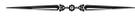


## *Introduction*



‘Rambut sama hitam, hati berlain-lain’  
(We may all have black hair, but our dispositions are different)<sup>1</sup>

**M**ALAYSIA HAS A population of approximately 28.4 million people, of whom about 60 per cent are Muslim and 40 per cent are non-Muslim. The group of non-Muslims consists of Buddhists (19 per cent), Christians (9 per cent), Hindus (6.3 per cent), and Sikhs (0.4 per cent). The members of the native tribes of East Malaysia (Sabah and Sarawak) and of the *orang asli* (original inhabitants) of West Malaysia profess animistic religions, although large numbers of Dayaks, Ibans, and Kadazans in East Malaysia have converted to Christianity. The largest ethnic group in Malaysia is the Malays (50 per cent), followed by the Chinese (24 per cent), the indigenous people (11 per cent), and the Indians (ie those of South Asian heritage, 8 per cent). Bahasa Malaysia is the official language, but English, Chinese (mainly in Cantonese and Hokkien dialect), Tamil, Telugu, Malayalam, Panjabi, Thai and several indigenous languages in Eastern Malaysia are also widely spoken in places. Malaysia has one of the most diverse societies in the world.

The Federation of Malaya became independent in 1957 under a Constitution drafted by Commonwealth jurists. It gathered under its wing the Straits Settlements of Penang and Malacca; and the nine Malay

<sup>1</sup> Various headings of this book begin with a Malay proverb. The versions quoted are often based on CC Brown, *Malay Sayings* (Graham Brash, Singapore, 1951: 1986). The translations, however, are sometimes my own, or provided by Malay friends, and adapted to their significance for the passage in question.

## 2 Introduction

States, Federated<sup>2</sup> and Unfederated.<sup>3</sup> This Constitution became the Federal Constitution of Malaysia when Malaysia was formed with the addition of three new states,<sup>4</sup> making 14 altogether, and the passing of some consequential amendments in 1963. It reflected what one might call the Anglo-Indian constitutional ideas of the 1950s, but adapted in some respects to the local situation. It embodied Westminster-type constitutional ideas and traditions, but also embraced constitutional supremacy, federalism, and a constitutional Bill of Rights, as well as other ideas squarely based on the Indian Constitution of 1950 and its precursors.<sup>5</sup> This structure was also infused with traditional elements and modified according to the perceived needs of a new polity divided by race and religion, and confronted by terrorism. Although amended frequently, and being the site of continual and intense struggle, the Constitution survived to celebrate its 50th anniversary on 31 August 2007.<sup>6</sup> Despite its colonial origins and its continually disputed interpretation and relevance, it has achieved, due to its longevity and in spite of its colonial origins, a status quite rare in the contemporary world – that of an autochthonous constitution. It is, in other words, meaningful after half a century to refer to ‘Malaysian constitutional traditions’. Where the Constitution used to be referred to, dispassionately, as ‘the Constitution’, it is now more often referred to, often passionately, as ‘our Constitution’; a current Malaysian Bar Council campaign is even called ‘My constitution’.<sup>7</sup> In this book it will be referred to, according to the context, as ‘the Constitution’ or ‘the *Merdeka* [independence] Constitution’.

It is with this story of constitutional continuity along with continued constitutional struggle that Malaysia offers this series a fascinating microcosm of virtually all the intractable problems of constitutionalism today. In contemporary Malaysia we find a heady mix of a lively democracy in perpetual motion; authoritarian nationalism; rapid economic development and urbanisation; and ethnic tension heightened by religious

<sup>2</sup> Negeri Sembilan, Pahang, Perak, and Selangor.

<sup>3</sup> Johor, Kedah, Kelantan, Perlis, and Terengganu.

<sup>4</sup> Sabah, Sarawak, and Singapore. Singapore left the Federation in 1965.

<sup>5</sup> The Government of India Act 1935, the British North America Act 1867.

<sup>6</sup> See A Harding and HP Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years, 1957–2007* (Kuala Lumpur, Malayan Law Journal/LexisNexis, 2007). This was the 50th anniversary of the Federation of Malaya Constitution, as opposed to the 50th anniversary of Malaysia itself, which falls in 2013.

<sup>7</sup> [www.malaysianbar.org.my/constitutional\\_law\\_committee](http://www.malaysianbar.org.my/constitutional_law_committee). ‘My’ is also the internet country-suffix for Malaysia.

conflict. All of these elements have deeply affected the contours of the Constitution. More than this, it is the Constitution which has also shaped, as well as providing a battlefield for, continued political struggle. For this reason all of the usual tropes of constitutional discussion, as we will see, have a particular Malaysian resonance – the political economy of law; the rule of law; constitutional government; constitutional monarchy; parliamentary democracy; federalism and states' rights; fundamental rights; the judiciary; even the separation of powers. This Malaysian resonance – constitutional ideas in Malaysian garb – will be in evidence in all the chapters of this book. In the spirit of this series the task of this book is to uncover, describe, analyse and critique constitutionalism as it is practised in Malaysia, pinpointing those issues, events, and landmarks which are either foundational or developmental, or simply indicative of the way things are. It will be an exercise in what Scheppele calls 'constitutional ethnography'.<sup>8</sup>

