

SPEECH AT THE LAUNCHING OF "DOCUMENT OF DESTINY: THE CONSTITUTION
OF THE FEDERATION OF MALAYSIA"
BY PROF DR. SHAD SALEEM FARUQI

Shangri-la, Putrajaya

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By

Tun Dato' Seri Abdul Hamid Mohamad

Chief Justice of Malaysia

I thank the organizers for inviting me to launch the book "Document of Destiny: The Constitution of the Federation of Malaysia" by Prof. Dr. Shad Saleem Faruqi. I thought that writing the foreword is enough. But Prof. Shad wants me to do more. It is an honor that I cannot refuse.

Ladies and gentlemen,

Malacca was a Malay Sultanate, populated mainly by Malays when it was conquered by the Portuguese in 1511. So were the Malay States in Malay Peninsular when they were colonized (by whatever name it is called) by the British in the 18th and 19th centuries. British colonization brought with it the immigrants mainly from China and India who later settled in Malaya for good. They in turn brought along their language, culture and religion. By the time Malaya was about to achieve her independence, Malaya was already a multi-racial, multi-language, multi-cultural and multi-religious country with social, economic and educational disparity as between the main races. In addition, nine of the States have Malay Rulers and two did not.

It was with this background that the Constitution was drafted after hard bargaining by the leaders representing the various races. The product is the Federal Constitution as we now have. While some universal principles of constitutional law like the fundamental liberties, a democratic form of government and separation of powers were adopted, other provisions, more peculiar to Malaya were also included. Thus we have provisions regarding the position of the Malay Rulers, the Malay privileges, the religion of the Federation, the Head of the religion of Islam in the States, the national language, the Malay Regiment, Malay Reserved Land and others. Indeed, Malaysia is perhaps the only country in the world where the King reigns for a fixed period of five years and who are elected by their peers.

In 1963, the States of Sabah and Sarawak joined Malaya and Malaya became Malaysia. Those two States, separated by the South China Sea from Malaya have their own peculiarities. They have no Sultans. They have a large number of natives who are Christians. The economic and educational disparity between the various racial groups, was even greater than that existed in Malaya. Further adjustments were made.

The Constitution is not a fiction. It is a document that captures the reality of the country at the time when independence was achieved plus the road map for the future that the people, through their leaders, would like it to be.

Having being born during the Japanese occupation, survived on tapioca and bananas, walked to school barefooted through the rice field, read the Hikayat Hang Tuah and Sejarah Melayu as textbooks, saw the struggle for independence, followed the debates regarding what the would-be Constitution should provide, in fact had very strong feelings about certain provisions, bought the first radio in the village from my own savings, waited for and heard the shout of “Merdeka” on 31st August 1957, the Constitution is a very special document to me. It is not just a legal document. There is a lot of emotion attached to it.

Outsiders or even the younger generation of Malaysians who did not go through the same experience might not have the same feeling about it. They only read the cold print with theories and precedents from courts in other countries at the back of their minds. And they start questioning the fairness of those provisions. They compare the Malaysian Constitution with the constitutions of other countries that do not have such provisions and which declare equality for all and do not contain “discriminatory” provisions. They fail to realize that, in such countries, the settlers, being superior in arms, had wiped out the natives and declared themselves equal. In 2005, I spoke at the Maxwell School of Citizenship and Public Affairs, University of Syracuse, U.S.A. After my speech a white American Professor stood up and said: “After listening to you, I wonder what the United States would be like if the Indians are still the majority.” I replied, “The United States could be like Malaysia”.

What many people fail to realize, in the case of Malaysia, is the willingness of the Malays and the natives from whom the country was colonized, to share power with others who came to settle after the colonization. Those specific provisions which I have mentioned earlier are the remains left after the bargain.

Perhaps it is that background that makes me feel very strongly that to understand the Constitution one has to know the history and the circumstances that had made it what it is. Similarly, in interpreting the Constitution, one should do so in the spirit in which the Constitution was promulgated. 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. We should not willingly but unconsciously submit ourselves to “judicial colonization” after we have successfully ended the political colonization. In other words, we should not follow blindly what other Judges in other jurisdictions say. We adopt the principle but, in applying it, we should take into account the local circumstances, public policy and public morality of Malaysia, and other relevant factors. 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?

