CONSTITUTIONAL SUPREMACY: THEORY VERSUS REALITY

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ROLE OF A CONSTITUTION

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

At the organisational level, the Constitution creates the various organs of the state; describes and delimits their powers and functions; and prescribes rules about their relationship with each other and with the citizen.

At the political level, a Constitution concerns itself with the location of authority in the state. It seeks to define and manage the exercise of power.

In the area of human rights, the Constitution provides for a government sufficiently strong and flexible to meet the needs of the nation, yet sufficiently limited and just to protect the rights of citizens. It 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 citizens are sought to be balanced.

At the philosophical level, a Constitution supplies the fundamental or core values - political, religious, moral, cultural and economic - on which society is founded.

Constitutional law is silhouetted against the panorama of, history, geography and economics. More than most fields of law, it reflects the dreams, demands, values and vulnerabilities of the body politic. A Constitution that will endure must not depart too far from the *volksgeist* (spirit of the people). At the same time – and herein lies a sublime challenge - a Constitution must be idealistic, aspirational and transformative. It must contain within it seeds of change for a just, new social order. It must balance stability with change.

In a fragmented and ethnically divided society, as Malaya was in 1957, and Malaysia remains today, the Constitution must weld people together into one common nationality.

In a unitary state or a federacy[1] or a federation, if there are regions, states or provinces that exhibit significant differences from the rest of the country, then the Constitution must maintain unity in diversity by granting special autonomy to such regions (e.g. Quebec in Canada, Kashmir in India (till late 2019) and Sabah and Sarawak in Malaysia.)

CONSTITUTIONAL DESIGN IN 1957

In 1957 when Malaya was negotiating with the British for the terms of our independence and the framework of our government, there were several choices available to the country's then leaders:

- A return to the historical system of absolute monarchy as in the great Kingdom of Malacca.
- Adoption of the syariah as the supreme law of the land.
- Adoption of the British system of parliamentary supremacy under an "unwritten Constitution".
- Adoption of a supreme Constitution on the lines of the USA and India.

The forefathers of our nation chose a supreme Constitution with the following basic features:

1. The Constitution as the supreme law.
2. The power of the superior courts to review legislative and executive acts for their constitutionality.
3. A federal system of government but with a heavy central bias.
4. Special provisions for greater autonomy for the East Malaysian states of Sabah and Sarawak.
5. Islam as the religion of the federation but with religious freedom for all other communities.
6. Constitutional guarantee of "fundamental liberties".
7. Special powers against subversion and emergency.
8. Constitutional monarchies at both federal and state levels.
9. A Conference of Rulers with some crucial constitutional functions.
10. Constitutional provisions for affirmative action in favour of the ethnic Malay majority in Peninsular Malaysia and the native communities in Sabah and Sarawak.
11. Special and entrenched amendment procedures.
12. A system of parliamentary ("Westminster", "responsible") government at both federal and state levels.
13. Free and fair democratic elections under a system of universal franchise.

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[1] A federacy is a federation in which one or more states enjoy special powers not available to other states. This is similar to an asymmetric federation.

14. An elected and bicameral Parliament at federal level.
15. A unicameral Legislative Assembly at the state level.
16. Independence of the superior courts.
17. Impartial public service.
18. The Constitution incorporates many "indigenous features" of the Peninsula and the East Malaysian states.
19. Unwritten, un-enumerated, non-textual and implicit principles of separation of powers, check and balance, rule of law and constitutionalism.

This essay will highlight only the features that are intimately connected with the notion of constitutional supremacy.

CONSTITUTIONAL SUPREMACY

Article 4(1) declares that "this Constitution is the supreme law of the Federation and any law passed after Merdeka Day[2] which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". The adoption of constitutional supremacy has tremendous implications for any legal order. In the context of Malaysia, the most important consequences are the following:

Constitution is the highest law: The Constitution is the "supreme law of the federation", the highest law of the land, the law of laws, the *grundnorm.* Any law, whether *pre-merdeka* or *post-merdeka,* federal or state, primary or secondary, in peace time or war time, of a secular or a religious nature, is to be tested by reference to the Constitution. This is the implication of Articles 4(1) and 162(6).[3]

Parliament is not supreme: Its legislative powers are limited and controlled by the Constitution. There are two types of limits on Parliament's powers:

1. *Substantive limits*: Parliament is forbidden from violating any provision of the Constitution unless expressly authorized. It cannot violate the human rights enshrined in Part II, Articles 5 -13. Additionally, it must confine itself to the Federal List and the Concurrent List in Schedule 9. For example, Islamic family law is in the State List and therefore outside the competence of Parliament except as to the Federal Territories..

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[2] Laws before Merdeka Day ("existing laws") are covered by Article 160(2).

[3] *Surinder Singh Kanda v The Govt of the Federation of Malaya* [1962] MLJ 169, PC; *Ah Thian v Govt* [1976] 2 MLJ 112; *Marathaei Sangulullai v Syarikat JG Containers* [2003] 2 AMR 660; *Danaharta Urus Sdn Bhd v Kekatong* [2004] 2 AMR 317; *Mohammad Faizal Sabtu v PP* [2012] 4 SLR 947.

The legal reality, however, is that courts do not always enforce the limits on legislative power vigorously.[4]

2. *Procedural limits*: In enacting laws or amending the Constitution, Parliament must comply with the prescribed constitutional procedures. Thus, amendments to the Constitution under Article 159(3) require a special 2/3 majority of the total membership. Amendments under Article 159(5) require a 2/3 majority plus the consent of the Conference of Rulers. Amendments under Article 161E require the consent of the Governors of Sabah and Sarawak. Any alteration to the boundaries of a State requires the consent of the State Legislature and the Conference of Rulers.

State assemblies are, likewise, not supreme: They must observe limits on their substantive powers which are enumerated in Schedule 9 Lists II and III. They must not violate the Federal Constitution or their own State Constitution. They must not violate fundamental rights. In addition, they must comply with all prescribed legislative procedures.

