


PEACEFUL, JUST & INCLUSIVE SOCIETIES: THE ROLE OF INSTITUTIONAL REFORM

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PRELIMINARY REMARKS

For many decades after her independence, Malaysia was regarded by much of Asia and Africa as an exemplar of a pluralist society in which peace, prosperity, democracy and development flourished.

The Constitution of Malaysia, with all its flaws, was a masterpiece of compromise, compassion and moderation. It sought to be inclusive and to promote unity in diversity.



Indeed, the blessings of the Almighty on this country were, and are, many. There have been no coup d'états. We have peace, stability and prosperity. No region, religion, race or tribe is at war with the central government. The dazzling diversity of the nation is not only permitted, it is celebrated. Other than some fringe groups of hate mongers, most of us live together in peace and harmony. We are a rainbow-hued nation with colours that are separate but not apart.



In the human rights arena, though some “first generation” civil and political liberties remain under stringent state control, the “second generation” socio-economic rights are well protected. In many areas like primary and secondary education, medical care, women’s emancipation, poverty eradication and workers’ rights, Malaysia has done quite well. Of course, there are still some valleys of darkness where the rays of justice do not reach. The plight of the *orang asli* is a clear example. But all in all, the country enjoys peace and prosperity and almost everyone has a chance for upward mobility.



In the last two decades however, constitutionalism faces threats from many quarters.

The constitutional scheme of check and balance amongst the organs of state has broken down. By 2018 the executive had coopted every organ of the state to do its bidding.

Hooligan politics, hate speech, religious extremism, enforced disappearances, political murders and a migrant death camp in Wang Kelian have marred our legal landscape.





The social fabric is under severe strain. An increasing number of people view every issue through a racial or religious lens. Race and religious polarisation is growing worse. In some respects we have become a nation of strangers

In many areas of governance, economy, law and social life, decisions are made or thwarted by powerful elements who constitute a “state within a state”.

There is serious corruption at all levels and the looting of public revenues by a voracious political and bureaucratic elite is widespread.

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But there is hope that this tide, like any tide, can be reversed. On the firm foundation that exists, we can rebuild institutions, principles and procedures to strengthen constitutionalism, rule of law, good governance and sustainable development in our nascent democracy.

With this aim in mind, an Institutional Reform Committee was formed by the Government immediately after GE-14.

CONSIDERATIONS FOR THE INSTITUTIONAL REFORM COMMITTEE

- The Committee was fully conscious that institutional reform by itself is not enough. Institutions are as good as the people who administer them.
- The success of legal, structural and institutional reforms needs backing by the public; commitment of capable and honest public servants to implement the reforms and political leaders of courage and conscience who stay the course. As Jesse Jackson said: "Leaders of substance do not follow opinion polls. They mold opinion, not with guns or dollars or position but with the power of their souls".



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- The Committee was also conscious of the fact that reform is a journey, not a destination. It is a continuing process and requires constant vigilance.
 - Legal reform has psychological and cultural dimensions. Besides legal literacy and constitutional patriotism, a prerequisite of democracy is the internalization by the bureaucracy and the citizenry of the values of constitutionalism. Sadly such internalisation is largely lacking.
 - Reform has time frames. Reform is like a banyan tree that gets entrenched only over time.

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- Another awareness was that the term 'national institutions' does not refer merely to constitutional and legal institutions but also includes economic, religious, cultural, administrative and social institutions that play a crucial role in the life of any nation and may help or hinder law reform and social engineering.

AGENDA FOR THE INSTITUTIONAL REFORM COMMITTEE

Due to the tight time schedule of 60 days and the magnitude of the task, the IRC concentrated on only eight areas. In addition, some members of the IRC were coopted to assist the various Committees of the Eminent Persons Council. All in all the following areas were scrutinized.

1. Independence and Integrity of the Judiciary
2. Law Officers and the Legal Service (the AG and the Judicial & Legal Service)
3. Human Rights Laws and Institutions.
4. Civil Service Reform

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5. Communication, Media and Information
 6. Federal-State Division of Powers
 7. Nation-Building in a Plural Society.
 8. Parliamentary Reform
 9. The Electoral Process
 10. Anti-Corruption Laws
 11. Police



12. Immigration

13. Syariah and Civil Court Conflicts

14. Establishment of an Independent Ombudsman

15. Establishment of an Independent Law Reform Commission



16. Autonomy of Statutory Bodies including Universities



IRC'S MODUS OPERANDI

The IRC invited the public to send recommendations and to appear before the IRC. As a result, we received 1,000 submissions, letters and e-mails from the public and NGOs. Among those who appeared before us were NGOs, women's groups, orang asli, natives of Sabah and Sarawak, retired judges, SUHAKAM, foreign embassies, international human rights organisations, retired public servants, LGBT groups and anti-corruption officers. We also invited the heads of the forces to meet with us.

