

Strengthening National Unity Through the Federal Constitution and ICERD Forum

Preface

“Differing interpretation of the Federal Constitution which is being advocated in selective ways by different political parties and civil society” has been identified by the National Unity Consultative Council (NUCC) as one of the issues and concerns impacting national unity in Malaysia. This confusion is best illustrated in the public discourse on International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) where different politicians and NGOs having differences in interpreting the Federal Constitution in their own ways with very strong emotive overtones away from facts and accuracy of interpretation. The forum sought expert opinion on the matter and to discuss solutions moving forward.

Background

As part of their election promise, the Pakatan Harapan (PH) government planned to ratify several United Nation (UN) conventions. Among them, the ICERD, received significant resistance from right-wing groups. A rally was organised against ICERD which saw the gathering of approximately 80,000 protestors – among the few nations which has protested against equality. Prior to the rally, the PH government backtracked and announced that they will not be ratifying ICERD indefinitely. not have enough sanctions behind it, thus making it not very effective. Malaysia’s failure to ratify ICERD makes it among 14 nations alongside the likes of Myanmar and North Korea not to do so. Of the 57 Organization of Islamic Cooperation (OIC) countries, 55 have ratified ICERD, with the two exceptions being Malaysia and Brunei.



Photo: YAB Tun Dr Mahathir Mohamad addressing the United Nation General Assembly on 28th September 2018 where he pledged to ratify all remaining core UN instruments related to the protection of human rights

1. Sources of Malay Discontent towards ICERD

There has been strong anti-ICERD sentiment among the Malays, not only from right-wing groups, but even some within PH and its voters. These fears are deeply entrenched within certain segments of Malaysian society. The fears identified are the following:

- i. **Fear of ICERD undermining Malay rights and the special position of the Malays.**
Many Malays fear that ICERD is the start of the erosion of Malay right. They also lament the removal of special financial assistance programmes, a form of alternative action which has been implemented since the New Economic Policy (1970) and its successive policies.
- ii. **Malaysia losing its sovereignty.**
Many Malays perceive ICERD to be a threat against Malay rulers and a means of colonisation.
- iii. **The undermining of Islam as the religion of the Federation**



2. ICERD and the Malaysian Federal Constitution

Throughout this event, ICERD was been widely accused of being incompatible with the constitution. However, this is incorrect as:

2.1. ICERD does not undermine Article 153 and supports affirmative action

Fears against ICERD have stemmed primarily from misinterpretations of Article 153 of the Malaysian federal constitution, which has somehow been exclusively tied up with race. In actual fact, ICERD does not under undermine Article 153 as ICERD has provisions for affirmative action. It acknowledges the need to rectify historical injustices and to enrich formal equality with functional and substantive equality. Articles 1(4) and 2(2) of ICERD permit “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection”. ICERD’s Article 20 allows nations to ratification with reservations. For example, Malaysia ratified the UDHR, but is it subjected to Malaysia’s Federal Constitution. Similarly, CEDAW was ratified but is subject to reservations, as is with many other treaties. This is the case not only with Malaysia but also many other countries.

2.2. Constitution is an inclusive document

The constitution was not built on the notion of “Ketuanan Melayu”. Article 153 is unlike the South African Constitution of Apartheid and segregation of racial superiority. Instead, the Malaysian Constitution adopts the idea of equality and protection before the law, even though it allows affirmative action. These provisions were intended to ensure that inhabitants of the country can live harmoniously together. Overzealousness in enforcing Article 153 Bumiputera quotas must be reviewed as it does not authorise reservations and quotas across the board. There has been an overreach of Article 153’s provisions, which in itself is unconstitutional. Affirmative action under Article 153 must be need-based and should not be abused to enrich those who are already well off. There are no different levels of citizenship in the constitution. All citizens are equal irrespective of race or religion despite perceptions that some people are second-class due to the misuse and overzealousness of how Article 153 has been enforced.

2.3. Constitution is pro human rights and anti-discriminatory

Articles 5 to 13 of the constitution protects human rights and is available to all irrespective of race (with some exceptions). Article 8 (1) declares that all persons are equal before the law and entitled to the equal protection. Article 8(2) states that, except as expressly authorised, there shall be no discrimination on the ground of religion, race, descent, place of birth or gender.

