

Full speech: M'sia - a lost democracy?

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Let me start by inviting you back into history. Imagine that it is the morning of the Aug 31, 1957. At midnight, an independent nation calling itself the Federation of Malaya is to be unveiled. Conceived as a cutting edge model of multiracial and multi-religious coexistence and cooperation, it is poised to stand out as an example of what can be achieved through diplomacy and a respect for the spirit of democracy.

It is of great historical significance that the transition from colony to independent nation, so often achieved only at the great price that turmoil and unrest exacts, has been achieved peacefully. Though this is a process that may have been made more difficult without the skill and fortitude with which negotiations to that end have been carried out, they do not define it.

That honour goes to the aspirations of all those who call Malaya home. The quest for self-determination has not been one that recognised race. It has been, simply put, a Malayan one.

I would like to think that as midnight approached, one of the elements that gave confidence to the Alliance leaders and, in fact, all Malaysians was the knowledge that a constitutional arrangement that accorded full respect and dignity for each and every Malayan, entrenched the rule of law and established a democratic framework for government had been put in place.

The federal constitution was a masterful document. Inspired by history and shaped lovingly to local circumstance, it was handcrafted by a team of brilliant jurists who appreciated that they could not discharge their burden without first having understood the hearts of minds of those who would call this nation their home and whose children would call it their motherland.

Hundreds of hours of meetings with representatives of all quarters resulted in a unique written constitution that cemented a compact between nine sultanates and former crown territories.

This compact honoured their Highnesses the Malay Rulers, Islam and the special status of the Malays even as it seamlessly allowed for constitutional government and created an environment for the harmonious and equal coexistence of all communities through the guarantee of freedoms and the establishment of the institutions that would allow for the protection and promotion of these guarantees. If at

all there was a social contract, it was the guarantee of equality and the promise of the rule of law.

I would say that as at Aug 31, 1957, the Federation of Malaya was set to become a shining example of a working democracy. Though special provisions had been included in the constitution to allow for protective affirmative action measures where the Malays were concerned, and later the natives of Sabah and Sarawak when these states merged into the renamed Federation of Malaysia, and for declarations of Emergency and the enacting of exceptional laws against subversion, these provisions were not anti-democratic nor were they undermining of the rule of law.

Conversely, if used as contemplated by the founders of the constitution, they were aimed at protecting democracy from grave uncertainties that could undermine the very foundations of the nation.

If I sound nostalgic, it is because in some ways it could very sadly be said that democracy and the rule of law, as they were understood at the time this nation achieved its independence, at a time when I was much younger, have been consigned to the past. Events that followed in history undermined and stifled their growth. To understand how this came about and the state of things as they are, one however must have an understanding of the politics of the country. I seek your indulgence as I attempt a brief summary of key historical events.

A turn for the worst

After the euphoria of 1957, race-relations took a turn for the worst in 1969. The race riots of that year have marked us since. As a response, adjustments were made and measures introduced to keep what was now perceived to be a fragile balance in place. The Rukun Negara was pushed through as a basis of national unity and the New Economic Policy (NEP) was unveiled by which the government was mandated to address the disparity in wealth between the Malays and the other communities, in particular the Chinese, that had been identified as the root cause of the resentment that had exploded into violence.

These measures, in my view, were on the whole positive. They were agreed to by all the political parties making up the government, in part due to an understanding that the NEP was a temporary measure aimed at assisting the Malays that would not disadvantage the other communities. The late Tun Dr Ismail talked about giving the Malays an opportunity to survive in the modern competitive world. It was readily appreciated that unless society as a whole addressed and rectified certain historical imbalances and inequities, the country would flounder. In my view, these

measures were easily reconciled with democracy and the rule of law.

The 1980s presented a different scenario altogether. We saw a unilateral restructuring of the so-called social contract by a certain segment of the BN leadership that allowed for developments that have resulted in our current state of affairs. The non-Malay BN component parties were perceived by Umno to be weak and in no position to exert influence.

Banded about by Umno ideologues, the social contract took on a different, more racist tone. The essence of its reconstructed meaning was this: that Malaya is primarily the home of the Malays, and that the non-Malays should acknowledge that primacy by showing deference to the Malays and Malay issues. Also, Malay interest and consent must be allowed to set the terms for the definition and exercise of non-Malay citizenship and political rights. This marked the advent of Ketuanan Melayu or, in English, Malay Supremacy.

