

# OUR CONSTITUTION – OUR DOCUMENT OF DESTINY

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*More than other fields of law, a Constitution reflects the dreams, demands, values and vulnerabilities of the body-politic. A Constitution that will endure must not depart too far from the spirit of the people as well as their social and economic needs. At the same time – and herein lies the challenge- it must be transformative and hitch itself to the stars.*

## THE CONSTITUTION: ITS MEANING AND SIGNIFICANCE

Constitutions are born to mark stages in progression towards self-government, to establish the foundations of a newly independent state or to start afresh after a revolutionary or ideological upheaval.

A Constitution is a body of fundamental law which describes the manner in which the state is organized, government carried on and justice administered. A Constitution is like a political architect's master-plan for the nation. It provides the legal foundation on which the structure of the state rests.

A Constitution is the highest law of the land. It is the apex of the legal pyramid. It is of superior legal validity to all other laws of the land whether passed by the Federal Parliament, State Assemblies or local authorities.

At the structural or organisational level, a Constitution creates the various branches and institutions of the state. It allocates powers and functions to the executive,<sup>1</sup> the legislature,<sup>2</sup> the

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<sup>1</sup> The executive is the largest branch. At the federal level it consists of the Conference of Rulers, the Yang di-Pertuan Agong (the federal King), the Prime Minister, the cabinet, the civil service, the police and the armed forces. It includes many specialised constitutional Commissions, Councils and offices existing under the Constitution. Amongst these are: the Attorney General, the Auditor General, the National Land Council, the National Council for Local Government, the National Finance Council, the Armed Forces Council, the Election Commission, the Judicial and Legal Service Commission, the Public Services Commission, the Police Force Commission and the Education Service Commission. At the state level, the executive consists of the State Sultans in the nine Malay states, the Governors of Penang, Malacca, Sabah and Sarawak, the state Chief Ministers, their State Executive Councils and local authorities.

<sup>2</sup> The federal legislature consists of the Federal Parliament (the Dewan Rakyat and the Dewan Negara). At the State level, there is a unicameral Legislative Assembly in each state.

judiciary<sup>3</sup> and other constitutional institutions like the Auditor-General, the Election Commission and the Attorney-General.

Besides creating the various organs of the state, the Constitution describes the powers and functions of these institutions. It also prescribes the procedures that must be followed when allocated powers are to be exercised.

The Constitution prescribes rules about the relationship of the various branches and institutions with each other and with the citizen. For example, it describes the relationship between the Conference of Rulers and the Yang di-Pertuan Agong, the Yang di-Pertuan Agong and the Prime Minister,<sup>4</sup> the PM and the Cabinet, the Cabinet and Parliament, the Dewan Rakyat and Dewan Negara, the political executive and the civil service.

At the political level, a Constitution concerns itself with the location of authority in the state. It tells us who can do what and subject to what procedure.

In the matter of human rights, the Constitution confers some basic rights on all citizens and imposes limits on state power to restrict these rights. Generally, the scheme of the Constitution is that officials of the state are not empowered to impose restrictions on human rights in their whims and fancies. The restrictions they impose must be derived from and permitted by the Constitution and laws. Human rights are inherent. It is power that needs legal justification.

In order to secure liberty and preserve the democratic ideal of “limited government” and yet at the same time to secure order and security, the Constitution (i) guarantees some human rights, (ii) specifies the permissible limits that may be imposed by law and (iii) provides remedies whenever rights are infringed. Every balanced Constitution seeks to provide for a government sufficiently strong and flexible to meet the needs of the nation, yet sufficiently limited to protect the rights of citizens. A Constitution provides a balance between society’s need for order and the individual’s right to freedom. The might of the state and the rights of the citizens are sought to be balanced. Controlling the government without crippling it is an important goal of constitutional law.

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<sup>3</sup> The judicial branch at the federal level consists of the Federal Court, the Court of Appeal, the High Court in Malaya and the High Court in Sabah and Sarawak. In addition, we have Sessions Courts, Magistrates Courts and scores of tribunals created by ordinary law. At the state level, each state has a hierarchy of Syariah Courts to adjudicate on 24 topics of Islamic law specified in Schedule 9, List II, Paragraph 1. In Sabah and Sarawak Native Courts exist to resolve disputes in areas assigned to the Native Courts by state laws.

