The Constitution of Malaysia

Pictorial Narrative

The composition is dominated by the Jalur Gemilang – the national flag of Malaysia. The valley of the blue canton signifies the unity of the Malaysian people and rising above it, the Crescent and the 14-point Federal Star, its golden rays illuminating other objects in the painting. The Crescent symbolises Islam, the country's official religion. The royal yellow is also the colour of the Malay rulers. Radiating from the Federal Star, the Stripes of Glory: the 14 alternate red and white stripes represent the equal status within the federation of the 13 member states and the federal government.

Central are the Petronas Towers denoting Malaysia's economic progress and modernity. Over the Skybridge, the National Monument – Tugu Negara – remembers those who lost their lives in Malaysia's struggle for freedom, principally during the Japanese occupation in World War II and the Malayan emergency, which lasted from 1948–1960. It is also the symbol of Barisan Nasional which has governed Malaysia since independence.

The Scales of Justice suspended from the Skybridge reflects Malaysia's adoption of the British democratic parliamentary system of government – the Westminster Model and the common law system.

Directly beneath the Scales is the Parliament Building with the Palace of Justice on the left.

Towering beside the Petronas Towers, is Tunku Abdul Rahman, Malaysia's first Prime Minister following independence in 1957, regarded as the Father of Independence.

Protruding on the opposite side of the Petronas is Keris Pendek Diraja, symbolising the Constitutional monarchy.

Also represented is multiculturalism and indigenous peoples of Malaysia:

Hinduism – the Om, swinging from Keris;
China – the dragon;
The Dayak – the Shield (next to Tunku Rahman) used by one of their chiefs;
Malays – buffalo horn-shaped roof of a Minangkabau house, below the shield.

THE CONSTITUTION OF MALAYSIA

Malaysia's constitution was set at the independence of the Federation of Malaya in 1957 along the lines of the Westminster model, embracing federalism and constitutional monarchy. That it has endured is explained in terms of the social contract agreed between the leaders of the three main ethnic groups (Malay, Chinese, Indian) before independence. However, increasing ethnic tension erupted in violence in 1969, after which the social contract was remade in ways that contradicted the basic assumptions underlying the 1957 Constitution. The outcome was an authoritarian state that implemented affirmative action in an attempt to orchestrate rapid economic development and more equitable distribution. In recent years constitutionalism, as enshrined in the 1957 Constitution but severely challenged during the high authoritarianism of Prime Minister Tun Dr Mahathir Mohamad's developmental state, has become increasingly relevant once again. However, conflict over religion has replaced ethnicity as a source of discord. This book examines the Malaysian approach to constitutional governance in light of authoritarianism and continuing inter-communal strife, and explains the ways in which a supposedly doomed colonial text has come to be known as 'our constitution'.

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The Constitution of Malaysia

A Contextual Analysis

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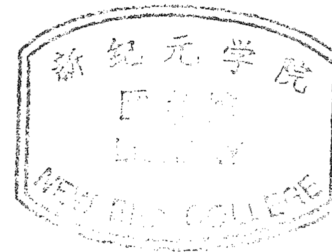

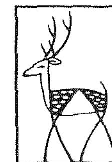

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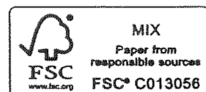

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Glossary of Malay Terms and Abbreviations

Adat: Malay custom
BN: Barisan Nasional; the National Front governing coalition, comprising UMNO and other parties
Bumiputera: 'son(s) of the soil'; refers to Malays and natives of Sabah and Sarawak who enjoy special privileges under the Constitution
CPM: Communist Party of Malaya
Dewan Negara: Senate
Dewan Rakyat: House of Representatives
ECM: Election Commission of Malaysia
EPU: Economic Planning Unit
FMA: Federation of Malaya Agreement
FMS: Federated Malay States
FPTP: the first-past-the-post, or simple majority, electoral system
MARA: Majlis Amanah Rakyat (the People's Council of Trust)
MCA: Malayan/Malaysian Chinese Association
MDec: Multimedia Development Corporation
Menteri Besar: Chief Minister (only for the nine Malay States)
Merdeka: independence or freedom
MIC: Malayan/Malaysian Indian Congress
MLJ: Malayan Law Journal
MSC (or MSC Malaysia): Multimedia Super-Corridor
NEP: the New Economic Policy (1970–90), the term often being used to include its successor economic policies as shorthand for the bumiputera (qv) preference policy
Orang Asli: aboriginal people; a collective term for the indigenous peoples of Malaya
PAS: Parti Islam se-Malaysia (Malaysian Islamic Party)
PKR: Parti Keadilan Rakyat (People's Justice Party)
PMO: Prime Minister's Office
PR: Pakatan Rakyat Malaysia, opposition coalition
Rakyat: the people
SUPP: Sarawak United People's Party

TM: Telekom Malaysia (telecommunications authority)
UMNO: the United Malays National Organisation
Yang di-Pertuan Agong: Supreme Head of the Federation, the King of Malaysia
Yang di-Pertuan Negeri: Governor of a State having no Ruler

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Introduction

'Rambut sama hitam, hati berlain-lain'
('We may all have black hair, but our dispositions are different')[1]

MALAYSIA HAS A population of approximately 28.4 million people, of whom about 60 per cent are Muslim and 40 per cent are non-Muslim. The group of non-Muslims consists of Buddhists (19 per cent), Christians (9 per cent), Hindus (6.3 per cent), and Sikhs (0.4 per cent). The members of the native tribes of East Malaysia (Sabah and Sarawak) and of the *orang asli* (original inhabitants) of West Malaysia profess animistic religions, although large numbers of Dayaks, Ibans, and Kadazans in East Malaysia have converted to Christianity. The largest ethnic group in Malaysia is the Malays (50 per cent), followed by the Chinese (24 per cent), the indigenous people (11 per cent), and the Indians (ie those of South Asian heritage, 8 per cent). Bahasa Malaysia is the official language, but English, Chinese (mainly in Cantonese and Hokkien dialect), Tamil, Telugu, Malayalam, Panjabi, Thai and several indigenous languages in Eastern Malaysia are also widely spoken in places. Malaysia has one of the most diverse societies in the world.

The Federation of Malaya became independent in 1957 under a Constitution drafted by Commonwealth jurists. It gathered under its wing the Straits Settlements of Penang and Malacca; and the nine Malay

[1] Various headings of this book begin with a Malay proverb. The versions quoted are often based on CC Brown, *Malay Sayings* (Graham Brash, Singapore, 1951: 1986). The translations, however, are sometimes my own, or provided by Malay friends, and adapted to their significance for the passage in question.

States, Federated[2] and Unfederated.[3] This Constitution became the Federal Constitution of Malaysia when Malaysia was formed with the addition of three new states,[4] making 14 altogether, and the passing of some consequential amendments in 1963. It reflected what one might call the Anglo-Indian constitutional ideas of the 1950s, but adapted in some respects to the local situation. It embodied Westminster-type constitutional ideas and traditions, but also embraced constitutional supremacy, federalism, and a constitutional Bill of Rights, as well as other ideas squarely based on the Indian Constitution of 1950 and its precursors.[5] This structure was also infused with traditional elements and modified according to the perceived needs of a new polity divided by race and religion, and confronted by terrorism. Although amended frequently, and being the site of continual and intense struggle, the Constitution survived to celebrate its 50th anniversary on 31 August 2007.[6] Despite its colonial origins and its continually disputed interpretation and relevance, it has achieved, due to its longevity and in spite of its colonial origins, a status quite rare in the contemporary world – that of an autochthonous constitution. It is, in other words, meaningful after half a century to refer to 'Malaysian constitutional traditions'. Where the Constitution used to be referred to, dispassionately, as 'the Constitution', it is now more often referred to, often passionately, as 'our Constitution'; a current Malaysian Bar Council campaign is even called 'My constitution'.[7] In this book it will be referred to, according to the context, as 'the Constitution' or 'the *Merdeka* [independence] Constitution'.

It is with this story of constitutional continuity along with continued constitutional struggle that Malaysia offers this series a fascinating microcosm of virtually all the intractable problems of constitutionalism today. In contemporary Malaysia we find a heady mix of a lively democracy in perpetual motion; authoritarian nationalism; rapid economic development and urbanisation; and ethnic tension heightened by religious

[2] Negeri Sembilan, Pahang, Perak, and Selangor.
[3] Johor, Kedah, Kelantan, Perlis, and Terengganu.
[4] Sabah, Sarawak, and Singapore. Singapore left the Federation in 1965.
[5] The Government of India Act 1935, the British North America Act 1867.
[6] See A Harding and HP Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years, 1957–2007* (Kuala Lumpur, Malayan Law Journal/LexisNexis, 2007). This was the 50th anniversary of the Federation of Malaya Constitution, as opposed to the 50th anniversary of Malaysia itself, which falls in 2013.
[7] www.malaysianbar.org.my/constitutional_law_committee. 'My' is also the internet country-suffix for Malaysia.

conflict. All of these elements have deeply affected the contours of the Constitution. More than this, it is the Constitution which has also shaped, as well as providing a battlefield for, continued political struggle. For this reason all of the usual tropes of constitutional discussion, as we will see, have a particular Malaysian resonance – the political economy of law; the rule of law; constitutional government; constitutional monarchy; parliamentary democracy; federalism and states' rights; fundamental rights; the judiciary; even the separation of powers. This Malaysian resonance – constitutional ideas in Malaysian garb – will be in evidence in all the chapters of this book. In the spirit of this series the task of this book is to uncover, describe, analyse and critique constitutionalism as it is practised in Malaysia, pinpointing those issues, events, and landmarks which are either foundational or developmental, or simply indicative of the way things are. It will be an exercise in what Scheppele calls 'constitutional ethnography'.[8]

The essence of constitutionalism, as the guiding concept of this series, is a system of principles, rules and practices of a legal or quasi-legal, binding, nature that frame political action and public decision-making. Constitutionalism also provides both limits and meaning to such acts and decisions. However, it is not a mere abstraction or a set of ideals put into effect on some kind of optional basis. It must also become and be seen as an aspect of the lived experience, history and discourse of the nation, and therefore will take on characteristics that are particular to the nation. It is moreover a characteristic of constitutionalism that it is not a settled concept but a dynamic one. We can observe that constitutionalism generally takes shape only through struggle, controversy and disagreement, seemingly changing its meaning and appearance over time.[9] Nowhere, perhaps, is this truer than in Malaysia, where it is apparent that public life often resembles a fierce struggle over the Constitution itself, a struggle in which every issue, it seems, is capable of being framed as a constitutional issue or one that calls into question the true meaning of constitutionalism. Thus education, for example, is not just about how to produce intelligent, skilled, and rounded younger generations: it is also about the national language and the preservation of minority cultures. It is not just an important political

[8] K Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38 *Law and Society Review* 389.
[9] See, further, A Harding and P Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Oxford, Hart Publishing, 2011) viii–ix.

issue – it is a constitutional issue affecting the basic rights of communities and individuals. As Harding and Whiting have put it,

> in Malaysia liberal values and causes are always culturally or socially inflected. Citizenship rights have a social and ethnic dimension; equality before the law has a different meaning as between Muslims and non-Muslims; freedom to speak is freedom to speak about something, and in Malaysia that something has ethnic/cultural/religious and social content and connotations.[10]

Seen in this light, Malaysian constitutionalism leaps out of the law texts and becomes relevant to the lives of all citizens. It is this living reality of constitutionalism in practice and in context – this living reality of constitutionalism that is the core of this series – that this book examines. The reader will not find here anything like comprehensive or detailed coverage in the style of a law text or reference work (several of these are listed as 'Further Reading' at the end of chapter one). Instead the objective in this series of linked essays is to gain insight into the principal areas of constitutional contention.

In order to fulfil this objective it is clearly necessary to discuss extensively the Malaysian context, examining the complex nature of Malaysia's diverse society, its problems and its achievements after half a century of existence. The major theme of the book will therefore be the ways in which pluralism (especially ethnic and religious pluralism) has affected, and is affected by, the struggles over constitutional principle. By 'pluralism' is meant here the conscious ways in which the polity, communities, and public opinion conceive and address the social facts of diversity. Pluralism does not therefore simply indicate these social facts ('diversity' will do that job well enough in these pages); rather, it indicates society's response to its diversity. Given that our concern is constitutionalism, it is the responses in relation to the constitution and constitutionalism that will be emphasised. Thus by looking at constitutional problems through the lens of pluralism, and in a society that in some way embodies virtually all of our hopes and fears in this age of what James Tully has called 'strange multiplicity',[11] we can perhaps gain some insight into how

[10] A Harding and A Whiting, '"The Custodian of Civil Liberties: The Malaysian Bar and the Defence of the Moderate State', ch 7 of T Halliday, L Karpik and M Feeley (eds), *Fates of Political Liberalism in the Post-Colony: The Politics of the Legal Complex* (Cambridge, Cambridge University Press, 2012).

[11] J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995).

constitutional government can play a large part in binding us together and resolving our differences.

Chapter one will set out the subject's historical background, starting with traditions of government in the Malay States, proceeding through colonial constitutional development and the introduction of the common law, federalism, and Westminster-style government, to the drafting of the Merdeka Constitution and the emergence of Malaysia in 1963. It will also discuss constitutional sources and fundamental concepts. We will see a remarkable trajectory from a strange assortment of territories under various forms of colonial rule towards the birth of a modern and successful nation under a constitutional system that, challenged and profoundly altered as it is, still resembles in many ways that of the 1950s. We will see how and why the Merdeka Constitution took its particular shape and came into effect.

Chapter two examines the nature and concept of the Malaysian state. The emphasis here will be on aspects of executive power and governmental roles and structures. The chapter will also discuss the principles and practice of Cabinet government; the public service in the age of privatisation and deregulation; and emergency and national security powers. Turning to performance as opposed to structure, the state's all-important role in orchestrating development and distributing its benefits will also be discussed. This latter topic involves discussion of one of the central issues in Malaysian constitutionalism – the issue of special privileges for bumiputera citizens (Malays and natives of Sabah and Sarawak). Here we will touch on the developmental state and Malaysian political economy in its legal configurations – a major theme of the book as a whole.

Chapter three will deal with the legislative branch, analysing the political party system in the context of electoral coalition politics and parliamentary representation. Here we will discover the nature of Malaysia's evolving democracy in a party system historically dominated by the ruling Barisan Nasional (BN) coalition but now challenged, especially since 2008, by opposition successes which seemingly offer a different vision of democracy and constitutionalism.

Chapter four examines constitutional monarchy. Given Malaysia's complex and unique system of constitutional monarchy and its renewed significance at the State level, attention will be given here to the traditional Rulers and their powers at the State level, and the role of the Conference of Rulers. This chapter will also offer an opportunity to

look at the Malaysian constitutional monarchy and its role with regard to constitutional conventions surrounding the legislature and its relationship with the executive at the State level and how these have operated in the Malaysian context.

Chapter five focuses on territorial governance, examining federal and state powers in the context of the evolving nature of governance at state and local government levels, including State finance. Here the constitutional system at the State level will be examined briefly, as well as local government. We will see here the dynamic of the federal structure.

Chapter six discusses human rights, examining the constitutional definition, restriction, and enforcement of human rights. Given the large dimensions of this topic, the approach will be to look at one area of rights (liberty of the person), one institution (Suhakam, the National Human Rights Commission), and one group with human rights issues (the indigenous peoples of Malaysia). We will find that human rights have also proved continually controversial and problematical in the context of the authoritarian state and the Asian values debate.

In chapter seven we look at the judicial branch, and especially the role of the Federal Court, focussing attention on the crucial role of the judiciary in the Malaysian polity. The focus here will be on the threats to, and the defence of, judicial independence and the role of the Malaysian Bar in its struggle to maintain constitutional government.

With this structure the book will, up to this point, not differ greatly from others in this series. But we will also see, in chapter eight, on religion, how religious considerations cut across, explain, comment on, and also challenge the fundamental principles of the contemporary constitutional order. The struggle over Malaysian society's pluralist nature will be especially in evidence here. The chapter will consider in particular the jurisdictional conflicts over the jurisdiction of the civil and syariah courts and the issue of religious freedom as the leading site of disagreement over the relationship between the state and religion.

Harper has called Malaysia the 'classic plural society'.[12] Those who look to Malaysia's achievements over half a century often pose the question how a country with such deep ethnic and religious divides, which make those of most countries pale into relative insignificance, has managed to conjure social and economic outcomes that nobody would have

[12] T Harper, *The End of Empire and the Making of Malaya* (Cambridge, Cambridge University Press, 2001) 2.

predicted with any great confidence in 1957. Indeed, Anthony Burgess' *A Malayan Trilogy*,[13] written between 1956 and 1959 (the critical period discussed in chapter one) paints a mid-1950s Malaya standing nervously on the brink of independence, a society apparently – if one believes Burgess' British characters – about to be torn asunder by ethnic hatreds which had only been held in check by a benevolent colonial power. The prospect of peace, stability, and progress seemed, to most observers, unrealistic to say the least in a society that had recently torn itself apart over race, allegiance, and ideology. This was the situation facing the constitution-makers such as Sir Ivor Jennings, and the first holders of political office such as Tunku Abdul Rahman.

The answer to that question is that ethnic hatreds have been mainly held in check by a 'regime of exception', in which 'normal' principles of law appropriate to stability and peace (such as due process of law, and civil liberties) have always been under threat and occasionally actually suspended. Relative stability has prevailed, and prosperity has blossomed more or less continuously, but at the cost of authoritarian methods of dealing with communal issues and challenges. At the same time profound, albeit habitually non-violent, conflict over ideas has been unremitting. Politics has rarely been anything less than overtly personal, subliminally but deeply communal, and fiercely tumultuous as it moves rapidly from one issue to another, often without any real resolution. The nation has edged towards the abyss only to be pulled back sharply by the employment of authoritarian methods, notably in 1969 and 1987. These same methods have often been used to advance and protect the concept and operation (and even suppress debate about) Malaysia's national development. As a result, democracy, constitutionalism and the rule of law are usually said to have been eclipsed, raped, or to be dying or even just dead. Ethnic and religious polarisation is usually alleged to be worse than ever before; it is never thought to have ameliorated. The mid-twentieth-century themes of the Malayan Trilogy have not really faded into the background, but have rather undergone a change of key.

Malaysia is a nation of paradoxes, defying attempts to parse its public discourse or indulge in familiar forms of categorisation. Not least of these paradoxes are the constitutional paradoxes explored in this book. This is, as we will see, a nation that embraces democracy but is not

[13] A Burgess, *The Long Day Wanes: A Malayan Trilogy* (Penguin, Harmondsworth, 1972).

comfortably classed as fully democratic. It exhibits fundamental rights mechanisms and rhetoric, but these are sporadically applied and habitually restricted in scope. It relies on the rule of law but the rule of law is also perpetually compromised. It bases its system of government on constitutionalism, but the Constitution itself is the subject of profound and controversial cleavages in understanding and interpretation. It is rampantly diverse, but the majority asserts its dominance over the rest. These and other Malaysian paradoxes will be examined in this book through the lens of Malaysia's evolving, troubled, and contested, but always intriguing, constitutional system.

Note: All references to 'Article' in this book are references to Articles of the Federation Constitution of Malaysia 1957, unless the context indicates otherwise.

1

Historical Background

Symbolic Malacca – The Constitution of Malacca and the Malay Concept of Monarchy – The Colonial Constitutional Experience: the Residential System – Federalisation – The Malayan Union – The Federation of Malaya – The Reid Commission – The Commission's Report and the Constitutional Debates – The Creation of Malaysia – The May 13 Incident – Conclusion

I. SYMBOLIC MALACCA[1]

> 'Di atas robohan Melaka, Kita dirikan jiwa merdeka, Bersatu padulah segenap baka, Membela hak keadilan pusaka' (Malay pantun by Burhanuddin Al-Helmy)
>
> (On the ruins of Malacca fort, We build the soul of independence, Be united every race, Defend the right of justice inherited)[2]

IN A SMALL area of the city of Malacca one can find nestled closely together a Chinese Buddhist temple, a mosque, the tomb of Malacca's Malay national hero Hang Tuah, a Hindu temple, a Catholic church and a Tamil Wesleyan church. The close proximity of these religious buildings and cultural symbols has never been a source of tension. The author was informed that for several hundred years those responsible for each form of worship or expression of culture have been careful not to harm or irritate the adherents of the others. It

[1] The Malaysian spelling is 'Melaka'. 'Malacca' is used in this book, given its greater familiarity internationally.

[2] Quoted in TN Harper, *The End of Empire and the Making of Malaya* (Cambridge, Cambridge University Press, 1999) 13.

would be hard to find a better symbol of the rich and historically deep diversity and mutual tolerance of Malaysian society. These buildings, redolent of several different cultures and religions, have existed in close proximity for centuries, adding colour and variety to a great city where one can also see the beautiful nineteenth-century houses of the culturally mixed Peranakan or 'Baba Nyonya' middle class;[3] a Dutch Stadthuys and church; a Portuguese fort, church and village; an ancient Chinese cemetery; and a Chinatown of British colonial design.

The Malacca Empire of the fifteenth century is, even today, symbolic in Malaysia as an ideal and glorious Malay civilisation that continues to stand as the benchmark for the Malay community.[4] It is regarded as an ideal pre-colonial polity for other reasons. It was here that an empire was formed in the fifteenth century that embraced much of what is characteristic of its successor, the Malaysian Federation, in the twenty-first century. Malacca is the Malays' archetypal kingdom, regarded as the historical fount of Malay culture, literature, and political thought; a necessary myth perhaps in an age of nationalist sensibility. With the exception of Brunei, which controlled what are now Sabah and Sarawak and became Islamic in the fourteenth century, Malacca was also the first Islamic kingdom (1409) in the territories now forming Malaysia. It had a highly developed legal code, the *Undang-Undang Melaka*,[5] referred to by Winstedt as the first constitution in Malaya of which we have any adequate record.[6] Malacca's constitution influenced the Malay States and the Borneo States in the centuries after Malacca's destruction by the Portuguese in 1511. The Portuguese victory was followed by that of the Dutch over them in 1641 and Malacca's cession by the Dutch to the British in 1824. Malacca presents a remarkable 450-year history of diverse colonisation and to this day has Portuguese and Dutch Eurasian communities. Even before 1511 Malacca was home to a great mixture of various communities of Malays (Bugis, Javanese, Boyanese, Minangkabau), Indians, and Chinese (followers of a Chinese

[3] The Peranakan are descendants of the original Straits Chinese, who sometimes married local Malays and became non-Chinese-speaking stalwarts of the British Empire and were often British subjects: see www.peranakanmuseum.sg/home/home.asp.

[4] Abdul Aziz Bari, *The Malaysian Constitution: A Critical Introduction* (Kuala Lumpur, The Other Press, 2003) 21.

[5] Liaw Yock Fang, *Undang-Undang Melaka: The Laws of Melaka* (The Hague, Martinus Nijhoff, 1976).

[6] R Winstedt, *The Malays: A Cultural History*, 6th edn (London, Routledge and Kegan Paul, 1961) 70.

princess who married the Malacca Sultan), and was also a successful and well run centre for international trade. Its first Ruler, Parameswara, had been a Hindu King from Singapore who married a Muslim woman and converted to Islam, changing his name to Iskandar Shah. Thus the Sultan was 'no longer an incarnate Hindu god but the shadow of Allah upon earth'.[7] During the British period Malacca became the centre of Peranakan culture, developed by a local adaptation of Chinese culture to that of the local Malays, resulting in something that is uniquely sophisticated, owing something to both cultures but also different from either. It is hard to think of anything more typical of Malaysia's multi-cultural society, which will be a major theme of this book, and which has affected deeply the configuration of its Constitution.

This chapter tracks the emergence of the Malaysian polity over time through an examination of its pre-colonial, colonial, and post-colonial history, and the formation of the Constitution of 1957. The emphasis will be not so much on general history as on the origins and development of the institutions and constitutional principles which can be seen in the contemporary constitution. It is fitting to begin this history with a reference to the constitution of Malacca, a city that symbolises all the ideas and factors that have influenced the Malaysian Constitution: Malay monarchy, Islam, colonial government, cosmopolitan internationalism, and the diversity of Malaysian society.

II. THE CONSTITUTION OF MALACCA AND THE MALAY CONCEPT OF MONARCHY

'Raja sa-keadilan, Penghulu sa-undang'

(The King is the fount of justice, but the Headman carries out the law)

Constitutional ideas in the Malay world, as elsewhere in Asia, were not the subject or the outcome of historic, axial, events. Rather, we can see the unobtrusive mingling of various ideas of government drawn from Buddhist, Hindu, Islamic and purely customary roots. These ideas revolved around the person of the *Raja*. *Kerajaan* (the condition of having a *Raja*) is identical in Malay culture and language with government itself – there simply is not historically any concept of republicanism.[8]

[7] ibid.

[8] A Milner, *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (Tucson, University of Arizona Press, 1982).

The Malacca constitution was therefore based on the idea of kingship.[9] The *Undang-Undang Melaka*, which contains a number of clearly constitutional rules, is directed in many ways to the powers of the Sultan and the organisation of the government. The Sultan had power to appoint important officials such as the *Bendahara* (Prime Minister), the *Penghulu Bendahara* (Treasurer and Head of the Civil Service), the *Temenggong* (Chief of Police), the *Laksamana* (Admiral), and the *Syahbandar* (Harbour-Master). If one looks closely at the actual legal content of the constitutional rules concerning the Sultan, one finds that they are mainly ceremonial (for example they legislate on issues of language and dress): they give him great dignity but little actual power. Although the *Undang-Undang Melaka* gives the Sultan extensive powers of appointment, this is so that he will not need to be, and indeed should not be, bothered with the trivialities of government. In fact these official positions, associated as they were with rights of revenue, were often appropriated by district chiefs who exercised considerable political power, passing the office on to their descendants. The Sultan's main prerogative was the exercise of judicial powers as a final court of appeal; he had the power to pass a sentence of death, as well as the right to grant honours, concessions and revenue monopolies, which were used by him to some political and fiscal effect. This was also true, later, of the *Rajas* (later usually styled 'Sultans') of the Malay States and of the Borneo sultanates that formed what we now know as Malaysia.

Malacca Empire in the sixteenth century dominated the Malay States during Malaya's brief period of unification. The splintering of the empire led to these States following Malaccan ideas of monarchy. Moreover, being riverine States with quite inaccessible interiors, they were very hard to bring under the control of a central power. This not only hindered the unification of Malaya but resulted in the constant assertion of local chiefly power and the imperative of consultation and consensus, which came to be a constitutional matter. The chiefs tended to resent the power of the *Raja* and, since the succession depended partly on their choice, the tendency was for a weak rather than a strong *Raja* to emerge. The *Raja* did not have the staff or resources to exert a great deal of control over an area beyond his own district, which he ruled much as a chief ruled his. Loyalty was owed to the *Raja*, but the *Raja* in turn could not be seen to shame his subjects. The chiefs needed

[9] For Malay conceptions of sovereignty, see further RH Hickling, *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (Petaling Jaya, Pelanduk, 2001) ch 5.

the *Raja* for security and social advancement, but they would not allow him to exercise absolute power. The actual political functions of the *Raja* were essentially confined to military, foreign and judicial affairs. This was quite logical in the sense that it was only in these areas that the chiefs really needed a central power. Even here, as with other important matters, the *Raja* had to consult his chiefs and achieve a consensus (*muafakat*) before acting, otherwise his decisions would not be implemented: this was of course a useful buttress against erratic or arbitrary acts.[10] When several chiefs of Perak refused to sign the Pangkor Engagement of 1874, which introduced an obligation to follow the advice of a British Resident, its legitimacy was doubtful. This point was brought home even more forcibly when the British Government attempted to unify Malaya in the Malayan Union Plan of 1946, getting the Sultans one by one to sign away their powers. This provoked a dramatic response, the Malays mobilising as never before to resist unification, citing their ancient governance traditions and the profound unconstitutionality (some even accused the Sultans of *derhaka* – treason) of literally signing away the Malay States without consulting the chiefs.[11] Malay monarchy was fundamental but not absolute, the *Raja* being held in check by the chiefs and by his duty to observe Islam and adhere to *adat* (Malay custom).[12]

We will see in the course of this book, especially in chapter four, that the monarchy has been a source of great controversy and its powers even under a system of constitutional monarchy have been restricted in some respects but increased in others. Not the least of the restrictions was the abolition of sovereign immunity in 1993,[13] a reform which runs very much counter to Malay tradition in which the *Raja* cannot be questioned. Nonetheless, it is to the continued cultural relevance of Malay constitutional traditions that Malaysia owes its federal structure.[14] Deep

[10] J Gullick, *Indigenous Political Systems of Western Malaya* (London, Athlone, 1988).

[11] Khong Kim Hoong, *Merdeka! British Rule and the Struggle for Independence in Malaya, 1945–57* (Petaling Jaya, INSAN, 1984) at 78ff; A Lau, *The Malayan Union Controversy 1942–1948* (Singapore, Oxford University Press, 1991).

[12] M Hooker (ed), *Readings in Malay Adat Law* (Singapore, Singapore University Press, 1970).

[13] See p 118.

[14] See, further, Mohamed Salleh Abas, 'Traditional Elements of the Malaysian Constitution', in F Trindade and HP Lee (ed), *The Constitution of Malaysia: Further Perspectives and Developments: Essays in Honour of Tun Mohamed Suffian* (Singapore, Oxford University Press, 1986).

disaffection from the Rulers in the 1980s and 1990s, resulting in executive loss of patience, might, all else being equal, have signalled the end of the monarchy: it did not. The abolition of this ancient institution (accomplished with relative ease in India and Indonesia) was, in Malaysia, unthinkable, even at the institution's lowest ebb. In the twenty-first century the monarchy remains more relevant than at any time since the 1940s.

The written nature of Malacca's constitution was unusual for fifteenth-century Asia. In many respects the *Undang-Undang Melaka* did not in any case function as a written constitution in the modern sense. The constitutions of the Malay States were unwritten, even though codes of law were not at all unknown before the arrival of the ever-legalistic Europeans.[15] It was not, however, until 1895 that a Malay State (Johor under Sultan Abu Bakar) adopted a modern written constitution. It was ceremony, precedent, and custom that prevailed in constitutional matters. To say that traditionally the Malay States had unwritten, customary, constitutions, is not to say that they had no rules or any distinction between politics and law; on the contrary Malay political culture emphasised an almost punctilious correctness of procedure, consultation, and appointment. The constant disputes over royal succession in the Malay States, often exploited by the British for their own ends, which have continued somewhat into the post-*Merdeka* era, tended to emphasise rather than undermine the importance of custom and precedent.

In the case of Negri Sembilan, which based its federal, matrilineal, and democratic constitution – and it still does – on ancient Minangkabau custom known as *adat perpatih*, the constitution exhibited an almost arcane complexity and formality.[16] From the late eighteenth century it was a federation under the nominal sovereignty of the *Yamtuan*, a Sumatran Minangkabau prince, and had complex rules of succession. It proved dysfunctional because its democratic principle entailed a requirement for unanimity in elections to office, which was of course hardly ever forthcoming, resulting in permanent constitutional gridlock. At another level it embraced the due-process notion familiar to common lawyers that an accused person could not be tried except by his peers. Its

[15] eg, J Rigby (ed) and R Wilkinson (trans), 'The Ninety-Nine Laws of Perak', in Hooker, above n 12, at 57–82.

[16] R Wilkinson, 'Constitutional and Adat Structure of Negeri Sembilan', ibid, at 333–43; Winstedt, above n 6, at 81–90; M Hooker, *Adat Laws in Modern Malaysia* (Kuala Lumpur, Oxford University Press, 1972) chs 6–8.

significance for the *Merdeka* Constitution is that the unique Malaysian system of choosing the federal head of state (the *Yang di-Pertuan Agong*) by an election amongst the Rulers is taken from Negeri Sembilan's strange but fascinating constitution.

The concept of *derhaka* (treason) was also important. If the *Raja* was tyrannical, as some succeeded in being, there were two remedies: flight to another *Raja* (allegiance was personal rather than territorial), or running *amok* (amuck) and committing suicide. Even if, as happened in Johor in 1699, the *Raja* was a psychopath guilty of the enormity of disembowelling a pregnant woman for stealing a jackfruit, there was no right of rebellion or tyrannicide, which itself would be the crime of *derhaka* bringing decay on the state itself: the *Raja* could be punished by God alone. In the Johor case the tyrannicide was punished by the growth of a tree from a wound caused by the *Raja* stabbing his assailant's foot, which ultimately killed him; the story expresses the impossibility of tyrannicide and the inviolability of the *Raja*'s person even in extreme circumstances.[17]

III. THE COLONIAL CONSTITUTIONAL EXPERIENCE: THE RESIDENTIAL SYSTEM

'Seperti Raja dengan menteri'

(Like the King and his minister, ie in complete accord)

As the historian Tim Harper points out, the British did not come to Malaya to catch butterflies. Their intervention was precipitated by a number of commercial and strategic ambitions, and occurred in two stages, moving inexorably towards constitutional structures and eventually independence in 1957.[18]

First, in 1786, the Sultan of Kedah ceded to the East India Company Penang (which they then called Prince of Wales Island) and a strip of land known then as Province Wellesley on the Kedah mainland opposite (now called Butterworth). Singapore was ceded to Britain by the Temenggong of Johor in 1819, and Malacca by a treaty with Holland in 1824. These colonies, initially governed from Calcutta, were brought

[17] For the full story, see L Andaya, *The Kingdom of Johor 1641–1728: Economic and Political Developments* (Kuala Lumpur, Oxford University Press, 1975) 180–91.

[18] TN Harper, above n 2, 58.

together in 1867 as the Straits Settlements colony under the Colonial Office in London, with their own Governor and a seat of government in Singapore. They were an attempt to establish profitable entrepot trade in a location, between China and India, in proximity to the Straits of Malacca. English law and legal institutions were introduced by a Charter of King George IV in 1826.[19] Although the British left in 1957, the common law, introduced by this Charter, remained.

The second stage of intervention related to the Malay States, beginning in 1874 and ending in 1920. This stage differed from the first in that it involved the establishment of what was, constitutionally speaking, a series of protectorates in which the principle of indirect rule was observed. The traditional Ruler was obliged by treaty to accept the advice of a British Resident, but the local governance structure remained largely intact.[20] A contributory factor in this intervention was the unmanageable series of problems confronting the Malay States with progressively alarming results during the course of the nineteenth century. The rules of succession, always the most crucial aspect of Malay constitutional customs, had resulted in numerous civil wars. The feudal Malay constitutions groaned under the weight of dynastic quarrels, mass Chinese immigration for tin mining, and rapid economic and social changes. Perak, for example, had more Chinese residents than Malays, and the constant battles between secret societies pushed law and order outside the government's control. The *Raja* requested British assistance and signed a treaty with the Crown, the Pangkor Engagement, at the island of Pangkor in 1874, under which Perak accepted a British Resident, setting a precedent for what became the 'residential system' throughout Malaya. The *Raja* agreed to accept the advice of the Resident on all matters except Malay religion and custom. Residents were accepted in Selangor (1887); Pahang (1887); the various states of Negri Sembilan (the Nine States, 1883–87), but they were unified in 1898. The four northern states were under the aegis of Siam and received British Advisers or Residents only later, with the agreement of Siam in a Treaty of 1909: Kelantan (1910); Terengganu (1910); Kedah (1925); and Perlis (1930). Johor, on the other hand, was recognised as an entirely independent state by a treaty of protection in 1885; the Sultan granted it a written Constitution in 1895, but it was finally brought under the residential system in 1914.

[19] A Phang, *From Foundation to Legacy: The Second Charter of Justice* (Singapore, Singapore Academy of Law, 2006).

[20] R Emerson, *Malaysia: A Study in Direct and Indirect Rule* (Kuala Lumpur, University of Malaya Press, 1937: 1970); J Gullick, *Malay Society in the Late Nineteenth Century: The Beginnings of Change* (Singapore, Oxford University Press, 1987).

British policy was to encourage Chinese immigration in the expectation that Chinese labour and investment would galvanise Malaya into economic and social progress. This had also been the policy of the Malay Rulers in, for example, Johor, Selangor and Perak. Friction between the two ethnic groups was rare; most disturbances were between Chinese secret societies, as occurred in Perak, or between Malay adherents of different aspirants to the throne, as occurred in Selangor. The institution of the *Kapitan Cina,* or headman of the Chinese community, was recognised by the Malays before it was taken over by the British: it is recorded that the most famous *Kapitan,* Yap Ah Loy, who is credited with the founding of Kuala Lumpur, was installed by the Sultan of Selangor in a formal ceremony in which Yap wore Malay costume.[21] The idea of the co-operation, yet functional separation, of the Malays and the Chinese was already an important aspect of government by the 1870s.

British constitutional policy lay in the avoidance of too much disturbance to Malay traditions and practice of government. However, the maintenance or enhancement of the authority of the Ruler over the chiefs would in turn enhance the power of the Resident. The chiefly privileges of tax collection, an obstacle to modem fiscal planning, were exchanged for pension rights. There was a good deal of reluctance to accept interference with time-honoured constitutional powers of this kind, but progress demanded that there should at least be some changes in the constitutional order.[22]

Nonetheless it is clear that although the British became more ambitious over time, great care had to be taken to observe the constitutional niceties. Unfortunately neither the Treaties nor the instructions given to the Residents by the Colonial Office contained any clear statement of the Resident's duties with regard to the Rulers and the existing system of government. Under the Treaties, the Ruler was in theory obliged to receive and act on the advice of the Resident, except in relation to matters pertaining to Islam and Malay custom. Interestingly enough, the

[21] S Middlebrook and J Gullick, *Yap Ah Loy* (Kuala Lumpur, MBRAS Reprint No 9, 1983) 40.

[22] J Gullick, *Rulers and Residents: Influence and Power in the Malay States 1870–1920* (Singapore, Oxford University Press, 1992).

Malay version of the Pangkor Engagement referred not to advice but to discussion *(berbicara)* between the Ruler and the Resident, which did not seem to suggest that the Ruler was always obliged to accept the advice proffered. It also seems likely that the significance of the exception concerning Malay custom and Islam was greater to the Malay mind than it was to the British. After all, before the British intervention, most government actually conducted by the Rulers could be said to pertain in some sense to Islam or Malay custom, which were supposed to prescribe the solution to all difficulties. On this view the British would confine their advice to technical issues of policy and implementation such as railway construction or public health, rather than make wholesale changes to decision-making processes. Clearly, however, much depended on the personality and conduct of the Ruler and the Resident. The British were not above interfering with the succession; their willingness to do so indicates also that the Ruler was potentially, and often actually, no mere puppet of a colonial puppet-master.[23]

We can assess the nature of this constitutional system by looking at the earliest and precedent-forming example, that of Perak under Raja Idris and Resident Sir Hugh Low, one in which the *Raja* and his minister were indeed usually in accord, but only as a result of good sense on both sides. The Resident did not always refrain from giving advice on religious matters, technically within the purview of the Ruler, presumably on the basis that nothing in the 1874 Treaty prevented him from offering such advice. On the other hand the *Raja* sometimes ignored Low's advice. The dividing line between British and Malay administration was generally drawn or interpreted by the Resident using his own discretion. His situation under indirect rule was sometimes extremely difficult due to the conflicting expectations of the Ruler and the Colonial Office. The first Resident, JWW Birch (1874–77), used public humiliation of Malay chiefs as a means of asserting his authority in an overly headmaster-like fashion: he paid with his life. Low (Resident 1877–89) on the other hand, was married to a Malay woman, familiar with Malay customs, and was influenced by the moderate administration of the 'White Rajah' of Sarawak, James Brooke (1841–68). He was able to achieve more by indirect means than others were able to achieve by direct means.

[23] E Sadka, *The Protected Malay States 1874–1895* (Kuala Lumpur, University of Malaya Press, 1968); P Loh, *The Malay States 1877–1895: Political Change and Social Policy* (Kuala Lumpur, Oxford University Press, 1969).

In most instances the residential system was essentially rule by consensus, because neither the Resident nor the Ruler could afford the other to act against his will in matters of importance. In so far as the Ruler made the Resident aware of Malay sentiment on particular issues, it could be said that sometimes the Resident acted on the Ruler's advice rather than *vice versa*.[24]

In addition there was a State Council in each State. Typically, for example in Perak, on which the other States based their State Councils, the State Council would consist of four Malay Chiefs, including the Ruler, two Chinese, and two European officials, including the Resident. The Resident nominated members who were appointed for life by their Ruler. The Ruler presided, but it was the Resident who took the initiatives. It would meet about seven times a year, but the lengthy agenda precluded much discussion; this was drawn up by the Resident, as was draft legislation after consultation with the Governor of the Straits Settlements. It was principally a consultative body, though even this function declined as the residential system became settled. The State Councils came to consider more numerous but more trivial matters. It was not generally a forum for the expression of opposition. Legislation was effected on the Resident's initiative by order of the Ruler-in-Council. There was no separation of powers: the State Council also exercised executive and judicial powers, acting as a final court of appeal, as the Ruler had done personally in previous times. The residential system thus presaged the takeover by the British of the judicial system, which was then remodelled along the lines of the common law. Although the judicial system was not legally independent of the executive, the introduction of common-law principles tended to encourage the practice of judicial independence. As we will see in chapter seven, judicial independence and the common law traditions of the Bar were to become controversial issues.[25]

Gradually, however, the powers of the State Council came to be restricted by the Colonial Office and the Governor of the Straits Settlements. The logic of consistency of action was hard to resist. The budget came to be settled by the Resident but also approved by the Governor before being put to the State Council. From 1892 all draft

[24] CN Parkinson, *British Intervention in Malaya 1876–77* (Kuala Lumpur, University of Malaya Press, 1964) ch 10.

[25] Gullick, above n 10 at 50ff.

legislation went to the Governor before the State Council. Crucial measures were sometimes not discussed in the State Council at all; the Malays were able to delay, but hardly ever prevent their being passed.[26] A process of federalisation had begun.

Viewed as a preparation for democracy, the residential system and the State Councils cannot be said to have been effective. In fact the Malay political system prior to intervention was possibly more democratic; major decisions were often taken only after a mass meeting of 100 or more chiefs and many days of deliberation. In no way did the British attempt to build on the more democratic elements of Malay political tradition, except that the State Councils did at least provide an opportunity for Chinese representation, which was a constitutionally important innovation. The legacy of this system is that the Malay States as well as the Federation itself have a Cabinet system, constitutional monarchy, and minority representation.

IV. FEDERALISATION

'Kapal satu, nakhoda dua'

'A Malay proverb says that there cannot be two masters to one vessel; neither can there be four Rulers over one country' (Raja Idris of Perak, at the Rulers' Durbar, 1903)

The logic of centralisation, efficiency and development, encouraged by business and legal interests, soon led to attempts at federalisation, which ultimately deeply affected the nature of federalism as it is practised now. In 1895 the four protected Malay States (Selangor, Negri Sembilan, Pahang and Perak) were grouped together into the Federation of Malay States (FMS) by a treaty. The other states (Johor, Kedah, Perlis, Terengganu and Kelantan) came to be referred to as the Unfederated Malay States. This was not a federal constitution, although it was a forerunner of the present federal system introduced in 1948. There was no surrender of sovereignty and the Government was to be administered 'under the advice of the British Government'; the residential system remained, at least ostensibly; and there was division of 'state' and 'federal' powers. The Rulers agreed to accept the 'Resident-General' in Kuala Lumpur as the representative of the British Government under the direction of the Governor of the Straits Settlements, styled for this

[26] ibid, ch 6.

purpose as the High Commissioner of the Malay States. However, the Treaty entailed the end of the practice, if not the theory, of indirect rule, because the new arrangements resulted in the centralisation of executive power and marginalisation of the individuality of the various States.[27]

The implementation of the Treaty involved the presentation of State budgets and draft legislation to the Resident-General and the Governor, whose consent was required before they could be passed, and an Attorney-General was appointed to draft legislation. The State Councils, although in theory unaffected, had their powers drastically reduced in practice, becoming essentially rubber stamps for the legislative will of the federal authorities. Federal departmental chief officers were appointed, initially merely in an advisory capacity, but from 1902 they were given departments and exercised important and exclusive executive powers. By this innovation the beginnings of a cabinet system of government were introduced. This arrangement, in which the British Government imposed its will without any corresponding protection for the FMS, exposed the latter to encroachment on their powers by the authorities in Kuala Lumpur. Effectively only the Residents themselves stood in the way. A centripetal federation was, one can see here, already in the making (see, further, chapter five). A disagreement between the Resident-General, Treacher, and the Resident of Perak, Rodger, over the Railway Enactment in 1903 illustrates the point. Rodger insisted that the legislation infringed states' rights, resting his case on the Constitution of Perak and the Pangkor Engagement. Treacher revealingly described the Constitution as '[not] tied down within the terms of written engagements, but fortunately . . . capable of growth and expansion with the approval of the Ruler for the time being as conditions change'.[28]

In 1904 even the judicial powers of the Resident and the appellate jurisdiction of the Ruler-in-Council, already eroded by the appointment in 1896 of a Judicial Commissioner for the FMS, were entirely removed and given to the Judicial Commissioner. This laid a foundation for the centralisation of the administration of justice and the introduction of the common law as the general law. *'Durbars'* or Conferences of Rulers, forerunners of the modern institution (see chapter four), were held in

[27] J Sidhu, *Administration in the Federated Malay States* (Kuala Lumpur, Oxford University Press, 1980) ch 2 (the apps set out the relevant treaties).
[28] Ibid, 115.

1897 and 1903. These were not significant events, however, as the powers of the Conference were vague and only advisory. Sultan Idris of Perak used the occasion of the 1903 Conference, however, to express Malay unhappiness at the erosion of States' rights. A further step was taken in 1909 with the introduction, by means of a further Treaty, of a Federal Council, headed by the High Commissioner, assisted by the Resident-General (from 1911 called Chief Secretary), and including the four Rulers, the four Residents and four unofficial members. The Treaty provided that draft budgets for the States should be considered by the Federal Council, and blandly assumed that it, as well as the State Councils, would be empowered to enact laws. However, the Treaty, following what we might call the logic of Pangkor, also reserved to the State Councils 'questions connected with the Mohammedan Religion, Mosques, Political Pensions, Native Chiefs, and Penghulus and any other questions which in the opinion of the High Commissioner affect the rights and the prerogatives of any of the . . . Rulers'.[29]

By implication the Treaty gave all other legislative powers to the Federal Council, and its Acts were to prevail over inconsistent State Enactments. This position was of doubtful constitutionality because legislative power could only be conferred on the FMS by express surrender of the sovereignty of the Rulers. The 1909 Treaty purported not to curtail any of the powers or authority of the Rulers, but in fact it did so by centralising legislative power. However, it represented the first genuinely federal constitution in Malaya in that it constituted a federal legislature (see chapter three) and divided legislative powers, albeit somewhat uncertainly, between the states and the federation (see chapter five). Of course this arrangement affected only four of the 13 States now forming Malaysia, but all the States have been profoundly affected by this 1909 Federal Constitution. The Rulers' influence was increasingly limited to customary and religious matters, and by convention they did not participate in Federal Council debates. Within the States, powers were vested more and more in the person of the Ruler, but exercised in fact by the British officials: 'By 1920 few could deny that the final vestiges of indirect rule had been trampled on and the Sultans were reduced to little more than glorified idols with feet of clay'.[30]

[29] *Agreement for the Constitution of a Federal Council, 1909*, cl 9.
[30] Sidhu, above n 27, 126.

An Agreement of 1927, under which the Rulers could be represented on the Federal Council by the Resident, finally placed legislative powers under complete British control. From 1927 a reversal of policy resulted, however, in the pursuit *of decentralisation* in order to accommodate States' rights in the face of expanding federal control. Legislative powers were clearly divided between the States and the Federation, and some federal departments were devolved onto the State Governments. The first tentative steps had been taken towards the now familiar federal structure.

V. THE MALAYAN UNION

'Seperti tulis di-atas ayer'
(Like writing on water)

During 1942–45 Malaya and Borneo were occupied by Japanese forces. The British cooperated with resistance elements, including communist ones, to undermine Japanese rule. The reoccupation by allied forces in 1945 made moves towards independence unavoidable. It was now clear that colonial government had failed to fulfil its basic promise of protection, and the war had aroused greater consciousness of nationalism and ethnic identity, and a new desire for self-determination, not least amongst those who had resisted the Japanese occupation.[31] Achieving independence, however, proved a complex matter. The territories now forming Malaysia then comprised a motley collection of federated and unfederated States together with colonies (the Straits Settlements). It had been a headache merely administering and defending them, and their constitutional differences were now an obstacle to independence. A British Cabinet Committee on Malaya and Borneo under Clement Attlee had decided during the war to create a unitary state in Malaya – Singapore and the Borneo States being left for later consideration. Malaya needed to be united to be defendable, a fact which was regarded as a precondition to independence.[32] There was, however, an obvious

[31] W Roff, *The Origins of Malay Nationalism* (Kuala Lumpur, University of Malaya Press, 1967).
[32] For a constitutional overview of the period 1946–57, see Rais Yatim, 'The Road to *Merdeka*', ch 1 of A Harding and HP Lee (ed), *Constitutional Landmarks in Malaysia: The First 50 Years, 1957–2007* (Kuala Lumpur, Malayan Law Journal/ LexisNexis, 2007); and Mohamed Noordin Sopiee, *From Malayan Union to Singapore Separation: Political Unification in the Malaysian Region 1945–1965* (Kuala Lumpur, University of Malaya Press, 1974).

constitutional obstacle to unification. The British government had no authority to unify the Malay States, which were legally independent. The Malay Rulers were therefore bullied and threatened into signing the so-called MacMichael Treaties, which surrendered their authority to the Crown, and allowed the implementation of the Malayan Union Plan, which was introduced by the Malayan Union Order-in-Council on 1 April 1946.[33]

The details of this constitutional arrangement need not detain us, because nothing in it has had any lasting effect or influence, and by 1948 it had been replaced with a federal structure. Almost all of the main changes it made were controversial. The surrender of the Rulers' sovereignty in effect abolished the Malay States, whose history went back hundreds of years, to the Malacca Empire and even before that, and was regarded as an insult to Malay culture and tradition. As we have seen, the Treaties were also unconstitutional due to lack of consultation with the chiefs. The Union also gave citizenship equally to all residents, thus, in Malay thinking, demoting the Malays in their own land by making them equal to migrant people with only five years' residence, and exposing them to marginalisation. As if this was not bad enough the Union made no move towards a democratic system of government, vesting practically dictatorial power in the Governor, who was able to control the exercise of all executive and legislative power, even to the extent of overriding any rejection of his proposed legislation by the mainly Governor-appointed 40-member legislature.

The reaction to this high-handed constitutional outrage was its total rejection by the Malays. The tumult was led by the Rulers and newly emerged political leaders from the Malay aristocratic class, notably Onn Jaffar and Tunku Abdul Rahman. They were joined by a thoroughly roused Malay *rakyat* and even former British officials. In March 1946, a new political party – the United Malays National Organisation (UMNO) – was formed by a congress of 42 Malay organisations with the express aim of defeating the Union. By June 1946 the arrival of a new Governor, Malcolm MacDonald, had prompted the abandonment of the Union and a decision to undertake plans for a federal structure to replace the Union.

[33] *Malayan Union Gazette Extraordinary*, 1 April 1946; J Allen, *The Malayan Union* (New Haven, Yale University Press, South East Asia Series No 16, 1967); J Ongkili, *Nation-Building in Malaysia 1946–74* (Singapore, Oxford University Press, 1985) ch 2.

VI. THE FEDERATION OF MALAYA

'Bujur lalu, lintang patah'

(Lengthwise you get through, sideways you get broken)

Again the constitution-making process was orchestrated by the Government, four Rulers and two UMNO representatives being drafted onto a Committee comprising also six officials. The resulting constitutional arrangement also dealt with the Malay States and the former Straits Settlements of Penang and Malacca, but the Rulers and the States and State Councils were to be retained in a system of constitutional monarchy. The Government would be headed by a High Commissioner with powers over all matters except Malay custom and religion. The special status of the Malays would be recognised, and citizenship for non-Malays restricted to those with 15 years' residence. The Legislative Council would be chaired by the High Commissioner, and would comprise officials, the nine Presidents of the State Councils, and 50 appointed unofficial representatives of the various races. In this way the proposals, which became the Federation of Malaya Agreement 1948 (FMA), made important concessions to Malay sentiment but not to democratic participation. Indeed the powers of the High Commissioner hardly differed from those of the Governor under the Malayan Union.

The FMA was opposed by a number of interests which coalesced into the All-Malaya Council of Joint Action (AMCJA) in February 1947. Alternative, and rather more interesting, proposals, called 'the People's Constitutional Proposals', were advanced by the AMCJA in July 1947. Under these proposals the Rulers would be retained as constitutional monarchs, Islam and Malay custom remaining under their control. Citizenship would be granted to all those born in Malaya or having eight years' residence. There would be equal rights and opportunities for all citizens, as opposed to special status for the Malays. Singapore would be included in the Federation. An elected Legislative Council would have 55 per cent Malay representation for the first nine years. The executive would be elected by the Legislative Council. A Council of Races would have powers to delay for three years any legislation having racial implications. These proposals made a nod towards Malay interests and opposition but clearly nonetheless reflected the aspirations of the non-Malays.[34]

[34] Khong, above n 11, ch 3.

