

# British Westminster System in Asia

## —The Malaysian Variation

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**Abstract:** Malaysia belongs to the family of British Westminster system and the English common law. While the external forms and trappings may present a foreign legacy, the actual working of the country's constitutional and legal systems reveals otherwise; namely the indigenous character and temperament. Given the circumstances this is something natural or that the indigenous character has emerged as something that is inevitable. But whatever the truth behind the phenomenon is, the standard to be used now has to be democracy and constitutionalism; not whether Malaysia should follow British tradition or otherwise. In other words, the origin of a practice or an institution is not important for what is more crucial today is whether such could be justified within the existing democratic framework.

**Key words:** constitutionalism; constitutional law; constitutional history; legal history; constitutional system; Westminster and parliamentary system; common law

### 1. Introduction

Malaysia is a federation of thirteen states, eleven in the Malay Peninsula and two in Borneo. Together with Brunei Darussalam and Singapore, Malaysia used to be under the British rule which began in the end of 18<sup>th</sup> century. Today the country belongs to the Commonwealth group of nations with a Westminster constitutional system<sup>1</sup> and a common law legal system. As Federation of Malaysia edges towards the 50<sup>th</sup> anniversary of independence next year there are many aspects of her system which merit scrutiny, something that may be useful from the perspective of comparative constitutional law and legal system.<sup>2</sup>

Some scholars such as de Smith argued that Westminster model was one of the well-known British exports in the Commonwealth.<sup>3</sup> However a closer look at the systems reveals that most of the provisions have been designed with local interests and peculiarities in mind. Indeed the Reid Commission<sup>4</sup>, which was charged with the duty to draft the Malaysian Constitution, actually did not agree with some of the provisions which sought to protect the indigenous community. In any case although the indigenous elements<sup>5</sup> may not be the pillars of her

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<sup>1</sup> This term has its origins in the Palace of Westminster in London, United Kingdom. This old palace is now houses British parliament, which consists of the House of Lords and House of Commons.

<sup>2</sup> Some of the ideas printed here have earlier been presented in a paper at the Third ASLI Conference held in Shanghai, People's Republic of China on 25-26 May 2006.

<sup>3</sup> S.A de Smith. *Westminster Export Model: The Legal Framework of Responsible Government* (1961) 1 JCPS 9. See also his *Constitutional Laws of the Commonwealth*, Vol.I. Oxford University Press, 1957.

<sup>4</sup> *Report of the Federation of Malaya Constitutional Commission 1957*, No.330, London: HMSO, 1957.

<sup>5</sup> For some insights on these see Abdul Aziz Bari. *Malaysian Constitution: A Critical Introduction*. Kuala Lumpur: The Other Press, 2003: 43-50.

democratic constitution, somehow they have influenced the way the constitution works.<sup>6</sup>

In some former British colonies, such as those in the African continent, the Westminster systems did not last<sup>7</sup> but in Malaysia it has survived though, slowly, it changed the direction and no longer look up to Britain for solutions. And such seems to be the case with the Malaysian legal system as well. Interestingly enough the legal system has also been based on the English common law system, another well known export from Britain.

## 2. On Westminster Democracy and Common Law System

Apart from being a Westminster democracy—which is also known as parliamentary democracy—Malaysia has some other prominent features; namely that it is also monarchical and has a federal system of government. As for the legal system it is mainly rooted in the English common law traditions. All these characters obviously indicate her past; something that is full with of indigenous and foreign traces.

The definition of Westminster democracy denotes a constitutional and political system whose roots and prototype are to be found in the United Kingdom. Looking at some of the Westminster systems one may list down some of the major characteristics which include: (1) the head of state is not the effective head of government; (2) the effective head of government is the prime minister who actually appoints and dismisses ministers; (3) the executive is appointed from members of the legislature, namely parliament; and that (4) the executive is responsible to the legislature.<sup>8</sup> Given these prominent features what differentiates British parliamentary system and the American presidential system<sup>9</sup>—the two main constitutional systems today—is the manner they flesh out the doctrine of separation of powers. While the British system applies the doctrine functionally,<sup>10</sup> the American system chooses to apply it strictly as required by the doctrine.