1. REFORM OF THE JUDICIARY

- Within the judiciary we have the three superior courts the Federal Court, the Court of Appeal and the two High Courts. Despite adequate constitutional safeguards, our superior courts have a mixed record of independence and integrity. However, one can note with thankfulness, that the superior courts are in renaissance over the last few years.
- There is a Judicial Appointments Commission to recommend (but not determine) superior court appointments. The law must require the executive to accept the recommendations of the JAC.
- In addition to the superior courts, there are several tiers of subordinate courts under the executive dominated Judicial & Legal Services Commission. Syariah Courts and Native Courts are under State laws. In addition there are hundreds of statutory and non-statutory (domestic) tribunals.

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- An independent, competent and empowered judiciary is crucial to a constitutional democracy. Judicial independence and integrity can also affect the economy as investor confidence can be adversely affected by a judiciary perceived to be compromised either in independence or competence.
 - Judicial powers which have been eroded by constitutional and legal developments in past decades should be restored (e.g. amendment to Article 121(1) and 121(1A).
 - The Judiciary will be strengthened if allowed to operate with collegiate self-governance instead of being subject to the prevailing hierarchical command and control.

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- An independent judicial appointments system is vital to ensure that judges are chosen purely on merit. (At present the JAC merely recommends)
 - The current system of ethics and discipline needs an overhaul to prevent disciplinary procedures being open for use as a means to influence judges to be partial. At the same time these procedures must not allow condonation of misconduct.
 - It is also important for the Judiciary to be provided with sufficient financial and institutional support to carry out its functions effectively.
 - The system of promotion, transfer and grant of honours to judges should be rationalized and de-politicised.

2. LAW OFFICERS AND LEGAL SERVICE

The fused roles of the Attorney General and the Public Prosecutor must be reviewed. Since the Attorney General acts in the best interest of the government ; and the Public Prosecutor must act in the interest of the public and criminal justice, conflicts of interest arise when there is a need to prosecute Ministers or public servants. The 1MDB case clearly illustrates this dilemma.

The Committee recommended a separation of the two offices and for an independent Office of Public Prosecutions to be set up.





The IRC also recommended that the Judicial and Legal Service Commission be divided to form:



- (i) the Judicial Service Commission,
- (ii) the Legal Service Commission and
- (iii) the Public Prosecution Service Commission.



This is to strengthen the independence of respective judicial and legal officers and prevent undue influence among the different bodies.

3. HUMAN RIGHTS INSTITUTIONS AND LAWS

- The IRC adopted a broad and holistic view of human rights. It noted that human rights development is part of human development.
- It acknowledged the “rights of future generations”. Human rights belong not only to us but also to our children and children’s children. Sustainable development requires us to show concern for the rights of future generations.
- Human rights are not confined to civil and political liberties. Human rights are interconnected. They also encompass unenumerated, socio-economic, developmental rights like food, water, shelter, health, education, roads, employment, minimum wages and other necessities of life. Poverty alleviation and environmental protection are part of human rights. However, no prioritisation between various types of human rights is desirable.

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- Of special interest to the IRC was the plight of the aborigines and natives of Sabah and Sarawak who should have the right to preserve their way of life and live in harmony with the rivers and forests where the souls of their ancestors dwell.



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- The IRC made recommendations for the strengthening of the National Human Rights Commission (SUHAKAM) and recommended the immediate withdrawal of the very regressive National Human Rights Action Plan and the repeal or reform of several oppressive laws that impinge on human rights.
 - Recommendations were also made to address specific human rights issues.



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- The IRC recommended that Malaysia accede to core international human rights instruments and optional protocols and withdraw reservations from human rights conventions to which it has already acceded.


4. PUBLIC SERVICES


In relation to public servants the following issues were examined:



Reducing the government's pension burden: "Pension, gratuity or other like allowances" are protected by Article 147 of the Federal Constitution and parliamentary legislation like the Pensions Act 1980 (Act 227) and the Pensions Re-Computation Act 1980 (Act 228)



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- The Federal Constitution in Article 147(1) provides a constitutional protection against reduction of pension benefits. Benefits can be enhanced but not made less favorable than under the law applicable on the “relevant date” i.e. the date on which the person became a member of the public services.

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- If the government can muster a 2/3 majority, Article 147 can be amended to decrease the government's unbearable financial liability.
 - The amendment can be dated prospectively to affect only new recruits or be made retrospective. In either case, the political fall-out will have to be managed.


