

UNDERSTANDING THE CONSTITUTION: THE NEED FOR A PARADIGM SHIFT

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ABSTRACT

The Federal Constitution of Malaysia proclaims itself to be the supreme law. As rules regulating the system of governance, the constitution is the focal points in resolving disputes regarding rights and responsibilities of the government and the governed. The courts in applying the constitution in resolving contentious disputes sometime arrive at erroneous conclusions either through misinterpretation or misunderstanding. A correct interpretation and understanding of the constitution require an appreciation of its history and its spirit. This paper considers the importance of the constitution by looking at the problem in construing the constitution and provides suggestions in ensuring proper application of the rules.

INTRODUCTION

The constitution occupies the primary position in the governance and legal system of a country. In the last 50 or so years, there were controversial cases

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which seem to be caused by the erroneous understanding of the constitution. Whether the cause is misinterpretation or misunderstanding, this phenomenon indicated the need of a serious study on the way we learn, teach and research the constitution. This should begin from an early stage and intensified by research activities and research institutions on this subject. This work will discuss the role and importance of the constitution. Afterwards, the current paradigm will be examined and its problems highlighted. Consequently, several suggestions on a paradigm shift will be made.

THE CONSTITUTION: ITS ROLE AND IMPORTANCE

The constitution is the rule that provides the framework for a country's ruling system. In discussion on the constitution, the supremacy of the Federal Constitution are always referred to. It is the benchmark for the legality of any law or actions of organs of the government. As the self-professed supreme law,¹ it provides a protection to the people from the government's abuse of power.

Apart from that, the Federal Constitution is also an important document in organizing the structure of society. The continuity of the government and the society's structure before and after independence was attained by including important elements such as citizenship, parliamentary democracy and constitutional monarchy.

The country's achievement as a federation consisting of different states, races and religions also depends on the formula that has been included in the Federal Constitution. In ensuring a working association of separate states, the legislative and executive powers are clearly mapped out. The rights and responsibilities of the people are sealed. This formula is the basis of the relationship between governments and between the government and the governed which needs to be respected.

¹ Article 4 of the Federal Constitution.

CURRENT PARADIGM AND ITS PROBLEMS

The Federal Constitution is a document which has been drafted by the Constitutional Commission based on the mandate of the Malay Sultanate, pre-independence Malaya government and the British government. The said document resulted from the efforts of the Commission and the contribution of political parties, associations and the people. Looking at the composition of the Commission, there were certainly influences of the constitutional rules of England, and the constitutions of Pakistan and India. However its final mould was obviously the voice and the local reality as emphasised by the Working Committee that fine-tuned the proposal of the Reid Commission.

Understanding of this important document, as also other documents, can be seen through interactions and through the institution that reads and interprets the said text. The first pattern of understanding that can be seen from the earlier cases shows a literal approach. Reading the text this way could prevent the interpreter from going far from the literal meaning of the text. The interpreter, being the courts, could avoid from being accused of adding or amending the meaning of the text. The courts unwillingness to change the language of the document can be seen in the case of *Datuk Harun*² whereby the court stated:

[the courts are not] at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, ...for the purpose of supplying omissions or of correcting supposed errors.

The courts are also unwilling to heed to the concept of justice and reasonableness. It can be seen that the courts are dictated by the positivist school of thought. The courts refuse to look at the need of justice and are only interested in applying the law as legislated by the Parliament. In the case of *Loh Kooi Choon*³ for example, the Federal Court stated:

² *Datuk Harun v PP* [1976] 2 MLJ 116.

³ *Loh Kooi Choon v PP* [1977] 2 MLJ 187.

The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not fit for judicial determination.

We must agree with the view that the courts should not act as the legislature. However, we should also remember that the courts, especially the courts that interpret the constitution, are not courts that indulge in mechanical interpretation. The pith and substance of the constitution are what need to be given life to. As Raja Azlan Shah LP said “a constitution being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way”.⁴

SEVERAL SUGGESTIONS

Looking at the decision of the courts, there are several approaches that could bring about the true understanding of the constitution. However the problem is that the courts are inconsistent in applying the correct approach. Below are several approaches that should be applied to ensure that the court could search for the true meaning of the constitution.