One could say that in a way Malaysia is closer to Australia than to her neighbor Singapore or India. This is because both Malaysia and Australia are monarchical and have a federal system of government. India, a common law jurisdiction, adopted a federal system of government and a member of the Commonwealth. India, however, is a republic. As we know Singapore is a republican Westminster system with a unitary set-up. However to Malaysian lawyers India is important to Malaysia because the latter took English law via the former<sup>11</sup>. Malaysia's important legislations such as the Penal Code, Criminal Procedure Code, Contract Act 1950 and Evidence Act 1952 have all been modeled along the Indian versions of statute with similar names all of which in turn were the codification of English common law principles.<sup>12</sup> Along the way there have been many amendments made to those laws by parliament. But the legal system and the way it is being organized are still very much under the common law mould.

There have been pronouncements by the Chief Justices of the Federal Court of Malaysia which may suggest that the system is moving away, if not departing from its common law roots. These include slogans and assertions such as the creation of Malaysian common law, re-assessment of the existing inquisitorial trial system and the revitalization of Asian values. It appears however that there is no blueprint to put that rhetoric into concrete

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<sup>6</sup> Some of the ideas printed here have earlier been presented in a paper: see Abdul Aziz Bari. *The Evolution of Malaysian Constitution Tradition*. Asian Law Institute Inaugural Conference, Singapore, 27-28 May 2004.

<sup>7</sup> For more insights on this see, e.g., B.O. Nwabueze. *Constitutionalism in Emergent States*, London: C. Hurst & Co. Ltd., 1973.

<sup>8</sup> S.A de Smith. *The New Commonwealth and Its Constitution*. London: Sweet & Maxwell, 1964: 77.

<sup>9</sup> For a preliminary comparison between the two systems see, e.g., Mohamed Suffian Hashim. *Parliamentary System Versus Presidential System: The Malaysian Experience*. Singapore: Malayan Law Journal Pte. Ltd, 1980.

<sup>10</sup> See the decisions of the British courts in *Hinds v R* [1976] All ER 353 and *Duport Steel v Sirs* [1980] All ER 529.

<sup>11</sup> See Mohamed Suffian Hashim. *Malaysia and India Shared Experiences in the Law*. Nagpur: All India Reporter, 1980.

<sup>12</sup> Ahmad Ibrahim & Ahilemah Joned. *The Malaysian Legal System*. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987: 27-29.

programs. Most of the time the rhetoric, Asian values for example, is actually related to questions pertaining to sovereignty, cultural relativism and resistance to full-scale globalization<sup>13</sup>. Of course these might have some impact on the manner the systems operate esp. when it comes to issues pertaining human rights and so on. In any case Asian values often characterized by emphasis on economic development and suspension of civil and political rights. It is interesting to note that essentially these are what the proponents of the third generations of human rights<sup>14</sup> have been advocating. But whatever it is, constitutionalism which stands as the bedrock of any democratic constitution is actually something that is universal and not just confined to the West.<sup>15</sup>

In the meantime Islam and Muslims have become more and more visible<sup>16</sup>. In Malaysia these factors have been crucial in the debate about various aspects of human rights as well as the future of the existing constitution. To a large extent this is more significant than the assertions of Asian values. This is certainly interesting as Muslims only constitute some 60 percent of Malaysia's population of over 25 million. Having said that however one must not forget the fact that Islam used to be the law of the land and that Malaysia is not an entirely secular state: This is one of the implications of the stipulation in the constitution that Islam is the religion of the federation<sup>17</sup>.

### 3. The Origins and Developments of the Existing Structure

The existing constitutional and legal systems emerged as the outcome of the various phases of impositions and adaptations. These periods, namely the traditional, British and independence, have all contributed towards the shaping of the existing system. The British were not the only powers that have come to the land but they left behind quite a lasting legacy<sup>18</sup>. Other European powers who came before the British—Portuguese and Dutch—did not leave anything which can be said as significant in the system today. The same is also the case with the Japanese who ruled briefly during World War II between 1942 and 1945.