However, there was a limit to British willingness to eat humble pie, one helping of which over the Malayan Union having steeled resolve to bring the FMA into effect. A Consultative Committee was set up, but the FMA had already been negotiated. Furthermore, geopolitics intervened as the Communists advanced towards establishing a People's Republic in China and the Malayan Chinese who formed the backbone of the Communist Party of Malaya (CPM), became ever bolder in confronting the colonial government. The CPM, having laid down its arms in 1945 after the allied victory over the Japanese, whom it resisted from the jungle, and having then joined the AMCJA, now moved towards armed rebellion. The AMCJA disbanded in June 1948 with the banning of many participating organisations and the outbreak of hostilities. In July 1947 Revised Constitutional Proposals had been published, but these hardly differed from the original FMA proposals. State Agreements were signed and the Constitution of the Federation of Malaya, based on the FMA, was passed into law by means of an Order-in-Council on 1 February 1948.[35] The Rulers had also agreed in the State Agreements to introduce written constitutions, where not already enacted, at the State level, by which they were to abide. The State Constitutions were promulgated (this time with the concurrence of the traditional chiefs), providing for a legislature (the Council of State), and also a cabinet executive (State Executive Council), whose advice the Ruler was required to follow.[36] Thus Westminster governmental traditions were taking root both at Federal and State levels.

The Constitution of the Federation followed the broad lines of the FMA. Its provisions were an important step towards the *Merdeka* Constitution only nine years later, which reflected much of what had been agreed in 1947–48. The Federal Legislative Council, as it emerged from the FMA process, consisted of 49 members: the High Commissioner as Chairman, with 14 official and 34 unofficial members. It had wide legislative powers, but the High Commissioner had important reserve powers to refuse assent to a Bill passed by the Legislative Council, and to declare that

[35] *Federation of Malaya Order-in-Council 1948*, SI 108/1948 (UK). See also *Constitutional Proposals for Malaya: Report of the Working Committee, 24 April 1947* (Kuala Lumpur, Government Printer, 1947); *Federation of Malaya: Summary of Revised Proposals, 24 July 1947* (Kuala Lumpur, Government Printer, 1947).

[36] A Harding, *Law, Government and the Constitution in Malaysia* (The Hague, Kluwer, and Kuala Lumpur, Malayan Law Journal/LexisNexis, 1996) 24–28.

a Bill before the Council should have effect even if not passed, if he considered this 'expedient in the interest of public order, public faith or good government'.[25] A Federal Executive Council advised the High Commissioner, who was, however, empowered to act in opposition to their advice. It was later noted by the Reid Commission which drafted the *Merdeka* Constitution that, in spite of the potentially dictatorial powers vested in the High Commissioner, these were not actually exercised dictatorially; a convention emerged that no major policy changes would be made without the consent of all the State Governments. An informal Conference of Federation Executives, held before each meeting of the Federal Legislative Council, helped to ensure that a consensus emerged on major issues.[37] We will see this method of resolving Federal–State issues mirrored in current arrangements in chapter five.

It was also at this time that the various State Constitutions (Johor and Terengganu already had written constitutions) assumed something like their present form. Limited legislative power was exercised by the State Legislative Council, covering Islam and Malay custom and whatever was not covered by federal legislative powers. The Ruler, like the High Commissioner at the Federal level, had reserve powers (no longer provided for) to perform actions which were contrary to the State Executive Council's advice. The State Government was headed by a *Menteri Besar* (Chief Minister). A system of federal grants to State Governments was operated. A Conference of Rulers was also set up, with powers to discuss and comment on Government matters, but with no powers to obstruct the advice tendered by the Government.

However, what was also important in terms of the shaping of the future constitution was the emergency, which began in 1948 and continued until 1960,[38] three years after *Merdeka*, which resulted in the passing of a veritable armoury of repressive laws, most of which have now become regular features of Malaysian law, such as the Sedition Act, the Newspapers and Printing Presses Act, and the preventive detention provisions subsequently contained in the Internal Security Act. Moreover, the emergency tended to centralise government, limit States' rights, and of course facilitate the overriding of ordinary law and fundamental rights. The latter were not included in the Constitution, so that not even the judiciary could

[37] ibid.

[38] R Clutterbuck, *The Long, Long War: The Emergency in Malaya 1948–1960* (London, Cassell, 1966).

enforce them except in terms of statutory interpretation. The 1948 Constitution did not, however, in other respects, remain static; rather it formed the basis for rapid constitutional and political development towards *Merdeka* and the 1957 Constitution.[39]

The development of the political process, galvanised by the tumult of the 1940s, was already very much under way. As always in decolonisation processes the major issue was who would take over as the safe-pair-of-hands leadership, who would both press for early independence and form the post-independence Government. All eyes were now on UMNO. In November 1950 the UMNO leader and principal candidate for Prime Minister, Dato' Onn Jaffar, an aristocrat from Johor, tried to make UMNO into a multi-racial party by proposing the admission of non-Malays into the party. UMNO was split over this issue, but Dato' Onn lost the debate, leaving UMNO in September 1951. Tunku Abdul Rahman (universally now, as then, referred to as 'the Tunku'), a prince of Kedah and a Cambridge-educated lawyer, opposed Dato' Onn's policy and became UMNO leader. From 1951, constitutional and political developments moved the Federation ever closer to its independence structure. A multi-party system began to take shape with new parties created mainly along communal lines. In April 1951 a 'quasi-ministerial' or 'member' system was introduced, under which nine leading unofficial members of the Legislative Council were appointed by the High Commissioner as heads of ministries, forming a prototype of the modern Cabinet (see chapter two). In 1952 the member system was augmented by new portfolios and the ministers also became members of the Federal Executive Council. Elections to Municipal Councils, the first elections to be held in Malaya, took place in December 1951. These were very tentative first steps towards democracy: all acts of Municipal Councils still had to be approved by the District Officer. In the Kuala Lumpur Municipal Council elections of February 1952, UMNO, under the Tunku's leadership, allied itself with the Malayan Chinese Association (MCA) formed in 1949 by a prominent Malacca entrepreneur, Tan Cheng Lock. The surprising and historically important result was a landslide victory (12 seats out of 14) for the new 'Alliance'. What originated as a tactical local election pact became a winning formula repeated throughout Malaya in subsequent elections, and was later elevated, as we will see, into something of a theory or at least a profound fact of government with long-term consequences for Malaysia. In all local elections during 1952–53 the Alliance won 94 out of 119 seats, although 30 of the increased number of 75 members of the Legislative Council were appointed from its main rival, Dato' Onn's multiracial Independence of Malaya Party.[40]

[39] Khong, above n 11, ch 4.

In spite of some policy differences between UMNO and the MCA, the Alliance, at a conference in August 1953, was able to agree on a firm independence platform of constitutional, responsible government; observance of basic liberties; constitutional monarchy; the reconciliation of the rights of communities; and the ending of the emergency. In December 1954 the Malayan Indian Congress (MIC), formed in 1946, also joined the Alliance, completing the unique inter-communal triptych which was to characterise post-*Merdeka* politics, and make an indelible mark on Malaysian constitutional development. A dominant-coalition party system was already in place, which presumed to represent all three of the main races in Malaya. Its preferences would prove very hard to resist. The Government now agreed to Legislative Council demands for an election of 52 out of 98 members of the Council, to be held in 1955, and to a Malayan Chief Minister and Cabinet; the FMA was amended accordingly. The reconstituted Legislative Council was also to comprise (from 1956) a Speaker, who replaced the High Commissioner in that capacity; three officials; the nine state *Menteri-menteri Besar* (Chief Ministers); two 'Settlement' representatives for Penang and Malacca; 32 representatives of 'scheduled interests'; and seven members appointed in consultation with the majority party: making 98 in all.

The Alliance proceeded to rout the opposition in the 1955 elections, winning 51 out of the 52 elected seats and 81 per cent of the vote. Elections were also held for all the State Legislative Councils and Settlement Councils by the end of 1955, with similar results. The Tunku became the first Chief Minister and formed a Cabinet, appointed by the High Commissioner in consultation with the Chief Minister, consisting of six Malays, three Chinese and one Indian, on whose advice the High Commissioner was on some matters now actually obliged to act. The distribution of portfolios was such that self-government had virtually been already achieved, the British Government being responsible only for external defence and foreign affairs. It was also agreed that the

[40] R Milne and D Mauzy, *Politics and Government in Malaysia* (Singapore, Times Books, 1978) ch 4.

British Residents would be withdrawn. The main planks of the *Merdeka* Constitution had, by 1955, been firmly laid.[41]

VII. THE REID COMMISSION

'Jikalau kita beranak, ikut kata bidan'

(If a baby is being born, do what the midwife says)

By 1956 the momentum towards *Merdeka* had become unstoppable. A Constitutional Conference on the usual imperial pattern was held in London in January and February 1956 between representatives of the British Government, the Rulers, and the Government of Malaya. The Conference proposed independence for the Federation by August 1957 and the appointment of a Constitutional Commission. The proposals having been accepted by the Rulers and the British Government, the Commission was appointed and submitted its Report in February 1957. Following a period of public debate the Government of Malaya appointed a Working Party, consisting of four Alliance members, four Rulers, and two British officials, to consider the draft Constitution, which was appended to the Commission's Report. Some changes were made to the draft, which was approved by the Federal and State Legislatures; the *Merdeka* Constitution was brought into effect on 31 August 1957, the event celebrated by an impressive ceremony at the Padang, now known as *Dataran Merdeka* (Merdeka Square) in Kuala Lumpur, the Tunku famously raising his fist with repeated cries of '*Merdeka*!'

Between early 1956 and mid-1957 the shape of the contemporary Constitution was settled through extensive debates, discussions and drafting exercises. Although there was a Constitution in place, it was the constitution of a colony, not of a new independent and democratic nation. Some things would not change, but new elements entered the constitutional mix.[42]

Prior to the London Conference the three Alliance parties had over some months negotiated between them behind the scenes a common position on the future Constitution, and their Memorandum had been

[41] Khong, above n 11, ch 5.

[42] This passage is based generally on J Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur, MBRAS, 2002); and Harding above n 36, 28–39.

submitted to the Conference. The Memorandum's most important proposals involved a compromise: non-Malay citizenship should rise, but Malay special privileges should be retained. It also dealt with such issues as the national language and the monarchy. This position was destined to become in effect the cornerstone of the nation and the *Merdeka* Constitution, and is now often referred to as the social contract: a social contract not in Rousseau's sense of a notional contract between individuals and the state, but rather an actual, negotiated contract between ethnic communities, indigenous and migrant, planning to live in close proximity, and hopefully also in peace and harmony. This arrangement, which was to have very important long-term effects, is discussed in detail in chapter two.

The Reid Commission itself consisted of five persons under the chairmanship of Lord Reid, the prominent Scottish Judge. The other members were Sir Ivor Jennings, the Cambridge academic, whose experience of constitution-making in several countries was highly respected throughout the Commonwealth, and who was also a personal friend of the Tunku; Sir William McKell, a former Judge and Governor-General of Australia; Justice B Malik, an Indian Judge; and Justice Abdul Hamid, a Pakistani Judge. None of the members was Malayan or (apart from Jennings) had any significant experience of Malaya. All were lawyers. Only Abdul Hamid was Muslim. All members except Lord Reid himself had experience of the operation of a federal constitution. It is clear that Jennings was the dominant intellectual force in the drafting process. Fernando draws attention to Jennings' unique blend of academic brilliance, leadership, practical wisdom, and sheer hard work during the second half of 1956; there can be no doubt that Malaysia owes a great deal to Jennings' efforts at that time.[43]

This method of constitution-making by experts seems surprising, however, in view of the notable recent example of constitution-making in India, where there was an elected Constituent Assembly, directed to similar problems to those of Malaya, and on a much larger scale. The constitution-making method adopted in Malaya no doubt enabled independence to be reached rather sooner than might otherwise have proved possible. The most persuasive reason, however, for not having a Constituent Assembly, was that the main positions had already been

[43] J Fernando, 'Sir Ivor Jennings and the Malayan Constitution' (2006) 34(4) *Journal of Imperial and Commonwealth History* 577.

negotiated amongst the key players, and there would be reluctance to countenance a departure from those positions that might lead to political disarray, and even to the inter-ethnic rioting which was still fresh in memory from the immediate post-war period, and had of course occurred on a wide scale in India. The London Conference reflected these considerations by giving the Reid Commission terms of reference embodying the main positions of the Alliance Memorandum. Its task was perceived therefore not so much as a political exercise as the translation into legal and practical terms of that which was already politically settled. The five members were clearly chosen not for their experience of Malaya, but for their legal wisdom and constitutional experience. The job was a technical drafting one, not a democratic process of nation-building. Nonetheless, even this limited task had to be performed in a realistic manner, employing sensitivity to the important issues that would be debated within the terms of reference. The Commission accordingly consulted widely and sympathetically and the resulting draft Constitution, set out in its Report,[44] although modified in certain respects, was accepted by all the relevant institutions in Malaya. Nonetheless, the *Merdeka* Constitution in its early days suffered from the fact that it was not drafted by the representatives of the people. It has often been seen or presented as a foreign document rather than an autochthonous one. A more democratically chosen body would, undoubtedly, have come up with somewhat different recommendations, if we may judge by the events of 1946–48.

The terms of reference agreed in London were, to summarise, as follows:

> To examine the present constitutional arrangements . . . taking into account the positions and dignities of . . . the Rulers [and] . . . to make recommendations for (i) a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on parliamentary democracy with a bicameral legislature, which (ii) would include provision for . . . the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy; . . . (iii) the safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States; . . . a constitutional . . . Head of State . . . for the Federation to be chosen from among . . . the Rulers; (iv) a common nationality for the whole of the Federation; [and] (v) the safeguarding of the special position of the Malays and the legitimate interests of other communities.[45]

There was however no mention in the terms of reference of fundamental rights or judicial independence.

During 1956, the Commission consulted widely all over Malaya, holding 118 meetings, including 31 at which evidence was presented, and considered 131 memoranda, notably those from the Rulers and the Alliance. The terms of reference bound the hands of the Commission in several respects, but on the other hand there was much latitude to be exercised in terms of addressing issues not specified and of course putting the terms of reference into a legally effective document. This involved critical choices. The modern Constitution was based on, and is still influenced by, the Commission's Report and the debates over it, and it is therefore important to set out the constitutional thinking of the time and the issues that were debated following the Report. It was accepted that the Reid Commission had in effect drafted the *Merdeka* Constitution (indeed the draft was appended to the Report, and the resulting Constitution is sometimes referred to as the 'Reid Constitution'). However, there were some proposals which proved controversial (they are discussed immediately below), and changes were made as a result of the recommendations of the Government's Working Party. The proposals were accepted by the Conference of Rulers in June 1957, and almost unanimously adopted by the Legislative Council in August. They were given effect by the Federation of Malaya Agreement 1957, the Federation of Malaya Independence Act 1957 (UK) and Orders-in-Council thereunder, the Federal Constitution Ordinance 1957, and State Enactments in the Malay States. This Constitution has remained continuously in effect since 31 August 1957.

VIII. THE COMMISSION'S REPORT AND THE CONSTITUTIONAL DEBATES

> 'Sesal dahulu pendapatan, sesal kemudian apa guna-nya?'
>
> (To be sorry in time is useful; but what is the use of being sorry afterwards?)

Most of the draft Constitution was either uncontroversial or had been agreed in advance. However, some issues not only resulted in intense

[44] *Federation of Malaya Constitutional Commission, 1956–7 Report* (Kuala Lumpur, Government Printer, 1957).

[45] ibid, para 3.

debate, but have continued to prove problematical over the last half century. These issues are the deeply connected ones of ethnicity, religion, and fundamental rights.[46]

An inevitable consequence of the terms of reference was the espousal of a Westminster-style executive based on the British model of constitutional monarchy.[47] The new office of constitutional head of the Federation (ultimately styled '*Yang di-Pertuan Agong*' and rendered in English in the Constitution as 'Supreme Head of the Federation'), was one whose powers resembled those of the British Crown. Given the nine existing monarchies of Malaya, the Commission naturally adopted the method of election which the Rulers themselves favoured, which was in essence a rotation of office amongst them on the basis of a five-year tenure. This system was in turn based on the system of precedence which had evolved among the Rulers themselves, and, more remotely, on the *adat* constitution of Negri Sembilan.[48] It is unique in constitutional law generally. The Rulers were to remain the Heads of Islam in the States. A Conference of Rulers (in existence already since 1948) was also recommended, which would have the principal function of electing or removing the *Yang di-Pertuan Agong*. However, its consent would also be required before certain laws could be passed, for example those concerning the privileges of the Rulers and the Conference itself. Notably, its consent would be required for legislation affecting the special position of the Malays and the legitimate interests of the other communities, but in relation to these matters each Ruler would be accompanied by his *Menteri Besar* (Chief Minister), and act on the advice of the State Executive Council. The Conference was also to have the right to be consulted about judicial appointments, as well as the power to discuss any national issues, each Ruler again being accompanied by his *Menteri Besar*.

Also in line with the terms of reference the Commission recommended a bicameral legislature (see, further, chapter three) comprising an elected 100-member *Dewan Rakyat* (House of Representatives) and a *Dewan Negara* (Senate), consisting of two members from each State, elected by the State Legislative Assemblies, augmented with 11 members appointed by the Federal Government as being persons of distinction or representative of racial minorities or aboriginal people. The purposes of the upper house were to revise or delay ill-considered legislation and protect the constitutional rights of the States. For constitutional amendments, a two-thirds majority of those members present and voting in each House would be required, but for ordinary legislation the *Dewan Negara* would only have power to delay up to one year, the *Dewan Rakyat* being able to override it by a resolution. The Commission envisaged that eventually the proportion of nominated Senators would decrease, that the number of members chosen by each State would be increased from two to three, and that they would be directly elected. The Government would have the power to proclaim an emergency and pass emergency laws inconsistent with the Constitution prior to Parliament sitting, when Parliament would assume this power.

Addressing the federal structure (see chapter five), the Commission separated federal and state powers in exhaustive detail, providing that neither the Federation nor the States would be able trespass on the powers of the other, although the federal legislature would have a strictly limited power to legislate for the States for the purpose of promoting uniformity. The Commission criticised the FMA for giving too much power to the States. Accordingly, the most important functions were to be allotted to the Federation. The theory adopted was that the States should not be financially overburdened, and thus become dependent on the Federal Government. They were not given independent powers of general taxation, an issue on which Justice Abdul Hamid dissented.

With regard to the judiciary, the Commission mandated the ordinary courts with responsibility for constitutional questions, so that the States' rights and fundamental rights would be guaranteed. The independence of the judiciary was not, however, well protected under the draft constitution (see, further, chapter seven). Judges were to be appointed by the Head of State on the advice of the Government in consultation with the Chief Justice. Judges were to retire at 65 but were to be removable in pursuance of an address passed by a two-thirds majority in each House.[49] The Commission considered that appeals to the Privy Council should be retained, as a valuable link between members of the Commonwealth, and also because the Privy Council's experience of other federal constitutions would be valuable. To the related issue of fundamental rights the

[46] Harding, above n 36, 35–39.

[47] The following section is based on the Commission's *Report*, above n 44; and Fernando's study, above n 43.

[48] See above; and ch 4.

[49] In the final version of the Constitution, the judiciary was protected by a requirement to convene a special tribunal: see ch 7.

Report devoted only two of its 194 paragraphs, equivocating in the following terms:

> The rights which we recommend should be defined and guaranteed are all firmly established throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done.

What emanated from this approach was a limited scope and entrenchment of some rights based loosely on the Bills of Rights in the Indian, Pakistani and Burmese constitutions. The feebleness of the Commission's justification for entrenching fundamental rights is all too apparent (see, further, chapter six). If the provision for judicial review of fundamental rights was merely to satisfy unspecified and unfounded apprehensions of unspecified quarters, but was basically unnecessary, it is hard to see why the Commission recommended the entrenchment of fundamental rights at all. The assertion that fundamental rights were already protected was either casual or optimistic in view of the emergency situation which prevailed. The failure to address obvious arguments in favour of entrenchment of fundamental rights seems bizarre in retrospect: it was indeed objectionable even at the time. The arguments were as follows. First, Malaya was a diverse society with many races, religions and languages, a condition which required a more positive reassurance, especially to minority groups, that their rights would not be removed, whoever was in power. Secondly, the principal need was for a strong central Government with institutional restraints to ensure against abuse of powers. Thirdly, the Constitution envisaged constitutional and democratic government and the separation of powers. Fourthly, certain rights are and were recognised by international instruments to be fundamental. The debate should really have been about how it would have been best to guarantee these rights, and what the role of the judiciary should be, not about whether fundamental rights needed to be guaranteed. As a result of the spineless approach which was adopted, the Alliance Government was, as we will see in chapters two and six, emboldened after 1957 to impose important and far-reaching restrictions on fundamental rights, both in amending the draft Constitution, and by frequent, almost routine, legislative amendments in subsequent years.

A further weakness in the Report in this area was that the five members were not unanimous on the question of judicial review. Justice Abdul Hamid, whose dissenting opinions on some matters have proved to be rather more prophetic than his opinions on this matter, objected to judicial review on grounds of 'reasonableness' of the restrictions of the civil liberties of freedom of speech, assembly and association set out in Article 10. In fact the Indian courts have had little difficulty in defining 'reasonableness' in relation to restrictions on political rights; the Malaysian courts could easily have followed their lead. Abdul Hamid's dissent gave a good excuse for the Government to insist on removing judicial review of the reasonableness of restrictions. It appears to be partially a direct result of this debate that the Article 10 rights have in fact been eroded in the absence of any real judicial protection.[50]

Although there were no objections outside the Government to the Commission's proposals on fundamental rights, there were also few objections to the Working Party's amendments. In the Legislative Council two Alliance lawyers and a trade-union representative spoke vigorously against the amendments, adverting to the possibility of the Alliance losing power at some future time, even though at the time it held all but one seat in the legislature. The press took a similar view. The Tunku, a Cambridge law graduate and a barrister, however, supported by the Attorney-General, stood firm on the platform of a strong central Government, unimpeded by 'too much legal propriety', dealing effectively with the country's problems in a dangerous world. The Attorney-General looked with disapproval on the possibility of a single judge striking down Parliament's decision on a matter of fundamental rights; he ignored the appeals procedure and institutional and doctrinal restraints on High Court Judges. It was clear that the Government did not stand merely on current necessities (which could after all be dealt with under an emergency proclamation), but regarded its views as having some kind of continuing validity, as we will see in chapter two.

Thus far the Commission was in the realm of deciding fairly standard constitutional questions, albeit with some local particularities to be considered. However, it also had to deal with the thorny questions of ethnicity and religion, and in particular the issue of special privileges. It was

[50] See ch 6. However, in recent cases the Malaysian courts have nonetheless imported the concept of reasonableness into art 10: see, eg *Muhammad Hilman bin Idham and ors v Kerajaan Malaysia and ors*, [2011] 6 MLJ 507.

obvious to all that the diversity of Malaya presented several constitutional problems. Religion, which now appears as the most divisive issue in Malaysia's pluralist polity, appeared at that time to most of the actors a much more peripheral issue. Ethnicity appeared to be the real challenge, in response to which the Commission offered another equivocal response:

> Under a democratic form of government it is inherent that all citizens of Malaya, irrespective of race, creed or culture, should enjoy certain fundamental rights including equality before the law . . . We found it difficult, therefore, to reconcile the terms of reference if the protection of the special position of the Malays signified the granting of special privileges to one community only and not to the others.

The problem was that the Malays as the majority, and, in their self-perception, indigenous[51] population, deserving of special recognition, were far behind other communities, especially the Chinese, economically. Colonial rule and the FMA itself had given the Malays some special privileges to avoid their being eclipsed in their own country by large or even larger numbers of ambitious and capable migrant people who controlled most of the economy. For example, most positions in the police and the public service went to Malays. The issue was whether this should continue, and if so in what form and for how long. At issue was the entire principle of the rule of law and a citizen's equality before it.

The Commission found that the special position of the Malays had been recognised and safeguarded with regard to land reservations, quotas for admission into the public service, business licences, and scholarships. Since there was no opposition to the continuance of these privileges for the time being, the Commission recommended their continuance, subject to review by Parliament after 15 years. They clearly viewed the special privileges as 'sunset legislation', whose necessity would decline rapidly when the consequent laws and policies took effect, and as aspects of government which were essentially incompatible with the overriding principle of equality. There was a sharp difference here between the Commission and the Working Party on the extent of continuation of special privileges for the Malays. While the Commission recommended that the special privileges should be reviewed after 15 years, the Working Party thought that the Government should review

[51] See ch 6 for the position regarding the *orang asli* population.

them from time to time, with no limitation. It was the Working Party view that prevailed.

The Commission also recommended that Malay be designated as the national language, English to remain in use as the official language for ten years, and Chinese or Indian languages also being allowed to be used in the legislatures.

The debates concerning religion in and around the Commission's Report are also important to understand in some detail even at half a century's distance. The interpretation of the Constitution has become the weapon of choice in the struggle over the constitutional position of religion, as we will see in chapter eight. Given the penumbra of ambiguity, or at least alleged ambiguity, of several provisions, the thinking of those involved in the drafting process becomes pre-eminently important. The Alliance wanted Islam to be the official religion of the Federation. The Rulers disagreed, reasoning that as Heads of Islam, being the religion of all the Malay States, they could not countenance religion being made in any sense a Federal matter, which would be radical and also undermine their position, since being Head of Islam was one of the few powers left in their hands. Moreover at that time Muslims were actually in a minority, so there was no real case for making Islam the official religion based on it being the majority's religion. It was no doubt under Jennings' guidance that the Commission discerned a contradiction between the notion of a secular state and having an official religion. Interestingly enough, although one might have easily pointed to Britain itself as the negation of this contradiction, Jennings was also an opponent of the establishment of Anglicanism as the official religion in England.[52] Thus the majority of the Commission, Justice Abdul Hamid dissenting, recommended that the Federation should have a secular state, and that there should be no official religion. Abdul Hamid, changing his mind on this issue when the Commission reached the Rome hotel room where the originating version of the historic document was drafted, argued that it was harmless to accede to the Alliance position on religion, since many other constitutions had similar provisions. As Fernando points out, however, his argument was hardly to the point when in none of those cases was the society in question, like India and Malaya, multi-religious. On the other hand, Jennings'

[52] Fernando, above n 43.

counter-argument that Islam did not need state support seems also hardly to the point.[53]

The Commission considered (looking at confusion in contemporary debates on this issue, for which see chapter eight, one might rather say 'foresaw') that a secular state did not sit well with an official religion. Predictably the Alliance leaders were displeased with the outcome and demanded a provision on official religion. Thus the stipulation in the current Article 3 of the Constitution that Islam shall be the religion of the Federation was inserted during the constitutional review process following the Commission's Report. UMNO stuck to its demand for an official-religion provision, and the other component parties of the Alliance were disposed not to unravel the carefully negotiated Alliance compromise, no doubt also recognising, in their own interests, the political inexpediency of exposing the Tunku's Malay-Muslim party UMNO to electoral difficulties. The Tunku himself was in favour of Article 3 on the grounds that the provision was innocuous; would not prevent the state from being secular in nature; was similar to provisions in constitutions of Muslim countries (Afghanistan, Iran, Iraq, Jordan, Saudi Arabia and Syria were cited, echoing Justice Abdul Hamid's reasoning on this point); was found in the Constitutions of some of the Malay States; and was agreed to unanimously by the Alliance, which also included non-Muslim parties. The non-Muslims' acceptance of Islam as the official religion was in essence a part of the social contract, from which they obviously derived other benefits, as we will see in chapter two. It was also clear in statements of the Alliance position that the enshrinement of an official religion would not create a theocracy, nor would it affect the secular nature of the state, alter the rights of the Rulers as Heads of Islam, or abridge the religious rights of non-Muslims. The official Working Party in reviewing the draft Constitution also went along with the Alliance view. Even Malay opposition parties agreed with the Alliance view on religion and non-Malay opposition parties did not raise the issue, preferring to attempt to safeguard economic, language and education rights.

The Constitution, properly contextualised, actually only entrenched the position which had applied in practice under British rule in the Malay States, namely, that within the Federal political system the actual role of Islam was confined to the States and dealt with by the Ruler of

[53] ibid.

the State in consultation with the Religious Council. In brief, it had only a ceremonial or symbolic role to play in the Constitution at the Federal level, and this was the only new element. The substance of provision for Islam was a State matter as defined in the constitutional division of Federal, State and concurrent powers (see further, chapters five and eight). An Islamic theocracy was not contemplated and the issue of making Islam the official religion was in essence a symbolic recognition of Malay-Muslim identity and the special position of that community. Malaysia was in other words considered an Islamic state only in the sense that Islam was established and enjoyed a special position, but this had no impact on religious freedom or on the structure and operation of the state. There was no proposal that the matter of religion be taken any further than Article 3.[54] Despite the apparent failure to address fully in the Constitution the religious predisposition of the Malays, the 1957 Constitution was approved by the Federal and State Legislatures and all major interests. It was Malay nationalism defined in relation to the Chinese and Indian communities, rather than Islam defined in relation to Christianity, Buddhism and Hinduism, which characterised the politics of this period.

The Reid Commission can be applauded on several fronts but also criticised on several fronts. That they were right about the basic structure of government in the new Federation is established by the test of time. Their recognition of the importance of the social contract was also wise. At the same it is surprising that, as lawyers to a man, they set so little store by fundamental rights, judicial review, and the importance of religion, and enjoyed so much confidence in parliamentary democracy, Alliance rule and emergency powers. In all these respects, however their responses were not untypical of thinking in the 1950s common law world of constitutionalism in a context of decolonisation. One could also argue that they had little choice in these matters given the situation of Malaya at the time. We will see in all of the later chapters of this book, however, that these very issues will return in several contexts for further discussion.

There were winners and losers in all this, no doubt. The Chinese and the Indians gained some access to the political system through the

[54] J Fernando, 'The Position of Islam in the Constitution of Malaysia' (2006) 37(2) *Journal of Southeast Asian Studies* 249; Thio Li-ann, 'Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars, and Article 121(1A) of the Federal Constitution', ch 14 of Harding and Lee, above n 32.

extension of citizenship and their participation in the Alliance victory in the constitutional debates. Their property and businesses were protected, their cultures and languages recognised and tolerated. But they would not necessarily be equal citizens. The Malays had their language serve as the official language, their status and their religion was established, and they were guaranteed an increasing share of the economy. These were moreover positions largely placed above any real political debate. But they were achieved at a cost. The *Merdeka* Constitution had placed the Alliance effectively in charge of the Constitution as well as the Government, given their electoral dominance and the requirement of only a two-thirds parliamentary majority for most constitutional amendments, and had thus created the possibility of an accrual of extremely wide powers with little accountability for their exercise. This will be a major theme in chapter two.

IX. THE CREATION OF MALAYSIA

'Bagai semut menghimpunkan lemukut – melukut'

(As ants collect a quantity of husk, bit by bit)

One of the difficulties of the constitutional developments of 1946–57 was that they failed to address the issues with a regional perspective, and there was therefore unfinished business – Singapore, Sarawak, North Borneo (Sabah), and Brunei. Singapore became a separate Crown colony in 1946. Sarawak had become a British colony, ceded by Rajah Brooke at the end of the war after a century of rule by the White Rajahs. North Borneo was already a British colony, while Brunei was a British protectorate.[55] There were reasons for caution. Further federation involving Borneo was opposed by Indonesia and the Philippines; Indonesia wanted to see a federation of North Kalimantan comprising North Borneo, Sarawak and Brunei, while the Philippines claimed possession of North Borneo. The addition of Singapore would increase the proportion of Chinese citizens, placing the Malays in a possibly permanent minority: a census in 1931 had found that 40 per cent of residents in the Malay states were Chinese.[56] The Prime Ministers of both Malaya and Singapore (the Tunku and Lee Kuan Yew) envisaged the creation of

[55] An 1888 treaty had made Sarawak, North Borneo and Brunei protected states.

[56] Rais Yatim, above n 32 at 8.

Malaysia embracing the Federation of Malaya, Singapore, Sarawak and North Borneo.[57] Brunei was not interested in sharing its increasing oil wealth, but elections and a UN Commission in the Borneo States, as well as a referendum in Singapore, supported the new Federation.

Accordingly, the Malaysia plan proceeded, despite the persistence of objections, especially from the Indonesian President Sukarno, who denounced it as a British neo-colonial plot. The Federation of Malaya, the United Kingdom, North Borneo, Sarawak and Singapore Governments entered into the Malaysia Agreement 1963; the Malaysia Act 1963 was passed by the Federation's Parliament to give effect to the Agreement in Malaya and to amend the Constitution, and new constitutions for the three states as States of Malaysia were provided by a UK Order-in-Council. The chief effect of all this was simply that three new States joined the Federation. There was no suggestion that an entirely new Constitution was required. Still, the negotiation of terms for the admission of these three new States entailed special constitutional provision being made for them, and these entailed in some respects an elevation of their status above that of the States of the existing Federation in terms of their legislative powers, guarantees of their continued autonomy, and (in the cases of North Borneo, now renamed Sabah, and Sarawak) disproportionately high representation in Parliament.

These changes introduced a new complexity into Malaysia's ethnic and political diversity. Singapore left the Federation in 1965 when disagreements between the Singapore and Kuala Lumpur Governments became too problematical.[58] Sabah and Sarawak, however, remain within the Federation, but with somewhat different laws and legal institutions from those of Malaysia, as well as different powers from the other States. Thus the Malaysian Federation took a slightly different form from that of Malaya in that it is a two-tier Federation with three elements, one of which is itself a Federation. These changes affected the manner in which the political system functioned more than they affected the actual constitutional structure. However, they necessitated in the Borneo States a separate High Court and separate legal professions, as well as State powers over immigration and changes with respect to

[57] For a constitutional study of Malaysia's creation in 1963, see Tan Poh-Ling, 'From Malaya to Malaysia', ch 2 of Harding and Lee, above n 32; Ongkili, above n 33.

[58] Kevin YL Tan, 'Singapore: In and Out of the Federation', ch 4 of Harding and Lee, above n 32.

citizenship, language, and ethnic status. These issues of federalism will be discussed further in chapter five.

One other matter requires mention here. In a fascinating case brought literally a few hours before Malaysia's inauguration, the constitutionality of the entire enterprise was thrown into doubt by the State of Kelantan, which sought an interim injunction effectively preventing the new country from being formed on the ground that Kelantan had not been consulted about the changed federal structure, and that it was accordingly not bound by the relevant constitutional amendments.[59] The Chief Justice addressed the issue squarely by stating:

> Never, I think, has a Judge had to pronounce on an issue of such magnitude on so little notice and with so little time for consideration . . . Time is short and the sands are running out. We cannot close our eyes and our ears to the conditions prevailing in the world around us and a clearer expression of opinion than would be customary is clearly required in a matter which relates to the interests of political stability in this part of Asia and the interests of ten million people, about half a million of them being the inhabitants of the State of Kelantan.[60]

In a judgment with heavy implications for the nature of Malaysian federalism, he held that the amendments to the Constitution creating Malaysia did not require Kelantan's consent, as there was no implied constitutional requirement to that effect. The amendments had been effected according to the express terms of the Constitution itself, having been appended to the Federation of Malaya Agreement 1957, to which Kelantan was a party. Moreover, anticipating future arguments over the extent of the power to amend the Constitution, he said that in doing these things he could not see that 'Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require the fulfilment of a condition which the Constitution itself does not prescribe'. This left open the idea that a constitutional amendment could be so fundamentally revolutionary as to require fulfilment of such a condition.[61]

Thus the new Federation was born amidst legal and international controversy as Indonesia mustered power to attempt to strangle the

[59] See, further, Johan Shamsuddin Sabaruddin, 'The Kelantan Challenge', ibid, ch 32.

[60] *Government of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahamn Putra Al-Haj* (1963) MLJ 355.

[61] See p 102.

newborn in its cradle. Malaysia was nonetheless formed on 21 September 1963.[62] Sukarno and the Indonesian *konfrontasi* were faced down in what has been called Malaysia's finest hour.[63] With Singapore becoming an independent republic on 9 August 1965 and Sukarno cast aside by the Indonesian military in September 1965, *konfrontasi*, which had seen guerrilla warfare in Borneo, paratroop landings in Malaya, and bombings in Singapore, came to an end. This was also the last chance of the communist party, in league with Sukarno, to take over Malaysia. The CPM insurgency limped on in the Northern Malaya jungle near the Thai border until 1989, by which time there were few of them left to surrender to the Malaysian Government. There were many struggles to come, but the infant had survived and the constitutional structure for the whole region had been settled.

X. THE MAY 13 INCIDENT

> 'Gajah sama gajah bergaduh, pelanduk mati di tengah-tengah'
>
> (When elephants fight, the mouse deer that gets between them is killed)

The new nation had survived but was not yet free from danger. Within four years of removing the external threat to its existence internal problems led, not to danger for its existence, but certainly to a crisis which narrowly failed to propel Malaysia into either permanent dictatorship or military rule. While the continued relevance of the May 13 incident[64] in 1969 has undoubtedly been exaggerated, it remains the most traumatic episode in Malaysia's history, one which threatened to eclipse the Constitution and democratic, parliamentary government. In the event it

[62] Malaysia's National Day is 31 August, which is *Merdeka* Day for the Federation of Malaya only; 50 years of independence were celebrated in 2007, although the Borneo States had been independent only since 1963.

[63] Tan Poh-Ling, above n 57 at 32; J Mackie, *Konfrontasi: The Indonesia-Malaysia Dispute 1993–1966* (Kuala Lumpur, Oxford University Press, 1974).

[64] *The May 13 Tragedy: A Report of the National Operations Council* (Kuala Lumpur, Government Printer, 1969); C Das, 'The May 13th Riots and Emergency Rule', ch 7 of Harding and Lee, above n 32; C Das, *Governments and Crisis Powers: A Study of the Use of Emergency Powers Under the Malaysian Constitution and Parts of the Commonwealth* (Kuala Lumpur, Current Law Journal, 1996) 314ff; Goh Cheng Teik, *The May 13th Incident and Democracy in Malaysia* (Kuala Lumpur, University of Malaya Press, 1971); L Comber, *13 May 1969: A Historical Survey of Sino-Malay Relations* (Kuala Lumpur, Heinemann, 1983).

radically affected their nature and trajectory for the worse. The state was dramatically redefined with changes to the social contract, the emergence of new policies, the instigation of emergency rule, and limits to free expression. These changes and their consequences will be discussed further in chapter two.

The general elections of May 1969 were especially racially charged. On 10 May results for Peninsular Malaysia were announced, and it became apparent that the opposition parties had achieved an excellent result, depriving the Alliance Government of its two-thirds majority,[65] winning the States of Penang, Perak and Kelantan, forcing a split assembly in Selangor, and reducing considerably the Alliance share of the vote, especially among the non-Malays. The opposition parties staged provocative victory processions on 12 May, and on 13 May a large pro-Government procession of Malays made its way to the Selangor *Menteri Besar*'s house. Tensions were at tinder-box level, and an incident involving Malay and Chinese youths immediately sparked serious and unprecedented rioting in many parts of Kuala Lumpur. In the next few hours many people died or suffered serious injuries in an orgy of violence, and there was also much looting and damage to property. The precise course of events and its causes remain a matter of dispute.[66] What really matters in terms of understanding Malaysia's history over the last four decades is what was said or believed to have happened and how that was used to restructure the state and justify authoritarian rule.

The situation which was created by the 13 May 1969 riots was such that extraordinary measures had undoubtedly to be taken. Ever present, of course, was the threat that the disturbances would spiral even further out of control and spread to other urban centres, engulfing the entire country. Therefore on 15 May an emergency was proclaimed under Article 150 of the Constitution extending to the entire Federation, on grounds of a threat to national security. Since the emergency was proclaimed at a time when Parliament had already been dissolved, and the elections had not been completed in Sabah and Sarawak, there was no Parliament to meet. In fact, although obliged under Article 150 to summon Parliament as soon as was practicable, the Government simply suspended the elections, which were not in fact completed until February

[65] This is the special majority required to amend the Constitution: see art 158.
[66] Kua Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969* (Petaling Jaya, Suaram, 2007).

1971, and only then, some 22 months after the Proclamation, was Parliament summoned. For all of this period Malaysia was under emergency rule. This period of executive dictatorship has had lasting effects on the Constitution and the legal system, which will be discussed in chapter two.

Of interest here is the unorthodox ad hoc structure of government which was developed by the Government to deal with the emergency. It immediately enacted the Emergency (Essential Powers) Ordinance No 1, which gave the Government extremely wide powers, to 'make any regulations whatsoever . . . which [the *Yang di-Pertuan Agong*] considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community'. The entire executive and legislative power of the Federation was vested in a Director of Operations (Tun Abdul Razak, also Deputy Prime Minister and then Prime Minister, 1971–74). For our present purposes in completing this survey of constitutional history what is significant is the immediate political aftermath in which a raft of amendments to the Constitution, going far beyond any amendments before or since, passed in 1971, fundamentally altered the nature of state and government.[67] The important objective was clearly to return the country to normal parliamentary government and democracy, albeit in a different form from that prevailing before the elections. To this end a National Consultative Council (NCC) was set up to consider ways of restoring racial harmony. It became clear, however, that Parliament would not be summoned unless the Government was sure that the constitutional amendments that it had proposed would be passed, with or without opposition support. The creation of the Barisan Nasional (BN) to replace the Alliance, and the accession to it of the Sarawak United People's Party (SUPP), gave the Government the likelihood of the two-thirds majority it sought, so the elections were completed, Parliament summoned, and the amendments passed. The administrative structure of emergency rule was dismantled, but the Proclamation and emergency powers still remained. Ordinance No 1 remained in force, which meant that the Government still exercised the legislative power granted to it by that Ordinance, and Tun Razak was by that time the Prime Minister, allowing for a smooth (and the first) constitutional transition of power. The return to normality was not a return

[67] Das, above n 64 (in Harding and Lee).

to the pre-1969 Constitution, but to a radically altered version of constitutionality: this was the price, in effect, of a return to any kind of constitutionality, the alternative being emergency rule. The constitutional amendments, termed in this book the '*Rukunegara* amendments', after the national ideology[68] which they were supposed to implement in the Constitution, were far-reaching, and took Malaysia a significant, and apparently permanent, step away from several tenets of the *Merdeka* Constitution.[69] Principally, the amendments redefined the social contract so as to give more special privileges to the Malays, extend their scope to natives of Sabah and Sarawak, and entrench those privileges even further than was already the case. They also expressed the social contract as a list of 'sensitive issues' that could not be discussed, except as to policy implementation, in any forum, including even the floors of the Federal and State Legislatures. These changes were the foundation of a New Economic Policy (NEP), designed to secure 30 per cent ownership of the economy for '*bumiputera*' (sons of the soil, or indigenous Malaysians) within 20 years. At a stroke the *Rukunegara* amendments had redefined ethnic relations and the political economy of Malaysia, the roles of executive and legislative powers, and the limits of freedom of expression. They had in effect converted a liberal democracy observing basic rights into an authoritarian semi-democratic police state with large exceptions to basic rights.

XI. CONCLUSION

Naturally Malaysian constitutional history did not cease in 1971, and there have been many other changes. These changes, in particular those relating to the Rulers and the judiciary, will be dealt with in some detail in chapters four and seven. Similarly the social contract will be dealt with in more detail in chapter two. The purpose of this chapter has been to indicate the main features of that history that led to the emergence of the Malaysian polity in 1957 and changed in 1971 to a form that has become familiar. Changes since 1971 have been important but have not affected the design fundamentally. This polity has elements that are traditional, colonial, and nationalist. With the *Rukunegara* amendments and

[68] See, further, ch 2.

[69] A Harding, 'The *Rukunegara* Amendments of 1971', ch 8 of Harding and Lee, above n 32.

the NEP, the polity settled into the foundations that had been delineated in 1957, redefining the nationalist component of the Constitution without doing away with the traditional and the colonial components. A new social contract took the place of the old, laying the foundations of Malaysia's developmental state, which is discussed in the next chapter. It is only in recent years that the settlement of 1971 has come under question, and the issues under discussion are material for other chapters of this book. We will see that a major theme underlying every chapter is the way in which the state has had to respond to the fact of ethnic and religious diversity in a manner that both managed social stability and facilitated development.

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[70] This list includes general Malaysian constitutional law publications in addition to items specific to the subject matter of ch 1.

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2

Executive Power and the Developmental State

Introduction – Constitutional Structure of the Executive Power – Privatisation – The Social Contract: Drafted and Amended – The Social Contract: Specific Performance – Conclusion

I. INTRODUCTION

'Kemana nak pergi layang-layang? Tali ada di-tangan kita'
(Where can the kite go? Its strings are in our hands)

WITH THE OBJECT of facilitating development, the intention of the constitution-making process of 1957 was to create a strong central Government with limited autonomy for the States. Typically of the style of constitutional drafting of the 1950s, the *Merdeka* Constitution gave no concrete indication of the type of state[1] ideology that was envisaged, nor did it set out any directive principles or priorities of Government.[2] The fundamental policies and principles of operation of the state were therefore left to the leadership of the new nation (the Alliance leaders) to develop, and democratic institutions to mould over time. As a result the true nature of the Malaysian state and citizenship in a plural society, whether considered juridically or politically, has been a matter for continued argument over most of the last half century.

[1] In this book 'state' (as noun or adjective) refers to the federal executive power and the Malaysian state generally, and 'State(s)' (as noun or adjective) refers to the 13 subjects of the Federation or any of them.

[2] The *Rukunegara* was a concerted attempt to supply the omission: see below, section IIB.

This chapter is designed not only to look at the constitutional structure of the federal executive branch (that of the States being left to chapter five) and the limits on its powers, but also to discuss the basis of the Malaysian state, arguing that it exhibits the principal features of what have been called the developmental states of East Asia.[3] Accordingly the term 'Malaysian developmental state' will be used here to indicate that the state has peculiarly Malaysian but also developmental characteristics.[4] This approach will involve examining how the state has been transformed over time and upon what principles it has operated. The overwhelming power of the state will be seen as a factor in every chapter of this book as affecting profoundly the nature and operation of all aspects of the constitutional system. We have seen in chapter one how the events of 1969 led to fundamental changes in the state's definition, direction and design. The Malaysian developmental state, the result of a renegotiated social contact and the *Rukunegara* amendments in 1969–71, and propelled by the New Economic Policy (NEP),[5] has proved remarkably stable. Four decades on, however, it cries out for renovation, but there is no real agreement as to the type or extent of renovation that is needed. The stated objective of the Malaysian Government under Mahathir's *Wawasan 2020* (Vision 2020), which dates from 1991, is to achieve the status of a fully developed country, not only in terms of economic progress but also in terms of national unity in a tolerant, democratic and caring society, by 2020.[6]

First we will look at the executive power as formally and legally defined in and structured by the Constitution, embodying a constitutional monarchy, a Westminster-style parliamentary executive, and a

[3] For discussion of the Asian developmental state, see eg, J Ohnesorge, 'The Rule of Law, Economic Development, and the Developmental States of Northeast Asia', in C Antons (ed), *Law and Development in East and South-East Asia* (London, Routledge, 2003) 91–130; M Beeson, 'Developmental States in East Asia: A Comparison of the Japanese and Chinese Experiences' (2009) 33(2) *Asian Perspective* 5.

[4] KS Jomo and Wong Sau Ngan (eds), *Law, Institutions and Malaysian Economic Development* (Singapore, NUS Press, 2008).

[5] The NEP technically ended in 1990, but was replaced by the 'National Development Policy' and then in 2000 by the 'National Vision Policy'. It has become conventional, however, to refer to the policy of *bumiputera* preference, which is at the core of the social contract, as the 'NEP'. There have also been 10 5-year 'Malaysia Plans' implementing these policies in detail.

[6] The achievement of this target is recognised to depend on continued high economic performance: see PM Najib's statement reported at www.asiaone.com/News/AsiaOne+News/Malaysia/Story/A1Story20110218-264114.html (18 February 2011).

prime-ministerial system of government. This will involve looking at the operation of cabinet government. We then move to examine the administrative structure of the state at the federal level, in terms of the public service, statutory agencies, regulation and privatisation. The chapter proceeds with a discussion of the social contract as a basic principle for the actual functioning of the state, clearly recognised – enshrined even – in the Constitution. The social contract is infrequently understood and debated, partly because criticism of the policies constituting it is prohibited in terms of the social contract itself, and partly because, dealing with the fundamental issue of ethnic preference, it is a deeply sensitive topic. Finally, the chapter looks at national security and emergency powers, which have been a very important part of state power during all of Malaysia's post-*Merdeka* history, expressing and reinforcing the authoritarian nature of a state which depends on the ostensible need to defend national security in the face of potential ethnic conflict. In dealing with these issues a major cross-cutting theme running through all of these topics is the political economy of the Malaysian developmental state and its development trajectory. It is here that the constitutional response, an attempt to create a plural and prosperous society, is most in evidence and also most tested.

II. CONSTITUTIONAL STRUCTURE OF THE EXECUTIVE POWER

> 'Air di tulang bumbungan, turunnya di cucur atap'
>
> (The water on the roof falls to the eaves – in other words power naturally flows from top to bottom)

A. A Constitutional Monarchy

The institution of a constitutional monarchy and a Westminster-model executive[7] was a given factor in the constitution-making process of

[7] See YAM Raja Azlan Shah, 'The Role of Constitutional Rulers in Malaysia', ch 5 of FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Developments and Perspectives* (Singapore, Oxford University Press, 1986); Abdul Aziz Bari, *The Development and Role of Constitutional Monarchy*, Unpublished PhD Thesis, University of Birmingham (1996); V Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah* (Kuala Lumpur, Professional Law Books; Petaling Jaya, Sweet and Maxwell Asia, 2004).

1957. This model was also imposed on the States, whose Constitutions were obliged under the Federal Constitution to conform to Westminster principles.[8] As a result the constitutional conventions associated with this model, and relating to the Head of State, the Head of Government, the legislature, and the relations between them, are rendered as written law in the Federal and State Constitutions, and have been definitive in Malaysian constitutional practice. These conventions have also been the subject of controversies that have usually arisen in the operation of the State Constitutions, but not, as we will shortly see, so far with the Federal Constitution.[9] For this reason examples and discussion of conventions are left to later chapters, where we look at Parliament (chapter three) and territorial governance (chapters four and five). The problem is, in essence, that of interpreting conventions which developed in Britain as unwritten customs dependent on precedent and political practice, but which now find themselves as written law in Malaysia but shorn of the particular national history that gave rise to them. For example, the convention that the Head of State acts on Government advice is enshrined in the constitutional text at Article 40; and the principle of collective ministerial responsibility is set out in Article 43(3). Westminster-style conventions, although clearly evident in Malaysian constitutional law, may well, however, not operate in precisely the same way in Malaysia as they do in Britain and other Commonwealth states, because Malaysia has a different history of democratic politics. It has in fact to some extent developed its own constitutional conventions or interpretations of them and, unlike in Britain, the courts have played an important part in interpreting and enforcing them (see chapter four). Some aspects of these conventions in relation to the executive are discussed below.

The starting point for looking at the federal executive is that the executive authority of the Federation is vested in the *Yang di-Pertuan Agong*, but this power is exercisable by him or the Cabinet or any Minister authorised by the Cabinet, and where he acts he does so on the advice of the Government.[10] In certain cases, such as the appointment of the Prime Minister, he has discretion to exercise,[11] but his exercise of discretion is bounded by precedent and the constitutional responsibilities that

[8] See Federal Constitution, sch 8: Provisions to be Inserted in State Constitution.
[9] See, further, ch 4.
[10] Arts 39–40; RH Hickling, 'The Yang di-Pertuan Agong as the Head of the Executive' [1991] *Supreme Court Journal* 43.
[11] Art 43.

this discretion entails. This position ensures that, although the *Yang di-Pertuan Agong* is the nominal Head of the Executive, the Prime Minister and the Cabinet are the real executive power. The convention that the Head of State must act on the advice of the Government has always been followed in Malaysia in much the same way as it has in Britain, at least at the Federal level. It does not necessarily mean that the *Yang di-Pertuan Agong* is unable to voice any opinions, but rather that in the last analysis he must act on Government advice, whatever his personal views might be. The Proclamation of Constitutional Principles,[12] introduced in 1992 during a controversy over the powers of the Rulers, rehearses Bagehot's classic statement of the limited rights of the monarch: 'to be consulted, to encourage and to warn'.[13] Since it represents both Government and royal opinion on the constitutional role of the monarchy, although not binding in law, this statement can be taken to represent law and practice as understood in Malaysia.

