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Some Perspectives On Government, The Constitution 
And The Electoral Processes In Malaysia 

By

G T S Sidhu
SOME PERSPECTIVES ON GOVERNMENT, THE CONSTITUTION AND THE ELECTORAL PROCESS IN MALAYSIA
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The three estates or three foundation pillars of the Constitution
are the executive, the Legislature and the Judiciary. And keeping
in view the principle that power of the State should not be
concentrated in one single person or authority lest it be abused
and following the thinking of the French Jurist Montesquieu there
was enscribed in the Malaysia Constitution the doctrine of
separation of powers between the executive, the Legislature and
the Judiciary with the necessary checks and balances.

To-day many believe and accept that there is a fourth estate in
the Governance of a Country which though not mentioned in the
Constitution is a free press or media and its freedom lies in
Article 10 of the Constitution which reads as follows:-

"Every Citizen has the right to freedom of speech and
expression".

It is the media that can protect the rights, liberties of the
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people by exposing any encroachment on these liberties by those
who govern the Country.
It is a truism therefore to say that the media is the fourth estate in the sense of the Constitution in the governance of a Country and the preservation of the rule of law, the doctrine of separation of powers and democracy in a Country. For it is the media that keeps the voter informed of his rights and duties and also as to what is happening or intended to happen or liable to happen by those who are governing the State on his behalf.

THE CONSTITUTION AND ITS FEATURES

A Constitution is not a Constitution if it is devoid of constitutionality that as has been said earlier if it does not embody the doctrine of the separation of powers or contain other basic features.

It may be appropriate here to say that India is the only Country in the world where the Supreme Court has in Kesavananda v. State of Kerala (1973) SC 1461 affirmed by Minerva Mills Ltd. v. Union of India (1980) SC 1739 stated that Parliament even if it has followed the procedure prescribed that is amended the Constitution by two-thirds majority yet such amendment will be invalid if destroys the basic structure of the Constitution.

Chief Justice S.M.Sikri on behalf of the majority of the Full Bench stated as follows:-

"But this does not place every provision of the Constitution in the same position. The true position is
that every provision of the Constitution can be amended provided in the result of the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

1. Supremacy of the Constitution;
2. Republican and democratic form of government;
3. Secular character of the Constitution;
4. Separation of powers between the Legislature, the Executive and the Judiciary;

In respect of the Constitution of Malaysia another basic feature could be added that is to say "constitutional necessity".

As stated earlier a Constitution is only a Constitution if it has Constitutionality which means it must have all the above basic features. If any of these are destroyed by amendment of the Constitution then the Constitution will become unbalanced and ultimately change from a Constitution to a document of oppression in the hands of those who govern the Country.

In Malaysia the above principle laid down by the Supreme Court of India has not been accepted by the Malaysian Courts. Therefore the preservation of the basic structure of its Constitution is in the hands of the members of Parliament, the people whose vote makes an individual an elected Member of Parliament and the Judiciary.
It may be mentioned in passing that the oath both a member of Parliament and a Judge takes is as follows:-

"...........that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution."

If the basic structure as enumerated earlier is destroyed by amendment to the Constitution by Parliament and the Courts are silent then the only way to preserve the basic structure is for the people of the country to exert pressure through the ballot box and elect members to the Legislature who will not only preserve the basic structure but repair if it has been damaged.

However before a member of the public votes he must know something about the basic features of the Constitution, the built in checks and balances and the necessity of having an independent judiciary.

Before concluding this aspect of the paper I may add and possibly it may be accepted in the future that included in the basic Structure of a Constitution should also be the following:-

(a) An independent Election Commission

(b) A free independent press or media

I have mentioned the above two features because in a Democratic Constitution the message of the Constitution as regards its safety from amendment can only be carried to the voter through
the media and an independent election commission free from any pressure or influence could provide the machinery for the voter to exercise his choice freely and with reason.

As stated earlier it is the media which includes the press, the television, the radio and other methods of dissemination news and information such as videos that educate the people on the reasons behind the Articles of the Constitution that examine the democratic nature of the Constitution.

To enable the people understand their rights and duties under the Constitution and to make their vote to preserve the Constitution and all its parts renders the people must themselves be knowledgeable enough to understand the Constitution and the reason as to why certain Articles have been included in the Constitution even though such Articles seem to make matters difficult for those who govern the country.

It may be proper for me here to quote from Modern Government by B.H. Sharma on "Condition Essential To The Success Of Democracy."

"No system, however good from the theoretical point of view, can prove useful, unless the conditions necessary for its successful working are present. And that is why
we find examples of the failure of democracy here and there. The first essential condition for the success of democracy is a high standard of general education, not necessarily literacy. Unless the mass of citizens are acquainted with their rights and duties and possess a high sense of civility, they cannot run a democratic government successfully. Though such of the education as is required in the practical working of democratic institutions via participation in elections, legislatures, or other public associations and institutions, it is very necessary to train the would-be citizens at an early age in the element of corporate life. Freedom of speech and association, coupled with a free and well-informed press which presents facts accurately and impartially without attempt, too much to express its own opinions or an imaginative public, are some of the necessary conditions of a popular education.