<sup>4</sup> Article 40(1) and 40(1A) inform us that the King must act on the advice of the Prime Minister and the federal cabinet except in those areas where the Constitution confers personal discretion.

At the philosophical level, a Constitution supplies the fundamental or core values on which society is founded. These values are political, religious, moral, cultural and economic. They may be contained in a stirring preamble to the Constitution or may be implicit in the glittering generalities of the Constitution's Articles.

### **BALANCING IDEALISM WITH REALISM**

A Constitution is not just a legal document. It is linked with philosophy and politics. It has as its backdrop the panorama of history, geography, economics and culture. A Constitution is the vehicle of the community's legal and social life.

**A Constitution mirrors societal realities:** More than other fields of law, a Constitution reflects the dreams, demands, values and vulnerabilities of the body-politic. A Constitution that will endure must not depart too far from the values and spirit of the people and the social and economic needs of society.

**A Constitution contains ideals and hopes:** While reflecting social, political and economic realities, most Constitutions hitch themselves to the ideals and values of the age. Herein lies the great challenge: a Constitution must reflect the existentialist realities of society. At the same time it must be idealistic, aspirational and transformative.

**A Constitution balances stability with change:** A Constitution must contain within it seeds of change for a just, new social order. It must balance continuity and stability with the need for social change.

### **MAIN FEATURES OF OUR CONSTITUTION**

Some of the features discussed below reflect the social, historical and economic realities of Malaya in 1957 and 1963. However, other features were imports from abroad and reflected contemporary ideals of constitutionalism, rule of law, social justice and good governance.

**Supremacy of the Federal Constitution:** This feature is a break from the past. In 1957, the choice was (i) to restore the sovereignty of the Malay Rulers as in Malay history; (ii) to adopt a supreme Parliament as in the UK; (iii) to move towards the supremacy of the Shariah to reflect the popular feeling of the rural Malays; and (iv) to draft and adopt a supreme Constitution as in India, the USA and hundreds of other "constitutional states" some of which were in Asia and Africa.

Malaya adopted the fourth alternative. Unlike the United Kingdom where there is no written Constitution, Malaya in 1957 adopted a written and supreme charter. Articles 4(1) and 162(6) affirm the supremacy of the basic law over all pre and post-independence legislation. The

Constitution is the supreme law of the federation. It is the law on which all other laws rest. It is the apex of the legal hierarchy, and no law can violate its prescriptions. Parliament is not supreme. There are procedural and substantive limits on Parliament's powers. State Assemblies are, likewise, limited in their legislative competence. We all have a right to go to the courts if a legislative, executive or judicial act infringes the glittering provisions of the Constitution. Courts have the power to nullify federal and state legislation if there is inconsistency with the supreme constitution. On at least 20 occasions since Merdeka, this power of judicial review was exercised with telling effect. Likewise, executive actions can be tested in the courts for their constitutionality.

**Existence of 13 State Constitutions:** This feature was a “concession to history”. It was meant to preserve the position of the Malay Sultans in their territories.

Along with a written and supreme Constitution at the federal level, the Federation of Malaya permitted written Constitutions in the states of the Federation. However, state Constitutions exist subject to the supremacy of the Federal Constitution throughout the land.<sup>5</sup> The State Constitutions are supreme in the respective states but subject to the primacy of the Federal Constitution.<sup>6</sup> All State Constitutions are required to contain some “essential provisions” prescribed by the Federal Constitution’s Eighth Schedule.

**Islam as official religion:** As Islam is a core feature of Malay identity and the Malays give to Islam a central place in their moral, personal and social life, the Constitution in Article 3(1) declares Islam to be the religion of the Federation. Schedule 9 List II Para 1 allows State Assemblies to create Shariah courts and to vest them with jurisdiction on 24 matters, mostly of personal laws. Muslims are compulsorily subjected to the Shariah and to the jurisdiction of the Shariah courts in the enumerated areas.

The Shariah law that is applicable in Malaysia is largely of the Shafie school of Islam with influences of Malay *adat* (custom).

It must be noted that despite Article 3(1)’s declaration that Islam is the religion of the Federation, the formulation and enforcement of Islamic law is not centralized and is left in the hands of individual States. This was to accommodate the historical position of each Malay Ruler as the head of Islam in his own region. Each State enacts Muslim laws for its own territory. The three federal territories of Kuala Lumpur, Putra Jaya and Labuan have a separate Act drafted by the federal Parliament.

