

A HISTORICAL EXPOSITION ON THE FUNDAMENTAL FEATURES OF THE FEDERAL CONSTITUTION AND ITS IMPORTANCE TO JUDICIAL INTERPRETATION: A STUDY ON ARTICLE 121(1A)

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ABSTRACT

The Federal Constitution has lasted for more than half a century after its introduction. Recent developments have witnessed various constitutional issues, some of them were controversial in nature such as the latest interpretation of Article 121 (1A) by the judiciary. Hence, an exposition on the heritage foundation of the Constitution is crucial in addressing these developments. The judiciary needs to understand the spirit of all constitutional provisions in order to achieve the correct interpretation of the intention of the legislator. Each country frames its constitution according to its own history and for the good of its own society. The objective of the article is to highlight certain customary elements which form the fundamental features of the Federal Constitution especially on the position of Islam as the religion of the Federation. The research methodology adopted in this article is a doctrinal analysis on the historical narrative that is meant to unearth certain aspects of the fundamental features of the Federal Constitution. The article also analyses the past and recent cases where the judiciary had come up with different interpretations of Article 121 (1A).

Keywords: Federal Constitution, Fundamental Features, Historical Exposition, Intention of Legislators, Judicial Interpretation.

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PENDEDAHAN SEJARAH MENGENAI CIRI-CIRI ASAS PERLEMBAGAAN PERSEKUTUAN DAN KEPENTINGANNYA TERHADAP TAFSIRAN KEHAKIMAN: KAJIAN ARTIKEL 121(1A)

ABSTRAK

Perlembagaan Persekutuan telah bertahan selama lebih daripada setengah abad selepas ia diperkenalkan. Perkembangan baru-baru ini telah menyaksikan pelbagai isu perlembagaan, sebahagian daripadanya bersifat kontroversi seperti tafsiran terkini Perkara 121 (1A) oleh badan kehakiman. Oleh itu, pendedahan mengenai asas warisan Perlembagaan adalah penting dalam menangani perkembangan ini. Badan kehakiman perlu memahami semangat semua peruntukan perlembagaan demi mencapai tafsiran yang menepati niat penggubal undang-undang. Setiap negara merangka perlembagaan mengikut sejarahnya sendiri dan untuk kebaikan masyarakatnya sendiri. Objektif artikel ini adalah untuk mengetengahkan unsur-unsur tradisi tertentu yang membentuk ciri-ciri asas Perlembagaan Persekutuan khususnya mengenai kedudukan Islam sebagai agama Persekutuan. Metodologi penyelidikan yang diguna pakai dalam artikel ini adalah analisis doktrin mengenai naratif sejarah yang bertujuan untuk mencungkil aspek tertentu ciri-ciri asas Perlembagaan Persekutuan. Artikel ini juga menganalisa kes-kes masa lalu dan terkini di mana badan kehakiman telah mengeluarkan tafsiran yang berbeza terhadap Perkara 121 (1A). Daripada tafsiran penggubal undang-undang, artikel ini juga menganalisa ciri-ciri asas Perlembagaan Persekutuan dengan merujuk kepada perkembangan sejarah yang membawa kepada pembentukan Perlembagaan tersebut.

Kata Kunci: Perlembagaan Persekutuan, Ciri-Ciri Asas, Pendedahan Sejarah, Niat Penggubal Undang-undang, Tafsiran Kehakiman.

INTRODUCTION

The Federal Constitution of Malaysia is heavily based on the Federation of Malaya Agreement 1948, which in turn succeeded the Malayan Union Constitution 1946. The earlier history of constitutions in Malaysia basically revolves around two formal documents, the

Constitution of the State of Johore 1895 and the Constitution of Terengganu 1911. Briefly discussed in this article are the chronological events and important documents involved in the making of the Federal Constitution, which include the Report of the London Constitutional Conference 1956, the memorandum by the Royal Highnesses to the Commission 1956, the report by Constitutional Commission 1957, the hearing proceedings of the Memorandums, Alliance Party Memorandum to the Constitutional Commission and the White Paper or names as Constitutional Proposals for the Federation of Malaya 1957.

The objective of this article is to highlight certain customary elements which form the fundamental features of the Federal Constitution especially on the position of Islam as the religion of the Federation. This is important as constitutional provisions must be understood from their historical background. In addition, the judiciary also needs to appreciate the history and to apply the spirit of all constitutional provisions while interpreting the Constitution. The judiciary shall also refer to the intention of the legislators when legislating laws.

In other words, the constitutional provisions must be interpreted and properly appreciated in light of their historical background and context, in order to find out the original intention of the drafters.¹ The importance of this approach is emphasised by the Privy Council in *Matadeen v Pointu*² which considered an appeal against the decision of the Supreme Court of Mauritius where Lord Hoffmann made the following important observation:

“The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account”.

¹ See *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55.

² *Matadeen v Pointu* [1988] YKPC 9.

Recent developments have witnessed some constitutional issues in the judgments especially on the interpretation of Article 121 (1A). Hence, an exposition on the heritage foundation which forms the fundamental features of the Federal Constitution is crucial in addressing the recent developments.

In doing so, the article is divided into three parts. Part One begins with the brief chronological events that led to the formation of the Federal Constitution. This part is crucial as it provides the background of what makes the Federal Constitution. In Part Two, the article attempts to discuss some customary elements that form the fundamental features of the Federal Constitution. To understand these fundamental features is important to the judiciary when interpreting each provision of the Constitution.

Part Three goes on to study Article 121(1A) of the Federal Constitution where it begins with the intentions of the Parliament as to the amendment of Article 121(1) as it provides the background of what makes Article 121 (1A). Then, the article continues analysing recent cases where the judiciary has come up with a different interpretation of Article 121 (1A) from the intention of the legislators.

The authors begin the article by providing a brief layout of the chronological events that lead to the formation of the Federal Constitution.