The essence of constitutionalism, as the guiding concept of this series, is a system of principles, rules and practices of a legal or quasi-legal, binding, nature that frame political action and public decision-making. Constitutionalism also provides both limits and meaning to such acts and decisions. However, it is not a mere abstraction or a set of ideals put into effect on some kind of optional basis. It must also become and be seen as an aspect of the lived experience, history and discourse of the nation, and therefore will take on characteristics that are particular to the nation. It is moreover a characteristic of constitutionalism that it is not a settled concept but a dynamic one. We can observe that constitutionalism generally takes shape only through struggle, controversy and disagreement, seemingly changing its meaning and appearance over time.<sup>9</sup> Nowhere, perhaps, is this truer than in Malaysia, where it is apparent that public life often resembles a fierce struggle over the Constitution itself, a struggle in which every issue, it seems, is capable of being framed as a constitutional issue or one that calls into question the true meaning of constitutionalism. Thus education, for example, is not just about how to produce intelligent, skilled, and rounded younger generations: it is also about the national language and the preservation of minority cultures. It is not just an important political

<sup>8</sup> K Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38 *Law and Society Review* 389.

<sup>9</sup> See, further, A Harding and P Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Oxford, Hart Publishing, 2011) viii–ix.

issue – it is a constitutional issue affecting the basic rights of communities and individuals. As Harding and Whiting have put it,

in Malaysia liberal values and causes are always culturally or socially inflected. Citizenship rights have a social and ethnic dimension; equality before the law has a different meaning as between Muslims and non-Muslims; freedom to speak is freedom to speak about something, and in Malaysia that something has ethnic/cultural/religious and social content and connotations.<sup>10</sup>

Seen in this light, Malaysian constitutionalism leaps out of the law texts and becomes relevant to the lives of all citizens. It is this living reality of constitutionalism in practice and in context – this living reality of constitutionalism that is the core of this series – that this book examines. The reader will not find here anything like comprehensive or detailed coverage in the style of a law text or reference work (several of these are listed as ‘Further Reading’ at the end of chapter one). Instead the objective in this series of linked essays is to gain insight into the principal areas of constitutional contention.

In order to fulfil this objective it is clearly necessary to discuss extensively the Malaysian context, examining the complex nature of Malaysia’s diverse society, its problems and its achievements after half a century of existence. The major theme of the book will therefore be the ways in which pluralism (especially ethnic and religious pluralism) has affected, and is affected by, the struggles over constitutional principle. By ‘pluralism’ is meant here the conscious ways in which the polity, communities, and public opinion conceive and address the social facts of diversity. Pluralism does not therefore simply indicate these social facts (‘diversity’ will do that job well enough in these pages); rather, it indicates society’s response to its diversity. Given that our concern is constitutionalism, it is the responses in relation to the constitution and constitutionalism that will be emphasised. Thus by looking at constitutional problems through the lens of pluralism, and in a society that in some way embodies virtually all of our hopes and fears in this age of what James Tully has called ‘strange multiplicity’,<sup>11</sup> we can perhaps gain some insight into how

<sup>10</sup> A Harding and A Whiting, “The Custodian of Civil Liberties: The Malaysian Bar and the Defence of the Moderate State”, ch 7 of T Halliday, L Karpik and M Feeley (eds), *Fates of Political Liberalism in the Post-Colony: The Politics of the Legal Complex* (Cambridge, Cambridge University Press, 2012).

<sup>11</sup> J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995).

constitutional government can play a large part in binding us together and resolving our differences.

Chapter one will set out the subject's historical background, starting with traditions of government in the Malay States, proceeding through colonial constitutional development and the introduction of the common law, federalism, and Westminster-style government, to the drafting of the Merdeka Constitution and the emergence of Malaysia in 1963. It will also discuss constitutional sources and fundamental concepts. We will see a remarkable trajectory from a strange assortment of territories under various forms of colonial rule towards the birth of a modern and successful nation under a constitutional system that, challenged and profoundly altered as it is, still resembles in many ways that of the 1950s. We will see how and why the Merdeka Constitution took its particular shape and came into effect.

Chapter two examines the nature and concept of the Malaysian state. The emphasis here will be on aspects of executive power and governmental roles and structures. The chapter will also discuss the principles and practice of Cabinet government; the public service in the age of privatisation and deregulation; and emergency and national security powers. Turning to performance as opposed to structure, the state's all-important role in orchestrating development and distributing its benefits will also be discussed. This latter topic involves discussion of one of the central issues in Malaysian constitutionalism – the issue of special privileges for bumiputera citizens (Malays and natives of Sabah and Sarawak). Here we will touch on the developmental state and Malaysian political economy in its legal configurations – a major theme of the book as a whole.

Chapter three will deal with the legislative branch, analysing the political party system in the context of electoral coalition politics and parliamentary representation. Here we will discover the nature of Malaysia's evolving democracy in a party system historically dominated by the ruling Barisan Nasional (BN) coalition but now challenged, especially since 2008, by opposition successes which seemingly offer a different vision of democracy and constitutionalism.

