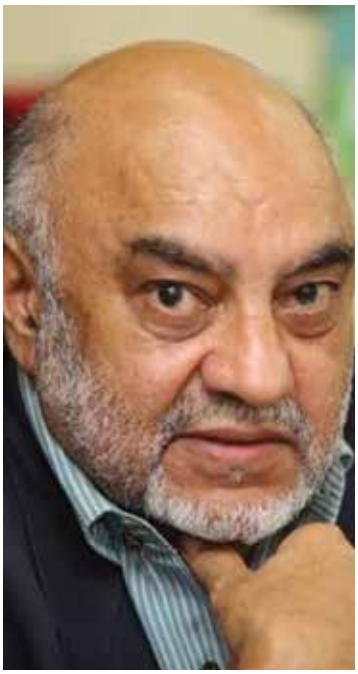
Our Constitution & Malaysia My Only Home[1]

Gurdial Singh Nijar

Introduction



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Most of us recall with fond memories the celebrations attendant upon that day when we had our very own tryst with destiny — 31 August 1957, Merdeka Day. From towns to villages, there was unabashed merriment. In my hometown of Muar (then Bandar Maharani), where Parameswara is reported to have rested en route to Malacca from Singapore — the Muar Padang was overflowing with all the townsfolk and those from the surrounding villages immersed in a plethora of offerings. In one distinct corner was the joget stage. Jaguh kampungs picked from among the damsels arraigned in a neat row of seats, handed them a pre-paid coupon, and demonstrated their dance prowess. The crowd watched in awe and wonderment, and applauded appreciatively from time to time. Nary a complaint: no burqa, haram, and the like. I was 11 years young then.
Lost to most of us, amidst all this, was that we were, on that day, bequeathed the founding document upon which our society was, and will continue to be, shaped: the Federal Constitution. Not many cared to scrutinise its contents — some 180 Articles. We assumed, quite rightly, that we were now a free and independent nation where all had a place under the Malaysian sun. And that we would grow together — both at work and play. The rest we left to the hands of good men (and women) — politicians, administrators, our teachers, our parents, our mentors.

We were not wrong. For this founding document established a set of binding principles. A commitment to democracy, to liberty, to the rule of law and to the self-evident equality of all men and women of whatever race or creed — with an outreach to those less advantaged.

The natural expectation was that in the ripeness of time — appropriate development would advance and knit together even more cohesively, the social, cultural and economic fabric that bound us each to one another and to the wider society. Life for all would elevate from great to greater!

After all in time, this age has become more and more exciting. Technological advances have liberated us in ways unimaginable. Communicating with others, transferring money, even the mundane paying of bills, and most significantly of all — accessing any information from anywhere in the world. All accomplished with a swift press of a button. Like the waving of a magician's wand!

Then there is a step up from biotechnology to modern biotechnology — where life-forms can be engineered and owned by big corporations; to nanotechnology — where life forms can be reduced to one-billionth of a metre. Mother's milk created in the mammary glands of sheep. Medicines like insulin produced from the barks of trees. Indeed, even the creation of life not in the way the Almighty ordained — but through artificial asexual reproduction seems attainable, if we believe specialised scientific journals.

Present Day Reality

Zoom to the present day Malaysia — expanded from the original Malaya. The critically integral provisions of the founding document are being questioned, even debased. There are of course some uplifting facets. But like any good doctor will tell you, diagnosis of that which is ailing is a prelude to finding a cure.

Let's examine some of these issues.

Racial and Religious Discord

Discords exist at various personal as well as societal levels. The diversity of views is to be celebrated, not berated. But not when speech and deeds turn antagonistic and threaten to tear asunder societies and communities, indeed the very fabric that holds us and this country together. Is this not the staple fare churned out daily, routinely by our political elites and promptly highlighted by the media? Then the imperative is to staunch their growth. It is for you, at least in your private wisdom, to assess whether the powers-that-be are doing so; or quite simply, turning a blind eye.

The mere mouthing of slogans of unity and acronyms is meaningless unless accompanied by action against those who persistently threaten to wreck social, ethnic and religious harmony.

The present debate over the pending Bill for Act 355 may serve as a salutary lesson. The enactment some time ago by the Kelantan Parti Islam Se-Malaysia ("PAS") Government of a law that is referred to as hudud was decried by the present Government as violating the Constitution. It was right because the power of the State Assembly to make laws is confined to limited topics stipulated in Schedule 9 List II, item 1. This does not include crimes against public order which are in the exclusive jurisdiction of the Federal Government. Now the PAS proponents have renewed their resolve and proposed a private member's bill with the tacit support of the ruling party eager to improve its electoral fortunes. This is aimed at overcoming the constitutional strictures. Sadly, oblivious of the hurt to a harmonious body politic — the edifice of our Constitution. And a betrayal of the promise by our founding fathers of a secular country with freedom guaranteed for all religions.