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<sup>5</sup> *Gobind Singh Deo v Yang Dipertua Dewan Rakyat* [2010] 2 MLJ 674; *ZI Publications v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Gan Boon Aun v PP* [2016] 4 MLJ 265; *Tuan Mat Tuan Wil Iwn Kerajaan Kelantan* [2016] 7 MLJ 704.

<sup>6</sup> Federal Constitution, Article 71(4) and Part I of the Eighth Schedule.

It must also be noted that Article 3(1) on Islam takes full note of the multi-religious nature of Malaysian society.

- Despite the adoption of Islam as the religion of the Federation, there is protection for believers of all other faiths. Article 3(1) states that all other religions may be practised in peace and harmony.
- Non-Muslims cannot be subjected to Islam because their freedom of religion is guaranteed by Article 11.
- There is explicit provision in Schedule 9 List II Para 1 that Shariah courts have jurisdiction only over persons professing the religion of Islam.
- Though Islam is the religion of the Federation, Malaysia is not a theocratic, Islamic state. The Federal Constitution is the highest law. Islamic law applies compulsorily to all Muslims but only in 24 areas (primarily of family law) enumerated in Schedule 9 List II Para 1. In all other areas like crime, contract and tort, Muslims are governed by secular laws enacted by elected assemblies.

**A secular concept of law:** Article 160(2) of the Federal Constitution supplies an authoritative definition of law. It states that “law” includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

From the above definition, at least three categories of rules qualify as law in this country:

(i) Written law. This category includes the Federal Constitution, Acts of the Federal Parliament, Emergency Ordinances by the Yang di-Pertuan Agong (King) under Article 150, federal subsidiary legislation, 13 State Constitutions, Enactments and Ordinances of State Assemblies, State subsidiary legislation and local authority bye-laws. In the context of Sabah and Sarawak, British statutes at cut off dates may be applied as law if there is no local legislation. In the field of commercial law, British statutes at cut off dates may be applied throughout the country if there is no local legislation.

(ii) English common law and Malaysian judicial precedents. Unlike in the civil law system in Europe, judicial precedents formulated by Malaysian and UK judges in the course of deciding cases have the force of law and are honoured by a system of *stare decisis* or binding judicial precedent.

(iii) Customs or usages. These become law if recognised by statute or common law.

It is noteworthy that under Article 160(2) religion, ethics, morality and custom are not law on their own strength or quality. Neither is there legal recognition for social practices, rules of international law and private law unless these are incorporated into or derived from a recognized

source of law. However, religion, ethics, morality, custom, social practices, rules of international law and private law may be admitted into law by incorporation, adoption or being posited or formalized into a statute or a judicial precedent.

In practice statutory recognition of custom or religious precepts is quite frequent. In West Malaysia it is quite common to see Muslim family law statutes containing a clause to the effect that “the law on this point shall be the law of the Shafie school of Islam and Malay *adat*”. In Sabah and Sarawak, a great deal of native custom is codified.

Though judicial practice is not always consistent, there is no dearth of cases in which judges give judicial recognition to Malay and Chinese customs and native law in Sabah and Sarawak. Since the nineties, superior courts are increasingly incorporating principles of Islamic jurisprudence into their judicial decisions.

It must be noted, however, that since the eighties, a policy of Islamisation is in effect and some areas of federal legislation (like banking, insurance, loans) are being influenced by Shariah principles that are being enacted into legislation applicable to all persons. There is increasing assertiveness by the Shariah establishment in many areas of social life that affect Muslims<sup>7</sup> as well as non-Muslims.<sup>8</sup> Some very painful and intractable conflict of jurisdiction cases between civil and Shariah courts remain unresolved.<sup>9</sup>

**Legal pluralism:** The Malaysian legal system consists primarily of secular Codes drafted by legislative authorities. But there are Shariah laws for Muslims in 24 or so personal law matters enumerated in the Constitution. In addition, customs of the Malays and customs of the people of Sabah and Sarawak are part of our law. At one time, Chinese and Hindu customs were recognised in family law relations. But due to the passage of the Law Reform (Marriage and Divorce) Act 1976 family law for non-Muslims has now been codified.

There is legal pluralism in that there are different systems of law and different systems of courts which operate within their assigned spheres. We have a hierarchy of civil courts, a different hierarchy of Shariah courts and another hierarchy of native courts in Sabah and Sarawak. Unfortunately, conflict of laws between civil courts and Shariah courts in West Malaysia and native courts and Shariah courts in Sabah and Sarawak is endemic and increasingly the various streams of law compete with each other for ascendancy.