"Any law": No law is permitted to violate the Constitution. The expression "any law" must be construed broadly and will include the whole range of laws recognised in our legal system,[5] including the following:

- Federal laws including Acts of Parliament in peace time or during an emergency
- Emergency Ordinances by the Yang di-Pertuan Agong under Article 150
- Federal subsidiary legislation, by whatever name called[6]
- State laws, including State Constitutions and State Enactments by whatever name called
- state subsidiary legislation by whatever name called
- Primary laws and subsidiary laws
- Procedural laws and substantive laws
- Secular laws and religious laws
- Customary laws
- Domestic laws and international laws
- Pre-Merdeka laws and post-Merdeka laws.

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[4] *PP v Gan Boon Aun* [2017] 3 AMR 164, FC; *Kooperasi Keretapi v Menteri* [2013] 4 MLJ 917; *PP v Bird Dominic Jude* [2013] 8 CLJ 471, CA; *Mat Shuhaimi Shafie v PP* [2014] 2 MLJ 145, CA; *Jamaluddin Mohd Radzi v Sivakumar a/l Varatharaju* [2009] 3 CLJ 785; *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173; *Bar Malaysia v Index Continent Sdn* [2016] 1 MLJ 445; *Pendakwa Raya v Karpal Singh* [2011] 9 MLJ 5.

[5] Refer to Article 160(2) of the Federal Constitution.

[6] *Md Aris Zainal Abidin v Suruhanjaya Pasukan Polis* [2002] 4 MLJ 105, CA; *Ooi Kean Thong v Pendakwa Raya* [2006] 3MLJ 389, FC

Pre-Merdeka laws: All existing laws on or before Merdeka Day derive their authority from Article 160(2). Such laws, if inconsistent with the supreme Constitution may be (i) modified by the courts[7] or by Parliament to fall in line with the Constitution or (ii) declared null and void by the courts.[8]

JUDICIAL REVIEW

The superior courts have the power to determine the constitutional validity of all legislative and executive actions on the touchstone of the supreme Constitution: Articles 4(1), 4(3), 4(4), 162(6), 128(1), 128(2).

Severability: A law that violates the Constitution may be invalidated by the courts in entirety or the courts may adopt the doctrine of severability to sever the illegal parts and save the rest of the statute.[9]

Retrospectivity or prospectivity: When the courts invalidate a law, they can order their decision to apply retrospectively or prospectively.

Grounds: In *Ah Thian v Govt* [1976] 2 MLJ 112 it was held that the courts can invalidate a law on three grounds:

1. violation of the federal-state division of powers prescribed by the Constitution (Articles 73-95E).
2. inconsistency with the Constitution e.g. violation of fundamental rights[10] or other Articles of the Constitution like Article 145[11] or Article 121[12]. Violation of the "basic structure" of the Constitution is ultra vires the powers of Parliament.[13]
3. State law is inconsistent with federal law (Article 75).

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[7] *Assa Singh v MB Johore* [1969] 2 MLJ 30; *Kerajaan Selangor v Sagong Tasi* [2005] 6 MLJ 289, CA

[8] *B Surinder Singh Kanda v Govt of the Federation of Malaya* [1962] MLJ 169, PC.

[9] *PP v Pung Chen Choon* [1994] 1 MLJ 566.

[10] *Muhammad Hilman Idham v Kerajaan Malaysia* [2011] 6 MLJ 507; *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 2 AMR313, FC

[11] *Quek Gin Hong v PP* [1998] 4 MLJ 161, HC; *Repco Holdings v Pendakwa Raya* [1997] 3 MLJ 681, HC.

[12] *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561, FC.

[13] *Sivarasa Rasiah v Badan Peguam* [2010] 2 MLJ 333; *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 2 AMR313, FC

Forum: Tun Suffian, LP in *Ah Thian*[14] ruled that in relation to ground number 1, Article 4(4) applies and leave (permission) of the Federal Court must be obtained. In relation to grounds 2 and 3 any court could exercise jurisdiction.

Regrettably, *Ah Thian* was undermined by many court decisions in the last decade which wrongly implied that any challenge to a law must go straight to the Federal Court for leave:

- *Fathul Bari Mat Jahya v Negeri Sembilan* [2012] 4 MLJ 281
- *Titular Roman catholic Archbishop of Kuala Lumpur v Menteri* [2014] 4 MLJ 765 (the Herald case)
- *State Govt of NS v Muhammad Juzaili Mohd Khamis* [2015] 6 MLJ 736
- *YB Khalid Abdul Samad v Majlis Agama Selangor* [2016] MLJU 338
- *Tuan Mat Tuan Wil v Kerajaan Kelantan* [2016] 7 MLJ 704
- *Gan Boon Aun v PP* [2016] 4 MLJ 265.

Fortunately the situation has been corrected by the Federal Court decision in *Gin Poh Holdings v Govt of Penang* [2018] 3 MLJ 417 which held that the exclusive jurisdiction of the Federal Court and the requirement for leave apply only when the allegation is that Parliament or a State Assembly is violating the federal-state division of powers or is in breach of mandatory procedures for enacting such a law.