The most important function of the *Yang di-Pertuan Agong* is to act as a symbol of unity for a diverse population.[14] His role is therefore largely ceremonial, but in addition to the prerogative powers defined in the Constitution he is the Head of Islam in the Federal Territories.[15]

B. The Prime Minister

The power in Article 43(2) to appoint the Prime Minister is as follows:

> the *Yang di-Pertuan Agong* shall first appoint as *Perdana Mentri* (Prime Minister) to preside over the Cabinet a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House.

There have been 12 federal elections since *Merdeka*; on each occasion the Alliance/Barisan Nasional has obtained a clear majority in Parliament,

[12] Kobkua Suwannathat-Pian, Palace, *Political Party and Power: A Story of the Socio-Political Development of Malay Kingship* (Singapore, NUS Press, 2011) app 1.
[13] W Bagehot, *The English Constitution* (Glasgow, Fontana, 1867: 1963) 111.
[14] See www.malaysianmonarchy.org.my/menuen.html.
[15] The federal territories comprise the City of Kuala Lumpur; Putrajaya, named after the Tunku (Abdul Rahman Putra Al-Haj), and constructed to the south of Kuala Lumpur in the 1990s, the administrative capital of Malaysia; and Labuan, an island offshore of Sarawak (in both geographical and financial senses), which is federal territory due to its economic significance as a kind of special economic zone.

and its Chairman, consistently also the President of UMNO, has been appointed Prime Minister. UMNO has therefore provided Malaysia's political leadership for the entire period of its history since independence.

It remains unclear whether the *Yang di-Pertuan Agong* has a reserve power actually to dismiss the Prime Minister. Article 43(4) merely says:

> If the Prime Minister ceases to command the confidence of the majority of the members of the House of Representatives, then, unless at his request the *Yang di-Pertuan Agong* dissolves Parliament, the Prime Minister shall tender the resignation of the Cabinet.

The latest guidance from the Federal Court in a 2010 case[16] involving the Chief Minister of the State of Perak appears to indicate that, despite any provision giving the Head of State a power of dismissal, he could nonetheless declare the office of Prime Minister vacant if, in his view, the latter has lost the confidence of a majority of MPs; moreover, in doing so he could take into account evidence of matters occurring other than in the legislature. This decision, apparently resolving doubt as to whether there was an implied power for the Head of State to dismiss a Chief Minister, is however questioned by a large body of constitutional opinion.[17] We can also note here that when UMNO was declared by the High Court to be an unlawful society in February 1988, the Opposition demanded Prime Minister Mahathir's resignation on the ground that he was no longer the leader of any political party.[18] However, the test of a Prime Minister's tenure is clearly the confidence of Parliament, not the leadership of any party or coalition, and there was no indication that Mahathir had lost the confidence of the majority of MPs: indeed BN leaders expressed confidence in him, and Government Bills continued to be passed in the *Dewan Rakyat.*

Each of the six Prime Ministers of Malaya/Malaysia has held office for at least five years; the Tunku held office from before *Merdeka* until the aftermath of the May 13 Incident (1955–70). He was called '*Bapa Malaysia*' (father of Malaysia) for his extensive role in constructing a new nation, as described in chapter one. His successor, Tun Abdul Razak (1970–76), died in office in 1976, by which time he had redesigned the state, and laid the foundations for the new social contract and the

[16] *Datuk Nizar Jamaluddin v Datuk Seri Zambry Abdul Kadir* [2010] 2 MLJ 285.

[17] See ch 4. The State Constitutions are identical to the Federal Constitution in this respect.

[18] See ch 7.

modern developmental state; after his death he was referred to as '*Bapa Pembangunan*' (father of development). Tun Hussein Onn was Prime Minister from 1976 to 1981 and was known as '*Bapa Perpaduan*' (father of unity), stressing the need for all communities to achieve prosperity. He resigned due to ill health. Tun Dr Mahathir Mohamad (Prime Minister 1981–2003) defined the nature and trajectory of the developmental state during his 22 years in the premiership, imposing his personal and controversial stamp on the polity as no other Prime Minister has done. He launched Malaysia on a path towards striking economic growth, but unlike his predecessors he was a risk-taker and a challenger rather than a builder of consensus, proactive rather than reactive. He survived many crises, taking Malaysia much further towards authoritarian government than any of his predecessors or successors. Datuk Seri Abdullah Ahmad Badawi became Prime Minister in 2003. He failed to deliver on BN promises with regard to corruption, swapped insults with former Prime Minister Mahathir, several of whose decisions he reversed, and resigned in 2009, when the current Prime Minister Datuk Seri Mohamed Najib Tun Abdul Razak (son of the second Prime Minister, Tun Razak) took office; this followed an unprecedentedly poor election result for the BN in March 2008. Najib has taken measures to revive the Malaysian economy following economic crises in 1997–98 and 2008–09, and seeks a transformation of Malaysian government. All Prime Ministers have been Malay-Muslim, UMNO politicians. In the opinion of an experienced Cabinet member, it is not, however, inconceivable that a future Prime Minister could be non-Malay or from a party other than UMNO.[19] Each Prime Minister has tried to contribute in his own way to the development of a state ideology: Razak by the *Rukunegara*; Mahathir with his *Wawasan 2020* (one writer has even, in a reflection of the invention of 'Thatcherism' and 'Reaganomics', coined the notion of 'Mahathirism'[20]); Badawi with *Islam Hadhari* (civilisational Islam); and Najib with his *1 Malaysia* concept.

The power accruing to Malaysia's Prime Ministers has been great. Not only have they controlled UMNO and the BN coalition, and thereby the Federal Government, but they have also indirectly controlled most State

[19] Rais Yatim, *Cabinet Governing in Malaysia* (Kuala Lumpur, DBN Enterprises, 2006).

[20] Khoo Boo Teik, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (Shah Alam, Oxford University Press, 1995); and see B Welsh (ed), *Reflections: The Mahathir Years* (Washington DC, Johns Hopkins University, 2004).

Governments for most of the time via their control over the BN. They have rarely even been challenged from within UMNO or the BN. Until the 2008 elections they have also commanded more than a two-thirds majority in Parliament as well as controlling the Senate, thereby enabling them to propose successful amendments to the Constitution, a power which they have exercised frequently.[21]

Mahathir's premiership expanded the power of the Prime Minister considerably. Unlike all of his predecessors he was not a lawyer but a medical practitioner by training and proved more impatient of constitutional checks and balances. In particular he challenged the power of the judiciary in 1988 (see chapter seven), the Rulers in 1983 and 1993 (see chapter four), and dissent within UMNO in 1987 and 1998, and got his way in all of these instances. He also held important ministerial portfolios during his premiership, taking over Finance, Home Affairs, and Defence during the period from 1998 to 2003. He not only had virtually unlimited power but exercised it extensively and personally, playing a significant role even in planning and executing major projects such as the Multimedia Super Corridor, Kuala Lumpur International Airport, the Petronas Twin Towers, and the new administrative capital, Putrajaya. He also orchestrated Malaysia's successful response to the financial crisis of 1997–78, resisting international criticism and demands.[22] During his period in office it became increasingly apparent that it was political rather than legal constraints on the Prime Minister's power that counted. These constraints exist mainly within UMNO and the Cabinet. It can be noted, however, that the narrowness of the BN's victory in the 2008 elections, with the loss of five State governments and drastically reduced parliamentary majority, has made the Government significantly more responsive to public opinion than previously; and the loss of the two-thirds parliamentary majority has taken constitutional amendments out of the equation.

[21] HP Lee, 'The Process of Constitutional Change in Malaysia', ch 15 of Tun Mohamed Suffian, HP Lee, and FA Trindade (eds), *The Constitution of Malaysia: Its Development 1957–1977* (Kuala Lumpur, Oxford University Press, 1978); A Harding and HP Lee, 'Constitutional Landmarks and Constitutional Signposts: Some Reflections on the First Fifty Years', ch 19 of A Harding and HP Lee (ed), *Constitutional Landmarks in Malaysia: The First Fifty Years, 1957–2007* (Kuala Lumpur, Malayan Law Journal/LexisNexis, 2007).

[22] RS Milne and DK Mauzy, *Malaysian Politics under Mahathir* (London, Routledge, 1999) 67–68, 75–76, 175–78.

The Prime Minister's Office (PMO) became increasingly large and important during Mahathir's premiership, and now has four Ministers in addition to the Prime Minister, exercising considerable control over economic policy in particular.[23] Currently the PMO has full Ministers dealing with economic planning (the Economic Planning Unit: EPU), unity and performance, parliamentary affairs, and religious affairs. The EPU is of particularly great importance, given the Prime Minister's control over the Finance Ministry and the fact that three other ministries (International Trade and Industry, Domestic Trade and Consumer Affairs, and Entrepreneur and Cooperative Development) are directly concerned with economic planning. The EPU is responsible for drawing up Malaysia's 5-year plans and until 2009 was responsible for decisions on all foreign direct investment approval.

C. The Cabinet

The *Jemaah Mentri* (Cabinet) is an institution expressly envisaged by the Constitution, in that Article 43 requires one to be appointed to advise the *Yang di-Pertuan Agong* in the exercise of his functions.[24] The other Ministers are to be appointed by the *Yang di-Pertuan Agong* on the advice of the Prime Minister, but these must be members of either House of Parliament, to which the Cabinet is collectively responsible. It is the resignation of the Cabinet which must be tendered in the event that the Prime Minister loses the confidence of Parliament.[25] Cabinet government is a particularly important feature of the Malaysian 'consociational' political system[26] in which there is a need to consolidate Government policy across 13 parties who are members of the BN ruling coalition and who mainly represent the various ethnic communities.

The operation of the Cabinet is described in gratifying detail in Rais Yatim's *Cabinet Governing in Malaysia*.[27] From this revealing account by an experienced Cabinet member, who is also a lawyer and a constitutional

[23] See www.pmo.gov.my.

[24] For discussion of the Cabinet, see further Abdul Aziz Bari, *Cabinet Principles in Malaysia: The Law and Practice*, 2nd edn (Petaling Jaya, The Other Press, 2002); Rais Yatim, above n 19.

[25] Art 43(4).

[26] Milne and Mauzy, above n 22, 16–19.

[27] Above, n 19.

scholar, it becomes clear that, although the power of the Prime Minister is acknowledged to be very great, the Cabinet is nonetheless also of considerable importance.

The structure of the Cabinet is dictated more by political than by administrative or governmental considerations. It is necessary for the Prime Minister to exercise great caution in its composition. Not only is he under the usual constraints of having to reflect opinion within his party and reward political associates, it is also necessary for him to include members of the component parties of the BN, members of the various ethnic communities, and representatives of the various States, especially Sabah and Sarawak. In recent years there has also been a small number of women in the Cabinet. The Cabinet is and has to be reflective of Malaysia's pluralism. The appointment of Ministers to the Cabinet is thus a balancing act in which the Prime Minister takes into account the candidates' experience, expertise, party, state, race, religion and gender. Which offices are to be represented in the Cabinet is also a matter for the Prime Minister to decide, but it has been conventional that all Ministers, in the sense of political heads of all Federal Government Departments, excluding Deputy Ministers and Parliamentary Secretaries, are members of the Cabinet. Thus the Cabinet is in effect the entire Government. Under Prime Minister Najib, the Cabinet has consisted of 30 Ministers who between them hold all the Government's ministerial portfolios.[28] The number has generally increased since the original 10 in 1955, the largest being 33 under Prime Minister Badawi: 19 are UMNO members; 10 are from other BN coalition parties, and one is an independent; 25 are MPs, five are Senators; 20 are Malay-Muslim, six are Chinese, three are natives of Sabah or Sarawak, and one is Indian; two are from Sabah and two from Sarawak;[29] there are two women; 20 are Muslim, ten are non-Muslim. Each State is also represented in the Cabinet. There is a Deputy Prime Minister, and both the Prime Minister and Deputy, as has also become conventional, hold major departmental portfolios (Finance and Education, respectively).

Due to its size and nature the Cabinet tends on the whole not to be a forum for the making of fundamental policy decisions, but rather for the settling of administrative matters. Accommodation between the BN

[28] A Second Finance Minister is included, presumably because the PM holds the main Finance portfolio.

[29] One of these is Chinese, the other three are members of native groups from Sabah/Sarawak.

coalition parties, which one might assume to take place in Cabinet, tends in fact to take place outside the Cabinet. The Cabinet meets for four hours once a week around an oval table at the Cabinet Office in Putrajaya. Cabinet papers are voluminous. Proceedings are conducted in a mixture of Malay and English, according to the speaker's preference, and the atmosphere is informal. The Prime Minister leads the meeting and invariably has his way: 'Ministers do not forget,' comments Rais Yatim, 'that under the Malaysian political system the PM calls the shots'.[30] This does not mean there is no debate, and some ministers are reported to have been outspoken in Cabinet.[31] Ministers can introduce their own items for discussion and contribute to discussion of matters not under their portfolios. Budgetary matters are very much under the control of the Prime Minister and the Finance Ministry; nonetheless under the last two Prime Ministers there has been more participation in budgetary decisions, and rarely does a Minister get total rejection of his Ministry's proposed programme. Cabinet papers are of course secret, and collective responsibility is strictly observed, any Ministers making public statements which deviate from the Government line being brought into line by the Prime Minister either in Cabinet or by means of an 'amicable phone call' followed by a ministerial clarification. This applies also to non-Cabinet members, as for example when Datuk S Sothinathan, a Deputy Minister, was suspended for publicly questioning an ethnically sensitive Cabinet decision regarding recognition of an overseas medical school.[32]

As we have seen, Ministers are collectively responsible to Parliament.[33] Individual ministerial responsibility is not explicitly referred to in the Constitution, but clearly does exist: ministers' question-time, for example, is a standard aspect of parliamentary proceedings. However, it has proved difficult for Parliament, where the BN has had a majority since 1955, to be more than a forum for the Opposition to criticise ministers. An incident in 2005 over approved permits for importing vehicles

[30] Rais Yatim, above n 19, 11.

[31] Milne and Mauzy, above n 22, 168–69.

[32] Bernama, 22 June 2004: see pgoh13.free.fr/sothinathan_suspended.php. To illustrate the ethnic nature of politics in Malaysia, it can be noted that this MIC politician was suspended for protesting about a Cabinet decision to derecognise an institution from which many Indian members of the medical profession had graduated. PM Badawi described the protest as a breach of *party discipline* rather than Government collective responsibility.

[33] Art 43(3).

indicates the true nature of ministerial responsibility. The then Minister of Trade and Industry, Datin Seri Rafidah Aziz, an experienced and forceful Cabinet Minister, was criticised by Government MPs via the media for lack of transparency in the way her ministry had granted permits to *bumiputera*. A spat followed between Rafidah and Mahathir, her former boss, with claims and counter-claims over the facts. In the event the General Assembly of UMNO rather than the floor of Parliament (although she was criticised in Parliament) was the main forum in which displeasure over Rafidah's conduct was voiced, encompassing irregularities in permit approvals but also her failure to meet with Mahathir to discuss their disagreement, regarded as discourteous according to Malaysian cultural norms. As a result of the criticism Rafidah, known as 'Rapid-fire' and the 'iron lady' of Malaysian politics, resigned in a flood of tears.

In 1982 Prime Minister Mahathir laid down a list of ethical requirements for his ministers which has been a touchstone for the Cabinet ever since; it includes, for example, a requirement to declare assets once every two years and avoid using any Government facilities for personal benefit.[34]

D. Administrative Agencies and the Public Service

Beyond the Cabinet and the 29 Government Departments the Federal Government follows a pattern familiar in Commonwealth states. There are numerous Government agencies embracing an array of functions, locations, degrees of autonomy, and legal bases. In addition there are many Government-linked companies, and of course in addition all of this is repeated in each of the 13 States.

Pursuing the theme of development we can note that large numbers of these agencies are described as having an explicitly development-related function. To take the example of information and communications technology, which is regarded as a critical aspect of Malaysia's development,[35] no fewer than 15 agencies have relevant functions. They range from the Ministry of Information and Communications to the Malaysian Communications and Multimedia Commission, the Malaysian Technology Development Corporation, the Multimedia Development Corporation (MDec), and the Multimedia Super Corridor (MSC). They involve a federal ministry and statutory agencies as well as a government-linked company.

One obvious feature of all of these agencies is their lack of independence. All are under the control of the Federal Government either directly via lines of responsibility leading to a minister and the Cabinet, or else the Government has power to appoint their members or executives. This is true even of Government-linked companies.[36] In practice the operation of ministerial responsibility insulates administrative agencies from parliamentary criticism. Even agencies that are formally independent of the Government are often nonetheless treated as if the minister has to answer for them in Parliament.[37]

Naturally the civil service (known in Malaysian law as the 'public service') is a crucial component of the developmental state. The public service includes general Federal and State service as well as the military and the police. It is responsible for the effective delivery of policy, and for the rational, pragmatic and continuous formulation and development of policy, irrespective of which group of politicians is in power. In Malaysia the Constitution in Part X deals at some length with the public service, providing for independent service commissions to control matters of appointment, advancement, transfer, discipline and dismissal. By this means the Constitution ensures that appointments are made on merit; that human resources are used effectively; and that public servants are not dismissed for political or other extraneous reasons, or unfairly.[38] The Constitution lays down in some detail the composition and powers of the service commissions: the Armed Forces Council, the Judicial and Legal Service Commission, the Public Services Commission, the Police Force Commission, and the Education Service Commission. To ensure the independence of the public service, no member of any legislature may be a member of a commission, or a member of the public service, or an officer or employee of a local or statutory authority.

[34] Rais Yatim, above n 19, 64.

[35] Abu Bakar Munir, 'Privatisation in Malaysia: A Case Study of the Telecommunications Department', in W Neilson and E Quah (ed), *Law and Economic Development: Cases and Materials from South East Asia* (Singapore, Longman, 1993) 169.

[36] M Likosky, *The Silicon Empire: Law, Culture and Commerce* (Aldershot, Ashgate, 2005) 169.

[37] See, further, M Puthucheary, 'Ministerial Responsibility in Malaysia', ch 6 of Tun Suffian, HP Lee and FA Trindade (eds), *The Constitution of Malaysia: Its Development 1957–1977* (Kuala Lumpur, Oxford University Press, 1978).

[38] For a full explanation, see *Government of Malaysia v Mahan Singh* [1975] 1 MLJ 3.

Additionally, a Chairman or Deputy Chairman of a Commission may not be a member of any board of directors or management of a commercial or industrial undertaking. Members of Commissions are usually to be appointed by the Government for terms of five years, with eligibility for reappointment, and have security from dismissal.[39] In practice the Government's control over the appointment of commissions means that they are not really independent. Senior positions equivalent to head or deputy head of a department are, however, filled not by the relevant Commission, but by the *Yang di-Pertuan Agong* on the recommendation of the Commission, and after considering the advice of the Prime Minister; the *Yang di-Pertuan Agong* may refer the recommendation back to the Commission for reconsideration. The Government is thus able to secure its desired candidates as senior public servants, and there is little doubt that public servants, rather than being strictly neutral, are expected to support Government policies fully.

Members of the public service hold office at the pleasure of the *Yang di-Pertuan Agong*, which means that they do not have a title to their posts, as Judges and members of service Commissions do, and can therefore be dismissed without cause, or without any charge having to be established against them. However, this does not mean that public servants may be summarily dismissed or demoted: there are some procedural restrictions, including the right to be heard.[40]

Given the relative security of tenure enjoyed by most public servants, the main problem has been that of ensuring quality of service delivery and linkage of the public service to overall development goals. Ever since the Montgomery and Esman Report in 1966,[41] the Government has sought various ways of doing this, notably via the privatisation and 'new public management' programme discussed in the next section.[42] Since 2010 a Government Transformation Programme has attempted to improve public access to Government services, increase the accountability of the public service, and by adopting 'National Key Result Areas' link these efforts very explicitly to specific development goals

[39] Arts 137–40.
[40] Art 135.
[41] JD Montgomery and MJ Esman, *Development Administration in Malaysia* (Kuala Lumpur, Government Printer, 1966); MJ Esman, *Administration and Development in Malaysia: Institution Building and Reforms in a Plural Society* (Ithaca, Cornell University Press, 1972).
[42] Ahmad Sarji bin Abdul Hamid, *The Civil Service of Malaysia: Towards Vision 2020* (Kuala Lumpur, Government of Malaysia, 1994).

such as improved standards of living, urban transport and rural infrastructure, and reducing corruption.[43]

III. PRIVATISATION

> 'Seperti gergaji dua mata, tarek makan, soring makan'
>
> (Like a double-edged saw, it bites when you pull it, and it bites when you push it)

It has long been recognised that development is not simply a result of government policies, and that it requires cooperation between government and private interests, both domestic and international. The distinction between public and private power has therefore always been a porous one. Privatisation is a loose concept implying a bundle of laws and other instruments ranging from stock market flotation of Government assets and Government contracting, to legislation and administrative regulation. In the Malaysian context it has involved transfers of assets to the private sector, charging citizens market prices for consumption of particular services, contracting out performance of public functions, and the undertaking of large public–private projects. While privatisation has been an almost universal phenomenon, especially since the 1980s, there were particular incentives for the Malaysian developmental state to move in this direction. The divesting of state assets to *bumiputera* would accelerate the meeting of NEP targets; the implementation of new public management in public administration, exposing the state to elements of competition and market-driven management would improve the rather obviously poor efficiency in service delivery in state enterprises; the large public debt – a major priority for foreign lenders – would be reduced; and foreign and domestic investment would be attracted to the large projects that would result from public–private partnerships. But it was seen as essential that privatisation should not compromise major objectives of the developmental state; it would have to be regulated in such a way that assets would not simply fall into foreign hands, and would have to serve the uniquely Malaysian priorities set out in the NEP.[44]

[43] See www.pemandu.gov.my/gtp/?page_id=6 (Performance, Management and Delivery Unit: '*Pemandu*' means driver).
[44] M Dass and K Abbott, 'Modelling New Public Management in an Asian Context: Public Sector Reform in Malaysia' (2008) 30(1) *Asia Pacific Journal of Public Administration* 59; KS Jomo, *Privatising Malaysia* (Boulder, Westview Press, 1995).

Malaysia was in fact one of the first developing countries to implement a policy of privatisation, which commenced under Prime Minister Mahathir's Japan-fixated 'Look East Policy' in 1983. It was later encapsulated in the Privatisation Master Plan 1991.[45] The intention was partly, as elsewhere, to dismantle or slim down the muscle-bound power of the state, surrendering government functions to private enterprise, releasing energy and creating incentives. In the Malaysian context it was, however, pre-eminently a means of garnering resources for infrastructural or technological projects in the interests of national development. The 'public and private sectors . . . [are] a team that work together to develop the country', as Mahathir himself expressed it.[46] Japan's development was offered as an explicit model under the Look East Policy; but a team of British accountants and lawyers advised on the implementation of privatisation, as the UK had just gone through an extensive privatisation process,[47] and a number of legal instruments were required to give effect to privatisation, where the British common law system and Westminster constitution offered common elements with Malaysia. The adoption of an Asian development model was, however, a clear statement that 'Malaysia Incorporated', as it came to be called, would become in some respects a typical Asian developmental state. This implies dominant party rule where democratic principles may in practice be limited in scope and development policies predominate; broad administrative discretion, favouring of a narrow range of preferred business interests and setting priorities; limits on judicial review and civil liberties; and the use of emergency or police powers if necessary to inculcate social and industrial discipline and minimise dissent.[48] The Asian developmental state envisages the state having a critical role in laying down industrial

[45] *Privatisation Master Plan* (Prime Minister's Department, Kuala Lumpur, Government Printers, 1991); see also *Malaysia's Privatisation Policy: The Rationale, Policy and Process* (Prime Minister's Department, Kuala Lumpur, Government Printers, 1992).

[46] Quoted in Likosky, above n 36, 147.

[47] KS Jomo, 'Privatisation in Malaysia: For What and for Whom?' in T Clark and C Pitelis (eds), *The Political Economy of Privatisation* (London, Routledge, 1993) 438.

[48] For examples of all of these features, see Likosky's discussion of the initial problems over the MSC in light of the spat between Mahathir and US presidential candidate Al Gore, the Anwar Ibrahim affair, and the resignation of Alvin Toffler from the Advisory Board of the MSC: M Likosky, 'Cultural Imperialism in the Context of Transnational Commercial Collaboration', ch 11 of M Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (London, Butterworths/ LexisNexis, 2002).

policy, directing sectoral development, and creating the necessary infrastructure for growth. There was also more than a suggestion in Malaysia that it was 'Asian values' that would guide the process.[49] Although it might seem paradoxical that a developmental state ambitious to acquire and fully utilise public power would indulge in privatisation, the manner in which this was done in Malaysia did not imply that the state was letting go of any kite strings.

An early instance of privatisation Malaysia-style was the controversial North-South Highway Project, the largest infrastructural project ever undertaken in the country, and also its largest BOT (build-operate-transfer) project. The contract for this project was awarded to a young entrepreneur who owned a company, United Engineers Malaysia (UEM), which had no track record of such projects; but he had good connections to the PMO, and UEM was owned by a company linked to UMNO, the ruling party. Moreover, the project for which the tender was submitted was one suggested by the entrepreneur himself and two other companies submitted lower bids. An apparently open international tendering process was undertaken, but UEM got the contract largely because it was able to offer a convincing array of sub-contractors who were in turn impressed with the political connections of UEM.[50] The contract created a political storm, the Opposition DAP Leader, Lim Kit Siang, pursuing extensive litigation, ultimately unsuccessful, to have the contract cancelled.[51] It also led to alterations in tendering procedures.

Another striking example is telecommunications,[52] which were privatised in two stages in the 1980s and 1990s. First, in 1984, the functions of the Government's Telecommunications Department were transferred to Telekom Malaysia (TM), a government-owned company; but the Department retained regulatory power. TM was then partially privatised in 1990. However, the Government retained most of the shares, and although no formal monopoly over telecommunications has been created, the PMO has the power of licensing. As a result TM, although a commercial success (hardly surprising given its de facto monopoly and its political connections and status), is in essence an arm of the developmental state rather than a private entity. It is a crucial part of the MSC,

[49] AJ Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge, Cambridge University Press, 2001) 13–16, 32–38.

[50] Likosky, above n 36, 153–55.

[51] *Government of Malaysia v Lim Kit Siang* (1988) 2 *Malayan Law Journal* 12.

[52] Abu Bakar Munir, above n 35.

discussed below, and also operates a university producing knowledge workers.[53]

During the 1990s Mahathir personally developed an ambitious plan, the Multimedia Super Corridor (now called 'MSC Malaysia'), which would, by attracting foreign companies to invest in it, create Asia's 'Silicon Valley' and propel Malaysia towards a knowledge economy as envisaged by the National Development Plan and *Wawasan* 2020, in order to create a fully developed economy by 2020. The Corridor, about 40km long, close to Kuala Lumpur and its International Airport, and boasting a fibre-optic backbone, would benefit from special laws and facilities. A Bill of Guarantees would ensure that investors would have confidence in their investment and would not be subject to *bumiputera* preference policies. An impressive International Advisory Panel comprising the likes of Alvin Toffler and Kenichi Ohmae would oversee the development of the project. The instruments used were many. A Multimedia Development Corporation (MDec) was set up in the form of a private company owned by the Government, whose Chairman and board members were to be appointed by the Government – indeed a third of the board must be members of the Government. MDeC is also funded by the Government, in its own terms 'combining the entrepreneurial efficiency and effectiveness of a private company with the decision-making authority of a high-powered government agency'. It is designed to act as a one-stop agency for investors that is also free of civil service red tape. As with TM, MDeC is a Government project owned and operated in effect by the Government. It too is an arm of the developmental state.[54]

Despite extensive privatisation the Malaysian developmental state has refused to let go of its assets, finding in privatisation a means of avoiding parliamentary and judicial scrutiny while reducing the financial burdens on, but not compromising the objectives of, the developmental state. If so, the resemblance with the Asian developmental state is virtually complete. The privatisation programme came to an end with the currency crisis in 1997. MSC Malaysia continues and its liberalisation of the regulatory process for foreign investment has been extended to more economic sectors and also zones such as the Iskandar Development

[53] Likosky, above n 36, 155–59.

[54] ibid, ch 6; B Ramaswamy, A Chakrabarty, and M Cheah, 'Malaysia's Leap into the Future: An Evaluation of the Multimedia Super Corridor' (2004) 24(11) *Technovation* 871–83.

Region in Johor.[55] Indeed, free zones, export-orientated zones, corridors and growth areas have been a major theme of economic development involving the public and private sectors. One of the latest, the Port Klang Free Zone, has become mired in allegations of large-scale corruption engulfing leading Chinese BN politicians.[56]

We have seen in this section how the Malaysian state, within the confines of Westminster-model government has been configured in ways that serve the requirements of a developmental state. Power has been highly centralised in the office of Prime Minister. The next section offers an analysis of the defining concept of Malaysia's developmental state, in which the twin goals of managing ethnic relations and national development have been brought together in the social contract as redefined in 1971. It is the social contract and its evolution more than any other issue that has preoccupied the developmental state.

IV. THE SOCIAL CONTRACT: DRAFTED AND AMENDED

'Aur bergantung ke tebing, tebing bergantung ke aur'

(The river bank depends on the bamboo, the bamboo depends on the river bank)

Since 1970 the making and implementation of Malaysia's social contract via the NEP has been the state's all-consuming task, involving the creation of prosperity, the reduction of poverty, and the providing of opportunity to the *bumiputera* majority.[57] However, the social contract is also vague and in some aspects difficult to parse. We have seen in chapter one the general rationale for its creation. But what exactly are its terms? Who are its parties? How is it implemented? Can it be changed? Confusion surrounds these issues, and the lack of any real freedom to address them has proved not so much a necessity of pluralism as a dysfunctional form of political process. The social contract is not contained in any particular document, and has to be construed mainly from the

[55] Tey Tsun Hang, 'Iskandar Malaysia and Malaysia's Dualistic Political Economy', ch 7 of C Carter and A Harding (ed), *Special Economic Zones in Asian Market Economies* (London, Routledge, 2011).

[56] 'PKFZ and MCA Party Crisis', *Sin Chew Jit Poh*, www.mysinchew.com/node/29144, 9 October 2010.

[57] E Gomez and KS Jomo (eds), *The State of Malaysia: Ethnicity, Equity and Reform* (London, RoutledgeCurzon, 2004).

provisions of the Constitution itself and the circumstances surrounding their adoption.[58]

The original terms of the social contract, crystallised in the *Merdeka* Constitution in 1957, were reasonably clear. The contract was concluded between leaders representing the three communities in their capacity as leaders of the three main political parties in the Alliance (UMNO, MCA and MIC). They could fairly claim to negotiate on behalf of their respective communities because they had demonstrated that, collectively, they had the overwhelming support of the electorate. This was an electorate to which the idea of being represented communally but in a manner which embraced accommodation and compromise was, as it proved, perennially appealing. The essence of the agreement was that the special privileges of the Malays would remain, while citizenship would be extended liberally to non-Malays.[59]

Such a social contract, even guaranteed by the adoption of a moderate, consociational form of politics under the Tunku, might seem unsatisfactory in terms of what it clearly allowed; in terms also of what it (perhaps rather less than clearly) did not allow; and in relation to those whose needs it failed to address, such as the *orang asli* and non-*bumiputera* poor and other disadvantaged minorities. Nonetheless, apart from the fact that it was very fulsomely supported by the people, the social contract has to be understood as a response to the deep fears of all communities that existed in the early decades of Malaysia's existence and which still persist today. In 1957 the Malays owned about 1 per cent of the economy; by 1969 that figure had risen to just 2.5 per cent, while about 66 per cent of the economy was foreign-owned.[60] In 1957, and even, one might argue, in 1969, the Malays were in danger of losing not just political status but even their aspirations for development. The non-Malays stood to lose their tenuous status as migrants and their own hard-won economic position and opportunities. Worse, they could lose their cultural and language rights as had happened with the Indonesian Chinese. The memory of post-war ethnic reprisals was also still fresh. The social contract was not seen as a dangerously

[58] See, further, for discussion of these important issues Norani Othman, MC Puthucheary and C Kessler (eds), *Sharing the Nation: Faith, Difference, Power and the State 50 Years After Merdeka* (Petaling Jaya, SIRDC, 2008).

[59] K von Vorys, *Democracy without Consensus: Communalism and Political Stability in Malaysia* (Princeton, New Jersey, Princeton University Press, 1975).

[60] KS Jomo and Chang Yii Tan, 'The Political Economy of Post-Colonial Transformation', ch 2 of Jomo and Wong, above n 4 at 27.

discriminatory new order but rather as a mercy, the best compromise that could be expected in fraught circumstances. Whatever the objections, it was thought better for those disadvantaged to live within its constraints than risk losing all. To some advocates of Malay rights this all means that the state embodies a fundamental and continuing notion of '*ketuanan Melayu*' (Malay dominance).[61] As we will see, however, the social contract is a compromise which *balances* the rights and interests of different communities, and the Constitution, while preserving some traditional elements and special privileges, does not embody Malay dominance but a pluralist democracy.[62]

The concessions embodied in the social contract were significant. For the Malays the impossibility of ever being in a minority in their own country was traded for acknowledgment that their position was special. From the perspective of many Malays the Chinese were suspected of allegiance to communist China rather than Malaya. For the non-Malays equal citizenship was traded for most of them being able to enjoy citizenship at all. In other words, even as liberal, pluralist democracy and constitutionalism were being adopted, this group accepted the status of second-class citizens. Beyond that it was clear from the retention of the States and their Malay monarchies in a federal structure, the designation of *Bahasa Melayu* (the Malay language) as the national language, and the establishment of Islam as the official religion, that the state was in essence a pluralist artefact underpinned by a substratum of Malay culture.[63]

The social contract was reflected principally in Article 153 of the Constitution, which permitted, indeed enjoined, the Government to act in a manner contrary to the principle of equal protection of the law, which is guaranteed by Article 8, in protecting the 'special position' of the Malays and the 'legitimate interests' of other communities. Article 153 was in fact derived from the Federation of Malaya Agreement 1948, which simply required the High Commissioner 'to safeguard the special position of the Malays and the legitimate

[61] 'Johor Ruler Urges Malays to Accept Ketuanan Melayu', *The Star*, 9 December 2010, thestar.com.my/news/story.asp?sec=nation&file=/2010/12/9/nation/7583175.

[62] J Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur, MBRAS, 2003), ch 6.

[63] Von Vorys, above n 59. See also Tun Mohamed Salleh Abas, 'Traditional Elements in the Malaysia Constitution', ch 1 of Trindade and Lee, above n 7.

interests of the other communities'.[64] The practice of reservation to Malays of positions in the public service, and certain scholarships and licences, as well as reservation of land, had commenced during the immediate post-war period under colonial government. Article 153 clarified and extended these practices and gave them constitutional legitimacy. The settlement of 1971, for reasons explained in chapter one, demanded a few changes to the terms of the social contract which were in effect a remaking of the contract on somewhat different terms. The main ones were the expansion of its scope to include in the *bumiputera* category natives of Sabah and Sarawak; the adding of admission to tertiary education as an area for the operation of quotas; and the entrenchment of the social contract, placing it, as a list of 'sensitive issues', beyond political debate, except as to implementation.[65] These changes configured a developmental state which was typical of Asian developmental states in subordinating all elements of the state to development and restricting criticism of policy, but also peculiarly adapted to the problems of Malaysia's multi-cultural society.

It is important to understand that Article 153 is not a licence to ignore the Constitution or the rights of citizens, or to indulge generally in official or institutionalised discrimination. It obliges the *Yang di-Pertuan Agong,* acting on advice (in other words the Government), to exercise his functions under the Constitution and Federal law in such manner as may be necessary to safeguard the special position of *bumiputera*[66] and, by giving binding directions to the relevant authorities, to ensure the reservation for *bumiputera* of a reasonable proportion of positions in the Federal public service; scholarships and other similar educational or training privileges; and permits or licences for the operation of any trade or business, where required by federal law. Specific authority to impose quotas for admission to institutions of higher education was added in the form of Article 153(8A) in 1971. Thus Article 153 represents a significant but balanced exception to equality before the law, allowing quotas in specified areas of public decision-making affecting individual opportunities. However, there are some express limitations. It does not allow unequal treatment of federal employees of different races; or deprivation of a public office or scholarship already held by any person.

[64] *Federation of Malaya Agreement 1948* (Kuala Lumpur, Government Printer, 1948) cl 19(i)(d).

[65] Art 10(4).

[66] See the following para for discussion of this term.

Similarly, it does not allow deprivation of a licence already held, or refusal to renew or allow transfer of a licence when such renewal or transfer might reasonably be expected in the ordinary course of events (here the Constitution gives effect to the familiar administrative-law notion of a legitimate expectation). Also, Parliament may not restrict business or trade solely for the purpose of reservation of quotas.

With the application of Article 153 to 'natives of Sabah and Sarawak' these communities too were made parties to the social contract. The communities protected by Article 153 are routinely referred to in Malaysia, and also in this book, although not in Article 153 itself as '*bumiputera*'.[67] Although the meaning of this term fluctuates somewhat in common usage, from an official perspective it includes: Malays, who are in turn defined by the Constitution as Muslims habitually using the Malay language and Malay customs and domiciled in Malaysia, and anyone with one Malay parent; natives of Sarawak, belonging to a scheduled list of indigenous groups, or having a parent belonging thereto; and similarly natives of Sabah. The indigenous *orang asli* (or 'aborigines' as they are called by the Constitution) comprise a number of indigenous groups who are confined to the mountainous jungle areas of central Malaya (see chapter six). The Constitution provides for the validity of 'any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service'. However, they are not designated as *bumiputera*, even though the indigenous 'natives' of Sabah and Sarawak, such as the Iban and Kadazan, are so designated. Essentially it is for the department in question to decide if a given person is a *bumiputera* or not. Given the indelibly mixed nature of Malaysia's diverse society, this issue is clearly an official headache embodying little in the way of social or economic logic. But the essential point is that by broadening the group of 'indigenous people' this group was able to construct a clear majority within Malaysia. The creation of Malaysia in 1963 followed by the departure of Singapore (with its 75 per cent Chinese population) in 1965 made this majority possible, and it was partly the prospect of such a majority that had driven the plan to form Malaysia in the first place.

[67] Meaning, literally, 'princes of the soil', or in English usage sons of the soil, but the term as used is gender neutral.

Oddly enough, the courts have never had to pronounce on the scope and meaning of Article 153 or the concepts of 'special position' or 'legitimate interests'. The lack of any litigation on these issues is probably attributable to their designation as sensitive issues, a fact of which lawyers would be acutely aware in providing advice. The likelihood is that litigating rights under Article 153 would also risk inflaming public feelings, inviting the possibility of prosecution under the Sedition Act or even use of the Internal Security Act. Nonetheless, although some litigation (see the *Merdeka University* case below) has indeed concerned ethnically sensitive issues, Article 153 itself has somehow not featured in such cases. It is of course also a good argument that the use of litigation to test the proper extent of constitutional power could function as a much safer means than other, more overtly political, means of raising issues with ethnic or religious implications. Sensitive cases involving religion, as we will see in chapter eight, have in fact been dealt with in the courts in the face of great tensions among the public.

One instance of litigation, relating to the national language, comes the closest that any litigation has come to a conflict over the social contract. The controversial case of *Merdeka University Bhd v Government of Malaysia*[68] examined the right of a private university to use a language other than the national language as the main medium of instruction, in the process virtually defining, in an expansive manner, the state itself. The promoting company, supported by a large number of Chinese guilds and chambers of commerce, applied to the Government under the Universities and University Colleges Act 1971 for permission to set up a private university, in which Chinese would be the main medium of instruction. Permission was refused on the grounds that the proposed university would conflict with the national education policy. The refusal was challenged in judicial review proceedings, partly on the grounds of contravention of Article 152 of the Constitution, under which the use of languages other than the national language is permitted, but not for 'official purposes', which are defined as 'any purpose of the Government, whether Federal or State, including any purpose of a public authority'. The definition of 'public authority' includes 'a statutory authority exercising powers vested in it by federal or state law'. A majority of the Federal Court held that the proposed university would be a statutory authority within this definition, so that it could not use Chinese as the main medium of instruction; the Government's decision was therefore held constitutionally valid. The reasoning was that even a private university established under statutory provisions was subject to some degree of public control in its affairs and involved a number of public appointments to office in its framework; acted in the public interest; and was eligible for grants-in-aid from public funds. The decision seems incorrect in that it confuses a public authority exercising statutory powers with a private body exercising private rights but subject to statutory regulation, even though statutory bodies are also providing the same service. The case is an example, coming at a time when the national language was being promoted in all forms of education as a basis for national unification, of how the policy demands of the developmental state are all-pervasive in Malaysia. It was highly controversial and appeared to cut against the notion of a pluralist and inclusive state. Since then, however, changes have been made to education policy that now allow private tertiary institutions to use English, as the medium of globalisation, information technology and science; and Arabic as the medium of Islam. National primary and secondary schools, on the other hand, have always been able to use Chinese and Tamil, and even to admit pupils other than those who have these languages as their mother tongue.[69]

As we saw in chapter one, there was no agreement amongst the Alliance parties in 1956–57 on the question of the duration of the special privileges under the provision which became Article 153. The Reid Commission said that after 15 years Parliament would have to reconsider the special privileges, but the outcome was that no duration was fixed. Given that the 15 years would have expired in 1972, it is probably fortunate that this benchmark was not adopted, as history in fact decreed the exact opposite – the special privileges were at that time not abolished but actually increased in scope and deeply entrenched in the Constitution. This issue was dealt with in the 1971 settlement not by settling a particular duration (although the NEP itself set targets to be achieved by 1990), but by protecting all the changes made by the

[68] [1982] 2 MLJ 243; see also V Sinnadurai, 'Rights in Respect of Education under the Malaysian Constitution', ch 3 of Trindade and Lee, above n 7; and for discussion of judicial review in relation to privatisation, Gan Ching Chuan, 'Administrative Law and Judicialised Governance in Malaysia: The Indian Connection', ch 12 of T Ginsburg and Albert HY Chan (eds), *Administrative Law and Governance in Asia* (London, Routledge, 2009).

[69] Peter KW Tan, 'The Medium-of-Instruction Debate in Malaysia: English as a Malaysian Language?' (2005) 29(1) *Language Problems and Language Planning* 47–66.

Rukunegara amendments with not just the usual two-thirds majority required for constitutional amendments, but also a requirement for the consent of the Conference of Rulers.[70]

Another area of lack of clarity in the social contract is the concept of 'legitimate interests of other communities', which are also protected by Article 153. No definition has been given of this term in any judicial or statutory interpretation. However, we can probably understand it in this light: assuming the city of Johor Bahru decided to allot 1000 new taxi licences, it would be constitutionally valid to decide to allot a quota of say 70 per cent to *bumiputera* taxi drivers; on the other hand it would be constitutionally invalid to take away the licences of 500 current non-*bumiputera* licence-holders and allot all or even a percentage of these to *bumiputera*. At any rate the notion of legitimate interests was understood in general terms as indicating that non-Malays would not be restricted in conducting business or having their property rights restricted; but no particular programme was implied, as opposed to some limited and obvious restrictions on the special privileges themselves.

Moving forward from 1957 to 1969, we have seen in chapter one that the deep communal fears of the 1950s had not been assuaged. Worse than that, unscrupulous politicians played on the fears of Malays for their own political advancement, and it was also the case that the special privileges had not produced much in the way of concrete results in 20 years of application. Added to the mix was the insensitive behaviour of the opposition parties in the manner of their response to the election results, which offered the Malays more grounds to fear what the current constitutional system could bring. Nothing of course could justify the behaviour that followed, but clearly the immediate situation and also its causes needed to be dealt with. An emergency proclamation was the answer to the immediate situation. As for the causes, the official position was that the special privileges had failed to deliver real social change, and the NEP was the remedy. One immediate effect of all this was to change the leadership in 1970 from the Tunku, moderate, tolerant and regarded by some factions as rather too conciliatory, to Tun Razak, who was seen as more of a technocrat, less charismatic, but a firmer supporter of Malay rights. The Tunku had led UMNO and the Alliance since 1951 and his country since 1957. This was the first transfer of federal executive power under the Constitution.

[70] Art 159(5).

The *Rukunegara* amendments added a new aspect to the social contract. The *Rukunegara* itself,[71] promulgated on national day 1970 by the *Yang di-Pertuan Agong*, was negotiated between political leaders representing different communities as a concerted attempt at nation-building by forming an agreed national ideology transcending Malaysia's diverse and deeply polarised society. It took Indonesia's *Pancasila* as a model, establishing parameters of debate and bases for national reconciliation; in particular, for present purposes, it involves respect for the Constitution and the rule of law. The ideology established is progressive, inclusive and liberal-democratic. By the 1971 amendments, policy on the sensitive issues (Article 153 privileges and legitimate interests, citizenship, the national language, and the monarchy) was placed beyond public debate, and even parliamentary privilege, it was provided, would not protect freedom of expression with regard to these issues. It was permissible, however, to debate the implementation of such policy. This was all enforced by means of the law of sedition, under which relatively small fines were usual, prison sentences much less so.[72] There is a dark side to the social contract. Its remodelling took place under the cloud of emergency rule, parliamentary democracy suspended, elections uncompleted, and citizens preventively detained without trial under the Internal Security Act. Agreements reached behind the closed doors of inter-party meetings were placed beyond public debate. The foundations were laid for an authoritarian style of government which contradicted many of the basic tenets or assumptions of the *Merdeka* Constitution. The amendments provided the basis for the construction of a developmental state that denied basic civil liberties and entrenched the Alliance, expanded and renamed the BN, in power.

[71] A Harding, 'The *Rukunegara* Amendments of 1971', ch 8 of Harding and Lee, above n 21 at 115. The text of the *Rukunegara* is appended to that chapter at 130–32. The word is made up of '*rukun*' (principles) and '*negara*' (nation). It can be argued that it is a milk-and-water document that few could object to. However, its principles are often breached and are worth regular reiteration: see Zainah Anwar, 'I've Rediscovered the *Rukunegara*', *New Straits Times*, 8 September 2006, also viewed at www.sistersinislam.org.my/index.php?option=com_content&task=view&id=534&Itemid=258.

[72] For judicial responses to sedition prosecutions and the limits to free speech, see Harding, ibid.

V. THE SOCIAL CONTRACT: SPECIFIC PERFORMANCE

'Bahawa kita memiliki telaga, Mengapa masih memegang talinya, Sedang orang mencapai timba?' (Usman Awang)

(We possess the wells; So why are we holding the ropes, While others are grabbing at the pails?)

The NEP and the social contract embodied in the amended Article 153 have been implemented principally by the quota system which is designed to provide opportunities for *bumiputera* citizens. The developmental state has also adopted other instruments to implement the overall policies of wealth creation and wealth distribution. Statutory boards were set up, designed to provide special programmes or assistance for *bumiputera* – principally Malay peasants. A notable example is the Federal Land Development Authority (FELDA), which is the world's largest plantation operator and has settled rural poor on smallholdings with loans to grow mainly oil palm. FELDA started operations in 1956, but its size and remit were greatly expanded during the 1960s and 1970s. In 1961 it commenced oil palm plantations as a crop diversification measure, given the volatility of the price of rubber, Malaysia's main product up to that time. It has settled as many as one million rural poor on its estates as oil-palm producers. The Majlis Amanah Rakyat (MARA, the People's Council of Trust) has carried out economic and social development in rural areas since 1966, with the objective of encouraging *bumiputera* entrepreneurship. MARA also set up the Institut Teknologi MARA (ITM) in 1966 to provide training courses for young *bumiputera*; in 1999 ITM became a university and was renamed UiTM.

Non-statutory rules and policies under the Foreign Investment Guidelines (abolished in 2009), supervised by the Foreign Investment Committee under the aegis of the EPU in the PMO, were designed to ensure that investors entered joint ventures with *bumiputera* partners to the extent of 30 per cent *bumiputera* ownership. The Industrial Coordination Act 1975 required both foreign and domestic investors to comply with employment policies benefitting *bumiputera*. Only 30 per cent *bumiputera*-owned companies were allowed to be listed on the Kuala Lumpur Stock Exchange. Tax concessions and Government procurement have been used to effect employment and share allocation quotas in the private sector. Special *bumiputera* discounts of at least 7 per cent were imposed on developers for the purchase of new housing. In relation to the public service, there was already a formal 4:1 *bumiputera* quota for Division 1 officers. This was continued and applied to the unified Administrative and Diplomatic Service and the police, while a 3:1 quota applied to the Judicial and Legal Service and the Customs Department. However, the pattern of actual recruitment to Division 1 posts was varied so that almost all new recruits were *bumiputera*.[73]

It is in relation to education, especially tertiary education, however, that Article 153 has had most effect. One important facet of Malay unrest in 1969 was the fact that Malays lagged behind other races in respect of university places. The universities admitted students on merit alone, which resulted in a socially dangerous imbalance in admissions. A Government Committee recommended that universities should ensure as far as possible that the racial composition of the student population within the university and within each faculty should reflect the racial composition of the country. This was given effect with the Government giving binding directions to tertiary institutions under Article 153 to reserve admission quotas, resulting in a dramatic increase in scholarships and places for *bumiputera* students.[74]

All these efforts have inevitably raised the issue of whether the targets have been met and what the implications of success or failure might be.

The Malaysian developmental state has indeed achieved economic development. Since 1970 and especially after Mahathir became Prime Minister in 1981, economic growth rates have been high, albeit not consistently so. Recessions in 1985/6 and 2008/9, in addition to the Asian currency crisis of 1997/8, have held back economic development, but the overall trajectory represents notable achievement. Malaysia no longer appears on most lists of 'developing countries', and poverty has been very substantially reduced.

At the same time the consequences of the NEP have by no means received universal applause. It is criticised for creating a comfortable urban Malay middle class and large numbers of state-dependant citizens, while ignoring real poverty amongst all communities. The so-called 'ali-baba' phenomenon involves *bumiputera* borrowers acting as front-men

[73] Dass and Abbott, above n 44; AJ Harding, *Law, Government and the Constitution in Malaysia* (The Hague, Kluwer, and Kuala Lumpur, Malayan Law Journal, 1996) 231–39.

[74] Tun Mohamed Suffian, *An Introduction to the Constitution of Malaysia*, 2nd edn (Kuala Lumpur, Government Printer, 1976) 312–19.

for non-*bumiputera* entrepreneurs; this has created much resentment and defeats the object of redistribution and increased opportunity. Often the Government itself has stressed that the need and the intention is for thrusting new entrepreneurs pushing the economy forward, not for handouts which do not produce proportionate common benefits. Corruption and cronyism in Government are other phenomena that have spurred criticism.[75]

In addition the factual issues regarding success of the NEP and its successor policies, the National Development Policy and the (current) National Vision Policy, are fraught with controversy. The main objective of the NEP was to increase *bumiputera* equity ownership from 1.5 per cent in 1969 to 30 per cent by 1990. Officially, the percentage was about 18 per cent in 1990, and stated by the Minister of international Trade and Industry as 22 per cent in February 2011.[76] The other main aspect of the NEP was to reduce poverty (seen largely in practice as a rural Malay issue) from 49 per cent in 1970 to 16 per cent in 1990. Officially, poverty was reduced to 3.6 per cent by 2007.[77] The NEP has without doubt succeeded in many respects, although there are still issues of uneven development. However, since there is no agreed method for benchmarking success precisely, the true position is difficult to ascertain and objective debate has been difficult to conduct while the issue has continued to be regarded as sensitive. When an NGO research unit issued a report in 2006 contradicting the Government's figures, and alleging that the true percentage for *bumiputera* equity ownership might be as high as 45 per cent, the Director of the unit, a prominent academic, was forced to resign amid serious recriminations and invective from Government ministers.[78] Debate about the meeting of targets, moreover, has had to substitute for debate about the principles of the NEP, because it is still an offence under the Sedition Act to question the policy. However, the current Prime Minister Najib has indicated gradual replacement of the NEP but without surrendering

[75] Gomez and Jomo, above n 57.

[76] 'MITI: Bumiputera Equity Market Stake at 22 Per Centre', SME Magazine, 28 February 2011, www.smemagazine.asia/index.php?option=com_content&view=article&id=722:miti-bumiputera-equity-market-stake-at-22-per-cent&catid=99:malaysia&Itemid=474.

[77] 'NEM: Absolute Poverty Reduced to 3.6% in 2007', The Malaysian Insider, 30 March 2010, www.themalaysianinsider.com/mobile/malaysia/article/NEM-Absolute-poverty-reduced-to-3.6-pc-in-2007.

[78] *The Star*, 12 October 2006, thestar.com.my/news/story.asp?file=/2006/10/12/nation/15695245&sec=nation.

affirmative action; and the Leader of the Opposition Anwar Ibrahim has even called for it to be replaced.[79] The closer official statements have come to saying that the 30 per cent target is being achieved, the more difficult it has been to close off debate about what comes next, whatever limitations the law imposes on freedom of speech.

