

**Reclaiming our Federal Constitution - Preserve, Protect and Defend
Inaugural Lecture of the Constitutional Law Lecture Series**

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Assalamu'alaikum warahmatullahi wabarakatuh

Ladies and Gentlemen:

1. Introduction

I'm honoured to be standing before you today. This is my inaugural Inaugural Lecture, and I'd like to thank the hosts Chooi & Company and the Faculty of Law at the University of Malaya for placing their trust in me. Either I am in the wrong profession or there is something wrong with your profession. And I know why the hall is well-populated: most of you are here because you are getting a CPD point, and the remainder are my friends.

In 2014 I was given the privilege of delivering the 3rd Raja Aziz Addruse Memorial Lecture at the International Malaysia Law Conference. Given the long and close relationship between my family and his, I could not pretend that my speech wasn't partly personal. Even though I never properly studied law, my conversations with him throughout the years contributed to my understandings of the workings of the law in Malaysia, and in particular the principle of rule of law. I am glad that his legacy lives on in the work of many young lawyers who are practising now. Unfortunately I could not attend the 4th Lecture as I was travelling, but I gather that Zainah Anwar was superb.

It is clear however that not everyone is subscribing to the principles espoused by the late Raja Aziz, who served as Bar Council President for three terms. For in the newspapers, in the courts, and in social media, there are conflicting understandings of what the law is for, who it serves, and to what extent it can be altered, whether through the process of law-making itself or simply by retrofitting new interpretations. This phenomenon of contesting interpretations is highly visible in our country today. It is a recurring theme in arguments between citizens, and significantly influences the debates happening in Malaysian civil society.

I touched on this in my second speech to legal practitioners at the Kuala Lumpur Regional Centre for Arbitration last year. Then, I spoke of the need to return to the intentions of the founders of our country if we hope to create a consensus about the proper functions of our national institutions, and from there arbitrate, or heal, the nation.

Central to that process must be the Federal Constitution, and so I am glad that my third lecture to your fraternity centres around it. For this evening's lecture, I have let the verbs in its title – given to me some weeks ago by Ira Biswas, Dr Sharon Kaur and Firdaus Husni – to determine my structure. First, I will discuss why we need a constitution, why we need to reclaim ours and then, I shall consider ways in which we can preserve, protect and defend it, before concluding.

But first, to pre-empt those in these secessionist or at least autonomous times I would like to acknowledge that although Malaysia was established in 1963, like in many other countries, constitutional principles and documents have been inherited from its earlier component units. In the case of our Federal Constitution, the constitution of the Federation of Malaya was taken as its basis, and I hope that references to its origins are taken in this light.

2. Constitutions

Why do we need constitutions? Totalitarian states have constitutions and so do democracies – sometimes unwritten. In most cases constitutions were crafted with a purpose: to legitimise leaders, dynasties or, in democracies, institutions that seek to perpetuate and advance certain values.

Some constitutions have preambles that explicitly state their purpose: in the United States the constitution is ordained and established by “We the People, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The preamble of the Indian Constitution specifies a particular form of government – a sovereign socialist secular democratic republic – and lists justice, liberty, equality and fraternity as the goals of the Indian people. The Spanish Constitution's preamble speaks of justice, liberty and security, promoting the progress of culture and the economy, and establishing an advanced democratic society.

The Malaysian Constitution has no preamble, a situation which may have exacerbated our present situation of having to reclaim it. Perhaps one could have been written at Merdeka, the formation of Malaysia or the formulation of the Rukun Negara – which some advocate ought to form our preamble.

At IDEAS we use Tunku Abdul Rahman's speech at the Merdeka Proclamation as a *de facto* preamble, in which he said that: "The Federal Constitution is made to safeguard the rights and prerogatives of Their Highnesses the Rulers and the fundamental rights and liberties of the people and to provide for the peaceful and orderly advancement of the Persekutuan Tanah Melayu as a constitutional monarchy based on Parliamentary democracy", which "shall be for ever a sovereign democratic and independent State founded upon the principles of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations."

Of course, countries whose constitutions have preambles still have problems, not least the United States, but at least they lay limits to how the document should be understood. For example, it is unlikely that an American would claim to be a patriot and say that they detest liberty. Rather, the disagreements would more likely centre around competing definitions of liberty, and the resulting policy preferences emerging from that definition.

Preamble or not, the articles of a constitution define the institutions that have power over our lives, and the mechanisms by which this power is exercised and constrained. Unless we wish to live in a state of anarchy, we need a constitution.