Presumption of validity: There is a rebuttable presumption in favour of the constitutionality of a law and the burden of proving that the law violates the Constitution is on the accuser. Courts do not readily nullify the will of the elected parliament as expressed in a statutory enactment.[15]

ISLAM AS THE RELIGION OF THE FEDERATION BUT NOT THE BASIC LAW OF THE LAND

Article 3(1) declares Islam to be the religion of the Federation but Article 3(4) states that "nothing in this Article derogates from any other provision of this Constitution". The implication of Article 3(4) is that though Islam has an exalted position, it is not the basic

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[14] See also *Syarikat Banita v Govt of Sabah* [1977] 2 MLJ 217; *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1 MLJ 697

[15] *PP v Datuk Harun Haji Idris* [1976] 2 MLJ 116; *Pesuruhjaya Ibu Kota KL v Public Trustee* [1971] 2 MLJ 30; *PP v Pung Chen Chon* [1994] 1 MLJ 566; *Marathaei Sangulullai v Syarikat JG Containers* [2003] 2 MLJ 337, CA; *Kerajaan Negeri Selangor v Sagong Tasi* [2005] 6 MLJ 289, CA; *Ooi Kean Thong v PP* [2006] 3 MLJ 389; *Bato Bagi v Kerajaan Negeri Sarawak* [2011] 6 MLJ 297, FC; *Mat Shuhaimi Shafei v Pendakwa Raya* [2014] 2 MLJ 145, CA; *PP v Azmi Sharom* [2015] 6 MLJ 751.

law of the land. Islamic principles cannot be employed to challenge or invalidate any principle, institution or law established under the Constitution. The litmus test of validity is the Constitution, not the principles of Islam: *Che Omar Che Soh v PP* [1988] 2 MLJ 55.

Malaysia is not a theocratic or Islamic state. However, this does not mean that it is a secular state. In the context of the legal system of Malaysia, a dichotomization between secular or theocratic is not helpful. In any case, much depends on semantics i.e. the subjective definition one assigns to a particular expression. A middle of the path approach is that Malaysia is a "constitutional state" with a pluralist and hybrid legal system.

Islamic law applies only in the 25 areas outlined in Schedule 9 List II Item 1. In all other areas, secular or civil laws hold the field and they must be enacted in accordance with the supreme Constitution by the authorized institution.

CONTROLLED EXECUTIVE

Just as Parliament is not supreme, all executive officials including the Yang di-Pertuan Agong, the Sultans, the Prime Minister, other Ministers, all public servants, the police and the army are bound by constitutional provisions. Thus, police arrests, preventive detention orders, banning of books and seizure of property must comply with constitutional safeguards.

FEDERAL-STATE DIVISION OF POWERS

There is a federal-state division of legislative, executive, judicial and financial powers in five Lists enumerated in Schedule 9. This federal-state division is protected by judicial review e.g. *Mamat Daud v Govt* [1988] 1MLJ 119.

Special rights for Borneo states: Under our asymmetrical federal system, there are special provisions for greater autonomy for Sabah and Sarawak under Articles 95B-95E, 112A-112E, 161-161H and the Ninth and Tenth Schedules.

CONSTITUTIONAL MONARCHIES

At both the federal and state levels**,** the Yang di-Pertuan Agong and the State Sultans are required to act on the advice of the elected executive except in those limited areas in which the Constitution grants them some discretion.

FUNDAMENTAL RIGHTS

These are specified in Articles 5 -13 and elsewhere in the Constitution. Fundamental rights are not absolute and the limits on them are prescribed by the Constitution. At the same

time the power of the government or Parliament to limit fundamental rights is subjected to specified and prescribed grounds.

SPECIAL PROCEDURES FOR CONSTITUTIONAL AMENDMENT

Parliament is not supreme and amendments to the Constitution require special and difficult procedures prescribed in Articles 2(b), 159(3), 159(5) and 161E.

SPECIAL POSITION OF MALAYS AND NATIVES

The Constitution in Article 8 affirms the principle of equality and non-discrimination. But as in India it permits affirmative action for three categories of persons:

- Malays (Articles 153, 89 and 160(2)).
- Natives of Sabah and Sarawak (Articles 153 and 161A(6).
- The aboriginal people of the Malay Peninsula (Article 8(5)(c)).

LIMITS ON POWERS TO CONTROL SUBVERSION

The Constitution was born during the communist emergency. It therefore armed the executive and the legislature with sufficient powers to combat threats to the state. However, even laws against subversion must observe some limits. Under Article 149 the power to combat subversion allows violation of only four fundamental rights – those in Articles 5, 9, 10 and 13.

LIMITS ON EMERGENCY POWERS

An emergency law under Article 150 cannot violate six topics mentioned in Article 150(6A):

- Islamic law,
- religion in general,
- custom of the Malays,
- native law in Sabah and Sarawak,
- citizenship, and
- language.

If an emergency law violated any of these specially protected rights, it is an open question whether judicial review will lie. Article 150(8)(b)(iii) seeks to exclude judicial review.

HOW HAS THE CONSTITUTION WORKED?

Are the above attributes of constitutional supremacy a living reality or a mere myth?

Do Parliament and the State Assemblies stay within their legislative competence? Do the officials of the state in the performance of their governmental functions comply with the limits imposed by the Constitution? If the Constitution is violated, do the courts perform their duty to nullify offending laws or executive actions? If rights are violated, are remedies available? It must be remembered that rights without remedies are like lights that do not shine and fires that do not glow.

Do officials of the state have knowledge of our basic law? Have they "internalised" its commands as guides to their actions? Do citizens show fidelity to our basic law?

No objective or "correct" answer to the above questions is possible. The picture is mixed. The cup of constitutionalism is not full to the brim but it is not empty. It is a matter of perspective whether the cup is "half full" or "half empty".

A LIMITED PARLIAMENT SUBJECT TO JUDICIAL REVIEW

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. Though there is no constitutional court, superior courts have the power and a duty to nullify federal and state legislation if there is inconsistency with the supreme constitution. However, a largely British trained judiciary has been reluctant to invalidate Acts of Parliament on constitutional grounds. The tendency is to avoid or evade constitutional issues and to convert constitutional issues to administrative law issues centred around the principles of ultra vires and natural justice.

The following is an incomplete list of cases where judicial review succeeded at some stage of the proceedings:

- *Surinder Singh Kanda v Govt of Malaya* [1962] 1 MLJ 169, PC
- *City Council of Georgetown v Govt of Penang* [1967] 1 MLJ 169
- *Aminah v Supt of Prisons* [1968] 1 MLJ 92
- *Assa Singh v MB Johor* [1969] 2 MLJ 30
- *Selangor Pilots v Govt* [1977] 1 MLJ 133, PC*[16]
- *Datuk Hj Harun Idris v PP* [1977] 2 MLJ 155*
- *Teh Cheng Poh v PP* [1979] 1 MLJ 50, PC**[17]

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[16] All decisions with an asterisk (*) refer to appeal court decisions which overturned lower court decisions in which, at some stage, the question of constitutionality was successfully raised.