Indeed since the 2000s signs have appeared that the NEP's star is waning. The Government itself is cautiously and by degrees addressing dysfunctional aspects of the *bumiputera* preference policy, no doubt aware of its need to satisfy non-*bumiputera* voters given the splintering of the Malay vote since 1999 between UMNO and opposition parties (PAS and PKR). The '30 per cent' rule in foreign investment approvals was rescinded in 2009, and earlier, for all investments, in the MSC and other zones. Quotas for university admission were abolished in 2004, and in 2008 the scholarship quota was adjusted from 90–10 per cent to 55–45 per cent in favour of *bumiputera*.[80]

There is clearly widespread belief that the social contract is outdated and changes are required. Placing an extra constitutional obstacle in the path of change (the consent of the Conference of Rulers, by amendment to Article 159) might prove to have been unwise (see chapter four). An alternative solution is offered by the fact that Article 153 allows the Government a discretion as to when and how to exercise the powers it grants, as with the adjustment in scholarship quotas. If the Government were of the view that the special position of *bumiputera* citizens was no longer in need of protection it could simply decline to use the powers involved and rescind relevant regulations. This would of course have the disadvantage of leaving the system in place for possible future use.

Any process to dismantle the social contract will have to be handled carefully. There is attachment to its principle as a matter of group rights, as well as to the benefits that it has bestowed on a large proportion of the population. The continuance of special privileges is seen by some as discouraging individual initiative as well as investment. However, many would regard their removal with dismay, and might argue with some

[79] 'NEP Still Relevant: PM Najib' *The Star*, 15 December 2010, thestar.com.my/news/story.asp?file=/2010/12/15/nation/20101215165551&sec=nation, 'Anwar: Dumping NEP Key to Regaining Competitive Edge': www.malaysia-today.net/mtcolumns/newscommentaries/30725-anwar-dumping-nep-key-to-regaining-competitive-edge, 20 March 2010.

[80] www.cpps.org.my/downloads/factsheets/National%20unity%20factsheet.pdf (Centre for Public Policy Studies).

force that the social contract and the NEP have conferred both significantly expanded opportunity and poverty reduction. Given the continued existence of ethnic and religious tensions, the social contract will no doubt continue to be a matter of sensitivity and controversy even as it evolves and in doing so changes the nature of Malaysia's developmental state and the definition of citizenship.

VI. CONCLUSION

> 'Hujan mas perak negeri orang: hujan keris lembing negeri kita'
>
> (Though it rains gold and silver there, it is still a foreign land: though it rains swords and daggers here, it is still our land)

In this chapter we have seen how the developmental state, structured along the lines of the Westminster constitution as a constitutional monarchy, emerged from the independence process. Its basic organisational principles had been determined but not its subsequent power or direction. We have seen how the executive leadership, in the office of the Prime Minister and the Cabinet, has been determinative of policy and direction through only six top executives since 1955, and how a variety of instruments has been employed, including privatisation, to address the ethnic problems and lofty ambitions of Malaysia's development state.

However, a deep-seated fault line threatening the new, democratic, state was its failure to address basic socio-economic justice despite the social contract of the mid-1950s. The May 13 incident was an axial moment that blew apart the Tunku's consensus around the existing social contract and demanded a restructuring of the state, the adoption of more specific objectives and targets than previously, and coercive methods that limit freedom of speech. These techniques have come to be identified with the Malaysian developmental state, moving through the advent of NEP politics, the new social contract and the *Rukunegara* of the 1970s to Mahathirism looking east and west in the 1980s and 1990s and, finally, the assessment of success and the prospect of reform in the 2000s. We have begun here to examine how the developmental state has attempted to collapse into the executive branch the dispersal and separation of power envisaged in the *Merdeka* Constitution. This theme will be developed in relation to a range of constitutional issues in ensuing chapters.

Central to all of these changes, we have noticed, is Malaysia's often problematical attempt to secure its own vision of development as a stabilising factor for its fraught and fractious pluralism. Here the social contract has been the real test of its success. Clearly there have been positive and negative aspects of this attempt. A new Malaysian state appears to be emerging from the womb of the old. Whether its shape would be recognisable to those two Cambridge lawyers and Westminster-model advocates, Sir Ivor Jennings and the Tunku, is for the time being a matter of speculation.

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3

Parliamentary Democracy in a Plural Society

Introduction – Elections and the Composition of the *Dewan Rakyat* – Political Parties and the Political Process – Parliamentary Process – Parliamentary Accountability – Parliamentary Committees – The *Dewan Negara* (Senate) – Conclusion

I. INTRODUCTION

'Nyamok berkepak, dunia nak chondong-kah?'
(If a mosquito flaps its wings, will the world keel over?)

AN EARLY DEMOCRATIC experiment in the form of municipal elections took place in the Straits Settlement of Penang in 1911; yet it was not until 1951 and in the same State that elections on a universal franchise were first held. These were quickly followed by similar developments in Kuala Lumpur, Johor and Terengganu. The first general elections were those for the Federal Legislative Council which were held in 1955. Since then both State and Federal Elections have been held on a regular basis, every four or five years, except for the emergency period of 1969–71, during which elections were suspended. The *Merdeka* Constitution, like the constitutions of many other newly-constituted states of the period that had been governed by Britain, envisaged a parliamentary democracy on the model of the Westminster constitution. Of course the overall constitutional configuration differed from the Westminster model in some important respects: supremacy, for example, lay with the Constitution rather than the will of

Parliament;[1] a Bill of Rights was included along the pattern of the Constitution of India; and a federal structure also entailed differences from the British system of government. The electoral system, without any serious debate or even consideration of alternative systems by the Reid Commission, was formed along Westminster lines with a single-member, simple plurality system (usually known as the 'first-past-the-post' or FPTP system), which still applies today at both State and Federal levels. Proportional representation was, however, considered before *Merdeka* by a committee of the Federal Legislative Council, but rejected on the ground that the electorate would have difficulty in understanding it; however, no attempt has been made to revisit this reasoning in light of changed circumstances, such as increased literacy and a greater plurality of parties. In Malaysia, where communally defined parties have been the norm but ethnicity is not evenly spread across constituencies, the FPTP system in effect requires parties to seek alliances across communal lines. This has occurred with both the ruling BN and the opposition Pakatan Rakyat Malaysia (PR). The existing system is highly advantageous for the coalition able to secure a majority of the vote. Following the 2008 election, for example, the BN with 50.27 per cent of the vote has 140 parliamentary seats while the PRM with 46.75 per cent of the vote has only 82 seats. In fact the governing coalition has always had a larger – and the opposition always a smaller – percentage of seats than votes. Only once – in 1969 – has the governing coalition received less than 50 per cent of the vote. Despite having obtained the critical two-thirds' parliamentary majority in every election except 1969 and 2008, it has never obtained two thirds of the vote.

In addition, the Constitution incorporates many of the Westminster conventions, notably those governing the relationships between the Government, the Head of State and Parliament.[2] Since the Government, by definition, must command a majority in Parliament, and a dominant-coalition system has operated continuously since *Merdeka*, Parliament has invariably endorsed the will of the Government. For example, a

[1] Art 4. However, it has been observed that 'in Malaysia . . . the principle of parliamentary sovereignty can be seen as dominating the concept of constitutional supremacy': MC Crane, M Gillen and T McDorman, 'Parliamentary Supremacy in Canada, Malaysia and Singapore', in DM Johnston and G Ferguson (eds), *Asia-Pacific Legal Development* (Vancouver, University of British Columbia Press, 1998) 15.

[2] AJ Harding, 'The Westminster Model Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States' (2004) 4(2) *Oxford University Commonwealth Law Journal*; and see ch 4.

study of the decade from 1982–92 reports[3] that only 27 of the 404 Bills considered were amended in the *Dewan Rakyat*, and none rejected, although 16 were withdrawn. In essence parliamentary process is a formality, and it is criticism of Bills outside rather than on the floor of Parliament that acts a check of some kind on legislation. For example, extensive civil society opposition to the Bill that became the Societies (Amendment) Act 1984 forced the Government to back down on some more swingeing proposals. In the case of the Bersih 2.0 rally calling for free and fair elections in 2011, the Government agreed to set up a parliamentary select committee to look into the electoral system. At the same time Parliament has been a major forum for political debate and calling the Government to account. Parliament is defined as consisting of the *Yang di-Pertuan Agong*, the *Dewan Negara* (Senate) and the *Dewan Rakyat* (House of Representatives), and is therefore bicameral.[4] The consent of all three is required to pass legislation; but in the case of the *Yang di-Pertuan Agong* a Bill becomes law automatically if he fails to assent to it within 30 days of it being presented to him. In addition to being the institution that exercises the Federal legislative power, Parliament also controls Federal government spending. The Prime Minister and Cabinet ministers must be members of one of the two houses, as one would expect in a Westminster-type structure.[5]

The *Dewan Rakyat* is the functional part of Parliament. The *Yang di-Pertuan Agong* has the power to summon, prorogue and dissolve it, acting on government advice. The *Dewan Negara*'s role is also virtually a formal one, and its impact on legislation, and indeed generally, has been minimal. The reasons for this will become clear as we see how the legislature operates under the strictures of the developmental state.

These basic determinants having been outlined, this chapter proceeds to examine in constitutional terms the nature and functioning of the parliamentary system under Malaysia's authoritarian developmental state. It will become apparent that parliamentary democracy has over

[3] Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Petaling Jaya, Star Publications, 2008) 513.

[4] In this chapter 'Parliament' refers to the constitutional definition set out in the text; but 'MP' will refer to Members of the House of Representatives (rendered here in accordance with Malaysian convention as the '*Dewan Rakyat*'), Members of the Senate or *Dewan Negara* being normally referred to in English as 'Senators'.

[5] As was indicated in ch 2, Senators are found in the Cabinet. Only the Prime Minister has to be an MP.

the years been limited in its traction within the political system both as a concept and as a matter of practice. A tight election result in 2008 has, however, somewhat revitalised Parliament as an institution, and the addressing of concerns about the electoral system has also renewed interest in the nature of parliamentary representation at the Federal and State levels. The chapter will therefore also examine the political process and the electoral system, within the system of parliamentary democracy as it has operated in Malaysia since *Merdeka*. The State Assemblies are also of some importance, but are dealt with separately in chapters four and five.

II. ELECTIONS AND THE COMPOSITION OF THE *DEWAN RAKYAT*

'Gajah berhati, kuman pun berhati juga'

(The elephant has a heart, but so has the mite)

The composition of the *Dewan Rakyat* is governed by Article 46 of the Constitution, which requires a constitutional amendment to change the number of seats; before a constitutional amendment of 1983, Parliament could alter this number simply by passing a law. At present the *Dewan Rakyat* consists of 222 members, but Article 46(2) specifies the number of members elected from each State and from the Federal Territories. The House has grown in number from the 98 members of the Federal Legislative Council (of whom only 52 were in fact elected) which replaced a wholly appointed Federal Council following the first general election in 1955. This increase naturally reflects a large growth in population (from around 6.3 million in 1957 to around 28 million as of 2011), but also the increase in the number of States from 11 to 14 with the formation of Malaysia in 1963 (reducing to 13 with Singapore's departure from the Federation in 1965). Another effect of the advent of Malaysia was the granting temporarily of over-representation in the *Dewan Rakyat*, in terms of the proportion of seats to population, to Sabah and Sarawak, which was one of the guarantees given to those States under the Malaysia Agreement 1963.[6] Currently, however, a dramatic increase in population in Sabah has resulted in disproportionate representation: Sarawak (population 2.2 million) with 31 seats has a

[6] See ch 5.

proportion of one seat per 71,000 population (well below the national average), while Sabah (population 3.1 million) has 25 seats and a proportion of one seat per 124,000 population (almost precisely the national average).[7] The dispensation of seats is not only unfair as between these two States: significant outliers are the highly urbanised areas of Kuala Lumpur itself (11 seats, or one seat per 232,000 population) and Selangor (22 seats, or one seat per 163,000 population) as of 2008. Thus there is no clear or consistent relation between the number of seats apportioned and the size of a State's population or electorate. The apportionment of parliamentary seats between the States is also set out in Article 46 of the Constitution, but is required to be reviewed by the Election Commission of Malaysia (ECM) at least once every eight years. This situation is indeed odd for a federal system where one would expect reasonably equal treatment of the various States. While a balance somewhat in favour of rural areas with their attendant difficulties is not unusual, the very considerable disproportion between the metropolitan conurbation, with its concentration of opposition support, and the rest of Malaysia seems lacking in any objective justification. Even the rural areas are not treated equally under this system: urban Penang, for example, has 13 seats with a proportion of one seat per 113,000 population, while rural Terengganu with eight seats has a proportion of one seat per 131,000 population. This aspect of the electoral system, along with many others listed below, seems in need of thorough review as Parliament begins to address the electoral system.

The functions of the ECM, set out in Article 113 of the Constitution, are mainly the conduct of Federal and State elections; preparing and revising the electoral rolls; reviewing, once every eight years, Federal and State constituency boundaries, the review taking no longer than two years; reviewing Federal or State constituency boundaries in the area affected, consequent on an increase in the number of elected members of the *Dewan Rakyat* or of a State Legislative Assembly, the review again taking no longer than two years; and making rules for the purposes of these functions. Although in appointing members of the ECM regard is to be had 'to the importance of securing an Election Commission which enjoys public confidence',[8] and the Commissioners enjoy security of

[7] These numbers denote residents rather than voters; Sabah has had a large influx of foreign workers in recent years.

[8] Events surrounding the *Bersih* 2.0 rally, 11 July 2011 (see below), indicate currently a considerable lack of public confidence in the ECM.

tenure similar to that of Judges, it is not a truly independent body. The seven Commissioners are appointed by the *Yang di-Pertuan Agong* after consultation with the Conference of Rulers; since the former acts on the advice of the Government, it is effectively the Government that appoints the ECM. All of the present Commissioners have had a career in the public service. The Chairman and Deputy Chairman and three ordinary members are Malay; one member is Chinese and one is Indian; one is from Sabah. The Commission reports directly to the Prime Minister with regard to the delineation of both Federal and State constituency boundaries, but the Prime Minister is required to submit the report to the *Dewan Rakyat* with a draft order, which may amend the recommendations but has to be approved by the House before it can take effect. The State Legislative Assemblies and Governments actually play no special role in all this, even though the delineation of State constituencies is potentially a highly sensitive issue of great interest to them. In effect therefore the Government can control even State constituency boundaries, a factor of some importance when several States are under PR (Federal opposition) control. The review procedure adopted by the ECM is laid out in Schedule 13 of the Constitution, and includes an opportunity for objections to be made against its recommendations. State Governments can and do object to such recommendations, and this triggers a requirement to hold a public enquiry. Elections themselves may only be challenged by means of an election petition in the High Court under Article 118. Each election spawns many such petitions. There is no appeal from the High Court's decision, nor can there be judicial review of an election court, as it is not an inferior court.[9]

The delimitation of constituencies must be carried out 'as far as possible' in the light of four principles, set out in Schedule 13 to the Constitution.[10] These are

1. The *congruency principle*: constituency boundaries should not cross state boundaries, and state constituency boundaries should not cross federal constituency boundaries. In practice this means that federal constituencies are each divided into a number of state constituencies.

[9] *Ignatius Stephen Malanjun v Election Judge, Sabah* [1989] 2 MLJ 433.

[10] The designation of these principles, adopted for clarity of exposition, is based on AJ Harding *Law, Government and the Constitution in Malaysia* (The Hague, Kluwer and Kuala Lumpur, Malayan Law Journal, 1996) 100–01.

2. The *administrative principle*: regard must be had to the administrative facilities available for registration and polling.
3. The *rural-weightage principle*: the number of electors within each constituency 'ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies'. This principle does not specify how far it can be taken without breaching the principle of equality between constituencies (and therefore between voters).
4. The *status-quo principle*: regard must be had to the inconveniences attendant on alterations of constituencies, and to the maintenance of local ties.[11]

These principles do not say that citizens should be treated equally with regard to the value of their votes – indeed they indicate the reverse. Nor do they provide any hierarchy of principles, as opposed to just a list, leaving the ECM to decide which principles have precedence. In practice the rural-weightage principle is the most significant. By legitimising large discrepancies between urban and rural constituencies, this principle allows proportionally more Malay than non-Malay representation in Parliament, since Malays are overall more concentrated in the rural areas than in the urban areas. It also of course privileges parties that appeal to the rural voter, and thereby accentuates the main problem with the FPTP system – that it delivers a disproportionate number of seats to the majority party. Up to 1973 the provision (Schedule 13, section 2(c)) referred to rural constituencies 'in some cases' containing 'as little as one half of the electors of any urban constituency'. With the repeal of these words the ECM was given carte blanche to create an even more alarming gulf between these two kinds of constituency. Given the timing of this change in the law, coming as it did hard on the heels of the *Rukunegara* settlement, the NEP and increasing authoritarianism (discussed in chapter two), it seems lacking in any real justification. In fact it has led to enormous disparities in representation, some urban constituencies having as many as 100,000 electors while some rural ones have as few as 20,000. In one extreme case highlighted before the Parliamentary Select Committee on Electoral Reform in 2011, the BN-held constituency of Putrajaya has 6,008 voters

[11] The names given to these principles are the author's own.

while PR-held Kapar has 112,224 voters, more than 17 times Putrajaya's numbers.[12]

Even if this law was justified in 1973 it is hard to see how it can be justified almost 40 years on, given that the NEP has reduced poverty and created opportunity, mobility, and vastly improved communications. It is apparent that a great deal of gerrymandering has occurred, with rural weightage being 'extreme in some carefully selected constituencies'.[13] In any event it is surely appropriate to address the problems of rural areas, and also deprived urban areas, whatever their ethnic mix, and poverty generally, with programmes targeted to their actual needs as opposed to distorting the electoral system and creating inequality in the electoral sphere where, above all, citizens should be equal. Indeed, given the lack of effectiveness of Parliament as a means of critiquing policy, this form of electoral discrimination does not even effectively address the problem of rural disadvantage. The author has commented on this issue as follows:

> The Malaysian Constitution has not gone so far as to resuscitate the rotten borough of 18th-century England in the form of the rotten *kampong* [Malay village], but there is a real danger of lack of legitimacy if the electoral system diverges too sharply from the principle of "one-man-one-vote-one-value".

It seems as if that point has now been reached as Malaysia's democratic credentials become increasingly contested by its own citizens. Indeed there are currently demands to change the electoral system fundamentally in this respect.

Many other defects have been noted in the electoral system. These include phantom voters;[14] incentives in the form of vote-buying; on-the-spot ministerial offers of development funding; and threats of economic sanctions for areas returning opposition candidates.[15] These issues have become more pressing as the political system has become, since 1999, more of a real contest between the BN and the opposition.

[12] 'A Retiree Exposes Gerrymandering in Sabah', *Malaysiakini*, 27 November 2011, www.malaysiakini.com/news/182546.

[13] D Mauzy, 'Resilient Hybrid Regimes' (2006) 2(2) *Taiwan Journal of Democracy* 47, 64.

[14] For example, Reuters reported on 28 February 2008 that 8,666 registered voters had been discovered on the roll who were apparently more than 100 years old, including two 128-year-olds: in.reuters.com/article/2008/02/29/idINIndia-32218620080229.

[15] Mauzy, above n 13, 18.

In 2007 and again in 2011 rallies were organised by Bersih,[16] a coalition of NGOs and political parties, demanding free and fair elections. Consistently with its name, Bersih demanded:

1. Cleansing of the electoral roll
2. Reform of postal voting
3. Use of indelible ink to prevent electors voting more than once
4. A minimum campaign period of 21 days
5. Free and fair access to the mainstream media
6. Strengthening of public institutions
7. Ending of corruption
8. Ending of 'dirty politics'

Initially, following an attempt by the *Yang di-Pertuan Agong* to mediate an escalating dispute between Bersih and the Government, the latter appeared to allow the July 2011 rally to take place in the National Stadium. Nonetheless a police permit was then refused, and despite attempts by the police to prevent the rally on the ground that it was an illegal assembly,[17] and more than 1700 arrests, it went ahead and was adjudged to be a success in mobilising opinion on these electoral issues. Moreover, official sympathy for a free and fair electoral system was not apparent. There were claims that Bersih was an attempt to overthrow the Government; arrests of peaceful protesters wearing or selling yellow Bersih T-shirts on grounds of participating in an illegal assembly; and the use of tear gas and chemically-laced water cannon against protesters, even, in one instance, aimed at a hospital. The Government was severely damaged politically; but it did offer to look at electoral reform, and in July 2011 in an unusual move the *Dewan Rakyat* voted to set up a parliamentary select committee to examine this issue. This was cautiously welcomed by Bersih, as 'an indication that the government is at long last paying serious attention to the voices of the *rakyat*'.[18]

The ECM itself, as we have seen, is not independent of the Government. Its powers are limited and not exercised as fully as they might be. The

[16] 'Bersih' means 'clean' in the Malay language.

[17] 'Bersih Fails to get Permit for Stadium Merdeka Rally', Malaysiakini, 8 July 2011, malaysiakinicom1.wordpress.com/2011/07/08/bersih-fails-to-get-permit-for-stadium-merdeka-rally-2.

[18] bersih.org. For critical analysis of the electoral system, see Tey Tsun Hang, 'Malaysia's Electoral System: Government of the People?' (2010) 5 *Asian Journal of Comparative Law* 147.

ECM has no role to play in enforcing electoral law except to provide evidence of irregularities, which are usually widespread, to the prosecuting authorities. Following the Bersih rally the ECM appeared to reject most of the demands, saying that most of them fell within the purview of other authorities; it indicated willingness to extend the campaign period, but at the same time to suggest that policing considerations were the determining factor. A major issue is that many voters either do not register, have difficulties getting registered, or do not find it easy to cast their vote, for example because they live far from where they are registered, or there are inadequate facilities for postal voting. Bersih claims that as many as 3.5 million voters are in effect disenfranchised. In addition there appears to be a widespread attitude of indifference towards elections that is not surprising after 12 successive Federal election wins by the governing coalition. The ECM rejects the idea put forward by Bersih of automatic registration of voters when they reach voting age. It also rejects the idea of equal access to official (Radio-Television Malaysia) as opposed to unofficial media[19] by all political parties. A strong case has thus been made, implicitly recognised by the Government, for a complete overhaul of an electoral system under which only just over half of citizens of voting age voted in the 2008 election, and which also contains an inherent bias in favour of the ruling coalition.

III. POLITICAL PARTIES AND THE POLITICAL PROCESS

'Banyak orang, banyak ragam-nya'

(Many people, many whims)

The political aspects of state formation in Malaysia have been discussed in chapters one and two, where reasons were offered for the emergence and dominant position of UMNO. One of the many paradoxes in the Malaysian political system, however, is that, despite increasingly authoritarian government since 1970, especially during Dr Mahathir's premiership, political parties have flourished, at least numerically. Currently 17 parties are represented in Parliament, of which 12 are constituent parties

[19] Electronic and social media (blogs, Facebook, Twitter, for example) have been extensively exploited by opposition activists. Some bloggers have been elected to Parliament.

of the BN and three are constituent parties of the PR.[20] Two unaligned parties and eight independents (all of whom are former PR members) hold the seats not held by the two coalition groups. In addition to these there are five registered parties currently without seats in the *Dewan Rakyat*. Fluidity has also been a feature of Malaysian political parties. Although several parties date from the 1940s or 1950s, new parties have appeared often. Ten have been registered in the last 20 years, the latest in February 2011. While some have lasted for a short time, others have attained instant success; PKR, led by former Deputy Prime Minister Anwar Ibrahim, for example, was registered in 2003, obtained seats in the legislatures in 2004, led four State Governments after that election, and is also the main Federal opposition party. From 1988 to 1994 *Semangat '46*, a party which split off from UMNO following a dispute over party elections and which contained several former Cabinet ministers, posed a serious threat to UMNO's dominance, but ultimately folded as quickly as it appeared, many of its members returning to UMNO.[21] Although floor-crossing or party-hopping statutes, designed to prevent members changing parties, are a feature of State Legislative Assemblies,[22] there is no restriction of this kind in the Federal Legislature, where the only relevant rule is that a Member who resigns her seat is disqualified for five years;[23] this rule was effected by a constitutional amendment passed in 1990 to prevent opposition parties using staged resignations as a means of testing the Government in by-elections.

All parties, and indeed all societies, are required to be registered under the Societies Act 1966.[24] This Act, with 70 sections, presents many obstacles, including a good deal of red tape and several mechanisms whereby the Government can control parties and civil society organisations. The Act recognises a distinction between political parties and other societies, defining a political party as a society that seeks to participate in elections at any level.[25] A society is defined as including 'any club, company, partnership or association of seven or more persons whatever its nature or object, whether temporary or permanent'. It is an

[20] Each of these groups includes one party currently without seats in Parliament.

[21] H Crouch, *Government and Society in Malaysia* (Ithaca, Cornell University Press, 1996) 121–29.

[22] See ch 5.

[23] Art 48(6).

[24] Act 355, amended in 1972 (Act A102), and 1981 (Act A515).

[25] s 2.

offence, until a society is registered, to organise or take part in any activity of or on behalf of it without the written permission of the Registrar of Societies.[26] The minister can declare unlawful any society which in his opinion is or is being used for purposes prejudicial to security, public order or morality. The Registrar and the minister have wide powers to refuse or cancel registration on a number of grounds connected with security, peace, welfare, public order or morality, affiliation or connection outside the Federation, and unlawful purposes. The Act contains extensive provisions relating to the officers, property, constitutions and branches of societies, and relating to information to be supplied to the Registrar. Decisions under the Act may be appealed from the Registrar to the Minister, whose decision is final. Controversial amendments to the Act were passed in 1987 following a crisis over the illegality of the ruling party (see chapter seven). In practice political parties, as opposed to some religious groups (see chapter eight), have not been declared illegal under the Act, but there are delays and frustrations in registering and in observing the Act's and the Registrar's requirements. Beyond that, civil society flourishes despite close statutory regulation.[27] All societies are required to observe the Constitution, and the Societies Act threatens societies with de-registration if any of their activities or affairs in any manner violates or shows disregard for: the system of democratic government headed by constitutional monarchy; the position of Islam as the religion of Malaysia; the use of the national language for official purposes; the position of the Malays and of the natives of Sabah and Sarawak; or the legitimate interests of the other communities.[28] In this way political parties are, consistently with the Sedition Act and Article 10 of the Constitution (for which see the discussion of the social contract in chapter two), strictly confined in the manner in which they address the 'sensitive issues'.

The political system is correctly described as a dominant-coalition system, very similar to a dominant-party system but incorporating the element of inter-ethnic accommodation. The BN, now comprising 12 parties, takes to a logical conclusion the system inaugurated by the Tunku in the 1950s, in that many of the parties that have formed it,

[26] Bersih itself (see above), denying that it is a society within the meaning of the Act, is considered unlawful by the Government.

[27] M Weiss, *Protest and Possibilities: Civil Society and Coalitions for Political Change in Malaysia* (Stanford, Stanford University Press, 2005).

[28] s 2A.

beyond the original three ethnic parties of the Alliance, have also represented other ethnic groups, especially native communities of Sabah and Sarawak. However, there is no doubt that within the BN coalition UMNO is dominant. The Chairman of the BN has always been the Prime Minister, and he and the Deputy Prime Minister have always been UMNO leaders. The MCA at one time held the finance portfolio, but no longer. Although the component parties of the BN hold Cabinet seats (see chapter two) they have little influence on policy despite their claim, which is often doubted, to obtain the best deal for their ethnic group. It is indeed hard to find a single example of a major policy explicitly prevented, abandoned or modified in the face of intra-BN opposition. A pattern was set by the 1959 crisis over Chinese education, which has always been a thorny issue for the BN: UMNO on that occasion resisted attempts by the MCA to block changes in education policy that affected Chinese education. MCA supported the Tunku at the expense of splitting the party.[29] At the same time UMNO policy-making keeps in mind the need to secure the votes of supporters of other BN parties, not just its own. Maintaining a close connection with Malay political leaders has been a priority for Chinese business interests. In this respect it can be noted that support for the MCA and the MIC (the two original coalition partners of UMNO) has eroded seriously over recent years, and these two parties have generally been even more fraught with internecine conflict than has UMNO. However, the logic of inter-ethnic accommodation is compelling, especially as the Malay vote has become increasingly split between two, and now three, main parties (UMNO, PKR and PAS). This logic applies of course as much to the opposition as to the BN.

Clearly the political dominance of UMNO and the BN has enabled the Government to take authoritarian measures, especially after 1969, confident that it would maintain its majority in spite of the unpopularity of these measures in many quarters. Nonetheless, to call a system a dominant-coalition system is merely to describe a pattern of political behaviour. This pattern, evident since *Merdeka*, was actually broken by the general election of March 2008. All told, following this landmark election, which saw more political participation and galvanisation than ever before, the BN holds 140 seats and the opposition 82 parliamentary seats. Although this looks like a healthy BN majority, the BN in fact

[29] RS Milne and DK Mauzy, *Malaysian Politics under Mahathir* (London, Routledge, 1999) 91–96.

obtained only just over 50 per cent of the vote and the PR just under 47 per cent. The opposition increased its representation in Parliament from the 20 seats it won in the 2004 election against the BN's 198. Also, the PR gained control of five of the 13 State Governments (Selangor, Kedah, Perak,[30] Penang, and Kelantan) as well as depriving the BN of its usual two-thirds majority in Parliament, thus preventing the BN government from summoning the special majorities generally required to amend the Constitution. The loss of traditionally UMNO seats in the metropolitan conurbation formed by Kuala Lumpur and the surrounding densely populated areas of the State of Selangor, and the loss of some Cabinet members' seats, was a sufficiently severe blow to the Government that Prime Minister Badawi described the result (quite inaccurately of course) as a 'defeat'.[31] Further damage to the Government took the form of a distinct shift in the voting patterns of ethnic minorities, away from the BN parties, who suffered especially badly, to the opposition, which offers parties which are more multi-racial in composition and policies. For these reasons, while it is difficult to draw too many conclusions from a single election, however significant, it may no longer be accurate to call the system a dominant-coalition system. Whether it emerges as a stable two-coalition system remains to be seen.

IV. PARLIAMENTARY PROCESS

> 'Sudah tahu bertanya pula'
>
> (You have been told already, but here you come asking questions)

Having examined the electoral system and the political party system we can now investigate actual proceedings in Parliament.

Proceedings are controlled by the Speaker. Although it is usual in Westminster-type parliaments for the Speaker to be appointed from amongst sitting members, which was indeed the case in Malaysia until 1964, the Speaker has since then been appointed from outside Parliament, although he is not allowed to vote. Opposition members often criticise the Speaker or his decisions, and sometimes question his impartiality. Nonetheless, occasionally the Speaker has played an important role in securing proper and thorough parliamentary process; in 1971, for example, the personal intervention of the Speaker secured a seven-day extension to the debate on the Constitution (Amendment) Bill introducing the *Rukunegara* amendments.[32]

[30] Subsequently it lost control of the Perak Government due to a loss of confidence: see ch 4.

[31] 'Malaysia's Election: A Political Tsunami?', *The Economist*, 10 March 2008.

The role of Leader of the Opposition is also crucial for effective accountability in Parliament. Since 1971 the Leader of the Opposition is a position recognised by Malaysian law and carries with it a salary. Parliament has undoubtedly been enhanced as an institution by the fact that from 1969 to 1999 and then again from 2004 to 2008 the former DAP leader Lim Kit Siang, a lawyer and a prolific author and blogger, was an effective and indefatigable Leader of the Opposition, and remains an MP. He was one of the longest serving opposition leaders in the world and ensured that parliamentary proceedings never became a pure formality, even if his criticisms had little overt effect on legislation or Government policy. Lim pursued his political aim to bring the Government to account not only via parliamentary debates and question time, but also in numerous court cases,[33] and was also, despite being Leader of the Opposition, detained without trial under the internal Security Act for periods of 18 and 17 months respectively during the 1969 and 1987 crackdowns.[34]

Parliamentary procedure in Malaysia will be very familiar to those acquainted with procedure in Westminster-type parliaments. This applies even to fine details of ceremony; for example, the mace, in the charge of a Sergeant-at-Arms, precedes the Speaker into the *Dewan Rakyat* and is placed below the table when the House resolves itself into committee, an indication that the more informal procedure appropriate to the committee-stage then applies; it contains sealed in its base pieces of rubber, tin, and grains of rice padi, the main produce of Malaysia.

Once elected, Parliament continues for a period of five years from the date of its first meeting, unless it is dissolved. This rule has been followed with the exception of the period of emergency rule from 1969–71. On dissolution a general election follows within 60 days. Standing Orders of the *Dewan Rakyat*[35] lay down the procedure and are made by

[32] Harding, above n 10, 94.

[33] An example was discussed in ch 2, section III: the *UEM* case.

[34] See, further, AJ Harding and HP Lee, *Constitutional Landmarks in Malaysia: The First Fifty Years, 1957–2007* (Kuala Lumpur, LexisNexis, 2007) 301; and Lim's blog at blog.limkitsiang.com.

[35] www.parlimen.gov.my/news/PM_DR_BI.pdf.

the House itself. A session, of which each Parliament usually has four or five, and which usually lasts for about one year, begins, by convention, with the 'speech from the throne', in which the Government outlines its legislative programme for the session, and ends with prorogation, which must not last more than six months. In Malaysia since 1984, prorogation does not discontinue Bills that are before Parliament or pending royal assent.[36] Sessions normally consist of five or six meetings, which can last a few days or a few weeks, depending on business. The quorum is 26 and before the opposition obtained a large number of seats in the 2008 election there were occasions when Government MPs deserted the chamber, making opposition and even sometimes Government business impossible to transact.

In Malaysia almost all Bills are in practice Government Bills. Legislative procedure in Parliament itself tends to be rather attenuated, and there is also little public debate beforehand on the principles of the legislation. The Cabinet approves the legislative policy, and after internal consultation within the Government it also gives final approval for the drafting of a Bill. Even MPs are often given very little notice of a Bill being introduced, and white papers are virtually unheard of. An extreme case was the Constitution and Malaysia (Singapore Amendment) Bill 1965, by which Singapore was expelled from the Federation. This momentous Bill, seen by MPs only the same day it was passed, took three hours to pass all stages through both Houses – one of the fastest divorces in history. MPs from Sabah and Sarawak, and even the Governments of those States, were not consulted in spite of their special interest in the matter, and even the Cabinet did not discuss it. This was admittedly a special case, but on 27 August 1967 no fewer than 24 Bills were passed in the *Dewan Rakyat*; and in 1993 a highly controversial constitutional amendment affecting royal immunity from suit (see chapter four) was passed in both Houses in less than three days. This once routine 'bouncing' of Parliament has not, however, been repeated to the same extent in recent decades.

Bills may be introduced in either House, receive three readings, as well as going through a committee stage, in each House, and receive the royal assent before becoming law upon publication in the official gazette. In some cases the consent of the Conference of Rulers is required. Money Bills are an exception to the above requirements. These

[36] Art 55(7).

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must be introduced by a Minister in the *Dewan Rakyat*, and can become law under Article 68 when passed by the House and having received the royal assent. To become law under Article 68 the Bill must be sent to the *Dewan Negara* at least one month before the end of the session, and if not passed by it without amendment within a month, it may be presented for the royal assent, provided the Speaker certifies that the provisions of Article 68 have been complied with. This certificate is conclusive for all purposes and may not be questioned in any court. If the Bill is *not* a money Bill similar rules apply, except that the *Dewan Negara*'s delaying period is maximally one year and one month rather than one month; in other words a whole session must pass before the Bill can bypass the *Dewan Negara*. By this means the Malaysian Constitution avoids the possibility of a constitutional deadlock between the lower and upper houses, giving the lower house final say over legislation. The presence of this rule has proved sufficient to avoid it ever having to be tested in an actual instance. Short of the BN losing power but retaining control over the *Dewan Negara* it is unlikely that the latter would display the degree of autonomy that a deadlock would imply.

The role of the *Yang di-Pertuan Agong* in legislation is almost, but not quite, a formality. As a result of a compromise over this issue when it became moot in the 1984 Rulers' crisis,[37] his assent must be given within 30 days of the Bill being presented for assent, otherwise the Bill becomes law automatically. As result of the crisis the Constitution was amended so that the *Yang di-Pertuan Agong* could return a Bill to the *Dewan Rakyat* with his reasons for refusing the royal assent. This latter rule was repealed by a further amendment in 1994, so that only the 30-day rule remains.

Constitutional amendments are in general subject to additional requirements compared to ordinary Bills; these requirements vary according to the constitutional provision sought to be amended, but Parliament is central to the process in all cases.[38] The basic rule is that a Bill to amend the Constitution must be supported at its second and third readings by two-thirds of the total membership of each House. There are, however, several exceptions to the rule, such as an amendment altering the composition of the *Dewan Negara*, admitting a new State to the Federation, altering State boundaries, or changing the

[37] See ch 4.
[38] Art 159.

federal capital.[39] In some cases, in addition to the special parliamentary majorities, the consent of the Conference of Rulers is required (see chapter four). This requirement applies to the *Rukunegara* constitutional amendments of 1971 and even ordinary laws passed under those amendments, such as the Sedition Act amendments under Article 10(4), restricting freedom of expression with regard to the sensitive issues. In other cases, where the special constitutional position of Sabah and/or Sarawak is affected by a proposed constitutional amendment, the consent of the respective State Government (but *not* its legislative assembly) is required.[40]

By this means the Constitution, in terms of its *express* provisions, achieves four different levels of entrenchment. We have already noted in chapter two that the entrenchment of the *Rukunegara* provisions could prove problematical in terms of updating the Constitution in light of the issue of *bumiputera* preference. There is, however, a possible but disputed fifth degree of entrenchment – an *implied* one – which arises from the 'basic structure' doctrine developed by the Supreme Court of India and considered in some Malaysian cases.[41] This doctrine holds that some provisions of the Constitution are impliedly not within the power of constitutional amendment because their amendment would destroy the constitution's basic structure. In a remarkable case brought by the Government of the State of Kelantan against the Prime Minister Tunku Abdul Rahman in 1963 (see chapter two) for an interim injunction to prevent the implementation of the Malaysia Agreement 1963 and the creation of the new entity – Malaysia – by the admission of three new states on the following day, it was held that Parliament by passing the Malaysia Act 1963 had not done anything 'so fundamentally revolutionary as to require fulfillment of a condition which the Constitution itself does not prescribe'.[42] The issue has been considered in the context of the Malaysian Constitution, and rejected in principle, although not decisively, by the highest court.[43]

[39] Harding, above n 10, 50.

[40] See ch 5.

[41] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; considered in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70.

[42] *Government of the State of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman* [1963] MLJ 355.

[43] Harding, above n 10, 51–54; see also Sharon K Chahil, 'A Critical Evaluation of the Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia' (2002) 3 *MLJ* xii.

The significance of the process for constitutional amendment is much greater in Malaysia than in most countries. For many years the opposition virtually campaigned on the slogan, 'Deny Them Two Thirds', so that preserving the *Merdeka* Constitution unsullied by executive tampering became a rallying point for many parties and for the civil society. Executive over-employment of the amendment process (42 amending Acts and more than 600 individual textual amendments since 1957) has had the effect of sanctifying rather than dissipating respect for both the text and the spirit of the Constitution. The basic structure of the Constitution appears somehow to have survived despite the legislative onslaught and the judiciary's apparent unwillingness to adopt the Indian basic structure doctrine.

Moving to parliamentary privilege, we can note that the Constitution provides at Article 63(2) that no person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in any proceedings of either House or any committee thereof, or in respect of anything published by or under the authority of either House. The parliamentary privilege secured by Article 63 is drastically affected by Article 63(4), introduced as one of the *Rukunegara* amendments in 1971, which provides that Article 63(2) shall not apply to any person charged with an offence under a law passed under Article 10(4) (which allows certain restrictions on freedom of speech, assembly and association), or the Sedition Act 1948 as amended by the Emergency (Essential Powers) Ordinance 1970. The same principles apply to the State Legislative Assemblies. This means that not even an MP or assembly member on the floor of the legislature can raise a question relating to policy on any of the 'sensitive issues' (except with regard to implementation), and use parliamentary privilege as a defence to prosecution. The Sedition Act has been used in such instances, for example in the case of Mark Koding, in which an MP was convicted of sedition when he advocated in Parliament the closure of Chinese and Tamil schools.[44] The case also shows that these draconian provisions do not simply protect Malay special privileges from criticism; they protect the entire social contract, including the legitimate expectations of other communities (here the legitimate expectation of the Chinese and Tamil-speaking communities to continue to have primary schools using their languages). These legislative amendments are bolstered by Standing Order No

[44] *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111.

23(2), which allows the Speaker to refuse any parliamentary question which is likely to 'promote feelings of ill-will or hostility between different communities in the Federation or infringe a provision of the Constitution or the Sedition Act'. This power has been widely interpreted, and has been used, for example, to refuse questions asking for statistics concerning the relative position of the various races in Malaysia with regard to scholarships and earnings, and even the numbers of members of the various tribes of *orang asli*. Standing Order No 36(10) also prohibits seditious words and 'words which are likely to promote feelings of ill-will or hostility between different communities in the Federation' being uttered in Parliament. In view of the very broad definition of promoting ill-will or hostility in Malaysia, these rules have in practice prohibited discussion of important but sensitive matters in Parliament.[45]

There is a Standing Orders Committee, which recommends changes from time to time, but, as with other Standing Committees, it is dominated by the Government's majority, and even its recommendations (sometimes favourable to the opposition) have not always been adopted by Parliament, when they have not found favour with the Government. For example, the Committee recommended that one out of every five days of parliamentary time should be devoted to opposition business, but this has not been followed: in fact under Standing Order No 15(1), on every sitting day Government business has precedence, and there are no days devoted to opposition business as such. Often the *Dewan Rakyat* has been adjourned *sine die*, leaving opposition motions undebated. Private members' business, on the other hand, is allotted 11 days in each session, and the last day before recess is devoted to backbenchers' motions.

V. PARLIAMENTARY ACCOUNTABILITY

> 'Di-bakar tak hangus, di-rendam tak basah'
>
> (Scorched but not burned, in the water but not wet)

In most areas Parliament has proved ineffective in securing executive accountability. Nonetheless, the mechanisms it affords have been energetically utilised and their terms and details argued over, and therefore

[45] See, further, ch 2.

kept very much alive by opposition members. Even Government backbenchers have made good use of Parliament to raise citizen or constituent grievances, and sometimes even join forces with the opposition over parliamentary procedure or provision. Currently it is the BN's policy not to support any opposition motions and the 'whip' system applies unless specifically lifted; in other words Government MPs are obliged to vote for the Government and against the opposition. This was tested when the chair of the BN Backbenchers' Club resigned after supporting the opposition in a motion to refer a Member to the House Privileges Committee, apparently in protest against the BN policy on opposition motions. The Club itself then issued a statement opposing the ban on support for opposition motions stating that it was not in accordance with 'basic parliamentary practice' and asserting MPs' right to vote in accordance with their conscience unless directed otherwise by the whip'.[46]

Apart from budget debates, debates on motions and Bills, and the committee system (for which see below) question-time is the main weapon available. Each day of the Monday to Thursday period? that the *Dewan Rakyat* sits, 90 minutes are allotted for the answering of hundreds of parliamentary questions per week of which the required 14 days' notice has been given. Given that all Members are entitled to ask oral and written questions, less than half of the questions tabled by the opposition get to be answered orally, and even answers to written questions become available only when the *Hansard* (published parliamentary proceedings) are published some years later. As often happens, question-time becomes a jousting match in which the opposition seeks to ambush the minister (or in Malaysia more usually the deputy minister), and the minister seeks to avoid embarrassment. No specific time is allotted for Prime Minister's questions, and the Government has usually been content to allow itself to be represented by the relevant minister or deputy minister.[47]

One interesting debate in 2005 went to the root of parliamentary government. The minister responsible for parliamentary business proposed the creation of a new position of Head of Administration for Parliament, and a new '*Jabatan*' (Department) of Parliament to deal with

[46] *New Straits Times*, 16 July 2006.

[47] Shad Saleem Faruqi, *Document of Destiny: the Constitution of the Federation of Malaysia* (Petaling Jaya, The Star, 2008) 522–26.

maintenance and assistance for MPs. Opposition leader Lim Kit Siang (DAP) started a campaign ('Save Parliament') against this proposal, citing a breach of the separation of powers, and in a rowdy parliamentary session a majority of MPs rose in support of rejecting the proposal and reinstating the Parliamentary Service Act 1963 (which placed the administration of Parliament in the hands of Parliament itself: it had been repealed in 1992). The minister explained that he meant '*Pejabat*' (Office) rather than *Jabatan* (the latter implying Government control), but insisted on the new Head of Administration. The consensus seems to be that these moves make no difference in practice to Parliament's independence, but MPs on all sides still complain of lack of support in terms of information and research. In September 2011 the Speaker announced his recommendation that the 1963 Act be re-enacted.[48]

VI. PARLIAMENTARY COMMITTEES

> 'Rumah sudah, pahat berbunyi'
>
> (The house may be finished but the chisel can still be heard. This refers to the reopening of old grievances)

As we have seen Bills have to negotiate a committee stage in the ordinary process of legislative enactment. The BN's majority and its control over its own MPs has ensured that in practice very few Bills are even amended in committee. The committee stage has occasionally been used to scrutinise important Bills; a recent example is the Select Committee on the Bill that became the Criminal Procedure (Amendment) Act 2006;[49] this Bill made extensive provision for the rights of accused persons in relation to police questioning and the right of access to counsel.

Parliamentary select committees, a potentially powerful method of calling the Government to account before Parliament, have also in general been ineffective in Malaysia. In the case of matters due for detailed public investigation of facts there has been in recent years a preference for Royal Commissions of Inquiry rather than parliamentary investigation. A prominent example of this is the RCI (July 2011) into the death of Teoh Beng Hock, an opposition party aide, who died in the custody

[48] 'Giving Parliament More Independence', *Free Malaysia Today*, 28 September 2011, www.freemalaysiatoday.com/2011/09/28/giving-parliament-more-independence.

[49] Act A1274.

of the Malaysian Anti-Corruption Commission (MACC). While the Commission concluded that Teoh took his own life in response to heavy MACC interrogation (a finding which is hotly disputed), it also made swingeing criticisms of the MACC's interrogation techniques.[50] Another is the RCI which reported in 1999, in relation to the infamous 'black eye' incident, that former Deputy Prime Minister Anwar Ibrahim had been severely beaten in custody by the Inspector-General of Police. This led to the sacking of the IGP and his conviction and prison sentence for assault.[51]

There are currently five standing committees: Selection, Public Accounts, Standing Orders, House, and Privileges. These are also mirrored in the *Dewan Negara*. In 2006 a Parliamentary Select Committee on Integrity was set up, only to create disappointment when its chairman resigned due to refusal by the National Registration Department to appear before it.[52] Other such committees are those on MPs' Ethics, and Unity and National Service. A further committee on electoral reform, in response to the demand for free and fair elections (see above), was approved by the House in July 2011. Overall, despite some encouraging signs of a revival of interest in parliamentary committees in the last five years, they have signally failed to implement meaningful accountability of the Government before Parliament. Numerous scandals raised before parliamentary committees have resulted in stalled investigations. An example (to elaborate on the discussion of this issue in chapter two) is the UEM affair, in which a lucrative highway contract was awarded to a company whose credentials were suspect, but which had strong links to UMNO.[53] In 2009 the opposition PR took the step of setting up 25 committees 'shadowing' 25 government ministries. This was stated to be preparatory to creating a shadow cabinet.

[50] The RCI Report can be found at www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=3287&Itemid=332. See also 'Teoh Beng Hock RCI a Sham that Deceived Malaysia', *Loyarburok*, 7 July 2011, www.loyarburok.com/2011/07/25/teohbenghock-rci-a-sham-that-deceived-malaysia.

[51] 'Former IGP Sentenced to Two Months' Jail', *Malaysiakini*, 18 April 2001, www.malaysiakini.com/news/2016.

[52] 'TI-M Calls for Tan Sri Dompok to Reconsider His Resignation as Chairman of the PSCI', *Transparency International Malaysia*, 17 May 2007, www.transparency.org.my/press28.htm.

[53] Shad Saleem Faruqi, above n 47, 529.

Naturally it is the Public Accounts Committee (PAC) that is the most important of the standing committees in terms of accountability. The PAC is chaired by a Government back-bencher, contrary to the usual Westminster convention, under which PAC is chaired by an opposition member. Opposition members sit on it in proportion to seats held in the *Dewan Rakyat*, and it has currently 14 members. With the benefit of the annual reports of the Auditor-General,[54] the PAC has often been sharply critical of government expenditure, and its findings, although not formally binding, are in effect regarded as such. Within its remit the PAC is powerful, but its remit does not include many high-spending 'off-budget' executive agencies, such as Petronas, the national oil company, and Malaysian Airlines, the importance of which has been highlighted in chapter two. As one commentator has argued, this places many instances of 'lack of financial discipline and dependence; slack financial accountability; a casual and indifferent attitude in decision-making; lack of specific expertise; and weak management' essentially beyond parliamentary correction.[55] The PAC has also been hampered by a three or four year time-lag in its scrutiny of public expenditure. Here the expansion of the developmental state beyond ministries into development agencies and government-linked companies does not in practice seem to serve the broader objectives of development. Ultimately it has been the publication of the Auditor-General's reports rather than the operation of the PAC that has proved effective.

VII. THE *DEWAN NEGARA*

'Di-tindeh yang berat, di-dilit yang panjang'

(Crushed by a heavy weight, bound by long coils)

As we have seen, Malaysia's Parliament is bicameral. Upper houses the world over have been challenged in finding a role that differs materially from that of the lower house, which usually enjoys greater electoral legitimacy. In Malaysia the perceived need for an upper house was as we saw in chapter one deeply related to the federal structure adopted in 1948, and the system of electing and appointing members was drawn up

[54] See also the Audit Act 1957, Act 62, as amended.

[55] Shad Saleem Faruqi, above n 47, 516–22.

to reflect this relationship. Given the brief experience of a unitary state (1946–48) and the strong opposition thereto, guarantees were needed of the autonomy and continuance of the States. This is confirmed also by the fact that the States themselves all have unicameral legislatures. The *Dewan Negara* is smaller than the *Dewan Rakyat*, consisting of 70 members. Of these, currently 26 are elected by the State Legislative Assemblies (two for each State), irrespective of the size or importance of the State. There is, however, no requirement for these members also to be members of the State Legislative Assembly. The other 44 members are appointed by the *Yang di-Pertuan Agong* on the advice of the Government, and must be persons who have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, or social service, or are representatives of racial minorities or are capable of representing the interests of aborigines (the *orang asli*). Of the appointed members four are chosen to represent the three Federal Territories (Kuala Lumpur, Putrajaya and Labuan). A Senator's term of office is a single term of three years, renewable once only (reduced from a single term of six years in 1978) and is not affected by a parliamentary dissolution. Dissolution of both houses is thus impossible.

There remains a possibility that in the case of a change in the Federal Government the executive might be faced with a hostile, opposition-controlled *Dewan Negara*. That would be a novel position in Malaysian political experience. The Constitution also envisages that the composition of the *Dewan Negara* might change radically. Article 45(4) allows Parliament to increase the number of State-elected members from two to three for each State; it also provides for the possibility of direct popular election of State members, as well as for the numerical decrease or even abolition of appointed members. In fact, however, the number of appointed members, far from reducing to zero, has increased from 16 to 42; and since 1964 they have had a majority over the State-elected members. Thus by appointing members who support the BN, the Government has ensured that there will be no effective opposition to its measures in the *Dewan Negara*. The House rarely amends Bills passed by the *Dewan Rakyat*; its debates make little impact on the wider political scene; and its composition ensures that its role in protecting States' rights is very limited. In fact the rapid turnover of Senators, especially since they enjoyed only three-year terms, makes the *Dewan Negara* more useful as a source of patronage than for protecting States' rights. The

short terms of office enjoyed by Senators reinforce this tendency. As a result it scarcely features in media reporting or in political discourse. With imagination a positive role for it could be found in terms of checking constitutionality, making or ratifying appointments, or investigating or considering matters that the *Dewan Rakyat* has no time to investigate. As things stand the *Dewan Negara* has been striking for its lack of impact on legislation, on government, or on the Constitution. It must be ranked among those institutions that have been entirely domesticated by the centripetal tendency of the Malaysian developmental state; and as a dignified element in the Constitution that could, in a new and more democratic era, also become an efficient element.