Affirmative action and special status became a matter of privilege by reference to race rather than of need and questioning of this new status quo was not to be tolerated. As Ketuanan Melayu evolved and entrenched itself, Islam became political capital due to the close links between Malays and the religion. The constitution itself defines a 'Malay', for purposes of affirmative action, as someone who amongst other things professes the religion of Islam.

This over the years led to a politically driven articulation of Malaysia as an Islamic state. Again, no questions were tolerated. Majoritarianism had become the governing paradigm of governance as the character and nature of rights were defined by Malay interests and defined by them.

This new political philosophy in which the primacy of Malay interests was for all purposes and intents the *raison d'être* of government naturally led to interference with key institutions. I say naturally as it was, and still is, impossible to reconcile the principles of equality and civil rights of the people of this country with the primacy of one group over all others.

Needless to say, a new social order in which some are made to defer to the primacy of others is not going to be easily accepted. As such, in order to enforce compliance and to encourage acceptance harsh measures would have to be taken to quash protest or disagreement. Policy doctrine or diktat not supported by consensus will almost certainly be a subject of contention.

It is for this reason that in the 1980s already harsh anti-democratic laws that allowed for the suppression of legitimate dissent such as the Internal Security Act, the Official Secrets Act, the Police Act, the Printing

Presses and Publications Act and the Sedition Act were tightened further.

Where possible, reliance on them was made immune from judicial scrutiny a feat achieved only through a constitutional amendment that suborned the judiciary to parliament. It got to a stage where when more than five friends got together, one wondered whether it was wiser to obtain a police permit. Such was the state of the law, such was the state of democracy.

Pandering to the Umno right

Mukhriz Mahathir will probably be the new Umno Youth leader. In saying as he did recently that there is no need for law and judicial reforms as it will not benefit the Malays, he typifies what is perceived as the kind of Umno leader who appeals to the right-wing of Malay polity. That he may be right is sad as it leads to the ossification of values that will only work against the interests of the party and the nation.

This type of thinking may pave the way to a suggestion in the future that we may as well do away with general elections altogether as they may not be good for the Malays for if the justice that a revitalised rule of law would allow for is not to the benefit of the Malays, what is? More inefficiency, more corruption and a more authoritarian style of government perhaps. We are a deeply divided nation, adrift for our having abandoned democratic traditions and the rule of law in favour of a political ideology that serves no one save those who rule.

How else can we describe the state of affairs in Malaysia? In a country where the rule of law is respected and permitted to flourish, just laws are applied even-handedly and fairly. I can point to numerous instances where that has not been our experience. Let me point a few out to you.

A gathering of one group constitutes an illegal assembly but not that of another. A speech or publication is seditious or constitutes a serious threat to the security of the nation such as to warrant detention without trial under the ISA if published by one person but not another. This cannot be right even if it were to be to the benefit of the majority, which is not the case.

My belief in constitutional democracy and the rule of law is founded on an acceptance of their functional qualities and the prospect of sustainable and inclusive development that they offer. It is of no concern to me whether Fukuyama was right when he declared that in view of the success of liberal democracies all over the world and the collapse of communism, mankind had achieved the pinnacle of success and history

was dead.

There are less esoteric reasons but as, if not more, compelling ones. Indonesia's transition to democracy since the end of military rule in 1998 showcases these. The majority of Indonesians have embraced democracy, religious tolerance, and religious pluralism. In addition, a vibrant civil society has initiated public discussions on the nature of democracy, the separation of religion and state, women's rights, and human rights more generally.

These developments have contributed to a gradual improvement in conditions for human rights, including religious freedom, over the past few years. Since 2003, Indonesia has also overtaken Malaysia on the Reporters sans Frontieres Press Freedom Index, moving up from 110th place to 100th out of 169 countries covered. Malaysia on the other hand has dropped from 104th place to 124th place in the same period.

