

'Only Parliament can rewrite Constitution'
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LAWMAKERS' PREROGATIVE: It is not for the courts to change highest law, says former CJ

OUR Constitution is ours. It was drafted to suit the circumstances in our country, the historical background, the political reality, the racial compositions, the social, educational and economic situation of the people. We may be different and we have done things our way.

For example, what do we do with the nine Rulers after the formation of the federation? We cannot have nine kings on the throne at the same time. To pick one and discard the rest forever, would not be fair. So we allowed them to choose one at a time among themselves to reign for five years. We are the only country in the world to have such a system and it works.

In some countries, when there is general dissatisfaction with the royalty, they would either be deposed or even assassinated. In Malaysia, we amended the Constitution and created a Special Court to try them in accordance with law. I presided the first full trial in that court where the defendant was a reigning ruler of a state and former Yang di-Pertuan Agong. And, what is important is that the judgment which turned out to be against him, was complied with. Show me one country in this world where such a thing happens.

Unfortunately, Malaysians always have the "imported goods are better" mentality. When they hear that other countries have Constitutional Courts, they also want a Constitutional Court here. They don't realise that Constitutional Court is a by-product of the Continental System and is not needed in the common law system. In those countries, Constitutional Courts were established, besides hearing cases involving the interpretation of the Constitution, to hear election petitions and judicial review cases. Our courts are already hearing such cases every day.

Common law countries, including England, United States, Australia, Singapore, New Zealand, Canada, India and others do not see the need to establish a separate a Constitutional Court. I say, we don't need it too. Do not waste taxpayers' money and create more problems.

When talking about equality, we should not merely compare the wording of the Malaysian Constitution with that of the Constitution of United States.

For example, we have such provisions as Article 153 which, on the face of it, looks discriminatory. But, the Indian Constitution has more such provisions. We should realise that, in the US, the settlers, being superior in arms, had wiped out the natives and declared to the world that they are equal.

Talking about freedom and equality, compare the objections that Muslims face to build a mosque in Europe or the US, even before 9/11, with the ease that the followers of other religions enjoy in building temples, churches and gurdwaras here.

I believe that to understand the Constitution one has to know the history and the circumstances that had made it what it is.

We respect the principles of Constitutional interpretation. We respect the universal human values, human rights and obligations. We respect the views of judges from other jurisdictions. But we should not forget our own history and the local circumstances.

Take same-sex marriage, for example. Are we going to declare the law that a marriage must be between a man and a woman unconstitutional on the ground that it contravenes the provision regarding equality before the law or because it restricts individual freedom? Are we not going to consider the fact that Islam is the religion of the Federation, that Islam does not recognise such marriage? Are we not going to consider that all religions followed by Malaysians do not recognise such marriage? Are we not going to consider the public morality of Malaysians?

I do not for one moment say that the Constitution must remain static. Indeed, the Constitution is a living document. But, it is not for the court to rewrite the Constitution under the pretext of interpreting it. That is a matter for the Parliament.

After all, members of Parliament are lawmakers elected by the people. If people, through their votes, indicate that they want changes to the Constitution, Parliament is the proper authority to do it. That is democracy. That is separation of powers. That is rule of law.

Perhaps the most controversial amendment to the Constitution on the subject is the Constitution (Amendment) Act 1971 (Act 30). A new Clause (4) was added to Article 10:

"In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law."

I would like to stress a few points here. First, Part III referred to in the amendment is on citizenship. Secondly, Article 152 not only protects the National Language but also the use, teaching and learning of other languages. Thirdly, Article 153 does not only talk about the special position of the Malays and the natives of Sabah and Sarawak but also about the legitimate interests of other communities.

So, do not think that the restriction is only in respect of the National Language, the special position of the Malays and the natives of Sabah and Sarawak and the Rulers. It also applies to citizenship, the use, teaching and learning of other languages as well as the legitimate interests of other communities. The restriction applies across the board, not one-sided as it is often made out to be.

We should not compare the kind of freedom that we practice in Malaysia with that of in the US or some Western countries.

It is not our religion, culture or upbringing to slander the prophets, not only Muhammad (s.a.w.) but also Isa (a.s.) or anybody for that matter in the name of freedom of speech; peeping on people in their privacy, taking their photographs secretly and publishing them in the name of freedom of the press.

Neither do I subscribe to uncontrolled owning on guns in the name of individual freedom, human right or whatever. On the day I was writing this line, newspapers reported another senseless murder of 26 people including 20 young children at an elementary school in Newtown, Connecticut, by a gunman. If you talk about individual right to own guns, don't those innocent children have a right to live?

We have to balance individual liberty against public safety and interest. To me, public safety and interest must supersede individual liberty. There is no such thing as absolute freedom. There is no right without responsibility. Human beings do not live individually. Even wild animals follow the rules of the herd. Even ants, when in a group, walk in a line, stop and kiss one another as they pass, perhaps a kind of greetings.

It has been proved in the last 55 years that Malaysia has enough to offer to everybody. What is needed is to improve the governance and accountability and eradicate corruption and poverty. But, everyone has to work hard and not merely expect handouts and subsidies. No group should be greedy and think only of its own interest. They should remember the tolerance and compromise that had been practiced in the past. And, politicians should think beyond five years!

Looking back, I am reminded of one Chapter in the Qur'an in which out of the total of 78 verses in it, one verse was repeated 31 times. I am referring to Chapter 55 (Surah Al-Rahman) and the verse is:

"So which of the favours of your Lord would you deny?"

Why does Allah repeat it so many times? Perhaps it shows how ungrateful human beings are and they have to be repeatedly reminded.

The above are excerpts from a speech delivered at the Transformation of Security and Fundamental Rights Legislation Conference on January 14.

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