

Report of the Federation of Malaya Constitutional Commission 1957
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Colonial No. 330

3. The members of the Commission were appointed in the name of Her Majesty The Queen and Their Highnesses the Rulers with terms of reference as follows:

“To examine the present constitutional arrangements throughout the Federation of Malaya, taking into account the positions and dignities of Her Majesty The Queen and of Their Highnesses the Rulers: and

To make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature, which would include provision for:

- (i) the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy (the question of the residual legislative power to be examined by, and to the subject of recommendations by the Commission) and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution;
- (ii) the safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States;
- (iii) a constitutional Yang di-Pertuan Besar (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers;
- (iv) a common nationality for the whole of the Federation;
- (v) the safeguarding of the special position of the Malays and the legitimate interests of other communities.”

14. In making our recommendations we have had constantly in mind two objectives: first that there must be the fullest opportunity for the growth of a united, free and democratic nation, and secondly that there must be every facility for the development of the resources of the country and the maintenance and improvement of the standard of living of the people. These objectives can only be achieved by the action of the people themselves: our task is to provide the framework most appropriate for their achievement. We must start from the present position as we find it, taking account not only of the history and tradition

of Malaya but also of existing social and economic conditions. Much that is good has already been achieved and we would not seek to undo what has been done. But many existing arrangements are inappropriate for a self-governing and independent country, and, in recommending the form which the necessary political and administrative changes should take, we have borne in mind that the new provisions must be both practicable in existing circumstances and fair to all sections of the community.

161. A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done. The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise. It was suggested to us that there should also be written into the Constitution certain principles or aims of policy which could not be enforced by the Courts. We do not accept this suggestion. Any guarantee with regard to such matters would be illusory because it would be unenforceable in law and would have to be in such general terms as to give no real security. Moreover, we do not think that it is either right or practicable to attempt to limit developments of public opinion on political, social and economic policy.

162. Our recommendations afford means of redress, readily available to any individual, against unlawful infringements of personal liberty in any of its aspects. We recommend (Art. 5) provisions against detention without legal authority of a magistrate, slavery or forced labour (but not against compulsory service) which apply to all persons (Art. 6); and provisions against banishment, exclusion from the Federation and restriction of freedom of movement which apply not to citizens of the Federation (Art. 9). We further recommend (Art. 10) that freedom of speech and expression should be guaranteed to all citizens subject to restrictions in the interests of security, public order or morality or in reality or in relation to incitement, defamation or contempt of court. And we recommend (Art. 11) that freedom of religion should be guaranteed to every person including the right to profess, practice and propagate his religion subject to the requirement of public order, health and morality, and that, subject also to these requirements, each religious group should have the right to manage its own affairs, to maintain religious or charitable institutions including schools, and to hold property for these purposes (Art. 12). We also recommend (Art. 8) provisions against

discrimination by law on the ground of religion, race, descent, or place of birth and discrimination on those grounds by any government or public authority in making appointments or contracts or permitting entry to any educational institutions, or granting financial aid in respect of pupils or students (Art. 12). We recommend (Art. 8(3)) that there should be no discrimination with regard to the right to carry on any trade, business, profession or occupation; that no person should be deprived of his property save in accordance with law (Art. 13), and that any law for compulsory acquisition or requisition of property must provide for adequate compensation. But, as we shall later explain, these provisions must be modified in certain respects to take account of the special position of the Malays as must the provisions with regard to the right to hold and dispose of property.

The Special Position of the Malays

163. Our terms of reference require that provision should be made in the Constitution for the “safeguarding of the special position of the Malays and the legitimate interests of other Communities”. In addition, we are asked to provide for a common nationality for the whole of the Federation and to ensure that the Constitution shall guarantee a democratic form of Government. In considering these requirements it seemed to us that a common nationality was the basis upon which a unified Malayan nation was to be created and that under a democratic form of Government it was inherent that all the citizens of Malaya, irrespective of race, creed or culture, should enjoy certain fundamental rights including equality before the law. We found it difficult, therefore, to reconcile the terms of reference if the protection of the special position of the Malays signified the granting of special privileges, permanently, to one community only and not to the others. The difficulty of giving one community a permanent advantage over the others was realized by the Alliance Party, representatives of which, led by the Chief Minister, submitted that - “in an independent Malaya all nationals should be accorded equal rights, privileges and opportunities and there must not be discrimination on grounds of race and creed...” The same view was expressed by their Highnesses in their memorandum, in which they said that they “look forward to a time not too remote when it will become possible to eliminate Communalism as a force in the political and economic life of the country”.