It must be pointed however that constitutional life and legal order was not something that was introduced by the Western powers. Before the Malacca Sultanate was defeated by the Portuguese in 1511, it was a regional power to which smaller states in the archipelago paid their homage. Its major constitutional instrument, the *Kanun Undang-undang Melaka* or the Malacca Code, was rooted mainly in Islamic law. There were Hindu and pre-Islamic influences but these were not the major pillars; they were essentially at the periphery and not the centre. Islamic roots and influence were also prominent in the codes of subsequent sultanates which emerged after the fall of Malacca. One good example was the Pahang Code or *Kanun Undang-undang Pahang* which was heavily influenced by the Malacca Code.

The Portuguese were expelled from Malacca by the Dutch in 1641. They in turn gave it to the British following the deal after the conclusion of Napoleonic war in Europe. The British footing began with the cession of

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<sup>13</sup> Kerstin Steiner. *The Ambiguous Nature of Asian Values: Regional and Global Response to the Increasing International Scrutiny of Domestic Human Rights Policies*, paper presented at *Second ASLI Conference*, Bangkok, Thailand, 26-27 May 2005.

<sup>14</sup> For more on this see Ian Brownlie. *Principles of Public International Law*, 5<sup>th</sup> edition. Oxford University Press, 1998: 583-584.

<sup>15</sup> Andrew J. Harding. *Law, Government and the Constitution in Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn. Bhd., 1996: 8-9.

<sup>16</sup> For more insights on this see Abdul Aziz Bari. *Islam Dalam Perlembagaan Malaysia*. Petaling Jaya: Intel Multimedia & Publications, 2005; and Andrew J. Harding *Islam and Public Law in Malaysia: Some Reflections in the aftermath of Susie Teoh*. In: Chibli Malat, ed. *Islam and Public Law: Classical and Contemporary Studies*. London: Graham & Trotman Ltd., 1993: 193-196.

<sup>17</sup> See *Federal Constitution*, Art. 3(1). See also Shamrahayu A. Aziz. *Islam As the Religion of the Malaysian Federation: The Scope and Implications*. *IJUMIJ*, 2006, 14 (33).

<sup>18</sup> Technically Malaysia is not a former colony: see cases decided by English courts such as *Mighell v Sultan of Johore* [1894] 1 QB 149. See also William Shaw. *International Law*, 2<sup>nd</sup> edition. Cambridge: Grotius Publications, 1987: 137-138.

Penang in 1789. Not too long after this, as noted earlier, they got Malacca followed by the acquisition of Singapore from the Sultanate of Johore in 1811. Having these three territories in their hands, the British started to get involved in the volatile Malay states and eventually signed various treaties with the rulers of those states. Starting with Perak in 1874 the process was completed with the treaty with Johore sultanate in 1914. As for the Borneo states the British rule had its roots in the deals made by the Brooke family with the Sultanate of Brunei.

When the country achieved independence from Britain in 1957, it was still the Federation of Malaya. It became bigger and was renamed the Federation of Malaysia in 1963 when the Borneo states of Sabah and Sarawak joined the federation together with Singapore. The island however was asked to leave the federation in 1965.

Some viewed that the Malaysian Constitution was unusual as it was drafted by non-locals<sup>19</sup>. But this view overlooked the fact that there was a conference discussing the form and framework of the constitution and that the final draft was actually the one which has gone through some revisions.

The application of English law has been done through several ways such as through the judges who applied English common law principles and through legislations which essentially sought to formalize what had been done by the judges<sup>20</sup>. Later when the English influence became more pervasive—something that took place due to English education etc., the position of English law principles became stronger as laws passed by the legislatures—during the British rule and even after independence—contained such principles. One must not forget that by then English language had already assumed prominence in the government administration as well as in the field of education. Given this it was rather natural that English law assumed a commanding position.