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- Alternatively, the government can draw up an attractive, alternative pension scheme that offers a new, holistic package to public servants. It can then offer public servants, serving or retired, an option to choose the new scheme over the scheme in operation on the “relevant day”. Under Article 147(3), it is provided that “where the law applicable to an award depends on the option of the person to whom it is made, the law for which he opts shall be taken to be more favourable to him than any other law for which he might have opted”.

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- In relation to persons not yet recruited, the relevant laws can be re-drawn in any way the government in Parliament likes. Pensions can be abolished or privatized. Consequently, any fresh recruits will enter the public service on new terms. The law will not be in violation of Article 147 if it does not affect those already in service.

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- It is noteworthy that the pension rights of employees of statutory bodies, statutory corporations and local authorities are not protected by Article 147 of the Constitution but by the Statutory & Local Authorities Pensions Act 1980 (Act 239). This Act can be amended in any way and Article 147's "not less favourable" rule will not apply.





Other financial issues relating to civil service: Issues have been raised about the very wide disparities between top and bottom salary schemes. It is also alleged that due to membership, Chairmanship or Directorship of government linked companies and entities, many top civil servants, specially those in MOF, receive up to RM 250,000 remuneration per month.





Lack of constitutional literacy: At all levels of the bureaucracy, this is a serious problem and needs to be addressed. Another serious affliction is that many civil servants prioritise policies over laws. *Re Bin Abdullah*



Many civil service circulars are in disregard of the laws: Many civil service circulars are in disregard of the Constitution or of the statutes involved.




Constitutional Commissions act without independence: The Constitution has created many independent Commissions and Councils - among them the National Land Council (Article 91), National Council for Local Government (Article 95A), National Finance Council (Article 108), Election Commission (Article 114), Armed Forces Council (Article 137), Judicial & Legal Service Commission (Article 138), Public Services Commission (Article 139), Police Force Commission (Article 140), Education Service Commission (Article 141A). Regrettably, these constitutional bodies have become politicised and have lost their independence.





Political neutrality: Appointees to the public services are required to observe a neutrality and reserve in politics. They are expected to give their best no matter which party is in power. This neutrality has been seriously questioned by aggrieved parties in opposition-controlled states. The politicization of the public services is a serious problem.



Check & balance role: Public servants with professionalism and integrity can do much to provide a brake against the over-exuberance of politicians, the disregard by many of them of the Constitution and the laws and the indulgence by many of them in corrupt practices. Behind the scenes, top public servants probably supply the needed, constructive critique of governmental policy. But the public perception is that politics reigns supreme and check and balance has broken down.

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- The spate of mega economic scandals, mismanagement of environmental resources, poor town and country planning, and the serious problem of illegal immigrants indicates that the role of the civil service as not only executors but also initiators and formulators of national policy for ministerial consideration has not been effective. The financial tragedies relating to 1MDB, Tabung Haji, EPF, FELDA, MARA, Bank Negara and PFI prove a serious breakdown of the check and balance role of civil servants.





Bureaucratisation of all government linked entities: Malaysia allows its top civil servants to sit on the Boards of virtually every government linked entity – whether a university, other statutory body or a commercial enterprise. This bureaucratisation has stifled creativity.

Official Secrets Act: This Act was meant to prevent security leaks. It also prevents information about corruption and nepotism from being exposed. Civil servants with a conscience who may wish to play a mole or whistleblower are seriously hampered in their patriotic duty to serve the nation. The Whistleblowers Act does not override the OSA.





Problem of corruption: Corruption in the public services has reached a critical point.

A less well known fact is that many top civil servants do favours in return for lucrative positions in the private sector after retirement. Regrettably, there is no rule barring a civil servant from working for a prohibited period in an industry connected with his official work.



Ethnic disparities: Despite Article 136 (impartial treatment of federal employees) and a clear-cut provision in clause (5) of Article 153 that “This Article does not derogate from the provisions of Article 136”, ethnic disparities in the public services, statutory bodies and GLCs are extremely serious and growing. Meritocracy (subject to Article 153 quotas) can do much to restore our nation’s position as a leading player in the region.





Disciplinary rules: The law relating to the discipline of public servants is unnecessarily complex and contradictory. There is no rational distinction between situations when the right to a fair hearing is granted and when it is denied.

5. MEDIA

Reforms to the Malaysian Communications and Multimedia Commission (MCMC) are vital. This body wields wide powers involving billion-ringgit industries and plays a key regulatory role impacting the public's ability to access information and communications services. It is imperative that the MCMC function as an independent body and is seen to be independent and corruption-free.