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<sup>7</sup> *YB Khalid Samad v Majlis Agama Islam Selangor* [2016] MLJU 338; *Tuan Mat Tuan Wil v Kerajaan Kelantan* [2016] 7 MLJ 704; *State Govt. of NS v Muhammad Juzaili Mohd Khamis* [2015] 6 MLJ 736; *Fathul Bari Mat Jahya v Majlis Agama Islam NS* [2012] MLJU 427;

<sup>8</sup> *Titular Roman Catholic Archbishop v Menteri* [2014] 4 MLJ 765; *Berjaya Books v Jabatan Agama Islam WP* [2014] 1 MLJ 138, [2015] 3 MLJ 65; *Majlis Agama Islam WP v Victoria Jayaseele Martin* [2016] 2 MLJ 309;

<sup>9</sup> *Pathmanathan Krishnan (Muhammad Riduan Abdullah) v Indira Gandhi a/p Mutho* [2016] 4 MLJ 455; *Kelantan v Wong Meng Yit* [2012] 6 MLJ 57; *Indira Gandhi v Pengarah Jabatan Agama Islam* [2013] 5 MLJ 352.

**Federal system:** In order to preserve the position of the Malay Rulers in their regions, Malaya in 1957 adopted a federal system. This is quite different from the unitary system in the UK and Singapore where the whole country is under one central government which has supremacy over all matters. Instead, Malaya/Malaysia adopted a federal (or dual) form of government. In some respects, the federal system in 1957 was inspired by the experience of the Federation of Malaya 1948. The Federation of Malaya had replaced the unpopular Malayan Union of 1946 with very strong centralized and unitary tendencies.

In the Federal Constitution, there is division of legislative, executive, judicial and financial powers between the Centre and the States though the weightage is very heavily in favour of the Centre. This division is protected by the Constitution. Judicial review is available if federal or state agencies exceed their powers.

**Special rights of Sabah, Sarawak and Singapore:** If in a country there are regions, states or provinces that exhibit significant differences from the rest of the land, then the Constitution must recognize their uniqueness, accept legal pluralism and maintain unity in diversity by granting special autonomy to such regions. For this reason, when in 1963 the Federation of Malaya merged with Sabah, Sarawak and Singapore to constitute the new and vastly enlarged nation of Malaysia, the three new states were admitted on terms and conditions that were far more favourable than were offered to the peninsular states in 1957. The issue of the special rights of Sabah and Sarawak in the Malaysian federation is a matter of some constitutional controversy. But it is hardly a unique phenomenon. Quebec in Canada, Kashmir in India (till mid-2019), Aceh in Indonesia and Mindanao in the Philippines are beneficiaries of special constitutional arrangements.

In 1963 Sabah, Sarawak and Singapore agreed to join the Federation of Malaya to transform it into a new nation by the name of Malaysia. Extensive changes were made to the 1957 Constitution to accommodate the special position of the new States. The East Malaysian regions of Sabah and Sarawak enjoy some executive, legislative, judicial and financial autonomy not available to the 11 Peninsular states. This asymmetrical arrangement for special treatment is entrenched in the 1963 amendments to the Constitution.<sup>10</sup>

**Singapore:** In 1965 Singapore was allowed to separate and become a separate independent nation.

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<sup>10</sup> *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741; *Fung Fon Chen@ Bernard v The Government of Malaysia* [2012] 6 MLJ 724.

**Fundamental rights:** In response to the humanitarianism of the era, the Constitution, in Articles 5 to 13 and elsewhere, protects a large number of political, civil, cultural and economic rights. It seeks to protect fundamental freedoms and to reconcile the irreconcilable conflict between the might of the state and the rights of the citizens. The chapter on fundamental liberties, the existence of an independent judiciary, the provision for judicial review, the institution of popular elections and representative parliament are clearly meant to create a democratic and responsible government under the law.

In his Proclamation of Independence, former Prime Minister Tunku Abdul Rahman encapsulated the constitutional dream beautifully: "This nation shall be founded upon the principle of liberty and justice and ever-seeking the welfare and happiness of its people."