#### 4. The Existing Constitutional and Legal Structures<sup>21</sup>

Although Malaysia is a constitutional monarchy<sup>22</sup> it has not entirely been modeled along the British lines. For one thing at the federal level, the Supreme Head of the Federation or the Yang di Pertuan Agong or simply the King, is elected from among the nine Malay rulers. This is done once in every five years on rotation basis. These nine hereditary rulers sit in the Majlis Raja-Raja, officially called the Conference of Rulers<sup>23</sup>, whose functions include electing the King. Although the monarchy, assume a role not entirely different from the British monarch—particularly the power to appoint government and dissolving parliament—the institution is arguably still influential for the population still, comparatively speaking, hold fast to the religion. In this respect, the rulers are the highest authority and they may act without or even against the advice of the government of the day. This requirement to act on advice is central to the Westminster notion of constitutional monarchy. From the legal standpoint perhaps one could argue that while the prerogatives of the British monarch may have fallen into disuse, the same may not be true with the Malaysian monarchs. For one thing their powers are being contained by the

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<sup>19</sup> See e.g., Zelman Cowan. The Emergence of a New Federation in Malaya. *Tasmanian Law Review*, Vol.I, 1958: 46-57. A former head of the Malaysian judiciary, Mohamed Suffian Hashim seems to have similar view: see his judgment in *Phang Chin Hock v Public Prosecutor* [1980] 1 *MLJ* 70.

<sup>20</sup> See Ahmad Ibrahim & Ahilemah Joned. *The Malaysian Legal System*. Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1987: 27-29. But cf Mohan Gopal, “English Law in Singapore: The Reception That Never Was” [1983] 1 *MLJ* xxv.

<sup>21</sup> For more on this see Abdul Aziz Bari & Farid Sufian Shuaib. *Constitution of Malaysia: Text and Commentary*, 2<sup>nd</sup> edition. Kuala Lumpur: Pearson Prentice-Hall, 2006.

<sup>22</sup> For more on this see Abdul Aziz Bari. *The Development and Role of Constitutional Monarchy in Malaysia*, unpublished Ph.D. Thesis, University of Birmingham, England, 1996.

<sup>23</sup> For more on this see Abdul Aziz Bari. *Majlis Raja-Raja. Kedudukan dan Peranan Dalam Perlembagaan*. Kuala Lumpur: Dewan Bahasa Dan Pustaka, 2001.

constitution and may not be taken away without their consent.

The power to consent or otherwise is unique for such a notion is unknown in British constitutional system where parliament is supreme. One must also remember that the constitutional heads of the Borneo states also have the same power with regard to constitutional amendments that touch the interests of the Sabah and Sarawak. These two constitutional heads, together with that of peninsular states of Malacca and Penang are also members of the Conference of Rulers<sup>24</sup>. However they are excluded from this body when it deals with matters pertaining to the monarchy and those matters falling within the rulers' jurisdiction. The position and role of the Conference of Rulers are interesting as it has its tentacles everywhere: It has various consultative powers and it meets three times a year. These include occasions where the Prime Minister and heads of state governments are also involved.

As far as parliament is concerned, one would notice that while the form may be taken from the United Kingdom the substance is obviously local. Instead of accommodating the interests of aristocracy the upper house in Malaysian parliament caters the interest of the unrepresented such as the states, the professional, the aborigines etc. In this way the interests of the states for example, are taken care of. While the federal legislature is bicameral the state ones are unicameral.

The judiciary has been reconstituted several times; the adversarial system has been put to question on several occasions. At the same time other types of adjudication continue to emerge and these include consumers' tribunal and house buyers' tribunal. Judiciary is the only branch that is entirely federal: As we have seen above both the legislative and executive branch, as one would expect in any federation, are divided between the federation and the states. Be that as it may one should bear in mind that the syariah courts, essentially Islamic family courts, are under the state jurisdiction. But in recent years there have been efforts taken to create a hierarchy of appellate courts for these courts and these come under the federal authority.

Such a development underlines the emergence of a system which, although still within the common law family, but nonetheless has some distinctive characteristics most of which have been necessitated by local needs and circumstances. But this is rather natural for a legal system is, after all, composed of rules and principles, processes, institutions and personnel whose main concern is the creation and regulation of laws.<sup>25</sup> As a system that operates in Southeast Asia, apart from serving the populations, it needs to adjust itself to its surroundings rather than keeps going back to England.

