

**AHMAD IBRAHIM MEMORIAL LECTURE 2008
“FIFTY YEARS OF CONSTITUTIONAL
GOVERNMENT IN MALAYSIA”***

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It has been a long time since I stood in front of academics and an illustrious audience. Today I consider it a great honour for me to deliver the 9th Memorial Lecture in honour of a great man, the late Professor Emeritus Tan Sri Ahmad Ibrahim who spent all his energy and learning towards spreading Islamic law. However I feel somewhat diffident and inadequate to the task having regards to the fact that the last twenty years of my life were spent away from active public service.

At the beginning, when the faculty of law was established at this university, I used to come on invitations by the late Professor Ahmad and sometimes by students to deliver lectures on various legal topics. I also participated in their seminars. Some students were so enthusiastic that they even had their photographs taken with me. When I was removed from judicial office in 1988, my association with the university ceased. I was no longer invited to give lectures and even the occasional invitations extended to me, I found very hard to accept. I became basically an outcast and as a result, I gave up my duty as an external examiner for the faculties of law of the University of Malaya and the National University of Singapore.

However I gained acceptance by Monash and Melbourne universities immediately after my dismissal as I was appointed as a fellow

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** Former Lord President of the Federal Court of Malaysia and later Supreme Court of Malaysia, (1984-1988).

and visiting professor at these two Australian universities. I mentioned all these to show how disappointed and disillusioned I was with the law of human beings which is, though based on reason and logic, but conceived mostly towards the law of power. Perhaps there is nothing wrong with the law itself but those applying it should have strong belief in the spirit of justice and fair play.

Having said that, I now turn to the topic of this lecture which is titled "Fifty Years of Constitutional Government in Malaysia." I offer an apology if what I am going to say is not accurate because this lecture is written purely from memory and my experience as Solicitor-General and also as a judge. Therefore, I am open to correction.

We have been independent from our colonial masters for more than fifty years. We should therefore have attained sufficient collective maturity to build further this nation of ours. However from time to time, we have heard unhealthy ramblings expressing dissatisfaction on certain sensitive provisions of the constitution with a view to dismantling and replacing them with new ones. On the opposite side, we also hear and read reports resisting changes which have been proposed. They argue that "Social Contract" within the constitution, such as provisions relating to Islam and the special position of the Malays, should be changed so that everything will be equal in the true sense of the word. It is therefore not surprising that this demand has been resisted by those who believe that these provisions are basic necessities to the formation of this federation and therefore, not negotiable.

We must remind ourselves that the "Social Contract" provisions are not expressed in the constitution but could be perceived as being there by reading certain fundamental provisions. These provisions were considered so important that without them the independence in 1957 and later the formation of Malaysia in 1963 would not be possible and achieved. The term "Social Contract" was first used by a famous British philosopher, John Locke, who was opposed to the absolute power of the King. This theory was advanced by him in response to the view of Thomas Hobbes who was the proponent of the King. Whichever its origin, the concept of "Social Contract" as applicable to Malaya or Malaysia should be traced from the Constitutional history of this country. Therefore it is necessary to go back into history to learn how and why these provisions became an integral part of the Malaysian constitution.

To begin with, I need to go back to the years before World War II (1940). At that time Peninsular Malaysia, known as Tanah Melayu,

consisted of three British colonies referred to as the Straits Settlements of Singapore, Penang and Melaka, four Malay states of Selangor, Perak, Negeri Sembilan and Pahang joined together as a federation named Federated Malay States (**FMS**) and lastly five other Malay states of Kelantan, Terengganu, Johor, Kedah and Perlis which were not federated and therefore were known as Un-federated Malay States (**UFMS**). These Malay States were under British protection by virtue of a number of treaties between them and the British Government.

In theory, the FMS and UFMS were independent states in the sense that the governing powers rested with, or were vested, in their respective Rulers or Sultans.