[17] All decisions with a double asterisk (**) refer to a successful challenge to the constitutionality of law in a court decision which ultimately was swept aside by constitutional amendment or legislative repeal.

- *Malaysian Bar v Govt* [1987] 2 MLJ 165*
- *Govt v VR Menon* [1990] 1 MLJ 277*
- *PP v Dato Yap Peng* [1987] 2 MLJ 311**
- *Mamat Daud v Govt* [1988] 1MLJ 119, FC
- *Nordin Salleh v Dewan Undangan Negeri Kelantan* [1992] 1 MLJ 343
- *Tun Datu Mustapha v Legislative Assembly of Sabah* [1986] 2 MLJ 388 and [1986] 2 MLJ 391
- *Faridah Begum Abdullah v Sultan Haji Ahmad Shah* [1996] 1 MLJ 617
- *Nguang Chan v PP* [2001] 2 AMR 1245, CA
- *Danaharta Urus v Kekatong* [2004] 2 MLJ 257*
- *Sagong Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591
- *Koh Wah Kuan v Pengarah Penjara Kajang* [2007] 6 AMR 269*
- *Subramaniam Gopal v Pahang Municipal Council* [2010] 2 MLJ 525
- *Robert Linggi v Govt of Malaysia* [2011] 2 MLJ 741*
- *Muhammad Hilman Idham v Kerajaan* [2011] 6 MLJ 507
- *Fathul Bari Mat Yahya v Majlis Agama Islam NS* [2012] 4 MLJ 281*
- *Nik Nazmi Nik Ahmad v PP [2014] 4 AMR 1* (case on section 9(5) Peaceful Assemblies Act*
- *PP v Yuneswaran Ramaraj* [2015] 6 AMR 271, CA
- Govt of NS v *Muhammad Juzaili Mohd Khamis* [2015] 6 MLJ 736, FC*
- *Kerajaan Malaysia v Mat Shuhaimi Shafiei* [2018] 2 MLJ 133, FC
- *Semenyih Jaya v Pentadbir Tanah* [2017] 3 MLJ 561, FC
- Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak [2018] 1 MLJ 545, FC

Sadly, many of the rulings in which laws were declared unconstitutional were reversed on appeal. Two were swept aside by legislative amendments. There are about 20 decisions in 62 years where judicial review left a lasting impact. It is clear therefore that judicial review of legislation on constitutional grounds is not a significant aspect of Malaysian constitutional jurisprudence. Constitutional supremacy is largely notional, a legal myth, a magnificient facade.

Opportunities to assert constitutional supremacy are often shunned by the courts. In *Eng Keock Cheng v PP* [1966] 1MLJ 18 the doctrine against excessive delegation was rejected. In the amendment process the scintillating idea that the amendment process cannot be abused to destroy the “basic structure” of the Constitution was repeatedly refused but finally accepted in *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561, FC.

Legislation like the Printing Presses & Publications Act, the Societies Act, the Pengurusan Danaharta Nasional Berhad Act and the Official Secrets Act confer absolute discretion but survive citizens' challenge in the courts.[18]

An alarming development is that on several occasions the executive has ignored the decision of the court on the unconstitutionality of a law and continued to rely on the law because an appeal to the superior court was pending. In *Nik Nazmi Nik Ahmad v PP* [2014] 4 AMR 1 the Court of Appeal had declared section 9(5) of the Peaceful Assembly Act unconstitutional. Yet the Police continued to rely on the law pending appeal (which ultimately succeeded in *PP v Yuneswaran Ramara* [2015] 6 AMR 271, CA.

JUDICIAL REVIEW OF EXECUTIVE ACTS

In contrast with legislation, constitutional review of executive action is, however, quite common. In the cases of of *Madhavan Nair v PP* [1975] 2 MLJ 264; *Persatuan Aliran v Min* [1988] 1 MLJ 442; *Tan Sri Raja Khalid* [1988] 1 MLJ 182, SC; *Minister v Jamaluddin Othman* [1989] 1 MLJ 369; *Abdul Ghani Haroon v Ketua Polis* Negara [2001] 2 MLJ 689, HC*; Teresa Kok Suh Sim v Menteri* [2016] 6 MLJ 352; *Arunamari Plantations v Lembaga Minyak Sawit* [2011] 1 MLJ 705; *PP v Thong Kiah Oon* [2012] 10 MLJ 140; *Berjaya Books v Jawi* [2014] 1 MLJ 138; *ZI Publications v Selangor* [2016] 1MLJ 153; *Kassim @ Osman Ahmad v Dato Seri Jamil Khir* [2015] 5 MLJ 710; [2016] 7 MLJ 669; [2016] 5 MLJ 258, CA the courts did their duty to censure abuse of executive power.

In *Jamaluddin Mohd Radzi v Sivakaumar* [2009] 4 MLJ 593, the decision of the Perak Assembly Speaker was quashed by the Federal Court.

Constitutional literacy is spreading and more and more lawyers, trained in Malaysian constitutional law, are raising constitutional issues in the courts but mostly unsuccessfully due to judicial reluctance to wield the momentous power of judicial review: *Negeri Kelantan v Wong Meng Yit* [2012] 6 MLJ 57; *Minister v MTUC* [2013] 1 MLJ 61. Courts rely on many reasons to refuse judicial review:

The principle of "non-justiciability": The area covered by this principle is very wide. This doctrine permits the courts to decline intervention because the issue at hand is unsuitable for judicial determination or where subjective discretion is held by the court to be unreviewable e.g Attorney General's powers under Article 145.

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[18] Refer e.g. to the *Aliran v Min of Home Affairs* [1988] 1 MLJ 440 and *Minister v MTUC* [2013] 1 MLJ 61).