3. Reclamation

So why, as the title of this lecture suggests, do we need reclaim it today? It is because among our fellow citizens are those who would interpret it in ways that are vastly different from the way other citizens do. Competing groups, approaching the constitution with lens formed from their own worldviews and experiences, and each proclaiming legitimacy, are trying to claim this document for themselves. These occurrences, although possibly exaggerated on our *mamak* tables and Twitter feeds, are more pronounced and visible now than before.

If this trend continues, our country will see greater polarisation. It will make living together increasingly difficult. That is why steps need to be taken to reclaim our constitution: to ensure that the vast majority of Malaysians will continue to accept the Federal Constitution as the supreme law of the land in a manner that is commonly understood.

But who do we need to reclaim it from? And more importantly, who do we need to reclaim it for?

To 'reclaim' assumes a pre-existing ideal. It implies that something was created in the past, but that it was lost, and now we want to get it back. Necessarily then, we require a historical understanding of how the constitution came into being.

Our Constitution emerged out of an agreement between those who possessed sovereignty: the Queen of the United Kingdom and the Rulers of the Malay States. With further approval by relevant legislative bodies, a commission was appointed to draft the constitution.

The goals of those who wrote and approved the document should therefore be seen as the primary interpreters of the Constitution. If we fail to acknowledge the superior legitimacy of its authors, then we fall into the trap of accepting all interpretations of the Constitution as equally legitimate. That will never create a resolution to the task at hand. If everyone is able to say “the Constitution means this” without any other means to determine its validity, then we might as well have no constitution at all. Indeed our Constitution tries to pre-empt this problem by setting up the arbiters of what is valid, or by describing the mechanisms to determine what is valid.

Some of these institutions predated the nation itself: like the Rulers and their states of which they continuously sovereign for centuries, or even the police with its beginnings in 1807, or the army in 1861, or even the recognition of customary land provisions. But other institutions were new, like the Dewan Ra’ayat and Dewan Negara. In some cases there was a remarkable fusion of elements, like the Conference of Rulers which combined the ancient institution of the Malay sultanates with the idea of federation and election which had antecedents in the socio-political *adat* heritage of Negeri Sembilan, within a democratic framework borne out of the Anglo-Saxon tradition of Westminster democracy.

The Federal Constitution was a document written out of a political process made essential by the desires and expectations of a new nation. The political forces of the day required that this new nation have a constitution that all parties – each with their own sources of legitimacy recognised by the others – could agree to. Much work has been done on examining the motives and opinions of the Reid Commission and how its members reacted to memoranda they received. But at the end of the day, when it was approved, a contract – a social contract, in the classical liberal sense, rather than a communitarian sense – was created.

The central question for us is, when was this understanding contested to the extent that it became necessary to say that we need to reclaim it?

The early opponents of our Constitution were easy to identify. The Communists did not recognise the Constitution in its entirety and other parties on the Left had their own constitutional proposals. The question of when entities in authority began to reinterpret the constitution away from the intentions of its initial authors and approvers is far more complex, and properly the topic of another lecture.

But the primary cause was politics: especially the rise of racial and religious politics, and the centralisation of power in the Executive. Some would point to the implementation of the New Economic Policy (or at least a bastardised version of it), the rise and institutionalisation of worldviews that differed from previous generations, and the efforts of a Prime Minister whose vision – or desires – required in his eyes the shifting of power from various institutions to himself. What is so tragic is that much of this damage was done in the pursuit of short-term political goals. Maybe that makes them less offensive: that the perpetrators didn't realise the long-term damage they were causing.

The many legal amendments to the Constitution were passed with large parliamentary majorities by YBs who arguably owed their loyalty to the party leader more than to their constituents. Of particular significance to the position of the Constitution were the 1988 amendments that divested the courts of the judicial power of the Federation.

A year before these amendments, the former Lord President after whom this hall is named gave his views about the power of Parliament vis-à-vis the Constitution. Tun Mohamed Suffian wrote: “The Malaysian Parliament is not supreme; it may make laws only on subjects specified in the Constitution, and, in the case of some laws, only if Parliament complies with conditions specified in the Constitution. Our Parliament is not supreme like the British Parliament. If it makes laws on subjects not specified in the Constitution or not in accordance with conditions specified in the Constitution, then the judiciary has power to declare them unconstitutional and void. This is embarrassing to Parliament and Government, but judges have no choice except to do their duty.”¹

The 1988 amendments marked a significant turning point in the battle between the Diceyan view of parliamentary supremacy and the basic structure view, which was also advocated by Raja Aziz Addruse. He wrote: “The fundamental principle which applies under a written constitution is that it is the Constitution itself, and not Parliament, which is supreme... To remove from the High Courts the judicial power of the Federation, which had since Merdeka Day been vested in them, and to have Parliament instead confer upon the High Courts their jurisdiction and power cannot be conducive to the maintenance of an independent judiciary.”² When asked in 2007 what the Constitution meant to him, Raja Aziz replied “it means nothing to me at the moment, because it can be changed at any time.”³

This has enabled specific articles in the Constitution being highlighted as a means to justify other laws and policies that previously might have been deemed unconstitutional by independent check and balance institutions. Worse still, the ends are argued to justify the means, even if they lead to corruption and a dangerous concentration of power in certain offices.