Reading the Constitution as a Whole

In interpreting the fundamental rights provisions, the court in several cases had applied a more liberal approach. For example, in the case of *Dr Mohd Nasir*,⁵ the appellant had applied to establish the Socialist Party of Malaysia. The Court of Appeal in interpreting freedom of association stated that the power to restrict this freedom must be “reasonable”. Although the phrase reasonable restriction is not used in Article 10, the Constitution should not be read literally. The Federal Constitution must be read as a whole in order to give effect to all its provisions.

⁴ *Dato Menteri Othman Bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

⁵ *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, CA.

The risk of this approach is when the court added words in order to convey the court's intention and not the intention of the constitution. In the case of *Sukma Darmawan*, the Court of Appeal had added the word "exclusive" after the word "jurisdiction" of the Syariah courts to oust the jurisdiction of the civil court only when the Syariah courts has exclusive jurisdiction over a matter. As suggested in other writings,⁶ this approach is erroneous because article 121(1A) of the Federal Constitution was amended to give exclusive jurisdiction over matters where both the Syariah courts and the civil court have jurisdiction; and not to give exclusive jurisdiction to the Syariah courts over matters where it already has exclusive jurisdiction.

Although there is a risk of misinterpreting the meaning of the constitution in using this approach, it nevertheless should not be discarded. This is because in every matter there is a risk of an error done by the court. What is important is for the court to be careful in looking at the constitution as a whole and striving to give effect to the whole of the constitution.

Looking at the Structure of the Society

The court also invites us to look at the structure of the Malaysian society without being too influenced by the structure of the society in other countries in interpreting the provisions of the Federal Constitution. This approach has been stated in the case of *M Sentivelu*,⁷ whereby the Court of Appeal reminded on the importance of not blindly following the English court which has a different structure of society from the Malaysian society. In this case, the court was of the view that more protection should be given to a person who faced disciplinary action because of the low level of legal awareness in this country as well as limited system of legal aid.⁸ If we are to change the applicable law in order to suit the socio-economic reality of the Malaysian society, the court should be the one to do this.

⁶ Farid Sufian Shuaib. 2003. *Powers and Jurisdiction of Syariah Courts in Malaysia*, Kuala Lumpur: Malayan Law Journal. pp.114-117.

⁷ *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393, CA.

⁸ *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393, CA, pp. 402-403.

This approach is also known as the “four walls” doctrine. This is based on the suggestion in the case of *Government of State of Kelantan v Government of Federation of Malaya*⁹ which stated that the constitution: “...is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries, such as Great Britain, the United States of America or Australia.”

There are criticisms given to this view which is perceived as a narrow view that does not help in promoting healthy interactions between countries in extending the protection of fundamental rights.¹⁰ There are some truths to these criticisms. However what needs to be given priority is the borrowing of idea from similarly structured constitutions. Such as in the case of *Government of State of Kelantan*,¹¹ the court referred to the “four walls” doctrine in rejecting an idea from England which does not have a written constitution. Instead, the court had referred to a Nigerian case which reminded on the need to give effect to written constitution.¹²

The Indigenous Element in the Constitution

It is important for us to interpret the Federal Constitution based on the practice and tradition which paints the Constitution itself. Without looking at the background of the Constitution, we would not be able to grasp the comprehensive understanding concerning a particular provision. This approach was stressed upon in the case of *Faridah Begum Bte Abdullah*¹³ in understanding the provision on legal immunity of the Rulers under the

⁹ *Government of State of Kelantan lwn Government of Federation of Malaya & Tunku Abdul Rahman* [1963] 1 MLJ 355, p. 359. See also *Public Prosecutor lwn Pung Chen Choon*, (1994) 1 MLJ 566.

¹⁰ See Li-ann Thio, “Beyond the ‘Four Walls’ in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, And Constitutional Adjudication In Malaysia And Singapore” (2006) 19 Colum J Asian L 428.

¹¹ *Government of State of Kelantan v Government of Federation of Malaya & Tunku Abdul Rahman* (1963) 1 MLJ 355, p. 359. See also *Public Prosecutor lwn Pung Chen Choon*, (1994) 1 MLJ 566; *Loh Kooi Choon v PP* [1977] 2 MLJ 187.

¹² *Adegbenro lwn Akintola* [1963] 3 WLR 63.

¹³ *Faridah Begum Bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617, Special Court for Rulers.