I am not surprised. In 1999, Indonesia passed a new press law that, in repealing 2 previous Suharto administration laws, guaranteed free press through the introduction of crucial measures. This new law allows journalists to freely join associations, guarantees the right of journalists to protect their sources, eliminates prior censorship of print or broadcast news and makes the subverting of the independence of the press a criminal offence. It also establishes an independent body to mediate between the press, the public and government institutions, uphold a code of ethics and adjudicates disputes.

Progress has not stopped there. On April 3, this year, Indonesia passed its Freedom of Information Act. This latest law allows Indonesia's bureaucracy to be open to public scrutiny and compels government bodies to disclose information. To enforce disclosures and to adjudicate disputes, a new body has been created under the new law, independent of government and the judiciary. While there remains some debate about the penal sanctions for misuse of the law, the passing of the act clearly is a step in the right direction.

The lessons of the African and the Caribbean states are there for all to see. Do we emulate Zimbabwe or do we take Botswana as our political and economic model? How is it that Haiti is far behind the Dominican Republic in economic terms when they both achieved their independence at about the same time, and have the same resources?

Singapore's success is mainly attributed to its commitment to good governance and rule of law, even though political dissent is not tolerated. Democracy, a system of government based on fair and transparent rules and laws, and the respect people have for institutions of government –

these make the difference. Economic prosperity drives democracy but stifle true democracy and the inevitable outcome is economic ruin. It is useful to remember that freedom is vital for economic development.

The critical feature of a constitutional democracy to me is the test of constitutionality itself. Does the government allow its own legitimacy to be questioned? Does it permit executive decisions to be challenged? Written constitutions normally provide the standard by which the legitimacy of government action is judged.

In the United States the practice of judicial review of congressional legislation ensures that the power of government to legislate is kept under check. Bipartisan debate and votes of conscience are not only encouraged but also expected of congressmen and representatives. More recently the basic law of Germany and Italy provided explicitly for judicial review of parliamentary legislation.

We have the opposite situation here. The jurisdiction of the high court can be, and has been, ousted when it comes to challenges of executive decisions even if such decisions impact on fundamental liberties and other rights under the constitution. For instance, where government compulsorily acquires land for a public purpose, the courts are prevented from questioning the bona fides of the acquisition.

Where a discretion is exercised by the minister of home affairs under the Internal Security Act, the court is barred from examining the exercise of the discretion except so far as to ensure that the procedural requirements have been followed. Such detention without trial would be considered repugnant in any system predicated on the rule of law.

Nation building is not a simple process. It is not achieved through tinkering with political ideologies or injudicious use of the coercive powers of state. These do not promote the lasting peace and stability that we crave for. We have failed miserably in dealing with complex issues of society by resorting to a political culture of promoting fear and division amongst the people.

A renewed national consensus needed

The Ketuanan Melayu model has failed. It has resulted in waste of crucial resources, energy and time and has distracted from the real issues confronting the country. Tan Sri Muhyiddin (Yassin), the DPM-in-waiting it would seem, suggested that there is a need for a closed-door forum for leaders of the BN to develop a common stand; a renewed national consensus grounded on the social contract.

This is positive step but it should include all political leaders and be premised on the social contract that was the foundation of independence. The results of March 8 (elections) clearly show that the BN no longer exclusively speaks for the rakyat. Promoting discourse and dialogue is essential, as we must learn to talk and to listen to one another again.

The recent pronouncement by the Malay rulers underscores the urgency with which we need to look at rebuilding the politics of consensus. Communication and trust amongst the people must be reestablished. The founders envisaged a government for all Malaysians. Even Tun Dr Mahathir (Mohamad) spoke about it. One of the elements of Vision 2020 as envisaged by Tun Dr Mahathir Mohamed was the creation of a united Bangsa Malaysia.

How can such a vision be achieved if the government is not willing to listen to the grievances of a substantial segment of Malaysians? Tun Dr Mahathir Mohamad introduced the idea of Bangsa Malaysia in a speech entitled “The Way Forward”. This is one of nine central and strategic challenges of Vision 2020. Although he only mentioned Bangsa Malaysia once, its use had sparked enthusiastic debates.

The creation of Bangsa Malaysia is the challenge of establishing a united Malaysian nation with a sense of a common and shared destiny. This must be a nation at peace with itself, territorially and ethnically integrated, living in harmony and full and fair partnership, made up of one Bangsa Malaysia with political loyalty to the nation.