VIII. CONCLUSION

> 'Bagai bunga dedap, sunggoh merah, berbau tidak'
>
> (Like the coral flower, it may be red, but it has no fragrance)

It is noticeable, and perhaps not surprising in view of the nature of the political system described above, that political discussion, as well as the daily round of media coverage of political scandal and turmoil, rarely seems to engage with Parliament as an institution. There appears not to be a large expectation that the great topics of the day will be ventilated in a serious manner in the legislature, which is seen as a body mainly concerned with legislation and a certain amount of political point-scoring, performing nonetheless some important symbolic and practical functions. This does not mean that individual members or the opposition are powerless to affect the implementation of policy or ask questions to ministers. Parliament has increasingly seen lively debate and close questioning of ministers. For example, during 2010 and 2011 serious corruption allegations involving an alleged sum of 13 million euro have been made concerning the Government's purchase of submarines from a French company in 2007. This issue, known as the 'Scorpene affair', has also been linked with questions surrounding the mysterious death (and concealment thereof) of a female Mongolian translator who had had a relationship with a close aide of the Prime Minister (who was Minister of Defence at the time) and had translated during the negotiations over the submarines. At the time of writing, 63 questions have been asked in Parliament about the

Scorpene affair, but much remains unanswered. In 2009 two policemen from the anti-terrorism unit were convicted of the murder, but the aide was acquitted.[56]

Assessed purely in terms of its ability to scrutinise legislation and render the executive accountable for its actions Parliament is clearly lacking in sufficient potency. It needs much more respect for parliamentary institutions on the part of ministers, and several far-reaching reforms, before Parliament can be rendered really effective. If and when the political will to reform Parliament comes about, however, the present institutions, having become in some sense traditional and accepted, will form a good basis for improvement. Since 2008 it can be argued that a two-party system now exists, and Parliament has to some extent been galvanised, as we can judge from questions about the Scorpene affair and the setting up of the Select Committee on Electoral Reform. However, the Government has still never suffered a defeat in Parliament, and there has been no motion of no-confidence in the Government. Despite telling performances in debate, the opposition has never succeeded in getting the Government to change legislation or policy proposals directly as a result of parliamentary debate (extra-parliamentary efforts, however, have sometimes been successful).

Parliament could easily have disappeared in the constitutional wake of the 1969 riots and the period of emergency rule, which lasted for 21 months (May 1969 to February 1971), a period in which Parliament was not summoned, and the Government ruled by emergency law. The Tunku and Tun Razak had sufficient respect for parliamentary democracy to realise that in Malaysia, unlike some surrounding states, it had to remain an essential feature of public life. Now that real political contestation has become the norm, the Malaysian Parliament becomes an institution pregnant with possibilities for democratic, participative, governance.

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[56] 'Altantuya Case: Judge Yet to File Judgment', *Free Malaysia Today*, 27 July 2011, www.freemalaysiatoday.com/2011/06/27/altantuya-case-judge-yet-to-file-judgment.

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4

Territorial Governance: Monarchy and the State Constitutions

Introduction – The Powers and Position of the Rulers – State Government Formation and the Limits of Royal Powers – The Conference of Rulers – Conclusion

I. INTRODUCTION

> 'Siapa jadi raja, tangan aku ka-dahi juga'
> (Whoever becomes Raja, my hands still go to my forehead)

IN CHAPTER ONE we have seen how the ancient Malaysian monarchies are deeply related to the constitutional architecture, in particular to federalism. We also saw how their role in relation to Islam remained intact despite British intervention. In chapter two we have also seen their role to be of some significance in terms of the social contract. The condition of having a Raja (*kerajaan*) has always been an aspect of Malay governance traditions and, as we will see, it still is in many ways. The Rulers' role in constitutional governance, in religion and in inter-religious conflict has never been more important at any time during the last 100 years. For this reason the role of the monarchy is deserving of its own chapter in this book.

The Malaysian monarchies have survived four centuries of colonialism following the fall of Malacca in 1511; constitutional interference with their powers; the intensity of party politics and nationalist leadership; and the advent of intrusive news media intent on finding scandal around every corner. In a world in which monarchy has become increasingly rationed,

confined, and subjected to critical scrutiny, the Malaysian monarchies have gone against the trend, becoming in recent years probably more powerful than they have been at any time since 1945.[1] They constitute nearly a quarter of all the world's existing monarchies. That they have survived is attributable to their centrality in Malay culture and government, their association with Malay nationalism in the 1940s, and the fact that Malay leaders such as Dato' Onn Jaffar and the Tunku were themselves aristocrats – indeed the Tunku himself was a prince of Kedah. Beyond that the Rulers, along with Islam, are essential to the maintenance of the Malay character of the Constitution and at the same time the need for a multi-ethnic, multi-religious society to have a vivid symbol of unity that lies beyond mere politics and constitutional rules. Malaysian constitutionalism seems to be a unique interweaving of two strands: on the one hand, Westminster-style constitutional structures that require the separation of the head of state from the head of government, and, on the other hand, traditional and symbolic elements that speak of Islam and Malay culture. Historically the Rulers are identified with both of these strands of constitutionalism. There is also the practical point that in a country with a highly developed sense of protocol, Government leaders can safely leave a good deal of time-consuming official duty to neutral but high-profile figures such as the Rulers and notable members of their sometimes large families. However, as we will see in this chapter, Westminster dualism has not always proceeded smoothly in Malaysia. The Westminster conventions need to be clearly understood by the actors involved, and also operated with some care, having regard to their general currency and problematical precedents in constitutional law. However, as a form of what is essentially customary public law they are not easily transplanted, and inevitably acquire localised understandings and precedents.

Of the 13 States of the Federation, nine have a traditional Ruler as Head of State, and every five years one of their number becomes the *Yang di-Pertuan Agong* at the federal level. This involves an election by the Conference of Rulers (for which see below) that in effect rotates the position of *Yang di-Pertuan Agong* between the Rulers, a system that is based on the traditional *adat* constitution of Negri Sembilan.[2] The *Yang di-Pertuan Agong* can be removed by a majority vote within the Conference

[1] Kobkua Suwannathat-Pian, *Palace, Political Party and Power: A Story of the Socio-Political Development of Malay Kingship* (Singapore, NUS Press, 2011) ch 1.

[2] AJ Harding, *Law, Government and the Constitution in Malaysia* (The Hague, Kluwer, and Kuala Lumpur, LexisNexis, 1996) ch 5.

of Rulers. The Rulers are all styled 'Sultan' apart from the Raja of Perlis and the *Yang di-Pertuan Besar* or '*Yamtuan*' of Negeri Sembilan.

The other four States (Malacca, Penang, Sabah and Sarawak), due to their colonial history, do not have a Ruler but a *Yang di-Pertua Negeri* (Governor), who is appointed by the *Yang di-Pertuan Agong* (acting in his discretion), after consulting with the Chief Minister of the State, to a four-year term, and can be removed only by a two-thirds majority in the State Legislative Assembly. It will be noted that as a result of an invariable practice in appointing *bumiputera* as *Yang di-Pertua Negeri*, all Heads of State in Malaysia to date have been *bumiputera*. However, both Governors and Rulers are constitutional heads, as is required by Schedule 8 of the Constitution, discussed in chapter two, which imposes the Westminster conventions on the State Constitutions.

With the McMichael Treaties of 1946 creating the Malayan Union the Rulers supposedly surrendered their sovereignty to the Crown, but in the Federation of Malaya Agreement 1948 their sovereignty revived, and was actually a precondition for the agreement itself. The Constitution of 1957, which was preceded by the Rulers' formal assent and blessing,[3] placed the matter of sovereignty beyond doubt by Article 181(1), which preserves the 'sovereignty, prerogatives, powers and jurisdiction of the Rulers . . . within their respective territories as hitherto had and enjoyed'. In addition, Article 71(1) guarantees the right of a Ruler 'to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State'.[4] Moreover, Article 38, which relates to the Conference of Rulers, provides that legislation directly affecting the privileges, position, honours or dignities of the Rulers may not be passed without the consent of the Conference of Rulers.[5] By securing these provisions the Rulers had rescued their constitutional position from virtual abolition in 1946 to complete constitutional entrenchment in 1957, such that to propose the abolition of the monarchy would now constitute the crime of sedition. Nonetheless they are constitutional heads of state and the constitutional

[3] Known as the *Wasiat Raja-Raja Melayu* (Declaration of the Malay Rulers), 5 August 1957.

[4] For discussion of the scope of prerogative powers in Malaysia see RH Hickling, 'The Prerogative in Malaysia' (1975) 17 *Malaya Law Review* 207; and contrast AJ Harding, 'Monarchy and the Prerogative in Malaysia' (1986) 28 *Malaya Law Review* 345.

[5] For instances of this, see below.

system has sometimes seen a struggle between Westminster norms and the traditional respect and even awe in which the Rulers are held by Malays and non-Malays alike. In this chapter we will consider several examples of this struggle in progress and a remarkable turn-around in the Rulers' fortunes.

II. THE POWERS AND POSITION OF THE RULERS

'Pagar makan padi'

(The fence eats the crop, equivalent to asking, quis custodiet ipsos custodes?)

The Rulers are subject to the constraints of Westminster-style conventions that are set out explicitly in both the Federal and State Constitutions.[6] As we saw in chapter two, they have merely the right 'to be consulted, to encourage and to warn'. The State Constitutions, although pre-existing the Federal Constitution, are regulated by it. Not only is the Federal Constitution itself supreme law under Article 4, so that any inconsistent law is rendered invalid; but in addition Article 71(4) and Schedule 8 of the Federal Constitution provide that the State Constitutions must include what Schedule 8 calls 'the essential provisions', or else provisions substantially to the same effect. Parliament can if necessary amend the State Constitution to enforce Article 71(4), and under Article 71(3) if it appears to Parliament that State or Federal constitutional provisions are being habitually disregarded in any State, Parliament may by law provide for securing compliance with those provisions; these provisions have not seen the occasion for their use. In an extreme case, as occurred in Sarawak in 1966 (see chapter five), the State Constitution can be temporarily amended by emergency law.[7] The essential provisions are in effect equivalent to the Westminster constitu-

[6] HRH Raja Azlan Shah, 'The Role of Constitutional Rulers in Malaysia', ch 5 of FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (Kuala Lumpur, Oxford University Press, 1986); FA Trindade, 'The Constitutional Position of the Yang di-Pertuan Agong', ch 5 of Tun Suffian, HP Lee and FA Trindade (eds), *The Constitution of Malaysia: Its Development, 1957–1977* (Kuala Lumpur, OUP, 1978); Harding, above n 4, 161–62; HP Lee, 'Constitutional Heads and Judicial intervention', ch 1 of Wu Min Aun (ed), *Public Law in Contemporary Malaysia* (Petaling Jaya, Longman, 1999).

[7] *Stephen Kalong Ningkan v Government of Malaysia* [1968] 2 MLJ 238, PC.

tional conventions. The Ruler is required to act on the advice of the Executive Council (the State's Cabinet). He may act in his discretion only in prescribed circumstances such as the appointment of the *Menteri Besar* (Chief Minister); the withholding of consent to a dissolution of the Legislative Assembly;[8] and the performance of his functions as the Head of Islam. He is also required, as we will see, to assent to Bills passed by the Legislative Assembly.

The executive powers of the *Yang di-Pertuan Agong* are set out expressly in the Constitution, as we saw in chapter two. Under Article 39 the executive authority of the Federation is vested in him, but is exercisable by him or by the Cabinet or any Minister authorised by the Cabinet. However, under Article 40(1) the *Yang di-Pertuan Agong* must act in accordance with the advice of the Cabinet, except as otherwise provided in the Constitution. Both he and the Rulers at the State level are also subject to the requirement of *accepting* the advice given, imposed on them as a result of a 1994 amendment to Article 40 and Schedule 8.[9] Article 40(2) goes on, however, to list the main situations in which, by way of exception, he may act in his personal discretion. They are the appointment of the Prime Minister; the withholding of consent to a request for dissolution of Parliament; and the requisition of a meeting of the Conference of Rulers concerned solely with their privileges, position, honours and dignities. Thus the position of the Rulers at the State level is mirrored by that of the *Yang di-Pertuan Agong* at the Federal level.

With regard to legislative powers, before 1984 the *Yang di-Pertuan Agong* had no role to play – and the same was true of the Rulers at the State level – except to signify assent to Bills duly passed by the legislature, and summon and prorogue the legislature as advised by the Head of Government. However, there had been several instances of Rulers simply failing to assent to Bills passed by State Legislative Assemblies, which was usually a way of showing displeasure or disagreement with the State Government. In 1983 the Government, fearing that the next *Yang di-Pertuan Agong* might interfere in federal politics even more deleteriously (in fact he had made a speech saying he would declare an emergency and throw out all the politicians[10]), introduced a controversial

[8] Consent to dissolution was refused in two cases: Kelantan in 1977 and Sabah in 1994.

[9] Constitution (Amendment) Act 1994.

[10] RS Milne and DK Mauzy, *Malaysian Politics under Mahathir* (London, Routledge, 1999) 32.

constitutional amendment Bill relating to the powers of the Rulers. For Bills passed by Parliament or State Legislative Assemblies the amendment provided for automatic royal assent if assent was not forthcoming 15 days after a Bill's presentation. The Bill also vested the power to proclaim an emergency, exercised hitherto, on Government advice, by the *Yang di-Pertuan Agong*, in the sole hands of the Prime Minister.

The result of this was, ironically, the precipitation of the very mischief the amendment was designed to prevent. The *Yang di-Pertuan Agong*, with the agreement of the other Rulers, refused his assent to the amendment, and the five-month constitutional crisis that followed resulted in an embarrassing climb-down by the Government. A compromise was reached under which the *Yang di-Pertuan Agong* was given the right to refer Bills back to Parliament with his reasons, and the Government withdrew the provision concerning emergency proclamations.[11] The Rulers on their part undertook not to withhold their assent to Bills at the State level, although this was not specifically dealt with in the agreed amendment.[12]

As a result of this crisis the Constitution (Amendment) Act 1984 gave the *Yang di-Pertuan Agong* power to send a Bill that had been passed by Parliament back to the House where it originated within 30 days, with a statement of the reasons for his objection to the Bill or any provision in it. If the Bill was passed again by both Houses then it became law automatically if the *Yang di-Pertuan Agong* did not assent to it within another 30 days after it was presented to him. Following a further constitutional amendment in 1994, the position has been greatly simplified, and the powers of the *Yang di-Pertuan Agong* reduced. Now he must assent to a Bill within 30 days, otherwise, on expiry of the 30-day period, it becomes law as if he had assented to it. There has as a result been no further difficulty over the royal assent at either level of government, with the exception of the 1993 crisis, to which we now turn.

The 1983 crisis did not resolve the position of the monarchies entirely. Rulers continued to interfere in politics, occasionally falling out with the *Menteri Besar*, and in Kelantan the Ruler even campaigned for the opposi-

[11] We have seen in ch 2 how important this is as an aspect of cabinet government.

[12] HP Lee, 'The Malaysian Constitutional Crisis: King, Rulers and Royal Assent' (1984) 3 *Lawasia* (NS) 22; HF Rawlings, 'The Malaysian Constitutional Crisis of 1983' (1986) 35 *International and Comparative Law Quarterly* 237; S Barraclough and P Arudsothy, *The 1983 Malaysian Constitutional Crisis: Two Views and Selected Documents* (Brisbane, Griffith University, 1985).

tion in the 1990 general election. In 1988 the *Yang di-Pertuan Agong* himself was involved in the public furore over the dismissal of the Lord President of the Supreme Court, Tun Salleh Abas (see chapter seven). Alleged criminal acts by the late Sultan of Johor, both when he was the Crown Prince of Johor and when he was the *Yang di-Pertuan Agong*, were the subject of extensive speculation. An MP listed no fewer than 15 allegations of criminal acts by the Sultan and six by two of his sons. The press highlighted the luxurious lifestyle of the Rulers, and their occasional flouting of the law; in one instance the Sultan of Pahang was criticised for spending RM4000 per day maintaining his horses in a luxurious lifestyle including air-conditioned stables.[13] Allegations of unlawful conduct could not be pursued in the courts because of the Rulers' constitutional immunity from suit. Under Articles 32(1) and 181(2) the *Yang di-Pertuan Agong* and the Rulers were not liable to any proceedings whatsoever in any court. This immunity related to the Rulers acting in their personal capacity and did not of course mean that the Federal or State Government enjoyed legal immunity from acts done in the name of the Head of State. This had been clarified by local cases and in 1980 the Privy Council itself.[14]

Clearly the problem had to be addressed, and first of all the Government attempted to get the Rulers to agree to act within the law and the Constitution by a self-regulatory Proclamation of Constitutional Principles dated 4 July 1992, which was designed, after some negotiations between the Rulers and the Government, to place the Rulers in a straightjacket of their own making by clarifying the operation of constitutional conventions and affirming the Rulers' intention of acting within the law.[15] However, the document that emerged was itself rather unclear on some points, and was signed only by the *Yang di-Pertuan Agong* and six of the nine Rulers. Moreover, it was clearly not constitutionally binding. Realising that the consensual approach had failed, the Government used an assault by the Sultan of Johor on a hockey coach to signal its intention of hardening its approach and using its two-thirds' majority in Parliament to amend the Constitution.[16]

[13] Suwannathat-Pian, above n 1, 363.

[14] *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli (No2)* [1967] 1 MLJ 46; *Teh Cheng Poh v Public Prosecutor* [1980] AC 458, 467, per Lord Diplock.

[15] See 'Statement by the Keeper of the Rulers' Seal and Proclamation of Constitutional Principles', Suwannathat-Pian, above n 1, app 1.

[16] Shad Saleem Faruqi, 'The Sceptre, the Sword and the Constitution at the Crossroad (A Commentary on the Constitution Amendment Bill 1993)' (1993) 1 *Current Law Journal* xlv.

A Bill to amend the Constitution was tabled in Parliament and was passed by both Houses in January 1993. The Bill removed the immunity of the *Yang di-Pertuan Agong* and the other Rulers from suit when acting in a personal capacity, and gave the jurisdiction in such cases (criminal and civil) to a Special Court consisting of the Lord President of the Supreme Court (now the Chief Justice of the Federal Court) as Chairman, the Chief Justices (now Chief Judges) of the two High Courts, and two other Judges or former Judges of the Supreme Court (now Federal Court) or the High Court, appointed by the Conference of Rulers. The Bill also conferred parliamentary privilege in respect of anything said during proceedings in Parliament or a State Legislative Assembly concerning a Ruler, except for advocating the abolition of the Ruler's constitutional powers.[17]

However, since legislation affecting the powers and privileges of the Rulers, as we have seen above, requires the assent of the Conference of Rulers (the Government nonetheless disputed this), the Conference met and issued a statement saying that it had unanimously decided not to consent to the Bill, on the grounds that further consultation was required in respect of such an unprecedented measure; that the Bill was unconstitutional as it trespassed on States' rights; and that the Special Court was an unsuitable forum for dealing with matters relating to the Rulers. However, the statement also recognised that 'there cannot be two systems of justice in the country', and that 'no Ruler has the right to hurt or cause harm to another person'. It also suggested, instead of a Special Court, an Advisory Board, which would have power to recommend the removal of a Ruler. Just as in 1983, the inevitable outcome was that an accommodation was reached. In February 1993, following a crucial meeting of the Conference of Rulers, the Rulers and the Government issued a joint declaration saying that an agreement had been reached whereby amendments to the Bill would be returned to the *Dewan Rakyat* by the *Yang di-Pertuan Agong*, and the Rulers would notify at the same time their assent to the amended Bill.[18]

The Bill in its amended form was passed by Parliament in March 1993. It provided for a new Part XV of the Constitution entitled 'Proceedings Against the *Yang di-Pertuan Agong* and the Rulers'. Article

[17] M Gillen, 'The Malay Rulers' Loss of Immunity' (1995) 29 *University of British Columbia Law Review* 163.

[18] ibid; and Harding above n 4, 76ff.

182 provides for a Special Court, constituted as in the original version of the Bill. The Special Court has exclusive jurisdiction (similar to that of the inferior courts, the High Court and the Federal Court), under the Constitution or any federal law, to try all offences committed in the Federation by the *Yang di-Pertuan Agong* or a Ruler, and all civil cases by or against them, wherever the cause of action arose. However, there are two limitations. First, proceedings may only be taken by or against the *Yang di-Pertuan Agong* or a Ruler in his personal capacity. Secondly, proceedings may not be brought against them except with the consent of the Attorney-General. If the Ruler is convicted of an offence and sentenced to more than one day's imprisonment he ceases to be the Ruler of the State unless he receives a free pardon. Otherwise, the amendments are in the same terms as the original version of the Bill.[19] Since 1993 there have been only two cases dealt with by the Special Court, both civil cases against a Ruler. The first in 1996 failed for lack of jurisdiction because the plaintiff was not a Malaysian citizen; the second, in 2008, succeeded, when the Ruler of Negeri Sembilan was ordered to honour the terms of a letter of credit.[20]

If the 1983 crisis was a draw and the 1993 crisis a defeat for the Rulers, they have since that time proved able to reassert the role of the monarchy both in terms of constitutional power and in terms of their influence in society. Partly this has resulted from subsidence of public disquiet concerning outrageous royal actions. This in turn can be attributed to the existence of the Special Court and to a realisation by the Rulers that their public behaviour must be not just lawful, but exemplary.

Since the end of their bête-noir Prime Minister Dr Mahathir's period in office (2003) the Rulers have improved their position in a turn-around even more remarkable than that of the 1940s. That which failed to destroy them appears to have made them even stronger. Indeed, whereas previously, especially under the Tunku and Mahathir, it was the task of politicians to guard the Rulers 'against weaknesses and follies', it seems now to be, more accurately, the Rulers' perceived role to guard politicians against *their* weaknesses and follies.[21] The ironical result of public anger concerning the Rulers' and their families' behaviour, and the two

[19] AJ Harding, 'Sovereigns Immune? The Malaysian Monarchy Crisis' (1993) 327 *The Round Table* 305.

[20] HP Lee, 'Malaysian Royalty and the Special Court', ch 15 of AJ Harding and P Nicholson (eds), *New Courts in Asia* (London, Routledge, 2010).

[21] Suwannathat-Pian, above n 1, 339–44.

constitutional amendments that forced them onto the narrow way of the rule of law and constitutional government, has been to improve their behaviour and image beyond recognition. Although there have been isolated examples of recidivism, such as allegations of domestic violence and a succession dispute in the royal family of Kelantan,[22] the trend has been the replacement of the Rulers of the previous generation with a new generation of enlightened, highly educated, and politically sensitive Rulers and princes, who have gone out of their way to fulfil, or perhaps even over-fulfil, the ideal of the Ruler as the meritorious and neutral guardian of the Constitution and justice.

These royals include the Rulers of Perak, Selangor, Terengganu, Perlis, and Johor. The signal example, however, and leader of this trend is HRH Nazrin Shah, the Raja Muda (Crown Prince) of Perak, son of HRH Sultan Azlan Shah, who was himself the Lord President of the former Supreme Court before becoming the Ruler of Perak and later the *Yang di-Pertuan Agong*. The Sultan himself, although criticised with regard to his handling of the Perak constitutional crisis in 2009,[23] is not only the country's former highest judicial officer but a prominent writer on constitutional law, one of whose books is listed for 'further reading' at the end of this chapter. The Raja Muda Nazrin Shah, who holds a PhD in political economy and government from Harvard, has in the last few years, in both writing and speeches (his book too is listed for further reading), outlined a version of the monarchy that diverges as far as is perhaps conceivable from its image during the Mahathir era.

This ideal sees the Ruler as a check on government and a father-figure for society in general; as a kind of roving ombudsman who will not stop short of sharp criticism of corruption, mismanagement, abuse of power, lapses from religious virtue, and socially destabilising behaviour.

Kobkua Suwannathat-Pian expresses the new ideal of monarchy in the following words:

> ... the ugly and unacceptable side of the old traditional lifestyle whereby the Rulers and princes could indulge in socio-economic excesses and vices [has] no place in the modern Malaysian world. As Rulers of their individual states, the Malay royalty is required to act responsibly, legally, compassionately, and be racially-blinded in both their private and public capacities. As constitutional monarchs, the [*Yang di-Pertuan Agong*] and the Rulers are expected to be fountains of justice and mercy, and to perform their fundamental duties of advising, warning and being consulted, in a manner which would help to bring balance to the administration of the country, and to safeguard the wellbeing of all Malaysians. The new royal role certainly goes beyond what was understood to be the responsibility and role of a constitutional monarch ever practised in the country.[24]

[22] 'Right Royal End to Palace Crisis', *The Star*, 19 September 2010, thestar.com.my/news/story.asp?file=/2010/9/19/focus/7044762&sec=focus.

[23] See below.

In performing these functions, note that the Ruler is seen as 'racially-blinded' – in other words, combining Malay and Islamic leadership with a role as protector of minorities. There is more than a hint here of learning the lesson of Thailand's King Bhumipol, who reached unassailability through Buddhistic virtue.[25] It also suggests a role as potential mediator in inter-communal disputes. The Rulers have clearly started to take a more active and somewhat less formal role in Malaysian society. Where in the past they have tended to be remote and sometimes even feared, they are now more likely to be seen in shirtsleeves engaging with the poor and with social problems or religious conflicts. This trend has been marked since the 2008 elections dented the BN and UMNO's political dominance that goes back to 1955.

How far can Nazrinian monarchy be expanded? The problem is neatly highlighted by an ongoing incident involving constitutional law professor Abdul Aziz Bari. This well known and accomplished scholar at the Khulliyyah of Laws, International Islamic University Malaysia, mildly criticised the Sultan of Selangor for the way in which the latter handled the DUMC church-raid incident in 2011 (discussed in chapter eight). The Ruler's intervention left some questions unanswered, including the correct role of the Ruler himself, as Head of Islam, in such a situation, as well as the legality of the raid itself, and the assumed facts of the matter. Bari was suspended briefly by his university pending investigation under the Sedition Act and the Multimedia and Communications Act, and students from another university protesting at what they saw as an interference with academic freedom were 'hauled up' and verbally disciplined by their university; Bari later received a death threat.[26]

[24] Above n 1, 383.

[25] AJ Harding and P Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Oxford, Hart Publishing, 2011) ch 1.

[26] 'Aziz Bari Receives Bullet, Death Threat', *The Malaysian Insider*, 24 October 2011, www.themalaysianinsider.com/litee/malaysia/article/aziz-bari-receives-bullet-death-threat.

Further instances suggest that Nazrinian monarchy is becoming accepted. Raja Nazrin himself set an example by refusing an offer from the State to pay for his wedding celebrations in 2007. In 2007 to great applause the Sultan of Selangor stripped of their State honours (datukships, for example) public figures who had proved themselves unworthy of holding them.[27] We have seen, too, how the *Yang di-Pertuan Agong* assumed an arbitral role between the Government and the Bersih coalition in 2011.[28] If this enhanced Nazrinian role for the Rulers is acceptable in contemporary Malaysian society, one question that seems to arise is whether the Rulers are to enjoy increasing immunity from criticism of the way they perform this role, even as their *legal* immunities are removed. Again Thai experience may be instructive but this time in a negative way: enhancement of the *lese majeste* principle in Thailand has proved a significant restriction of free speech in practice.[29]

III. STATE GOVERNMENT FORMATION AND THE LIMITS OF ROYAL POWERS

'Burong pipit sama enggang, mana boleh sama terbang?'
(Sparrows and hornbills, how shall they fly together?)

Problems in the operation of constitutional conventions with regard to the Rulers' role in Government formation and survival at the State level have been perennially a problem in Malaysia, and more so since the 2008 elections, which seem to have given impetus to Nazrinist monarchy. In Perlis the BN's choice of MB was rejected by the Ruler, and a Member of the Assembly with majority support amongst BN members was selected, the Prime Minister backing down from his own choice. In Terengganu a constitutional crisis erupted when the Ruler rejected the BN's sitting candidate, who had overwhelming BN support, after the BN won the State election. Another BN Assemblyman was appointed by the Ruler, the Prime Minister complaining that the appointment was unconstitutional. Amidst threats of dissolution of the Assembly and support for the *Menteri Besar* from PAS, who were actually in opposition in the Assembly, the Prime Minister again backed down, and the *Menteri Besar* survived. In these instances the Ruler did not even feel obliged to

[27] Suwannathat-Pian, above n 1, 382.
[28] p 93.
[29] Harding and Leyland, above n 25, 237–47.

explain his preference. In both Selangor and Perak the appointment of the Member of the Assembly proffered by the PR coalition, which was successful in the election, was not automatically endorsed but the subject of searching inquiry by the Ruler.[30]

In one instance arising from the political convulsion of 2008 the matter is particularly instructive in the light of the new politics and Nazrinian monarchy, and eventually went to the highest court. In March 2008 the PR coalition won control of the State Government of Perak with a slim majority. The State Constitution in those States that have a Ruler as Head of State usually requires the *Menteri Besar* to be Malay (in Penang, by contrast, the Chief Minister has usually been Chinese). The Ruler is, however, empowered, in his discretion, to override any provisions in the State Constitution restricting his choice of *Menteri Besar* if, in his opinion, it is necessary to do so in order to comply with the duty to appoint whoever has the confidence of the Assembly. This issue arose in Perak in March 2008, but instead of asking the Ruler to override the constitutional provision regarding the appointment of the *Menteri Besar* by appointing the leader of the party with most seats, which would have meant appointing a Chinese *Menteri Besar*, the PR proffered a Malay PAS Member, Datuk Nizar, who was acceptable to all three parties in the PR, even though PAS had the least number of seats. Nizar took office but was soon in trouble with the Ruler when he purported to transfer a religious official without consulting the Ruler, who is the Head of Islam in the State.

As is explained above, the Constitution of Perak, along with the other State Constitutions, provides for the operation of Westminster-style conventions. Under Article 16(2)(a), in the context of appointment of the Executive Council:

> His Royal Highness shall first of all appoint as *Menteri Besar* to preside over the Executive Council a member of the Legislative Assembly who in his judgement is likely to command the confidence of a majority of members of the Assembly . . .

Article 16(6) goes on to state:

> If the *Menteri Besar* ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, then he shall tender the resignation of the Executive Council.

There is no express provision for the dismissal of the *Menteri Besar*.

[30] Suwannathat-Pian, above n 1, 388–90.

In a 59-member Assembly, the PR held 31 seats, while the BN held 28 seats. In February 2009 three PR Assemblymen apparently announced their resignations from the assembly, leaving the assembly apparently deadlocked at 28-28; the three defectors then switched sides to the BN. Nizar approached the Ruler on 5 February 2009 for a dissolution 'to resolve the deadlock' in the Assembly. The Ruler refused the request, but previously to informing Nizar of his decision he had met with 31 assemblymen and satisfied himself that these 31 members (including the three defectors) supported the BN leader, Datuk Zambry, as the *Menteri Besar*. Accordingly the Ruler, immediately following his refusal of a request for dissolution, informed Nizar that he no longer commanded the confidence of a majority of the Assembly and asked for his resignation. This was not forthcoming, but later the same day the Ruler's office issued a press statement stating that the office of *Menteri Besar* had fallen vacant and that Zambry had been appointed as he commanded the confidence of a majority in the Assembly. Thus Nizar was ousted without any vote being held in the Assembly. He sued Zambry for declarations to the effect that he, Nizar, was still the *Menteri Besar* of Perak. The courts had to decide whether the Ruler had power in effect to dismiss the *Menteri Besar* by declaring the office vacant and appointing another Member, there being no express power of dismissal in the Constitution; and whether such power, if it existed, could be exercised on the basis of events occurring outside the Assembly, there having been no motion of no confidence or similar event in the Assembly.

The case caused considerable excitement across the country. A High Court decision in favour of Nizar was appealed to the Court of Appeal successfully by Zambry, who again succeeded on a further appeal by Nizar to the Federal Court.[31] The outcome was that the courts read into the Constitution a power to declare the office of *Menteri Besar* vacant, and found it was constitutionally valid for the Ruler to take such action even without a vote in the Assembly. The decision breaks new ground in allowing the Ruler considerable latitude, which is not apparent in the constitutional text or in general understandings of constitutional conventions, to reach his own judgement as to the issue of the legislature's continued confidence in the Head of Government. It is not only a

[31] *Datuk Nizar Jamaluddin v Datuk Seri Zambry Abdul Kadir* [2010] 2 MLJ 285. For an extensive critique and discussion of the Perak crisis, see A Quay (ed), *Perak: A State of Crisis* (Loyarburok, Kuala Lumpur, 2010).

highly problematical understanding of the notion of confidence and the proper role of the Head of State in a Westminster-style constitution; it appears to be contrary to Malaysian precedent which suggests that confidence can only be ascertained on the floor of the legislature.[32] It also conjures up the possibility of royal interference in the operation of the Constitution at both State and Federal levels, and of the monarchy becoming a political football as competition continues to increase between the BN and the PR.

Despite the difficulties with this case, the Malaysian courts have at least, as in this example, usually been both willing to exercise jurisdiction in political cases involving conventions, and also willing to pronounce clearly on the role of the Head of State. For example, in 1985 they intervened in a constitutional crisis in Sabah to quash an appointment of a Chief Minister.[33] The State elections had produced a close result, PBS gaining 25 out of the 48 seats, USNO 16, and Berjaya, which had been the State Government since 1976, six. PBS had an overall majority, even if a small one, and its Leader, Datuk Joseph Pairin Kitingan, expected to be appointed Chief Minister. However, at about 3.40am on the night of the announcement of the election results, Tun Mustapha Harun and Harris Salleh, the Leaders of USNO and Berjaya, visited the residence of the *Yang di-Pertua Negeri* (Governor), Tun Adnan, and prevailed upon him to appoint Tun Mustapha as Chief Minister on the basis that USNO and Berjaya had 22 seats, but with the appointment of an additional six members who had to be nominated by the *Yang di-Pertua Negeri*, they would have an overall majority in the Assembly. Tun Adnan had not been officially made aware of the election results. He was shown a piece of paper which said 'we have no confidence in you and will remove you', which he interpreted as a threat to his life. At about 5.30am he swore in Tun Mustapha as Chief Minister. At 2.30pm the same day Tun Adnan wrote to Tun Mustapha revoking his appointment, and informed Datuk Pairin of this. At 8pm he swore in the latter as Chief Minister. Tun Adnan had never given Tun Mustapha the usual Instrument of Appointment.

Tun Mustapha challenged the validity of the revocation of his appointment and of Datuk Pairin's appointment, seeking declarations

[32] *Stephen Kalong Ningkan v Tun Haji Openg and Tawi Sli* [1966] 2 MLJ 187.
[33] *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert and Datuk Joseph Pairin Kitingan No 2* [1986] 2 MLJ 420.

that he himself had been validly appointed, and was still the Chief Minister. In the meantime the Assembly passed two votes of confidence in Datuk Pairin. The defendants (Tun Adnan and Datuk Pairin) objected that the court had no jurisdiction over the questions at issue, because they concerned the manner of exercise of discretion by the Head of State and raised political questions which should be, and had been, dealt with by the legislature and not by the courts. The Judge held that although the court had no jurisdiction to question the manner of exercise of discretion by the Head of State, it did have jurisdiction to consider whether there had in law been an appointment, which, in view of the defendants' reliance on allegations of conspiracy, misrepresentation, fraud, and duress, was in issue. The questions involved were legal, constitutional, ones within the jurisdiction of the court, distinct from the political question of the confidence of the Assembly. The defendants appealed to the Supreme Court, which upheld the Judge's decision, and the matter was sent back for trial.

In an unimpeachable decision the Judge held that the Head of State had not exercised his judgement on the issue of confidence because he had not received the official results of the election, and because the appointment of Mustapha had been the result of the cumulative effect of the pressure and threats operating on his mind, and that accordingly the swearing-in was null and void. It was also held that in exercising his judgement the Head of State had to consider the position when, following a general election, the nominated members had yet to be appointed: they could only be appointed on the advice of the Cabinet, which could itself only be appointed after the appointment of the Chief Minister. Finally, he held that the appointment of a Chief Minister had to be signified by a signed Instrument of Appointment under the Public Seal, a matter required by unbroken convention in Sabah.

These are not the only occasions on which constitutional conventions have given rise to uncertainty, even though they are written into the Federal and State Constitutions. Happily this very fact has enabled the courts to take custody of conventions and treat them as justiciable. While the Sabah case is reassuring as evidence of the courts' willingness to enforce the spirit as well as the letter of the Constitution, the Perak decision seems to be a high-water mark for expansion of the Ruler's constitutional powers and creates some uncertainty as to where this kind of reasoning could lead. An occasion on which the Sultan of Selangor recently instructed Assembly Members to pass a Bill relating to

his powers over Islam created an adverse reaction and arguably takes matters beyond the Ruler's constitutional role.[34]

IV. THE CONFERENCE OF RULERS

'Yang tegak di-sokong'

(What is already upright is buttressed)

In 1897, meetings of the Rulers or Durbars were instituted. This led to the creation of the Conference of Rulers under the Federation of Malaya Agreement 1948, and its retention in the *Merdeka* Constitution as an expression of the Rulers' resistance to any erosion of their sovereignty, where they saw some strength in numbers and constitutional entrenchment. A distinction needs to be drawn between two kinds of function performed by the Conference.

First, it discusses questions of national policy. Here the Rulers meet with the *Yang di-Pertua Negeri* of the four States without a Ruler, as well as the *Yang di-Pertuan Agong*, the Prime Minister and the *Menteri Besar* or Chief Minister of each State. The Heads of State act on advice in this capacity. The Constitution requires that the Conference be consulted before any change in policy affecting administrative action under Article 153 (special privileges: see chapter two). In practice the Conference is primarily a useful means of discussing Federal–State relations outside the glare of publicity, and without confrontation, as it has no actual powers in this regard.

Second, it performs functions of a constitutional nature, in relation principally to the monarchy itself and religion; but here the Conference consists only of the nine Rulers and each Ruler acts in his discretion. These functions include the election of a *Yang di-Pertuan Agong*, giving consent to any law altering State boundaries or affecting the privileges of the Rulers; and giving advice on any appointment which requires the Conference's consent or where the Conference is required to be consulted. This latter function includes, most importantly, the appointments of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the High Court in Malaya and the

[34] 'Selangor Upset Over "Royal" Intervention', *Free Malaysia Today*, 9 November 2011, www.freemalaysiatoday.com/2011/11/09/selangor-upset-over-royal-intervention.

High Court of Sabah and Sarawak, the Judges of the High Court, the Auditor-General, and the Chairmen and members of the Public Service Commission and the Election Commission. In relation to religion the Conference can extend religious observances to the whole Federation, and can also give rulings on some religious issues: in one instance it was forceful in reminding the Islamic Development Department that it had no power to issue a fatwa on the propriety of Muslims participating in yoga.[35]

The Conference has also begun in recent years to assert itself in relation to judicial appointments, on one occasion successfully rejecting the Prime Minister's nominee for a senior judicial appointment even though its role is stated as merely that of being consulted.[36]

One significant power that falls under this second type of function relates to the *Rukunegara* amendments, as a result of which Article 159, which deals with constitutional amendments, was amended to impose the requirement of consent to the passing of constitutional amendments and ordinary laws relating to the 'sensitive issues': citizenship, the special privileges of Malays and natives of Sabah and Sarawak, the national language, and the Rulers themselves; and laws governing the questioning of policy on those issues.[37] In effect the Conference of Rulers has been given the task of policing any attempt to reverse the *Rukunegara* amendments, as though the social contract itself is entrusted to the Rulers collectively. This indicates how the Rulers fulfil the dual role of being guardians of Malay rights and also protectors of the legitimate interests of non-Malays. This dual role can also be seen in the intervention of the Sultan of Selangor in the DUMC church-raid issue discussed in chapter eight, where he appeared both to protect Muslims from attempts to convert them from Islam while at the same time encouraging Christians to assert, but realise the limits of, their religious freedom. In practice the Conference has indeed provided evidence that it sees itself as the guardian of the social contract, as it reminded everybody in a sternly-worded 'Special Press Statement' dated 16 October 2008.[38]

[35] Suwannathat-Pian, above n 1, 398.

[36] ibid, 387–88. For a positive construction of what is meant by consultation in this and other contexts, see JC Fong, *Constitutional Federalism in Malaysia* (Petaling Jaya, Sweet and Maxwell Asia, 2008) ch 9.

[37] See ch 2, section V.

[38] Suwannathat-Pian, above n 1, app 3.

V. CONCLUSION

'Gajah masok kampong'

(An elephant enters the village – used especially of a visit by the Raja)

We have seen in this chapter how even debates about the position of Malaysia's monarchies bring us ineluctably back to the nature of governance, basic freedoms, and the role of religion and ethnicity in a situation of conceptually fraught and contested democracy. There are clearly advantages and disadvantages in the rejuvenated twenty-first-century monarchy. Malaysians themselves seem not to have made up their minds at this early stage of monarchy renewal whether or not they actually approve of the development. Most would welcome the distinct improvement in royal behaviour, making the Rulers into exemplary figures. Others see the monarchy as an antidote to the arrogance and unethical behaviour of some politicians, and also as a recourse when all else fails, especially in inter-religious matters. However, it is uncertain whether the majority are content to see the Rulers going beyond the strict confines of the constitutional text in the way the royal house of Perak appears to envisage. Whether this version of the monarchy is merely a by-product of a situation where the BN is no longer seen as a protector,[39] but the opposition too has limited power, remains to be seen.

FURTHER READING

Chandra Muzaffar, *Protector? An Analysis of the Concept and Practice of Loyalty in Leader-Led Relationships within Malay Society* (Penang, Aliran, 1979).

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5

Territorial Governance: Federal, State and Local Government

Introduction – Federal and State Powers: A Measure of Autonomy – Federal and State Finance – Special Position of Sabah and Sarawak – A Case Study: State Governance in Selangor Post-2008 – Local Government – Conclusion

I. INTRODUCTION

'Jamah lubah jampat datai, Berumban bemalam rantau jalai'

(In the spirit of federalism, this is a Sarawakian proverb: 'If you are patient you will arrive soon enough, if you are in a hurry you will spend the night half way'. More haste, less speed – a good way, perhaps, to embark on the federal project.)

IN CHAPTER 1 we have seen how the adoption of a federal structure was a necessary condition for independence and also a necessary consequence of opposition to the Malayan Union, which was followed by the Federation of Malaya Agreement 1948, and later the Malaysia Agreement 1963, which added three new States to the Federation on special terms.[1] We have also seen in chapter four how federalism is deeply related to the continuance of the Malay monarchies. Any attempt to abolish either the monarchy or the federal structure,

[1] For detailed discussion of this constitutional history from the aspect of federalism, see JC Fong, *Constitutional Federalism in Malaysia* (Petaling Jaya, Sweet and Maxwell Asia, 2008).

both of which were beyond even Dr Mahathir at the height of his ascendancy, seems bound to be foiled by the profound cultural linkage of the States with their Rulers. Anyone who has been in a State capital in Malaysia at the time of the Ruler's accession or birthday will understand that this link is unbreakable. This is the point the British were rudely reminded of in 1946. However, the constitution-making process followed only a few years after Malaya had proved indefensible before concerted attack, and took place in the midst of a bloody and vicious civil war (the emergency of 1948–60). Therefore although federalism was a necessary element the focus was nonetheless on creating a strong central government with only 'a measure of autonomy' being given to the States. The imperatives of the developmental state under BN rule have tended to accentuate a centripetal tendency in the practice of federalism in Malaysia, and so it is the strong central government rather than the rigid maintenance of States' rights that has prevailed. We may remind ourselves that this result was no accident: it was always intended by the British, the Alliance, and the Reid Commission. The constitution-making process of 1956–57 also ensured that the States maintained their own constitutional systems based on constitutional monarchy, an elected, unicameral state legislature, and a Westminster-style Constitution as mandated by the Federal Constitution at Schedule 8 (the 'essential provisions' of State Constitutions). In chapter four we have seen how the Westminster conventions operate at the State level.

The question arises whether federalism serves any useful purpose other than the cultural one of supporting the unique system of constitutional monarchy. The answer appears to be that it does. It is necessary to consider, first of all, that in 1963 Malaysia adopted a 'two-tier' or asymmetric federal system[2] with the accession of Sabah and Sarawak on special terms: Malaysia is in a real sense a Federation of three subjects (Malaya, Sabah and Sarawak), one of which (Malaya) is itself a Federation. One reason for federal structures is that they are a means of accommodating ethnic difference. This is often assumed to be relevant in Malaysia but it is only a marginal factor, because almost all ethnic groups, even the *orang asli*, are spread across most or all of the States. Even strongly Malay populations, like those of Kelantan and Terengganu, have large Chinese minorities concentrated mainly in urban

[2] Shafruddin Hashim, 'The Constitution and the Federal Idea in Peninsular Malaysia' (1984) 11 *Journal of Malaysian and Comparative Law* 138, 177.

areas. On the other hand some ethnicities are more concentrated in some States than others: Sabah and Sarawak with their indigenous groups[3], such as the Iban and the Kadazan, have demographies quite different from the other States and from each other. More obvious are considerable differences in culture, history and economic development. Kelantan is more Malay/Muslim, while Penang is more Chinese; Selangor is ethnically mixed but more urbanised and more middle class. Malacca has a rich and unique colonial history, legal traditions, and ethnic mix, while Negeri Sembilan clings to its unique matrilineal customary laws and constitution.[4] Johor and Kelantan have the greatest sense of their own autonomy, having showed the greatest reluctance of all in joining the Federation, while Sabah is swamped by migrants and is claimed by the Philippines as part of the old Sulu Sultanate. There are also geographical considerations. Sabah and Sarawak are very large with vast tracts of jungle, and are separated from Malaya by the South China Sea, making communications with '*semananjung*' (the peninsula) particularly difficult, a factor regarded by their inhabitants as both a curse and a blessing. Penang, Malacca and the Federal Territory of Kuala Lumpur are effectively city-states, and Perlis is also tiny, while Penang alone amongst the States is an island. Kedah produces rice, while Pahang and Johor produce palm oil. Selangor people drive along multi-lane highways to their vast residential estates while Sarawakians trudge through impenetrable jungle to their longhouses. There is in short, no single, special logic that explains the differences between the States; they are just all different from each other along different axes, and have very different needs, especially as between West and East Malaysia, that would exist whether or not there were a federal structure or whatever that structure demanded. Apart from the modes of difference listed, a federal structure also provides a welcome form of political ventilation in a developmental state with an enormously powerful centre. Even the form development takes is often moderated by the intervening agency of the State Governments; this is particularly true in Sarawak where Pehin Sri Haji Abdul Taib Mahmud, the leader of Parti Persaka Bumiputera Bersatu (PBB), who is only the fourth Chief Minister of Sarawak, has enjoyed what is virtually a fiefdom, albeit associated with the BN, since 1980.

[3] The Constitution, art 161A(7) specifies 28 different groups, including Malays, as natives of these States.

[4] For Malacca, Negri Sembilan and customary land holdings, see art 90.

At root, however, it is still the cultural factor that maintains the Federal structure. One might pass insensibly the boundary between Johor and Negri Sembilan, barely marked by a sign board and an unrelieved scene of oil-palm plantations; yet it would be a brave proposition that would reduce in any way the significance of Johor's proud history or Negri Sembilan's unique *adat* constitution. When in 1994 it was proposed to relieve Johor of its Royal Johor Military Force, a private army under the direct control of its Sultan and the only one of its kind (a reasonable measure, one would think, in a Federal system of government), the parliamentary Bill giving effect to this had to be hastily withdrawn in the face of Johor UMNO members' opposition, even though there were genuine concerns about the actual and possible use of this force.[5]

The question of utility also raises the inevitability of a downside to federalism, in particular when there is local government to consider in addition. If federalism is an immovable fact, is it still the case that Malaysia with its population of 28.6 million needs *three* levels of government, let alone three levels of *elected* government? Inefficiencies and lack of coordination do arise when different governments are responsible for overlapping, inter-locking, gap-creating, or sometimes contradictory, functions. Obvious examples are provided by foreign investment and environmental management. Foreign investment approval is given by the Federal Government; but land has to be obtained from the State Government; and the local authority's permission is required to build a factory. Environmental regulation is another case where powers are spread across all three levels of government, leading to complexity in environmental policy and decision-making,[6] and confusion over water supply, water resources, and drainage. We will see that the secret that allows this system to work quite well in practice by and large is its flexibility and its reliance on institutionalised forms of cooperation. Litigation on Federal and State powers, for example, has been rare.

In this chapter the focus is on Federal–State relations, but we will also look at the conditions of territorial governance at the State and local government levels. Since East Malaysia does not otherwise feature heavily in this book, and federalism tends to look different according to where one is standing, the topic will be approached with Sabah and Sarawak very much in mind, and a section is devoted to their special position within the Federation.

[5] *Far Eastern Economic Review*, 29 September 1994, 28.

[6] eg, it is not even entirely clear why the Environmental Quality Act 1976 is a Federal law. For discussion of the complex problems of environmental impact assessment in a federal structure, see *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23; and Fong, above n 1, at 56–57.

II. FEDERAL AND STATE POWERS: A MEASURE OF AUTONOMY

'Bertepok tangan sa-belah tak 'kan berbunyi'

(Clapping with one hand cannot make noise)

Bestowing on States a mere measure of autonomy (the term used by the Reid Commission) implies that most legislative and executive power is vested in the Federation rather than the States. This is confirmed by an examination of Schedule 9 and Articles 74 and 80 of the Constitution. Schedule 9 contains three lists, pertaining to Federal, State and Concurrent powers. Concurrent powers can be exercised by either State or Federal authorities, and any residual powers not mentioned belong to the States. The lists designate both legislative *and* executive powers. If there is any inconsistency between Federal and State law Federal law prevails.[7]

Schedule 9 is riddled with complexity and succeeds in delineating almost every detail of Federal and State powers.

As one would expect, the Federation deals with all of the larger issues affecting the country as a whole, such as external affairs, defence, energy, the legal system, and citizenship. Trade, industry, and transport are also Federal powers, as well as social issues such as health care and education. Most importantly, finance and general taxation are Federal matters.

State powers are largely limited to Islamic law and custom, land, agriculture, forests and natural resources; however, local government and therefore all of its functions are also under State control. The concurrent powers such as social welfare, planning and public health, are in general exercised by the States. Sabah and Sarawak have powers over immigration, as well as over native customary law and personal law, and some other functions such as harbours and posts. They also have power to impose a sales tax but have not exercised it.

It is immediately apparent that the Federation has much more power than the States, and that Sabah and Sarawak have much more power

[7] Art 75.

than the Peninsular Malaysian States. Sabah and Sarawak's control over immigration, not only from outside Malaysia but also from the rest of the country, is very unusual in a Federal system. The most expensive functions too, such as defence, health care, and education, lie with the Federal power. On the other hand the States are in charge of many functions that impact directly and visibly on the environment and on the lives of communities. It will be noted that most of these relate to the physical environment. Local government too has significant functions such as building and development control, and market regulation.

The exclusive arbiter over the constitutional division of powers is the Federal Court. It is also the exclusive arbiter of disputes of any kind between States or between the Federation and a State.[8] Although the Federal Court has on occasion decided disputes of this kind, it has only rarely struck down a statute as being contrary to Article 74,[9] and in one case it laid down the applicable criteria in such cases.

In *Mamat bin Daud v Government of Malaysia*[10] the plaintiffs were charged under an amendment to the Penal Code, section 298A, which created a new offence of doing an act on the ground of religion which was likely to cause disunity or affect or prejudice harmony between people professing the same or different religions. They were charged with doing an act likely to prejudice unity amongst Muslims in that they acted as unauthorised Bilal, Khatib and Imam at Friday prayers. They sought declarations that section 298A was ultra vires Article 74 because in pith and substance it dealt with Islam, a State matter, and was therefore beyond the power of Parliament to enact. On a careful analysis of section 298A, a lengthy, complex and sweeping provision, the Supreme Court decided, by a majority of three to two, that the acts prohibited by the section had nothing to do with public order, a federal matter, but were directly concerned with religion. Two of the majority formulated the following test, with which the dissenting judges agreed:

[8] Art 128(1).

[9] In *City Council of Georgetown v Government of Penang* [1967] 1 MLJ 169, two State laws were struck down as inconsistent with Federal law. In *Noordin Salleh v State Legislative Assembly of Kelantan* [1993] 3 MLJ 344, a State party-hopping law was struck down because it violated art 10 of the Constitution which gave the power to regulate freedom of association to Parliament only. See, further, T Thomas, 'Anti-hopping Laws: The Malaysian Experience', ch 11 of G Hassall and C Saunders, (eds), *The People's Representatives: Electoral systems in the Asia-Pacific Region* (Sydney, Allen and Unwin, 1997).

[10] [1986] 2 MLJ 192.

> it is the substance and not the form or outward appearance of the impugned legislation which must be considered . . . no amount of cosmetics used in the legislative make-up can save legislation from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject-matter of legislation to which it really belongs.

The dissenting judgments applied the test differently, finding that the statute applied to all persons irrespective of religion, and was a public order statute 'directed to the tranquil observance of all faiths without disruption of the public weal'.

The division of Federal and State powers also has to be read against provisions that give the Federation even greater power than appear in Schedule 9. Under Article 76, the Federal Parliament is empowered to legislate in respect of matters on the State list in three situations.

First, it may legislate for the purpose of implementing international agreements. Here it cannot legislate with respect to Islamic law or Malay custom, which have been explained in chapter one to be quintessential State powers; and not in any case without consulting the State Government.

Secondly, it may legislate to promote legal uniformity between two or more States; in this case as well as for the first situation, the law only takes effect when passed by the State legislature, when it becomes State law. Additionally, Parliament is given a specific power to legislate for ensuring uniformity of law and policy in relation to land and local government; but in this instance the law does not have to be passed by the State legislature and remains Federal law. The Constitution also recognises the importance of creating uniformity in relation to these issues by creating a National Land Council and a National Local Government Council.[11] These provisions concerning land and local government do not apply to Sabah or Sarawak.[12]

Thirdly, Parliament can legislate where simply requested to do so by a State legislature.[13] The National Land Code 1965 is a good example of

[11] Arts 91, 95A. See also arts 83 and 92 on land acquisition and development plans.