There are many provisions in the constitution that forbids discrimination:

- Article 12 (1) relating to education, admission of pupils, fees and financial aid;
- Article 136 regarding impartial treatment of federal employees, where in the public service there should be no discrimination on the grounds of race (at entry point, under Article 153, reservations and quotas are permissible, but once in service, Article 136 should prevail and there should be no discrimination);
- Articles 14-22 citizenship is open to all irrespective of race (subject to qualifications)

The right to vote and the electoral process makes no distinction on ground of race; there are no seats reserved for members of a particular race or religion in the Malaysian Parliament or State Assemblies. Positions in the cabinet, public services, judiciary and the constitutional commissions are open to all.

However, there are permissible exceptions:

- Special position of the Malays and the natives of Sabah and Sarawak (Article 153)
- Malay Regiment (Article 8)
- Malay Land Reserves (Article 89) and
- Protection for the aborigines (Article 8)

All these exceptions are hedged in by limitations. For example, Article 153 quotas do not apply in all areas, such in the area of household purchase of groceries or housing, where one race does not get more concessions than the other. Hence, Article 153's quotas do not apply across the board but only in four areas; positions in the public services; scholarships, educational and training facilities; licenses and permits; and post-secondary education. The Article enjoins the King to safeguard the legitimate interest of other communities. There is no provision to deprive a non-Malay of their land simply to give it to a Malay. It is meant to safeguard against, for example, monopolies. Hence, Article 153 is quite a moderate article.

Unfortunately, the rights of Sabahans, Sarawakians, and aborigines have often been conveniently forgotten. These preferential provisions are not based on the idea of racial superiority or exclusiveness but on a mixture of historical realities and the impulses of affirmative action. Their primary purpose is to indulge in social engineering through the law and to ensure that those left behind in socio-economic development are able to catch up with the others.

Note: The definition of race and ethnicity has been used interchangeably in this report to refer to the general definitions of ethnicity

2.4. Time limits for affirmative action

The main difference between Article 153 and ICERD is that it sets limit to durations for affirmative action, while Article 153 has no time limit. ICERD does not want eternal clauses, but at the same time, it does not specify a specific time limit.

2.5. Constitution is balanced

Article 89(2) requires that where land is reserved for Malays, an equal area shall be made available for general alienation. Article 89 also states that no non-Malay land shall be reserved for Malay reservation. Therefore, the constitution was drawn up carefully to walk the middle path.

2.6. Not anti-monarchical

ICERD is not anti-monarchical and in no way affects the honours and dignities of the 27 monarchies existing in the world today, six of whom are absolute monarchies.

2.7. Ratification of international conventions requires parliament's endorsement

International law is not law until it is law unless ratified by parliament. Even if ratified by the executive, it is not law until endorsed by parliament. Amendments to the constitution is subject to the special procedures of Articles 159(5), 161E and 38(4) where a two-third majority plus the consent of the Conference of Rulers and the Governors of Sabah and Sarawak is required. It cannot be change arbitrarily by the Prime Minister. Although the constitution has clauses which are moderate, provides for equality and affirmative action, in the age of international law, issues come not only in terms of human rights, but also in the form of intellectual property, good governance, and every other form of international law. If ICERD is ratified and not complied, there will be criticism. But international law is such that it does not have enough sanctions behind it, thus making it not very effective.

2.8. No interference with matters of religion

ICERD does not address itself with the matter of state religions, but is about racial discrimination. In ICERD's definition on discrimination, religion is left out. Hence, the attacks on ICERD on the grounds of religion is totally unacceptable from an objective point of view. On reservations made by Muslim majority counties, only Saudi Arabia has a clause on Syariah. Most of the reservations are in relation to ICERD's Article 22. If there is a dispute, it cannot be referred to the International Court.

Islam is against racial discrimination. The Prophet Muhammad, in his final sermon at Mount Arafat, said that the black is not superior to the white, and the white is not superior to the black. Arabs were not superior to the non-Arabs and vice versa. Instead, superiority comes from piety in the eyes of God, where those who are pious are superior. Hence, those using the argument that ICERD is a threat to Islam is doing a great disservice to the faith.

Other Muslim countries support ICERD. The Organization of Islamic Cooperation (OIC) supports human rights and equality as shown in its support of the Universal Islamic Declaration of Human Rights 1981 and Cairo Declaration 1990.

Therefore, ICERD and Article 153 are perfectly compatible. What is not compatible are some of the administrative actions which needs to be brought in line with not only international law, but also to the Federal Constitution itself.

