



Asian Seminar on Innovations In Legal Education for Alternative Development

15 – 17 February 1985
Penang,
Malaysia.

TEACHING CONSTITUTIONAL LAW – A REVIEW

by

EDWARD PHILLIPS
LAW FACULTY
UNIVERSITY OF MALAYA



Consumers' Association of Penang
87 Cantonment Road,
Penang, Malaysia.

Copyright CAP and Author

TEACHING CONSTITUTIONAL LAW - A REVIEW

by

EDWARD PHILLIPS

"In the conduct of political affairs, there must always be some gap between constitutional principles or theory, and political practice: what is can never coincide exactly with what ought to be. But dangers arise, and particularly in a society claiming to respect certain principles of democracy, when the gap becomes very wide and when such constitutional doctrine as there is no longer seems to explain very much of what happens".

I shall begin at the beginning with a very basic question: should Constitutional Law be an object of study? To this there can be only one answer. In nearly all the countries of Asia, with a very few exceptions, the written constitution stands as a symbol of our independence; an independence that was sometimes earned by rebellion, and sometimes by negotiation. It is part of our nations' histories. More than that, the constitution is the standard against which we measure and value so many things; in particular, it is the standard against which we measure governmental and administrative activity. In brief, the Constitution is both the symbol and instrument of constitutionalism. At this point I wish to emphasise that the term 'Constitutional Law' is here used not only to refer to the study of the Constitution but also to include the concept of 'constitutionalism'. And I would define constitutionalism as being, very broadly, the limiting of the arbitrariness of political power.

Constitutional Law is therefore a fitting object of study, not only within the law faculties or even within the cliché-ridden ivory towers of the universities. The teaching of Constitutional Law should reach out to every citizen of every Asian nation. Lawyers and, I might add, law teachers, have a passionate devotion to their own legal technicalities. This must change if Constitutional Law is to be understandable.

If lawyers are the only people within a society who know and understand how the Constitution operates, then the Constitution ceases to breathe and becomes a dead thing. Within the scope of this paper, however, I will confine my observations to the teaching of Constitutional Law within the universities, particularly the law faculties.

On to the next question: does Constitutional Law deserve its position as a compulsory subject in law schools? Again, my answer is an unequivocal 'yes'. I put forward the following reasons for answering in the affirmative.

First, the content of the subject. The Constitution is the basic law, the supreme law, the grundnorm of all municipal law. The Constitution is the 'source' of all law. It regulates the making of law. Under its authority an unjust law can be struck down; under its authority the power of the powerful is held in check. The Constitution regulates government. It both prescribes and proscribes. Its study is central to every legal system. In short, it is a 'core' legal subject by any definition of that term.

Second, its intellectual content. There is much in the study of constitutional law to stretch the mind and to build a creative and imaginative approach towards legal studies and legal practice. The concepts acquired from an understanding of Constitutional Law are often the tools which are used in the further analysis of other legal areas. Sir Garfield Barwick (Chief Justice of Australia), once remarked that in his dealings with lawyers, one conclusion he came to was that lawyers who had studied and worked under a written constitution tend to be sharper in the recognition of legal principles at work in actual factual situations than those who have no need to continually test legislative and executive acts against constitutional limits.

Third, the accessibility and relevance of the subject. Whatever also it may be, Constitutional Law could never be described as too remote. Its relevance to the everyday life of every citizen not only to lawyers, is beyond dispute. No understanding, analysis or criticism of current affairs can ever be complete or comprehensive without an understanding of Constitutional Law and its principles. It is indeed a very rare event in political and public life that does not raise any issue of constitutional significance.

Fourth, the human interest implicit in the subject. In many Asian countries The Constitution was born out of an intense struggle for freedom and self-determination. Thus, the Constitution stands as an embodiment of the ideals and aspirations of its drafters. It is more than a mere historic record of independence, however. The Constitution is a living instrument and it represents the hopes of every nation. More important, in those Asian nations where the lofty ideals expressed in the Constitution have become perverted in the cause of oppression and repression, the Constitution and its ideals represent salvation and hope for those who live in misery.

Fifth, as a focal point of legitimate dissent. In this connection the doctrines of constitutional supremacy and ultra vires come into their own. Dissent in much of Asia is often characterised as disloyalty and treachery to the nation. But if an attempt is made to build dissent upon the groundrock of the Constitution then those who wield power will find it more difficult to condemn or, even worse, to trivialise dissent.

Within law schools, therefore, Constitutional law ought to be a compulsory subject. What about outside the law schools? I would suggest that it also be a compulsory subject in certain other faculties; for instance in politics, economics and administration. These faculties are often the pools from which the civil service is drawn and therefore the opportunity of inculcating the principles of constitutionalism should not be lost. Beyond these faculties I would suggest that the opportunity to study Constitutional Law be given to every student, no matter what his particular field of study may be.

