

## **M'sian constitution: Supreme law of the land?**

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The federal constitution, hereinafter FC, is a Janus-faced political compact with the ramifications of an adhesion contract since the time of its birth till today.

Some basic rights for the people are mentioned, but the major provisions in it are written to justify the existence of the three organs of state in the Lockean mindset with a Benthamite twist.

The record shows that no Malayan participated in the Reid Commission which was set up at the behest of the British Empire with five jurists from India, Pakistan, England and Australia charged with the task of crafting, drafting and producing a written supreme law for Malaya.

England, it seems, never had a written constitution. But it wanted one for Malaya. Mind you, the British had not even solved their own Irish problems, but they were trying to manage the Malayan affairs of state.

While reading law, we were taught that England has no written constitution, per se. Most of us did not argue as we concentrated in wanting to pass examinations.

But the Magna Carta of 1215 was a written contract between the King of England and his subjects. Our law textbooks made no mention of it.

I remember fielding the question, but I was told politely that we had to get on with the tutorial, and that there was another time and place for that question. I have never quit asking and answering that question all these years.

In America today, for example, the US constitution, is seldom invoked except when it suits a political master. One sitting US Supreme Court judge constantly reminds the lawyers who argue before the high court that the US Constitution is not a "parchment guarantee". He is in the minority.

A written constitution is a concrete document aimed at assuring the citizenry that there is a guaranteed irrevocable standard. It is not just a parchment guarantee.

In Malaysia, the constitution is what the attorney-general, or the presiding judge of a case, says it is provided it has been cleared by the Putrajaya puppeteers. In all fairness to my brethren at the Bench, there have been some exceptional judges in Malaysia.

There are still some actively serving the Bench who hold the reins of the FC with a sure grip quite unfazed by the Putrajaya punters.

Maybe the time has come for the Malaysian law fraternity to brief and argue cases not only based solely upon the facts of the instant case, the applicable statute, and the decisions of past judgments (the doctrine of stare decisis), but with the fortitude,

certainty, consistency, clarity, and power of the FC, together with the applicable principles and philosophy of law, maxims, doctrines, and other principles of jurisprudence.

A totally holistic jurisprudential argument, oral and written, will make the judges aware that the law is a changing growth and not a formless code.

It will beget a superior Bar and an equally superior Bench. The Malaysian judiciary must start believing that it is a co-equal branch of government in a Westminster system of shared powers between itself, the legislature and the executive under the provisions of the FC.

The 'Kempen PerlembagaanKu' was launched by the Bar Council's Constitutional Law Committee in 2009 to spread an awareness of what the FC means and what it is all about.

The aftermath of GE12 in 2008 may have inspired this campaign, nevertheless, the citizenry has a right to know what their constitution, as the supreme law of the land, assures and guarantees them free from an overreaching and unlimited government.

I believe the Bar Council had a serious plan to show and tell the people of Malaysia how the government of Malaysia is violating their rights on a daily basis. Maybe the courageous laudable lady of lasting legible law, Ambiga Sreenivasan, was the midwife when this baby was born.

There are some erudite epigones in Malaysia who believe that the FC is in theory the supreme law of the land. That is an appalling view to adopt. They probably believe it is not a pragmatic document. Maybe they feel there is no need to offend their sensitive political masters.

According to Article 4, the FC is the supreme law of Malaysia. Interestingly, Article 4(1) stipulates that "any law passed after Merdeka Day which is inconsistent with this constitution shall, to the extent of the inconsistency, be void."

I call this the Inconsistency Clause. Keep in mind that no Malayan was involved when the FC was undergoing its very own peculiar birth pangs and pain.

It is obvious and evident that the Reid Commission's five jurists did not address the occasion when a pre-Merdeka law may be repealed, or amended, by a future legislature to the sway and swing of political winds generated by a powerful executive.

Our judges should gravitate toward this constitutional solution to any politically motivated constitutional amendment, and declare that act of Parliament as a violation of Article 4(4).

Why have a written supreme law with a supreme legislature threatening a head-on collision with its own power to make or unmake any law? But the Inconsistency Clause of Article 4 (1) is supposed to shackle a supreme legislature.

Interestingly Article 4(4) gives a Federal Court judge the power of judicial review in tandem with Article 162(6). But do our judges use this authority, if not their right, to exercise a judicial power vested in them by an implied reading of Article 121? That judicial power was the sine qua non of the Malaysian judiciary prior to the 1988 judicial juggling and jousting when the judges' jugulars were exposed and threatened.

Our FC stands in mute testimony to the vagaries and uncertainties of parliamentary enactments, coupled with a good measure of mockery by the political masters. Instead of being revered, respected, and regarded as the supreme law of the land, the FC is generally unused, or wantonly abused, if not recklessly misused depending on who is standing in the dock.

Constitutional amendments over the years since Merdeka have not etched any advantage or benefit for the rakyat although it has fattened the hopes and aspirations of the occupants of Putrajaya.

I can only hope that the Agong takes the FC's Article 39 seriously as the safe haven and abode of executive authority because the prime minister, in whom all unconstitutional executive powers are vested, stands on shaky ground under Article 43(4) if he is unable to command the confidence of the majority of the members of the Dewan Rakyat.

Perhaps GE13 will change all that.