Unfortunately, the MCMC has been used as a political tool to silence government critics over the internet. Reforms are required to make the MCMC more independent, transparent and accountable.

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- These include reforms to the appointments process and to the Minister's powers to issue directions to the MCMC.
 - Media reform is important to ensure that the media is free to act in the public interest and hold the government to account.
 - The Committee recommended the repeal of the Printing Presses and Publications Act 1984 and proposed the setting up a statutory media council, where membership is voluntary.
 - The report also recommends the enactment of a freedom of information law and a review of the Official Secrets Act 1972 to bring it in line with the proposed FOI law.


6. FEDERAL-STATE RELATIONS



Malaysia's federal system has a very heavy central bias especially in the matter of the lucrative sources of income which are mostly in federal hands. This has facilitated central control in many matters of planning and development.

However, this has also raised the complaint of lack of fiscal federalism especially from states with petroleum resources. Sabah and Sarawak have some serious grouses. Many States complain that annual allocations to them are not based on need but on politics.

A further bone of contention is that many powers of the states - meticulously provided for in the Constitution – are neutralised by the overarching influence of federally dominated Constitutional Commissions and Councils.

The States also complain that though Islam is in their Legislative List, federal syariah authorities habitually trespass into matters of Islam allocated to the States.

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- On the other hand, some commentators take State Governments to task for abusing their power over land, rivers, agriculture, forestry and local government to adopt predatory, environmentally destructive and non-sustainable policies of town and country planning, land and agricultural development, de-forestration and management of rivers.
 - It is also well known that many State Enactments on Islam encroach on topics in the Federal List.

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- The many Commissions and Councils created by the Constitution to address these issues have become too politicised to play a balanced, regulatory , check and balance role.

7. NATION-BUILDING IN A DIVIDED AND PLURAL SOCIETY

- Malaya/Malaysia's Constitution was a masterpiece of compromise, compassion and moderation. Even in its ethnic clauses it walked the middle path.
- Unfortunately, constitutional literacy is very weak and constitutional revisionism is in full swing within some powerful sectors of the population. A wide gap has developed between the promise of the Constitution and the ground realities.
- Concerted efforts to improve constitutional literacy may help to moderate the religious and racial extremism that has become mainstream. To go forward as a nation, we need to go back to the spirit of accommodation that animated the forefathers of the Constitution in 1957 and 1963.



8. REFORM OF PARLIAMENT

- An elected legislature exists at the federal level and there are unicameral State Assemblies in all States. However, the three federal territories are without a representative, elected assembly.
- In theory, Parliament is the grand inquest of the nation with the power and responsibility to keep the executive answerable, accountable and responsible to the representatives of the people. In actual practice Parliament has become a rubber stamp. In the legislative and financial sphere it legitimates, does not legislate. In the sphere of enforcing responsibility in government, it is as if the coroner has exchanged a place with the corpse. Some reforms have, however, been successfully instituted by the new Speaker of the Dewan Rakyat and one hopes that Parliament's institutional efficacy can be restored.





Parliament has a myriad of constitutional functions, four of which are:

- the making of laws,
- keeping the executive accountable and answerable,
- scrutinising national finance, and
- providing a platform for redressing constituents' grievances.





Except for the last function, the others are not being performed effectively by Parliament For this reason, about 50 recommendations were made by the IRC, the most prominent of which are:

- The Government should issue policy papers on legislative proposals.
- Lifting of the veil of secrecy surrounding Bills
- Parliament should set up more Standing/Select/Specialised/Ad hoc/Joint Scrutiny Committees. Legislation Committees must be appointed regularly after the second reading to facilitate public participation.(This reform has been undertaken).
- A Joint Committee on Subsidiary Legislation should be established
- Departmental Committees of Parliament must be established to oversee all ministries (partially accepted)
- Other key investigatory committees should be established on human rights, environment, public grievances (being enforced)

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- A Parliamentary Committee must be established to oversee key public appointments (partially accepted)
 - There should be a parliamentary committee to examine long term budgetary policies
 - The Public Accounts Committee (PAC) should be headed by a member of the opposition (enforced)
 - Jurisdiction of the PAC and the Auditor-General to be enhanced
 - OSA should not apply to parliamentary papers
 - An Institute of Parliamentary Affairs on the lines of ILKAP and INTAN should be established
 - An independent law reform commission must be set up to keep laws under review and to report to parliament
 - An independent ombudsman should receive and resolve public grievances and report to Parliament


9. ELECTIONS



- The IRC focused on reforms to resolve long-standing weaknesses affecting the integrity of Malaysia's elections.
- The formation of an independent and empowered Election Commission. (New and respected appointments have been made)
- Wide-ranging changes to the process of constituency re-delineation. The IRC noted that if more constituencies are mixed, candidates will be encouraged to avoid narrow, racial and religious issues and to look at problems and prospects through a national lens.
- A Royal Commission of Inquiry must be undertaken into the 'first past the post', single member constituency electoral system. Several proportional representation and hybrid alternatives need examination.