They governed their states following treaties with Great Britain on the advice of British officials known as British Residents, High Commissioners or British Advisors. Although in theory the Sultans could probably refuse to accept the British advice, in practice their advice were accepted without much ado. It is through these advisors that the laws applicable in the Malay states which were then Islamic law and Malay customs were gradually subverted and replaced by English laws. There were, however some oppositions from local inhabitants such as well known personalities like Tok Jangut from Kelantan, Mat Kilau from Pahang, Haji Embong from Terengganu and others but all these and their revolts they raised were crushed.

The economy of Tanah Melayu then consisted mainly of tin and iron mining and rubber plantation. These activities attracted people from India and China to come over and to work and settle in Malaya. There was no immigration law as we understand it today. Immigration was an open door matter. The concepts of citizenship and permanent residence were not known. Some of those who come to Malaya, were British citizens from other parts of the British empire, whilst some others were foreigners coming from outside the British empire. The Malays were subjects of the Sultans of their respective states in which they were born and lived, but internationally they carried the badge of British protected persons.

At the end of World War II, the Japanese having been defeated in 1945, left Malaya and once again the British returned and set up a temporary government known as the British Military Administration (**BMA**). This government was replaced, but was intended to be a permanent one, known as Malayan Union. The union was opposed by the Malays then led by the late Datuk Onn bin Jaafar because under the

Malayan Union, the Rulers had practically surrendered their powers to the British. This meant that the union transformed the Malay states to be British colonies. The movements to oppose the formation of Malayan Union brought into existence a number of political parties, namely UMNO, MCA, MIC and PAS. The result was that the Malayan Union was replaced by another form of government known as the Federation of Malaya, created by the agreements between the Rulers and the British government. These collective and separate agreements were known as the Federation of Malaya Agreement 1948 which came into effect on 1st February 1948. That is why to commemorate the date, we have a public holiday every 1st of February of each year.

The federation of Malaya united nine Malay states and two British colonies (Singapore being excluded). The powers of the Rulers were restored and an attempt to create a Malayan nation state was crafted by the Federation of Malaya Agreement. The period between 1948 and 1957 was a period of intense political activities staged by the local inhabitants demanding independence from Britain. This demand was spurred by political movements in other parts of the British empire in which many British possessions in Asia and Africa gained their independence. For Malaya, it was not an easy task to carve out a constitution which would please everyone, having regard to the fact that there are several different communities, each with its different culture, religion and interest. These diverse elements must somehow be brought together to form a single social or political fabric upon which a constitution of an independent nation could be formulated. Finally, three main communities, the Malays led by UMNO, the Chinese led by MCA and the Indians led by MIC came to an agreement to form a united front then known as the Alliance. For the purpose of negotiating with the British government, this united front, supposedly representing the various inhabitants of Tanah Melayu then, and the Rulers of the nine Malay states also participated in the negotiations through their counsel, Mr Neil Lawson QC.

The Rulers are the traditional elements in the Constitution. For the Malays, it would be unthinkable not to accept them as citizens and have their rights written in the Constitution. On the other hand, it would be wrong not to recognise and to protect the legitimate rights of other communities. Thus the Constitution in the end represents a balanced compromise between the two contending interests. This compromise is reflected in a number of provisions of the Constitution drafted by the

Constitutional Commission 1946 (**Reid Commission**). The watchdog to oversee the implementation of and the interpretation of these various provisions was entrusted to the judiciary, then known as the Supreme Court. After six years, the Federation of Malaya was enlarged by the entry of Singapore and two Borneo states of Sabah and Sarawak. It was on those provisions that Malaysia was formed with additional provisions regarding these new members states. However, after a span of two years, Singapore left the federation because of her insistence upon a policy of Malaysian Malaysia which meant that there should not be any special provision for the indigenous people (Bumiputera).

One would have thought that the concept of Malaysian Malaysia was buried for good. However in the general election of 1969, six years after Singapore left Malaysia, the ghost of Malaysian Malaysia was resurrected and came back showing its ugly head whereby racial riots broke out in Kuala Lumpur and elsewhere in the midst of the general elections (1969) which was then still continuing. The caretaker government of the late Tunku Abdul Rahman and the late Tun Abdul Razak did what was expected of any government to do in order to protect lives and properties. It declared a state of national emergency, suspended or abandoned the general elections which became an impossibility to continue and lastly created a temporary military style of government by decrees. This government was known as the National Operations Council (**NOC**) to rule the country until such times as peace and stability would return and democracy would be restored.