BRIEF CHRONOLOGICAL EVENTS LEADING TO THE FORMATION OF THE FEDERAL CONSTITUTION

A brief overview of the pathway that the country encountered as well as the important matters and events related to the drafting of the Federal Constitution is provided in this part of the article.

The British began to study and compile plans to set up the Malayan Union as a new form of government for Malaya after Malaya fell to the Japanese occupation in early 1942.³ The British, as the colonial masters felt that the Malayan Union could improve the

³ R.J. Wilkinson, *Journal of the Malayan Branch of the Royal Asiatic Society*, vol 13, no. 2 (122), 161 – 162.

relationship between the people of Malaya as well as to resolve the issue of irregular food supplies at that time. The British narrative was that the Malayan Union administration will result in the Malay states being better organised.⁴ However, the Malay people rose against the Malayan Union due to the fact that its proposed administration system which affect the position of the Malay Rulers and the Malay people themselves. The English Colonies in London discreetly set up a rife in the form of colonisation through the Malayan Union to replace the rule introduced by the British Army without holding any discussion with the Malay Rulers and the Malays.⁵ The birth of consciousness among the Malays to fight for the independence of Malaya is the result of this important event.⁶

The first Malay Congress held on 11 March, 1946 was, arguably, an official starting point of the principle of the Malays' spirit of unity in opposing the British which was clearly reflected in the protests against the Malayan Union. 41 Malay organisations formed the first Malay Congress which also comprised the entire Tanah Melayu Malay Congress. The Congress succeeded in uniting the Malays into a powerful expressive tool which led to the abolishment of the Malayan Union. The primary intention of the Congress at that time was to look after and care for the sovereignty of the Malay Rulers and the rights of the Malays as the sons of the soil.⁷

The United Malays National Organisation (UMNO) was formed on 11 May, 1946 as a result of the first Malay Congress and with the support of the Sultan of Johor. UMNO in its early days played various roles and the formation of the Federation of Malaya in 1948 was a result of its contribution. On 2 June, 1946, the Conference of

⁴ National Archives of Malaysia (1945) Proposal for Malayan Union, Kuala Lumpur.

⁵ Rizal Yaakop, "The British Legacy and Development of Politics in Malaya", *Global Journal of Human Social Science*, vol. 14, no. 1, 5.

⁶ Ibid.

⁷ Ramlah Adam, *Kemelut Politik Semenanjung Tanah Melayu*, (Universiti Malaya Publication, 1998), 179.

Rulers was informed by Sir Edward Gent⁸ and Malcolm MacDonald⁹ that the British Government had agreed to consider the recommendations of the Malay Rulers and for UMNO to draft a new constitution for Malaya. Eventually, 11 committee members led by Dato' Onn Jaafar¹⁰ were entrusted to draft a new constitution to replace the Malayan Union Constitution on 25 July, 1946.¹¹

The Conference of His Excellency the Governor of the Malayan Union, their Royal Highnesses the Rulers of the Malay States and the Representatives of UMNO subsequently appointed an Executive Committee after UMNO had completed the draft constitution led by Dato' Onn. The Working Committee was non-committal in nature and was established instead to review, comment and make recommendations to the details of the proposed constitution. A notable output of the Working Committee was the 'Draft Federation Agreement' as well as a model agreement between the states making up the Federation.¹²

The proposed constitution which was signed by all nine Malay Rulers, later known as the Federation of Malaya Agreement 1948 was

⁸ Sir Gerard Edward James Gent KCMG DSO OBE MC (28 October 1895 – 4 July 1948) was the first appointed Governor of the Malayan Union in 1946. He was most famous for heading early British attempts to crush a pro-independence uprising in Malaya led by the Malayan Communist Party during the Malayan Emergency. DBpedia via https://dbpedia.org/page/Edward_Gent (Accessed 16th August, 2022).

⁹ Sir Malcolm John MacDonald, British Governor-General of the Malayan Union (May 1946-1948) and later Commissioner-General for Southeast Asia from 1948 to 1955. BookSG via <https://eresources.nlb.gov.sg/printheritage/image.aspx?id=f61f4cfc-2b5f-448c-916d-765eb72f0db9> (Accessed 16th August, 2022).

¹⁰ Dato' Onn bin Jaafar, (born 1895, Johor Bahru, Malaya [now in Malaysia]—died January 19, 1962, Johor Bahru), Malayan political figure who played a leading role in the Merdeka (independence) movement and the establishment of the Federation of Malaya, forerunner of the present country of Malaysia. Britannica via <https://www.britannica.com/biography/Dato-Onn-bin-Jaafar> (Accessed 16th August, 2022).

¹¹ A.J. Stockwell, "The formation and First Years of the United Malays National Organization (UMNO)", *Modern Asian Studies*, 14.

¹² Ibid.

finally accepted by the British on 21 January 1948. The agreement resulted in the abolishment of the Malayan Union Constitution 1946 and the official approval of the Federation of Malaya Order in Council. The Federation of Malaya was formed on 1 February, 1948 which was also the date that the Federation of Malaya Order in Council came into force.¹³

With the exception of Johor and Terengganu which already had their respective constitutions since 1895 and 1911, every Malay state possessed its own constitution from 1948 onwards. In order to conform to the requirements of the Federation of Malaya Agreement 1948, important modifications were made to these two earlier constitutions including, among others, the introduction of the Constitutional Monarchy, whereby the Malay Rulers were to act on advice, although some matters within the prerogative of the Rulers was retained, especially on matters pertaining to the religion of Islam and Malay Customs.¹⁴

The Federation of Malaya Agreement paved the way towards self-determination and independence. Apart from inspiring the Malaysians to strive for full independence from their colonial masters, it also formed the basis of the Federal Constitution with the inclusion of the customary elements such as Islam as the religion of the Federation,¹⁵ the Yang Di-Pertuan Agong as the Supreme Head of the Federation and his Consort,¹⁶ the safeguarding of the special status of the Malays and the natives of Sabah and Sarawak as the indigenous people of the nation¹⁷ and the Malay language as the national language of the Federation.¹⁸

The independence talks, formally known as the London Constitutional Conference were held from 18th January to 6th February, 1956, remain a landmark event in the steps leading towards the creation of a self-determining Malaya. The London Constitutional Conference

¹³ Stockwell, 14.