It will be seen from the above that the burden of educating the public to exercise its vote with reason not only falls on the media but on every educational institution.

It is my view that in Malaysia the people are not sufficiently educated in respect of how they are governed to understand the checks and balances that are built in the Articles of the Constitution. Just to give a person a copy of the Constitution in Malaysia and expect that he will understand the implications or
damage to the Structure of the Constitution by amending or deleting a few words from an Article is a false hope. For example Article 12 (2) of the Malaysia Constitution was amended by deleting the following words "and provide therein instructions."

12 (2) "Every religious group has the right to establish and maintain institutions for the education of children (and provide therein instructions) in its own religion."

By a deletion of a few words forty-five per cent of the population of Malaysia was deprived of having its own institutions of learning. This is an example of what can happen with amendments to the Constitution. It is therefore a duty on the media to explain the implications of any amendments to the Constitution to the people.

Of course to inform the people as to what is happening in the Governance of a Country the media should be free and not controlled by those in power by owning the media or be in a position to cancel the licence under which the press or the media is functioning.

It may be appropriate to quote here Joseph Pulitzer who enunciated certain principles in relation to the press which would equally apply to the whole media. Of the press he said -
Always fight for progress and reform
Never tolerate injustice or corruption
Always fight demagogue of all parties
Never belong to any party
Always oppose privileged classes and public plunderers
Never lack sympathy for the poor
Always remain devoted to the public welfare
Never be satisfied with simply printing the news
Always be drastically independent
Never be afraid to attack wrong either by predatory plutocracy or predatory poverty

On this aspect of the role of the media in a democracy having said that it has been accepted as the fourth estate in the Governance of a Country including Malaysia I would add in a developing Country like Malaysia the media has to play an important role to educate the people so that the rule of law enshrined in the scheme of the Constitution is not destroyed and a democracy changed to autocratic rule of a few.

I believe that the media should itself understand what destruction is taking place by amendments to the Constitution. For if the media cannot understand the consequences of the amendments then it will be impossible for them to educate the people or providing the people with reasoned arguments for and against the proposed amendments.

Let me here give an example as to the recent amendments to
Article 121 of the Malaysian Constitution.

Article 121 of the Malaysian Constitution before it was recently amended vested the Judicial Power of the Federation in the High Court as follows:

"Art. 121. (1) Subject to Clause (2) the Judicial Power of the Federation shall be vested in two high Courts of co-ordinate jurisdiction are status namely:

1. High Court of Malaya
2. High Court of Borneo

and in such inferior courts as may be provided by Federal Law.

The above is an echo of Article III of the Constitution of the United States which reads as follows:

"The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

However on the 10th day of June, 1988 Article 121 of the Constitution was amended to read as follows:

"Art. 121. (New): There shall be two High Courts of co-ordinate jurisdiction and status namely:"
1. High Court of Malaya
2. High Court of Borneo

and such inferior courts as may be provided by Federal Law and the High Courts and inferior courts shall have jurisdiction and power as may be conferred by or under Federal Law."

One questions - what is the object of the above amendments? - Remembering always that from time immemorial the courts have had inherent powers to do justice. That under the scheme of the Constitution the power to administer justice is not with the Legislature or the Executive but the Judiciary. A person unhappy with the decision of an arm of the Government can test its legality with an independent body that is the Judiciary.

The above amendments imply that the Judiciary will in the future only have jurisdiction and power as may be conferred on it by the Legislature. The power it has as its inherent jurisdiction can be curtailed by an ordinary law passed by the Legislature.

One cannot help feeling that ultimately this will not only curtail the Independence of the Judiciary but encroach into the jurisdiction of the judiciary in respect of its Judicial
Powers of Review."

It is for the media to inform the people of the amendments and the consequences of such amendment so that they can put a stop to such action through the ballot box, may be not to change the government but to deprive them of a two-thirds majority and prevent them from amending the Constitution to destroy the doctrine of Separation of Powers as the above amendment to the Article does.

A consequence of the above amendment to Article 121 resulted in Parliament amending the Societies Act in that any decision of a political party on the interpretation of its Constitution, rules or regulations or relating to the affairs of the party shall be final and conclusive. The amendment further prohibits any court proceedings in respect of the decision and excludes the courts jurisdiction to determine any suit, application, question or proceeding regarding the validity of such decision.

One cannot help feeling that the Executive and the Legislature are beginning to take advantage of the amendments to Article 121 that the courts shall have power and jurisdiction as may be conferred by or under Federal Law.

One questions again? - If a grave injustice is resulting from the interpretation of the constitution of a political party by those in power in the political party who then is to say an injustice is being done - if not the Court who else? Is this the
beginning of the end of the constitutionality of our Constitution.

At the risk of repeating I must emphasize that if the checks and balances in the Constitution are destroyed and the media does not inform the people as to what is happening or educate them in what the ultimate outcome would be then the State will itself have to pay a price when democracy and this State is a total and utter failure.