Case Study: Equality in practice and reality

The constitution is about what happens and what works (ie. if it works, it is constitutional). The US Constitution was one of liberty, and yet, it had its own apartheid system which was only rectified in 1964, centuries after their constitution was introduced. Similarly, in Malaysia, the realities are very different, especially after 1969, when people, politicians, and civil servants seem to have acquired unlimited power and can do anything they want in the name of the Malays and once in a while, in the name of the natives, and are able to get away with it.



US President Lyndon Johnson shakes hands with Martin Luther King Jr after the enactment of the Civil Rights Act – Source: CNN

3. Failure to Stand and Campaign for ICERD

3.1. Manipulation via the lack of constitutional literacy

While the move by the opposition against ICERD was politically motivated and self-serving, it was also compounded with the lack of constitution literacy. The constitution then “becomes what the politicians say it is”, regardless of the facts. However, it is not only the Malays, but the Chinese and other ethnicities too may not have a clear understanding of ICERD.

3.2. Inadequate support for ICERD

There was a lack of awareness and communication about what ICERD was really about. There was hardly a response from the government beyond denying that it is incompatible nor were sufficient counter articles produced to defend ICERD’s compatibility. Even if there were, it was not done in the language that mattered - the Malay language. CSOs also failed to counter the narrative sufficiently in Bahasa Malaysia. The reason why CSOs were relatively silent was because they were advised by government that voicing out will work against the government’s efforts and will increase tensions. Overall, the lack of government response caused it to lose the narrative.

3.3. Lack of support from government figures and departments

State-owned media were also against ICERD. The government should control their own assets before they can convince members of the general public. Several politicians from the Pakatan Harapan government were also not supportive of ICERD.

3.4. Government caught unprepared

The cabinet was not prepared, as not all Cabinet members were educated about ICERD.

3.5. Differences in understanding

Different perspectives of the nation’s history based along ethno-religious centric understandings lead to a lack of shared existence and vision among the various ethnic groups. Not all ethnic groups had a consensus of what ICERD implies and what it could bring.

4. Recommendations

4.1. Education on the Federal Constitution and ICERD

There needs to be a campaign to educate people of what ICERD is and is not to alleviate fears. People need to know that Article 153 is not the only provision where Malay rights come from nor is it the provision that provide exclusive Malay rights, as it is for all. They also need to understand that ratifying ICERD and other human rights conventions will not make them worse off. This is where civil society and people need to carry out economic empowerment programmes that will help the poor in the semi-urban areas in terms of providing their young tuition and provide needs-based programmes.

There is first a need for education within the PH component parties on ICERD as it is unknown how many, including those objecting, have even read and or understood what ICERD and UN processes are. More deliberate and structured programmes should be given to politicians to learn the process of politics, governance, democracy, as well as other human rights values. Only when prepared can they educate the public about what ICERD is about.

4.2. Remind the public of Malaysia role in international efforts

The public must be convinced that Malaysia is and has always been a responsible member of the international community and that Malaysia has always worked with and supported the United Nations. Malaysia has sent peacekeepers for years and has also been on the Human Rights Council twice.

4.3. Better government coordination

There needs to be a more concerted effort from the coalition government. There was no consensus nor a united stand. Some within PH were even against it themselves. The progressives need to organise themselves in more effectively. The government needs to collaborate with civil society to bring the government's message across.

4.4. Grassroot engagement

The government needs to take genuinely efforts to understand the concerns of those against ICERD, putting themselves in their shoes to try and understand their pains and concerns. The views of the Malay masses as well as those of the Sabah and Sarawak people must be taken into account. At the same time, those going against ICERD should also put themselves in the shoes of those without special privileges. Open rational dialogues discussing these issues can create greater awareness and understanding.

4.5. Quality education for national unity

There is much discussion about national unity programmes and civic education. While education would have resolved or prevented this problem, the issue is whether or not educators are equipped with the necessary knowledge. If they are not, they cannot be expected to teach children properly or objectively. This needs to be resolved as education is the foundation for national unity.

4.6. More use of the Malay language to discuss ICERD

More exposure in these issues need to be made available in the Malay language.

4.7. Inculcate critical history reading

This will enable people to compare different facts and have better understanding of the another's position.

4.8. Oppose the racial narrative

The government needs to continue to develop a national narrative to counter racial and religious narratives.

4.9. Strong foundations for civil society for a stronger voice

Civil society groups need to make their presence felt and let their opinions be heard. The government should release the Institutional Reforms Committee (IRC) report which contains ideas for civil society reform. CSO groups need to organise themselves to counter ultra-radical groups which are twisting human rights discourse by engaging the public and explain these issues, advocating that human rights are good for everyone.

