federal Constitution. History has noted that before the Second World War, Malay language was used widely for official purposes like meetings, correspondence, legislation and judiciary in non-Allied Malay States, Police Department and so on to facilitate the administrative affairs because the staff comprises of various races (Bin Abas, 1985). This is strengthened by the fact that the Malay language is accepted as an official language when Johor accepted a British advisor in 1914. For example, in a letter dated 11 May 1914, Sultan Ibrahim who was then Sultan Johor wrote to Sir Arthur Young, the Singaporean Governor:

“I also have to seek for your acceptance about the principle that Malay language and English language must be accepted as the official language to be used in courts and in all of my government agencies. In relation to Malay writings, Jawi or Arabic must be given an official acknowledgment (Maxwell and Gibson, 1924)”.

European officers who held 95% of the positions in group I needed to learn Malay language, take the Malay language test and were required to pass, only then they would be assigned to the Malaya Federation at the time (Hashim, 1987). This shows that the Malay language had

been accepted as the official medium despite being in the British colonialization era. This was acknowledged by Tan Siew Sin in the Federal Legislative Council, 10 July 1957 which is as follows:

“The non-Malay community has put high hopes about their culture and language. Let me say it for instance, the Reid Constitution where the earlier draft did not say anything about retaining and expanding the Chinese and Tamil languages or other languages. When suggested to Malay leaders that the constitution should explicitly state that the retention and expansion of both Chinese and Tamil must be encouraged and preserved they agreed. I mentioned this to show them outside of the circle that Malay leaders are basically fair and visionary”.

The concept of granting the national status to the Malay language is far wider and has more effects than its acknowledgement as an official language alone. One of the effects is that this language directly became the medium of communication to be used for all official means and that all other languages, although, they can be taught and learned can only be used for purposes other than the official ones. The meaning of “official” is defined in Clause (6) in Article 152 of the Constitution concerning any of the purposes of the government including any intention of civil authorities.

The main purpose of making Malay language the national language is to cater for the requirement to unify various ethnic groups, so that, it becomes a united country through one common language which is Malay language which had become the medium of instruction, since, the Melaka Sultanate era. This is because when the constitution was formulated, previous leaders had decided that an independent state could not continue to use English as the official language, if it was to unite its pluralistic citizens. Thus, the non-Malays need to accept the language more than the national language but at the same time they need to accept the rights of the non-Malays to use and learn their mother tongue as dictated in the constitution.

The federation: Malaysia practises the concept of Federal administration. Through this concept, the central government has the power in all important issues comprehensively but at the same time, it retains the state autonomy and respects the nobility, the status and the jurisdiction of the kings in Islamic and Malay custom affairs. The concept of the federation introduced in Malaya by the British in 1895 was nothing new. The

territorial integration took place in the 16th century when nine territories namely Segamat, Naning, Rembau, Sungai Ujong, Johol and Jelebu, Hulu Pahang, Jelai and Kelang merged and were called Negeri Sembilan. The division of power was arranged between territories by appointing Yam Tuan Besar as the head at the central level whereas undang ruling the district level. Both heads at the center and in the territory had an autonomy agreed in a number of aspects.

The concept of the federation introduced by the British in 1896 through the 1895 Federal Treaty combining four states under British namely Selangor, Perak, Pahang and Negeri Sembilan under one central government and it was led by a General Resident. The structure was the continuation of the concept of the federation practised in Negeri Sembilan. The federal implementation introduced by the British to develop the state with the lowest income had changed the landscape of the development in all the states involved. A lot of problems were able to be addressed through the federal administration. The federal system was continued after the attempt to form the federation state was rejected by the king and the people of Malaya. Malaya gained its independence as a Federation whereby all the states in Malaya signed the agreement that formed “Federation of Malaya” with the central government located in Kuala Lumpur. Article 1 (1), Federal Constitution clearly states that the Federal must be known as the Federation of Malaya. On 16 September 1963, Sabah, Sarawak and Singapore agreed to be in the Federation known as the Malaysian Federation. The discussion above shows that the history of the formation of the constitution in Malaysia was earlier than the federal formation in Negeri Sembilan (Bin Muslim *et al.*, 2015).

CONCLUSION

In Malaysia, the approach adopted in the process of the constitutional formulation is based on BN. This is because the Federal Constitution is the outcome of the process of bargaining between the three largest ethnic groups at the time comprising of the Malays, Chinese and Indians through UMNO, MCA and MIC. The bargaining process has created a balanced interest among various ethnic groups in the Federal Constitution to date. Clearly in 1957, during the formulation of the constitution, Malays and non-Malays safeguarded their interests for an independent country. The Malays were not only concerned with their socio-economy but also about their position. However, this did not prevent every ethnic to cooperate and finally, agreed in various aspects such as flexible citizenship, Islam, Malay and special position of the Malays. Based on the approach by BN, several

important things in the constitution like Malays or the locals, Islam, Malay language, Institutional Monarchy and federal administration will be retained and re-instated and this becomes the fundamentals to the formulation of the constitution.

ACKNOWLEDGEMENTS

The researchers gratefully acknowledgement the financial support provided by Department of National Unity and Integration, Malaysia and National University of Malaysia.

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