Non-justiciability extends to emergency proclamations, preventive detention orders, power of pardon, decisions under the Societies Act, transfer of civil servants, many decisions under the Printing Presses & Publications Act, compulsory acquisition of property orders, AG's powers under Article 145 to prosecute or not to prosecute, to transfer cases laterally or horizontally, or to apply one law or another. Proceedings of the State Assembly are not reviewable: *Teng Chang Khim v Dato Raja Ideris* [2014] 4 MLJ 12.

Ouster clauses: Besides judicial reticence, judicial review of executive and legislative action is further weakened by several ouster, preclusive or finality clauses in the Constitution. For example:

- Article 4(3) on exclusion of judicial review of Parliament's legislative power
- Article 150(8) on finality of emergency powers of the government, and
- Article 121(1A) on the powers of the syariah courts which are unreviewable by the civil courts.

Locus standi: At other times courts will decline to hear because the applicant lacks locus standi or because there was some procedural flaw in the application: *Kelantan v Wong Meng Yit* [2012] 6 MLJ 57.

A disturbing development is that the police and the civil service often defy court decisions. In several custody cases involving infants, police have failed to enforce civil court orders. In the recent *A Child & Ors v Jabatan Pendaftaran Negara* [2017] MLJU 1043, CA (the Bin Abdullah decision), the National Registration Department (NRD) defied the Court of Appeal decision that under the Births and Deaths Registration Act, an illegitimate child in Johor is entitled to carry his father's name if the father desires and the mother agrees. The NRD subjected a federal law within federal jurisdiction to a federal fatwa even though the federal fatwa had not been adopted by Johor nor had it been put in the gazette.[19]

FEDERAL-STATE DIVISION OF POWERS

Unlike the unitary system in the UK and Singapore, Malaysia has a federal form of dual government. There is a division of legislative, executive, judicial and financial powers between the Centre and the States though the weightage is heavily in favour of the Centre, especially in matters of finance. The federation's primacy is, however, less pronounced in relation to Sabah and Sarawak.

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[19] Most regrettably, the Court of Appeal was overruled by the Federal Court on the questionable ground that the federal law deals with family names or surnames and as Malays do not carry a family name but only the father's name, the federal Act is not applicable to them. The Federal Court decision involves pure semantics and turned on the arbitrary meaning assigned by the court to the term 'surname'. It is submitted that a father's name may well be given the description "surname".

The federal-state division is protected by the Constitution and judicial review is available if federal or state agencies exceed their powers e.g. Case of *Mamat Daud* v Government [1988] 1 MLJ 119, FC where s. 298A of the Penal Code was held to be a trespass on state powers. See also *Fung Fon Chen @Bernard v Govt* [2012] 6 MLJ 724.

In practice, however, federal-state disputes are resolved through behind-the-scenes compromises within the ruling political coalition which controls the federal as well as most of the 13 state governments. In opposition controlled states, contentious issues of local government elections, water resources, installation of cameras on state roads by federal agents and appointment of State Secretary remain unresolved. Special challenges exist in relation to the special provisions for Sabah and Sarawak.

As a precondition of the formation of Malaysia, Sabah and Sarawak have greater power than the peninsular states. Their Assemblies have additional legislative powers in Sch 9, Supplementary State List and Supplementary Concurrent List. Federal power to interfere with the states is not as pronounced in relation to Sabah and Sarawak as in relation to peninsular states. For example, these states are exempted from Parliament's power to pass uniform laws about land, agriculture, forestry, local government and development: Article 76. Policies of the National Land Council and National Council for Local Government are not binding on Sabah and Sarawak.

Under Article 161E, constitutional amendments affecting these states require the consent of the Governors of these states: *Robert Linggi* (2011) 2MLJ 741, HC.[20] The federal government's stranglehold over lucrative sources of revenue is not as strong in relation to Sabah and Sarawak as it is in relation to other states. These states can raise loans with the consent of Bank Negara. They are allocated special grants. They have eight sources of revenue not permitted to other states (e.g. import and excise duty on petroleum products, export duty on timber, forest produce and minerals. They are entitled to earnings from ports, harbours and state sales tax. The protection of Article 153 applies to natives of Sabah and Sarawak.

Native law and custom in these states are protected by law and enforced through a hierarchy of Native Courts. The High Court has a special wing in Sabah and Sarawak with a Chief Judge for the region. There is protection for English and native languages. In 1963 these states had no official religion. This position was later altered for Sabah. Malay Reserve law does not apply in Sabah and Sarawak. Lawyers in these states have an exclusive right of audience in state courts and in relation to cases originating there.

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[20] The High Court was overruled by the Court of Appeal.

In the Dewan Rakyat there are 31 MPs from Sabah and 25 from Sabah. This number (56) translates to 25% of the total number of MPs and 50% of the majority (56/112) required to govern.

In recent years, contentious issues about Islamisation and Malaynisation of Sabah and Sarawak have been raised. There are disagreements about use of English, recognition of Chinese education, amount of petrol royalty, illegal immigrants, Borneonisation of the civil service and compliance with Article 161E.

FUNDAMENTAL LIBERTIES

In response to the era of human rights after World War Two, the Constitution, in Articles 5 to 13 (and elsewhere), provides for a large number of political, civil, cultural and economic rights.

Personal liberty (Article 5): No person shall be deprived of "life" or "personal liberty" save in accordance with "law". Every arrestee has the right to apply for habeas corpus; to know the grounds of arrest; to see a lawyer; to be produced before a magistrate within 24 hours (Article 5).

If Article 5(1) is given a "prismatic interpretation", as former judge Gopal Sri Ram and some other judges occassionally attempted, the Article can confer many un-enumerated rights not explicitly mentioned in the Constitution Thus 'life' in Article 5 can include "the dignity of life" and the "necessities of life" like employment. "Liberty" in Article 5 can include the right to go to the courts, to travel abroad, to choose one's manner of dressing/grooming and to sex-change surgery. "Law" in Article 5(1) need not mean any law passed by Parliament . It can mean a just and reasonable law, a law that is not oppressive or harsh.