Two years later in 1971, NOC was dismantled and the former Parliament was recalled. As part of the strategies to restore democracy, Kuala Lumpur, the capital of Malaysia, which was then part of Selangor state territory was detached from the state and became a separate entity known as Federal Territory to be governed directly by the government of Malaysia. The Sedition Act (1948) was augmented by a provision prohibiting speaking, and touching on matters regarded as sensitive issues. These provisions were further augmented by having them entrenched in the Federal Constitution. The sensitive issues were those pertaining to citizenship, position of Rulers, rights of Bumiputeras and the Islamic religion (Article 10(4)). These are provisions which can be regarded as the Social Contract reached by the parties negotiating for independence in 1956.

These two events, the departure of Singapore and the race riots in May 1969 should be a sufficient reminder for us all to take note of

how delicate the Malaysian social fabric was and still is. So long as people do not disturb the compromise reached at the Independence in 1957 and as long as they focus their energy towards economic development and amelioration of social conditions, the country would progress because the country is endowed with resources.

Practically in the modern world, every country, with the exception of England, has a written constitution which inevitably is left to the courts to interpret, though the practitioners of the constitution are largely politicians and social activists. Provisions on fundamental liberties entrenched in the constitution would be meaningless if an aggrieved person could not have access to court to challenge the constitutionality of the act taken by the authority. Thus, the Constitutional Commission provided a guarantee consisting of the “supremacy of the law and the power and duty of the court to enforce citizen’s rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise” (**Reid Commission Report: page 70**). This prescription demands that the judiciary should not only be competent, but above all, be one enjoying the confidence and trust of the people and the executive. During the first thirty years of independence, this prescription was accepted without question. It was regarded as part of the natural corollary of the independence of the judiciary. During that time, the Malaysian judiciary earned such a high prestige that it was often referred to as the most trust worthy institution east of the Indian Supreme Court. However, this golden era was brought to an end by the judicial crisis in 1988 which everybody knows and perceives as almost totally paralysing the judiciary. This is not the place to discuss the reasons and merits and demerits of the crisis, but I have made reference to it, not because I was the one who was at the centre of it in my attempt to defend the judiciary, but above all it is an event which destroyed public confidence in it. Now, the public perception, whether right or wrong, was that the court would not be sympathetic to them if the controversy involves the executive, although occasionally some judges do show their courage and independent mind.

Attempts to revive the public confidence in courts received a further setback with the revelation of the so called “Lingam tape” on a matter of the appointment and promotion of judges and the suspicious relationship between judges and lawyers having cases in court. Whilst waiting for Parliament to amend the constitution providing for the establishment of a judicial commission to deal with appointments and promotions of judges, it is our hope that the newly appointed Chief Justice

will carry out the necessary judicial administration in such a way as to ensure the restoration of public confidence. We wish him well. It is on public record that he would take the necessary action against what is reported as “errant judges.” We will support him to do all that is right. The executives the world over are impatient and have no complete trust in the judiciary though they seem to accept that their action and policies are often the executives are open to judicial scrutiny. This causes them to perceive as placing the court on higher position than the executive. Such perception is a misunderstanding of the rule of law. The expression “Supreme Court,” as the apex court has to be changed to “Federal Court” or whatever name as long as the word “supreme” is omitted. The expression “Lord President” which is a title of the highest judge in the hierarchy of judicial offices was similarly altered to the Chief Justice, the objection being to the word “Lord.” As a matter of history, the name “Supreme Court” as the highest court in Malaysia was given by the British and the word “Lord President” was given by the late Sir James Thompson who was the first person to hold such office on Merdeka day. Sir James, being a Scotsman, brought the title from Scotland, his native country to Malaysia undoubtedly, influenced by the Scottish judicial system. The late Tun Syed Sheikh Barakabah who succeeded the late Sir James one day asked me whether the word “Lord” was suitable to describe the office he was holding because he felt uncomfortable with it, but I told him that he need not be so.