[12] Art 95D.

[13] See also art 76A, which gives States limited powers to pass laws on Federal matters; and arts 83 and 85–88 which allow the Federation to acquire State land in the national interest and to declare an area a development area, which gives Parliament power to pass laws otherwise prohibited by art 74. In practice development areas have often been simply absorbed into the Federal Territory (eg, Putrajaya), or declared as special economic zones, eg Iskandar Development Region, Johor.

the use of this power. Like the Local Government Act 1976, discussed later in this chapter, it is a Federal law dealing with a State matter; it was passed at the request of all the States rather than under the special powers mentioned above for land and local government. The two statutes mentioned here were passed following agreement between the Federation and the States in their respective national councils. But again, they do not apply to Sabah or Sarawak, which, as on many other issues, have their own laws.

Although executive powers follow legislative powers, Article 80 provides similar flexibility to Article 76 by allowing Federal law to confer executive authority on a State. A good example is the Immigration Act 1959, as amended in 1963, which gives the Governments of Sabah and Sarawak control over immigration in their respective States. It is also permissible for State and Federal authorities to exercise executive powers on behalf of each other. State powers must also be exercised so as to ensure compliance with Federal laws, and not so as to impede the exercise of Federal powers.[14]

The design of the Federal structure by the Reid Commission was in essence the work of Sir Ivor Jennings, who had experience both in Malaya and in another federal system (Pakistan). The structure created has the merit of channelling the preponderance of power to the centre without reducing States to the position of mere agents of the Federal power and without creating too much structural rigidity. If there is a difficulty with the division of power it lies in the under-resourcing of State Governments (see below). The division of power outlined above has not, however, required any significant adjustment since 1957, which indicates that on this issue the Reid Commission successfully reconciled the aspiration for State Government with the needs of national development and nation-building. The single significant amendment to Schedule 9 relates to the issue of tourism, which was added to the Federal list in 1994; this was slipped into a major constitutional amendment relating to other issues and without consultation with the State Governments, which had their own tourism initiatives.[15] However, States have not been prevented, in practice, from promoting tourism.

Nonetheless, it would be too much to claim that this design has prevented all difficulties between States and the Federal power, or reduced

[14] Art 81.

[15] Constitution (Amendment) Act 1994, Act A885.

all inefficiencies to a vanishing point, as we will see in the next section. The structure is also tested by a post-2008 politics in which some State Governments are controlled by Federal opposition parties. For example, it is the policy of opposition-controlled State Governments to reintroduce local government elections. Since local government is a State matter, it should be uncontroversial for those States to carry out this policy, but nonetheless Federal legislation (the Local Government Act 1976) stands in the way.[16]

III. FEDERAL AND STATE FINANCE

'Biar sepeh, tumbang jangan'

(Chip the tree if you like, but don't fell it)

In fulfilment of the idea of a strong central Government with limited powers for the States, the Reid Commission placed financial matters firmly in the hands of the Federal Government. They refused on grounds of efficiency to give States the power to tax income, as a result of which the imbalance between Federal and State finances is marked. The total revenue of all of the States combined in 2006 was less than RM9 billion, compared to Federal revenue of more than RM120 billion in the same year. Expenditure showed a similar imbalance. State Governments are hard pressed to avoid an operating deficit, and development funding normally has to come from Federal sources.[17] The problem therefore was, and is, how to resource the execution of State powers.

The solution adopted was to enable the States to draw on Federal resources while exploiting the possibilities for maximising their own revenue. To avoid annual battles over the amount of Federal funding, States are entitled under the Constitution to certain grants, which are calculated according to formulae.[18] These mandatory grants are as follows:

[16] 'Conference on the Road Map to Local Government Elections', Malaysian Bar, 28 July 2008, www.malaysianbar.org.my/bar_news/berita_badan_peguam/conference_on_the_roadmap_to_local_government_elections.html.

[17] Fong, above n 1, ch 5. For an example, see *Malaysia Today*, 'What AG's Report Says about Selangor', www.malaysia-today.net/mtcolumns/newscommentaries/44428-what-ags-report-says-on-selangor, 25 October 2011.

[18] Art 109; for details as to how this works, see Fong, above n 1.

First, there is a Capitation Grant, which is based on the annual population projection for the State, as assessed by the Federal Government, and, being graduated, favours States with a small population. The amounts payable are amended from time to time by Parliament according to inflation and population increase, but Parliament may not reduce the grant to less than 90 per cent of the previous year's grant.

Second, there is a State Road Grant. Maintenance of State roads is an important function and a large expenditure. This grant is calculated by multiplying an average maintenance cost per mile by the number of miles of road the State has, and so favours those States with extensive highways and therefore high maintenance costs. Arguably this leaves States that need infrastructural *development* at some disadvantage; however, since this argument applies principally to Sabah and Sarawak whose development needs are dealt with by other means, a problem of entrenched underdevelopment seems not to arise from this system.

These grants are constitutionally guaranteed and set out in detail in Schedule 10, so that there is no element of discretion involved. In theory, therefore, State finance does not depend on Federal approval; but in practice the situation tends to be otherwise. Mandatory grants are in general terms barely sufficient for State Governments to keep their doors open, and they have usually been run on deficit funding which is then made up by the Federation.[19] In order to take development initiatives, however, States need finance over and above the mandatory grants, and unless they can find the resources otherwise, which is difficult for them,[20] they will be dependent on discretionary Federal grants. These are not always forthcoming unless the State Government is under the control of the BN, a factor which in the past has sometimes prompted opposition parties obtaining control of the State Government actually to join the BN as the only means of securing effective federal cooperation with the State Government. This happened in Penang (Parti Gerakan, 1974) and Sabah (Parti Bersatu Sabah, 1986).

Nonetheless, States also have some sources of revenue based on their own powers, which are similarly guaranteed by the Constitution.[21] They can, for example, charge rents on State property, impose licence fees, and charge water rates. In practice the most important elements are the

[19] Fong, above n 1 at 107, states the total State deficit for 2006 as RM193 million.
[20] But not impossible: see details of the Auditor-General's report on Selangor, above n 17 and the section on Selangor below.
[21] Art 114.

royalties and other revenue derived from land and natural resources, such as tin, petroleum, oil, minerals, and timber; however, Parliament may restrict the levying of royalties or similar charges made in respect of mineral concessions.[22]

The need for States to obtain royalties on natural resource exploitation has given rise to conflict between States that have such resources (principally Sabah, Sarawak and Terengganu) and the Federal Government.[23] States have attempted to claim the right to royalties on the exploitation of resources (oil and gas, for example) found under the continental shelf adjacent to, but beyond, territorial waters, areas that, in their view, belong to the State, but in the view of the Federal Government belong to the Federation. This conflict was initially resolved by the Petroleum Development Act 1974, sections 2–4, under which all oil and gas rights were vested in the Federation in the form of Petronas, the national oil company, in return for 'such cash payment as may be agreed between the parties'. Petronas is one of the notable government companies that we saw in chapter two as characteristic of the developmental state. In 1975 the payment was agreed at five per cent of the price of oil and gas found and sold by Petronas,[24] and has been a continuing source of dissatisfaction on the part of these three States. However, Sabah and Sarawak are also the recipients of the largest amount of development funding from the Federal Government. As a former Attorney-General of Sarawak comments, this outcome only shows the dependency of these States on Federal development funds.[25] It is highly arguable that the five per cent payment is a long way below what is reasonable, but the Federation has the power to impose its will, even if unreasonably.

The oil and gas royalty was also the subject of a dispute between Terengganu and the Federal Government which lasted from 2000 to 2008. Terengganu had the same agreement with the Federal Government as Sabah and Sarawak, but in 2000 after the State Government was taken over by the opposition party PAS, the Federal Government suddenly cancelled the royalty payment. Terengganu sued the Federal Government for breach of contract.[26] The case lingered in the courts until after the

[22] Art 110.
[23] Fong, above n 1, 98–103.
[24] Under Tripartite Agreements of 1975, involving the Federal Government and the Governments of Sabah, Sarawak and Terengganu.
[25] Fong, above n 1 at 103, n 24.
[26] *Petroliam Nasional Bhd v State Government of Terengganu* [2004] 1 MLJ 8.

BN regained control over the State Government in 2004, which then withdrew its suit; the Federal Government then reinstated the royalty payments (about RM1 billion a year), back-dated with interest.[27]

One other possible way of raising revenue was explored by the Government of Kelantan in the 1960s, and also led to conflict with the Federal Government. Although State Governments are prohibited from borrowing except from, or with the consent of, the Federal Government, Kelantan attempted in effect to achieve the opposite result by obtaining pre-payment of mining royalties from a mining company. On a reference to the then Supreme Court by the Federal Government it was held that this constituted a valid source of revenue; it was not a loan, because no interest was payable. However, this position was then reversed by a constitutional amendment extending the definition of the word 'borrow' in Article 160.[28] This indicates once again how real power rests ultimately with the Federal Government.

It can be seen that a successful federal fiscal arrangement, which Malaysia by and large can claim to have, requires a good deal of negotiation and compromise. This is achieved through the mechanism of the National Finance Council (NFC),[29] whose main task is to iron out difficulties of a fiscal nature arising in the federal context. It consists of the Prime Minister, such Ministers as the Prime Minister shall appoint, and one representative from each State. It must meet at least once every 12 months, and is summoned, as often as he considers necessary, by the Prime Minister (or else by three or more State representatives), who presides. The Federal Government is under a constitutional duty to consult the NFC in respect of matters such as the making of Federal grants to the States; the assignment to the States of Federal taxes or fees; and the making of loans to the States. Parliament is required annually to pay into a State Reserve Fund such sums as are deemed by it, after consultation with the NFC, to be necessary; and the Federation may from time to time make payments out of the Fund to the States for the purposes of development or to supplement revenues. All matters of potential controversy are dealt with by the NFC, and it is interesting to note that open

[27] 'Terengganu to Withdraw Suit Against KL and Petronas', *The Malaysian Insider*, 19 June 2008, www.themalaysianinsider.com/litee/malaysia/article/Terengganu-to-withdraw-suit-against-KL-and-Petronas.

[28] *Government of Malaysia v Government of Kelantan* [1968] 1 MLJ 129; and see Constitution (Amendment No 2) Act 1971 (A31), s 8.

[29] Art 108.

fiscal controversy between a State and the Federation, or between States (with the exception of the issue of oil revenues, as above), is rare.

As Fong writes,

> The financial arrangement between the Federation and the States . . . has enabled Malaysia to maintain financial stability, economic progress and transformation . . . it may not be perfect, but it has proved to be one which seems to be best suited for the Federation.[30]

Whether this will continue to be true in the post-2008 era of opposition-controlled State Governments remains to be seen.

IV. SPECIAL POSITION OF SABAH AND SARAWAK

> 'Dekat tak berchapai, jauh tak berapa entara'
> (Near, but not to be grasped; far, but no great distance)

The Tunku's grand design for decolonisation, which was consonant with British policy too, was to incorporate the remaining South East Asian territories under British control, namely, Singapore, Sabah, Sarawak and Brunei, into a larger Federation spanning Malaya and Borneo.[31] The only realistic options for the Borneo territories were to become independent separately, form their own federation with Brunei, or join Sukarno's increasingly unstable and hostile Indonesia. Communist insurgency determined this issue for the majority of people in these territories. At the same time there was unease about the possibly deleterious effects of joining the Federation. A Memorandum of the Malaysia Consultative Committee, a Committee of the Commonwealth Parliamentary Association, consisting of representatives of the Governments of Britain, Malaya, Sabah and Sarawak, supported the federation of Sabah and Sarawak with Malaya and Singapore in its Memorandum of February 1962. Brunei took part only as an observer, and ultimately declined to join Malaysia, partly because of disagreement about Brunei's oil revenues, and partly over issues relating to the precedence of the Sultan of Brunei in the proposed federal scheme.

[30] Fong, above n 1, 120.

[31] JP Ongkili, *Nation-Building in Malaysia, 1946–74* (Singapore, Oxford University Press, 1985); Poh-Ling Tan, 'From Malaya to Malaysia', ch 2 of AJ Harding and HP Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years, 1957–2007* (Kuala Lumpur, LexisNexis, 2007).

The Cobbold Commission, consisting of representatives of the British and Malayan Governments, visited Sabah and Sarawak in 1962 and reported that the majority supported federation with Malaya, provided due regard was had to the special position of Sabah and Sarawak, the ethnic implications, the physical distances involved, and these territories' political immaturity compared to Malaya and Singapore.[32]

The Legislative Assemblies of both territories voted in favour of federation subject to appropriate safeguards. An Inter-governmental Committee was then set up, comprising representatives from the same four Governments, to thrash out constitutional safeguards for Sabah and Sarawak, reporting in February 1963. Negotiations with Singapore proceeded separately, and a referendum in Singapore also supported federation. The Malaysia Agreement was eventually signed on 9 July 1963 by all the Governments concerned, and Malaysia came into being on 16 September 1963. This was effected not by a new Federal Constitution, but simply by the admission of new States to the existing but renamed Federation under Article 1 of the Constitution, and by numerous amendments to the Constitution giving effect to the negotiated settlement that was embodied in the Malaysia Agreement.

The principal point of concern[33] was the possible effect of migration on land, commerce, and the employment and professional opportunities of East Malaysians faced with competition from more qualified people from Malaya and Singapore. In this connection a draft Bill on immigration was appended to the Malaysia Agreement and promptly passed into law as the Immigration Act 1963 a few days before Malaysia came into being. However, there was also concern about other issues: financial arrangements and development; the special position of natives of Sabah and Sarawak; the national language; religion; the legal system; representation in the Federal Parliament; and of course how these States would be protected from future constitutional changes affecting any of these issues. Between them Sabah and Sarawak have about 60 per cent of Malaysia's land but only about a fifth of its population. They saw their problem as the need for protection against more powerful neighbours. The Cobbold Commission had stressed the need for a sense of

[32] The Commission's Report, *The Report of the Commission of Enquiry: North Borneo and Sarawak, 1962*, was published by the Colonial Office as Cmnd 1794/1962 (HMSO).

[33] ie, for Sabah and Sarawak. Since Singapore left the Federation in 1965, the special provisions for Singapore need not detain us.

equality and partnership in the new federal scheme. According to Lord Cobbold it was to be a 'partnership', not a 'takeover'.[34]

Sabah and Sarawak were thus placed in a position that was not available to the States that formed the Federation of Malaya in 1948 in that they were able to negotiate their part in the Federal scheme. These States were both resource-rich and under-developed. Accordingly they have the benefit of special grants and other fiscal privileges.[35]

First, unlike the other States, they may borrow money with the consent of Bank Negara (the Central Bank of Malaysia). Second, Schedule 10 also provides for special grants for Sabah and Sarawak, over and above the Capitation Grant and the Road Grant (see above), the bases of which were negotiated at the time of their accession. The object of these is to ensure that State revenue is adequate to meet the cost of existing State services, with reasonable provision for their expansion. Third, Sabah and Sarawak are allowed eight further sources of revenue not allowed to the other States. Fourth, the restrictions on the proportion of export duty on minerals mentioned above do not apply to Sabah and Sarawak.

Quite apart from the central issue of immigration, Sabah and Sarawak have substantially more powers than the other States, as we have seen. Parliament's powers to legislate for land and local government do not apply to Sabah and Sarawak; this allows these States exclusive legislative control over these two matters.

Crucially, the Governments of Sabah and Sarawak also have special powers to veto constitutional amendments affecting their States, and in this respect they have a considerable advantage over the other States, who have no such powers.[36] Under Article 161E(2) no amendment shall be made to the Federal Constitution without the concurrence of the Government of Sabah or Sarawak, as the case maybe (oddly, *not* the Legislative Assembly), if the amendment is such as to affect the operation of the Constitution with regard to: Malaysian citizenship and the equal treatment of persons born or resident in the State; the constitution and jurisdiction of the High Court of Sabah and Sarawak, and the appointment, removal and suspension of its Judges; the State's legislative and executive powers and financial arrangements between the

[34] Above n 32 at para 237.

[35] Art 112.

[36] This was demonstrated by the Kelantan case: see ch 1.

Federation and the State; religion and language in the State, and the special treatment of natives of the State;[37] and the quota of MPs allocated to the State in proportion to the total number of MPs.[38]

The reference to the judiciary is an unusual one. The object here was to preserve the separate nature of the High Court and the legal profession serving it. This was designed to guarantee the judicial enforcement of the law in Sabah and Sarawak, bearing in mind that essentially each of these states had its own legal history, statute laws, legal system, and legal profession, and to protect its legal profession from being swamped by lawyers from Malaya seeking to practise before the courts in the State. Since the jurisdiction of the High Court in Sabah and Sarawak enjoys the protection indicated in the last paragraph, this entails that there is doubt whether, for example, the separation of syariah from civil jurisdiction effected by the constitutional amendment of 1988 (see chapter eight) has any application in these States.[39] In any event the judiciary in the two States has remained largely unaffected by turbulent developments regarding the judiciary in Peninsular Malaysia;[40] however, the joining of the two systems at the Federal level via the umbilical cord of appeals to the Court of Appeal and the Federal Court mitigates this factor to some extent. For lawyers and their clients it is still possible for a lawyer from Peninsular Malaysia to be admitted to practise in Sabah or Sarawak by the court on an ad hoc basis, but this is without prejudice to obtaining a permit to enter for the immigration authorities.[41]

The balance of power between the Federation and the two Borneo States received a severe test soon after Malaysia came into being.[42]

By 1966 tensions had developed between the Federal and Sarawak Governments. Although the ruling party in Sarawak, SNAP, was a member of the Alliance, which ruled at the Federal level, the Chief Minister of Sarawak, Stephen Kalong Ningkan, pursued an independent policy which irritated Federal leaders. Constitutional chicanery followed as the Federal Government undermined Ningkan's position. A letter, signed

[37] See also Art 161A.

[38] Over-representation of Sabah and Sarawak was guaranteed only up to 1970, but after that the issue is whether their representation is equal to other States': see ch 2.

[39] Fong, above n 1 at 143, n 51.

[40] See ch 6.

[41] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.

[42] HP Lee, 'The Ningkan Saga: A Chief Minister in the Eye of a Storm', ch 5 of Harding and Lee, above n 31.

by 21 of the 42 members of the Council Negri, the State Legislature, was sent to the *Yang di-Pertua Negeri* (Governor) saying that the signatories no longer had any confidence in Ningkan as Chief Minister. On the basis of this letter the *Yang di-Pertua Negeri* asked for Ningkan's resignation, and when this was not forthcoming, Ningkan having asked that 'the matter be put to the constitutional test', he dismissed Ningkan by publishing a declaration in the Gazette that he had ceased to hold office, and appointed another member of the Council Negri as Chief Minister. These events are strikingly similar to those in the more recent Perak crisis of 2009, discussed in chapter five. As in Perak there had been no motion of no-confidence, and Ningkan refused to accept his dismissal, commencing proceedings in the High Court for declarations that he was still the Chief Minister.

The issue was whether a power to dismiss the Chief Minister could be implied into the State Constitution, and if so, whether it had been properly exercised. Article 7(1) of the State Constitution, in line with Westminster-style conventions said: 'If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the [*Yang di-Pertua Negeri*] dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council [State Cabinet]'. The High Court held that even if there was a power to dismiss the Chief Minister, the term 'confidence' implied a vote in the legislature, not a letter, even leaving aside the ambiguous mathematics of the case.[43] The dismissal was therefore unlawful and Ningkan resumed office. This decision is at odds with the decision in Nizar's case discussed in chapter four.

The response from the Federal Government was to proclaim, on the ground of a threat to the security of Sarawak, an emergency, under which the Federal and State Constitutions were temporarily amended by the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 so as to give the *Yang di-Pertua Negeri* power to dismiss the Chief Minister, and also power to summon the legislature without receiving advice to that effect. However, there was no real security threat, the real reason for the proclamation being the existence of a constitutional crisis which offered no immediate resolution in favour of the Federal Government's interests. The Council Negri was duly summoned,

[43] *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187, [1967] 1 MLJ 46.

Ningkan lost the vote on the ensuing no-confidence motion, and was dismissed from office.

This was not quite the end of the story. Ningkan challenged the emergency proclamation in the courts, alleging, plausibly, a fraud on the Constitution, and took his case eventually to the Privy Council, but without success.[44]

The problem with this episode from the perspective of the States, and of Sabah and Sarawak in particular, is that it means there are no legal or even, probably, political limitations, on the power of the Federation to interfere with the State Constitution, State Government or the division of State and Federal powers. The Privy Council, considering in *Stephen Kalong Ningkan* the meaning of 'emergency' in Article 150(1), stressed the breadth of the concept that

> it is not confined to unlawful use or threat of force in any of its manifestations . . . the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse elements as wars, famines, earthquakes, floods, epidemics and the collapse of civil government . . .[45]

In some cases even more hidden methods have been used to interfere with the State Government. Sabah, indeed, provides a good example.[46] Following the February 1994 State elections in Sabah, PBS, under Datuk Joseph Pairin Kitingan, was returned with 25 of the 48 seats in the State Legislative Assembly, the BN under Tan Sri Haji Sakaran Dandai, taking 23 seats. After a rather unseemly delay, during which he remained in his car, parked outside the Istana (Governor's residence) for two days, Pairin was appointed Chief Minister, and shortly afterwards his Cabinet also received their appointments. Immediately on Pairin's resumption of office, moves began to unseat him. He soon learned of the defection of three PBS assemblymen, which turned his majority of the elected members into a minority; attempting to forestall what seemed inevitable, he requested that same day a further dissolution of the Assembly. This was refused by the *Yang di-Pertua Negeri*. He then learned of a petition to the

[44] *Stephen Kalong Ningkan v Government of Malaysia* [1968] 2 MLJ 238.

[45] ibid.

[46] AJ Harding, 'When is a Resignation not a Resignation? A Crisis of Confidence in Sabah' (1995) 335 *The Round Table* 353; see also AJ Harding, 'Turbulence in the Land Below the Wind: Sabah's Constitutional Crisis of 1985–6' (1991) XXIX *Journal of Commonwealth and Comparative Politics* 86.

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Yang di-Pertua Negeri, signed by 30 members of the Assembly, saying they had no confidence in him and demanding his resignation. Less than one month after taking office, Pairin resigned, without there having been any motion of no confidence in the Assembly. By this time, he commanded only 21 votes in the Assembly, as against 27 for the BN. Sakaran was then appointed Chief Minister.[47]

Unfortunately, paying Assembly Members to switch parties has happened on many occasions, and the courts have struck down anti-hopping laws designed to prevent this occurring on the ground that they contravene freedom of association under Article 10 of the Constitution.[48] Although such episodes are not exclusive to Sabah and Sarawak, three leading instances of manipulation of State Government have occurred in these States, which are supposed to have special protection under the Constitution. The opposition, too, has tried to manipulate State politics in its favour. Following the 2008 election, a plot was hatched under which a number of Sarawak MPs would defect to the opposition and a government of national unity would be formed. The plot failed when information reached the Prime Minister, and 40 East Malaysian MPs were sent to Taiwan by a backbenchers' club 'to study agriculture'.[49]

Although the Federation has not sought to alter the balance of legislative powers in its favour, the underlying reality of Federal politics means there are limits to States' political autonomy, even where they receive special constitutional protection. Of particular concern here is that the use of emergency powers can side-step the consent of the State Government, which is the main guarantee against abuse of the power of constitutional amendment.

V. A CASE STUDY: STATE GOVERNANCE IN SELANGOR POST-2008

As we have seen, the system of governance at the State level is based on Westminster-type norms with very little difference in practice between

[47] Even so, a member of Pairin's Cabinet brought a case, unsuccessfully, to have Pairin's resignation held inapplicable to Cabinet members: *Datuk Amir Kahar Tun Mustapha v Tun Mohamed Said Keruak* [1994] 3 MLJ 737.

[48] See above n 9.

[49] *Free Malaysia Today*, 5 September2011, www.freemalaysiatoday.com/2011/09/05/coup-bid-five-mps-ready-to-defect.

the State Constitutions. The purpose of this section is to take a brief look at State Government in a State controlled by parties opposed to those in power at the Federal level, in the post-2008 era. When PR took over the Selangor State Government in 2008 the event marked a major achievement for the federal opposition which had never in Selangor's history under 13 previous Governments controlled the State. PR had promised radical change that included governance reform at the State level. At the same time PR involved three parties (PKR, DAP and PAS) which in some respects had little in the way of policy in common. Selangor was indeed a test for constitutionalism and constitutional reform.

The new Government that was sworn in had an Executive Council involving leaders from all three parties. It comprised 11 ministers: six Malays, four Chinese and one Indian, with four female members. Under the leadership of PKR's Tan Sri Abdul Khalid Ibrahim, a well known corporate figure, as *Menteri Besar*, they established an agenda to address poverty alleviation based on 'needs rather than race'. Signal policies implemented in the first two years were based on the concept of *Merakyatan Ekonomi Selangor* (the People-Based Selangor Economy), or husbanding the State's resources, stated to be 'owned by the people', to assist in poverty alleviation. Examples included free water to the extent of the first 20 cubic metres annually per household; increasing revenue from mineral exploitation; investing surplus funding annually in a trust fund for babies; and awards for students from poor homes entering university. At the same time the State Government created areas of increased transparency, accountability and participation. Examples here included publication of the RM500 billions' worth of Selangor State assets to the public; and becoming the first State in Malaysia to pass right-to-information legislation: even before the Freedom of Information (State of Selangor) Enactment 2011 was passed, the State Government set about releasing official information. Town hall meetings in 12 districts were held to evaluate the State Government's performance after two years in office. Open tendering was instituted for State Government contracts.[50]

[50] For these and other initiatives listed below, see *State Government of Selangor, Governing Selangor: Policies, Programmes and Facts* (Shah Alam, Pejabat Setiausaha, Kerajaan Negeri Selangor, 2010). I am also grateful for the assistance of Mr Teng Chang Khim (DAP), Speaker of the State Legislative Assembly.

The State Government also set about reforming the State Legislative Assembly and local government along the lines of democratic governance. A Select Committee on Competency, Accountability and Transparency (SELCAT) was established with Government and opposition members, chaired by the Speaker, to hold public hearings on alleged discrepancies in the running of the State. The Contempt of the House Enactment 2008 was passed to enforce appearance before SELCAT. Public declaration of State Executive Committee members' assets was introduced, although only for assets acquired or disposed of from March 2008. One aspect of SELCAT's activity has been to investigate a practice of allocating a sum of RM500,000 to Assembly Members for spending in their constituencies. A similar practice obtains at the Federal level where, for example, in September 2011, sums of between RM500,000 and RM2.5 million were allocated to BN MPs or candidates in constituencies that were marginal in the 2008 elections. However, the PR has operated a similar practice in Selangor.[51] Another initiative was mounted to establish a State Legislative Assembly Service Commission (SELESA); this would implement a separation of powers between the executive and the legislature by giving the Assembly control over its own administration. Thus far this measure has not been passed in the Assembly, and has not found favour with the Ruler. Measures were also taken to revitalise local government in the State by providing a system and resources to connect each local councillor with a particular ward in the council's area; standardising local government committees; and working towards reinstituting local government elections, which are due to begin with a pilot election for Petaling Jaya Municipal Council in 2012.

The new politics was not, however, without its challenges. The promise of a new style of government and pro-poor policies created expectations that could not always be fulfilled, for example in the area of rehousing of slum dwellers. The State Government also ran into difficulties with the Federal Government when a new State Secretary (Head of the State civil service) was appointed by the Federal Chief Secretary following consultation with the Ruler, but not with the *Menteri Besar*. A stand-off between the latter and the new State Secretary ensued, the

[51] 'BN MPs Get Extra Funds as Snap Polls Loom', *The Malaysian Insider*, 4 September 2011, www.themalaysianinsider.com/print/malaysia/bn-mps-get-extra-funds-as-snap-polls-loom.

Menteri Besar maintaining that convention required consultation with him.[52] A better solution, however, might be to amend the Constitution to make it clear that the State Government has power to appoint all of its own civil servants. Genuine autonomy for State Governments seems not be achievable unless they control their own administration. The role of the Ruler of Selangor is also a significant potential obstacle for the State government, as we saw above and also in chapter four.

Occasionally ideological splits within the PR also surfaced, for example over a proposed ban on Muslims working in places where alcohol was sold.[53] Policies relating to poverty alleviation and promotion of democracy and accountability, however, are common to all three PR parties, and it is in these areas, predictably, that some progress has been made.

VI. LOCAL GOVERNMENT

'Dapat puncha-nya sahaja sampai-lah ka-hujong-nya'

(Just give me one end of the fishing line and I can get to the other)

Malaysian local government along its present lines can be traced back to the British occupation of Penang, which later formed, with Malacca and Singapore, the colony of the Straits Settlements. In 1801 a Committee of Assessors was established there to supervise urban development. Local authorities were then established gradually in the Straits Settlements, and later in the Malay States, but only as and when it appeared necessary in a particular urban setting. As independence loomed after 1945, experimentation with democracy was undertaken at the level of urban local government. By 1957 there were no fewer than 289 local authorities in Malaya, major city councils being elected.

Two major changes have been made to local government since *Merdeka*.[54]

[52] Tommy Thomas, 'Consultation is Vital in the State Secretary Appointment', *The Malaysian Insider*, 4 January 2011, www.themalaysianinsider.com/breakingviews/article/consultation-vital-in-selangor-state-secretary-appointment-tommy-thomas.

[53] 'Muslims Serving Alcohol: Ban or No Ban?', *The Nutgraph*, 24 January 2011, www.thenutgraph.com/muslims-serving-alcohol-ban-or-no-ban.

[54] For the reforms of the 1970s, see MW Norris, *Local Government in Peninsular Malaysia* (Farnborough, Gower, 1980).

First, in 1965, local government elections were suspended as an emergency measure, and have not since then been reinstated.[55] At the same time a Royal Commission of Inquiry on Local Authorities was established, which reported in 1968 (the Nahappen Report) recommending the continuance of local elections and a reduction in the number of local authorities. Unfortunately the proposed reforms were overtaken by the May 13 episode of 1969. In 1971 the Development Administration Unit (DAU) of the Prime Minister's Department rejected the Nahappen Report's recommendation for reinstating local elections, arguing that elected local government, which facilitated the domination of the haves over the have-nots, and provided for 'over-democratised over-government at the local level', was no longer consonant with the objectives of the developmental state.[56]

The passing of the main statute, the Local Government Act 1976 (LGA), was the second major reform, designed to implement the other main recommendation of the Nahappen Report. The LGA, preceded in this by the Local Government (Temporary Provisions) Act 1973, regularised local authorities in Malaya, which had by 1976 grown in number from 289 in 1957 to an unwieldy 373, in five different categories, by 1973. With implementation of the legislation during 1973–88, and an equivalent exercise in Sabah and Sarawak, the total number of local authorities in the whole of Malaysia was eventually reduced to 138 and the categories to three: municipal councils, city councils, and district councils. At present there are 151 local authorities, of which 39 are municipal councils, and 12 are city councils, which are led by a *Datuk Bandar* (Mayor).[57]

Currently more than two thirds of Malaysians live in urban areas, and these correspond to Malaysia's 'local government areas', that is, those areas that have local authorities as defined by the LGA. Rural areas are under the authority of District Councils, which are still administered with respect to local functions by the colonial system of District Officers

[55] Elections were suspended by the Emergency (Suspension of Local Government Elections) Regulations 1965. The Local Government (Temporary Provisions) Act 1973 abolished all elected local authorities and gave the power to appoint local authorities to the State Governments; see now Local Government Act 1976, s 15; and see P Tennant, 'The Decline of Elective Local Government in Malaysia' (1973) 13 *Asian Survey* 347.

[56] J Saravanamuttu, 'Act of Betrayal: The Snuffing out of Local Democracy in Malaysia', *Aliran Monthly 2000*, aliran.com/archives/monthly/2000/04h.html.

[57] For full information on these, see www.lawyerment.com/guide/gov/Local_Authorities.

(DO), who are appointed by, and are responsible to, either the State Government or the Federal Government, depending on the State in which the authority lies. The DOs are Presidents of the district councils, which are advised by various committees of specialists. The districts have never had representative local government; indeed they are not even regarded as being part of the system of local government as such under the LGA. Nonetheless, they perform the same functions as municipal and city councils.

Local government is the lowest level of Malaysia's multi-layered system of government, employing only 7 per cent of public employees. Nonetheless, local government functions such as development control, public housing, parks and public places, and public nuisances are an extremely important aspect of urban living and the environment. Local councils consist of between 8 and 24 persons and are appointed by the State Governments from amongst prominent citizens resident in the locality,[58] and they therefore tend to reflect the interests of the party or coalition in power at the State level. With regard to Kuala Lumpur, since it is a Federal Territory the *Datuk Bandar* is appointed by the Federal Government for a period of five years, and the Dewan Bandaraya Kuala Lumpur (KL City Council) is placed under the Prime Minister's Department.[59] The National Local Government Council, comprising Federal and State appointees and set up under Article 95A of the Constitution, coordinates policy for the 'promotion, development and control of local government' and the administration of local government law.

Local authorities derive their revenue from rents, fees for services, and licences (about 32 per cent); State and Federal Governments by fiscal transfers, for example, for road maintenance or development projects (about 17 per cent); and local taxation in the form of property assessments or the equivalent (about 51 per cent). Fiscal transfers in the form of equalisation grants are made to local authorities by the Federal Government, but in general according to statistics of the Ministry of Housing and Local Government, these represent only about 10 per cent of the shortfall in revenue against local authorities' assessed needs.[60]

[58] LGA, ss 3, 13.

[59] Federal Capital Act 1960, rev 1970, ss 4, 7.

[60] UNESCAP, 'Country Paper: Malaysia', *Local Government in Asia and the Pacific: A Comparative Study*, www.unescap.org/huset/lgstudy/country/malaysia/malaysia.html (1999).

Local authorities are also empowered to borrow money from State and Federal Governments and financial institutions. The result of lack of adequate resourcing has been an understandable emphasis on maintaining services rather than on development and response to changing needs. Little has been done to improve provision of services at similar or lower cost by privatising local government services.[61] There is consequently a deficit in effective enforcement of relevant laws, authorities seemingly unable in many ways to fully utilise their powers. One particular problem that seems capable of being easily addressed is that, since local government employees do not form part of the public service as such, but are simply employees of the local authority in question, they cannot simply be transferred to other local authorities. Thus meritorious employees can get stuck at middle levels of promotion for years, there being few opportunities for promotion, and may leave the service for better prospects elsewhere; mediocre employees on the other hand tend to remain where they are.[62]

Another problem with the local government system is its secrecy. In February 2006 even a federal minister was moved to call local government authorities 'secret societies' because of

> the lack of transparency and accountability, highlighted by public concern over mismanagement, wastage of public funds on overseas junkets under the pretext of study tours, approvals for deforestation of land causing untold damage to the environment, lack of enforcement, bribery and corruption in local townships.[63]

Even though the meetings of local authorities are open to public scrutiny, they have the option to make the minutes secret. Committee meetings are even more inaccessible because there is a presumption of secrecy.[64] A study of public participation in the preparation of Petaling Jaya's Structure Plan in 1996 revealed that even during a process of statutory public consultation, so little information was actually released that it was difficult for the public to produce strong and constructive

[61] Ahmad Tory Hussain and Malike Brahim, 'Administrative Modernisation in the Malaysian Local Government: A Study in Promoting Efficiency, Effectiveness and Productivity' (2006) 14(1) *Pertanika Journal of Social Sciences and Humanities* 51.

[62] UNESCAP, above n 60.

[63] Cited in PG Lim, 'Elected Government Should be Considered Again by Malaysia', *City Mayor Politics*, 20 February 2006, www.citymayors.com/politics/malaysia_locdem.html.

[64] LGA, ss 23, 27.

criticisms.[65] The lack of a substantive right to demand information and the existence of laws that actually limit access to information are serious concerns in local government, and indeed other, contexts. Hopefully a current trend towards freedom of information will go some way to alleviating these difficulties.

Without either elections or access to information regarding local authority decision-making, it is extremely difficult for members of the public to determine whether local authorities are acting in the public interest. Since many urban concerns (particularly public nuisances and planning issues, but also the provision of environmental services) are under the control of local government, the State Governments' attitude towards local government becomes an important factor. The absence of electoral or any form of accountability, and the general fiscal weakness of local authorities, indicate that the State Governments regard local authorities as minor instruments of policy rather than as the dynamic and autonomous development agencies they could be.

This position is disappointing when it is considered that the suspension of local elections was implemented initially only because of the Indonesian confrontation with Malaysia in 1964–65: the Royal Commission had actually recommended not only the retention of local government elections, but their extension to all local government areas. The May 13 incident in 1969 led to the permanent (as opposed to emergency) abolition of local government elections by the Local Government (Temporary Provisions) Act 1973. In view of huge changes socially, economically and politically since that time, one would have thought the case for reinstatement of local elections to be overwhelming; and indeed the case for restoring them has never fallen silent. The urban electorate is now highly educated and cosmopolitan. It is also highly critical of government, which may explain the failure to return to elected local government. Experience of local democracy even in the 1950s and 1960s indicates that control of local authorities would probably tend to fall to opposition parties, whose support tends to be concentrated in urban areas, which are local government areas under the LGA.[66] It seems that government has not considered that

[65] AJ Harding and Azmi Sharom, 'Access to Environmental Justice in Malaysia (Kuala Lumpur), ch 5 of AJ Harding (ed), *Access to Environmental Justice: A Comparative Study* (Leiden, Martinus Nijhoff, 2007).

[66] eg, in the 1962 local council elections in Perak, an opposition party, PPP, won 57 per cent of the votes and 112 of the 150 seats contested in the Kinta District, even though the BN had won the federal election by a large margin: see Saravanamuttu, above n 56.

local politics might act as a safety valve releasing tension in national politics. In any event the lack of accountability ensuing from lack of elections is great. For example, even now most local authorities do not produce annual public financial accounts or activity reports. The conclusion of Tennant as long ago as 1973 that 'elective local government was a late colonial intrusion which did not flourish in the Malaysian political system'[67] seems as apposite now as it was almost 40 years ago; but perhaps not for much longer. Now that, following the 2008 elections, some States are controlled by the PR, those States wish to reinstate local elections; however, since the Local Government Act 1976 (LGA) definitively abolished local elections, the only recourse is to raise the issue with the NCLG with a view to national legislation. A study in 2000 indicated that 72 per cent of voters favoured a return to elected local authorities.[68]

VII. CONCLUSION

We have seen in this chapter how the 'measure of autonomy' that the Constitution affords the States, although not overtly altered by constitutional amendment, has been subject to political control and even manipulation by the developmental state at the centre. The opportunities for standardisation of the law across the Federation have also been fully exploited, and even in administrative and financial affairs the Federation holds sway. The States are, as a result, only just able to maintain their measure of autonomy under the prevailing federal system. This applies even to the States with asymmetric powers – Sabah and Sarawak. The ineluctable domination of territorial government by the developmental state seems, however, to be waning. The 2008 elections may or may not prove to have made a difference constitutionally at the Federal level, as it is too early to say; but at the State and local level that difference is already apparent. Territorial governance has been ventilated and re-examined in leading States such as Selangor and Penang. If local elections are reinstated at least in urban areas, then the answer to the question, can Malaysia sustain three levels of democratic government, seems to be: yes for urban areas, but probably no for rural areas. If so, then a release of energy and participation at all three levels seems the likely outcome.

[67] P Tennant, 'The Decline of Elective Local Government in Malaysia' (1973) 13 *Asian Survey* 347, 365.

[68] ibid.

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6

Human Rights in an Authoritarian State

Introduction – Emergency Powers and National Security Laws – Individual Liberty and Preventive Detention – *Suhakam*: The Human Rights Commission of Malaysia – Human Rights: the Indigenous Perspective – Conclusion

I. INTRODUCTION

'Ada-kah pernah telaga yang keroh mengalir ayer-nya jerneh?'
(Will you ever get clear water from a dirty well?)

DURING HIS PERIOD in the office of Prime Minister, Dr Mahathir Mohamad argued strenuously against Malaysia's adoption of Western liberal democracy in a manner that spoke directly of human rights. He emphasised the claims of stability and authority over those of democracy and individual rights, painting the West as both in thrall to extreme individual licence, and making use of human rights to establish a form of hegemony over the developing world. Malaysia on the other hand was both culturally attuned to stricter social values and requiring efficient implementation of development as a priority over human rights.[1] Not everybody shared this view. Quite apart from civil society organisations and the legal profession, Mahathir's own Deputy Prime Minister at the time, Anwar Ibrahim took a contrary

[1] AJ Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge, Cambridge University Press, 2001) chs 1 and 2; Khoo Boo Teik, *The Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (Shah Alam, Oxford University Press, 1995) 42–47.

view of human rights, identifying them as both universal and evident in Islamic and all cultures.[2] Now that Malaysia is no longer regarded as a developing country, the logic of the Asian values argument should at least have led to an emphasis on some version of human rights rather than their rejection. This is indeed what has occurred.

As a country front and centre in the 'Asian values versus universal human rights' debate, Malaysia generally received a bad press from international bodies such as the ICJ, Amnesty International, and Human Rights Watch both for its official stand on human rights in general, and for its actual practice of human rights with regard to preventive detention and restrictions on civil liberties, and, more recently, for restrictions on freedom of religion (for the latter, see chapter eight). Moreover, unlike many comparable Asian countries, it has not acceded to widely accepted international instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – this is usually justified on the basis of the Asian values approach or on the basis that the rights contained in these instruments are already guaranteed under Malaysian law. The Convention on the Elimination of all Forms of Discrimination Against Women, on the other hand, was ratified by Malaysia in 2005.[3]

Undoubtedly, the Asian values debate has affected adversely and probably delayed the improvement of human rights in Malaysia. The question therefore now arises whether the Asian values argument still represents the position of the Malaysian Government some years after the close of the Mahathir period. His successor, Abdullah Badawi, had previously, as Foreign Minister, stated the Asian values position at the 1993 Vienna Conference on Human Rights, saying that the rights of the individual were 'certainly not in splendid isolation from those of the community', and that excessive individualism was an agent of moral decay which weakened the social fabric.[4] At the same time he did not reject the need to 'continuously strive for the upholding of human dignity, and the essential worth of the human person'. Subsequently the 1993 Bangkok Declaration,

[2] Anwar Ibrahim, *Asian Renaissance* (Kuala Lumpur, Times International, 1996).

[3] However, Malaysia has derogated from some provisions due to conflict with the Constitution and Islamic law; art 8 of the Constitution was amended in 2001 to prohibit gender discrimination. Malaysia has however also ratified the Convention on the Rights of the Child.

[4] 'Statements by Representatives of Asian Governments at the Vienna World Conference on Human Rights', in James TH Tang (ed), *Human Rights and International Relations in the Asia-Pacific* (London, Pinter, 1995) 213, 236.

signed by 34 Asian countries including Malaysia, decried the emphasis on civil liberties and emphasised the importance of the basic needs of Asian people in terms of socio-economic rights.[5] The present Prime Minister, Najib Tun Razak, in relation to the Bersih rally (July 2011) made statements reflecting the Asian values approach, indicating that such protests (in fact peaceful and orderly) could not be afforded as they would create chaos on the streets.[6] As we will see in a later section, the Human Rights Commission of Malaysia (for which the Malay acronym is 'Suhakam') as the official arm of the state responsible for human rights, has also given some emphasis to socio-economic rights in its practical human rights work; as Whiting points out, this is a logical response to the privileging of development over civil liberties, which is a preference of those who advocate an Asian-values approach to human rights.[7]

The prevailing theory nonetheless remains uncertain, oscillating between on the one hand a refusal for the time being to accept international human rights as binding norms, and maintaining on the other hand that human rights are well understood and respected in Malaysia, their fulfilment in practice being a governmental objective. It is clear that the 'Asian values' approach is far less stridently advanced than it was in 1990s, and the advent of the ASEAN human rights mechanism[8] has also dampened enthusiasm for a distinctively Asian-values-based approach.

A lack of real enthusiasm for human rights was apparent even from the beginning. In drafting the *Merdeka* Constitution the Reid Commission proceeded on the rather unhelpful basis that, while fundamental rights were firmly entrenched in Malaya, there were 'vague apprehensions about the future' and there was 'no objection' to including them in the

[5] Thio Li-ann, 'Panacea, Placebo or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (Suhakam)' (2008–2009) 40 *George Washington International Law Review* 1271, 1286.

[6] 'Political Affray in Malaysia: Taken to the Cleaners', *The Economist*, 14 July 2011, www.economist.com/node/18959359.

[7] A Whiting, 'In the Shadow of Developmentalism: The Human Rights Commission of Malaysia at the Intersection of State and Civil Society Priorities', and Thio Li-ann, 'Taking Development Seriously: Beyond the Statist Rhetoric of the Human Right to Development in ASEAN States', in C Raj Kumar and DK Srivastava (eds), *Human Rights and Development: Law, Policy and Governance* (Hong Kong, LexisNexis, 2006).

[8] The ASEAN Intergovernmental Commission on Human Rights, for which see www.asean.org/22769.htm.

Constitution.[9] By the standards of the 1950s, with India's Constitution looming large as a state-of-the-art version of human rights, and in light of the Commission's unwillingness to look carefully at this issue, it was hardly surprising that the *Merdeka* Constitution simply, for the most part, adopted a somewhat attenuated version of the Indian provisions. As we saw in chapter one, the debate that followed concentrated on judicial review rather than on the actual content of the human rights provisions.

The fundamental liberties in Part II of the Constitution include the right to life and personal liberty; freedom from slavery and forced labour; protection against retrospective laws and double jeopardy; equality before the law; the right of freedom of movement; freedom of speech, assembly and association; freedom of religion; and the right to property.[10] The Indian Constitution provided for judicial review of any legislative restriction on freedom of expression, assembly and association on the basis that such restrictions had to be reasonable. Article 10 of the *Merdeka* Constitution made no such provision, merely listing a series of broad grounds upon which Parliament may restrict these rights if it 'deems it necessary or expedient'. These grounds include security of the Federation, public order, morality, and incitement to any offence.[11] As a result the Constitution substantially restricted judicial review of legislation, at least as concerns freedom of speech, assembly and association. We have seen in chapters two and three how these rights have been restricted in practice. However, we will also see in chapter seven that recently the courts have redressed the balance, scrutinising restrictions on Article 10 rights by importing the concept of reasonableness.

The Constitution was also passed during the emergency of 1948–60, a context which deeply affected the contemporary relevance of human rights. Emergency powers were provided for under Article 150 as an exception to most of the human rights provisions. In addition Article 149, in providing for special powers against subversion, gave justification for substantial restrictions on human rights even under *normal* circumstances. Taken together, these special powers, already drawing human rights narrowly by 1957 standards, barely begin to fulfil present-day expectations. They also amount, almost, to the entrusting of human

[9] *Federation of Malaya Constitutional Commission, 1956–7 Report* (Kuala Lumpur, Government Printer, 1957) paras 161–62.

[10] Arts 5–13.

[11] Art 10(2).

rights to the mercy of the executive power. It was inevitable that the rights set out in the Constitution would be eroded over time as the developmental state increased its power, as we have seen in chapter two. Indeed with most of the provisions of Part II one finds that the opposite of rights is the result: equality becomes in practice discrimination, freedom becomes in practice prohibition. The human rights provisions hardly even needed to be amended to achieve this result, so broad were the permissible restrictions. A notable exception to this is Article 10 itself which, as discussed in chapter two, while providing for potentially large restrictions, was also drastically amended by the *Rukunegara* amendments to restrict public speech further with regard to the so-called 'sensitive issues'.

This chapter does not seek to present an exhaustive analysis of each right provided in the Constitution. Instead, as a means of gauging the theory and practice of human rights in Malaysia, we will take three different examples and three different approaches. First, we will examine the fate of a particular provision, Article 5, which provides for the right to life and personal liberty, in the light of the developmental state's attempts to curtail individual liberty on the basis of national security considerations; here emergency powers will also need to be examined. Secondly, we will examine human rights from an institutional perspective by looking at Suhakam as a major initiative in human rights development. Thirdly, we will examine human rights from a minority, non-metropolitan perspective by looking at the rights of Malaysia's indigenous people, where we go beyond the provisions of Part II of the Constitution, presenting a more positive and holistic picture of imaginative application of human rights in an area where development and ethnicity, the two main themes of this book, meet head on.

II. EMERGENCY POWERS AND NATIONAL SECURITY LAWS

> 'Jikalau tidak di-pechah royong, di-mana boleh dapat sagu'
>
> (If the palm-trunk is not broken, how is the pith to be extracted?)

In this section we examine emergency powers which lie at the very fault line where human rights meet the naked power of the developmental state. Personal liberty in Malaysia depends to a large extent on the scope and use of these powers.

Although provision for extensive emergency powers overriding certain constitutional provisions is by no means unusual,[12] the operation of the constitutional system in Malaysia has been deeply affected by this regime of exception.[13] It will be recalled that the Government declared an emergency throughout Malaya in June 1948 to counter the communist insurgency. Even as the Constitution was being drafted, Malaya was still in the throes of this emergency – in effect a civil war – thereby colouring the entire approach to the constitution-making process and human rights. The inclusion of Article 149 allowing preventive detention, in addition to Article 150, made it constitutionally possible for the regime of exception to transform into a regime of what could be termed alternative normality; in other words emergency-type powers could and did become a permanent alternative, as opposed to a time-limited exception. Malaysia's development state has used this regime of exception to suppress criticism of Government policies, along with dangerous speech in Malaysia's fragile public spaces. Emergency and national security powers have therefore operated notably as a major inhibition to free speech as well as an incursion on liberty of the person.

From 1948, and especially following the assassination in 1951 of the Governor, Sir Henry Gurney, the CPM pursued a policy of guerrilla warfare, striking suddenly and selectively, and then melting into the inaccessible jungle, assisted by sympathetic rural Chinese. This kind of insurgency proved extremely hard to combat conventionally, and the colonial authorities resorted to some extreme measures. Preventive detention for periods of up to two years was authorised, along with the creation, under the 'Briggs Plan', of 'new villages' to contain the rural Chinese population, cutting off the terrorists from their support systems. In addition punishments were meted out to whole communities suspected of harbouring terrorists or refusing to cooperate with the authorities.[14] This emergency lasted beyond *Merdeka* up to 1960, and terrorist incidents continued to occur sporadically right up until 1989, when the CPM, by then reduced to a pathetic, half-starved remnant, negotiated a settlement with the Malaysian Government. The emergency was extremely costly in terms of human life, property damage, and damage to normal life – and of course to the rule of law and human rights.

[12] V Ramraj and A Thiruvengadam (eds), *Emergency Powers in Asia* (Cambridge, Cambridge University Press, 2009).

[13] CV Das, *Governments and Crisis Powers: A Legal Study on the Use of Emergency Powers* (Kuala Lumpur, Malaysian Current Law Journal, 1996).

[14] ibid, 101–07.

In many ways the 1948–60 emergency set the pattern not only for the conduct of future emergencies, but even, in some respects, for what became regular laws, such as the Internal Security Act 1960 and the Societies Act 1966. Even since *Merdeka*, no less than four emergencies have been proclaimed – in 1964, 1966, 1969 and 1977; the last three proclamations were officially regarded as still in force until they were revoked by Parliament in November 2011 (the Government takes the view that the 1964 Proclamation was impliedly revoked by the 1969 Proclamation). Only between July 1960 and November 1964 had there been no legal state of emergency, in spite of the vastly improved security and public order condition of Malaysia over the last four decades. Thus the rule of regular law has had to compete, until very recently, with a system of laws which, although not often invoked, exists as a legal alternative for a range of issues, including criminal prosecutions.

The Constitution confers on the Government broad powers under Article 150 to proclaim an emergency if the Government is satisfied that a grave emergency exists whereby the security, or the economic life, or public order, in the Federation or any part thereof is threatened. The scope of emergency powers under Article 150 was drawn widely by the Privy Council in *Stephen Kalong Ningkan v Government of Malaysia*, as we saw in chapter five, stressing that an emergency 'is not confined to unlawful use or threat of force in any of its manifestations . . . [but] is capable of covering a very wide range of situations and occurrences'.[15] Furthermore, in 1981 Article 150 was amended so that a proclamation can be issued before the actual occurrence of the threatened event, by way of preventive action, if the Government is satisfied that there is imminent danger of its occurrence.[16] The same amendment made it permissible to issue proclamations on different grounds or in different circumstances, regardless of the existence of other proclamations; thus two or more emergency proclamations may validly overlap, chronologically or even geographically, and a later proclamation does not impliedly revoke an earlier one. The result of all this, and of further judicial

[15] *Stephen Kalong Ningkan v Government of Malaysia* [1968] 2 MLJ 238.