This kind of "judicial activism" to give life to the Constitution and to provide a check and balance that is common in India and the USA is, however, frowned upon by most of our judges. The dominant view is that the role of judges is to interpret the law strictly, literally and as it is found. Law is 'lex' not 'jus' and 'recht'. The latest position is, however, very encouraging. In *Alama Nudo Atenza v PP* [2019] 3 AMR 101,FC it was held that the double presumption of guilt in a drug law was disproportionate and therefore the law was a violation of Articles 5 and 8.

Abolition of Slavery (Article 6)**:** There is protection against slavery and forced labour Regrettably indirect forms of slavery are not unknown.

Protection against retrospective criminal laws (Article 7(1)): No law creating an offence or increasing the penalty for an offence can be backdated.

No double jeopardy (Article 7(1)): Anyone who has been acquitted or convicted of an offence cannot be tried again for the same offence (Article 7(2)).

Equality (Article 8)**:** The Constitution provides that all persons are equal before the law and entitled to the equal protection of the law. However, to the requirement of equality two types of exceptions exist. First, there are many significant exceptions provided by the Constitution itself. For example, Article 153 protects the special position of the Malays and the natives of Sabah and Sarawak. The affirmative action of Article 153 was meant to secure long term economic and social equality between the various races.

Second, in addition to constitutional exceptions to the equality requirement, the courts have evolved the doctrine of "reasonable classification" to justify differential treatment.

The equality provision is a generic provision and has been utilised in some countries to strike down laws that confer absolute discretion. In India tender exercises and excessive reservations and quotas have been reviewed under the equality clause.

Freedom of movement (Article 9)**:** Within the country this right is guaranteed But unlike in India there is no constitutional right to a passport or to travel abroad.

Freedom of speech, assembly and association (Article 10): Speech is subject to 14 restrictions including prior restraints and post-event criminal penalties. Assemblies can be regulated on two grounds. Associations can be restricted on three grounds. In general, rhe rights of Article 10 are largely residual as Parliament's power to pass restrictive laws is rather wide.

Religion (Article 11)**:** Despite some recent problems, this is one of the best protected freedoms. The country is dotted with mosques, temples, churches and gurdwaras. Muslim and Non Muslim holidays are observed.

Due to public order implications of missionary work, the Constitution in 1957 included an Article 11(4) to permit restrictions on preaching to Muslims. Some state legislatures have interpreted this broadly to include a ban on the usage of many Malay/Arabic/Muslim words like "Allah", Kitab, Nabi etc. Lately other sad issues are straining the social fabric. Non-Muslims are subjected to raids on their churches and temples by syariah officials to seize Bibles with the word "Allah" and to investigate proselytization of Muslims. Marriages are interrupted, burials are prevented, bodies are exhumed to be reburied. There is a ban on the use of the word Allah and 30 or so other words by non-Muslims. Non-Muslim infants are converted to Islam in orphanages or as a result of the conversion of one non-Muslim parent in a marriage to Islam. Rumours about halal-haram products fill the market now and then.

Unlike non-Muslims, Muslims are subject to strict moral policing in an expanding area. In

personal laws, they are compulsorily subject to the syariah. There are severe procedural restrictions against apostasy. This raises questions about Article 11. Questioning a fatwa is a criminal offence. Muslims are subject to strict thought-control through requirements of tauliahs, imposition of criminal penalties for questioning fatwas, banning of books, bans on some Muslim scholars from abroad, fatwas against yoga, liberalism and pluralism. These laws and fatwas raise questions of freedom of speech in Article 10. In one East Coast State there is a fatwa against boy and girl riding motor-bike together.

Enforcement of hudud is the popular cry of the day. An aggressive, Taliban, Saudi-style Islam is taking hold. The Arabisation of Malay society is widespread. Many Muslims are wondering whether they are entitled to the fundamental rights guaranteed by Articles 5-13 or are these rights subject to Article 3 (on Islam as religion of the federation) and Schedule 9, List II, Item 1 which empowers the States to enact laws on enumerated areas of Islam?

Education (Article 12)**:** The Constitution confers some rights in respect of education. Malaysia has admirably supplied free primary and secondary educations to all its citizens irrespective of race or religion.

Property (Article 13)**:** This right is one of the better protected rights under the Constitution.

Other constitutional rights: In addition to Articles 5-13, many other rights are guaranteed by the Constitution e.g. the right to citizenship (Articles 14-22), the right to vote (Article 119), the right to contest elections (Article 47), safeguards for civil servants (Articles 135-136 and 147), and the right of preventive detainees to some safeguards for due process (Article 151).

Implied rights: The jurisprudence of implied, unenumerated, non-textual rights is in its infancy but has taken roots in some judicial decisions. However, the international law on human rights is generally kept at bay by our courts because international law is not part of the definition of "law" under Article 160(2): *Beatrice Fernandez v Sistem Penerbangan Malaysia* [2005] 4 AMR 1, FC. But there are some happy exceptions: *Noorfadilla Ahmad Saikin V Chayed Basirun* [2012] 1 MLJ 832; *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180.

In sum, most of the fundamental rights seem to be protected against the executive branch only. The Constitution, born during the communist insurgency, allows Parliament to subject fundamental liberties to such extensive regulation on enumerated grounds that the description of liberties in Articles 5-13 as "fundamental" poses problems in political philosophy. Also, there is the jurisprudential question whether fundamental rights are confined to the public sector and the private sector is exempt from them?

ISLAM AS THE RELIGION OF THE STATE

Islam is the religion of the federation but there is freedom to other communities to practise their own religions in peace and harmony: Article 3. Despite the adoption of Article 3, our country was not meant to be a theocratic, Islamic state. Article 4(1) proclaims that the Constitution is supreme. Article 3(4) clearly lays down that nothing in this Article derogates from any other provision of the Constitution. This means that Article 3 does not override any other article of the Constitution: *Che Omar Che Soh v PP* [1988] 2 MLJ55, SC.