Different meanings have been given to that term Bangsa Malaysia. Many believe that it was intended to bolster the non-Malays through the envisioning of a united country where their cultural and religious uniqueness would not be threatened; Tun Dr Mahathir in fact explicitly mentioned this.

On the other hand, some believe that Bangsa Malaysia was just a neat reference to a Malaysia united under Malay or, more appropriately, Umno hegemony. Whatever the case, I would like to believe that whilst the government of BN has done little other than pay lip-service to the concept, principally by issuing pandering slogans, since Dr Mahathir left, the country will nevertheless in the future move towards a more pluralistic society.

The integration of different ethnic groups would occur naturally through the expansion of economic life and through the unintended effects of globalization so much so that ethnicity will be depoliticised. We nonetheless need to actively promote efforts at an institutional level if we want this notion of Bangsa Malaysia to materialise. The political parties

making up government may not want to do so for their own short-term interests but as a whole, the people will call for it.

This brings us again to the democracy and the rule of law. We will not succeed in promoting, a united country and allow for the evolution of Bangsa Malaysia if we do not subscribe to the rule of law. We need the openness, freedom and social justice that will be possible only with it in place. and democracy. How do we bring unity to the people if we are not prepared to respect their dignity?

To achieve the aspirations of the New Economic Policy, bumiputras need to be given thinking tools to participate in the global economy. At present their attention is kept focused, almost on a daily basis, on race related issues even though there are serious issues such as the economy and the lack of trust in the institutions of government to deal with.

The obsession with the Ketuanan Melayu doctrine has in fact destroyed something precious in us. It makes us lose our sense of balance and fairness. When a certain Chinese lady was appointed head of a state development cooperation, having served in that cooperation for 33 years, there were protests from Malay groups because she is Chinese.

A new economic vision is necessary, one that is more forward looking in outlook and guided by positive values that would serve to enhance cooperation amongst the races. This will encourage change for the better; to develop new forms of behaviour and shifts of attitudes; to believe that only economic growth will serve social equity; to aspire to a higher standard of living for all regardless of race.

We need to meaningfully acknowledge that wealth is based on insight, sophisticated human capital and attitude change. A new dynamics focused on cooperation and competition will spur innovation and creativity.

Some might say that this is a fantasy. I disagree. How do we go about transforming the culture and values of the bumiputras so that their ability to create new economic wealth can be sustained? By changing our political and legal landscapes with freedom and democracy.

Dr Mahathir was right to ask that Malays embrace modernity. He fell short of what we needed by focusing on the physical aspects of modernity. He was mistaken to think all that was needed to change the Malay mindset was science and technology. He should have also promoted the values of freedom, human rights and the respect of the law.

If affirmative action is truly benchmarked on the equitable sharing of

wealth that is sustainable, then we must confront the truth and change our political paradigm; 40 years of discrimination and subsidy have not brought us closer. There is a huge economic dimension to the rule of law and democracy that this government must learn to appreciate.

Syariah or secular principles

Relations between Islam, the state, law and politics in Malaysia are complex. How do we manage legal pluralism in Malaysia? Can a cohesive united Bangsa Malaysia be built on a bifurcated foundation of syariah and secular principles? Will non-Muslims have a say on the operation of Islamic law when it affects the general character and experience of the nation? This is a difficult challenge and the solution has to be found.

Leading Muslim legal scholar Abdullah Ahmad an-Na'im is hopeful. He believes that the way forward is to make a distinction between state and politics. He believes that Islam can be the mediating instrument between state and politics through the principles and institutions of constitutionalism and the protection of equal human rights of all citizens.

Whatever the formula, we can only devise a system that rejects absolutism and tyranny and allows for freedom and plurality if we are able to first agree that discourse and dialogue is vital. Democracy and respect for the rights and dignity of all Malaysians is the prerequisite to this approach.

A compelling argument for a constitutional democracy in Malaysia is that only through such a system will we be able to preserve and protect the traditions and values of Islam and the position of the Malay rulers. For a peaceful transition to true democracy of this country, one of key issue that requires care is the position of Islam and its role in the political system of the country.