¹⁴ Ibid.

¹⁵ Federal Constitution of Malaysia, Article 3 Part I.

¹⁶ Federal Constitution of Malaysia, Article 39.

¹⁷ Federal Constitution of Malaysia, Article 153.

¹⁸ Federal Constitution of Malaysia, Article 152(1).

also resulted in the establishment of a Constitutional Commission (popularly known as Reid Commission, after the name of the Chairman of the Commission, Lord Reid) with academics and professionals among its ranks. Historically speaking, Tunku Abdul Rahman¹⁹ was appointed Chief Minister of the Federation of Malaya upon completion and the victory of the electoral process held in July 1955.²⁰ The people of Malaya had been given a clear mandate via the election results to continue urging for independence and for Malaya to have a Constitution of its own.²¹

The Constitutional Commission, or Reid Commission was mainly tasked with drafting a constitution for an independent Malaya. The five main terms of reference of the Reid Commission which were approved by Her Majesty the Queen and Their Royal Highnesses, as summarised by Sir Ivor Jennings;²²

“First, the establishment of a strong central government with the states and settlements enjoying a measure of autonomy and with machinery for consultation between the central Government and the States and Settlements;

Second, the safeguarding of the position and prestige of Malay Rulers as constitutional Rulers of their respective States;

¹⁹ Tunku Abdul Rahman Putra Alhaj, (born Feb. 8, 1903, Alor Star, Kedah, Malaya [now Malaysia]—died Dec. 6, 1990, Kuala Lumpur, Malaysia), first prime minister of independent Malaya (1957–63) and then of Malaysia (1963–70), under whose leadership the newly formed government was stabilized. Britannica via <https://www.britannica.com/biography/Tunku-Abdul-Rahman-Putra-Alhaj> (Accessed 16th August, 2022).

²⁰ Edited by Robert Johnson and Timothy Clack, “At The End Of Military Intervention, Historical, Theoretical, and Applied Approaches to Transition, Handover, and Withdrawal”, (United Kingdom, Oxford University Press, 2015).

²¹ Federation of Malaya Constitutional Commission, 1956-57 Report (Kuala Lumpur: Government Printer, 1957).

²² Sir (William) Ivor Jennings, constitutional lawyer and educationalist, a member of the Malayan Constitutional Commission (1956-1957). Archives Hub via <https://archiveshub.jisc.ac.uk/search/archives/487144f7-5bf3-33cf-9239-ab9c1914e53f> (Accessed 16th August, 2022).

Third, the establishment of Yang-di-Pertuan Besar for the whole Federation to be chosen from among their Highnesses of the Malay Rulers;

Fourth, set-up for a common nationality for the whole of the Federation; and

Fifth, the safeguarding of the special position of the Malays and the legitimate interests of the other communities.²³

The Commission began its work in Malaya in June 1956 and completed its first report in December of the same year. During this period, the commission met 118 times and received 131 memorandums submitted by political parties, organisations and the public.²⁴

In the beginning, for a lack of a properly defined job scope the Commission was unsure whether it was to draft the constitutions for all the states forming the Federation or only a single Constitution applicable to all states named as the Federal Constitution. It was decided that, after the terms of reference were finalised, the Commission shall prepare a draft of a Federal Constitution and a Chapter (to form a Schedule to the Federal Constitution) to deliberate on matters to be included in the state constitutions.²⁵

The Constitutional Commission received a fairly extensive response to the first draft of its report and the first draft of the Constitution were released simultaneously in February 1957. Another 11 members committee consisting of 4 representatives of the Malay Rulers, 4 representatives of the Alliance Government, the British High Commissioner, the Chief Secretary and State Attorney was formed to review the recommendations that arose from the Commission's series

²³ Federation of Malaya Constitutional Commission, 1956-57 Report (Kuala Lumpur: Government Printer, 1957).

²⁴ Ibid.

²⁵ Federation of Malaya Constitutional Commission, 1956-57 Report (Kuala Lumpur: Government Printer, 1957).

of discussions aimed to evaluate the various objections and comments related to the constitutional contents.²⁶

The Reid Commission prepared the second draft of the Constitution based on the outcome of meetings, discussions and memorandums submitted by the parties. This draft was subsequently presented, discussed and passed in the British Parliament. The Constitution was brought back to Malaya upon the completion of the enactment process in the British Parliament and once again tabled, discussed and approved by the Federal Legislative Council.²⁷

In conjunction with the declaration of independence of Malaya, the Federal Constitution finally came into force on 31 August, 1957, mere days after it was approved by the Federal Legislative Council on 27 August, 1957.²⁸ The new nation stood tall among other sovereign nations with the Federal Constitution underlying its independence.

In Part two, the article attempt discussion on some customary elements (local ingredients) that form the fundamental features of the Federal Constitution. Understanding these fundamental features is of utmost important to the judiciary when interpreting each provision of the Constitution so that the spirit and intention of the legislators are upheld and achieved. The article begins with the special position of the Royal Institutions.

ROYAL INSTITUTIONS

The Royal Institutions comprised of the Malay Rulers were once an absolute monarchy, the sovereign with full power over the people. The Malay monarchs were steeped in centuries-old tradition and were

²⁶ National Archives of Malaysia (1956). Federation of Malaya Bill. Kuala Lumpur: Malaya Bill, Second Reading.

²⁷ National Archives of Malaysia (1956). Kuala Lumpur: File for Reid Commission Report.