[16] Constitution (Amendment) Act 1981, A514.

pronouncements, is a breathtakingly wide power to proclaim and act on an emergency proclamation.[17]

The immediate consequence of an emergency proclamation is that the Government obtains the power under Article 150 to legislate by ordinances having the same effect as an Act of Parliament, except when both Houses of Parliament are sitting, and provided the Government is satisfied that circumstances exist which render it necessary to take immediate action. This power extends to 'any matter with respect to which Parliament has power to make laws, regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament'. Parliament also has the power to pass emergency laws following a proclamation. The provisions of emergency laws cannot be invalidated on the ground of inconsistency with any provision of the Constitution, except those relating to Islamic law; Malay custom and native custom in Sabah or Sarawak; religion; citizenship; or language.[18] Thus the entire body of fundamental rights is effectively in suspension during an emergency in the sense that any legislation pursuant to it can override fundamental rights.

Laws passed under Article 150 must eventually be laid before both Houses of Parliament and, if not sooner revoked, cease to have effect if annulling resolutions are passed by both Houses. This occurred, as we have seen, in November 2011. This is without prejudice to anything previously done by virtue of the proclamation or ordinance, or to the executive power to issue a new proclamation, or promulgate any further ordinances. In practice no such parliamentary resolutions were passed until November 2011, so that emergency laws were still in force unless they could be argued to have lapsed as a result of changed circumstances, an argument which was not resolved by the Malaysian courts before being purportedly pre-empted by an ouster clause introduced in 1981 (see below).

Emergency laws have been a constant preoccupation of civil society as well as Suhakam and international commentators.[19] The notorious

[17] Das, above n 13, ch 5.

[18] Art 150(6A).

[19] For a description of actual experience of preventive detention in Malaysia, see Kua Kia Soong, *445 Days Behind the Wire: An Account of the October '87 ISA Detentions* (Kuala Lumpur, Research and Resource Centre, Selangor Chinese Assembly Hall, 1989). For an international response, see N Fritz and M Flaherty, *Unjust Order: Malaysia's Internal Security Act* (New York, The Joseph R Crowley Program in International Human Rights, Fordham Law School, 2003).

Emergency (Securities Cases) Regulations 1975 (ESCAR) were particularly opposed by the legal profession (see chapter seven). These Regulations amended the procedures for criminal trials involving national security (certified by the Attorney-General to be such) in several respects. Notably they removed judicial discretion in sentencing; provided that multiple accused and offences could be tried together even if not connected; and permitted hearsay evidence, which could be given by anonymous witnesses and awarded the same weight as direct evidence. When a juvenile was given a mandatory death sentence under the then new ESCAR provisions (for possession of a firearm in a situation where national security was not in fact implicated), the Bar convened an Extraordinary General Meeting on 18 October 1977 at which in an unprecedented step members resolved to boycott all ESCAR cases because provisions were so clearly 'repressive and against the rule of law'.[20]

Given the great extent and alarming potential of these powers the question arises whether the courts are able to act as any kind of check on their exercise. In 1979 in *Teh Cheng Poh v Public Prosecutor*[21] the Privy Council, in its last and most notable judgment on the Malaysian Constitution, relating to ESCAR, held that, once Parliament had sat, the executive power to make regulations under emergency ordinances, as well as the power to enact ordinances, lapsed. Thus all regulations under the 1969 Emergency Proclamation made since February 1971, when Parliament was finally summoned, were invalidated. If it were otherwise, the Privy Council noted, the Cabinet could 'pull itself up by its own bootstraps' simply by calling ordinances 'regulations'. In consequence Parliament passed the Emergency (Essential Powers) Act 1979, retroactively operative from 20 February 1971, to validate the regulations, including ESCAR, and all actions taken thereunder, and confer on the Director of Operations all the powers granted under Emergency Ordinance No 1 of 1969, which had effectively given him plenary legislative and executive power. As a result of *Teh Cheng Poh* the Constitution was amended in 1981 so as to introduce into Article 150 an ouster clause purporting to deprive the courts of any jurisdiction to challenge or call into question, and to make final and conclusive the Government's satisfaction with regard to the making of a proclamation and the promulgation or continuance in

[20] [1978] 1 MLJ v.

[21] Discussed further in ch 7.

force of an emergency ordinance. The ouster clause is alarming for its implications for the entire constitutional order. It means nothing less than that the Government can, unobstructed by threat of legal challenge, proclaim an emergency, make law pursuant to it, and continue to give effect to such laws, irrespective of the situation, the reasons, or any change in circumstances, or any effect on human rights.

The consequence of this position regarding judicial review is that the only check on the executive, and the only safeguard for human rights, is Parliament itself. Parliament too, however, is equally ineffective in this regard. Not only does the executive have a majority in Parliament, but since the 1981 amendment there is not even an obligation on the executive to summon Parliament.[22]

The surprising fact is that Malaysia has been under emergency law for most of its existence. Paradoxically, 'normality' has been the exception, and the regime of exception the norm. Emergency laws operate in parallel with the regular constitutional and legal system. This is not to say that Government habitually acts under emergency law and ignores regular law and fundamental rights: quite the opposite. What it does mean is that acting under the rule of ordinary law has become optional in some cases. For example, corruption prosecutions can be taken forward under emergency law which is still in force.[23] What is more important, the full rigour of the regime of exception with its panoply of drastic powers is capable of being invoked at any time.

As if the continuation of emergency powers was not enough, the Constitution at Article 149 also provides for the possibility, *irrespective of any emergency*, of the passing of legislation on such bases as a threat of organised violence; the excitement of disaffection against the Government; the promotion of feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; the procurement of alteration, otherwise than by lawful means, of anything by law established; actions prejudicial to the maintenance or the functioning of any supply or service to the public; or actions prejudicial to public order or security. Any provision of such legislation designed to

[22] Above n 16.

[23] eg, Anwar Ibrahim was tried in 1998–99 on five counts of corrupt practices under the Emergency (Essential Powers) Ordinance No 22 of 1970, s 2(1): Wu Min Aun, 'The Saga of Anwar Ibrahim', in AJ Harding and HP Lee (ed), *Constitutional Lanmarks in Malaysia: The First 50 Years, 1957–2007* (Kuala Lumpur, LexisNexis, 2007).

stop such actions may be valid even if inconsistent with fundamental rights provisions or contrary to the division of state and federal powers. It is under this provision that Parliament has passed the Internal Security Act 1960, and the Dangerous Drugs (Special Preventive Measures) Act 1985, both of which allow for preventive detention.

The Malaysian Government has made full use of both kinds of security powers in ways that have been controversial and highly deleterious to observance of fundamental rights, the rule of law, and the integrity of the constitutional order.[24] This is particularly true of the Internal Security Act, as we will see.

Internal threats were of course apparent with violent breakdown in social order in 1969 and potentially occurrence of the same situation in 1987, when heightened ethnic tensions came close to sparking riots; Operasi Lalang (Weeding Operation) was mounted to detain those whose were raising tensions, along with a variety of others who were simply opposed to the Government.[25] It now seems clear that both in 1969 and in 1987 there was more than an element of exploitation of inter-ethnic strife by political factions for their own ends. For this many entirely innocent people experienced many months of detention. It is a sign of increased concern about human rights that on 24 November 2011 the emergency proclamations were at last revoked by Parliament on the Government's motion, entailing the eclipse of hundreds of emergency laws.[26]

III. INDIVIDUAL LIBERTY AND PREVENTIVE DETENTION

> 'Baharu bertunas sudah di-petek'
>
> (The tree had barely produced shoots when they were plucked).

In this section and against the background of national security laws we look at individual liberty as provided for under the Constitution. Here

[24] Das, above n 13, ch 6; CV Das, 'The May 13 Riots and Emergency Rule', in Harding and Lee, above n 23; Khairil Azmin Mokhtar, 'The Emergency Powers (Kelantan) Act 1977', ibid; HP Lee, 'Constitutionalised Emergency Powers: A Plague on Asian Constitutionalism?', ch 14 of Ramraj and Thiruvengadam, above n 12.

[25] Kua Kia Soong, above n 19.

[26] 'Emergency Proclamations Lifted, EO Void', 24 November 2011, www.freemalaysiatoday.com/2011/11/24/emergency-proclamations-lifted-eo-void.

the question is: how does such a guarantee work in practice in light of these overriding laws?

Article 5(1) provides that '[n]o person shall be deprived of his life or personal liberty save in accordance with law'. Article 5 goes on to protect the life and liberty of the person by providing for rights in the criminal process: the right to habeas corpus; to be informed of the reasons for arrest and have access to counsel; and to be brought before a court within 24 hours of arrest.[27] Yet as with many other Malaysian fundamental rights provisions, Article 5 in effect takes away with one hand what is proffered with the other. As is indicated above, the Constitution provides the Government and Parliament with the means to circumvent Article 5 (in addition to most other rights) where a threat of organised violence (Article 149) or an emergency (Article 150) is in question. Both of these latter provisions allow Article 5, as well as other fundamental rights provisions, to be overridden, and in practice it has been overridden by a number of pieces of legislation such as the Internal Security Act 1960 (ISA) and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO).

Article 5 is the most frequently litigated of the fundamental rights provisions. The most important issue in practice is whether Article 5(2) (the right to habeas corpus) and other rights in Article 5 can be used to challenge a preventive detention order made under the ISA or EPOPCO. More than 50 years after its enactment, in September 2011, the Government finally announced that the ISA, as well as all emergency proclamations and laws, would be repealed.[28] In October 2011 two oppressive, although much less used laws – the Restricted Residence Act 1933 and the Banishment Act 1959 – were repealed, followed by the revocation of all the emergency laws in November 2011. By the time this book appears the law on personal liberty may look very different from how it has generally looked since preventive detention was introduced in 1930.[29] However, it is not presently clear whether the ISA will be replaced or, if so, with what. The ISA has been the main site for the definition of, and the struggle over, human rights, and has also created a tension in which the judiciary has been caught between the authoritarian state, on the one hand, and an outraged civil society (many of whose

[27] Art 5(2)–(4).

[28] Malaysian Bar, 'PM Cites Factors for ISA Repeal', 19 September 2011, www.malaysianbar.org.my/legal/general_news/pm_cites_factors_for_isa_repeal.html.

[29] Emergency Enactment 1930 (FMS).

members have had direct experience of preventive detention) on the other.[30]

The approach generally taken by the judiciary in habeas corpus cases has, we will see, been to eschew direct challenge to the Government on the issue of substantive justification for the detention, while implementing a high level of scrutiny with regard to the procedure adopted.

The ISA's most important provision is section 8(1), which provides that

> if the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order directing that person to be detained for any period not exceeding two years.

The two-year period can be extended an indefinite number of times.[31] The detainee is entitled to know the grounds for the detention and the allegations of fact upon which the order is based, and to be served with a copy of the order.[32] The detainee also has the right to make representations before an Advisory board within three months of the detention, but the recommendation of the Advisory board is not binding on the Minister, and the three month period can be extended.[33] A detainee is also entitled to a review of his or her case by the Advisory Board every six months during the detention period.[34]

A good example of the extensive use of the ISA is Operasi Lalang in October 1987. Following the escalation of acute racial tensions in Kuala Lumpur over the issue of Chinese education, about 109 persons of different political and ethnic groups, including notable opposition figures such as Lim Kit Siang were detained for periods of several months or longer. The incident caused an outcry both in Malaysia and internationally. It was said that the Government had used racial tensions, which undoubtedly existed, to crack down on its opponents regardless of their responsibility in the matter. At the same time many Malaysians considered this crackdown as the only alternative to serious racial riots, and the

[30] For discussion of the case law, see Kevin YL Tan, 'The Law and Practice of Preventive Detention: Recent Developments in Malaysia and Singapore', ch 10 of Wu Min Aun (ed), *Public Law in Contemporary Malaysia* (Petaling Jaya, Longman, 1999).

[31] s 8(7).

[32] Art 151(1)(b); ISA, s 11.

[33] Art 151(1)(a); ISA, ss 11–12.

[34] ISA, s 13.

spectre of 'May 13' was, as on other occasions, invoked to justify the crackdown.[35]

The courts have heard numerous habeas corpus applications arising from Operasi Lalang and other invocations of the ISA and emergency legislation. In general they have refused to investigate the allegations of fact relied on by the Government, as well as the sufficiency of those facts in justifying the decision to detain. This was established in the seminal case of *Karam Singh* in 1969,[36] and reaffirmed in *Theresa Lim Chin Chin* in 1988,[37] where Salleh Abas LP stated that

> the court will not be in a position to review the fairness of the decision-making process by the police and by the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision . . .

a result which was described by him as adopting a 'subjective' as opposed to an 'objective' test of ministerial satisfaction. In another case decided at about the same time the Supreme Court drew a distinction between the grounds for the detention and allegations of fact, stating that the former but not the latter were reviewable.[38] In *Tan Sri Raja Khalid*[39] it was alleged that, acting as Managing Director of a consultancy company and as a member of the loans committee of a bank in which large numbers of members of the armed forces had an interest, the detainee had caused substantial losses to the bank, thereby causing feelings of anger and agitation among members of the armed forces. It is hardly surprising that habeas corpus was granted in this extraordinary case, but what is surprising is that, in view of the case law, the decision was based on the absence of any actual evidence that the detainee had acted in any manner prejudicial to security; in effect the court applied the objective test. To similar effect is the case of *Jamaluddin Othman*, discussed in chapter seven, where the court held that the ISA could not be used to detain a person who was attempting to convert Muslims to Christianity.[40]

[35] Kua Kia Soong, *The Malaysian Civil Rights Movement* (Petaling Jaya, SIRD, 2005) ch 7.
[36] *Karam Singh v Minister for Home Affairs* [1969] 2 MLJ 129.
[37] *Theresa Lim Chin Chin v Inspector-General of Police* [1988] 1 MLJ 293.
[38] *Minister for Home Affairs v Karpal Singh* [1988] 1 MLJ 468.
[39] *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182.
[40] *Minister for Home Affairs v Jamaluddin bin Othman* [1989] 1 MLJ 418.

However, the issue was not completely resolved by these cases. A notable Singapore Court of Appeal case in 1989[41] established an *objective test* of ministerial satisfaction under Singapore's ISA, following which the statute was amended in such a way as to prevent judicial review. The Malaysian Parliament followed the example of Singapore's Parliament in passing the Internal Security (Amendment) Act 1989, substituting a new section 8B, an ouster clause, which prohibited judicial review of any act or decision of the *Yang di-Pertuan Agong* or the minister in the exercise of their powers under the Act, save in regard to compliance with any *procedural* requirement in the Act governing such act or decision.

As a result of this amendment, in considering habeas corpus applications both under the ISA and other laws providing for administrative detention, the judiciary has concentrated on procedural defects. They have taken the view that, where the liberty of the subject is involved, the statute must be construed strictly with regard to procedure.[42] On the whole they have indeed been very strict. Procedural defects have been held to include the following: delay of more than eight months between the alleged facts and the making of an order; a break of nine and a half hours in the chain of authority to detain; failure to interview the detainee during a 60-day period of detention; failure to inform the detainee properly of his right to make representations by inadequate translation of the forms into Tamil; failure by the Advisory board to consider the detainee's representations within the three-month period; the Minister taking into account an Advisory Board recommendation that was made *ultra vires*; failure to detain the detainee in the place specified in the order; refusing access to a lawyer or members of the detainee's family; even failure to serve two copies of the detention order on the detainee, rather than one. However, there are limits even to this degree of scrutiny: a detainee cannot obtain release due to a mere typographical error in the order.[43]

In contrast with the strictness of their approach to procedural issues the courts have been less sympathetic with detainees who suffered actual mistreatment, even though such detainees, by definition, are being detained for security reasons and not because they have committed an

[41] *Chng Suan Tze v Minister for Home Affairs* [1989] 1 MLJ 69.
[42] *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245.
[43] In order to avoid excessive citation of cases supporting these simple propositions, the reader is referred to Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Petaling Jaya, The Star, 2008) 226–32.

offence or merit punishment. Here they have held that the conditions of detention do not go to the legality of the detention itself.[44] Exemplary damages have, however, been awarded in one case of mistreatment during detention.[45]

One of the difficulties with legislation as broad in substantive scope as it is narrow in procedural protection is that there is potentially no limit to the types of cases that can be regarded as coming under it. Although the ISA was designed to combat communist insurgency following the ending of the 1948 emergency, even the courts have recognised in *Theresa Lim Chin Chin*[46] that it is not confined to this threat. In practice, not only has the principle of administrative detention been applied in legislation against drug-trafficking and drug addiction,[47] it has also been used against people forging documents, cloning cell phones, defrauding banks, and spreading Shi'ite teachings. In 1995 the IGP even suggested it be used against persons spreading rumours of vampires.[48] The temptation to see literally any social problem through the lens of the special legal regime, irrespective of individual human rights, seems to have proved irresistible.

Where the courts have considered the meaning of the right to life and personal liberty under Article 5(1), they have been more creative than they have been allowed to be in ISA cases. They have refused, despite many ingenious arguments to the contrary, to hold that a mandatory death sentence is constitutionally invalid under Article 5(1) or otherwise.[49] Nonetheless, the word 'life' has been given a broad construction. It has been held to include employment; livelihood under native customary land rights; the right to live in a healthy, pollution-free environment; one's reputation; and even the right to seek judicial review of an administrative decision.[50]

[44] *Morgan Perumal v Ketua Inspektor* [1996] 3 MLJ 281; *Rajeshkanna Marimuthu v Tuan Haji Abdul Wahab* [2004] 5 MLJ 155.
[45] *Abd Malek bin Hussin v Borhan bin Haji Daud* [2008] 1 MLJ 368.
[46] *Theresa Lim Chin Chin v Inspector-General of Police* [1988] 1 MLJ 293, 296.
[47] Drugs Dependants (Treatment and Rehabilitation) Act 1983; Dangerous Drugs (Special Preventive Measures) Act 1985.
[48] Kevin YL Tan, above n 30, 309.
[49] eg, in *Public Prosecutor v Lau Kee Hoo* [1984] 1 MLJ 110.
[50] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241; and see Shad Saleem Faruqi, above n 43, 207–08.

Police powers in general have presented considerable difficulties in the context of human rights. In recent years there has been an increasing clamour for police reform,[51] and although reform was promised by Prime Minister Abdullah Badawi, little change has been seen despite a royal commission being established to look into it.

Although one can say on the evidence of the case law referred to in this section that on the whole the judiciary affords fairly good protection, nonetheless reports of police conduct remain extremely worrying. In July 2008, the *Dewan Rakyat* was informed that there were 1,535 deaths in prisons, rehabilitation centres, and detention centres for illegal immigrants between 2003 and 2007 (85 occurred in police lock-ups).[52] Instances of police being accountable or punished in relation to these instances remain very few. There have also been cases involving other enforcement agencies such as the very controversial and tragic case of Teoh Beng Hock, a young party worker who died in 2009 after being questioned while in the custody of the Malaysian Anti-Corruption Agency (MACA). His body was found in the street below the MACA offices. A vocal civil-society campaign was set in motion to challenge the official story that he took his own life. A Royal Commission looked into the matter and reported in the same fashion, but found that Teoh had been 'subjected to aggressive and relentless questioning'. Nonetheless an open verdict was reached by the Coroner and questions still remain.[53]

The Royal Commission on the Police reported in 2005 recommending a raft of fundamental reforms. Lack of government action on this agenda contributed to the resignation of Abdullah Badawi as Prime Minister in 2009. Since then little has been done to address the recommendations which included the setting up of an independent police complaints body.

The impending repeal of the ISA has been demanded for least 40 years, and hinted at by those in power since as long ago as 1997. It is apparent, however, that whatever Parliament decides on this issue, and

[51] Kua Kia Soong (ed), *Policing the Malaysian Police* (Petaling Jaya, Suaram, 2005).
[52] Malaysian Bar, '1535 Deaths in Custody: What are we Waiting for?', 23 July 2009, www.malaysianbar.org.my/general_opinions/comments/1535_deaths_in_custody_what_are_we_waiting_for_.html.
[53] Malaysian Bar, 'RCI: Teoh Beng Hock Committed Suicide (Update)', 22 July 2011, www.malaysianbar.org.my/legal/general_news/rci_teoh_beng_hock_committed_suicide_update.html.

whatever the judicial response, the real question is whether there can be an accompanying change in legal culture amongst enforcement officers and political decision-makers who are used to the exercise of extremely broad and largely unquestioned powers.

IV. *SUHAKAM*: THE HUMAN RIGHTS COMMISSION OF MALAYSIA

'Bergurindam di-tengah rimba'
(Reciting poetry in the middle of the forest)

The setting up of Suhakam represents the most significant positive development in the field of human rights in Malaysia since 1957. Following the Vienna Conference a number of Asian states decided to set up a national institution with responsibility for human rights. In Malaysia the result was the Human Rights Commission of Malaysia Act 1999. Coming as it did during the highly charged political tumult resulting from the arrest and trial of former Deputy Prime Minister Anwar Ibrahim, matters started on the wrong foot as the Bill to create Suhakam was announced only two months before it was introduced in Parliament and was not made public until it was passed. Far from applauding this human rights initiative, civil society organisations expressed dismay at the lack of public participation and suspicion as to what the real motives for the Act were.[54]

As with the general run of such national institutions, the functions of Suhakam are to promote awareness of human rights; advise and assist the Government in relation to legislation and administrative procedure; make recommendations to the Government with regard to accession to international human rights instruments; and to inquire into complaints.[55] Suhakam's specific powers include advising the Government of complaints and recommendation of measures to be taken; studying and verifying infringements of human rights; visiting places of detention; conducting public inquiries into human rights violations; and issuing public statements.[56]

[54] S Sothi Rachagan and Ramdas Tikamdas (eds), *Human Rights and the National Commission* (Kuala Lumpur, Hakam, 1999).
[55] Human Rights Commission of Malaysia Act 1999, s 4(1).
[56] s 4(2).

Given the 'Asian values' ideology frequently propounded in the 1990s by Government leaders in opposition to international human rights, a pertinent and very practical question is, how human rights are defined for Suhakam's purposes. The 1999 Act defines human rights as the 'fundamental liberties as enshrined in Part II of the Constitution'. On the other hand, regard is to be had to the UN Declaration of Human Rights 1948 'to the extent that it is not inconsistent with the Federal Constitution'. It seems therefore that the practical standard is Malaysian law but this does not preclude Suhakam from arguing for adoption or adherence to international norms as a matter of development of law and practice, or to rely on rights which simply fall outside the fundamental rights provisions of the Constitution. Suhakam's own elaboration of human rights in its published materials and programmes[57] takes a universalist rather than a relativist or culturally-specific position in explaining and defining human rights, referring to a range of international instruments including ones Malaysia has not ratified. It adopts a practical definition of human rights that in several respects does indeed go beyond the list of fundamental liberties set out in the Constitution. Examples are native land rights; the right to housing; the right to privacy; the rights of persons with disabilities; and lesbian and gay rights. Suhakam has even investigated water privatisation on the basis that access to water supply is an internationally recognised human right.

A related issue is how Suhakam's activities relate to judicial review. The 1999 Act is quite clear on this. It cannot investigate a matter that is before the courts or where it has already been determined by the courts.[58] In *Vythilingam v Human Rights Commission of Malaysia,* the High Court refused to compel Suhakam to hold an inquiry into a serious incident, the Kampong Medan riots, in which a number of Indian villagers were killed or injured; however the court also facilitated human rights monitoring by deciding that Suhakam can nonetheless hold a watching brief in an appropriate case before the courts, where it suspended its investigation due to expected legal proceedings.[59]

Commissioners are appointed by the *Yang di-Pertuan Agong* on the recommendation of the Prime Minister for a period of three years, which

[57] See www.suhakam.org.
[58] 1999 Act, s 12.
[59] [2003] MLJU 94.

term is renewable once.[60] The Act provides for appointment of up to 20 Commissioners; however, while the last tranche of Commissioners (2008–10) numbered 16, the current tranche numbers only seven.[61] This drastically reduces the amount of energy and the breadth of expertise that are brought to bear in the fulfilment of a very broad and complex remit. The Act does not indicate with any specificity the kind or range of persons to be appointed, except to say that the Commissioners should be appointed from amongst 'men and women of various religions, political and racial backgrounds, who have knowledge of, or practical experience in, human rights matters'.[62] Following an amendment to the main Act in 2009, and in a nod towards independence in the process of appointing the Commissioners, the Prime Minister must now consult a Committee comprising Chief Secretary to the Government (the Chair); the Chair of Suhakam; and 'three members of civil society who have knowledge of practical experience in human rights, to be appointed by the Prime Minister'. The Committee members may include former judges and former Commissioners but not active participants in politics or current or former enforcement officers.[63] The Commissioners fulfil their duties part-time with allowances but (except for the Chair) without remuneration.[64] Suhakam currently employs 79 staff, mainly at its head office in Kuala Lumpur, with offices also in Sabah and Sarawak with a staff of 6 and 3, respectively. The 1999 Act also provides that the Government shall provide Suhakam with adequate funds to enable it to discharge its functions under the Act.[65] In other words Suhakam does not enjoy budgetary independence; the adequacy of funding is clearly a matter to be judged by the Government in light of its overall commitments and policies. Therefore in the matter of both appointments and

[60] 1999 Act, s 5, substituted by National Human Rights Commission (Amendment) Act 2009, A1353, s 2. Prior to this the period was two years with no restriction on reappointment.

[61] The breakdown is three Malay, two Sabah/Sarawak natives, one Chinese and one Indian; five male and two female. Previously nine Malay, one Sabah/Sarawak native, two Indian, four Chinese; 11 male, five female.

[62] 1999 Act, s 5(3), substituted by National Human Rights Commission (Amendment) Act 2009, A1353, s 2. Before the amendment s 5 referred to 'prominent persons'.

[63] 1999 Act, s 11A, added by Human Rights Commission (Amendment) Act 2009, A1353, s 3; and amended by Human Rights Commission (Amendment) (Amendment) Act 2009 [sic], A1357, s 2.

[64] 1999 Act, s 8.

[65] s 19(1).

budget Suhakam cannot be said to enjoy any measure of independence from the Government. Nonetheless Suhakam enjoys a ranking of 'A' for its compliance with the 1992 Paris Principles on National Human Rights Institutions.[66]

Commencing its operations in 2000, under the chairmanship of Tan Sri Musa Hitam, a former Deputy Prime Minister and former Chair of the UN Human Rights Commission, Suhakam was almost immediately involved in the storm over the Anwar Ibrahim case. Investigating allegations of human rights violations at a mass demonstration related to the Anwar case at the Kesas Highway near Kuala Lumpur, it issued a report severely criticising the authorities for their handing of the demonstration and found many violations of human rights.[67] Their Report was airily (and puzzlingly given the backgrounds of the Commissioners) dismissed by Prime Minister Dr Mahathir as resulting from a 'Western bias'.[68] According to an early assessment of Suhakam, it 'surprised and alarmed the government by taking its mandate seriously and issuing public statements, investigatory reports (including several reports on visits to places of detention) that were critical of executive action, police behaviour and repressive laws. It also strongly recommended accession to important international human rights treaties'.[69]

Two key Commissioners, Anuar Zainul Abidin and Mehrun Siraj, were not reappointed when their two-year term expired. This has been attributed to their role in the Kesas Highway Report and strong stances in media statements. Civil society activists feared the worst when the former Attorney-General Abu Talib Othman, who had been involved in the Operation Lallang ISA crackdown in 1987 and other authoritarian measures, was appointed the second Chair of Suhakam in 2002. As it turned out this particular Chair proved quite vigorous in asserting the importance of human rights and attempting to persuade the government to

[66] This is granted after review by the International Coordinating Committee of National Institutions for the Protection of Human Rights: *Human Rights Commission of Malaysia Annual Report 2010* (Kuala Lumpur, Human Rights Commission of Malaysia, 2010) 3, www.suhakam.org.my/c/document_library/get_file?p_l_id=24205&folderId=39678&name=DLFE-10502.pdf.

[67] *Inquiry on its own Motion into the November 5th Incident at the Kesas Highway* (Kuala Lumpur, Human Rights Commission of Malaysia, 2001). At the time of writing Suhakam is about to conduct a public inquiry into police actions in relation to the Bersih 2.0 rally of July 2011.

[68] Thio, above n 5 at 1332.

[69] A Whiting, above n 7, 389.

repeal repressive laws such as the ISA and ouster clauses preventing judicial review of certain ministerial decisions.

In recent years Suhakam has received an average of around 1000 complaints annually, but about half have been found to be outside its jurisdiction. Complaints have focused overwhelmingly on police powers, specifically with respect to inaction, excessive use of force, abuse of powers and preventive detention. In Sabah and Sarawak however the focus was mainly on land issues, especially encroachments on indigenous land.[70] Suhakam has a number of Working Groups indicating their areas of activity. These relate to Education and Promotion; Complaints and Inquiries; Law Reform and International Treaties; Economic, Social and Cultural Rights; International Issues and Cooperation; Indigenous People's Rights; and National Inquiries. Its annual reports present an impressive picture of activity designed to create awareness and improvement of human rights in the broadest sense of the term.

The real problem with Suhakam, however, has been constantly, not so much poor performance, as a lack of action following its work and its pronouncements. Suhakam's 2010 Annual Report, for example, points out that although Suhakam has conscientiously reported annually to Parliament, as required by the Act, Parliament has never debated any of its Reports. With some Commissioners resigning 'or declining to have their terms renewed because this official indifference has persuaded them that they are engaging in an exercise in futility', writes Mahadev Shankar, a former Commissioner who is also a former appeal court judge, 'there is a growing sense of public disquiet that [the annual reports'] ultimate fate is to become fodder for the termites that must lurk in the parliamentary archives'.[71] The problem goes further than lack of interest in Suhakam's reports. The Government has also failed to act on most of its specific recommendations. For example, an eminently sensible and well argued case presented in 2002 for a National Human Rights Action Plan, placing human rights at the centre of development and aimed at practical programmes to deliver human rights, especially for the most vulnerable groups, was rejected with the somewhat obtuse statement that human rights were already guaranteed under the Constitution and the law; however, by 2010 the Government had announced its intention to create such a Plan.

[70] Report, above n 66, 104. Complaints in Sabah were disproportionately high compared with Sarawak and Peninsular Malaysia: ibid at 36, Table 1.

[71] M Shankar, 'Suhakam: The National Human Rights Commission', ch 16 of Harding and Lee, above n 23, 243 at 251.

The de facto minister for law stated, revealingly, in 2006 that Suhakam was 'never meant to have teeth'.[72] It has been assumed that, if Suhakam was never meant to have teeth, it was invented merely to provide the Government with an alibi, to give the impression that human rights were being addressed. However, the minister was literally correct in that it is a facilitative, advisory, body without any actual powers of enforcement. Suhakam cannot unilaterally, for example, award compensation, or set up a body to monitor police conduct. There is clearly still misunderstanding as to Suhakam's role. An example is provided by the current Chair, Tan Sri Hasmy Agam:

> When we told the police we wanted to monitor [an illegal assembly for a candlelight vigil against the ISA] the first reaction wasn't good . . . They thought we wanted to join the protesters. I think many among the police don't understand Suhakam's basic function. They probably thought that since it was an illegal assembly, we had no right to observe it.[73]

As often happens with reforms of this kind, the rot sets in when it comes as a shock for the reformers to realise that their motives are taken literally by appointees who attempt to fulfil their stated remit conscientiously. Nonetheless a survey of Suhakam's work over a decade reveals that it has in fact achieved much in terms of ventilating a wide range of issues, inculcating the language and sometimes the practice of human rights awareness. Of particular importance is Suhakam's support for vulnerable groups such as women and children; disabled persons; LGBT people; migrant workers; asylum seekers; refugees; and, notably, the indigenous peoples, to whom we now turn.

V. HUMAN RIGHTS: THE INDIGENOUS PERSPECTIVE

> 'Dulu gajah menyerang kita. Sekarang pembangunan yang menyerang kita'
>
> (In the past, we were attacked by elephants. Today we are attacked by development)[74]

[72] 'Govt: We Don't Intend to give Suhakam Teeth', *Malaysiakini*, 27 March 2006, www.malaysiakini.com/news/48965.

[73] Suhakam, 30 August 2010, www.suhakam.org.my/c/document_library/get_file?p_l_id=24205&folderId=314540&name=DLFE-8802.pdf.

[74] The author is indebted to Cheah Wui Ling for this quotation: see below n 83.

Malaysia's indigenous communities provide a useful case study on human rights for a number of reasons. First, the topic of human rights is appropriate for the introduction of this important strand of Malaysia's ethnic diversity amounting to about 11.7 per cent of the population; the indigenous communities themselves are not a group, but are culturally and ethnically very diverse. Secondly, these communities span both West and East Malaysia, being mainly concentrated in Sabah and Sarawak; this enables us to view human rights from a distinctively non-metropolitan perspective. Thirdly, the Constitution and the law have been thoroughly tested by the problem of these vulnerable communities being threatened by development. We will see here a much more positive aspect than some other areas of human rights, showing the potential for development of human rights in the constitutional context. Fourthly, indigenous rights have been strongly advocated by Suhakam in recent years and have become an area of significant activity both in Suhakam and in the courts. Currently there are more than 100 native land claims in the courts in Sarawak alone.[75]

In Malaysia the word 'indigenous' is an ambiguous one.[76] The Malays themselves lay claim to indigenous status in Malaysia, as is implied in the common use, in both legal and everyday contexts, of the word '*bumiputera*' ('sons of the soil'). Under Malaysian constitutional law, as we have seen in chapter two, *bumiputera* are entitled to certain special privileges amounting to a constitutionally entrenched affirmative action programme.[77] The communities entitled to this status are defined in the Constitution as Malays and natives of Sabah and Sarawak.

The natives of Sabah and Sarawak[78] comprise a large number of tribal people indigenous to those two Borneo states, including the Iban, Murut, Kadazan, Kenyah, Penan, and many other groups. The Iban constitute 30 per cent of Sarawak's population, while the Kadazan are the largest group in Sabah at 17 per cent. Taken altogether the indigenous peoples at around 2.2 million constitute about half of the population of these two States. In general these communities live in longhouses and live off cash crops or the produce of the sea and the jungle, but development has introduced other forms of employment in the logging, oil, gas and palm oil industries. However, the considerable economic development has largely left behind the native communities; indeed development in the form of logging, construction and new dams, often threatens their land and their traditional way of life.

[75] The author is indebted to Bian Baru for this information.

[76] R Bulan, 'Native Status under the Law', in Wu Min Aun, above n 30.

[77] Art 153.

[78] The term 'native' is used here, in accordance with the convention in Malaysian law and the Constitution to denote the indigenous peoples of East Malaysia, ie Sabah and Sarawak, *only*.

In addition to these groups there are the several indigenous peoples of the Malayan peninsula,[79] known collectively as the '*orang asli*' (aboriginals), numbering around 140,000, who are, illogically, and unlike the natives of Sabah and Sarawak, *not* officially classified as *bumiputera*, despite the fact that they have lived in Malaya for more than 40,000 years. Although there are many programmes benefiting the *orang asli* it is a source of grievance that they are not classified as *bumiputera*.[80] The *orang asli* are not one community but 18 distinct communities, having different geographical origins, languages, cultures, and modes of subsistence. The generic term *orang asli* was coined for administrative and strategic purposes during the colonial period, and, since the Aboriginal Peoples Act 1954, it is in effect a term that also has legal consequences. Most of them live in about 7,000 remote mountainous villages, but some are semi-nomadic, some live in fishing villages, and a few have now joined the urban economy.

Although all of these groups are in fact indigenous to Malaysia, the legal and constitutional statuses of the *orang asli* on the one hand, and the natives of Sabah and Sarawak on the other hand, are quite different.[81] Indigenous people as a whole

> suffer disproportionately from preventable diseases, have higher infant and maternal mortality rates, are poorly provided with basic services and utilities, and have lower levels of education . . . the great majority . . . continue to suffer widespread and persistent poverty, high rates of illiteracy, and limited access to medical care.[82]

Orang asli do not have the benefit of *bumiputera* status. Moreover, unlike the natives of Sabah and Sarawak they do not have official recognition of their customs as law. Again, unlike the natives of Sabah and Sarawak, they do not (or did not until recently) enjoy land rights as such,

[79] There are 3 main groups or 18 sub-groups, in total about 140,000 people.

[80] 'Speaker Shoots Down Motion on Orang Asli's Bumiputera Status', *Malaysia Today*, malaysia-today.net/mtcolumns/newscommentaries/35337-speaker-shoots-down-motion-on-orang-aslis-bumiputera-status, 19 October 2010.

[81] See arts 8(5)(c), 45(2), 160(2).

[82] SR Aiken and CH Leigh, 'Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia' (2011) 45(4) *Modern Asian Studies* 825, 830.

but only what we might call land concessions, unlike all other Malaysian citizens, who have property rights protected by the Constitution at Article 13. As Dr Colin Nicholas of the Centre for Orang Asli Concerns, their principal spokesperson, puts it, they were regarded as 'wards of the government' and their land rights amounted to being 'tenants-at-will'.[83] In addition, only a small proportion of inhabited *orang asli* lands has been declared as aboriginal reserve, leaving them unprotected from compulsory government land acquisition or third party encroachment.[84]

The Constitution does recognise the special needs of the *orang asli* in some respects. It provides for the validity of 'any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service'.[85] The Constitution also provides for appointed members of the *Dewan Negara* [Senate] to include 'representatives of racial minorities' and those who 'are capable of representing the interests of aborigines'.[86] The assumption here seems to be that the *orang asli* are incapable of representing themselves in the legislative sphere. If that was ever so, it is certainly not so nowadays as there are *orang asli* senators and other advocates as well as NGOs representing their interests. The emergence of activists and advocates for the *orang asli* community, and for the natives of Sabah and Sarawak, has been a critical factor leading to the ventilation of the land rights issue in the courts, and other human rights issues before State Governments and Suhakam.

Historically the *orang asli* have been successively ignored, resettled, controlled, treated as an opportunity for religious proselytisation (both Christian and Muslim), and exploited economically. The natives of Sabah and Sarawak have had a rather better history, being much larger groups whose customs were generally respected and preserved during the colonial period (especially in the Sarawak of the white rajahs) and as a matter of constitutional law after 1963. The very definition of the *orang asli* as a group is the result of the colonial government's need to prevent them from helping communist insurgency during the Malayan

[83] Cheah Wui Ling, '*Sagong Tasi* and *Orang Asli* Land Rights in Malaysia: Victory, Milestone or False Start' (2004) 2 *Law, Social Justice and Global Development Journal* 5, www.go.warwick.ac.uk/elj/lgd/2004_2/cheah.

[84] ibid.

[85] Art 8(5)(c).

[86] Art 45(2).

Emergency (1948–60),[87] or to recruit them behind government efforts to end it. The 1954 Act, passed at the height of the emergency, contained some extraordinary provisions that transformed the *orang asli* overnight from complete separation to complete governmental control. The Government was empowered to appoint village headmen, to remove *orang asli* communities from their designated areas and reserves, and to reacquire such land from them at any time without appeal or compensation (other than for crops and dwellings but not for actual land values[88]), or any alternative provision. The recognition, definition and entrenchment of their land rights is tenuous at best; in practice compensation has been very small and very slow in being granted, and the gazetting even of lands officially recognised as *orang asli* lands has extended only to 19 per cent of the total since 1954. By 2002 even the gazetted *orang asli* lands in the state of Selangor were reduced to 24 per cent compared with their extent in 1992 as the Kuala Lumpur conurbation spread rapidly, embracing the Multimedia Super Corridor and Malaysia's information technology capital Cyberjaya, Kuala Lumpur International Airport, the new administrative capital of Putrajaya, and all the attendant infrastructural and residential development, involving in this case extensive highways and a new dam.

All these developments had an adverse impact on the *orang asli*. For them, the land question is of enormous significance. They have deep spiritual and emotional ties to it, and they have continuously depended on it, for thousands of years, for their livelihood and their sense of well being. Thus, while economic development is of great importance not just for urbanites but for the *orang asli* too, there has to be some means of accommodating and mediating between development and traditional land rights. The Constitution and the laws providing for the rights of the *orang asli* can provide a means of laying down the most basic matters which should be assumed in seeking the solutions to their problems. Of particular importance is the assertion that the *orang asli* have land *rights* (not merely concessions) which must be respected, and that they have a right to be heard and to be represented in the relevant decision-making processes. These problems are quintessentially human rights issues.

[87] J Leary, *Violence and the Dream People: The Orang Asli in the Malayan Emergency 1948–1960* (Athens, CIS, Ohio University, 1995).

[88] *Koperasi Kijang Mas Bhd v Government of Perak* [1991] 1 CLJ 486.

The Malaysian courts have not been supportive of public interest litigation,[89] and have not in general adopted socially progressive interpretations of fundamental rights provisions or advanced the interests of vulnerable groups. In the present instance it took several years of patience and extremely hard, unremunerated legal work and factual research by a number of lawyers and NGO advocates to get indigenous customary land rights legally recognised. In *Director-General of Environmental Quality v Kajing Tubek*, for example, in 1997, the Court of Appeal even cast doubt on whether representatives of 10,000 natives of Sarawak had standing to challenge the environmental impact assessment for a dam that would flood their traditional lands and deprive them of their livelihood.[90] Along with the legal resistance to indigenous claims went a general hostility towards activism by indigenous groups or any recognition of their rights.

The decisive breakthrough came in 1997 when 52 *orang asli*, whose land rights were affected by development in the state of Johor, succeeded in a representative action against the Government of Johor in securing the recognition of their land rights in terms that were unequivocal. In this case, *Adong bin Kuwau v Government of Johor*[91] the Court of Appeal referred to a line of similar cases in different jurisdictions culminating in well-known Australian and Canadian[92] cases. They rejected the notion that native peoples had no rights except those granted by the subsequent conqueror or discoverer, and affirmed the notion that their land rights, in the form of usufructuary rights (rights to harvest the produce of the land), remained in force at common law except where clearly and specifically extinguished by legislative or executive action. A wide interpretation was given to the constitutional right to property (Article 13) and to adequate compensation for its deprivation, as applied to indigenous land rights.

[89] See, eg, *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; Tey Tsun Hang, 'Public Interest Litigation in Malaysia: Executive Control and Careful Negotiation of the Frontiers of Judicial Review', ch 5 of Po Jen Yap and Holning Lau (eds), *Public Interest Litigation in Asia* (London, Routledge, 2011).

[90] [1997] 3 MLJ 23; see Gurdial Singh Nijar, 'The Bakun Dam Case: A Critique' (1997) 3 *MLJ* ccxxix.

[91] [1997] 1 MLJ 418, affirmed by the Court of Appeal in [1998] 2 MLJ 158; see MB Hooker, '"Native Title" in Malaysia: *Adong's Case*' (2001) 3 (2) *Australian Journal of Asian Law*.

[92] Especially *Mabo v State of Queensland* (1992) 66 ALJR 408; *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145.

A similar line of decisions became apparent in East Malaysia. In Sarawak, native customary land rights, under the Sarawak Land Code 1957,[93] had been frozen as of 1 January 1958, with some limited opportunities for creating such rights after that date. In *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* in 2000[94] an impressive judgment in the High Court of Sabah and Sarawak adopted the same reasoning as in *Adong*, following the Australian and Canadian cases as well as *Adong* itself in establishing the legal nature of the customary land rights in Sarawak. Furthering the tendency to look also at international norms, the Judge referred to the Draft Declaration on the Human Rights of Indigenous People. This decision offered further encouragement to customary land claims, and the *Adong* case was then affirmed and extended in the High Court of Malaya and the Court of Appeal in 2005 in the apex case of *Government of Selangor v Sagong Tasi*.[95]

This case related to the Temuan people who had occupied for generations land, part of which had been gazetted as aboriginal land under the Aboriginal Peoples' Act 1954. Part of this land was compulsorily acquired for the construction of the main highway between Kuala Lumpur and the new Kuala Lumpur International Airport. The Temuan were 'evicted rather unceremoniously and left to fend for themselves and their families'. They sued the Selangor State Government for statutory compensation and trespass. Whereas the *Adong* case had asserted that the *orang asli* had usufructuary rights over their designated land, *Sagong Tasi* went much further. It decided that the *orang asli* have not just usufructuary rights but 'customary community title' at common law, and that their property is constitutionally protected. The Land Acquisition Act 1960, which provided only a power to grant compensation was modified in its application to accord with Article 13 of the Constitution, which states that 'no person shall be deprived of property save in accordance with law' and that 'no law shall provide for compulsory acquisition or use of property without adequate compensation'. The Court of Appeal affirmed *Adong* in deciding that the State authorities

[93] Laws of Sarawak, c 81, ss 2, 5. For Sabah, see the decision in *Sipadan Dive Centre Sdn Bhd v State Government of Sabah* [2010] 1 LNS 1218; and A Doolittle, *Property and Politics in Sabah, Malaysia (North Borneo): A Century of Native Struggles over Land Rights, 1881–1996* (Seattle, University of Washington Press, 2005).

[94] [2001] 6 MLJ 241. An appeal succeeded on the facts but the Court of Appeal affirmed the law as stated in the High Court: [2005] 3 CLJ 555.

[95] [2002] 2 MLJ 591, [2005] 5 MLJ 289.

owe a fiduciary duty to the *orang asli*: 'a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs'. It held also that their rights extended to land which had erroneously not been gazetted by the defendant State Government. For good measure the court awarded the plaintiffs full costs and exemplary damages reflecting the brutal manner in which they had been treated.[96]

Again the same principles have been extended to the natives of Sabah and Sarawak in *Madeli Salleh v Superintendent of Lands and Surveys, Miri Division*.[97] In a 2011 case *Andawan bin Ansapi v Public Prosecutor*,[98] six natives were convicted of criminal trespass when they cultivated rice padi in a forest reserve. The High Court overturned the conviction on the basis that they were exercising customary land rights that pre-existed the reservation, and that the exercise of their customary rights was guaranteed by the right to life under Article 5(1).

Since the *Sagong Tasi* case, courts, especially in Sabah and Sarawak, have been flooded with native land claims.[99] However, these developments take the human rights of indigenous peoples beyond land rights, and even beyond the right to life, as there are undoubtedly many other issues to be addressed. What the cases have done apart from establish native customary land rights is to establish indigenous rights more generally as a matter of [illegible] rather than resistance. As a result of these cases, in 2008 the State Government of Selangor (under PR control from March 2008) not only withdrew the appeal against the decision in *Sagong Tasi* but established an Orang Asli Land Task Force to protect native land. Suhakam in 2010 established its first National Inquiry Committee, which investigated the land rights of indigenous peoples.[100] Suhakam has also established offices in Sabah and Sarawak to provide access to its services for native people, and has mounted initiatives in aboriginal education and towards the recognition of aboriginal customary law. In 2010 it also investigated and referred to the police allegations of long-term sexual abuse of Penan women and girls by timber workers in Sarawak.[101] All this tends towards establishing the rights of indigenous people in Malaysia in a way that is envisaged both by notable judgments from other Commonwealth countries and by international instruments. As the Judge in a recent Sarawak case said:[102]

> Finally, given that natives are the original inhabitants of the country it might be questioned whether it is entirely correct to treat claims for NCR by looking at them only from the standpoint of ownership of the lands. Rather such claims should be looked differently, namely, that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers . . . The fruits on the wild trees, the fishes in the river, the wild boars and other animals on the land are their food for survival.

VI. CONCLUSION

> 'Di-mana bumi di pijak, di-situ langit di junjung'
>
> (On whatever soil we stand, there we carry the weight of the sky)

This chapter has attempted to go beyond the constitutional provisions relating to human rights, looking at issues of civil liberties in relation to national security, and institutional arrangements to bridge the gap between aspiration and delivery in the human rights context. In the last section we have looked at human rights from the aspect of disadvantaged indigenous communities for whom the struggle for human rights has barely begun. The imperatives of human rights were hardly taken seriously by the Reid Commission when they considered the entrenchment of human rights in the *Merdeka* Constitution. More attention to how to define and guarantee human rights in the Malaysian context might have made it harder for human rights to be eroded as they have been under the strictures of an authoritarian developmental state that took 'Asian values' as its guide to human rights. However, there are some positive aspects to this story.

Human rights discourse has never disappeared or gone underground, even when the intervention of the state has been at its most invasive and

[96] MB Hooker, 'Native Title in Malaysia Continued – *Nor's Case*' (2002) 4(1) *Australian Journal of Asian Law* 92.

[97] *Madeli Salleh v Superintendent of Lands and Surveys, Miri Division* [2008] 2 MLJ 677.

[98] Suit No [illegible]41-128-2010, High Court, Kota Kinabalu.

[99] For this and much other information in this section, I am indebted to an unpublished paper, 'Native Customary Rights (NCR) Over Land in Sarawak', by Bian Baru ([illegible]). See also Aiken and Leigh, above n 82 at 867.

[100] See R Bulan (with A Locklear), *Legal Perspectives on Native Customary Land in Sarawak* (Kuala Lumpur, Suhakam, 2008).

[101] www.freemalaysiatoday.com/2011/09/30/prioritise-issue-of-penan-rape.

[102] *Agi Anak Bungkong v Ladang Sawit Bintulu Sdn Bhd* (2010) 1 LNS 114.

when the Asian values discourse has been most evident. The reason for this is that the Bar and civil society have proved able to maintain their own freedom to operate and speak about human rights issues, even under the most difficult of circumstances. Indeed, compared with their equivalents in many developing countries, they have been heroic and often successful. This success has taken the form, initially, of resisting very deep incursions on human rights by the state, and, latterly, the embracing of human rights as an ideal of some description even by the state itself. Clearly human rights discourse also resonates with a substantial proportion of the electorate, prompting the Government towards an uncertain, open-ended path of reform. Thus to speak of human rights has never quite been politically incorrect and is now actually politically correct. There is no reason of course to suppose that the struggle for human rights in Malaysia is anything other than a work in progress. However, constitutional rights, despite their narrow formulation, have been an important reference point. Litigation has produced patchy outcomes but remains the principal method of defining the content of human rights in the Malaysian context, and often the only effective method of enforcing them. Suhakam has proved a very useful addition to the human rights apparatus, but does not have the powers either to accomplish or to command human rights enforcement. In the result there can be no doubt that human rights have truly arrived in Malaysia. Their accomplishment as a matter of law, habit, and policy remains a project for the future. An excellent start is the repeal of all the oppressive national security and emergency laws which have cast a spell over all aspects of human rights. As this book goes to press a heated debate takes place over the extent of freedom of assembly in light of a Bill before Parliament to which the Government has already made concessionary amendments in the light of public objections.[103] Experience in Malaysia has shown that the ability to speak of human rights is the indispensable foundation for their fulfilment.

[103] 'Bar: Peaceful Assembly Bill Should Have Panel for Consultation', *The Star*, 28 November 2011, thestar.com.my/news/story.asp?file=/2011/11/28/nation/9988401&sec=nation.

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7

The Judiciary and the Defence of Judicial Power

Introduction – Judicial Independence and the Constitution – The Judicial Power – Constitutional Interpretation – The Judicial Crisis of 1988 – Judicial Independence: a Downward Slide – A Scandal Leads to Better Outcomes: the Lawyers' Walk for Justice – Conclusion

I. INTRODUCTION

> 'Yang menang pulang menjalar, yang alah pulang merangkak'
> (Those who win [at law] go home wriggling, while those who lose crawl home on their bellies)

THE MALAYSIAN JUDICIARY has been placed in the eye of the constitutional storm probably as often as the judiciary of any other country. Judicial independence has been an arena, rather than a condition, for the defence or promotion of constitutionalism and the moderate state. The judiciary therefore holds a position that is undeniably difficult. On the one hand the authoritarian developmental state is uncomfortable with decisions that it cannot control: recently, for example, the de facto Minister for Law stated, citing the separation of powers, that a decision of the Court of Appeal striking down a statute was, pending the Government's appeal, just an opinion of the court.[1] On the other hand a lively, well-organised and idealistic Bar is ready to pounce on the slightest defect in judicial reasoning or the least short-

[1] 'Law Minister: UUCA "Still Law" Despite Court Decision', *Malaysiakini*, 2 November 2011, www.freemalaysiakini.com/?p=1038.

coming of the bench. The fact is that Malaysia, belying the Asian stereotype, has rapidly become a highly litigious society; not only are the courts flooded with cases, but the cases themselves often relate to the most sensitive political issues sometimes having profound ethnic, religious and human rights implications. In this chapter we will see the judiciary holding the ruling party an unlawful society, lecturing the Prime Minister on the separation of powers, prohibiting a tribunal from investigating allegations of misbehaviour against its own highest judicial officer, and trying the leader of the opposition for sodomy and corruption. In chapter six we have seen the judiciary defending human rights, albeit inconsistently. In chapter eight we will see the judiciary defining the role of religion in society. We will also see the judiciary subjected both to a dramatic coup by the executive, and interference with senior judicial appointments, as well as being accused of corruption. This chapter tells the story of continuing controversy concerning judicial independence and its long defence by the Malaysian Bar.