Thus far, I have been endeavouring to paint a picture of Constitutional Law as a favourable, and compulsory, subject of academic study, but what about the actual techniques of teaching Constitutional Law?

First and foremost, a student must be able to assimilate the material and learn how to apply and evaluate it. He must understand, too, the clash of conflicting interests and the problems of policy which lie behind the interpretation of the Constitution. The teacher's task therefore is to introduce students to the complexities of the Constitution.

This involves raising the ready perception that in the facts and circumstances of any problems with which they have to deal there may lurk constitutional issues. To be effective and efficient in this perceptive appreciation of a situation, it is not enough to have become familiar with the terms of the Constitution in the abstract, or with its principles in an academic way. It is necessary to be able to perceive and to pinpoint in the facts and circumstances of a situation the relevance and applicability of those constitutional provisions and principles.

There are as many techniques of teaching Constitutional Law as there are teachers of Constitutional Law. Inevitably, the best method of teaching will involve a compromise and a mixture of different methods. It is fitting to remember when discussing techniques that the teacher has one primary duty; to guide students along twisting trails - they must acquire the

technical details of their subject before criticism or evaluation is possible. This is usually a tedious task and a teacher who does not make any attempt to make his subject 'come alive' can very easily kill off his students' interest in the subject. This would be disastrous in any area of study but I would go so far as to say that this would be downright tragic in the case of Constitutional Law, given the pervasive influence of the subject and its importance.

An important point to bear in mind when discussing innovations in the teaching of Constitutional Law, or for that matter, any other law subject, is the sheer volume of material that has to be covered within a limited period of time. In most universities actual teaching time accounts for only between one-half to two-thirds of the calendar year. Within that time span so much has to be done that both teachers and students feel that they are fighting a losing battle vis-a-vis the syllabus.

To this I would make the observation that teachers and students must inevitably reconcile themselves to the fact that some battles may be lost, provided that the war is won. The Constitutional Law syllabus must be pruned. Some topics within the syllabus may be treated generally, and many expositions and technicalities may be omitted without much loss.

In addition, some topics may be more profitably dealt with under other subjects. For example, the rule against the enactment of retrospective criminal statutes could, and should, be dealt with under Criminal Law. Another example would be to treat the prohibition against compulsory acquisition of property without adequate compensation in the Property Law syllabus. Then there are those general topics, like the independence of the judiciary, which ought to be treated in the context of the study of the particular legal system, and not specifically under Constitutional Law.

Pruning the syllabus is bound to cause great discomfort to those teachers who are loath to throw away their carefully acquired and meticulous lecture notes, as well as to those students who insist upon being spoon-fed. The other alternative is for the Constitutional Law syllabus to be divided into two parts. Some law faculties already have such a system. To cite only two examples, this is done at the National University of Singapore and at the University of the Phillipines.

At the National University of Singapore, first year students do a compulsory course called Constitutional Theory. This is then followed, in their second year, by the compulsory Constitutional Practice course. The first course deals with a selected number of constitutional principles, including theories of the supremacy of the Constitution, the tripartite separation of power, the Bill of Rights, ministerial responsibility and the ultra vires doctrine. The approach used is largely a comparative studies approach. The Constitutional Practice paper which follows concentrates on the actual workings of the Constitution.

At the University of the Philippines, first year students do a paper called Constitutional Law 1. This covers the fundamental concepts of public laws; the legal structure and basic functions of government; and the distribution and limitation of power. Constitutional Law 2, in the second year, covers the Rule of Law; limited government, the Bill of Rights and Duties; and judicial review.

While some of us might quibble as to the actual content of each of these courses, the principle is in itself sound, and I for one would advocate its greater use. The objection that is bound to be raised is that it leads to a certain amount of overlapping and duplication. This is inevitable in any area of the law. In fact this overlapping can serve as a useful reminder to teacher and student alike, that law subjects can never be taught in isolation or separate from each other.

To carry the point further, constitutional principles, despite their name, are in fact applied in other areas of the law quite apart from Constitutional Law. The ultra vires doctrine is just one of them and so is the concept of fundamental rights. Separating discussion of these doctrines from the study of the Constitution itself would reinforce the point that these doctrines and principles apply equally to other areas of the law. Take for example, Criminal Law, the Law of Evidence and Criminal Procedure. All these subjects inevitably involve constitutional issues. As such there is much benefit to be gained from dealing with these issues of constitutionalism separately.

Assuming that these suggestions are adopted, the old question again arises; how is Constitutional Law to be taught? The easiest, though certainly not the best, method of imparting information to students is through the orthodox lecture. Its biggest advantage lies in the fact that a vast amount

of information can be directed at the student within a relatively short period of time. The disadvantages, however, are that this is largely a one-way process. There is no participation from the students who merely play the role of a passive audience. It has been shown that the learning process is accelerated if the element of participation is involved and this is certainly not true of the orthodox lecture. In any case, the principle reason that has always been put forward for using the lecture method is that the sheer volume of the material to be covered demands its use. If, however, the three suggestions above are adopted, then the teacher is, to a large extent liberated from the constraints. He can therefore afford to experiment and to use other more time-intensive methods. Primarily, this would be (a) problem and case studies (b) the 'Socratic' method (c) the comparative approach.