Although the term 'secular' does not appear in the Constitution, historical evidence in the Reid Commission — which drew up this document — states that this country was meant to be secular. Its Working Paper states: "There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State." In Che Omar Che Soh v PP [1988] 2 MLJ 55, our apex court ruled that Islam while declared the religion of the Federation, "it is not the basic law of the land".

Some challenge this view saying Islam predated the advent of colonial rule. But what of the myriad competing streams of legal pluralism that existed before then? The Neolithic 2500 BC and 1500 were animistic. Add to this the Mesolithic (including the Senois, the Bataks of Sumatra, Dayaks of Borneo and the proto and deutero Malays with their own traditions and beliefs. And the advent of Hinduism from India and Buddhism from China between the 1st to the 13th century. Before 1963 native customs were the order of the day in Sabah and Sarawak. Islam came to Malacca via trade routes only in the 14th century from parts of Arabia, India and China; and only gained a footing in Malaya in the 15th century. For this reason, undoubtedly, the founding document embeds firmly its secular status. Muslim scholars acknowledge that the fact that the State is involved in religious activities does not change this; activities such as building mosques and madrasahs, organising zakat collections and disbursements, taking charge of the Haj and maintaining a prominent role in the administration of Islamic affairs. They attribute this to the religion's intimate link to Malay identity. "The religion is in fact the principal identity marker of the Malays. Because of this Islam is projected in the Constitution as part of the nation's identity": The Sun 20 February 2017 (12).

But as is evident the Constitution does not state that the government and administration are based upon the Koran and Sunnah. Or that syariah is the law of the land. There is no special role accorded to the ulama in determining public policies. Article 4(1) of the Constitution states its role as the supreme law of the land, not syariah law. "Law" as defined in Article 160(2) of the Constitution does not include syariah. Instead it includes written law, the common law and any customs. Article 3(4) dealing with religion says that this article does not derogate from any other provision of the Constitution. The mandatory death sentence in Che Som's case could not be invalidated because it was allegedly un-Islamic, ruled the Federal Court. Syariah authorities are appointed by state governments in the exercise of their temporal jurisdiction.

Islam is not a prerequisite for citizenship or for occupying any post in government, including that of the Prime Minister. But there have been inroads. Article 121(1A) established Islamic Courts which jurisdiction is protected. After the amendment in 10 June 1988 their status was equated to that of civil courts. This change has given rise to contestations of jurisdiction[2]. First, who has the power to determine what is within or without the jurisdiction of syariah courts; second, which court to turn to if one party to a dispute is a Muslim and the other not; third, where the case should go if the issue is mixed and involves elements of both syariah and civil law; fourth, what if a syariah-related law involves a constitutional law question about fundamental rights or federal-state division of power?[3]

The civil courts seem to disclaim jurisdiction whenever there is a hint of an Islamic religious issue involved. It is in this context that law A355 is viewed with some anxiety by a pluralistic society. The Government is on the verge of legislating on this issue — adding to the fear that this could well be the slippery slope that will diminish, if not eclipse, the secular status of the Constitution.

Repressive Laws and Actions

Selective prosecutions exacerbate the problem. In this context, the rampant use of obnoxious laws like the Sedition Act against our young and other activists — a colonial relic law enacted to punish freedom fighters like Gandhi, Samad Ismail and Ahmad Boestamam, all suffered long imprisonment terms in British-administered jails; the resurrection of the Internal Security Act 1960 through innovative laws like Security Offences (Special Measures) Act 2012 ("SOSMA") which provides for no bail and imprisonment pending the conclusion of appeals — even after the initial court sets you free; and subjecting women and children to be shackled with monitors. And the use, or rather abuse, of immigration laws by imposing willy-nilly travel bans on citizens; and indefinite incarceration of non-citizens. The constitutionality of each of these executive acts and omissions are being challenged in our courts. On the basis of a violation of articles that guarantee our fundamental freedoms. They militate against the basic structure and undermine the democratic, secular and equality ethos of our Constitution.

Executive overreach is at an all-time high. For example it is suggested that as regards many of the executive acts, there can be no recourse to the courts or even to natural justice. A similar arrogant claim in the case of US President Trump's travel ban was rebuked last week by California's 9th Circuit Court of Appeal. The three-member panel said:

"There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy. It is beyond question, that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action."