¹ Tun Mohamed Suffian, ‘The role of the judiciary’, *The Malayan Law Journal*, July 1987

² Raja Aziz Addruse, ‘Fundamental Rights and the Rule of Law: Their Protection by Judges’

³ Roger Tan, ‘A gentleman who believed in honesty and fair play’, *The Star*, 13 July 2011

If it was a political process that weakened the Constitution, then ultimately it is a political process that will enable its reclamation.

This process can only use history as its primary basis. Not just the intentions of the Constitution's authors and approvers, but the commentary of leaders who served afterwards as well. Indeed, after they left office both Tunku Abdul Rahman and Tun Hussein Onn opined that the way the Constitution was being treated in later years was not as they understood it.

Alas, with that generation gone, the phenomenon of reinterpretation by politicians continues unabated and unchallenged by those with authority. It has become ingrained in the thinking and modus operandi of political actors. Thus, just as creating the Constitution was seen as a grand national project, so ought reclamation be similarly perceived, involving representatives that are seen as legitimate by all sections of the population.

There might be pessimism that this is achievable, but we have beaten the odds before. Many commentators thought Malaya, and then Malaysia would fail; whether because of the Communist Insurgency, Confrontation with Indonesia, racial riots, or even the Asian Financial Crisis. With the right leadership, I think such a project is feasible. And our chances are rosy if we consider that other countries ravaged by war and division have managed to do it, like Germany or Rwanda or, closer to home, Indonesia.

Many others have been talking about forging a new grand consensus in recent times.

Not too long ago Tengku Razaleigh Hamzah mooted the creation of a Truth and Reconciliation Commission to tackle the many challenges facing the country. Other veteran or former politicians have come up with methods that they think will result in conflict resolution – including the creation of a new political party which as yet remains untested electorally.

A more recent proposal by Dato' Seri Nazir Razak is a Second National Consultative Council in which the best minds and leaders from across society would unite for "national recalibration". This harks back to the first NCC which was set up in 1970 to "establish positive and practical guidelines for inter-racial cooperation and social integration for the growth of a Malaysian national identity". Such an effort faces two principal challenges: firstly, identifying and gathering the right minds and leaders that would command confidence from all sections of the population; and secondly, seeking the adoption of its resolutions by government. If it can achieve this, then it could make a significant contribution in reclaiming the Constitution for all Malaysians.

There are other efforts that could be scaled up or emulated towards the same objective. There is a Department of National Unity and Integration in the Prime Minister's Office which has done some great work with IDEAS in having young Malaysians visit villages, towns and places of worship across the country, exposing participants to the diversity of communities who call themselves Malaysians.

And there are formulations of group identity that do speak in terms of unity. Many Johoreans I know are deeply proud of Bangsa Johor, initiated by the sultan in 1920 "to unite the various races in Johor under one flag for greater cooperation, harmony and peaceful existence."

"Muslim unity" too can have different connotations. Some might use it to suggest an opposition to non-Muslims in policy terms; but others might use it to stress Islam's acceptance of people of all backgrounds. And one crucial component in the reclamation project is whether the bulk of Malay Muslim citizens today – many of whom practice religion in different ways to their parents and grandparents during what is often termed Malaysia's *zaman jahiliyah* as portrayed in the movies of Tan Sri P Ramlee – will be able to reconcile the Constitution with their faith.

In this regard we can take note of developments in other parts of the Muslim world, notably Turkey and Tunisia where commentators have noted how even Islamist political parties have embraced the democratic model operating under man-made constitutions.

The key question to this reclamation project is: despite changes in our society, can the Constitution still accommodate the vast majority of citizens? If the answer is no, then the only logical, but sad, conclusion is that we need a new one. But if the answer is yes, then we must take the necessary steps to guarantee that it is preserved, protected and defended.

These are the topics to which I now turn.

4. Preservation: Education

Central to preserving the Constitution is ensuring that the intentions of the document are memorised and passed on to future generations of Malaysians. This may take the form of museums and online campaigns, but primarily, to my mind, being embedded in the education system.