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- A comprehensive clean- up of the electoral roll
 - The introduction of automatic voter-registration (proposal accepted)
 - Lowering of the voting age to 18 (accomplished)
 - Improvements to the provisions for absentee voting
 - The conduct of elections
 - Political financing must be regulated
 - To strengthen local democracy, the Committee proposed the re-introduction of local government elections to make local authorities responsible and responsive.

10. ANTI-CORRUPTION

- The Malaysian Anti-Corruption Commission (MACC) was established under the Malaysian Anti-Corruption Act 2009 as an independent, transparent and professional body to manage the nation's anti- corruption efforts. However, the MACC has been seen to be ineffective in eradicating corruption, resulting in a loss of public confidence.
- Reforms are needed for the MACC to function independently with established structural protection from executive control.

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- Institutional reform was recommended for the setting up of a newly established constitutional anti-corruption commission under the Federal Constitution which will report directly to Parliament and not be subjected to the jurisdiction of any government ministry. This commission will provide oversight to the MACC which will be renamed the 'Anti- Corruption Agency'.

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- The agency should have the power to prosecute without the AG-filter.
 - Amendments to laws such as the MACC Act, the Whistleblower Protection Act 2010 and the Witness Protection Act 2009 also formed part of the recommendations.

11. POLICE

- The IRC urged the implementation of the outstanding recommendations of the 2005 Royal Commission of Inquiry, including the establishment of an Independent Police Complaints and Misconduct Commission, with some adjustments proposed by the Committee.
- The Committee also recommends the decentralisation and depoliticisation of the police, as well as for the development of a human rights culture in the police,

12. IMMIGRATION

The government must address issues in the Immigration Department like smuggling, human trafficking and to establish the facts behind the Wang Kelian migrant 'death camps'.

13. SYARIAH, CIVIL & NATIVE COURTS

- Since the 80s, the 14 Syariah establishments in the States and federal territories have grown immensely in legal, political and financial powers.
- Painful and intractable conflicts between civil and Syariah courts proliferate.
- There is also the mutual problem of the federal Syariah establishment occasionally trespassing into the powers of the States and the State legislatures, in turn, breaking free of the constitutional limits on their powers.
- In Sabah and Sarawak, Syariah courts and native courts are often in competition for jurisdiction over those citizens who happen to be both Muslim and natives.

14 & 15. OMBUDSMAN AND LAW REFORM COMMISSION

OMBUDSMAN: The existing Public Complaints Bureau is an executive body that is supposed to investigate the executive. In its place there should be an independent Ombudsman that reports to Parliament.

LAW REFORM COMMISSION: Likewise, there should be an independent Law Reform Commission to keep laws under review; to have fingers on the pulsebeats of the nation; to listen to the feedback of affected interests; and to keep the law abreast of change. The Commission should report to Parliament.



16. STATUTORY BODIES.

There is a spate of statutory bodies, Quangos and GLCs with massive economic muscle and potential to shape the nation's life or to squander national wealth for selfish purposes. They lack professionalism, independence and integrity because they are under political control.

Even universities are not spared. They lack autonomy and are subject to great deal of extra legal civil service control on financial, administrative and educational policies.

CLOSING REMARKS

- One and a half years after GE14, the quest for reform remains alive. But the progress has been slow, erratic and with some U-turns. This is because old power dynamics remain in place. Many institutions of the state remain steeped in old ways. Some royal houses, elements in the police, the Syariah establishment and the civil service wield enormous power which is often exercised to delay or halt reform. Sometimes the results of adjudicated civil court cases like the *Re Bin Abdullah* case are not obeyed. The Selangor government's attempt to reintroduce a unilateral conversion Bill despite the unanimous Federal Court decision in the *Indira Gandhi* case is a sad example of disrespect for judicial decisions.

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- In a democracy change takes time. Sixty-one years of authoritarian and feudal governance cannot be reversed in one year. Democracy's dilemma is that it has to deal with undemocratic forces in a democratic way!
 - The present government needs a firmer conviction to do what is right even if that is not popular.
 - On our part we the citizens need to set up alliances of human rights groups to counter the power of the deep state that seeks to maintain the status quo. We all have a role to play.