²⁸ National Archives of Malaysia (1956). Kuala Lumpur: File for Reid Commission Report.

synonymous with the culture and history of this country. The arrival of the British in Malaya had resulted in the gradual erosion of the Malay Rulers' powers and this became more evident with the introduction of the Malayan Union proposal, which was rejected by the Malays. The Malays' vehement objection towards the Malayan Union resulted in its abolition and as a result, the sovereignty and position of the Malay Rulers were restored and later acknowledged by the Federation of Malaya Agreement 1948.²⁹

During the course of the discussion for independence, the British accepted the notion that the Malay Sultanate is a vital component for establishing a newly independent nation. This can be seen in the term of reference for the Reid Commission Report and the 1948 Constitution of the Federation of Malaya. Despite the fact that the head of State is the British Governor, the British still accepted the position of the Malay Sultan as the sovereign in their states in the 1948 Constitution.³⁰

The British administration in Malaya adopted a cautious approach when dealing with matters pertaining to the Royal Institutions and placed great importance on maintaining good relations with the Malay Rulers. Hence, it was hardly surprising that the Alliance Party often conveyed its wishes to the British colonial masters via the Royal Institutions.³¹

As the historical owners of the Malay states as well as signatories to the Malayan Independence Agreement, assent by the Malay Rulers towards the agreement had made it possible for Malaya to achieve independence.³²

In drafting the Constitution, the Constitutional Commission did its due diligence in determining the agreement and willingness of

²⁹ Ibrahim Mahmood, *Sejarah Perjuangan Bangsa Melayu*, (Kuala Lumpur: Penerbitan Pustaka Antara, 1981), 178.

³⁰ Constitution of Federation of Malaya 1948, Article 155 stated; "save as expressed herein, this Agreement shall not affect the sovereignty and jurisdiction of Their Highnesses the Rulers in their several States".

³¹ Ibrahim Mahmood, 178.

³² Ibid.

the Malay Rulers, termed as Their Royal Highnesses in accepting the principles of constitutional monarchy via a series of meetings and the notes that followed. Sir Ivor Jennings repeatedly asked the Malay Rulers regarding their readiness towards becoming constitutional monarchs and this was reflected in the minutes of the Commission meeting. The Commission was assured by the lawyer representing the Malay Rulers that the Malay Rulers agreed to and were willing to accept constitutional monarchy on condition that their position as head of Islam in their respective states, loyalty to the King, the highest position of land ownership and implementing legislation authorised except to the extent delivered by him and finally, the highest position in their respective states, were maintained.³³

The Federal Constitution recognises three Royal Institutions at present, namely the Yang di-Pertuan Agong, the Conference of Rulers and the Rulers of nine Malay states.

Article 71 of the Federal Constitution protects the Royal Institutions and guarantees the right of the ruler of a state to succeed and to hold, enjoy and exercise the constitutional rights and privileges of ruler of that state. Meanwhile, Article 181 preserves and guarantees the sovereignty of the Rulers.

The article continues with the provisions on the protection of the Malay privileges which are also customary elements (local ingredients) that form the fundamental features of the Federal Constitution. This part of the article highlights the feature based on historical records.

MALAY PRIVILEGES

The Malays are said to exist in Southeast Asia since more than a millennium ago and the majority of the Malays in the region then had rendered the region of Southeast Asia to be known as the “Malay Archipelago”. Modern day Malaysia was part of the Malay Archipelago and therefore has been home to the Malays for centuries. Compared to the immigrants especially from China and India who

³³ National Archives of Malaysia (1956). London Conference. Kuala Lumpur: File Report Regarding London Conference.

came via the British policy during the colonisation era, the Malays in Malaysia are regarded as the original settlers of the nation.³⁴

Nobody had questioned the special position of the Malays during the early days of colonialism and before the British strengthened their position in Malaya.³⁵ However, the influx of other races into Malaya and the colonials' policy of preferring the Malays to work in villages and other non-urban settings had resulted in the Malays being left behind economically as well as in terms of education.³⁶

Naturally, the Malay Rulers were concerned over the special position of the Malays. The British and the Malay Rulers inked various agreements and understandings related to the position of the Malays and the community's privileges.³⁷ Despite all this, the British had gone back on their word by introducing the Malayan Union which significantly reduced and disrespected the special position of the Malays, which now casually or even legally termed as Malay privileges.³⁸ In addition, a common citizenship policy under the Malayan Union had the effect of further eroding Malay privileges, which played an important role in the Malays' opposition to the Malayan Union.³⁹

The Malay privileges were restored after the Malayan Union proposal was abolished. Such move was affirmed in Paragraph 19(1)(d) of the 1948 Agreement which read, "In the exercise of his executive authority, the High Commissioner shall have the following special responsibilities, that is to say ... (d) the safeguarding of the

³⁴ John Russell Denyes, *The Malaysia Mission of the Methodists Episcopal Church*, (New York: Open Door Emergency Commission, Missionary Society of the Methodist Episcopal Church, 1905), 15-16.

³⁵ John Russell Denyes, *Malaysia* (Board of Foreign Missions Methodists Episcopa Church, 1919), 15.

³⁶ Ibid.

³⁷ Denyes, 15.

³⁸ Rizal Yaakop, 5.

³⁹ Ibid.

special position of the Malays and of the legitimate interests of other communities ... ".⁴⁰

As a result, safeguarding the special position of the Malays became the responsibility of the British High Commissioner under the 1948 Agreement which also mentioned that the privileges given to the Malays did not deny or sidestep the interests and position of the other communities. The same provision also clearly mentioned such matters, where the British High Commissioner is responsible to safeguard the legitimate interests of the other communities and not just the special position of the Malays.⁴¹

As Malaya marched towards independence and self-determination, questions arose regarding the special position of the Malays which were successfully restored in the Federation of Malaya Agreement 1948.⁴² Various views on the issues of Malay privileges were discussed and documented during the making of the 1957 Constitution.⁴³ One of the Constitutional Commission's terms of reference was safeguarding the position of the Malays alongside the legitimate interests of the other communities.⁴⁴

As it is named, matters pertaining to Malay privileges were largely of concern to the Malays. The Malay Rulers' memorandum to the Constitutional Commission in 1956 regarding Malay privileges outlined four areas of importance, namely Malay reserve land, privileges in education, appointment of Malays in the civil service and last but not least, economic privileges for the Malays. As members of the Conference of Rulers, the Malay Rulers also proposed for themselves to be granted specific powers on matters relating to Malay privileges.⁴⁵

⁴⁰ Sheridan, 29-61.

