

THE CONSTITUTION AT A CROSSROADS

A must read piece by Prof Shad Saleem Faruqi...

One for posterity....& the Archives

The Constitution at a crossroads

Fresh winds of 'constructive interpretation' are blowing due to the contributions of many constitution-minded jurists and legal practitioners.

THE Faculty of Law at Universiti Malaya and prominent law firm Chooi & Company relaunched their constitution and Rule of Law Series last Thursday at the Auditorium Tun Mohamed Suffian.

The highlight of the session was a scintillating and scholarly address by retired distinguished Federal Court judge Tan Sri Zainun Ali on "Safeguarding Constitutional Supremacy".

As the moderator, I too had the honour of expressing a few thoughts on our Constitution, which I like to call our "document of destiny".

I began on a positive note by counting our blessings that the Constitution has survived 66 years. There have been no coup d'etats or military takeovers.

The Constitution survived the confrontation with Indonesia from 1963 to 1966.

It accommodated the transformation of Malaya into Malaysia in 1963.

It managed the peaceful separation with Singapore in 1965. It outlived the bloody racial riots of 1969. It outlasted the communist insurgency.

In 1983, 1984, 1993 and 1994, it survived the acrimonious constitutional amendments that curtailed the powers and immunities of the monarchy.

In the late 1980s, the Constitution was seriously weakened, but it survived the Executive assault on the Judiciary when the Lord President and some top judges were dismissed for not pandering to the Executive's wishes.

However, there were, and remain, many other challenges to constitutionalism and the rule of law in our nascent democracy.

1. For 50 or so years after Merdeka, constitutional supremacy was largely a magnificent facade and a legal myth. The Executive-controlled Parliament legislated whatever it liked. In the rare case, like Teh Cheng Poh (1979) when the court nullified an

SHAD SALEEM FARUQI



Reflecting on the law

unconstitutional legislation or quashed an illegal administrative order, the Executive hit back with a backdated constitutional amendment!

2. Executive powers in a plethora of laws like the Internal Security Act, Official Secrets Act, Printing Presses and Publications Act, and University and University Colleges Act were virtually unlimited.

Constitutional challenges to these powers, as in the *Altaran* case, were often dismissed summarily by the courts on the ground that the Executive action was permitted by a parliamentary enactment. The British tradition of parliamentary supremacy dominated our legal system.

3. More than 100 statutes (and some provisions in the Constitution) contain "ouster clauses" barring the courts from reviewing Executive action. Additionally, there is a surfeit of self-imposed limitations by the Judiciary on judicial reviews.

4. In 1988, the amended Article 121(1) sought to emasculate the inherent, prerogative power of the courts to review government action.

5. The Islamic state movement seeks to subject Article 4(1) - that the Constitution is the supreme law of the Federation - to Article 3(1), that Islam is the religion of the Federation. Its advocates overlook Article 3(4) that says, "Nothing in this Article derogates from any other provision of this Constitution."

6. Till the courageous *Ibi Putra* decision, state assemblies felt free to pass any law on "offences against the precepts of Islam" despite explicit limits on this power (that this power cannot be exercised in relation to any matter in the federal list or covered by federal law).

7. Federal violations of Sabah-Sarawak rights are now coming home to roost.

8. The 1964 and 1969 proclamations of national emergency under Article 150 lasted 47 years and cast a dark shadow on constitutionalism.

9. Almost all the check-and-balance mechanisms of the Constitution failed to operate satisfactorily. Parliament and the Executive reigned supreme.

10. Because of political instability since 1918, the Westminster-style constitutional monarchy is growing stronger with some "Eastminster" style powers!

11. Neither in the Legislative sphere nor in holding the government to account did Parliament exercise its powers satisfactorily. The Executive dominated Parliament.

12. The non-separation between the Attorney General (AG) and the Public Prosecutor gave credence to suspicions of selective prosecution and unequal treatment under the law.

13. In the 1980s, judicial independence was threatened by the Executive. Now, some pressure groups are behaving like a "state within a state" and trying to compel the courts to get out of the way of the tides of public opinion. A disturbing fact is that some judicial decisions often go unenforced.

14. Constitutional literacy within the public services, Parliament, politicians and the public remains weak. "Constitutional patriotism" is even rarer!

15. Some courts have held that the Constitution's safeguards do not apply in private sector relationships.

16. The citizenship chapter

bristles with gender discrimination.

17. Endemic corruption favours the rich and subverts social engineering measures.

However, there are soothing winds of change. The Constitution appears to be in renaissance. Till the 1990s, the courts generally interpreted the Constitution literally, textually and pedantically.

Now, fresh winds of "constructive interpretation" are blowing due to the contributions of many constitution-minded jurists like the late Datuk Seri Gopal Sri Ram, Datuk Seri Mohd Hishamuddin Yunus, Tan Sri Zainun Ali, Datuk Mah Weng Kwai, Tun Richard Malanjum, Chief Justice Tun Tengku Maimun Tuan Mat and Tan Sri Nallini Pathmanathan.

The influence of legal practitioners should not be overlooked as they often plant the seeds that lead to the greening of the landscape of ideas.

There have been many important legal and political developments in the last two decades.

1. Previously, the Bar and Judiciary were steeped in the tradition of parliamentary supremacy. Now, constitutional review of legislation is increasingly an issue.

2. The Constitution is being subjected to a creative, liberal, "constructive interpretation" by some judges.

3. Separation of powers and independence of the Judiciary are being strengthened.

4. Article 4(1) on constitutional supremacy and Article 121(1) on the judicial power are being seen as generic, interconnected and overarching.

5. Human rights are being interpreted prismatically and as an interconnected whole.

6. Laws conferring absolute discretion are being read as a violation of equality under Article 8(1).

7. The basic structure doctrine that a constitutional amendment cannot destroy the foundational principles of the Constitution has been revived.

8. Article 121(1A) on the inde-

pendence of the Syariah Courts is being reinterpreted to permit judicial review of the Syariah authorities if they act unconstitutionally.

9. The AG's absolute powers under Article 145(3) were limited in the case of *Sundra Rajoo* (2021).

10. In some recent cases, constitutional guarantees may apply to private law situations.

11. Administrative law issues (like natural justice) are being constitutionalised. This is a remarkable development because in the past, constitutional law issues were often reduced to issues of administrative law.

12. Ouster clauses in legislation have been declared to be unconstitutional. Ouster clauses within the Constitution pose a greater problem and are being scrutinised.

13. The 47-year-old emergency ended in 2011. The one proclaimed in 2022 had an admirable sunset clause.

It is clear, therefore, that there are currents and cross-currents in Malaysian constitutional law.

The Constitution is in flux. Only time will tell which tide will prevail.

My hope is that the Constitution - our document of destiny, our chart and compass, our sail and anchor, our armour of defence against the passions, prejudices and vicissitudes of politics, the guardian of our rights and the source of our freedoms - will be restored to the pedestal on which it was placed when Malaya began its tryst with destiny.

I pray that the Constitution's imperatives will one day become the aspirations of the people.

Emeritus Prof Datuk Dr Shad Saleem Faruqi is Holder of the Tunku Abdul Rahman Chair at Universiti Malaya. He wishes all Christian readers the love and blessings of the Christmas season and prays for peace on earth and goodwill towards all humanity. The views expressed here are his own.

Source: The Star, 11 December 2023