## 5. Indigenous Character of the System

There are characteristics which obviously did not come from the British and English systems. These include federal system which has its roots in the United States as well as some legislations such as the National Land Code 1965 and Company Act 1960 both of which have Australian influence. While the cabinet system of government was taken from the United Kingdom its working needs to be understood within a federal system. One also needs to bear in mind the political landscape where the ruling party is a coalition of political parties, not a two-party system such as the one prevailing in the United Kingdom. This has created a political culture that is different from the one prevailing in the United Kingdom which may explain why some powers have been exercised in a different manner. This is quite evident in the appointment of government. Although the rulers are independent from the federal

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<sup>24</sup> These four heads of states are appointed by the Yang di-Pertuan Agong, the federal king, exercising his discretion after consulting the chief ministers of the states concerned.

<sup>25</sup> See Peter Wesley-Smith. *An Introduction to the Hong Kong Legal System*, 2<sup>nd</sup> edition. Hong Kong: Oxford University Press (China), 1993: 10-17.

government,<sup>26</sup> the dependence of the states on the federal governments has put the federal government in a position to influence the appointment process. On some instances, the federal government was even able to dictate the appointment of the state governments. Here one must not overlook the fact that since independence Malaysia has been ruled by the same coalition of parties, with the occasional exceptions in some states.

Then there is the syariah courts system<sup>27</sup>, another notable variation from the English and Indian systems. But while this court hierarchy is independent from the civil one, the latter still retains supervisory jurisdiction. Although the syariah courts are basically given the power only to deal with Muslims, the fact that conversions to Islam is a fact of life has made what are sometimes seen as conflicts between the two systems of courts inevitable. In the meantime the influence and impact of Islam and Islamic law has been on the rise<sup>28</sup>. With the advance of Islamic banking and insurance a special bench has even been established at the high court to deal with those matters. This phenomenon actually underlines the need to understand the doctrine of Islam if one is to make sense of what has been happening in Malaysia since independence in 1957.

Unlike the British monarch who is legally immune from suits, their Malaysian counterparts are arguably not so. The setting-up of the Special Court in 1993 has to a certain extent curtailed that privilege. Many reasons could be advanced here. Apart from democracy and constitutionalism one should remember that Islam, which is the religion of the Malaysia federation, promotes equality. Although the reason for the royal immunity was to ensure that the monarchs would not be intimidated by the government of the day the implementation was not entirely free from problems. Apart from addressing these problems the 1993 amendment has also allowed criticisms against the rulers so long as these do not amount to the abolition of the monarchy.

In the area of human rights the establishment of Suhakam, the National Commission of Human Rights in 2000, was significant<sup>29</sup>. Although it was primarily meant to educate the public about human rights and to investigate complaints of human rights abuse its presence has been felt. In a way one could say that the commission has been able to fill up the gap left by the failure of the courts to play the role; namely to strike a balance between citizen rights and limitations imposed by parliament through the laws it passed.

## 6. The Conflicts and Their Resolutions

The working has not always been a plain sailing. Thus in 1983, for example, there was a crisis between the rulers and the federal government. It was followed by another one between 1990 and 1992 and then in 1993. Meanwhile the judiciary was at logger heads with the federal government in 1988. Pledge of loyalty, unusual in a Westminster democracy, was imposed on the public servants in 2001.

At the heart of the 1983, constitutional crisis was the attempt to do away with the royal assent to bills passed by the legislatures as well as the power to declare emergency. The crisis was solved through a compromise: That the King would have a delaying power and that the power to declare state of emergency would be returned to the King. However the first compromised formula was later removed by the government through a constitutional amendment

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<sup>26</sup> See Federal Constitution, Eighth Schedules.1 (2) (a).

<sup>27</sup> For more on this see Farid Sufian Shuaib. *Powers and Jurisdiction of the Syariah Courts in Malaysia*. Kuala Lumpur: Malayan Law Journal Sdn. Bhd, 2003.

<sup>28</sup> For some insights on this point see, eg., Abdul Aziz Bari. Enforcement of Shari 'ah in Malaysia: Divine Provisions in a Constitutional Democracy. In: Hussin Mutalib, ed. *Islam and Democracy: The Southeast Asian Experience*. Singapore: KAF & CCIS, 2004: 33-52.