164. When we came to determine what is “the special position of the Malays” we found that as a result of the original treaties with the Malay States, reaffirmed from time to time, the special position of the Malays has always been recognized. This recognition was continued by the provisions of clause 19(1)(d) of the Federation Agreement, 1948, which made the High Commissioner responsible for safeguarding the special position of the Malays and the legitimate interests of other communities. We found that there are now four matters with regard to which the special position of the Malays is recognized and safeguarded.

(1) In most of the States there are extensive Malay reservations of land, and the system of reserving land for Malays has been in operation for many years. In every State the Ruler-in-Council has the power to permit a non-Malay to acquire a piece of land in a Malay reservation but the power is not used very freely. There have been some extensions of reservations in recent years but we do not know to what extent the proportion of reserved land has been increasing.

(2) There are now in operation quotas for admission to the public services. These quotas do not apply to all services, e.g., there is no quota for the police and, indeed, there is difficulty in getting a sufficient proportion of non-Malays to join the police. Until 1953 admission to the Malayan Civil Service was only open to British subjects of European descent and to Malays but since that date there has been provision for one-fifth of the entrants being selected from other communities. In other services in which a quota exists the rule generally is that not more than one-quarter of new entrants should be non-Malays.

(3) There are not also in operation quotas in respect of the issuing of permits or licenses for the operation of certain businesses. These are chiefly concerned with road haulage and passenger vehicles for hire. Some of these quotas are of recent introduction. The main reasons for them appear to be that in the past the Malays have lacked capital and have tended to remain on the land and not to take a large part in business, and that this is one method of encouraging the Malays to take a larger part in business enterprises.

(4) In many classes of scholarships, bursaries and other forms of aid for educational purposes preference is given to Malays. The reason for this appears to be that in the past higher education of the Malays has tended to fall behind that of the Chinese, partly because the Chinese have been better able to pay for it and partly because it is more difficult to arrange higher education for Malays in the country than for Chinese in the towns.

165. We found little opposition in any quarter to the continuance of the present system for a time, but there was great opposition in some quarters to any increase of the present preferences and to their being continued for any prolonged period. We are of opinion that in present circumstances it is necessary to continue these preferences. The Malays would be at a serious and unfair disadvantage compared with other communities if they were suddenly withdrawn. But, with the integration of the various communities into a common nationality which we trust will gradually come about, the need for these preferences will gradually disappear. Our recommendations are made on the footing that the Malays should be assured that the present position will continue for a substantial period, but that

in due course the present preferences should be reduced and should ultimately cease so that there should then be no discrimination between races or communities.

166. With regard to land we recommend (Art. 82) that, subject to two qualifications, there should be no further Malay reservations, but that each State should be left to reduce Malay reservations in that State at an appropriate time. Land is a State subject and we do not recommend giving overriding powers to the Federation in this matter. We do not think that it is possible to lay down in advance any time when a change should be made because conditions vary greatly from State to State. The two qualifications to the rule that there should be no further reservations are: first, that if any land at present reserved ceases to be reserved, an equivalent area may be reserved provided that it is not already occupied by a non-Malay; and, secondly, that if any undeveloped land is opened up, part of it may be reserved provided that an equivalent area is made available to non-Malays.

167. The effect of our recommendations (Art. 157) is that with regard to other preferences to Malays no new quota or other preference could be created. These preferences can only be lawfully created or continued to the extent to which that is specifically authorized by the Constitution. With regard to the existing quotas which we have referred to above we recommend that the Malays ought to have a substantial period during which the continuance of the existing quota is made obligatory, but that, if in any year there are not enough Malay applicants qualified to fill their quota of vacancies, the number of appointments should not be reduced and other qualified applicants should be appointed in sufficient numbers to fill the vacancies. We recommend that after 15 years there should be a review of the whole matter and that the procedure should be that the appropriate Government should cause a report to be made and laid before the appropriate legislature; and that the legislature should then determine either to retain or to reduce any quota or to discontinue it entirely.