In fact I regard this to be of paramount consideration. Although the expression Islamic state is heard from time to time, and whilst it is true that Abim (Malaysian Muslim Youth Movement), PAS and lately Umno had the concept a key part of their agenda, the areas of emphasis differ and are subject to the contemporary political climate.

For reasons too lengthy to discuss now, I would say that the "synthesis of reformist Islam, democracy, social welfare justice and equity" would be sufficient to appease the majority of Muslims in so far as the role of Islam in public life is concerned. This state of affairs could be achieved peacefully and without tearing the constitution apart.

The progressive elements in PAS, inspired by Dr Burhanuddin Helmi in 1956, are still alive. PAS leaders of today who have carried that torch also make reference to a more accommodating vision of Islam that puts a premium on substantive justice and the welfare of the people as major policy initiatives.

Umno's approach (or more accurately Dr Mahathir's approach) to Islamic content in public policies was articulated in the early 1990s. This however achieved little in changing the political system. His "progressive Islam" was more nationalistic than PAS, and designed to usher new elements of modernity into Islam.

Science and technology were touted as the means to defend Islam and the faith. The approach taken was short on the ideas of human rights and social justice, and the rule of law and designed more to convince the rakyat of Islam's compatibility with elements of modernity like science and technology..

Anwar Ibrahim, the present opposition leader, articulated a brand of reformist Islam that was more individual centered and liberal. Drawing its humanist thought from the great Muslim scholar, Muhammad Iqbal, Islam Madani gave emphasis on human rights and freedoms. Islam Hadhari came on to the scene just before the 2004 general elections as another form of progressive Islam, possibly inspired by the thinking of another noted scholar, Ibn Khaldun. Unfortunately, nothing much came out of this effort.

Whichever model or line of thought that will find permanence in our political landscape, Islamic aspirations and ideals will certainly become an important component in the realm of public policy. To prevent conflicts and ensure that various beliefs are absorbed and accepted into the political system, it is imperative that no force or compulsion is used.

This is where the merit of a government adopting democracy and rule of law becomes apparent. The discussions and deliberations of even sensitive and delicate issues will make the participants aware of the value of ideas and the value of peaceful dialogues. Managing disputes through a determined, rules-based process will allow for a peaceful resolution of problems.

The tolerance shown by the protagonists in Indonesia over delicate religious issues bodes well for that country and serves as a useful illustration of what could be. Approached this way, Islam in the context of Malaysian politics will be prevented from being as divisive and as threatening as race politics.

In this, the issue of conflicts of jurisdiction still requires resolution. Our civil courts are denuded of jurisdiction to deal with matters that fall within the jurisdiction of the sharia courts. No court has been given the jurisdiction and power to resolve issues that may arise in both the sharia courts and the civil courts. The present separation of jurisdictions presupposes that matters will fall nicely into one jurisdiction or the other.

However, human affairs are never that neat. What happens to the children of a marriage where one party converts to Islam and the other party seeks recourse in the civil Court? Or when the sharia court pronounces that a deceased person was a Muslim despite his family contesting the conversion? Or where the receiver of a company is restrained from dealing with a property by a sharia court order arising out of a family dispute? Where do the aggrieved parties go? I had suggested the establishment of the constitutional court, but that plea has fallen on deaf ears.

Marked increase in draconian measures

There is marked increase in the use of harsh draconian measures in dealing with political and social issues. Some people say that groups such as Hindraf (Hindu Rights Action Force) advocate violence and therefore justifies the use of such measures. They may have overlooked the fact that violence begets violence. Was not the detention of Hindraf leaders under the Internal Security Act itself an act of aggression, especially to people who consider themselves marginalised and without recourse?

It is time that the people running this country realise that we will not be able to resolve conflicts and differences peacefully if we ourselves do not value peaceful means in dealing with problems. The situation has been aggravated by the absence an even-handed approach in dealing with organisations like Hindraf.

While I applaud the prime minister for calling upon the Indian community to reject extremism, should not a similar call be made on the Malay community and *Utusan Malaysia*? I call on the prime minister, both the outgoing and the incoming, to deal with such issues fairly. Start by releasing the Hindraf leaders detained under the ISA. The release would create a window for constructive dialogue on underlying causes of resentment.