Constitution. Mohd Azmi FCJ in discussing the effect of the constitutional amendment to Article 181 stated that:

*In interpreting an amendment to a written Constitution, regard should be had not only to the words used by the promulgators of the amending Act, but also to the traditions and usages which have given meaning to those words, and last but not least, to the character and origin of the Constitution under consideration.*¹⁴

Looking at the history and the tradition on the position of the Rulers, the Special Court for Rulers held that an amendment needs to be clearer if it was to allow for non-citizen to take legal action against the Rulers. Equality under article 8 cannot be used to permit non-citizen from taking legal action against the Rulers.

The leading case that highlighted this approach is the case of *Dato Menteri Othman bin Baginda*¹⁵ which concerns with a related matter being a challenge made to the appointment of the Undang Luak Jelebu in Negeri Sembilan. The majority decision of the Supreme Court stressed that the Federal Constitution had strengthened our indigenous elements such as the position of the Rulers and the hereditary system of the monarchy.

In interpreting related matters, the court has to take into account the history and development of the indigenous element and give effect to the strengthening of this element in the constitution. In this context, literal approach should not be used which will cause this traditional element to be marginalized. As such, although the Laws of Constitution of Negeri Sembilan does not clearly state that the *Dewan Ka'adil dan Undang* (the Council of the Yang di-Pertuan Besar and the Ruling Chiefs) has the power to decide upon disputes relating to customs, the court must give such effect to the "advice" given by the *Dewan Ka'adil dan Undang* in order to give

¹⁴ *Faridah Begum Bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617, p. 629.

¹⁵ *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, SC.

recognition to the tradition which had been in existence prior to independence and incorporated in the constitution.¹⁶

The Indigenous Element and Fundamental Rights

The acceptance and continuous relevance of the Constitution is based on the determination of the negotiating party of independence, the Reid Commission and all those involved in the importance of the indigenous element being maintained in the Constitution of the Independent Federation.¹⁷ This constitution did not simply imitate the constitution of India, America or England. It received the idea of parliamentary democracy while at the same time maintaining the indigenous elements.¹⁸

In this period of 50 or so years, the issue of conflict between indigenous elements and fundamental rights is sometime highlighted. The royal institution for example had sometimes receives criticisms not only in terms of its practice but also in terms of its democratic principle and also in terms of its need of continuous protection.¹⁹ The position of the Malays and the Malay language, especially the New Economic Policy, often becomes topics of discussion among politicians and academics.²⁰ Another matter is concerning the position of Islam which is not only a favourite topic among politicians but also decisions of the courts.

An issue that showcases this problem is on the issue of freedom of religion. The Court has decided that freedom of religion can never be overcome by executive actions. In the case of *Jamaludin*, the Supreme Court

¹⁶ Article 16 of the Laws of Constitution of Negeri Sembilan.

¹⁷ See also for example Abdul Aziz Bari. 2006. *Pelebagaan Malaysia: Asas-asas dan Masalah*, Kuala Lumpur: Dewan Bahasa dan Pustaka. pp.99-106; Mohd Salleh Abas. 2003. *Prinsip Perlembagaan & Pemerintahan di Malaysia*, Kuala Lumpur: Dewan Bahasa dan Pustaka. pp.38-59; Abdul Aziz Bari. 2003. *Malaysian Constitution: A Critical Introduction*, Kuala Lumpur: The Other Press. pp.43-50.

¹⁸ See Abdul Aziz Bari. 2003. *Malaysian Constitution: A Critical Introduction*, Kuala Lumpur: The Other Press. p.43.

¹⁹ See for example Abdul Aziz Bari. 2006. *Pelebagaan Malaysia: Asas-asas dan Masalah*, Kuala Lumpur: Dewan Bahasa dan Pustaka. p.93-96; H P Lee. 1995. *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press. pp.93-96; Andrew Harding. 1996. *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd. pp.61-63.

²⁰ See for example Kua Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969*, Kuala Lumpur: SUARAM, 2007; Mahathir Mohamad. 1970. *The Malay Dilemma*, Singapore: Times Books International.

clearly upheld the freedom of religion of a Christian who was detained under the Internal Security Act. However, in the case of *Hjh Halimatussaadiah*²¹, the Supreme Court easily followed an executive direction which prevented the wearing of veil (“*pardah*”). Also in the case of *Meor Atiqurrahman*,²² where the Federal Court reminded us that freedom of religion is not absolute and it can be restricted by school regulations. It is quite difficult for us to derive principles from these inconsistent cases. However it is to be admitted also that in all cases the courts take into account the need of fundamental rights while at the same time acknowledging that fundamental rights are not absolute.