4.10. Article 153 needs to be properly understood

Social engineering needs to be balanced with the need for unity. Article 153 requires an interpretation and application along ethnic clauses in ways that will promote national unity and give everyone a sense of belonging.

4.11. Laws for equal treatment

There needs to be legislation that encourages equal treatment between each other. Irresponsible politicians have continued to push race and religion issues again and again, despite them being aware that these are just perceptions and imagined. There is need to

come down heavily on these elements, and stop racial hate speeches. This sends a clear message that such actions are not right and redraw the narrative to heal the nation. In addition to Section 298 of the Penal Code and the Sedition Act, there is a need for a National Harmony Act or even a Hate Speech Act or an anti-discriminatory law framework, which is

recommended by the NUCC. The NUCC also recommended the need for community mediation centres to resolve issues before they go out of control and contained at a local level before it can become a major national issue.

Case Study: Rule of law to protect national unity

Singapore has a very strict Religious Harmony Act. In one case, there was an Imam who at the end of the prayer said "May Allah save us from the Christians and the Jews". He was then prosecuted as he aroused hatred.

THE STRAITS TIMES

Imam who made offensive remarks about Jews and Christians will be asked to leave Singapore

PUBLISHED APR 3, 2017, 3:33 PM SGT



4.12. Highlight positive stories of unity

The role of the media is very important. Though it has highlighted much hatred, there have been positive stories as well, but the media tends to emphasis on the former. Those pushing for ICERD should appear on mainstream media and on more Malay channels, such as RTM which has a wider rural reach, to talk about ICERD.

4.13. Government needs to be steadfast

The government must be confident and show courage at the face of adversity during such trying times. Otherwise they run the risk other issues facing similar reactions and circumstances.

4.14. Focus on socio-economic development

A wide income gap is not sustainable and must be reduced. It matters as it affects national unity social and cohesion. Civil society should carry out economic empowerment programmes that will help the poor in the semi-urban areas in terms of providing their young tuition and provide needs-based programmes.

4.15. Avoid a referendum

Having a referendum on ICERD is not advisable as a referendum requires literacy. As it stands many do not event know what ICERD even stands for. It also depends how the referendum is drafted, which can be misconceived for other purposes.

5. Conclusion

The alliance between the United Malay Nationalist Organisation (UMNO) and the Pan-Islamic Party (PAS) along with the disintegration of the National Front (BN) implies that the two strongest opposition to the government is right wing, and see race and religion as opportunities to attack the government. It is foreseeable that this tactic will be used continuously by UMNO and PAS to attack the PH government on as many issues as possible.

The ICERD issue has been mixed with emotion, politics, and history. The backtrack on ICERD gave in to a very extremist kind of narrative. Pressing on race and religious issues is the opposition's strategy to create division within PH. Hence, despite a "New Malaysia", race and religion are still effective and persuasive political tools.

Malays need to realise that other Malaysians do not want them to be left behind or be deprived of their rights. The real problem lies in the hands of politicians who have created an imagined enemy - a perception that the Malay rights will be lost, although this is impossible.

The ill effects from the fallout and distrust of ICERD need to be rectified. Divisions in the country need to be healed. Otherwise, these divisions will keep spreading if unaddressed. Progressives need to have a coordinated effort to educate members of the public about what ICERD is about and set the narrative.

Annex 1: Timeline of Events

The following is a timeline of anti-ICERD activity, particularly towards the end of 2018:

