08/01/2000

Need for enlightened approach in interpreting Constitution

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I REFER to the article entitled "Dr Mahathir's advice on summoning Parliament was constitutional" by Prof Dr Shad S. Faruqi (NST, Dec 25).

Although looking at it from a different angle, I am of the view that the 10th Parliament sitting on Dec 20 was legal and proper. But there are several points that merit scrutiny in Shad's comment.

First, I agree with him on the role and functions of a caretaker government. However, this must be seen in the light of the obligation of a head of state in the Westminster system, in this case the Yang di-Pertuan Agong, to appoint a government (i.e. the Prime Minister) to advise him, as soon as possible.

The Constitution does not specify the time limit. However, given that it has put an obligation on him to act on advice, the appointment must not be delayed.

Article 43 (1) states: "The Yang di-Pertuan Agong shall appoint a Jemaah Menteri (Cabinet of Ministers) to advise him in the exercise of his functions." It is standard practice in all parliamentary democracies, particularly in the United Kingdom, that a government be appointed immediately after an election.

As a matter of fact, the appointment was only made 11 days after the general election results were announced on Nov 30. If made earlier, it would have avoided all the fuss and confusion.

Second, was there an appointment of a caretaker government in the first place? Or was it mere assumption? Article 43(2) seems to suggest that it is to be made formally. It reads, inter alia, that "... if an appointment is made while Parliament is dissolved ...".

It is interesting that while both sides argued about the rights and existence of the so-called caretaker government, nobody seemed to pay attention to an equally important point: whether the advice was in fact tendered and, at what point?

The third point concerns the quick re-convening of the Dewan Rakyat to get approval for the money to run the administration. I do not think this is a good reason, particularly when it was the Government itself which had set the motion to abandon the process to approve the Budget. Such a difficulty would have been avoided if the Yang di-Pertuan Agong had rejected the request to dissolve the Dewan Rakyat, as he is empowered to do under Article 40(2).

The Reid Commission had recommended that the head of state be justified in turning down the request for dissolution if such was not in the national interest. It is submitted that dissolving the House while it was debating the Budget fell within the category.

Furthermore, the election could have been held anytime before June 2000. It could be that the reason for the constitutional provision to refuse a request for dissolution was to avoid personal or party interests from coming into play.

I do not think it is legitimate, given the circumstances and the very foundation for the Emergency provision under Article 150, to use that provision. The Government itself has not used it, despite suggestions in the past. Legality per se is not a good argument in constitutional law. One must not lose sight of its impact on the entire constitutional structure. Given the arguments, there seems to be no justification to use Article 150.

Many people think that advice of the Cabinet is the necessary condition for the summoning of Parliament. This is due to the misconception that the Yang di-Pertuan Agong must act on the advice of the Cabinet at all times. This in turn stems from a misconception of the role of the office, particularly its value as a check and balance mechanism in the Constitution.

The debate was the result of the approach that treats the constitutional document like an ordinary contract document and interprets it literally. In certain circumstances, such an approach results in absurdity.

The more viable approach is to divide the King's powers into three - discretionary, functional and those that require advice. Apparently there are routine functions of government which are done in the name of the Yang di-Pertuan Agong, e.g. the issuing of passports. These powers are found in all branches; executive, legislative and judiciary.

Also, the duty to act on advice is only relevant when it comes to executive actions. Summoning Parliament does not fall under that category. One should remember the doctrine of separation of powers. It is undesirable, even dangerous, to insist on that condition: what if it involves a motion against the Government itself? This point reveals the absurdity of the view that asserts Cabinet advice in the summoning of the House.

It may be added that relying on the general provision of acting on advice, i.e. Article 40 (1) and (1A), which has clearly been put under the "executive" part, would effectively render the entire provision pertaining to that, namely Article 55, useless and insignificant. This is not to suggest that the Yang di-Pertuan Agong act personally; e.g. to dissolve the House at will and the like. That is contrary to the notion of constitutional monarchy.

Stipulating advice could also lead to another difficulty: what if the Government refuses to advise the summoning even though the 120-day limit laid down by the Constitution has passed? Or that it deliberately prevents the sitting even after it has exceeded the maximum six-month recess allowed by the Constitution? One could also argue that the Constitution would not have expressly stipulated these limits if all depended on the advice of the Cabinet.

In developed democracies, these are all part of the routine done by the bureaucracy in the name of the state. In the UK, the Government and the Opposition would discuss it and reach an agreement which would be treated as consensus and then convention.

But whatever it is, the recent controversies have highlighted some of the gaps in the constitutional structure, and call for a more enlightened and viable approach in understanding and interpreting the Constitution.

It is clear there is a need to review the way we look at the Constitution, lest it ends up in difficulties and absurdities. One may argue that the law needs certainty. However that is not the essence of the law. And that is why we need lawyers who must constantly review the way the Constitution is interpreted and developed. Otherwise they would be irrelevant.