By problem and case studies, I mean a situation where the teacher takes either a problem from current affairs or a problem faced by the nation in its past and utilises this factual situation for a discussion of constitutional principles. The idea here is to present the Constitution and constitutionalism as working, active, principles and not merely as academic subjects that must be 'learnt' for examinations. As such, fictional problems should be used as little as possible in order to reinforce the perception of reality. The great advantage of this approach is that it develops the techniques of problem-solving by utilising Constitutional Law as the potential source of possible answers.

The 'Socratic' method of questions and answers is often viewed as a typically American technique, though it has been adopted in many Asian universities. As far as Constitutional Law is concerned, it has much to recommend it. The idea here is to encourage an imaginative and creative approach and the 'Socratic' method injects an element of student participation into a teacher's otherwise boring monologues.

Constitutional Law and the comparative studies approach were, I feel, made for each other. In no other area of the law is a comparative approach more useful and the law teacher should utilise this as much as possible.

Because of the colonial era and the inescapable fact that most Asian Constitutions are based on western models, Asian legal scholars are familiar with western legalism and constitutionalism. Accordingly there is a tendency to look to western models for comparisons. This is, in itself, not a bad thing. There is much that Asian Constitutional Law teachers can learn from

the American 'due process' procedure, for example, or from the way in which the American Bill of Rights has been interpreted and applied. What is important however is that these comparisons must be kept in perspective. Presumptions and hasty data interpretation and theorising from a weak basis in knowledge of western legal systems may result in much distortion and confusion. Furthermore this sort of approach may lead to the unfortunate idealisation of the western-type Constitution as the 'perfect' model. This is especially true as many western scholars assume that their own are precisely the practical standards against which the legal and constitutional behaviour of other nations may best be judged. No reference is made to what Lawrence Beer calls "the ecology of the specific constitutional issue in a foreign society - its history, social environment, legal background, and the direct effects and probable by-products of alternative solutions to the problem".

The major obstacle to the development and use of comparative studies in Constitutional Law is the often-made comment that each nation is so unique and separate from the world community that almost any apparent similarity must be regarded as either illusory or insignificant. While there may be a great deal of weight in this argument vis-a-vis the western-type Constitution, the argument should not be overrated. Moreover, it may not be true of comparative studies involving the Asian nations themselves.

Obviously, there is no such thing as 'Asian' constitutionalism. Asia is too vast and diverse; each Asian nation has its own separate history and culture and legal systems, and then there is the problem of sub-groups as well. Nevertheless, there is also much in common. Primarily, there is the historical fact of colonial domination and the problems associated with development and progress. All this helps to cut across national divides. To take one example, issues of fundamental rights and liberties are common to countries as culturally diverse as Bangladesh and the Philippines.

Moreover, elements of cross-national similarity do link, even if loosely, some Asian countries. A number of examples may be considered. The majority of the world's Muslims live in Asia and there is the link of the Islamic legal tradition. These countries share the problems that may arise out of the incorporation of Islamic principles, either directly or indirectly, into the Constitution. On the other hand, the British colonial system has left a common mark on India, Pakistan, Bangladesh, Malaysia, Singapore, Sri Lanka, Burma and Hongkong.

To make the comparative approach effective, however, the law teacher and the law student must be able to lay their hands on sufficient material. This is often the area where problems arise simply because the material does not exist. There has been too little cross-national dialogue on constitutional and legal issues. Detailed studies of specific problems or aspects of individual nations are a necessary basis for the development of constitutional theory and comparative perspective on constitutional doctrines. Too few such studies exist. This is where the law teacher has to exercise his ingenuity. Very often students can be set the task of making these studies, albeit in a limited form, themselves.

Ultimately, it has to be realised that there is no such thing as a 'perfect' technique for teaching Constitutional Law. The closest we can approach the ideal is to try using a package of techniques. Much more important, we must realise that the law students' concept of Constitutional Law and its scope depends largely on the approach which his teacher adopts. An old-fashioned, traditionally-minded teacher cannot, with rare exceptions, produce bold, creative and imaginative lawyers. This would be unfortunate. Asia needs lawyers who can use the Constitution and constitutionalism in innovative and new ways to achieve social justice. It is therefore all the more urgent and important that materials for an innovative, and necessarily comparative, approach to the teaching of Constitutional Law be gathered and developed. The use of these materials will, hopefully, stimulate the sensitivity of students to the social and legal problems faced by the nations of Asia and to inculcate in them the principles and idealism of constitutionalism which may in turn go some way towards resolving these problems.