In this regard I am much inspired by what I have seen in other democracies. In the United Kingdom, every schoolchild learns about Magna Carta to understand the importance of rule of law which lies at the heart of the unwritten British Constitution. In the United States, children are taught about the War

of Independence, the writing of the Constitution and its key amendments on repeated occasions. And I was just in Germany where the guilt over the tragedy of National Socialism is almost inheritable, informing domestic and foreign policy today.

Unfortunately our education system, as far as I can see in my many interactions with primary, secondary and university students in both public and private institutions, does not necessarily seem designed to nurture citizens to take a historical narrative view of what it means to be citizen today. It does not teach, for instance, why we have a Dewan Ra'ayat, what its powers are and the fact that one day, when you reach the age of 21 you will have the power to elect candidates to it.

Even then it is not good enough merely to learn what the Federal Constitution says and means, but it is important that critical thinking lies at the heart of our education system so that young citizens are equipped to question how it is applied. Extra-curricular activities such as music and sport can also be immensely important: our first Prime Minister often cited understanding the rules of sports as an analogy to understanding the rule of law. Only in this way can we think of the constitutionality of laws and policies in terms of principles as well as strict legality.

Now, I am not for a moment suggesting that there should be a monopoly over the teaching of history or citizenship. The challenge for every democracy is achieving a sufficient agreement in the core values of a nation, while also enshrining freedom of expression and academic debate. That is also one of the reasons why competition in the education system is a good thing.

And that is also why this lecture series is so important. I commend the UM Faculty of Law and Chooi & Company for initiating it and I am sure it will make an important contribution to how young Malaysians think about the Constitution and its role in Malaysia.

Furthermore, education goes beyond formal institutions of learning and I have always been a fan of the Bar Council's MyConstitution Campaign, whose Rakyat Guides can form the core of a module on the Constitution that can be taught in schools.

With a citizenry equipped to preserve the Constitution, we can in turn have greater confidence in the institutions that are charged to protect it.

5. Protection: Institutions

I imagine that at the time of independence, public knowledge in the role of our institutions, and public confidence in them, was relatively high. I don't have historical data, but let me take a straw poll here:

how many people in this room are over the age of 60? Okay. Keep your hand up if you had more confidence in the national leadership growing up than you do now. Keep your hand up if you had more confidence in political parties in general growing up than you do now. Or in parliament. Or in the police. Or in the civil service. Thank you. Certainly I have seen recent polls which show that a majority of Malaysians are concerned by corruption in our national institutions.

One recent example of a failure of an institution to protect the Constitution was the passage of the National Security Council Bill by Parliament last December. Apart from the outcry by civil society, the Conference of Rulers called for refinement and many international bodies including the European Parliament called for the bill's withdrawal. Even if some lawmakers genuinely felt that the bill is in line with the Constitution, there was no public consultation and little time for debate in the House. Intriguingly, the provisions by which the bill allegedly became law have never themselves been tested, which may give the courts an opportunity to do their duty in protecting the Constitution.

Recently there has been much consternation over the delimitation exercise carried out by the Election Commission, amid concern that it is not following the principles laid out in the Thirteenth Schedule of the Constitution, instead obeying unpublished guidelines from the Executive.

The Malaysian Anti-Corruption Commission has been praised for making large seizures of late, and it is hoped that they will continue to do their job so without being swayed by political considerations. The MACC, as well as the Royal Malaysia Police and Attorney-General's Chambers, have also been accused of not properly conducting investigations into 1MDB, whereas agencies in the United States, Switzerland and Singapore have taken actions and explained why they have done so according to their remits. Of course, allegations and accusations can always be batted down and spun away, but their frequency is alarming.

The Constitution never envisaged that such institutions would be compromised in their independence: indeed, many of you will recall how there were no provisions to sack a Lord President when Tun Salleh Abas was removed in 1988. It is perhaps because of these perceptions of interference that so many today – even those responsible for the damage in the first place – are appealing to the royal institution to step in and restore balance to the Constitution. But this is tricky territory: for many of these proposed interventions might themselves be deemed unconstitutional. For example, on the idea that the Agong can dismiss a Prime Minister, some might say that precedents at the state level mean that it is allowed, while others would insist on an explicit provision that would enable it.