I do not for one moment mean 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. Just as the people had spoken through their political leaders at the time when the Constitution was being drafted leading to what it is, at any point of time the people may do the same again leading to changes. That is what democracy is about.

We believe in separation of powers. The principle must apply equally to the three branches of the government. There should not be a double standard in favor of either of them, when it suits us.

Our Constitution, over the last fifty years, has seen a fair share of amendments. In some countries the Constitutions are not amended. They are just thrown away. Yet in other countries, they are “amended” by the courts! At a conference of Constitutional Court Judges in Manila two years ago, I was proud to make a point that drew admiration from other participants that of all the countries represented at the conference, Malaysia was the only country whose original Constitution was still in existence.

In my view, amendment to the Constitution is a matter of policy. So long as the procedure is followed, Parliament is free to amend it. Indeed, from the time the book was printed until it is launched today there is already a move to amend Article 121. This is an interesting development. It shows that an amendment made in anger as a reaction (or was it over-reaction?) to a decision of the court could last for only one generation. It was in 1987 when the then Supreme Court decided the case of Public Prosecutor v. Dato' Yap Peng (1987) 2 MLJ 311 in which the court relied on the opening words of the original Article 121(1) that read: “Subject to clause (2) the judicial power of the Federation shall be vested in two High Courts...”. The following year, the Article was amended. Those words were removed and substituted with the words “There shall be two High Courts....(which) shall have such jurisdiction and powers as may be conferred by or under federal law.” Now, twenty years later, we are going back to the original provision: water finds its own level.

Ladies and gentlemen,

It is true that Prof. Shad Saleem Faruqi was not born in Malaysia. He did not experience the struggle for independence nor the demands and counter-demands for certain provisions to be included or excluded. But, he had been in Malaysia long enough. He studied here and has been teaching here for more than three decades. He is a Malaysian and, above all, he is married to a Malay girl from Melaka. So, he has “the feel of Malaysia”. That alone qualifies him to write this book, not to mention the many years that he had been teaching the Constitution at UiTM and written hundreds of articles on it.

One thing that I should mention about this book is that the author has recorded the many trials and triumphs of constitutionalism over the last 50 years. He has pointed out

“six sterling achievements of the socio-legal system ushered in by the 1957 document of destiny”.

These are, first, our “enduring and endearing inter-ethnic harmony”. Second is “the peaceful and cooperative manner in which social restructuring is being accomplished in Malaysia”. Third is the remarkable emancipation of women in Malaysian society. Fourth is “the politically wondrous phenomenon of our ruling, rainbow coalition” that has lasted 52 years from 1955 till today. Fifth is the sterling example that Malaysia offers to the rest of the Muslim world of “a moderate, enlightened, progressive and tolerant Muslim nation that embraces modernity and democracy and yet accommodates the spiritual view of life”. Lastly is Malaysia’s achievement of keeping the armed forces out of political, economic and social decision-making.

Ladies and gentlemen,

Just as one should not mistake the translation of the Qur’an by Abdullah Yusuf Ali, no matter how authoritative it is, as “The Qur’an”, one should not take this book as the Constitution. It is the Constitution as understood and explained by the author. One may or may not agree with some of the views expressed by the author. That is a matter of opinion. But, what is important is that the author has explained the provisions exhaustively and in a very simple way that any non-lawyer or student can understand. To lawyers and Judges, this book can be the starting point in their research either in the preparation of their arguments or in the writing of their judgments. There is not doubt that this book is a great contribution to the legal literature on the Constitution and constitutional law in Malaysia.

I congratulate the author and the publisher for their great contribution.

With those words, I am pleased to launch the book “Document of Destiny: The Constitution of the Federation of Malaysia” by Prof. Dr. Shad Saleem Faruqi.

Thank you.