And so with us. A Privy Council decision on a parallel provision of our Constitution declared that there are some fundamental precepts that form the basic construct of the Constitution and cannot be violated: Ong Ah Chuan v PP [981] 1 MLJ 64 (Privy Council).

The Role of the Judiciary

Which bring me to the role of the judiciary. Its independent status is recognised in the Constitution. It is one of the three key institutional pillars of our country. The two others are, of course, the legislature (Parliament) and the Executive (the government). This entrenches the doctrine of the separation of powers firmly. The judiciary's pivotal role in the context of public law is to hold an even balance when there is a contestation between the citizenry and the executive — that is, when there is a complaint that the government has abused its power and violated the rights of the citizenry as guaranteed by the Constitution.

Recently our apex Federal Court over-ruled an earlier Federal Court decision that struck down any law that made unreasonable restrictions on fundamental rights permitted by the Constitution. In effect, it abdicated its role as a third pillar of government to check overzealous legislative act, especially in the context of a ruling party dominating our Parliament. This legal positivism carried to the extreme ignores the earlier established jurisprudence affirming the supremacy of the Constitution. As a former Head of the Judiciary, Lord President Tun Suffian said:

"The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and the State legislatures in Malaysia is limited by the Constitution and they cannot make any law they please":
Ah Thian v The Government of Malaysia [1976] 2 MLJ 112.

This is compounded by the failure to apply in some critical cases a dynamic approach so critical when interpreting the provisions of a 1957 Constitution in the context of evolving societal needs and demands. Only this can assure that the Constitution stays relevant and compatible with the fundamental values of modern day Malaysia. Failing which respect for the judiciary can be undermined, as warned a legal luminary, the late Justice Eusoffe Abdoolcader in a landmark case on the right to bring an action:

" ... with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, (the law's pace) must strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels."

Mercifully, more and more judgments especially of the Court of Appeal are beginning to recognise this key role in this context.

The Environment

The environment is yet another area of judicial focus. Recently the outgoing Chief Justice proposed that we amend the Constitution to entrench the right to a clean and healthy environment. While this is laudable, it is significant to note that the right to a clean and healthy environment was laid down as long ago as 1997 by the Court of Appeal in Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan. The Court interpreted the fundamental right to life in Article 5 of the Constitution to incorporate all facets that are an integral part of life itself and those matters which form the quality of life. This generous interpretation extended the constitutional guarantee to a healthy environment — for only with that can people then enjoy life meaningfully.
Significantly, this outcome was achieved when there was no express constitutional or statutory provision on the right to a healthy environment. As the definition of "law" in our Constitution includes the common law pronounced by court decisions, the decision — derived from an expansive and dynamic interpretation of the Constitution — is a binding decision that has the force of law. This view was reaffirmed in the later Bakun Dam case.

But this development —incorporating the right to a clean environment as a constitutional imperative — was reversed by a subsequent Federal Court decision Sugumaran [2002] 4 CLJ 105 — on rather vacuous grounds.

Our appellate courts' earlier pro-environment pronouncements were anchored on judicially charted waters. The highest courts in other jurisdictions — India, Australia, Canada and many others — have established such rights from sparse, or no, explicit provisions. Our courts have been rather reticent to take on a proactive role. Sans an enlightened judiciary any provision of the Constitution can be interpreted in less than a benign manner.

Including the Rukunegara

In similar vein, several non-governmental organisations ("NGOs") clamour for the inclusion of the tenets of the Rukunegara as a preamble to our Constitution.

Again, while this may enhance the protection of fundamental rights, preserve the integrity of institutions and keep unbridled power in check, the final check may be an enlightened judiciary. It is noteworthy that from the Directive Principles of the Indian Constitution — encapsulated broadly in our Rukunegara — the Indian courts have birthed a plethora of rights. This, despite a cautionary provision that these Directive Principles are not binding in the interpretation of the Constitution: Article 37, Indian Constitution. Again, the magic interpretative wand of an enlightened judiciary breathed contemporary life into the Constitution.

Other issues of critical importance relating to the environment need to be addressed. Already we are facing the haze. Air pollution is killing people. In India it has reached 1.1 million persons every year, according to the medical journal Lancet based on 2010 figures. In China it is 2 million people. This cannot be ignored. Measures are not being adequately thought of and implemented. The issue is a lingering scourge.