Whilst we discuss the relationship between the executive and the rakyat, I like to refer to the use by the police of Section 27 of the Police Act 1967 to curb and deny freedom of speech enshrined in Article 10. Although this Act prescribes that the freedom of speech, assembly and association may be restricted by law passed by Parliament, the police in practice use Section 27 not only to restrict or regulate freedom of speech but to prohibit it altogether at their discretion. In their view, if there is no police permit authorising an assembly in which there would be speeches made, such assembly will be regarded by them as illegal and those participating would be guilty of an offence. Although applications for the permits are normally submitted by the organisers well in advance of the dates when the assembly would be held, the police, for reasons only known to them, invariably delay giving their decisions. If the decision is a rejection of the permit there would be hardly sufficient time for the organisers to inform the would-be-audience and to appeal to the Chief Police Officer (**CPO**) against the rejection. This creates difficulties to

the organisers which in certain cases lead to confrontation between the police and the public who come to hear the speeches. Thus, Section 27 is being used to give the police a *carte blanche* to refuse or to allow a permit. No guideline appears to be in existence enabling the Officer in Charge of the Police District (**OCPD**) as to how his discretion would be exercised. The result is that freedom of speech is ultimately at the hands of the police. Such situation could not have been intended by the constitution.

Another objection is that the decision of the CPO from the decision of the OCPD is final and cannot be questioned in court. This ouster provision runs counter to the concept of the judiciary being a guardian and guarantor for the fundamental liberties. In fact when we examine several legislations dealing with powers of the executive and administrative authorities, these ouster-provisions (decisions of authorities being final and not open to judicial scrutiny) are so common, that they are found in most written law to deny the court of the power to decide the validity or otherwise of the impugned decisions and thus, in a sense protecting the executive. Yet, in any democratic country where the rule of law prevails, examination by the court of actions of the executive is a lively topic and forms the bulk of the public law. Some countries like France created a special court called **Conseil d'État** (Council of State) to deal with administrative matters. In common law countries such function is part of the duty of the ordinary courts to safeguard and protect the rights of citizens.

The worst scenario of the ouster provision is the one enacted in the Societies Act 1966 pertaining to the decisions of political parties which are placed beyond the reach of the court. If a member of a political party is aggrieved by a decision of his party, such member cannot take his grievance to court because the decision of his party is final and court is not allowed to deal with it; the justification being to protect the court from being involved in politics. Do we seriously believe that the court should be so protected? The end result is that political parties are above the law and are laws to themselves. They make their rules, enforce them and interpret them. One may ask: is this not usurping the powers of the courts? No wonder money politics grow very exuberantly in the party elections process despite abhorrence exhibited by party stalwarts and members. The practice of money politics has become so ingrained that it is impossible to abolish or at least to curb even given the best intention

and efforts. Only inward discipline, like the realisation of self respect, would probably refrain one from indulging in such corrupt practices.

In the year 1993, the country saw a collision between the executive and the monarchy. The executive, fearing that the King would not cooperate with them by refusing to give assent to bills passed by Parliament, amended the Constitution giving a 30 day time limit within which the King would give his assent. If no assent was given within that period, the bills so passed would be gazetted and thus, automatically become law, despite lacking the Royal Assent. Before this amendment, no time limit was prescribed by the Constitution for the King to give his assent.

Another provision causing an inroad into the dignity, status and privileges of the monarchy is the amendment of Article of 181 by which the King and the Rulers are made amenable to legal action in their personal capacity. They could now be sued in a Special Court created by a new Article (ie Article 182). Needless to say that these two amendments; dispensing with royal assents and amenability to court proceedings adversely affect privileges, positions, honours and dignity of the monarchy and in my view, contravene Article 38(4) of the Constitution under which no such law could be passed without the consent of the Conference of Rulers. After introducing the bill in Parliament to abolish the royal immunity, the government for the first time realised that consent of the Conference of Rulers was necessary and that it should be obtained. The Bill was then suspended. In the first encounter, the Conference of Rulers refused to give their consent but the government was adamant to get the Bill passed. So, the government sought to obtain their consent by embarking upon tactics of intimidation and shame brought to bear upon the Rulers. Their practices and their lifestyle became favourite topics of newspaper reports -much to their embarrassment. Consent was eventually given but was not unanimous. I know for sure that the Kelantan and Johor Rulers did not give their consent. However, it was during this time that the Sultan of Johor apologized to me the blunder and regret for having me dismissed from the judiciary. Whatever it may be, I do not believe that consent given under such circumstances could be held to be valid.