I also appeal for the release of (*Malaysia Today* webmaster) Raja Petra (Kamaruddin) from his ISA detention. He is a champion of free speech. His writings, no matter how offensive they may be to some, cannot by any stretch of the imagination be seen as a threat to the national security

of this country.

The Malays are now a clear majority in numbers. The fear of their being out numbered is baseless; they are not under seige. The institutions of government are such that the Malays are effectively represented, and there is no way the interest of the Malays can be taken away other than through their own weakness and folly.

The BN government must abandon its reworked concept of the social contract and embrace a fresh perspective borne out of discussions and agreements made in good faith with all the communities in this country. It is time for us all to practice a more transparent and egalitarian form of democracy and to recognize and respect the rights and dignity of all the citizens of this country.

At the end of the day, we must ask ourselves what it is that will allow us to protect all Malaysians, including the Malays? Good governance is about good leadership; and good leadership is all about integrity. We must have leaders of integrity in whom people can place their trust.

If there is no integrity in leadership, the form of government is immaterial – it will fail. Integrity in leadership is the starting point to creating a just and fair society. Integrity of leadership does not lie only with the prime minister or his cabinet. It needs to permeate through all the organs of government. A key organ of government, the one tasked to protect the rights of the common man against the excesses of government, is the court. The rule of law in a constitutional democracy demands that the judiciary be protective of the nation's subjects be they, I would say especially, the poor, the marginalised and the minorities.

The courts must act with courage to protect the constitutionally guaranteed rights of all citizens, even if to do so were to invoke the wrath of the government of the day. Even though not all judges will rise to be chief justice, in their own spheres they must show courage. For example, in *PP vs Koh Wah Kuan (2007)*, a majority bench of the federal court chose to discard the doctrine of separation of powers as underlying the federal constitution apparently because the doctrine is not expressly provided for in the constitution.

This conclusion is mystifying as surely the court recognizes that power corrupts absolutely and can thus be abused. If the courts are not about to intervene against such excesses who is? Checks and balance are what the separation of powers is about. Surely the apex court is not saying that the courts do not play a vital role in that regard?

The reluctance of the court to intervene in matters involving the executive is worrying. In *Kerajaan Malaysia & Ors v Nasharuddin Nasir*, the federal court ruled that an ouster clause was constitutional and was effective in ousting the review jurisdiction of the Court if that was the clear intention of parliament. The apex court so readily embraced the supremacy of parliament even though the constitution declares itself supreme.

There is nothing in the federal constitution that explicitly sets out the ability of parliament to limit the court's review jurisdiction. The court could have just as easily held that as the constitution was the supreme law, in the absence of express provisions in the constitution the court's review jurisdiction remained intact.

Is it not possible that in vesting the judicial authority of the federation in the high courts the framers of the constitution intended the review powers of the courts to be preserved from encroachment by the executive and legislature? In India, the supreme court has held on tenaciously to a doctrine of 'basic structure' that has allowed it to ensure the integrity of the democratic process and the rule of law. Any attempt to denude the courts of the power to review by amendment of the constitution has been struck down.

The rule of law has no meaning if judges, especially apex court judges, are not prepared to enter the fray in the struggle for the preservation of human rights and the fundamental liberties. Supreme court judges in other jurisdictions have done so time and time again. Though it is far less difficult to accommodate the will of the government, that must be resisted at all costs, particularly where justice so demands.

Only then can we say that Malaysia is grounded on the rule of law. To all our judges I say discard your political leanings and philosophy. Stick to justice in accordance with the law. As Lord Denning reminded us: Justice is inside all of us, not a product of intellect but of the spirit. Your oath is to the constitution; shield yourself behind it. Without your conviction, democracy is but a concept.

I would like to say more about law, democracy and about our beloved country. But time does not permit. In any event, I have to be careful. The more we say, the more vulnerable we become. But my parting message is this: The people of goodwill must continue to strive to bring about change, so that we can rebuild the trust of all Malaysians.

From that trust, we can rebuild the country where we do not live in fear,

but in freedom; that the rights of all Malaysians are acknowledged, respected and protected by the system of law that is just and fair. There is no quest more honourable and a struggle more worthy of sacrifice.

This is the full speech delivered by former de facto law minister Zaid Ibrahim at the LawAsia 2008 conference in Kuala Lumpur this morning.