The Constitution in Articles 5-13 confers a number of civil and political liberties, among them the right to life and liberty, abolition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality before the law, freedom of movement and protection against banishment, freedom of speech, assembly and association, freedom of religion, rights in respect of education, and right to property. Elsewhere in the Constitution, there is a right to vote and to seek elective office, protection for public servants, and some protection for preventive detainees. A number of ordinary statutes confer rights on women, children, workers, pensioners, consumers, trade unionists etc.

However, it must be noted that fundamental rights are not absolute and are subject to extensive regulation by Parliament on grounds (like public order, national security and morality) permitted by the Constitution. So significant is Parliament's power to restrict fundamental liberties that their description as "fundamental" poses problems in political philosophy.

**Emergency powers:** The communist insurgency cast a dark shadow on constitutional development. The forefathers of the Constitution, through Articles 149 and 150, armed Parliament and the executive with overriding powers to combat subversion and emergency. These special powers have been employed extensively to restrict many fundamental rights.

**Judicial review:** The supremacy of our Constitution is supported by judicial review. The Constitution in Articles 4(1), 4(3), 4(4), 128(1) and 128(2) is explicit about the power of the superior courts to examine the constitutionality of all executive<sup>11</sup> and legislative actions. As in many other countries, Malaysian courts are reluctant to employ the instrument of unconstitutionality to dissect state actions. Nevertheless, a fair amount of case law has developed on constitutional challenges.

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<sup>11</sup> *Persatuan Aliran v Minister* [1988] 1 MLJ 442; *Arunamari Plantations v Lembaga Minyak Sawit* [2011] 1 MLJ 705; *Berjaya Books v Jawi* [2014] 1 MLJ 138; *ZI Publications v Selangor* [2016] 1 MLJ 153;



In the area of federal-state division of powers we have the case of *Mamat Daud v Government of Malaysia* (1988). In this case 298A of the federal Penal Code was held to be a trespass on the State List because it was about Islamic crimes which are within the jurisdiction of the States.<sup>12</sup>

In relation to unlawful interference with fundamental rights there are hundreds of applications to the courts. One prominent case is that of *Fathul Bari Mat Jahya v Majlis Agama Islam NS* (2012).<sup>13</sup> The Plaintiff was prosecuted for lecturing on Islam without a letter of authority (*tauliah*) from the State authorities. He submitted, unsuccessfully, that the requirement of a prior permit was a violation of his freedom of speech and freedom of religion.<sup>14</sup>

On violation of constitutional amendment procedure there are cases like *The Government of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* (1963) 29 MLJ 355. In this case Kelantan argued but unsuccessfully that in admitting Sabah, Sarawak and Singapore into the Federation of Malaya to constitute the new Federation of Malaysia, the consent of all states including Kelantan should have been obtained.<sup>15</sup>

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<sup>12</sup> [1988] 1 MLJ 119. For other instances, see *The Government of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* (1963) 29 MLJ 355; *The City Council of George Town v The Government of the State of Penang* [1967] 1 MLJ 169; *Government of Malaysia v Government of the State of Kelantan* [1968] 1 MLJ 129; *Abdul Karim Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171; *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23; *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741; *Dato' Ting Cheuk Sii v Datuk Hj Muhammad Tufail Mahmud* [2009] 1 CLJ 899; and *Fung Fon Chen@ Bernard v The Government of Malaysia* [2012] 6 MLJ 724.

<sup>13</sup> [1988] 1 MLJ 119

<sup>14</sup> Some other prominent cases are: *PP v Yee Kim Seng* [1983] 1 MLJ 252; *Che Ani Itam v PP* [1988] 1 MLJ 113; *Tye Ten Phin v Menteri Hal Ehwal Dalam Negeri* [1989] 2 CLJ 877; *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 4 CLJ 105; *Yii Hung Siong v PP* [2005] 6 MLJ 432; *Ooi Kean Thong v PP* [2006] 3 MLJ 389; *Muhammad Hilman Idham v Kerajaan Malaysia* [2011] 6 MLJ 507; *Nik Noorhafizi Nik Ibrahim v PP* [2013] 6 MLJ 660; *Nik Nazmi Nik Ahmad v PP* [2014] 4 MLJ 157; *Berjaya Books v Jabatan Agama Islam WP* [2014] 1 MLJ 138; *Mat Shuhaimi Shafiei v PP* [2014] 2 MLJ 145; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* [2014] 6 CLJ 541; *PP v Azmi Sharom* [2015] 6 MLJ 751; *State Government of Negeri Sembilan v Muhammad Juzaili Mohd Khamis* [2015] 8 CLJ 975, [2015] 6 MLJ 736; *PP v Yunuswaran Ramaraj* [2015] 9 CLJ 873; *Pathmanathan Krishnan v Indira Gandhi Mutho* [2016] 1 CLJ 911; *ZI Publications v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Majlis Agama Islam WP v Victoria Jayaseele Martin* [2016] 2 MLJ 309; *Maria Chin Abdullah Iwn Pedakwa raya* [2016] 9 MLJ 601; *Y B Khalid Abdul Samad v Majlis Agama Islam Selangor* [2016] MLJU 338; and *Khairuddin Abu Hassan v Kerajaan Malaysia* [2016] MLJU 990.