<sup>29</sup> See Abdul Aziz Bari. *Protecting Human Rights in a Written Constitution: The Case of Malaysia's National Human Rights Commission*. The Second ASLI Conference, Bangkok, Thailand, 26-27 May 2005.

in 1994 whose legality is doubtful. The 1990-1992 crises was essentially the outcome of the frustration of the ruling party UMNO which lost of one of the states to its arch rival PAS. A series of amendments were mulled—which include the doing away of power of the constitutional heads to appoint a government—but none was eventually pushed through. This tension underlined the confusion about the role of the constitutional heads in the system. The 1993 crisis on royal immunity was somewhat indicative of certain problems such as the size of the royal houses and the likes. Although the federal government claimed that it acted in the name of popular sovereignty the people were not given the opportunity to have a say. As usual the press was used by the politicians in power to justify the amendments. But what is particularly worrying was the weakening of a traditional institution that has been able to perform a kind of check and balance function. The amendment made in 1994 seems to have been aimed at reducing the monarchy into a mere rubber stamp. But, as has been indicated earlier, this piece of constitutional amendment may be unconstitutional as it did not get the consent of the rulers as required by the constitution.

The symptoms of the 1988 judiciary crisis, which ended with the dismissal of the head of the judiciary Mohd Salleh Abas, began to emerge when the government expressed its unhappiness with the way judiciary carried out its judicial review role. Interestingly enough it was in this year that the phrase judicial power was deleted from the constitution and that the power of the syariah courts was given constitutional protection. However as the government possessed more than two-thirds in parliament it had no problem in pushing the bills to amend the constitutional provisions through. It is to be noted that the procedure to remove judges from office was different from the one existing in the United Kingdom: instead of resolution of the lower house of parliament the Malaysian Constitution chose to do it via the setting-up of a special tribunal. This has created a problem: it was manipulated in such a way that the executive was able to dictate the appointment and eventually the proceeding of the tribunal. The 1988 crisis also highlighted the problem pertaining to the definition of judicial misbehaviour.<sup>30</sup>

In the meantime there have been problems pertaining to the rules on cabinet government<sup>31</sup> esp. the one on ministerial responsibility. This could have been due to the political landscape, such as the fact that unlike in the United Kingdom in Malaysia political parties are being organized along racial lines, not ideologies. Thus it is quite often to find ministers involved in public spats among themselves. Indeed recently some senior ministers effectively took a different line from the one taken by the Prime Minister. In strict Westminster term this should have been a straight forward case of resignation or dismissal. Legally speaking, the British rules and convention pertaining to cabinet government are to be applied but this did not take place.

The public service<sup>32</sup>, which is supposed to be neutral and apolitical, has always been subordinated to the will of the ruling politicians. In strict Westminster tradition the public service is supposed to be neutral and gives its allegiance and loyalty to the state as symbolized by the head of state. But as the public service has been functioning under the same political party right from the independence it finds it difficult to disentangle itself from under the control and influence of the ruling party. This is without doubt is a clear deviation from Westminster tradition. At the beginning of the 21<sup>st</sup> century members of the public service was even forced to pledge loyalty to the government of the day<sup>33</sup>; a clear breach of the constitutional principle reiterated by the Reid Commission in its

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<sup>30</sup> For more on this see, e.g., H.P. Lee. *Constitutional Conflicts in Contemporary Malaysia*. Kuala Lumpur: Oxford University Press, 1995.

<sup>31</sup> For more on this see Abdul Aziz Bari. *Cabinet Principles in Malaysia: The Law and Practice*, 2<sup>nd</sup> edition. Kuala Lumpur: The Other Press, 2002.

<sup>32</sup> The public service includes the armed forces; see Abdul Aziz Bari. *Armed Forces Personnel as Public Servants under the Federal Constitution: A Review of the Decision in Abdul Salam bin Husin*. [2001] 1 *MLJ* xxix.

<sup>33</sup> *Ibid*, *MLJ*, 2001 (1): 96-98.

report and later the constitution<sup>34</sup>.