8th March 2018	Pakatan Harapan's manifesto includes the ratification of international conventions if it wins the 14 th General Election.
28th September 2018	The Prime Minister, YAB Tun Dr Mahathir Mohamad, at the United Nations (UN) said that the new government has pledged to ratify all remaining core UN instruments, but acknowledged that it will not be easy for Malaysia as it is multi-ethnic, multireligious, multicultural, and multilingual and it will accord space and time for all to deliberate and to decided freely based on democracy
15th October 2018	YB Khairy Jamaluddin said in parliament that ratifying ICERD may affect Article 153 of the Federal Constitution. This is the first time a case was raised against ICERD.
24th October 2018	The Minister for Unity, YB Waytha Moorthy, said that ratification will take place in early 2019. He also talked about other treaties, that reservations can be made and that the ratification of ICERD may require the government to modify several existing legislations and policies.
25th October 2018	Waytha Moorthy reiterates that ICERD can be ratified with reservations.
Unknown date Circa October 2018	A petition against ICERD was conducted which gained much traction. Certain individuals, which may not necessarily be within UMNO but personalities with a significant following in the Malay community, featured it on social media with headlines saying that the PH government wants to ratify ICERD which will be a threat to Article 153 and Malay rights. Those opposed to ICERD began writing articles. These were people who were experts in the legal field who described ICERD as being incompatible with the constitution, such as former Chief Justice, Tun Abdul Hamid Omar.
1st November 2018	Minister of Foreign Affairs, YB Saifuddin Abdullah said that ICERD is not a priority and that other conventions will be first looked at.
17th November 2018	UMNO and PAS announced that they will conduct a joint protest against the ratification of ICERD.
19th November 2018	Chaos in parliament when Waytha Moorthy was called a racist minister and much sentiment was stirred regarding ICERD as they were wrapping up the Budget 2019 debate. YB Muhyiddin Yassin said that he will not stop the anti-ICERD protest on the grounds of openness.
21st November 2018	Calls for delay on ICERD were made, including from Pakatan Harapan MPs, such as Anwar Ibrahim, Hassan Abu Karim, and several others, arguing that the concerns of the people must be resolved. Saifuddin was a lone voice, trying to defend the ratification of these treaties.
22nd November 2018	Waytha Moorthy reiterates that the government will not abolish or amend Article 153 of the Constitution
23rd November 2018	The Prime Minister announced that the government will not ratify ICERD. He also said that the government will continue to defend the Federal Constitution which contains a social contract that has been agreed upon by all races. Khairy called for Saifuddin's resignation on the basis that they did not think it through before convincing Mahathir to make the announcement in the UN.
25th November 2018	YB Lim Kit Siang said that no Malaysians would want Malaysia to ratify ICERD at the price of another May 13 th Racial Riot.
26-27th November 2018	By coincidence, the Seafeld Temple Riots occurred
5th December 2018	The Kelantan government declared Sunday, 9 th December 2018 a public holiday so that people can attend the anti-ICERD rally. There was also a statement from YB Hadi Awang saying that there will be "negative effects" for those who do not turn up
7th December 2018	SUHAKAM was asked to postponed its celebrations to the day after the Anti-ICERD Rally
8th December 2018	80,000 people gathered peacefully for the anti-ICERD rally. Tun Mahathir announced that he will not attend the SUHAKAM celebrations because the government will not accept ICERD while SUHAKAM wants to

Annex 2: Forum programme and role players

Forum on Strengthening National Unity Through the Federal Constitution & Ratifying the International Convention on the Elimination of Racial Discrimination (ICERD)

Date: 21 December 2018 (Friday)

Time: 3.00pm to 5.30pm

Venue: Perdana Room, Level 2, Royal Lake Club, Jalan Cenderamulia, Tasik Perdana, 50480 Kuala Lumpur

- 3.00 pm Word of Welcome by **Tan Sri Michael Yeoh** (KASI Institute)
- 3.10 pm Introduction and Moderation by **Prof Datuk Dr Denison Jayasooria** (KITA-UKM)
- 3.20 pm **PANEL DISCUSSION**
- **Emeritus Professor Datuk Dr. Shad Saleem Faruqi** (Tunku Abdul Rahman Chair as Professor of Constitutional Law, University of Malaya)
 - **Prof Datin Dr Faridah Jalil** (Professor in Constitutional Law, UKM Law Faculty)
 - **Dato' Ambiga Sreenevasan** (Member of the Institutional Reform Committee).
 - **Mr Syahredzan Johan** (Former Co-Deputy Chairperson of the Bar Council's Constitutional Law Committee).
 - **Mr Eugene Yapp** (Programme Consultant on Unity in Diversity Initiatives, Gabungan Bertindak Malaysia)
 - **Dr Khoo Ying Hooi** (Senior Lecturer, University of Malaya and Assistant Secretary-General, PROHAM)
- 4.20 pm Open Discussion
- 5.00 pm Concluding Remarks
- End of Forum

-
*The views presented in this report may not necessarily represent that of the
Kingsley Strategic Institute or its partners.*



Kingsley Strategic Institute

8th Floor, West Wing, Menara Matrade
Jalan Sultan Haji Ahmad Shah
50480 Kuala Lumpur
Malaysia

Email: info@kasi.asia

© Kingsley Strategic Institute 2019

www.kasi.asia
www.facebook.com/ksinsti
www.linkedin.com/company/ksinstitute
www.twitter.com/KSInsti
www.instagram.com/kingsleyinst