<sup>15</sup> See also *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741.

On the exercise or abuse of emergency powers we have the Privy Council case of *Teh Cheng Poh v PP* [1979] 1 MLJ 50, 2 MLJ 238, [1980] AC 458 and *Abdul Ghani Ali @ Ahmad v PP* [2001] 3 MLJ 561.

On the Attorney-General's exclusive power under Article 145 to commence prosecutions we have a dozen or so cases including *Subramaniam Gopal v PP* [2010] 2 MLJ 525.

**Constitutional monarchy:** We have a constitutional monarchy at both the federal and state levels. The unique aspects are that (i) we have not one but nine Rulers – one at the federal level and nine hereditary Sultans/Rajas at the state level. Four states without hereditary rulers have State Governors. (ii) The federal monarchy is elected and rotational. The King is elected by his nine brother Rulers for a fixed period of five years. This procedure was inspired by the unique system of rotation in Negeri Sembilan and Perak. (iii) The King can be dismissed by the Conference of Rulers. (iv) The King and his brother Rulers are not immune from civil or criminal proceedings. However, any proceeding against them must commence in a Special Court under Articles 182-183.

The Yang di-Pertuan Agong and the State Rulers are required by federal and State constitutions to act on the advice of the elected government in the whole range of their constitutional functions, except in a small area where personal discretion has been conferred. Even in this area, constitutional conventions limit royal discretion. In the overall scheme of the Constitution, the monarchs are required to reign, not to rule.

**Conference of Rulers:** The primary function of this unique institution is to elect and remove the Yang di-Pertuan Agong (King) , elect the Timbalan Yang di-Pertuan Agong (Deputy King), consent or refuse to consent to constitutional amendments in ten areas, and to offer advice on some appointments.

**Affirmative action:** One of the unique features of the Constitution is that affirmative action policies in favour of Malays and the natives of Sabah and Sarawak are entrenched in the basic law.

**Special amendment procedures:** Unlike ordinary laws which can be amended or repealed by simple majorities of legislators present and voting, most constitutional provisions are entrenched against easy repeal. Special two-thirds majorities are required. In respect of some provisions, the consent of the Conference of Rulers or of the Governors of Sabah and Sarawak is also mandated. However, unlike Australia, the amendment procedure does not require the consent of the people at a referendum.

**Parliamentary government:** Unlike the system of independent government in the United States that is built on a rigid, institutional separation between the executive and the legislature, in

Malaysia the government is part of Parliament, is answerable, accountable and responsible to it, and can be dismissed on a vote of no-confidence by the Lower House. We emulated the British, Westminster style of parliamentary government at both federal and state levels.

**Elected parliaments:** Popularly elected assemblies exist at both the federal and state levels. At the federal level, the Parliament is bicameral but with preponderance of power in the House of Representatives (Dewan Rakyat) over the Senate (Dewan Negara). All 13 State Assemblies are unicameral. The Constitution mandates periodic elections, universal adult suffrage (right to vote) and an independent Election Commission.

The Constitution and laws provide the main electoral principles. We have a single member constituency system. Every citizen of age 18 who has registered as a voter in a constituency is eligible to vote unless he/she suffers from an electoral disqualification. Right to seek elected office is likewise protected and no racial, religious, gender, educational or income criteria apply. Victory in a constituency is on a “simple plurality” vote and there is no proportional representation. There are no reserved seats for the army,<sup>16</sup> police or any race or religion in the elected House of Representatives. A unique feature of the electoral landscape is that rural constituencies may have less than half of the population of urban constituencies.

The federal Senate is, however, mostly appointed. It has 44 appointed members and 26 indirectly elected Senators – two from each State indirectly elected by the 13 State Assemblies.