⁴¹ Stockwell, 14.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Paragraph 3, Report of the Federation of Malaya Constitutional Commission 1957.

⁴⁵ Stockwell, 14.

Sir Ivor Jennings accordingly emphasised that the terms of reference to be noted by the Constitutional Commission shall read, "the safeguarding of the special position of the Malays". Jennings accepted Malay privileges as a term of reference by referring to Clause 19(d) of the Federation of Malaya Agreement 1948. The Commission decided that under such circumstances, appropriate provisions must be proposed to be entrenched in the Constitution in order to achieve the mandate to secure Malay privileges.⁴⁶

The Alliance Party also presented its views and recommendations regarding the entrenching of Malay privileges in the Federal Constitution. In another memorandum, the Pan-Malayan Islamic Association also implied along the same lines that the constitution of the country shall be established according to social structure, political necessity as well as its geographical layout. Their Highnesses the Malay Rulers are the heads of their respective states and the Malays are the *Bumiputra* or the sons of the soil, as such political sovereignty evidently lies in their hands.⁴⁷ Hence, the question of whether the Constitution was to have entrenched Malay privileges or otherwise does not arise.

Article 153 of the Federal Constitution articulates the privileges of the Malays in the areas of public service, education and the economy. Such provisions in Article 153 were recommended by the Constitutional Commission based on the terms of reference on their appointment. Additionally, other Malay privilege matters such as those pertaining to Malay Reserve Land were enshrined in Article 89 and Article 90 of the Federal Constitution.

Aside from the above, another customary element (local ingredients) that form the fundamental features of the Federal Constitution is the provision of the Malay language as the National language.

⁴⁶ National Archives of Malaysia (1956). London Conference. Kuala Lumpur: File Report Regarding London Conference.

⁴⁷ Fernando, "Defending the monarchy....", 149-167.

MALAY LANGUAGE

Nations around the world instill a sense of patriotism and belonging as well as foster integration among their citizens via a common, and sometimes official language. Having one or more officially recognised languages enhances the self-esteem of a nation and defines its identity. An acknowledged and important inarguable feature in the history of the Federal Constitution is the position of Malay language or *Bahasa Melayu*.

The history of the nation forms a strong basis for *Bahasa Melayu* to be regarded as its national language. *Bahasa Melayu* was the *de facto* national language long before the colonial era. *Bahasa Melayu* became the lingua franca for all the traders from around the world that flocked to Malacca when it was the busiest port in the Malay Peninsula and among the most populous ports in the world.⁴⁸

The issue of language was never a matter of contention during the constitutional negotiations. The Malay Rulers' memorandum to the Constitutional Commission indicated the need to have *Bahasa Melayu* entrenched in the Constitution as the official language of the country as well as part of the Malay privileges.⁴⁹ The Malay Rulers' recommendation received undivided support from the Alliance Party and was consented to by the Constitutional Commission.⁵⁰

As enshrined in Article 152 of the Federal Constitution, other languages are not sidelined with due recognition of Malay language as a National language. Integrating the various races and uniting a nation through a common language known as *Bahasa Melayu* which also happened to be the medium of communication in the country since time immemorial remains the one and only main objective behind this provision.

⁴⁸ Hanis Izrin Mohd Hassan, "Kegemilangan Bahasa Melayu Sebagai Lingua Franca", *Jurnal Kesidang*, vol. 2 no. 1 (2017), 18-30.

⁴⁹ Federation of Malaya Constitutional Commission, 1956-57 Report.

⁵⁰ Ibid.

In the case of *Mohd Zai bin Mustafa v Menteri Pendidikan Malaysia & Ors* (Rayuan Sivil No. W-01(IM) (NCVC)-682-11/2021),⁵¹ it has been decided that the use of a non-Malay medium of instruction for teaching in Chinese and Tamil vernacular schools is not for an official purpose, and is not an infringement of Article 152(1). The use of the language is therefore not unconstitutional and is protected under the Constitution by virtue of both Article 152(1)(a) and 152(1)(b). Chinese and Tamil schools are not part of public authority as defined under Article 160(2) of the Federal Constitution.

Finally, the article continues with another customary element (local ingredient) that form the fundamental features of the Federal Constitution which is the position of Islam as the religion of the Federation.

THE POSITION OF ISLAM

Article VII of the Johor State Constitution 1895⁵² and the provisions of Chapter 51 of the Terengganu State Constitution 1911⁵³ indicate that clear legal provisions on the position of Islam had indeed existed in the constitution of the Malay states during pre-independence times, making the Malay State as “*Islamiyyah Melayuwiyyah*”. In the case of *Ramah v Laton*,⁵⁴ the Court of Appeal of the Associated States of Selangor has decided that Muslim law is not a foreign law but local law and the law of the land.

Islam is declared as the religion of the Federation in Article 3(1) of the Federal Constitution. This Article is of significant importance because not only does it give recognition that Malaysia is not a secular state, the provision is also backed by other provisions that support the religion and the Muslims within Malaysia. In this regard, the views of Abdul Aziz Bari and Tun Abdul Hamid Mohamad are

⁵¹ See also *Mohd Alif Anas bin Md Noor & Ors v Menteri Pendidikan Malaysia & Ors* [2022] MLJU 1140.

⁵² Article LVII of the 1895 Johore Constitution. See Ahmad Ibrahim (1987), 3.

⁵³ Chapter 51 of the Terengganu State Constitution 1911 See Ahmad Ibrahim (1987), 3.

⁵⁴ *Ramah v Laton* [1927] 1 MLRA 97.

relied on in illustrating that the provision relating to the special position of Islam under the constitution.⁵⁵ The provision received different interpretations as well as resulted in some confusion, although it is worded clearly.