Chapter four examines constitutional monarchy. Given Malaysia's complex and unique system of constitutional monarchy and its renewed significance at the State level, attention will be given here to the traditional Rulers and their powers at the State level, and the role of the Conference of Rulers. This chapter will also offer an opportunity to

look at the Malaysian constitutional monarchy and its role with regard to constitutional conventions surrounding the legislature and its relationship with the executive at the State level and how these have operated in the Malaysian context.

Chapter five focuses on territorial governance, examining federal and state powers in the context of the evolving nature of governance at state and local government levels, including State finance. Here the constitutional system at the State level will be examined briefly, as well as local government. We will see here the dynamic of the federal structure.

Chapter six discusses human rights, examining the constitutional definition, restriction, and enforcement of human rights. Given the large dimensions of this topic, the approach will be to look at one area of rights (liberty of the person), one institution (Suhakam, the National Human Rights Commission), and one group with human rights issues (the indigenous peoples of Malaysia). We will find that human rights have also proved continually controversial and problematical in the context of the authoritarian state and the Asian values debate.

In chapter seven we look at the judicial branch, and especially the role of the Federal Court, focussing attention on the crucial role of the judiciary in the Malaysian polity. The focus here will be on the threats to, and the defence of, judicial independence and the role of the Malaysian Bar in its struggle to maintain constitutional government.

With this structure the book will, up to this point, not differ greatly from others in this series. But we will also see, in chapter eight, on religion, how religious considerations cut across, explain, comment on, and also challenge the fundamental principles of the contemporary constitutional order. The struggle over Malaysian society's pluralist nature will be especially in evidence here. The chapter will consider in particular the jurisdictional conflicts over the jurisdiction of the civil and syariah courts and the issue of religious freedom as the leading site of disagreement over the relationship between the state and religion.

Harper has called Malaysia the 'classic plural society'.<sup>12</sup> Those who look to Malaysia's achievements over half a century often pose the question how a country with such deep ethnic and religious divides, which make those of most countries pale into relative insignificance, has managed to conjure social and economic outcomes that nobody would have

<sup>12</sup> T Harper, *The End of Empire and the Making of Malaya* (Cambridge, Cambridge University Press, 2001) 2.

predicted with any great confidence in 1957. Indeed, Anthony Burgess' *A Malayan Trilogy*,<sup>13</sup> written between 1956 and 1959 (the critical period discussed in chapter one) paints a mid-1950s Malaya standing nervously on the brink of independence, a society apparently – if one believes Burgess' British characters – about to be torn asunder by ethnic hatreds which had only been held in check by a benevolent colonial power. The prospect of peace, stability, and progress seemed, to most observers, unrealistic to say the least in a society that had recently torn itself apart over race, allegiance, and ideology. This was the situation facing the constitution-makers such as Sir Ivor Jennings, and the first holders of political office such as Tunku Abdul Rahman.

The answer to that question is that ethnic hatreds have been mainly held in check by a 'regime of exception', in which 'normal' principles of law appropriate to stability and peace (such as due process of law, and civil liberties) have always been under threat and occasionally actually suspended. Relative stability has prevailed, and prosperity has blossomed more or less continuously, but at the cost of authoritarian methods of dealing with communal issues and challenges. At the same time profound, albeit habitually non-violent, conflict over ideas has been unremitting. Politics has rarely been anything less than overtly personal, subliminally but deeply communal, and fiercely tumultuous as it moves rapidly from one issue to another, often without any real resolution. The nation has edged towards the abyss only to be pulled back sharply by the employment of authoritarian methods, notably in 1969 and 1987. These same methods have often been used to advance and protect the concept and operation (and even suppress debate about) Malaysia's national development. As a result, democracy, constitutionalism and the rule of law are usually said to have been eclipsed, raped, or to be dying or even just dead. Ethnic and religious polarisation is usually alleged to be worse than ever before; it is never thought to have ameliorated. The mid-twentieth-century themes of the *Malayan Trilogy* have not really faded into the background, but have rather undergone a change of key.

Malaysia is a nation of paradoxes, defying attempts to parse its public discourse or indulge in familiar forms of categorisation. Not least of these paradoxes are the constitutional paradoxes explored in this book. This is, as we will see, a nation that embraces democracy but is not

<sup>13</sup> A Burgess, *The Long Day Wanes: A Malayan Trilogy* (Penguin, Harmondsworth, 1972).

comfortably classed as fully democratic. It exhibits fundamental rights mechanisms and rhetoric, but these are sporadically applied and habitually restricted in scope. It relies on the rule of law but the rule of law is also perpetually compromised. It bases its system of government on constitutionalism, but the Constitution itself is the subject of profound and controversial cleavages in understanding and interpretation. It is rampantly diverse, but the majority asserts its dominance over the rest. These and other Malaysian paradoxes will be examined in this book through the lens of Malaysia's evolving, troubled, and contested, but always intriguing, constitutional system.

Note: All references to 'Article' in this book are references to Articles of the Federation Constitution of Malaysia 1957, unless the context indicates otherwise.