Moreover, the royal institution itself was also affected by constitutional amendments. Here, too, Raja Aziz Addruse was prescient, criticising amendments to the Constitution that “will arm the Executive

with the power to subjugate the Rulers through threats of prosecution for any offences, however minor. The Rulers will be at the mercy of the Executive.”⁴

Since so much power resides in the Executive, it is important that political leaders themselves commit to protecting the Constitution, supported by their political parties. Unfortunately we have seen how political parties have wilfully misinterpreted the Constitution when speaking to different audiences. This process creates a downward spiral by reinforcing expectations by those particular audiences that these interpretations will be adhered to, only further catalysing the polarisation that we are trying to combat. Sometimes, politicians within the same coalition – or even in the same party – disagree with each other, but delay any intellectual resolution in the mutual interests of staying in power.

Incentives must therefore be placed on political parties on all sides to subscribe to a common interpretation of the Constitution: and there is no greater incentive than demands by the voting public, which is why education is so important.

Ultimately, those who are supposed to be served by the Constitution ought to feel obliged to defend it.

6. Defence: Civil society

You can of course take a military understanding of defence, and certainly our armed forces have played a critical role in defending our Constitution in the past, particularly when our enemies were ideologically opposed to its precepts. But the everyday defence of the Constitution should come primarily from citizens, particularly through civil society.

If in the eighties and nineties Malaysians were too preoccupied with economic growth to get agitated by assaults on the Constitution, today that is not the case. Some of the largest displays of citizen action have occurred in recent years, stimulated by an internationally-aware young demographic, leading to rallies and petitions, dialogues and conferences, tweets and re-tweets.

But that demographic also has elements of fear. Fear that greater access to markets means that they won't be able to compete, and thus need assistance more than ever. Fear that increasing connectivity means that culture and traditions will be under threat, and that the apparatus of state need to aggressively defend them. Fear of the great uncertainty that acronyms like TPP, RCEP or even ASEAN conjure up. And these too manifest themselves in forms of citizen action: counter-rallies and denunciations, heckling at forums and supposedly fake Facebook accounts.

⁴ Quoted in Professor Mark Gillen, 'The Malay Rulers Loss of Immunity', 1994

Some of these movements and counter-movements invoke the Constitution in justifying themselves; some don't. And I dare say some are devoid of any intellectual arguments whatsoever, merely doing the bidding of their political paymasters.

Still, we cannot make the arrogant and counterproductive mistake of simply being confrontational. Instead, it is vital to demonstrate that the questions of this national polarisation can be answered with the Federal Constitution and the institutions that it enshrined. That is the job of us citizens using the democratic space that is still available to us. One obvious form of defence might be to encourage the 4.7 million young Malaysians eligible to vote but not registered to go and register.

7. Conclusion

Ladies and gentlemen, this process of reclamation, preservation, protection and defence is not a step-by-step guide. They are symbiotic with each other, and need to be approached simultaneously. And one reason I am optimistic about the future is that I have witnessed so many people and organisations doing exactly that – not just through IDEAS, but through other foundations, organisations and companies I'm involved with, which have given me insight as to how even corporate Malaysia can be affected by constitutional questions.

If I may conclude with some Malaysian legal parlance:

I put it to you that in reclaiming our Federal Constitution we must re-forge a legitimate consensus as to how it should be interpreted.

I put it to you that in preserving our Federal Constitution we must educate all Malaysians but especially future generations as to its timeless principles.

I put it to you that in protecting our Federal Constitution our institutions must be filled with people who think in this way.

And I put it to you that in defending our Federal Constitution citizens must exercise their democratic rights to prevent institutions from deviating from their constitutional mandates.

Finally, I would like to propose one possible preamble to our Federal Constitution:

The Constitution is a democratic achievement of the highest order. It is the product of many minds working with a common aim, to evolve a basic charter for this new nation of ours: a

charter drawn from our past experience and suited to the conditions of our surroundings and way of life; a charter of our firm faith in the concepts and traditions of parliamentary democracy; and most important of all, a charter of our common belief that certain fundamental liberties are essential to the dignity and self-respect of man.

This Constitution is a comprehensive declaration of duties and responsibilities, authority and prerogatives, affecting all organs of the State and all citizens of the land.

This Constitution is the guardian of the rule of law. It protects the integrity, the freedom from influence, and the independence of our Courts. It ensures the security, integrity and impartiality of the Civil Service.

The Constitution belongs to all of us – it belongs to Us as the Yang di-Pertuan Agong, it belongs to you as the Members of Parliament, it belongs to the people as the fount of power.⁵

Ladies and gentlemen, as you probably detected from the last sentence, these are not my words, but the words of the first Yang di-Pertuan Agong.

Perhaps, as a first step to reclaiming our Federal Constitution, this royal injunction can be disseminated to all who would reclaim, preserve, protect and defend it.

Thank you very much.

⁵ Speech of the Yang di-Pertuan Agong in the Dewan Ra'ayat, 12 September 1959.