

Constitutional convulsions since 1957

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A CONSTITUTION is the repository of a nation's dreams, demands, values and vulnerabilities. Crises, conflicts and convulsions that are inherent in the life of a nation invariably leave indelible marks on the nation's basic law because a Constitution is a mirror of the nation's political, social and economic milieu.

Over the last 50 years, Malaya and Malaysia have been buffeted by many storms. On the positive side, it can be said that it is no mean achievement that the Merdeka Constitution has survived many momentous events that could have torn other nations asunder.

When Malaya sought to expand into Malaysia in 1963, there was determined opposition internationally from the Philippines and Indonesia and domestically from the state of Kelantan. The Philippines invoked international law to lay a claim to Sabah. Indonesia resorted to an undeclared war. The state of Kelantan moved the High Court to try to block the Malaysia Day Agreement on the ground that the consent of the Ruler of Kelantan had not been obtained to the admission of Sabah, Sarawak and Singapore.

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In 1969, racial riots raked the Klang Valley. Emergency was declared. The Constitution and democracy were suspended for 22 months and the nation was ruled by a National Operations Council. Significant, some say radical, adjustments were made to the nation's legal, social, economic and educational arrangements. A vigorous programme of social restructuring through the New Economic Policy was ushered in in the wake of the riots.

Since 1969, ethnic quotas and considerations have permeated every aspect of life. The "Malaynisation" of most public services is quite marked and the government's efforts to recruit more non-Malays into the police and armed forces have had limited success.

Emergency

On the political front, there have been four official proclamations of emergency - a national emergency in 1964 because of the conflict with Indonesia; another national emergency in 1969 because of

racial riots in Kuala Lumpur and its suburbs; emergency in the state of Sarawak in 1966 because of the political deadlock among various factions in the state; and emergency in 1977 in Kelantan because of the vote of no-confidence by the state assembly in their *mentri besar*.

It is noteworthy that the emergency proclamations of 1964 and 1969 have not yet been withdrawn. Officially, the country is still in a state of national emergency and has been in this state for the last 43 years!

On the electoral front, the Alliance has expanded into the Barisan Nasional. The remarkable formula for sharing power among the races has worked successfully since 1955. But race-based politics now competes with religion-inspired political and social ideas.

A debate is raging whether the country is an Islamic or a secular state.

Religious extremism is on the rise. This has manifested itself in many ways: the Kerling attacks, the Memali incident, attacks on an armory, vigorous moral policing, detention of apostates, prosecution of deviants, ex-communication of thousands who do not observe the approved version of the faith, and constant branding by religious zealots of others as *murtads* (apostates) and *kafirs* (infidels). The debate about whether the country is a secular or Islamic state has raised political temperatures.

Human Rights

On the human rights front, a civil society is slowly but surely emerging.

A Human Rights Commission (Suhakam) has been established and though its reports are habitually ignored by Parliament, it is helping to create positive dialogue on human rights issues.

Gender equality has received a boost because of an amendment to Article 8 of the Constitution. Many crippling legislative controls on the media are now losing their sting because of the triumphs of technology in areas like the Internet.

But other laws conferring nearly unfettered discretion on the executive to restrict personal liberty, freedom of speech and right to assembly and association remain in place.

The constitutional amendment process has been used to augment governmental powers. Fifty-four Amendment Acts covering nearly 700 alterations to the basic charter have been accomplished. The most controversial amendments have related to the curtailment of procedural rights of preventive detainees and arrestees; withdrawal of the principle of *jus soli* in citizenship cases; and the

application of sedition law to parliamentary proceedings.

The autonomy of the Election Commission in the matter of constituency delineation has been compromised. The statutory guideline on determining weightage in favour of rural districts has been removed. Reid had recommended a maximum variation of up to 15% of the electors.

Royalty's position

Parliamentary controls over emergency powers have been removed. Extension of the Yang di-Pertuan Agong's power to promulgate Emergency Ordinances whenever the two Houses are not in session concurrently means that, during an emergency the country operates more like a diarchy than a country with separation of powers.

The two Houses of Parliament rarely sit concurrently. If there is an emergency in operation, even if one House is in session, the Yang di-Pertuan Agong can seize the legislative initiative.

The royal houses suffered serious setbacks in the 80s and 90s. The Yang di-Pertuan Agong and the Rulers can now be bypassed in the legislative process. Royal immunities were withdrawn in 1993. The initial amendment of January 1993 was vetoed by the Conference of Rulers and a watered down draft of March 1993 barely obtained the approval of the Conference.

Since the early eighties, Islamisation has proceeded at a fairly vigorous pace. There has been an upsurge in opposition politics. Regional sentiment has increased in several states. The ruling party, Umno, suffered serious internecine disputes twice in the last two decades.

In the eighties, the Lord President and five other Supreme Court judges were suspended. The Lord President and two judges were dismissed. In the decade that followed, the judiciary suffered a terrible loss of reputation. A terrible judicial winter descended on the nation. The ice is only now beginning to thaw.

The federal state division of power is also facing pressures for change in such areas as water management.

Islamisation

Due to the growing sentiment towards an Islamic state, state assemblies are enacting more and more legislation on Islamic matters. Some of the state laws trespass both on federal jurisdiction and on the rights of citizens under Part II of the Constitution.

Syariah courts were till June 10, 1988 regarded as subordinate to the High Court. But by Act A704 it was provided

that the High Courts and the inferior courts referred to in Article 121(1) "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts".

This watered amendment catapulted the Islamic religious courts to almost equal constitutional status with the civil courts.

Sadly, the amendment did not clarify a number of things. First, who has the power to determine whether a matter is within or outside the jurisdiction of the Syariah courts? Second, where should a case go if one party is a Muslim and the other a non-Muslim? Third, what should happen if an issue is mixed and involves elements of both syariah and civil law?

Fourth, what if a syariah-related law or decision involves a grave constitutional law question about fundamental rights or federal-state division of power? Fifth, what if the remedy being prayed for is unavailable in the syariah courts?

Since 1988, the civil courts have generally shown great reluctance and restraint in any matter where there is the slightest whiff of an Islamic religious issue. Barring some exceptions, e.g. Federal judge Datuk Abdul Hamid's recent decision in the case of Latifah Mat Zin, civil judges have generally hidden behind Article 121(1A) to give way to the syariah courts and to adroitly evade or avoid constitutional issues.

In any system with legal pluralism, overlaps are bound to occur and jurisdictional conflicts are unavoidable. The conflicts can be resolved either through judicial interpretation or through legislative guidance.

The judiciary has singularly failed in this area. A legislative initiative is, therefore, necessary to clarify issues arising under Article 121(1A).

All in all, however, it can be said that the Constitution has survived these momentous events. By far and large, constitutional processes guided these crises. But it is also arguable that many parts of the Constitution have largely remained at the outskirts of society. Many of its gilt-edged provisions have not yet become the chart and compass, the sail and anchor of the nation's endeavours.

In the decades ahead, the Constitution will have to accommodate the incoming tides of globalisation and Islamisation.

There is every reason to believe that the spirit of tolerance, moderation and compromise that animated the drafting of the basic charter in 1957 will be summoned again and will prevail.

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