The Lancet study states that the causes of air pollution and climate change are inextricably linked. Hence climate change is an issue that can no longer be viewed as a conversation piece for intellectual parlours. We see it manifested — and reported routinely. Typhoon Megi hits Taiwan, tsunamis, phenomenal storms and monsoons. Nearer home, "a high tide phenomenon with massive waves and strong winds hit the west coast of the peninsula recently in Nov" — coinciding with the floods brought with the northwest monsoon.

Noam Chomsky, the world renowned linguist and Professor Emeritus at the prestigious Massachusetts of Technology, identifies climate change as one of the two major threats facing the world today (the other is nuclear war). Scientific journals attest to the fact that the rate of global warming today is far faster, maybe a hundred or more times as fast as any moderately comparable period that can be estimated in the geological record.

Glaciers are melting much faster than predicted. The Arctic mass is melting; the Himalayan glaciers are melting. Undermining water supply and upsetting agricultural patterns and threatening food security for huge areas in Asia. The sea level is rising threatening millions who live on coastal lands as well as on the plains as in Bangladesh. Severe droughts have claimed, in India, three-digit million lives.

Species are being killed at the level of the so-called fifth extinction — when 75% of the world's species disappeared after five mass extinctions. Sixty-five million years ago, an asteroid hit the earth, with catastrophic consequences. It ended the age of the dinosaurs. It opened the way for small mammals to develop, ultimately evolve. Finally, the evolution to Homo Sapiens.
But we, the evolved Homo Sapiens, are acting in the same way as the asteroid did. To bring about the sixth extinction — as alluded to by Kolbert, a prize-winning New York journalist in her book on the environment, "The Sixth Extinction: An Unnatural History". The reality is that climate change is actually part of an even bigger phenomenon: the many ways humans are changing the planet. Are we not, the successful species, harnessing the qualities that make us successful — smart, creative, mobile, cooperative — to destroy the natural world?

On Corruption

The sine qua non of a functioning democracy is clean uncorrupted governance. Rulers lose their right to govern, indeed even be in politics, if they breach this fundamental ethical incorruptibility norm.

For corruption, the cancer that insidiously nibbles established governance systems and ultimately destroys them irreparably, we in Malaysia are all too familiar with this infliction. It has been lit up for us of late by a thousand spotlights.

Corruption can reach such a proportion whereby those in power, the kleptocrats — bent solely on their own enrichment — drive indignant populations to extremes (such as the Taliban, ISIS, Boko Haram and the like). This may occur, says the 17th century political thinker John Locke in his Second Treatise: "Where an appeal to law, and constituted judges, lies open, but the remedy is denied by a manifest perverting of justice, and the barefaced wresting of the laws to protect or indemnify the violence or injuries of some men or party of men…".

In her book, Thieves of State, Sarah Chayes, an award-winning former NPR correspondent, makes a compelling case that we must confront corruption for it is a cause — not a result — of global instability. We are beginning to see signs of the relationship between instability and corruption in our very own country.

The recent scandals and other cases highlighted through the MCC prosecutions point to a tip of the iceberg of the massive leakages of public coffers. How long can a country sustain these without harm to its economy and society?

Perhaps we should pause to reflect whether corruption is just a matter of legality, or financial irregularity and bribery; or as Arundhati Roy, of the God of Small Things Booker Prize winner asserts — is the currency of a social transaction in an egrgiously unequal society in which power continues to be concentrated in the hands of a smaller and smaller authority.

Elsewhere voters are beginning to register their demand for morality and politics to converge and are sensitive to the misdeeds of politicians, as noted by the New York Times of 11 February 2017, speaking of France.

Conclusion

These then are the many issues that we face at a personal, societal and generational level. We cannot wish them away. For they have become all too significant to ignore. Such issues as the separation of powers; the fundamental architecture of the Constitution (secular versus theoretic); tensions between the rule of law and individual freedoms; the notion of solidarity, unity, nationhood and identity; and the place of minorities, especially religious ones.

Fundamentally, what should we do — to reclaim the lost space; to restore and regenerate eroded values and wounded rights? In short, to ensure our founding document, and the principles embedded within, are alive enough, and honourable enough, to be worth fighting for. For other than to restore principles and honour and our past glory years — for ourselves, our children and the progeny thereafter — there may be little else worth fighting for. This requires careful considerable thought and action.

After all, unlike those foreigners partaking the 'Malaysia My Second Home' programme, for us Malaysia is our only home!

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[1] *Talk at EKTA function, Royal Selangor Club KL, 21 February 2017.*

[2] *Identified in Latifah v Rosmawati [2007] 5 MLJ 101 (FC).*

[3] *See further on this: Shad Faruqi, Document of Destiny, 2008, KL: Star Publications, pp. 128–130.*