Matters of Islam are generally assigned to the States. But state power to legislate for Islam does not cover the whole field of the syariah and is subject to a number of significant limits. First, the legislative, executive and judicial powers of the States do not extend to every matter of Islam. In Sch 9 List II, para 1, only 24 enumerated areas (mostly of personal law) are assigned to state legislatures. Second, in criminal law, the States are allowed to punish "offences against the precepts of Islam" subject to severe limitations:

(i) States can create Islamic offences only if these offences do not exist under federal law. Thus, most crimes including *hudud* offences like murder, theft, rape are in federal hands and not triable in syariah courts.

(ii) Penalties for syariah offences cannot exceed the 3-6-5 formula (three years' jail, six lashes, five thousand fine).[21]

Third, syariah courts exist under state law and have jurisdiction only over Muslims (Sch 9 List II Para 1). But see *Pathmananthan a/l Krishnan (Muhammad Riduan Abdullah) v Indira Gandhi a/p Mutto* [2016] 4MLJ 455.

However, since the late 80s civil society pressure to move in the direction of an Islamic state with supremacy of the syariah has become quite strong. The ruling party has taken note. In 1988, an Article 121(1A) was inserted into the Constitution forbidding civil courts from interfering in any matter "within the jurisdiction of the syariah courts". Well intentioned though Article 121(1A) was, it does not clarify who has the power to determine where jurisdiction lies in contested cases. Since the insertion of Article 121(1A) a number of significant developments have impacted on the Malaysian Constitution.

First, in many cases, Article 4 (on constitutional supremacy) and Article 11 (on freedom of religion) are being subordinated by administrators, politicians and some judges to Article 3 (on Islam): *Titular Roman Catholic Archbishop of KL v Menteri* [2014] 6 CLJ 541. This is despite Article 3(4) which says that "nothing in this Article derogates from any other provision of this Constitution". Acquiescence of the superior civil courts to this "Islamic state" sentiment is not unanimous but is widespread and is reshaping the Constitution.

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[21] Syariah Courts (Criminal Jurisdiction) Act 1965

Second, in many judicial proceedings involving legal dualism/legal pluralism where both civil and syariah matters are involved, civil courts are very reluctant to enforce constitutional rights or the federal-state division of powers:

- *Sulaiman Takrib v Kerajaan Terrenganu* [2009] 6 MLJ 354
- *James v Kerajaan Malaysia* [2012] 1 MLJ 721; [2009] MLJU 1812
- *Syarie Prosecutor v Mohd Asri Zainul Abidin* (unreported)
- *Mohd Alias Ibrahim v RHB Bank* [2011] 3 MLJ 26; [2011] MLJU 304
- *Kerajaan Negeri Kelantan v Wong Meng Yit* [2012] 6 CLJ 351, CA
- *Dato Seri Anwar Ibrahim v PP* [2000] 2 MLJ 486, CA.

However, the acquiescence by the civil courts to the unilateral jurisdictional expansion by the Syariah courts is not unanimous. There are cases on record where the power of judicial review was exercised with telling effect e.g. in *Indira Gandhi Mutho v Jabatan Agama Islam Perak* [2018] 1 MLJ 545, FC.

Third, many State legislatures are violating the federal-state division of powers. They often confer on syariah authorities a jurisdiction over civil and criminal matters which the Constitution assigns to federal authorities: *Kelantan v Wong Meng Yit* [2012] 6 MLJ 57
For example, states are running detention and rehab centres which are matters within federal jurisdiction. Hudud laws are being passed. Gambling and betting and homosexuality are punished even though these are federal matters. Muslim couples seeking to marry are required to take HIV tests in some states. Communicable diseases are a federal health matter. Companies are required to pay zakat.

Fourth, many federal laws and institutions are being Islamicised. Banking law (which is a federal matter) has been amended to require banks to follow the rulings of Syariah authorities.[22] EPF (a federal matter) is required to comply with rules of *faraid.* Will pension and insurance rules follow suit?

Fifth, the fundamental rights of Muslims guaranteed by Part II of the Constitution are often subordinated to restrictive state laws. Thus, Muslims cannot speak about Islam without a *tauliah* from state authorities: *Fathul Bari Mat Jahya v Majlis Agama Islam NS* [2012] MLJU 427. Challenging a *fatwa* is a crime. Arrest of Muslims for selling books on Islam, the issue of apostasy, *ratu cantik* contests, Islamic education, cross-dressing, sex-change operations, branding of some Muslims as deviationists, raise issues of constitutional rights.

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[22] *JRI Resources Sdn Bhd* v Kuwait Finance House (Malaysia) Berhad [2019] MLJU 275. See also *Mohd Alias Ibrahim v RHB Bank* [2011] 3 MLJ 26; [2011] MLJU 304.

The idea is gaining ground that as long as a law or an action is in the holy name of Islam, the Constitution does not apply to Muslims; the chapter on fundamental rights is not applicable. State Enactments under Schedule 9 List II can override the chapter on fundamental rights: *Fathul Bari Mat Jahya v Majlis Agama Islam Negeri Sembilan* [2012] 4 MLJ 281.

Sixth, to some civil judges, the non-reviewability provision of Article 121(1A) for syariah court decisions is applicable even to decisions by other syariah officials.

Seventh, syariah authorities and syariah courts often make decisions that impact on the constitutional rights of non-Muslims. Non-Muslim marriages are dissolved because one party had converted to Islam. Children of such a civil marriage are often converted to Islam without the consent of the non-converting spouse: *Indira Gandhi v Pengarah Jabatan Agama Islam* [2013] 5MLJ 352. Churches are raided to arrest Muslims who are allegedly being converted. Bibles in Malay or with the word Allah are seized. Summons are served on non-Muslims to appear in syariah courts. Many words of the Malay language are banned to non-Muslims.