We need to understand local elements in understanding the Constitution. This approach was taken in the case of *Lina Joy*.²³ The majority decision acknowledges that the position of Islam and the Syariah courts is to be understood by looking at the Federal Constitution and the legal system with the background of the history and the structure of the society in pre and post independence. The point on fundamental rights cannot be argued without taking into consideration these backgrounds because fundamental rights in the Federal Constitution were not enacted in vacuum.

The Universal Declaration of Human Rights

Aside from the indigenous element, reference is also made to the Universal Declaration of Human Rights 1948 (UNDHR) in interpreting the Constitution. This reference is strengthened by the legislating of the Malaysian Human Rights Commission Act 1999. This Act states that reference is to be given to the Universal Declaration of Human Rights 1948. However it is to be reminded that such direction is qualified by stating that it is in so far as the declaration is not inconsistent with the Federal Constitution. In other words, reference and attention is given to the international instrument in so far as it is not contrary to local provisions.

²¹ *Hjh Halimatussaadiah bin Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61, MA.

²² *Meor Atiqurrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors* [2006] 4 MLJ 605.

²³ *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119; [2005] 6 MLJ 193, MR; [2007] 3 CLJ 557, FC.

This issue arises in *Mohamad Ezam bin Mohd Noor*.²⁴ The lawyer for the applicant invited the judge to take into consideration the said Declaration in interpreting the Federal Constitution. The court did not show a high inclination to refer to the international instrument because the provision in the Federal Constitution is already clear.²⁵

The Universal Declaration, as stated in the Malaysian Human Rights Commission Act 1999, can be given attention to. However, as stated by the same Act, such attention or reference is in so far as to matters that are not contrary to the Federal Constitution itself.

Organisation and Research

What has been discussed above is concerning the understanding of the constitution through its interpretation. In this section, the writer wishes to bring forth several structural and organizational suggestions that can bring about a better understanding of the constitution. There are suggestions towards the establishment of a Constitutional Court. Such establishment is to ensure judges that interpret the constitution are really capable and experienced in the matter. In the event we accept the importance of interpreting the constitution in order to achieve the aim of the constitution, we need to ensure that the constitution is interpreted by qualified persons with specialization in constitutional matters. At present, issues on the constitution can be interpreted by the High Court, the Court of Appeal and the Federal Court. Certain constitutional questions are limited to the jurisdiction of the Federal Court such as any dispute as to the legislative competency. A Constitutional Court could give the desired specialization.

The aim of the Constitutional Court is the resolution of disputes by persons specializing in the constitution. If the Constitutional Court is not established, the second way is to establish a special constitutional division. Such specialization has been practiced by the High Court in having special

²⁴ *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449, FC.

²⁵ *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449, FC, p. 514. See also *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557, FC, pp. 586-587, where the majority decision was not ready to refer to the said declaration.

criminal and commercial divisions for example. Recently also the Islamic banking division has been established. Therefore, specialization is a matter that has to be considered in order to increase the quality of constitutional interpretation.

Besides improving the court's structure, the structure of external support also needs to be deliberated. So far there is no constitutional research centre. Such a centre could support judicial interpretive works by conducting in-depth research on the constitution. The result of such research and activity of the centre could provide deeper understanding of the constitution. Such a centre could be established by any university or any other body.

CONCLUSION

After 50 years, we have to re-examine our approach in understanding the Federal Constitution. We may need to accept the Federal Constitution as an indigenous product and should therefore be understood by accepting the indigenous elements. This is a view that we need to adopt and could be said as the needed paradigm shift. With this, the Federal Constitution would not be deemed as foreign, where if interpreted would give rise to an understanding that is inconsistent with the local structure and thinking. Certainly we have to admit that there can be advantages in learning and accepting external elements which are consistent to our needs and requirements. However, we must not forget to put the Federal Constitution in the Malaysian context.

The understanding of the Federal Constitution, as with other disciplines, needs specialization. This does not only refer to legal practitioners and academics but also to judges and the courts themselves. Support groups and organizations which could do research and lead the development of the constitution also need to be established in order to solidify the understanding of the constitution.

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