ELECTION COMMISSION AND INDEPENDENT POLICIES

As I have said above an independent election commission should form part of the civil structure of the Constitution. This is simply because if there are free elections and the constituencies are fairly delimited or restriction there will be little difference in what age bias to the electoral constituencies and probably in a multi-racial country like Malaysia there may not be always a likelihood of an existing party controlling a two-thirds majority in Parliament to so easily amend the Constitution.

In Malaysia Part VIII - Articles 116 to 120 of the Constitution establish an Election Commission and the manner in which it is to function.

To make it independent of Parliament the members of the Commission are appointed by the King after consultation with the Conference of Rulers who are the Sultans of different States of Malaysia. In appointing members the King must have regard to the
importance of securing an Election Commission which enjoy public confidence.

A member of the Commission holds office until the age of sixty-five years and he can only be removed on the like grounds and in the like manner as a Judge.

The remuneration of a member of the Commission is charged on the consolidated fund and cannot be altered to his disadvantage after his appointment.

From the above it can be seen that the idea behind Part VIII of the Constitution was to make the Commission an independent body answerable only to the people and the King and removable only under a special procedure.

However, its powers to demarcate constituencies has been taken away by amendment to the Constitution. Under the original Article 113 the power to delimit the constituencies was with the Election Commission and guidelines were spelt out under the original Article 116 which stated as follows:

116 (4) Each State shall be divided into constituencies in such manner that each constituency contains a number of electors as nearly equal to the electoral quota of the State as may be after making due allowance for the distribution of the
different communities and for differences in density of population and the means of communication; but the allowance so made shall not increase or reduce the number of electors in any constituency to a number differing from the electoral quota by more than fifteen per cent."

It will be seen from the above that difference of the number of voters in each of the Constituencies should not be more than fifteen per cent.

However, the above original Article was amended by the Constitution (Amendment) Act 1962. by this Act

(a) the power to delimit or desertate constituencies was taken away from the Commission and given to Parliament.

(b) the Election Commission would now only recommend to Parliament any changes required to be made on the delimitation of the Constituencies.

(c) the guidelines as to the delimitation was changed by adding to the Constitution a Thirteenth Schedule and deleting the guidelines provided for in Article 116.
(d) the new guidelines provided that weightage be given in favour of rural constituencies and in some cases a rural constituency may contain as little as one half of the electors of any urban constituency. However by a later amendment the weightage to the extent of 1:2 for rural constituencies was deleted. As no limitation was provided in the manner as in the original article that is fifteen percent the absence of such limitation may be construed to mean any weightage could be provided even more than 1 to 2.

Certain comments were made by certain authors of constitutional law and may be convenient to quote them here.

Mr. J.N. Abdullah in "The First Five Years of the Federation of Malaya Constitution" (1962)

"...the abolition of the powers of an independent Commission smacks a little of expediency and can be a dangerous policy."

Professor H.E. Groves - "Constitution (Amendment) Act 1962.

"...this power to a transient majority of Parliament, whose temptation to gerry-mander districts and manipulate the varying numerical possibilities between 'rural' and 'urban' constituencies for political..."
advantage is manifest. It is, perhaps, not
unworthy of comment that the Constitution
does not offer any criteria for the
determination of what is 'rural' and what
is 'urban'."

As stated by Yacoob Hussain Merican in his Article "Developments
in the Law concerning Elections in Malaysia" in the 1959 election
which was held on the 13th of August, 1959, the Alliance a
political party emerged the victor but with greatly diminished
percentages compared to the 1955 election. It controlled 74 seats
while the opposition had 30 seats. However the overall majority
vote dropped from 81.7 per cent in 1955 to 51.9 per cent in 1959.

It will be noticed that the ruling party had just achieved two-
thirds majority. So one asks was the Constitutional (Amendment)
1962 interfering with the independence of the Election
Commission a preparation to gerry-mandering in the words of
Professor H C Groves.

THE ROLE OF THE MEDIA

While the role of the media in Western Democracies may be to the
extent of informing the public the national issues involved,
however, in Malaysia the greatest problem is as to how to get the
public to understand the Constitution and the checks and balances
it embodies to preserve its basic features. And to show the
people by reasoning as to what would happen to the balance of the
Constitution if certain amendments are carried through.
Further it becomes the responsibility of the media to explain to the people now vital it is for the voter to elect members to Parliament who will be true to their oath that they will preserve, protect and defend the Constitution that is its basic structure which embodies the rule of law, the separation of powers and the principles of democracy.

The Malaysian Constitution has been amended so many times and so often and so quickly without giving anybody a chance to discuss the amendments that one wonders how soon in future the Constitution will become a mere document devoid of its constitutionality and basic features.

This slide down can only be prevented by the voter through the electoral process guided by the media with its ability and facility to reach voters in the remotest area.

What if one bright morning the representatives of the people in Parliament amend the Constitution to say that all members elected shall be permanent members of Parliament for life? I might in conclusion say the above might not ever happen even though there are third world countries where democracies have through amendments to the Constitution become Dictatorships.

G.T.S. Sidhu