The position of Islam in the Constitution is supported by many other provisions besides Article 3. For example, the State Legislature is empowered to block proselytisation, or any expansion of the doctrine or religion other than Islam among Muslims via Article 11(4). The reason for this provision was expressed by the Malay Rulers through their Highnesses' memorandum to the Constitutional Commission although its purpose is not defined in the Constitution.⁵⁶ The Malay Rulers wanted a special provision that protects the Malays in this country from the teachings of communism, of which doctrine denies the existence of God.⁵⁷ The propagation of such ideology among the Malay people was of a noble concern on the part of the Malay Rulers. In short, the position of Islam and Muslims is secured in the sense that they are meant to be free from attempts to proselytise them and of religious propaganda.

Article 12 allows the government to allocate financial assistance for Islamic education, which is indeed a privilege while the Constitution is indeed silent on government assistance to the educational institutions of other religions. Provided students at a school number no less than 15, Section 36 and 37 of the Education Act 1961 made it compulsory for any school receiving government assistance to teach Islam to Muslim students. Expressly empowered by the Federal Constitution, the two sections of this 1961 Act and its implementation should not be considered as contrary to the Constitution or in any manner discriminating against other religions simply because the government is not obliged to render similar help in teaching other

⁵⁵ See Abdul Hamid Mohamad, *Buat Kerja*, (Kuala Lumpur: Utusan Publication & Distributors, 2017), 83. See also Abdul Aziz Bari, "Religion, Law, And Governance in Malaysia", *Islam and Civilizational Renewal*, (2010), 60 – 77, see *Islam dalam Perlembagaan Malaysia*, Petaling Jaya: iMAP, 2005.

⁵⁶ Joseph M. Fernando, "Defending the monarchy: The Malay Rulers and the making of the Malayan constitution, 1956-1957", *Open Edition Journal*, 88, 2014, 149-167.

⁵⁷ Fernando, 149-167.

religions. Besides the above, there are provisions that enable Islamic organisations to receive funding from the national budget to be used in the course of strengthening Islam in the country. Additionally, the positions of the *Menteri Besar* or chief minister and the state secretaries of nine states are exclusively for Muslims.⁵⁸

The oath of office of the Yang di-Pertuan Agong in the Fourth Schedule of the Constitution also provides a clear picture on the position of Islam. The oath is not only an express swear indicating the task of the Yang di-Pertuan Agong in defending Islam at all times but is also uttered using the name of Allah. In addition, in a state of emergency the special position of Islam is indicated in Article 150(6A) where Parliament is not allowed to formulate new Islamic law during such time. In other words, the executive can make necessary laws during an emergency with the exception of legislation pertaining to Islam. The amendment of Article 121 (1) of the Federal Constitution by inserting a new Clause (1A) also recognises the position of Syariah Courts in the Federal Constitution. Case in point, after the amendment of Article 121 (1) in 1988, the Federal Court was respectful of the Syariah Court in its approach such as when it ruled that written approval from the Syariah Court must be obtained by a person in his or her bid to change one's religious status, as seen in the case of *Azlina (Lina Joy) v Majlis Agama Islam Wilayah Persekutuan & Ors*⁵⁹ until the recent development that will be discussed in Part Three of this article.

In Part Three, the article begins by providing the reason triggering the amendment of Article 121(1) of the Federal Constitution.

⁵⁸ Abdul Aziz Bari, "Religion, Law, And Governance in Malaysia", *Islam and Civilizational Renewal*, (2010), 60 – 77.

⁵⁹ *Azlina (Lina Joy) v Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 1 MLRA 359.

A STUDY ON ARTICLE 121 (1A) OF THE FEDERAL CONSTITUTION

The conflicts of jurisdictions between the civil courts and syariah courts were heard since the early 1970s. In the case of *Commissioner of Religious Affairs v Tengku Mariam*,⁶⁰ the Federal Court held that the Civil Courts were not bound by the gazetted *fatwa* of the Mufti of Terengganu. The Privy Council followed the judgments and held that the *wakaf* was void. In *Myriam v Mohamed Ariff*,⁶¹ Abdul Hamid J decided that the High Court has jurisdiction in a custody case which involves a Muslim.

Article 121 of the Federal Constitution was amended via the insertion of a new Clause Article 121 (1A) in order to overcome the conflict. Article 121 (1A) reads, “The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.” The provision came into force on 10th June, 1998.

According to Almarhum Professor Ahmad Ibrahim,⁶² the prevailing reason for the amendment of Article 121 by inserting Article 121 (1A) is to avoid the recurrence of conflicts like in *Myriam v Mohamed Ariff* case. In this particular case, the parties divorced before a Kadi (Syariah) Court and it was agreed and consented between both parties in the proceeding that the *hadhanah* of the children (a daughter and a son) was granted to the father/respondent. Later, the applicant went before the Civil High Court to obtain an order for the *hadhanah*

⁶⁰ *Commissioner of Religious Affairs v Tengku Mariam* [1970] 1 MLJ 220.

⁶¹ *Myriam v Mohamed Ariff* [1971] 1 MLJ 265.

⁶² Tan Sri Datuk Professor Ahmad Ibrahim (*b. 12 May 1916, Singapore–d. 17 April 1999, Gombak, Malaysia*), also known as Ahmad bin Mohamed Ibrahim, the founder of Kulliyah Undang-Undang at the International Islamic University of Malaysia (UIAM) which was later named as Kulliyah Undang-Undang Ahmad Ibrahim after him. He also played an important role in the drafting of Article 121 (1A), of the Federal Constitution in 1988. The Patriots via https://www-the-patriots-asia.translate.google/prof-ahmad-ibrahim-tokoh-perundangan-islam-di-malaysia-dan-singapura/?x_tr_sl=ms&x_tr_tl=en&x_tr_hl=en&x_tr_pto=sc (accessed 16th August, 2022)

to be granted to the mother/applicant. The learned High Court departed from the Kadi (Syariah) Court's decision and granted the *hadhanah* of the son to the mother /applicant.