Eighth, syariah courts interpret their jurisdiction expansively. Civil courts interpret their jurisdiction so narrowly that even on constitutional issues they often refuse jurisdiction. A heartening departure is Abdul Hamid, FCJ in *Latifah Mat Zin v Rosmawati Sharibun* [2007] 5 MLJ 101; and Richard Malanjum FJ in *Lina Joy v Majlis Agama Islam WP* [2007] 4 MLJ 585 that issues of constitutionality are for the superior civil courts. Ninth, syariah authorities often defy the rulings of the superior courts and the opinions of the Attorney-General on constitutional matters.

Tenth, in several contentious child custody cases the police have not enforced the orders of the civil courts and instead favoured the orders of syariah authorities.

Eleventh, the protection of Article 121(1A) was meant for syariah courts. Some civil court judges are extending the protection of Article 121(1A) to even the administrative authorities involved in enforcing the syariah: case of the conversion of *Indira Gandhi's* infants by the Registrar of converts.

CONCLUSION

In 1957, the monumental challenge was to reconcile the seemingly irreconcilable conflict of interests between the major races, religions and linguistic groups. In addition, the wishes of the Malay Rulers and the British masters had to be accommodated.

In many countries lip service is paid to minority rights. But in Malaya in 1957 the "minorities" were nearly 45% of the population, with well-organized political structures and a stranglehold (along with the British) over the economy. The Malay-Muslim features

of the Constitution (which were demanded by UMNO) were balanced by other provisions suitable for a multi-racial and multi-religious society. Malay privileges were offset by safeguards for the interests of other communities. This "social contract" largely survived the fires of politics for half a century.[23] In 1963 special protection for Sabah and Sarawak was inserted into the basic charter.

All in all, the spirit that animates the Constitution is one of moderation, compassion and compromise. Our Constitution is a carefully balanced document. This is one of our greatest blessings. Sixty-two years into independence, the Federal Constitution, though amended significantly in many parts, is still the apex of the legal hierarchy. It has endured. It has preserved public order and social stability. It has provided the framework for Malaysia's economic prosperity. It has generally reconciled the seemingly irreconcilable conflict of interest between ethnic and religious groups in a way that has few parallels in Asia, Africa and Europe.

The army has been kept under check. There have been no coup d'etats. Social engineering under the Constitution is progressing peacefully. We have had 14 General Elections peacefully. Lately, however, there is rise of hooligan politics. Women's emancipation is progressing well but there are many remaining challenges.

However, there is a darker side. In some respects, constitutionalism faces some severe challenges. Many liberties like free speech remain curtailed. Many laws enacted by Parliament ignore constitutional limits and confer absolute power on the executive. There is strengthening of the apparatus of the state at the cost of individual freedoms. As in many parts of the world the executive has become omnipotent.

Fundamental rights do not apply in the private sector. The international law on human rights is largely kept at bay.

There is a serious problem of corruption. Corrupt practices violate Article 8 on equality before the law. Corruption hurts the poor, advantages the rich.

Emergency laws under Art 150 lasted for about 48 years from 1964-2012. Preventive detention, anti-subversion and anti-terrorism laws under Article 149 abound. The Internal Security Act has been replaced with equally strict laws.

The system of check and balance has not worked well. There is lack of accountability, openness and transparency in many aspects of government. Parliament is largely a rubber

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[23] The social contract is, however, under severe strain now from two linked forces: those of "ketuanan Melayu" and the tide of Islamisation.

stamp to the executive. It legitimates; it does not legislate. Politicization of critical constitutional institutions seems to have taken place. Prior to the 14th General Election almost all the constitutional institutions including the Election Commission, the Attorney-General, the Auditor-General, the Registrar of Societies, the police, the Civil Service, the judiciary, especially the lower courts and the MAAC did not arouse confidence in their impartiality and independence.

The superior courts are recovering slowly from the drastic Tun Salleh episode. But judicial review of parliamentary and state laws is not a significant feature of our constitutional reality.

The system of affirmative action seems to have forgotten the orang asli. Article 153 was a fairly balanced, moderate provision of affirmative action hedged in by many limitations which have been ignored. Article 153's implementation needs careful fine tuning and balancing.

In federal-state relations Sabah and Sarawak have strong grievances that need to be looked into. The federal-state division of power in Schedule 9 Lists I and II over matters which have an Islamic content has broken down. State Assemblies are passing laws on matters outside their jurisdiction. Schedule 9 Lists I and II are not being enforced by our superior courts. The 2017 fire tragedy in kampong Dato' Keramat reminds us about Islamic religious schools. Everyone says that Islamic religious schools are in state hands. That is not true. All education is a federal matter: Schedule 9 List I, Para 13. What is happening is that extra-legally the state religious authorities are exerting control over everything that has an Islamic content. The federal government looks the other way.

Is Article 4(1) subordinate to Article 3(1)? If so, how will this impact on the peninsula's relationship with our Borneo states. Article 3(4) is ignored by our superior courts.

Article 121(1A) on the independence of the Syariah courts is given very wide interpretation by the civil courts. Constitutionally, syariah courts are independent of the civil courts only as long as the Syariah courts stay within their jurisdiction.

A conservative, obscurantist and aggressive version of Islam from Saudi Arabia is replacing the tolerance and compassion that were the hallmark of Malay society and the Malay archipelago. The increasing "Arabisation" of Malay society and the subordination of the Constitution to religious oligarchies are undermining the Constitution and impacting negatively on the rights of Muslims and non-Muslims. The religious oligarchy seems to have emerged as a "state within a state" with powers far larger than the Constitution envisaged.

Are we moving towards a Saudi version of an Islamic state? Are we going to have one-country-two-systems - two systems of laws and two systems of courts for the Muslims and

non-Muslims? Opinions may vary on the desirability of the above. What needs to be pointed out that this is not what was envisaged by the Constitution. Of course, constitutional change is possible and may be viewed by some people as desirable. All that can be said is that the Constitution is in flux and undergoing silent, unwritten changes. Only time will tell the shape of things to come. There are currents and cross-currents.