Another incident worth mentioning here is the proposal of the Federal Government to disband the Johor Military Force (**JMF**) which has been in existence since 1885 and has become part of the Johor Sultan's bodyguards. Likewise, a bill was introduced in Parliament for the purpose without the consent of the Sultan of Johor and the Conference

of Rulers. The legal opinion which I gave to the Sultan was confirmed by Mr. Neil Lawson QC, the same QC who had advised the Rulers at the time when Merdeka constitution was being negotiated. Not only Article 38(4) was not complied with, but the government was under a constitutional obligation by virtue of Article 71(1) to guarantee Rulers to succeed and to hold, enjoy and exercise the constitutional rights and privileges. It is unfortunate that all these amendments were not referred to the courts for its opinion under Article 4 of the Constitution. The court, in my view, should be given the opportunity to deliver opinions on constitutional matters so that the government would not be so ready as to amend constitutional provisions which they find to be irksome and regard as an impediment to the carrying out of their policies. The loss of power to amend the constitution due to the failure of the government to obtain a two-thirds majority of control in Parliament is acutely felt, despite the fact that the majority it obtains is still large and can still function effectively. If trust is given to the court, perhaps Parliament would not be seen as a rubber stamp of the executive.

The events I related here are all from memories and experience. Since my dismissal from the judiciary, I have not had proper helpers to assist me to do research and even to type documents. I am absolutely helpless in using any modern gadgets. Time has overtaken me.

My initial reaction to the invitation by Dr. Najibah to deliver this lecture was to decline, but my memory of the late Professor Emeritus Tan Sri Ahmad Ibrahim was so profound and endearing that on second thoughts, I found it hard to refuse. Here is a simple dedication on my part to contribute to the legacy of the late Professor in the field of law.

I name this topic as fifty years of constitutionalism because the subject is very current with the voice demanding renegotiation of certain provisions perceived by many as favouring the Malay community. I endeavour to trace the history of these provisions which are in my view undeniably a compromise between factions which were then negotiating independence from Britain.

The Malays, intrinsically look up to their Rulers as their protectors and if the institution of Rulers is somewhat affected, their protection would equally be affected. Thus, Article 153 relating to special privileges of the Malays place a special responsibility on the King to protect them in the case of the Federal Constitution, and on Malay Rulers in case of State Constitution. It is in this context that the so called “**Ketuanan Melayu**” is spoken of by politicians and political activists. The *quid pro*

quo of these constitutional provisions relating to the Malay community is the grant of citizenship to non Malays, many of whom were then foreigners and the recognition and protection of their legitimate rights and the rights to profess and to practice their religions subject to public order and morality. To question any of these provisions is to undo what was agreed and had been acted upon for so long and is fraught with dangers of conflict.

While still on this subject, I remember as a student studying history of Roman law and society. In those ancient days in Rome only a person born from Roman parents would become a Roman citizen. As Rome was then a thriving metropolis attracting many people to come and settle, there grew a sizeable number of foreigners in their midst. These people were originally referred to as **Peregreneous** (foreigners) and to deal with them, a **Praetor** (Minister) was appointed. As time passed, the Peregreneous were slowly assimilated into the Roman society and by this time they would be known as the **Phlebian**s and thus finally fully assimilated with the original Roman citizens. Malaysia seems to follow a similar line of development and it is hoped that we too shall reach a situation where the Malaysian citizenship would be fully integrated and the concept of Malaysian Malaysia accepted without question, provided that in the mean time the present constitution would be allowed to operate in the manner and spirit that were originally intended.