What has precipitated all those problems? Do they signal the unsuitability of the system here or that they were natural and were they just a series of processes which were part of the necessary adjustments? It has to be pointed out that, as has been indicated above, the system is not something that was imposed by the departing British: The locals had in fact played their role in constructing the system. But nonetheless there is no democratic foundation, something that would give all the institutions and processes their soul and direction. Paradoxically enough it was the traditional institutions such as the monarchy that have been able to assert independence while others, such as the judiciary and parliament have not quite been able to carry out its democratic role.

Meanwhile there have been suggestions and proposals to create a constitutional court to deal with matters pertaining to religious issues. This has been suggested in the wake of confusion following the conflict arising out of conversion in late 2005: The syariah courts asserted their jurisdiction the ordinary courts have generally been declining<sup>35</sup>. This has made the non-Muslims unhappy and hence the proposal to set up a constitutional court to deal with such issues has to be made.

### **7. Emerging Distinctive Tradition and Character**

Unlike in Africa where military coup d'etat has put an end to the system, the constitutional system in Malaysia remains despite the adjustments since the independence. This stability might have been due to the monarchy system which is no longer around in those countries: such is also the case of India, Burma or Indonesia.

As has been noted above there are many features of the existing system which have been taken from non-British sources. Even with those taken from Britain their actual working has not been similar with their prototype. However some of the deviations such as the subjugation of the public service by the ruling politicians were not good and undemocratic. Essentially these were the extension of autocratic tendency in the system. This underlines the point that what matters in the end is whether the system or its contents is good from the point of view of democracy. And one must always remember that this is something that stands at the very heart of the constitutional system.

One of the safeguard against tyranny and monopoly of power is the existence of a functioning check and balances system or machinery. This presupposes the existence of a court that is independent. Apart from playing its role as the major checks and balances agent the court is also crucial to allow the system itself to work. Unfortunately this has not been the case with Malaysia. Many observers felt that this was the aftermath of judicial crisis in 1988. However a closer look at the local jurisprudence reveals that such has been the case since the independence in 1957. The judges were simply reluctant to assert their authority part of which seems to have been the unconscious application of the doctrine of parliamentary supremacy. It is true that judges have often reiterated the supremacy of the constitution but that has not been what the ordinary people in the street see and feel.

With regard to parliament it has not really been effective or free from the government control. While the lower house, just like the British House of Commons, is unable to play its role due to inherent problems<sup>36</sup> the upper house has been packed with government appointees who could not be expected to play a critical role.

### **8. Concluding Remarks**

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<sup>34</sup> See Federal Constitution, Art.132.

<sup>35</sup> See, e.g., Aliran. The Moorthy Maniam Case: Compassion and Justice Missing. *ALIRAN Monthly*, 2005, 25 (11, 12): 2-8.

<sup>36</sup> For more on this see, e.g., Philip Norton. *Does Parliament Matter*. Hemel Hempstead: Harvester Wheatsheaf, 1993.

Looking at the system in totality is quite obvious that there exists a mixture of borrowings from other systems: English, Indian, Australian, American and other Asian countries (e.g. the formula to solve the 1983 crisis). But at the same time the Islamic factor continues to be important in the system. One may say that this is simply the case of a system that is going back to its original roots: Before the British rule it was Islam that reigned supreme in the Malay sultanates then.

It appears that the changes and adjustments were not planned but something that were inevitable. These have been due to indigenous temperament, political conflicts etc. However there were occasions where it was autocratic tendencies among the politicians that provoked the problems. Constitutional crises of 1983 and 1988 seem to fall under this category. What is regrettable on these occasions was that democracy and constitutionalism have to take a backseat.

But whatever it is, the Malaysian variation of Westminster model has its own unique characteristics. Although the main characteristic, namely the cabinet system responsible to the legislature, remains, Malaysia has a federal system. This explains the election and rotation of the office of the head of state among the surviving nine sultanates. This is also the reason behind the provision for senators representing the states in the federal parliament. Thus while the form may be British, the actual process and working of the Malaysian Westminster system obviously are not. The same thing is the case with the judiciary. Although it is under the federal jurisdiction, the courts have to operate in a system where there is another hierarchy of courts, with another feature which underlines the unique character of Malaysian Westminster system.

(Edited by Rita)