Regrettably we have no local authority elections though these did exist in the early years of independence.

**Independent judiciary:** The superior courts are separate from and independent of the executive and the legislature. The constitutional position of judges is that they are not regarded as civil servants and enjoy many special safeguards in matters of appointment and dismissal. Their terms and conditions of service cannot be altered to their detriment. They are insulated from politics. They have power to punish for contempt of court. In the performance of their functions they enjoy absolute immunity.

**Impartial public service:** Civil servants are required to maintain a reserve in politics. Their term in office is unaffected by the rise and fall of governments. Under Article 135, they enjoy many procedural safeguards against arbitrary dismissal or reduction in rank.

**Democratic system:** The legal system has most of the formal attributes of a democracy – elections to choose the federal and state governments; a bicameral Parliament at the federal

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<sup>16</sup> Contrast this with Myanmar where 25% of the seats in Parliament are reserved for the armed forces.

level; a unicameral Assembly in each of the States; a well-developed electoral system; a system of political parties; a judiciary with safeguards for judicial independence; and constitutional protection for enumerated human rights in Articles 5-13. But unfortunately, there is also constitutional permission for executive detention without trial; laws about sedition, treason, and official secrets; prior restraints on free speech through licensing and permits for the media; police control over assemblies and processions; and censorship and banning of books and publications.

**Access to the courts:** In theory, the right of access to the courts for the enforcement of rights is regarded by some judges as part of the constitutional guarantee of personal liberty. According to Justice Gopal Sri Ram, JCA as he was then, the right to go to courts is part of the constitutional right to personal liberty.

Regrettably, for 70% of the accused in lower courts who are often unrepresented, the right of access is unenforceable because of the high cost of litigation and the infancy of legal aid and advice. In Malaysia, lawyers are not allowed to seek contingency fees, give rebates or advertise their services. These rules impact adversely on citizens' ability to seek legal redress.

**Indigenous features:** In a fragmented and ethnically divided society (as Malaya was in 1957 and even more so in 1963) the Constitution must seek to weld people together into one common nationality. That is why in 1957 the Constitution walked the middle path of compromise, moderation and accommodation between the special needs of Malays and the legitimate interests of the minorities who made Malaya their abode.

Though the 1957 Constitution was drafted by a foreign Commission appointed by the British, it worked closely with the then political leaders of Malaya and the multiracial Alliance to incorporate into the basic law some unique and indigenous features of the Malay archipelago, among them:

- the unique system of multiple Malay monarchs united by a Conference of Rulers;
- the system of Malay Reserve Lands;
- Islam as the state religion but freedom of religion for all other religions;
- affirmative action provision to preserve the special position of the majority Malay community (and in 1963 of the natives of Sabah and Sarawak);
- Protection for Malay customs (and in 1963 for native law and custom of Sabah and Sarawak);
- Bahasa Melayu as the national language;

- weightage for rural areas (which are predominantly Malay) in the drawing up of electoral boundaries;
- reservation of some top posts in the State executive for Malays, and
- legal restrictions on preaching of other faiths to Muslims and apostasy by Muslims.

However, the Malay-Muslim features are balanced by other provisions suitable for a multi-racial and multi-religious society. The Constitution is replete with safeguards for the interest of other communities. Notable features are as follows:

- Citizenship rights are granted on a non-ethnic and non-religious basis. The concept of *jus soli* (citizenship by birth in the country) was part of the Constitution in 1957 and was used to grant citizenship to 1.2 million non-Malays. However, *jus soli* was removed from the Constitution in 1963. Now the requirements of citizenship are more complex.
- The electoral process permits all communities an equal right to vote and to seek elective office at both federal and state levels. Race and religion are irrelevant in the operation of the electoral process.
- The chapter on fundamental rights (with some exceptions) grants personal liberty, protection against slavery and forced labor, protection against retrospective criminal laws and repeated trials, right to equality, freedom of movement, protection against banishment, right to speech, assembly and association, freedom of religion, rights in respect of education and right to property to all citizens irrespective of race or religion.
- At the federal level, membership of the judiciary, the Cabinet of Ministers, Parliament, the federal public services and the special Commissions under the Constitution are open to all irrespective of race or religion.
- Education is free at the primary and secondary levels and is open to all.
- University education is subjected to strict quotas. However, to open up educational opportunities for non-Malays, private schools, colleges and universities are allowed. Foreign education is available to whoever wishes to seek it. Government education scholarships are given to many non-Malays though this is an area where a large discontent has developed over the proportions allocated.
- Even during a state of emergency under Article 150, some rights like citizenship, religion and language are protected by Article 150(6A) against easy repeal.
- The spirit of give and take between the races, regions and religions is especially applicable in relation to Sabah and Sarawak.
- Even where the law confers special rights or privileges on the Malays and the natives of Sabah and Sarawak, there is concomitant protection for the interests of other communities. For example, though Islam is the religion of the Federation, Malaysia is not an Islamic state. The Shariah does not apply to non-Muslims.