Some aggrieved parties at the Syariah Courts took advantage of such a situation and used the Civil High Court as a back door to turn the former's decision in their favour. This practice was seen as undermining the credibility of the Syariah Courts, thus the amendment to Article 121 by inserting Clause (1A) acts was an initiative to uphold the credibility of the Syariah Courts and the sanctity of the *Hukum Syarak*.

Based on the Hansard of Dewan Rakyat, Parlimen Ketujuh, Penggal Kedua (17th March, 1988 and 18th March 1988) and Dewan Negara, Parlimen Ketujuh, Penggal Kedua (4th April, 1988 and 5th April 1988), it can be summarised that the intentions of the Parliament as to the amendment of Article 121 (1) by inserting Clause (1A) are as follows:-

- (1) to avoid Civil Courts from reversing or quashing decision made by Syariah Courts as it threatens the credibility of the Syariah Court and the administration of *Hukum Syarak* by Muslims;
- (2) to protect and uphold the credibility of Syariah Courts as Syariah Courts are conferred with absolute powers to decide on matters which fall under their jurisdiction especially on matters pertaining to *Hukum Syarak*;
- (3) to ensure that the Civil Courts shall have no jurisdiction to hear or decide on matters which exclusively fall under the jurisdiction of the Syariah Courts;
- (4) to ensure that the Civil Courts shall have no jurisdiction to review decisions made by the Syariah Courts;
- (5) decisions made by Syariah Courts shall no longer be referred to Civil Courts; and

(6) to acknowledge and uphold the position of Syariah Judges accordingly and to uphold the sanctity of *Hukum Syarak*;

Hardly three years after the amendment to Article 121(1) was introduced, the conflict has reverted to the old position in the case of *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus*.⁶³ Edgar Joseph Jr. J, the learned judge in this case has said, among others: “My research into the authorities compels me to the conclusion although the Administration of Muslim Law Enactment 1959, Penang does expressly confer general civil jurisdiction on the Court of Kadi Besar to hear and determine proceedings where the parties profess the Muslim religion and which relate, inter alia, to the guardianship or custody of infants, such jurisdiction is not exclusive.”

Shahamin’s case was overruled by the Supreme Court in *Mohamed Habibullah bin Mahmood v Faridah bte Dato’ Talib*.⁶⁴ In this case, the Supreme Court affirmed that the effect of the amendment of Article 121 (1) by inserting Clause (1A) was that matters within the jurisdiction of the Syariah Court were outside the jurisdiction of the Civil Courts. In the case of *Azlina (Lina Joy) v Majlis Agama Islam Wilayah Persekutuan & Ors*,⁶⁵ the Federal Court was respectful of the Syariah Court in its approach when it ruled that written approval from the Syariah Court must be obtained by a person in his or her bid to change one’s religious status from Islam. When the judgement was delivered, most people seemed to have thought the conflict of jurisdictions is finally over.

Amending Article 121 (1) by inserting Clause (1A) should have settled the conflict of jurisdiction between the Civil and Syariah Courts. The intention of the legislators as mentioned above is very clear. However, recent developments on how the Civil Courts interpret

⁶³ *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus* [1991] 3 CLJ 220.

⁶⁴ *Mohamed Habibullah bin Mahmood v Faridah bte Dato’ Talib* [1992] 2 MLJ 793.

⁶⁵ *Azlina (Lina Joy) v Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 1 MLRA 359.

Article 121 (1A) are really disturbing and worrying to the majority of the Muslims in Malaysia.

The article begins with analysing the case of *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*.⁶⁶ In this case, the converted father who had obtained custody of the three children from the Syariah Court had unilaterally converted them to Islam while their Hindu mother had been granted custody of the children by the High Court. The wife sought to set aside the conversion in judicial review proceedings. The question before the Court was whether the consent of only one parent is sufficient to effect the conversion.

The Court of Appeal had reversed the relief granted to the wife by the High Court on the ground that the subject matter of the review was within the exclusive province of the Syariah Court. On further appeal, the Federal Court allowed the appeal by the wife. In delivering the judgment of the Federal Court Justice Zainun Ali FCJ said, *inter alia*:

“The amendment inserting Clause (1A) in Article 121 does not oust the jurisdiction of the Civil Courts nor does it confer judicial power on the Syariah Courts. More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect; it would be invalid, if not downright repugnant, to the notion of the judicial power inherent in the basic structure of the Constitution.”

In the case of *Rosliza Ibrahim v Kerajaan Negeri Selangor & Anor*,⁶⁷ the appeal concerns the appellant’s application that her father and mother were not married at the time of her birth and she was accordingly an illegitimate child. As such, the religious status of her punitive father could not be regarded in the determination of her own religion. As the appellant did not adopt the religion of her father and never raised as a Muslim, she was not a person professing the religion of Islam.

⁶⁶ *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC).

⁶⁷ *Rosliza Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLRA 70.

In this case, both the High Court and Court of Appeal rejected the appellant's argument. The Court of Appeal further held that her bid to renounce the religion of Islam was a matter within the jurisdiction of the Syariah Court. However, the Federal Court allowed the appellant's appeal and set aside the orders of the High Court and Court of Appeal. Tengku Maimun Tuan Mat CJ delivering the judgment of the Federal Court said, among others that "Following the judgment in *Indira Gandhi's* case, it was clear that even the father had the secular paternal right to decide the Plaintiff's (appellant's) religion, the right was not his to exercise alone. There was no evidence that the mother jointly consented to recognise the plaintiff (appellant) as a Muslim."

Her ladyship further said that,

"There was a critical distinction between no longer a Muslim and never was a Muslim. The former fall within the jurisdiction of the Syariah Courts and the latter described as *ab initio* cases, could not fall within the jurisdiction of the Syariah Courts. The phrase professing the religion of Islam was a provision of the Federal Constitution. Ascertaining the meaning of any provision of the Federal Constitution was a judicial power classified broadly under the umbrella of judicial review and accordingly it was a power vested strictly and only in the Civil superior courts."

