Giving effect to a Malay translation

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The Constitution is not a piece of subsidiary legislation that can be enacted, amended and enforced by executive fiat without parliamentary scrutiny.

THE attorney general has announced that the government intends to act under the authority of Article 160B of the Federal Constitution to submit a Malay translation of the Federal Constitution to the Yang di-Pertuan Agong.

Article 160B provides that if the Federal Constitution is translated into the national language and submitted to the King, His Majesty may prescribe such national language text to be authoritative.

From then on, the national language text will prevail over the English text.

It is submitted that having an authoritative text of our basic law in the national language is understandable as Malay is our Bahasa Kebangsaan under Article 152.

However, this delicate job requires a non-partisan approach and a process of wide consultation with constitutional and language experts.

The translators must have knowledge of constitutional history and a deep understanding of the nuances of both Malay and the English language.

There must be a commitment to the letter and spirit of the original charter.

In addition to linguistic and historical issues, there are several important questions of constitutionality:

> The effect of an authoritative translation;

> The constitutionality of Article 160B;

> Violation of the special rights of Sabah and Sarawak; and

> The need to read Article 160B harmoniously with other Articles.

Effect of a translation

A translation substitutes the earlier text with a newer text. It is akin to a super amendment. It amounts to a replacement of the 1957/1963 Federal Constitution with a new executive version of our supreme law.

A translation is a work of art. No two people will translate a text exactly alike.

Therefore, the new “authoritative text” reflecting the subjective understanding of some language experts (chosen by the executive), must comply with constitutional procedures for amendment in order to obtain constitutional and democratic legitimacy.

A translation can affect the rights of our Rulers, diminish the special position of Sabah and Sarawak, and curtail the human rights of ordinary citizens.

It can expand the powers of the government

Note how in one case involving unilateral conversion of children – Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak (2018) – the lawyers for the state put forward the translation of the term “parent” in Article 12(4) as “ibu atau bapanya” and not as “ibubapa”.

Such a translation was seriously prejudicial to the constitutional rights of the unconverted spouse whose children were unilaterally converted without her knowledge or consent.

The translation of the word “parent” as “ibu atau bapanya” is also a disregard of Section 2(95) of the Eleventh Schedule which provides that “words in the singular include the plural, and words in the plural include the singular”.

In one 2018 Malay translation, the term “precepts of Islam” in Schedule 9 is translated broadly as “perintah agama”. In the same Schedule, the words “professing the religion of Islam” are translated as “menganut agama Islam”.

But adhering and professing are not the same thing.

Any translation by experts without the involvement of Parliament and compliance with amendment procedures will cause unnecessary misunderstandings, generate tensions and invite litigation.

Constitutionality of Article160B

This Article was not found in our original Constitution but was inserted by Act 1130 as an amendment with effect from Sept 28, 2001.

As it has the potential of adversely affecting the rights of the Rulers and the special position of Sabah and Sarawak, it should have complied with the procedures of Articles 38(4), 159(5) and 161E.

These Articles mandate that for the enactment of some laws, the consent of the Conference of Rulers and the Governors of Sabah and Sarawak must be obtained. There is no evidence that this consent was obtained. Article 160B may, therefore, be procedurally ultra vires and an unconstitutional exercise of the amending power.

Special rights of Sabah and Sarawak

The issue of unconstitutionality is particularly relevant in relation to Sabah and Sarawak's special rights.

* Article 161E requires the consent of Sabah and Sarawak Governors in amendments affecting some special rights of these States.

* Article 161(3) of the Federal Constitution provides that no Act of Parliament relating to the use of English for any official purposes in Sabah and Sarawak shall come into operation until the Act has been approved by Enactments of the legislatures of these States. There is no evidence that Article 160B was approved by the Enactments of Sabah and Sarawak legislatures.

* Even Section 1(2) of the National Language Act 1963/1967 provides that the Act is applicable to Sabah and Sarawak only on a date to be appointed by their legislatures.

* The spirit of Article 161E, 161(3) and the National Language Act is that in the matter of the use of the Malay language, Sabah and Sarawak are to have considerable autonomy.

Article 160B must not be read in isolation

The provisions of the Constitution are like the inter-connected branches of a majestic tree. No provision of the Constitution can be read in isolation.

The royal prescription authorised by Article 160B to permit the original text of the Merdeka Constitution to be subordinated to an authorised Malay version must take note of other mandatory provisions relating to the amendment of the Constitution. These provisions are:

* Article 159(3) which requires a two-thirds majority of the total membership in both Houses.

* Article 159(5) which requires the consent of the Conference of Rulers.

* Article 161E which requires the consent of the Governors of Sabah and Sarawak.

Article 160B cannot override Articles 38(4), 159(5) and 161E. Article 160B must be read in the context of other Articles providing special procedural safeguards for enacting or amending constitutional laws.

Ratification of the Merdeka Constitution

The draft of our Federal Constitution was the handiwork of constitutional experts of the Reid Commission and the Tripartite Working Party. Their proposals were then subjected to an extraordinary process of ratification by the Federal Legislative Council, the Assemblies of the Malay States, the United Kingdom Parliament and the British Crown.

It will be most regrettable if the 1957 Constitution was replaced by a new Constitution with no involvement of the Conference of Rulers, citizens' groups, and no participation by the federal or state legislatures.

The reliance on a constitutionally questionable Article 160B is open to challenge.

In sum, while the move to produce an authoritative Malay text is desirable, the new text must go through Parliament and the formal procedures of the amendment process.

A monumentally significant move as this should not be achieved by a purely executive act.

The supreme Constitution is not a piece of subsidiary legislation that can be enacted, amended and enforced by executive fiat without parliamentary scrutiny.

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