- All religious communities are allowed to profess and practice their faiths in peace and harmony. State support by way of funds and grant of land is often given to other religions. Missionaries and foreign priests are allowed entry into the country. Every religious group has the right to establish and maintain religious institutions for the education of its children.
- Though Bahasa Melayu is the national language for all official purposes there is protection for the formal study in all schools of other languages if 15 or more pupils so desire, legal protection for the existence of vernacular schools and legal permission to use other languages for non-official purposes.
- Though Article 89 reserves some lands for Malays, it is also provided that no non-Malay land shall be appropriated for Malay reserves and that if any land is reserved for Malay reservations, an equivalent amount of land shall be opened up for non-Malays. Alienation of or grant of Temporary Occupation Licence (TOL) over state land to non-Malays is not uncommon.
- Article 153 on the special position of Malays is hedged in by limitations. First, along with his duty to protect the Malays, the King is also enjoined to safeguard the legitimate interests of other communities. Second, the special position of the Malays applies only in the public sector and in only four prescribed sectors and services. Third, in the operation of Article 153, no non-Malay or his heir should be deprived of what he already has. Fourth, no business or profession can be exclusively assigned to any race. Fifth, Article 153 does not override Article 136. Quotas and reservations are permitted at entry point but once a person is in the public service he should be treated equally.

**No immunity for government:** Most remarkably, the King and the Malay Rulers are subject to the civil and criminal law and can be tried in a special court. The government is not immune from civil proceedings in contract or tort.<sup>17</sup> However, it enjoys some procedural advantages: the time limit in contract and tort to sue the government is reduced from 6 years to 36 months. Evidence may be withheld in the public interest. Facts may be suppressed under the Official Secrets Act. Some remedies like injunction and specific performance are not available against the government. In some situations, the government may even have total immunity.

**Constitutional Commissions:** The Constitution and laws have created a number of independent Commissions and Councils that are supposed to oversee particular aspects of governance. There is the Election Commission, Armed Forces Council, Judicial and Legal Services Commission, Public Services Commission, Police Force Commission, Education Service Commission, Anti-Corruption Commission and the Human Rights Commission. In addition, we have the Auditor General and the Attorney-General. Whether these Commissions and

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<sup>17</sup> *Kerajaan Malaysia v Ambiga Sreenevasan* [2016] 5 MLJ 721

institutions act with integrity and independence or whether they are under the control of an omnipotent executive is a matter of opinion.

**Powerful federal police force:** The Police Force is a federal force and is charged with the responsibility of maintaining security, public order and investigating crime. However, the power to launch a prosecution lies with the Attorney-General who doubles up as the government's chief lawyer as well as the Public Prosecutor.

**Civilian control over the forces:** Even during the communist insurgency (1957-1989) or during racial riots in 1969 or during the emergency (1964-2012) there has been civilian control over the army and the police. We have had no *coup d'etats* or "stern warnings" from the armed forces. Separation of the police force from the armed forces and a parity between the top echelons of the army and the police achieves an admirable check and balance between the two.

**No preamble:** It is noteworthy that unlike most Constitutions of the world, the Malaysian Constitution does not contain a Preamble – an opening statement encapsulating the values and ideals of the nation's document of destiny. These ideals and values do exist, of course, but have to be seen and felt in the glittering generalities of the 183 Articles of the Constitution.

## CONCLUSION

All in all, our Constitution reflects the realities of the past as well as the ideals of the present. It is indigenous in many provisions yet it borrows the best practices from many other jurisdictions. Its politics, economics and philosophy charter a middle path. Despite many flaws, it is a masterpiece of compassion, compromise and moderation.

The challenge for Malaysian citizens is to revive the spirit of the Merdeka Constitution and to bridge the gap between theory and reality.