In another case, *Iki Putra bin Mubarak v Kerajaan Negeri Selangor & Anor*,⁶⁸ the issue to be determined by the Federal Court concerns the interpretation or effect of the words "except in regard to matters included in the Federal List" contained in Item I, List II, Ninth Schedule of the Federal Constitution ("State List"), vis-à-vis the power of the State legislatures to make laws under the said item. The Petitioner sought to challenge the competency of the Selangor's State Legislative to enact Section 28 "Sexual intercourse against the order of nature" of the Syariah Criminal Offences (Selangor) Enactment 1995. The Federal Court allowed the Petitioner's appeal.

⁶⁸ *Iki Putra bin Mubarak v Kerajaan Negeri Selangor & Anor* [2021] 3 MLRA 384.

Tengku Maimun Tuan Mat CJ delivering the judgment said, inter alia that “States did not have an overriding power of legislation on the subject of criminal law. Their power was strictly designated to matters which Parliament did not otherwise have power to make laws on. In the result, having regard to the preclusion clause in Item 1 of the State List, when the two legislatures (Federal and State) legislated a law concerning the subject matter of criminal law, and the two laws touched on the same matter, the said laws could not co-exist even if the said law was to be against the precepts of Islam.” Her ladyship further said among others that “To that extent, Section 28 of the 1995 Enactment was inconsistent with the Federal Constitution and was therefore void.”

In the case of *SIS Forum (Malaysia) v Majlis Agama Islam Selangor (Intervener)*,⁶⁹ the Applicant sought for a declaration that Section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 is invalid on the ground that it makes provision with respect to a matter which the legislature of the State of Selangor has no power to make, and as such, the said provision is unconstitutional, null and void. The Federal Court unanimously allowed the petition and granted the declaration prayed for by the Applicant.

Tengku Maimun Tuan Mat CJ delivering the judgment said, inter alia, “The use of the words judicial review alone and in a manner which enables the Syariah Courts to exercise such powers is itself to assign unto such courts powers which have always been unique and exclusive to the Civil Courts. The words: constitution, organisation and procedure of Syariah Courts cannot be stretched to confer such powers on the Syariah Courts. Further, given the settled demarcation of the jurisdiction of the Civil and Syariah Courts, the demarcation will be observed, should the Syariah Courts exercise and possess parallel powers of judicial review and public law remedies.”

The latest conflict on jurisdiction between Civil Courts and Syariah Courts is the case of Loh Siew Hong. She has obtained an order from the Family Division of the Kuala Lumpur High Court as the sole

⁶⁹ *SIS Forum (Malaysia) v Majlis Agama Islam Selangor (Intervener)* [2022] 3 MLRA 219.

custody, care and control of her three children. In the case against *Nazirah Nanthakumar Abdullah & Anor*,⁷⁰ she applied for a writ of habeas corpus to issue an order that her children be released from the personal custody of the 1st and/or 2nd respondent and be returned to her custody. The Kuala Lumpur High Court allowed her application. In another case that involved her, *Loh Siew Hong v Nagahswaran a/l Muniandy (Majlis Agama Islam Dan Adat Istiadat Melayu Perlis (MAIPs), proposed intervener)*,⁷¹ the application by MAIPs to become the intervener was dismissed.

On 1st August 2022, the High Court of Kuala Lumpur granted leave to Loh Siew Hong for her judicial review against the unilateral conversion of her three children. Loh Siew Hong is challenging her ex-husband's move to change their three underage children's religion from Hinduism to Islam without her knowledge and consent in 2019.

Based on the development of the above recent cases, it is submitted that the interpretation by the judiciary on Article 121 (1A) of the Federal Constitution has been diverted from the intention of the legislators when Article 121 (1) was amended in 1988. Hence, an exposition on the heritage foundation of the Federal Constitution is crucial to address these developments. The judiciary needs to understand the spirit of all constitutional provisions in order to achieve the correct interpretation on the intention of the legislators.

CONCLUSION

Understanding the constitutional provisions require the judges to understand the history behind each of these provisions. It is indeed compelling for the article to mention that, evaluation of issues addressed in this paper is beyond legal or statutory provisions as the evaluation was aided greatly by reference to the original documents in the making of the Constitution. Here lies the value of a constitution, which should always be read inseparably from the history of the

⁷⁰ *Loh Siew Hong v Nazirah Nanthakumar Abdullah & Anor* [2022] 5 MLRH 209.

⁷¹ *Loh Siew Hong v Nagahswaran a/l Muniandy (Majlis Agama Islam Dan Adat Istiadat Melayu Perlis (MAIPs), proposed intervener)* [2022] MLJU 1503.

country. Due attention must also be given to historical events leading to the Malays' objection to the Malayan Union and the framing of the Federation of Malaya Agreement 1948. On a similar note, it is pertinent to focus on all related documents in the process of making the independent constitution of 1957. Such documents have had a profound impact on all provisions of the Constitution, most of which involve elements of custom.

A historical perspective may assist judges in understanding the spirit and applying the words of the Constitution as they were meant to be. This is especially relevant at times when the nation is facing changes, socially or even legally. The judges cannot ignore the importance of the fundamental features of the Federal Constitution such as the special position of the Royal Institutions, the Malay privileges, the Malay language as the National language and the position of Islam as the religion of the Federation when interpreting each and every provision of the Federal Constitution, as for the purpose of this article, Article 121(1A). Thus, the exposition of the fundamental features is indeed relevant to the current and future understanding of the Federal Constitution.

Suffian LP delivering the judgment in the case of *Phang Chin Hock v PP*,⁷² said, among others “Whatever may be said of other Constitutions, they are ultimately of little assistance because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions'.”

⁷² *Phang Chin Hock v PP* [1980] 1 MLJ 70 (FC).