State Religion

169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance it was stated - "the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practicing their own religions and shall not imply that the State is not a secular State." There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the

Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that Counsel for the Rulers said to us - "It is Their Highnesses' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation. Their Highnesses are not in favour of such a declaration being inserted and that is a matter of specific instruction in which I myself have played very little part." Mr. Justice Abdul Hamid is of opinion that a declaration should be inserted in the Constitution as suggested by the Alliance and his views are set out in his note appended to this Report.

CHAPTER XII SUMMARY OF RECOMMENDATIONS

Fundamental Rights

70. Fundamental Rights should be guaranteed in the Constitution and the courts should have the power and duty of enforcing these rights. The rights guaranteed should be freedom from arrest and detention without legal authority, freedom from slavery or enforced labour and should include provisions against banishment and restriction of freedom of movement of citizens. Freedom of speech should be guaranteed to all citizens subject to the interests of security, public order or morality and freedom to profess, practice and propagate religion should also be guaranteed (Para. 162).

71. There should be guarantees against discrimination on the grounds of religion, race, descent or place of birth in making Government appointments or granting entry to educational institutions or granting financial aid to pupils or students. There should be no discrimination with regard to the right to carry on any trade, business, profession or occupation and no person should be deprived of his property except under a law providing for adequate compensation (Para. 162).

72. The special position of the Malays should be recognized with regard to Malay reservations, quotas for admission to the public services, quotas in respect of the issuing of permits or licenses and in connection with scholarships, bursaries and other aids for educational purposes (Para. 165).

73. The present preferences should remain but should not be increased (Para. 165).

74. There should be no additional Malay reservations of land except that if any land presently reserved ceases to be so then an equivalent area may be reserved, and if undeveloped land is opened up part may be reserved provided that an

equivalent area is made available to non-Malays (Para. 166).

75. Quotas should be continued for a period of 15 years provided that if in any year there are not enough Malay applicants, the number of appointments should not be reduced but other qualified applicants should be appointed (Para. 167).

76. After 15 years there should be a review of the quotas and preferences and the appropriate legislature should then determine whether to retain, reduce or discontinue them (Para. 167).

77. Malay should be the national language and English should be retained as an official language for 10 years. Parliament should then be free to decide whether discontinue them (Para. 170).

78. The language qualifications for candidates should be abolished and for 10 years a member of the legislature who cannot speak fluently either Malay or English should be entitled to speak in his own language provided that there is a Chairman who understands that language and a record of the speech can be taken (Para. 171).

79. Existing emergency legislation should continue until the end of the emergency provided that it is approved by Parliament if the emergency does not end within one year (Para. 173).

80. Parliament should have special powers to deal with any attempt by any substantial body of persons to organize violence against persons or property (Para. 174).

81. There should be power to make a Proclamation of Emergency in the event of war or internal disturbance constituting an immediate threat to the security or economic life of the country. In that event Parliament should have the most ample powers and the Federal Government should be entitled to give directions to State Governments and officers and to pass the necessary ordinances if Parliament is not sitting when the emergency is declared (Para. 175).

82. Preventive detention should be illegal except in so far as it may be allowed by emergency legislation. In no case should a citizen be detained for more than three months unless an advisory board appointed by the Chief Justice has reported that there is sufficient cause for such detention (Para. 176).

NOTE OF DISSENT BY MR. JUSTICE ABDUL HAMID

Islam as a State Religion

11. It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating and practicing their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after article 2 in Part I or at the beginning of Part XIII.

“Islam shall be the religion of the State of Malaya, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practice and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim.”

12. A provision like one suggested above is innocuous. Not less than 15 countries of the world have a provision of this type entrenched in their Constitutions. Among the Christian countries, which have such a provision in their Constitutions, are Ireland (Art. 6), Norway (Art. 1), Denmark (Art. 3), Spain (Art. 6), Argentina (Art. 2), Bolivia (Art. 3), Panama (Art. 1), and Paraguay (Art. 3). Among the Muslim countries are Afghanistan (Art. 1), Iran (Art. 1), Iraq (Art. 13), Jordan (Art. 2), Saudi Arabia (Art. 7), and Syria (Art. 3). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King who is required by the Constitution to uphold that religion (Constitution of Thailand (Art. 7)). If in these countries a religion has been declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody, no harm will ensue if such a declaration is included in the Constitution of Malaya. In fact, in all the Constitutions of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitutions and to embed it in the Federal.