There are of course reasons for the centrality of the judiciary and litigation in the constitutional system. First, politics and the various mechanisms of the developmental state have generally been so dominated by the BN for most of the last few decades that other venues for pursuing claims, such as Parliament or direct dealings with Government departments, have usually been ineffective. Moreover the BN parties own many of the traditional media – newspapers and television channels. Second, Malaysia's powerful legal professional association, the Malaysian Bar Council, while never ceasing to criticise the actual performance of the judiciary, has leapt to its defence whenever its independence was threatened. What has been at stake here is not simply the fear of domination of the executive over the judicial branch, but the independence of the entire legal complex, including the Bar itself. As Harding and Whiting claim,

> Malaysian lawyers have developed and sustained a capacity to support and defend the core liberal legal values of the rule of law, the independence of the judiciary and the integrity of the constitution and of constitutional government, and to speak and act, sometimes vigorously, in defence of civil and political rights.[2]

[2] AJ Harding and A Whiting, '"Custodian of Civil Liberties and Justice in Malaysia": The Malaysian Bar and Moderate State', ch 7 of T Halliday, L Karpik and M Feeley (eds), *Fates of Political Liberalism in the Post-Colony: The Politics of the Legal Complex* (Cambridge, Cambridge University Press, 2012).

In spite of the apparent unwillingness by the judiciary, or at least most of the judiciary for most of the time, to act as an effective check on the executive power, the Bar has succeeded in mobilising effectively to defend constitutional values from repeated attacks by the authoritarian state. For example, judicial independence itself has in practice depended principally on the Bar. Consequently the Bar has mobilised to defend, successfully, its own autonomy in the face of attempts to interfere with its internal organisation.[3] Of course the Bar is not alone in defending constitutional values, and has been joined in this by NGOs and good governance advocates. These networks have made extensive use of the new electronic media[4] to bring constitutionalism to the foreground of public debate in order to protect judicial independence and fundamental rights. Third, the Bar has, 'almost without exception, evidenced a cultural orientation typical of common lawyers towards "liberal legalism", rendering it passionate in its defence of constitutionalism, the rule of law, and human rights, for which judicial independence is regarded as an indispensable condition.'[5] In chapter six we have also seen how the fundamental rights guarantees, restricted as they are, have given rise to extensive opportunities for constitutional litigation, where the legal profession is able to coordinate judicial review with the making of more general cases for human rights and civil liberties, highlighting the need for judicial independence. The executive has consistently attempted, but often, and increasingly, fails to control this kind of public discourse, as we have seen in chapter two and chapter six. In some respects, although we have seen in chapter two how the flagship government policies have not in general been litigated, the Constitution has acted as a mechanism for criticising the Government in a more general fashion, translating political debates into legal ones.

The judiciary, although often accused of being in thrall to the executive power, of being corrupt, or being less than totally competent in its decisions, has nonetheless, as we will see, somehow survived every undermining event, sometimes reaching courageous decisions that defy cynicism, but often also weak decisions that confirm that cynicism. The judiciary has never been out of the public eye. Thus, although many

[3] See *Malaysian Bar v Government of Malaysia* [1987] CLJ 185.

[4] J Abbot, 'The Internet, Reformasi and Democratisation in Malaysia', in ET Gomez (ed), *The State of Malaysia: Ethnicity, Equity and Reform* (London, RoutledgeCurzon, 2004).

[5] Harding and Whiting, above n 2, 271.

people have legitimate doubts about several aspects of the judiciary and its role,[6] such doubts are not reflected in any unwillingness on the part of lawyers or their clients to go to court or to defend the judiciary as an institution when attacked. Indeed on 26 September 2007 large numbers of lawyers with the virtually unanimous support of their professional colleagues, turned out at Putrajaya in the pouring rain to 'march for justice', protesting interference with judicial appointments. The judiciary seemed to them to be an institution worth defending.

However judges are themselves judged or defended, the judiciary in Malaysia has the power and duty of adjudicating claims of great importance. In performing its task it can review the constitutionality of legislation and the validity of executive or judicial acts, and has in its armoury a wide variety of weapons, in terms of legal doctrines and remedies, to give practical effect to judicial power. The most significant of these weapons is the Constitution itself, which, by providing for judicial review and judicial independence, reserves to the judiciary a prominent role in the constitutional process. For this very reason judicial independence has been a particularly fraught issue. In this chapter we will focus on judicial independence, examining the judiciary crisis of 1988 and the way in which judicial independence has been defended and the judiciary revived as an institution of particular importance in Malaysian constitutionalism.

The judiciary, at least as far as the civil courts are concerned, is organised on the pattern of the common law. Its common-law origins go back to the appointment of a Magistrate in Penang in 1801; the setting up of judicial institutions in the Straits Settlements and the Malay states in the nineteenth century; the establishment of a national judiciary under the Malayan Union in 1946; and the consolidation of common law reception by the Civil Law Act 1956.[7] The *Merdeka* Constitution elevated the judiciary to its present constitutional role as an independent branch, and the process of replacing expatriate British judges with a locally produced judiciary, commenced in 1952, was completed by 1969. The last formal link with the English legal system was the final appeal to the Privy Council, which was abolished with effect from 1 January 1985.

[6] 'Quotes that Illuminate the Perak Impasse', *The Malaysian Insider*, 23 May 2009: 'Lawyer Sulaiman Abdullah was stunned after hearing the unanimous decision. He offered this gem dripping with sarcasm: "We have extraordinary judges with extraordinary ability"'.

[7] J Foong, *The Malaysian Judiciary: A Record from 1786 to 1993* (Singapore, Malayan Law Journal, 1994).

The Federal Court of Malaysia, master of its own judicial household for the first time, was renamed the Supreme Court, and then renamed the Federal Court again in 1994 with the setting up of a new Court of Appeal. For the reasons explained in chapter four, there are two High Courts – of Malaya and of Sabah and Sarawak – each with its own Chief Judge. The Federal Court has a Chief Justice, referred to until 1994 as the Lord President. The power of interpretation of the Constitution (for which see below) is in theory vested in any court, on the basis that the Constitution is supreme law and therefore must be given effect in any court. However, the Federal Court alone enjoys the power to decide on issues arising between the Federation and a State, or between States, and has a special advisory jurisdiction in relation to matters referred to it for its opinion by the Federal Government.[8] In relation to applications for judicial review, it is the High Courts that have jurisdiction.

In the initial stages after *Merdeka* the Malaysian judiciary was recognised to have achieved one of the highest standards of competence and independence in all of Asia. Not only did Malayans speedily replace expatriate judges on the bench without any noticeable decline in the quality of decision-making, but the local judiciary was also drawn from all ethnic groups and religions (although a large majority were and are Malay Muslim), and acted, as a symbol of unity in a diverse nation. When a prince of the royal house of Johor was sentenced more lightly than would have been the case with a commoner, the Federal Court, asserting equality before the law, was unequivocal in its criticism of the judge.[9] The late Tun Mohamed Suffian, a former Lord President, famously claimed that 'nobody reading our judgment with our name deleted could with confidence identify our race or religion'.[10] As we will see, the judiciary fell very far from these heights in subsequent years, commencing its decline almost as Tun Suffian penned those words in 1986.

Some judges have achieved outstanding reputations both in Malaysia and abroad, which suggests a degree of social standing that is unusual; they have become, in some cases, household names. Many, after

[8] Arts 128, 130.

[9] *Public Prosecutor v Tungku Mahmood Iskandar* [1973] 1 MLJ 128; and see *Public Prosecutor v Tengku Mahmood Iskandar* [1977] 2 MLJ 123.

[10] Tun Suffian, 'Four Decades in the Law – Looking Back', in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (Kuala Lumpur, Oxford University Press, 1986) 216.

retirement from the bench, became noted legal scholars or lecturers, newspaper columnists, holders of non-judicial office, or feisty commentators on public affairs. One former Lord President, Tun Salleh Abas, went into politics. Another former Lord President, Raja Azlan Shah (as he then was), became Sultan of Perak and then *Yang di-Pertuan Agong.*[11] In many cases their judgments have been weighty and frequently quoted. They are often reported in the press in full. Most Malaysian judges have been appointed from the government legal service and the magistracy, and fewer from the practising Bar.

II. JUDICIAL INDEPENDENCE AND THE CONSTITUTION

'Besar kayu, besar bahan-nya'

(The tree may be great, but so is the work of cutting it up)

The Constitution attempts to secure judicial independence in several ways.

First, Judges of the Federal Court, the Court of Appeal and the two High Courts are appointed by the *Yang di-Pertuan Agong*, acting on the advice of the Prime Minister, after consulting the Conference of Rulers, and (except for the appointment of the Chief Justice himself) the Chief Justice. The Prime Minister is also required to consult the Chief Justice and the Chief Judges on appointments to the Federal Court; the President of the Court of Appeal on appointments to the Court of Appeal; and the Chief Judge of a High Court on appointments to that High Court. In the case of the appointment of a Chief Judge of a High Court, he must also consult the Chief Judges of both High Courts; and in the case of the appointment of a Chief Judge of the High Court of Sabah and Sarawak, he must consult the Chief Ministers of Sabah and Sarawak.[12] This latter requirement is an expression of those States having a legal system that is essentially separate from that of Malaya. In addition the Judicial Appointments Commission Act 2009 imposes a further requirement in respect of judicial appointments; the Judicial Appointments Commission (JAC) is empowered to report to the Prime Minister with reasons the names of selected persons who merit appointment to these positions and the position of judicial commissioner: three

[11] See ch 5.
[12] Art 122B.

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persons in the case of an appointment to a High Court, and two persons in the case of an appointment to a higher court. The Prime Minister may require the JAC to request the selection of two further names for consideration, but is not able to substitute his own preferences and ignore the JAC's selections. He is also under a statutory duty 'to uphold the continued independence of the judiciary' and 'must have regard to . . . the need to defend that independence'.[13] These provisions were enacted due to concerns about interference with judicial appointments following the Royal Commission Report on the Lingam Tapes (see below). Article 123 restricts judicial appointment to a citizen who has for the preceding ten years been an advocate of one of the High Courts or a member of the judicial and legal service of the Federation or of the legal service of a State. Appointment is to the age of 65, although the *Yang di-Pertuan Agong* may, acting on advice, extend that period by six months, usually for the completion of cases part heard.[14]

The *Yang di-Pertuan Agong* acts on advice in the matter of judicial appointments. The Conference of Rulers, which is entitled to be consulted, has on recent occasions taken its role of being consulted seriously, rejecting one candidate proposed by the Prime Minister for a senior judicial appointment.[15]

The Constitution also provides for security of judicial tenure. Judges' salaries are charged on the Consolidated Fund, and the salary of a Judge and his other terms of office, including pension rights, may not be altered to his disadvantage after his appointment. Furthermore, the conduct of a Judge may only be discussed in Parliament on a substantive motion supported by one quarter of the total number of members, and not at all in the State Legislative Assemblies.[16] However, the matter of dismissal of judges has been a highly controversial issue, and in the next section we will examine the judiciary crisis of 1988, which resulted in three judicial dismissals – this in spite of constitutional provision in Article 125 designed to secure their tenure. This Article provides that if the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the *Yang di-Pertuan Agong* that a Judge of the Federal Court, Court of Appeal, or the High Court, ought to be removed on the ground of any breach of the Code of Ethics prescribed under

[13] Judicial Appointments Commission Act 2009, s 2 and Part III.
[14] Art 125.
[15] 'Malaysia's Sultans Seek to Get Their own Back', *Asia Sentinel*, 10 August 2007.
[16] Arts 125–27.

Article 125(3A) (formerly the criterion was 'misbehaviour') or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the *Yang di-Pertuan Agong* (acting here again on advice) shall appoint a Tribunal and refer the representation to it; and may on the recommendation of the Tribunal remove the Judge from office. The Tribunal must consist of not less than five persons who hold or have held high judicial office, or if it appears to the *Yang di-Pertuan Agong* expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth; and must ordinarily be presided over by the Chief Justice.

The tribunal procedure laid out in Article 125 was inserted into the *Merdeka* Constitution at the insistence of the judiciary itself. The Reid Commission had recommended a method of dismissal similar to that pertaining in Britain, whereby an address of both Houses of Parliament is required: it was thought that judicial tenure should not be placed at the mercy of a parliamentary majority. Unfortunately, as we will see, this protection, when invoked, proved to be quite inadequate for the purpose. The Judges' Code of Ethics of 1994[17] lays down nine principles for a Judge to follow. These amount to a duty to avoid conflicts of interest, and not to: act dishonestly; bring the judiciary into disrepute; delay judgments; refuse to obey a proper administrative order or comply with any statutory directions; absent himself from court during office hours; or participate in any political activity.

The ethnic backgrounds of the judges are mixed. Since the early 1970s around 70 per cent of judges have been Malay. Currently, based on the judiciary's official website[18] the higher judiciary (the two high courts, the Court of Appeal and the Federal Court) comprises 96 judges, of whom 71 are Malay, 13 Chinese, five Indian, and seven others, and there are 33 female judges. The breakdown in the Federal Court is seven Malay and one Chinese.

III. THE JUDICIAL POWER

> 'Bintang di-langit dapat di-bilang, arang di-muka tak sedar'
>
> (He can count the stars in the heavens, but misses the smuts on his own face)

[17] Introduced by the Constitution (Amendment) Act 1994 (Act A885), s 21.
[18] kehakiman.gov.my.

Of course the independence of the judiciary is only important if the judiciary itself has sufficient formal power and is willing and able to dispense justice in terms of human rights and in conformity with constitutional principles.[19] The extent of its formal power is partly determined by its willingness to protect judicial independence, and in this respect the Malaysian judiciary's powers are somewhat hobbled by two developments, both of which are related to the 1988 amendment of Article 121.

The first relates to Islamic law jurisdiction and is discussed in chapter eight, where we will see that, although the ordinary civil courts retain the power to interpret Article 121(1A), they have done so in a way that defers to the syariah courts. For example, in *Lina Joy*, as will see in chapter eight, the Federal Court held that only the syariah courts can decide if a person has apostasised from Islam, even though the Constitution guarantees for all citizens freedom of choice of their religion.

The second development relates to the separation of powers and is both fundamental and instructive with regard to the performance of the judiciary. Before it was amended in 1988, Article 121(1) vested the judicial power of the Federation in the High Courts and such inferior courts as might be provided by federal law. After the 1988 and subsequent amendments Article 121(1)–(2) merely provide for the jurisdiction of the High Courts, the Court of Appeal, and the Federal Court being determined by statute. This has the effect of reversing the decision in *Dato Yap Peng*, preventing the judiciary from protecting its own power by defining that power and isolating it from statutory intervention. In that case the Supreme Court used the concept of judicial power to strike down a controversial statutory provision, section 418A of the Criminal Procedure Code, which allowed the Attorney-General to withdraw a criminal case before a lower court, even after the court was seized of the case, and send it to the High Court. As Eusoffe Abdoolcader SCJ so graphically and prophetically put the matter, 'any other view would . . . result in relegating the provisions of Article 121 vesting judicial power in the curial entities specified to no more than a munificent bequest in a pauper's will'.[20] Thus in one aspect the amendment was designed in effect to limit and codify judicial powers, taking the power of defining

[19] HP Lee, 'The Judicial Power and Constitutional Government: Convergence and divergence in the Australian and Malaysian Experience' (2005) 25 *Journal of Malaysian and Comparative Law* 1.
[20] *Dato Yap Peng v Public Prosecutor* [1988] 1 MLJ 119.

them away from the judiciary itself and vesting it in the legislature. Whether it succeeded, however, in that objective remained unclear.

In *Sugumar Balakrishnan* in 1998 Gopal Sri Ram JCA in the Court of Appeal was decisive in holding that Article 121(1) 'does not have the effect of taking away the judicial power from the High Court . . . [it] remains where it has always been, with the judiciary'.[21] In *Kok Wah Kuan* in 2007 the Court of Appeal, led again by Gopal Sri Ram JCA, faced with a statute providing that the sentencing of juveniles should be at the discretion of the executive power, not of the courts, struck down the statute as violating the separation of the judicial power. However, the Federal Court on appeal took an entirely different view, the majority holding that the Constitution does *not* recognise the separation of powers since this doctrine is not an express provision of the Malaysian Constitution, and therefore could not be inferred.[22] Richard Malanjum FCJ, however, dissenting, stoutly upheld the principle of the separation of powers, holding that the constitutional amendment

> should by no means be read to mean that the doctrines of separation of powers and independence of the judiciary are now no more the basic features of our federal constitution – or that the courts have now become servile agents of the Federal Acts of Parliament [required] to perform mechanically any command or bidding of a federal law.[23]

Interestingly enough the Commission of Inquiry into the Lingam tape (discussed below) addressed this issue and recommended that Article 121(1) be re-amended back to its original form, and the Bar Council too has called for constitutional amendments to provide for a clear separation of powers.[24]

We see here a stark division between, on the one hand, judges unwilling to uphold a doctrine that seems very evident in the provisions of the Constitution, and very necessary in view of Malaysian experience and, on the other hand, judges who are staunch in defending the judicial power and the Constitution. The *Kok Wah Kuan* decision is alarming in

[21] *Sugumar Balakrishnan v Pengarah Imigresen* [1998] 3 MLJ 289.

[22] *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

[23] Ibid, paras 33–34; see, further, R Foo, 'Malaysia: Death of a Separate Constitutional judicial Power' [2010] *Singapore Journal of Legal Studies* 253.

[24] 'Prove Commitment to an Independent judiciary, Bar Council Tells Putrajaya', *The Malaysian Insider*, 9 September 2011, www.themalaysianinsider.com/mobile/malaysia/article/prove-commitment-to-independent-judiciary-bar-council-tells-putrajaya.

its implications for the separation of the judicial power which the Bar has fought so strongly to defend. It is less alarming if one considers that it may not represent the final word on this matter.

IV. CONSTITUTIONAL INTERPRETATION

When Malaysian judges are seized with a constitutional case, exercising the judicial power to uphold the Constitution, how do they set about the task of constitutional interpretation? What principles do they apply?

Principles of constitutional interpretation are not codified or even stated in the Constitution itself. Moreover the Malaysian judiciary is not necessarily consistent or predictable in its methods. Sometimes the Constitution is treated as if it were like an ordinary statute, while at other times it is given an expansive interpretation.

One approach that is very clear is that constitutional issues are not necessarily seen as wholly separate from, for example, administrative law matters, criminal matters, or even property matters. Indeed it is very often in such cases that the Constitution comes to be applied and interpreted, the Constitution being treated as one of several kinds of applicable law, albeit having unique authority. Two cases discussed in chapter eight afford good examples. The case of *Lina Joy* was treated largely as an issue of judicial review of administrative action rather than as an issue of freedom of religion; and in *Titular Roman Catholic Archbishop of Kuala Lumpur* the relevance of considerations in administrative decision-making was treated as equally important with constitutional freedom of expression. As we saw in chapter six, in preventive detention cases dealing with liberty of the person, administrative law principles are applied. Sometimes this has been attributed to the fact that most Malaysian judges were educated in the English common law tradition of parliamentary supremacy, where review of administrative action is highly possible but review of legislative action is not. Now that most lawyers and judges have been educated in the Malaysian legal education system, which emphasises constitutional law, this seems less persuasive than it once was, and one can discern an increasing tendency to use the Constitution where necessary.

Some other principles of interpretation can be noted.

First, the Constitution must be interpreted within its own four walls. Thus, although the Malaysian Constitution may bear a family resemblance

to other constitutions of similar provenance and vintage, its provisions must be considered in the light of the entire Constitution and the prevailing conditions in Malaysia. It follows that although authorities from other jurisdictions may interpret similar or identical provisions and offer some guidance, they cannot be regarded as anything more than persuasive. In general, English authorities have been found to be more persuasive than Indian authorities, even though the Malaysian Constitution is nearer in content and structure to the Indian Constitution than the British.[25] The Malaysian judiciary has found that, while Indian cases can be highly instructive or persuasive, there are sharp differences between the cases, which create difficulties in terms of using them as precedents. As Ong Hock Thye CJ said in *Karam Singh*, 'Indian judges impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers.'[26]

Second, the Constitution must be interpreted broadly. It is not a statute, where a narrow interpretation may be justified: it must be assumed that the constitution-makers intended their words to be of broad application. Thus Eusoffe Abdoolcader J said in *Datuk Harun Idris*:

> The court stands as arbiter in holding the balance between individuals and between the state and the individual and will not have the slightest hesitation to condemn or strike down any statutory shelter for bureaucratic discrimination, any legislative refuge for the exercise of naked arbitrary power in violation of any of the provisions of the Constitution and equally any executive action purported to be made thereunder.[27]

Third, there is a strong presumption that a statute is constitutionally valid: the burden of proof lies with the party seeking to establish that it is not, and the court will lean in favour of an interpretation of a statute which renders it consistent with the Constitution.

The other main issue affecting the scope of judicial interpretation is the doctrine of precedent, which is a fundamental aspect of judicial reasoning in common law jurisdictions. As elsewhere in the common law world, courts are bound by decisions of higher courts and the Court of Appeal is bound by its own decisions, subject to some exceptions. However, the question which arises, especially in a constitutional context, is whether the Federal Court has the power to depart from its own previous decisions and those of its predecessors. In *Dalip Bhagwan Singh*[28] Peh Swee Chin FCJ held that while it could so depart, the Federal Court should use this power sparingly. This is consistent with the problematical decision in the *UEM* case, where the Supreme Court was not unanimous on this question.[29]

[25] See, eg, Suffian FJ in *Karam Singh v Minister for Home Affairs* [1969] 2 MLJ 129.

[26] [1969] 2 MLJ 129, 141; to similar effect is the discussion by Suffian LP in *Datuk Harun Idris* at [1977] 2 MLJ 155.

[27] [1976] 2 MLJ 116, 124.

Article 10 has given rise to recent examples that illustrate these principles. In *Sivarasa Rasiah v Badan Peguam Malaysia*[30] in 2010, a lawyer who was elected to Parliament challenged a statute, section 46A of the Legal Profession Act 1976, which prevented MPs from holding office in the Bar Council on the basis that his freedom of association had been infringed. The Federal Court held that it had not, because morality (a permissible restriction under Article 10) was not maintained by preventing conflicts of interest in the legal profession. However, in so holding the court adopted what it called a 'prismatic approach to interpretation', importing the notion of reasonableness into Article 10 on the basis also that restrictions on guaranteed rights must be read restrictively. In *Muhammad Hilman bin Idham*[31] in 2011 the Court of Appeal by a majority struck down Section 15(5) of the Universities and University Colleges Act 1971, which prevented students from expressing or doing anything which might reasonably be construed as expressing support for, sympathy with or opposition to any political party. The majority used the prismatic approach and concept of reasonableness in *Sivarasah Rasiah*, arguing that the statute was an unreasonable or even irrational restriction on freedom of expression which did not in fact serve public order as was argued by the Government. Moreover it was suggested that a statute could be struck down if it contradicted the basic structure of the Constitution. The latter point opens up new possibilities for striking down not just statutes but constitutional amendments.

V. THE JUDICIAL CRISIS OF 1988

> 'Pedena tidak, terpelok sarang tebuan'
>
> (What I grasped was not a jar of treasure but a hornet's nest)

[28] [1998] 1 MLJ 1, 14.

[29] [1988] 2 MLJ 12.

[30] [2010] 2 MLJ 333.

[31] [2011] 6 MLJ 507.

We now turn to the most traumatic constitutional episode in Malaysian history: the judicial crisis of 1988. This episode, more than any other, has defined the judiciary and the limits of judicial power. The crisis resonated internationally, defined a generation of lawyers, and destroyed overnight the strong reputation of the Malaysian judiciary for its independence from the executive power. The story is a very complex one involving a concatenation of events in which the judiciary was caught in a perfect storm: involved in an intense conflict with the executive power it was then trapped in an internal conflict within the dominant party. It is both a tragic story and an instructive episode with regard to the protection of the constitutional value of judicial independence.[32]

A. Judicial Activism 1986–88

Following the abolition of the final appeal from the Malaysian courts to the Judicial Committee of the Privy Council from 1 January 1985, the Malaysian judiciary had taken a more activist line than previously in constitutional matters. According to the Lord President at the time, Tun Mohamed Salleh Abas, the judges, now that they were master of their own household, felt that they had the responsibility to 'chart a new judicial course'.[33] In doing so they recognised that they had to proceed slowly, listening to all the arguments, and having regard to the nature of the country, and to the litigants before them. It does not appear that they had any preconceived philosophy to be implemented, but simply a heightened sense of the importance of their role in a new situation in which they had final authority when it came to legal interpretation. It should be mentioned here that the judiciary had not sought, especially in the years following the *Rukunegara* amendments (from 1971) to challenge the executive in crucial matters of Government policy. Still less did they have any political agenda. They were indeed accused by lawyers and others of being timid and of not protecting constitutional rights in

[32] For a fuller discussion, see V Sinnadurai, 'The 1988 Judiciary Crisis and its Aftermath', in AJ Harding and HP Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years, 1957–2007* (Kuala Lumpur, NexisLexis, 2007).

[33] Tun Salleh Abas, John Galway Foster Memorial Lecture, University College London, 4 November 1988, reproduced in Tun Salleh Abas, The Role of an independent judiciary (Kuala Lumpur, Promarketing Publications, 1989). See also Tun Salleh Abas, 'Independence of the Judiciary' [1987] 1 MLJ xi.

the way the Constitution envisaged. While this was regrettable it had also probably lulled the executive, during two decades of rapid development and BN political hegemony, into a false sense of security and the expectation of deference.

During the ensuing period of about three years, a number of crucial judicial decisions were made. It is worth mentioning some of these decisions to indicate what kind of a new course was being charted during a period of intense political strife, especially within the dominant party, UMNO, as Prime Minister Mahathir tightened his grip on political power. It was during this period, let us note, that the power of the developmental state was seen at its most intolerant, the Government no longer being prepared to see mounting criticism from unionists, opposition parties and civil-society organisations, instituting in October 1987 the *Operasi Lalang* crackdown (see chapter six) on political opponents and civil society activists. These ISA detentions resulted in many habeas corpus cases coming before the courts in 1988. As many as 107 opposition political leaders, unionists, students and social activists were detained under the ISA, some for two years, on the grounds that their activities inflamed racial tensions and threatened national security.[34]

In *Berthelsen*[35] the revocation of a foreign correspondent's employment pass on grounds of national security was quashed because he had not been given a hearing. This decision was remarkable because it extended the scope of natural justice into an area where security considerations might be thought to negative the application of natural justice; the applicant had, it was held, a legitimate expectation that the duration of his employment pass would be allowed to run. A number of other important decisions worked against the perceived interests of the executive power. *Mamat Daud*,[36] discussed in chapter four, affirmed States' rights under Schedule 9 of the Constitution. *Dato Yap Peng*[37] as we saw above employed the doctrine of judicial power to strike down the Government's choice of venue for a criminal trial. In the *UEM*[38] case, initially, the Leader of the Opposition Lim Kit Siang, was given standing to raise in court telling allegations of corruption against the Cabinet itself, although the decision was eventually reversed by the Supreme Court by a slim

[34] See ch 6.

[35] *JP Berthelsen v Director-General of Immigration* [1987] 1 MLJ 134.

[36] *Mamat bin Daud v Public Prosecutor* [1988] 1 MLJ 119.

[37] *Dato Yap Peng v Public Prosecutor* [1988] 1 MLJ 119.

[38] *Government of Malaysia v Lim Kit Siang* [1988]2 MLJ 12.

majority and overruling its own previous decisions in the very same matter. A closer shave for the Government could hardly be imagined. Most impressively of all, perhaps, the *Tun Mustapha*[39] litigation arising out of a constitutional crisis in Sabah (for which see chapter five) was resolved against the result probably preferred by the Federal Government, the Federal court rejecting the idea that the constitutionality of an appointment of a Chief Minister was an issue beyond judicial determination.

This list of cases is merely a small bouquet of significant cases decided around this time. However, the judiciary was not placing the Government in a judicial stranglehold: it should be noted that a number of critical cases also went in the Government's favour. For example, several national security cases, such as *Theresa Lim Chin Chin*[40] were decided against preventive detainees. The refusal of a pardon was held, in *Sim Kie Chon*,[41] not to be reviewable by the courts. A contempt case against the Prime Minister was also dismissed.[42]

Several of the decisions struck down had been made by the Prime Minister Dr Mahathir himself, in his capacity as Minister of Home Affairs, or had been made by officials under his direction. He was clearly displeased by these decisions, because in several speeches he attacked the judiciary. The Leader of the Opposition cited him for contempt of court when he complained to Time Magazine about the obstructiveness of the judiciary. The Prime Minister's frustration was so graphically expressed that one might have sympathised with his plight but for the veiled threat with which he concluded:

> The Judiciary says, 'Although you passed a law with certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts say, 'We will interpret your disagreement.' If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to interpret it our way. If we find that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.[43]

[39] *Tun Datuk Haji Mahomed Adnan Robert v Tun Datu Haji Mustapha bin Datu Harun* [1987] I MLJ 471. And see ch 5, section IV.

[40] *Theresa Lim Chin Chin v Minister for Home Affairs* [1988] 1 MLJ 294; and see *Deputy Minister for Home Affairs v Cheow Siong Chin* [1988] 1 MLJ 432.

[41] *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494.

[42] *Lim Kit Siang v Datuk Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383.

[43] *Time Magazine*, 24 November 1986.

The case was dismissed, but not before the courts had given the Prime Minister a lecture on the separation of powers.[44]

It was following these decisions that the constitutional amendment to Article 121 was passed, which as we have seen removed the term 'judicial power' from the Constitution. The Lord President replied to executive criticisms of the judiciary in speeches, and even from the bench. It was in such a soured atmosphere that the most crucial case of all, one of the most remarkable in Malaysian history, came to be decided.[45]

B. The UMNO Election Case

In April 1987 UMNO held elections for the posts of party President and Deputy President. In eight successive Governments since *Merdeka* the holders of these posts had been the Prime Minister and the Deputy Prime Minister. This was the first occasion on which the UMNO leadership had been challenged from within the party. The elections were very hard fought, and the results were extremely close: the incumbents, Dr Mahathir and Tun Ghafar Baba (known popularly as 'Team A') narrowly defeated Tengku Razaleigh Hamzah and Datuk Musa Hitam (known as 'Team B'); but there were doubts as to the legitimacy of this result. Eleven UMNO members who were Team B supporters filed a suit challenging the legality of the elections, and seeking orders for the holding of fresh elections. Their case was that, amongst other irregularities, the presence of delegates from 30 branches which had not been approved by the Registrar of Societies made the elections invalid, because some voters were not entitled to vote; the 30 branches represented four out of 133 divisions, and sent 44 delegates to the UMNO General Assembly, enough to alter the close election result.

As a political party, UMNO was required to be registered under the Societies Act 1966, which applies to all societies (see chapter three). Under section 12 of the Act, 'where a registered society establishes a branch without the prior approval of the Registrar such registered society and the branch so established shall be deemed to be unlawful societies'. When the case was tried by Justice Harun Hashim at the High Court in Kuala Lumpur in February 1988, the defendant UMNO

[44] Above n 40 at 387.

[45] *Mohamed Noor bin Othman v Mohamed Yusoff Jaafar* [1988] 2 MLJ 129, affirmed on appeal sub nom *Mohamed Noor bin Othman v Haji Mohamed Ismail* [1988] 3 MLJ 82.

officials did not dispute the allegations of illegality, but argued that in any event the plaintiffs were not entitled to the relief sought because they had no enforceable interest in the matter, UMNO having become an unlawful society by operation of section 12. Paradoxically therefore, it was the *defendants* who argued that the party itself was an unlawful society, while the plaintiffs urged on the court a benevolent construction of the Act which would allow UMNO to remain lawful. The defendants (in effect Team A) were thus attempting to scuttle the party itself to avoid the possibility of an order for new elections.

The Judge held that from the first moment an unapproved branch was established, both UMNO and the branch became unlawful societies; the elections were therefore invalid. However, he also held that the plaintiffs could not have a remedy because they could not acquire any right which was founded upon that which was unlawful. Using a Malay proverb, he said that it was a case of *keris makan tuan*: the *keris* (a traditional curved Malay dagger) turning on its owner.

For the ruling party to be held unlawful is probably without precedent in the constitutional history of any country: UMNO was also the political equivalent of the family silver. The Prime Minister reassured the public that the Judge's decision would be accepted, but was quick to draw a distinction between his party and the Government, pointing to his majority support in Parliament. The illegality was, he said, a technical matter. He had a number of options open to him, the most obvious being to affirm his parliamentary majority by introducing a Bill in Parliament having the effect of reversing the High Court's decision, thereby solving both the political and the legal problems at one stroke. Presumably the reason he did not do this was because it would have revived the election issue which precipitated the crisis.[46]

It was, however, Team B which took the initiative. An 'UMNO Pro-tem Committee' was set up with the Tunku himself, now 85 years old, as President, and the third Prime Minster (and son of UMNO's founder) Tun Hussein Onn, as Deputy President. It applied for the registration of 'UMNO Malaysia', a new party. The application was rejected by the Registrar, who was under the Prime Minister's direction, on the ground that the old UMNO had not yet been deregistered, and the name of the new party was too similar to that of the old party. Just after deregistration occurred, Team A submitted a similar application to register a new party, UMNO Baru ('New UMNO'). The application was granted. The Prime Minister made it clear that Team B supporters would not be welcome in the new party. Team B also proceeded to register a new party, Semangat '46 (Spirit of '46; 1946 marks UMNO's founding). UMNO Baru consolidated its position and Semangat '46 went into opposition. In due course the word 'Baru' was in practice dropped. The general election of 1990 confirmed the continuance of the BN in Government. In the meantime the UMNO litigation continued, as the plaintiffs had appealed to the Supreme Court, which ordered that the appeal should be heard on 13 June before nine Judges, comprising the entire membership of the bench. In view of the settlement of the UMNO issue, it was clearly crucial from the Government's point of view that the settlement they has engineered should not be disturbed by the Supreme Court.[47]

C. A Perfect Storm: the Judiciary Entangled

This was precisely the very delicate political situation in mid-1988, at the time the judiciary crisis also reached its height. Following a meeting of the Kuala Lumpur Judges on 25 March to discuss ways of resolving the tension between the judiciary and the executive, the Lord President was mandated to write to the *Yang di-Pertuan Agong*, asking him to intervene. The letter expressed disappointment with accusations made against the judiciary by the Prime Minister, and expressed the hope that they would be stopped. The *Yang di-Pertuan Agong* took exception to the letter because he considered the Rulers would have been brought into conflict with the executive if he had acted on the letter's implied request to intervene in the crisis, and communicated his disapproval to the Prime Minister in an audience on 1 May. It should be noted that the Rulers had already come into serious conflict with the executive over the royal assent to legislation in 1983, as was discussed in chapter five.

Subsequently the Prime Minister, acting under Article 125, represented to the *Yang di-Pertuan Agong* that the Lord President should be removed on grounds of misbehaviour and being unable to perform his functions as Lord President, and advised the appointment of a Tribunal and Tun Salleh's suspension pending the report of the Tribunal. This

[46] AJ Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 *International and Comparative Law Quarterly* 57.

[47] HP Lee, 'A Fragile Bastion Under Siege: The 1988 Convulsion in the Malaysian Judiciary' [1990] *Melbourne University Law Review* 38.

course was agreed to by the *Yang di-Pertuan Agong* and, after an unsuccessful attempt to persuade Tun Salleh to retire quietly, put into effect.

Tun Salleh objected to the Tribunal on several grounds, including the ground that it was to be chaired by the Chief Justice of Malaya and Acting Lord President, Tan Sri Hamid Omar, who would succeed him if he was dismissed, so that the proceedings would breach the principles of natural justice. The Tribunal rejected his arguments and Tun Salleh applied to the High Court for an order of prohibition to prevent the Tribunal from proceeding, on grounds of its unconstitutionality.

Amid unprecedented scenes in Kuala Lumpur with lawyers and others protesting in the streets in large numbers, on 2 July the High Court postponed the hearing of Tun Salleh's application, refusing an interim order restraining the Tribunal, which was now sitting. Tun Salleh renewed his application for a stay before the Supreme Court the same day. Five Supreme Court Justices heard the case immediately, granting Tun Salleh an order restraining the Tribunal from submitting its report. Then, on 7 July, the five Judges constituting the Supreme Court were themselves suspended and another Tribunal was convened under Article 125 to investigate charges of misbehaviour against them. They were charged principally with conspiring to hold an illegal sitting of the Supreme Court.

What followed had an air of inevitability. Tun Salleh's application for leave was dismissed by the High Court, and the Supreme Court lifted the stay on the Tribunal's proceedings, at the same time rejecting a number of applications and appeals by Tun Salleh. The reasoning was that the Supreme Court's order of 2 July was made without jurisdiction and that, as the Tribunal was only an investigative body, not a deciding body, to restrain it would be to restrain the *Yang di-Pertuan Agong* from receiving the Tribunal's report. Subsequently, the appeal in the UMNO Election case was unanimously dismissed by the Supreme Court,[48] the Tun Salleh Tribunal reported recommending his dismissal, and the Tribunal on the five Judges also reported.[49] The outcome was that Tun Salleh and two of the five Judges were removed from office.

[48] Above n 41.

[49] *Report of the Tribunal Established under Article 125(3) and (4) of the Federal Constitution Re YAA Tun Dato Haji Mohamed Salleh Abas, Lord President, Malaysia* (Kuala Lumpur, Government Printer, 1988); [1988] 3 MLJ xxxiii; *Report of the Tribunal Established under Article 125(3) and (4) of the Federal Constitution Re YA Tan Sri Wan Suleiman bin Pawan Teh, Supreme Court Judge* [etc] (Kuala Lumpur, Government Printer, 1988); [1989] 1 MLJ lxxxix.

Impartial observers have found that the tribunals were packed by the executive, and the charges against Tun Salleh were flimsy, the evidence failing to reveal any misbehaviour on the part of him or the other Judges. Signally, the Tribunal on Tun Salleh based its findings on uncontradicted evidence, Tun Salleh having refused to appear before them, and seemingly applied a civil rather than a criminal standard of proof; it also applied a very broad test of misbehaviour, failing to consider the attacks to which Tun Salleh had been subjected.[50]

D. The Bar Responds

These events created a storm across Malaysia and internationally. They were an important issue in the 1990 general election. They resulted in a complete stand-off between the Government and the new Lord President, Tan Sri Hamid Omar, on the one hand, and the Bar on the other. The Bar, passing a motion of no-confidence in the Lord President and demanding his removal, sued him unsuccessfully for contempt of court, alleging obstruction of justice in the 1988 proceedings.[51] Thereupon the Government retaliated with a successful contempt prosecution against the Bar Council Secretary for scandalising the judiciary.[52] The Bar responded by avoiding the Lord President at social events (as opposed to shunning him in court, which would have harmed their clients). In Malaysia's very protocol-conscious society this move was highly confrontational. Many senior statesmen, lawyers, and other public figures, principally the Tunku and Tun Suffian, weighed in with fierce criticism of the Government. The episode was correctly described as an unconstitutional interference with judicial independence. The decisions of the judiciary predictably reverted to an extreme timidity not even generally seen before 1985. The judiciary had never been at such a low ebb. Looking back on those events in 2006 the Bar Council President

[50] Lee, above n 47; FA Trindade, 'The Removal of the Malaysian Judges' (1990) 106 *Law Quarterly Review* 51; Lawyers' Committee for Human Rights, Malaysia: Assault on the Judiciary (New York, 1990); Raja Aziz Addruse, *Conduct Unbecoming: In Defence of Tun Mohd Salleh Abas* (Kuala Lumpur, Walrus, 1990); M Gillen and T McDorman, 'The Removal of the Three Judges of the Supreme Court of Malaysia' (1991) 25 *University of British Columbia Law Review* 171.

[51] *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281.

[52] *Attorney-General of Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167.

told the public: 'Those were the sickest hours of executive incursion into the judiciary . . . those shameful events have left gaping wounds in the Malaysian society, from which we are yet to fully recover'.[53]

To the credit of the Malaysian Bar, for 20 years (1988–2008) the issue of the 1988 tribunals was never allowed to fade into history. In fact it became like an old injury that continues to cause pain even years later. A campaign was persistently pursued to reverse the result of the 1988 crisis. Eventually in 2008, five years after Dr Mahathir's retirement, an independent Panel of Eminent Persons cleared the Judges of any wrongdoing, and financial compensation and public recognition (although no formal apology) was granted by the Government.[54]

The Bar and many commentators consider the 1988 judicial crisis a watershed in Malaysian constitutional history: before 1988, courts were independent and judges decided according to the rule of law; after 1988, both the appearance and the reality of judicial autonomy were compromised. Before the removal of the judges in 1988 there was no suspicion of corruption or actual bias, but soon afterwards abundant evidence began to appear of political and corporate interference in court processes and judicial appointments. The hornet's nest was now broken and the judiciary was to suffer even further.

VI. JUDICIAL INDEPENDENCE: A DOWNWARD SLIDE

> 'Di-lutu umpama tebuan sarang pechah'
>
> (Blows raining down like hornets swarming from a broken nest)

If 1988 was an unmitigated disaster for the judiciary, it also heightened awareness of constitutional issues generally and in particular inculcated vigilance in relation to judicial appointments and performance, placing the Bar, which had been strong in defence of the judiciary, firmly in a position of civil-society leadership in relation to these issues. The Bar established a standing committee to monitor the erosion of judicial independence, published a declaration of judicial independence for the benefit of the public, and conducted public talks across the nation to explain the basis of constitutionalism, and how the concept of judicial independence was essential to constitutional democracy.

[53] Harding and Whiting, above n 2 at 275.

[54] *Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia* (Kuala Lumpur, Bar Council, 2008).

However, matters got worse rather than better, the judiciary not simply neutered in public law matters, but mired in corruption allegations in relation to private law matters. In a string of commercial and defamation cases throughout the 1990s it seemed that some judges were not deciding cases according to the law, but in order to please powerful business interests. In the *Ayer Molek* litigation, it was held on appeal that the first instance decision gave 'the impression to right-thinking people that litigants can choose the judge before whom they wish to appear'; 'there is something rotten in the state of Denmark', said one of the Judges in the Court of Appeal[55] (there was a sub-text: the special applications and appeals division of the High Court was located, along with the Danish Embassy, in Denmark House). A well-known businessman, Vincent Tan, was also involved in a number of defamation cases where his activities had been questioned.[56] Although the defamation cases were private actions, they had a chilling effect on journalists and lawyers commenting on judicial matters, the damages running to extraordinarily large figures.

By 1996 the judiciary had reached an ebb probably even lower than that of 1988. An anonymous 33-page 'poison-pen' letter was circulated at the annual judges' conference. It detailed extensive accusations of judicial corruption and incompetence, naming judges and itemising instances. These allegations seemed plausible to many observers, but even before he had commenced a formal investigation, the Attorney-General characterised them as 'vile, insidious, devious and scurrilous', designed to 'ridicule, abuse and insult the judiciary'. He then authorised an investigation by the police and the Anti-Corruption Agency – not into the substance of the allegations, but into their *authorship*.[57] Later the Attorney-General announced that the allegations were baseless, and that the author (popularly believed to be a certain High Court Judge) had voluntarily resigned and therefore he would not be prosecuted.[58] Indeed it was the legal profession that was blamed: even before the formal

[55] *Ayer Molek Rubber Company Berhad v Insas Berhad* [1995] 2 MLJ 734 (Court of Appeal, describing the conduct of the plaintiff's lawyer as an abuse of process, criticising severely while reversing the High Court).

[56] See, eg, *Ling Wah Press (M) Sdn Bhd v Vincent Tan Chee Yioun* [2000] 4 MLJ 77; *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673.

[57] CV Das (ed), *Justice Through Law: Fifty Years of the Bar Council of Malaysia, 1947–1997, A Pictorial Biography of the Legal Profession* (Kuala Lumpur, Bar Council of Malaysia, 1997) 89–90.

[58] ibid, 92.

investigation had commenced, the Attorney-General stated that he believed some lawyers were plotting to 'undermine the integrity of the judiciary and the administration of this country'.[59] As a result the allegations were not properly investigated, and the evidence of corruption was never brought into the open.

The Bar Council was prominent in a demand to set up a Judicial Appointments Commission, which would insulate judicial appointments from political interference; and a Royal Commission of Investigation into the administration of justice, to investigate thoroughly allegations of such interference. The Bar Council's defence of the principle of judicial integrity was, however, met with accusations such as that of Dr Mahathir himself when he accused the Bar of 'always oppos[ing] Government decisions' and behaving 'like an opposition party'; and he challenged it to form a political party instead of 'hiding behind the shield of a professional body'.[60]

From 1998 to 2004, as *reformasi* supporters rallied around deposed Deputy Prime Minister Anwar Ibrahim, Anwar was tried and sentenced for the crimes of sodomy and corruption in a judicial process condemned by Malaysian and international observers as hopelessly flawed.[61] Ultimately Anwar was cleared: by 2004, after Dr Mahathir's retirement, one conviction was struck down and on another he received a pardon. Judicial deference to the Government during these trials, and intimidation of Anwar's lawyers, raised further concerns about the separation of powers and the administration of justice.[62] In addition the Government attempted to intimidate defence lawyers involved in the case. For example, former Bar Council President, Zainur Zakaria, was sentenced to three months' imprisonment for contempt of court when he accused prosecutors of fabrication, fraud and blackmail.[63]

In 2000 allegations supported by photographs and receipts appeared to show that the Chief Justice Eusoff Chin had taken a holiday with

[59] *New Straits Times*, 17 March 1996.

[60] *New Straits Times*, 17 October 1996.

[61] eg, Amnesty International, *Sodomy Verdicts a Major Setback for Human Rights*, AI Index ASA 28/009/2000 (8 August 2000).

[62] Wu Min Aun, 'The Saga of Anwar Ibrahim' in Harding and Lee, above n 32; and for background on the Mahathir/Anwar conflict, Tey Tsun Hang, 'Malaysia: The Fierce Politico-Legal Backlash' (1999) 3 *Singapore Journal of International and Comparative Law* 1.

[63] *Re Zainur Zakaria* [1999] 3 CLJ 696; however, this was reversed on appeal, see *Zainur Zakaria v Public Prosecutor* [2001] 3 CLJ 673.

defamation lawyer (and counsel for Vincent Tan) VK Lingam in 1994. This raised considerable concern at possible collusion between the country's highest judge and a prominent lawyer representing particular business interests.

This time the response was more frank and positive, and an ameliorative process began at last. The de facto law minister, Datuk Seri Rais Yatim, criticised the Chief Justice for his actions, recognising public concern about judicial corruption, adding that change would have to come 'largely from within the legal community' in the absence of political will.[64] As the Government had used its numbers in Parliament eight months earlier to prevent an opposition politician from discussing judicial conduct, the Law Minister's comment about the absence of political will was sadly accurate.[65] By this time even the largely Government-owned newspapers were commenting adversely upon the administration of justice.

In 2001, the new Chief Justice, Tun Mohamed Dzaiddin Abdullah, replacing Eusoff Chin who had retired, attempted reconciliation, but this was roundly rejected by the Bar. Moreover, the Court of Appeal, in the course of protracted litigation by a rogue member of the Bar seeking to prevent the Bar from engaging with these judicial issues by calling EGMs and passing motions,[66] interpreted Article 125 of the Constitution as actually prohibiting *any and all public discussion* of the administration of justice unless it took place in Parliament. This decision clearly elevated judicial independence over freedom of speech.[67]

VII. A SCANDAL LEADS TO BETTER OUTCOMES: THE LAWYERS' WALK FOR JUSTICE

> 'Puchot yang layu di-siram hujan'
>
> (The shoot that was withering was revived by the rain)

It was indeed in the pouring rain on 26 September 2007 that the Malaysian judiciary turned the corner and began to hope for better days.

[64] *New Straits Times*, 8 June 2000.

[65] Kim Quek, 'Malaysian Justice in Shambles', *Harakah*, 16–30 June 2000.

[66] For the extended Raja Segaran litigation, see Harding and Whiting, above n 2.

[67] *Majlis Peguam Malaysia v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15; for discussion see Harding and Whiting, above n 2.

Earlier that month, Anwar Ibrahim released on the internet the first part of a secret videotape – the 'Lingam Tape' – dating from 2002, showing VK Lingam speaking on the phone with a person who appeared to be the then Chief Judge of the High Court of Malaya, and later Chief Justice, Ahmad Fairuz Abdul Halim. The tape indicated a conspiracy to use defamation suits to crush lawyers and journalists criticising Vincent Tan and to broker senior judicial appointments. It also contained evidence that a senior Judge had decided an election petition against an opposition MP for political reasons.[68] Anwar claimed that the tape proved 'a political conspiracy of the highest level and corruption of the highest judicial office', and that many court proceedings, including his own trials, must now be viewed as tainted and unreliable.[69]

Later, Anwar released two other parts of the tape, raising further similar concerns, and as a result the Bar organised the 'Lawyers' Walk for Justice' to Putrajaya. As one young lawyer put it: 'If lawyers in Pakistan can rally to uphold the integrity of their judiciary, why can't the Malaysian lawyers do the same?'[70]

The Bar Council called on its members to march to the Palace of Justice and then to the Prime Minister's office to present two memoranda calling for a royal commission of inquiry into the judiciary and a permanent judicial appointments commission to oversee a non-political appointment process for judges:

> [F]or too long we have watched the judicial appointment process become unfathomable and shrouded in secrecy. For too long we have cried out for reform, but the authorities have not heeded our pleas. Malaysians cannot afford to stand by and watch any longer. The time has come for us to act decisively'.[71]

Harding and Whiting report on the march as follows:

> In order to dramatise that their actions were motivated by justice, not politics, many lawyers donned formal court attire when on 26 September 2007 about 1500 of them, accompanied by 500 civil society activists, marched in pouring rain under the watchful eyes of the riot police. The event was reported extensively on the internet. In defiance of a police road block and

[68] See www.youtube.com/watch?v=CeDX78s3Rl0; www.youtube.com/watch?v=le5kqhD-6KQ&feature=related.

[69] Harding and Whiting, above n 2 at 286; *Malaysiakini*, 17 September 2007.

[70] Harding and Whiting, ibid. The chapter cited contains a fuller account of the whole story of the 'Lingam Tapes'.

[71] ibid.

> instructions that their march was illegal, the protesters presented the Bar's two demands at the Prime Minister's Office.[72]

The Government had already responded to public concerns by establishing a three-person independent panel of eminent persons, under the chairmanship of a former Chief Judge of the High Court of Malaya, to look into the scandal. This panel reported a few weeks later recommending a Royal Commission of Inquiry. The government acted on this and the Commission reported in May 2008. The Report found that the tape was indeed authentic, and expressed concern about interference in judicial appointments organised by some judges and lawyers, some members of the government, and some businessmen. This 'had the effect of seriously undermining and eroding the independence and integrity of the judiciary as a whole'.[73] Accordingly the Commission agreed that a judicial appointments commission was necessary.[74]

The Judicial Appointments Commission Act (discussed above) was passed in 2009, although the Attorney-General decided to take no criminal action against any individual as a result of the Commission's Report, a decision which outraged the Bar.[75] The post-2009 dispensation concerning judicial appointments probably still leaves something to be desired. In particular the executive still controls the process, and being consulted or offering advice or names is not the same thing as being able to ensure judicial independence. In November 2007 Chief Justice Ahmad Fairuz retired, and following the general election in March 2008 an UMNO minister implicated in the affair was dropped from the Cabinet.

In June 2008 a High Court Judge made extensive and shocking allegations from the bench concerning Government interference in the judiciary; these included an allegation that he himself and selected judges had been threatened by Dr Mahathir and 'packed off to a boot camp [in] 1997 where there was an attempt to indoctrinate them with the view "that the government interest was more important than all else"'.[76] No action was taken on these allegations, and the Judge himself resigned.

[72] ibid.

[73] *Report of the Commission of Enquiry on the Video Clip Recording of Images of a Person Purported to Be an Advocate and Solicitor, etc,* 9 May 2008.

[74] ibid, 37, 77–78, 175.

[75] *The Malaysian Insider*, 26 February 2009.

[76] 'Justice Ian Chin Tells of Threats and Indoctrination Attempt', *The Star*, 11 June 2008, thestar.com.my/news/story.asp?file=/2008/6/11/nation/21512634&sec=nation.

Clearly there are issues concerning the judiciary that have still not been addressed, despite the Bar's demands. However, the judiciary looks much more secure and enjoys a higher reputation than as recently as 2008. But the struggles continue. In 2011 Parliament passed the Judges Remuneration (Amendment) Act 2011, which increased the period of service for maximum judicial pension from 15 to 18 years, while reducing the period for the Chief Justice from 10 to three years. This was criticised for its unfairness and retrospective effect.[77] Concern has been expressed over the lack of criminal consequences arising from the Lingam Tapes affair.[78] Currently, Lingam himself, having failed in an attempt at judicial review of the Royal Commission's Report, is subject to disciplinary proceedings by the Bar Council.

VIII. CONCLUSION

'Tak boleh tandok, telinga di-pulaskan'

(If he cannot twist the horn, he twists the ear)

In 1979 in *Teh Cheng Poh* the Privy Council made its most notable decision on the Malaysian Constitution when it struck down the notorious Emergency (Security Cases) Regulations 1975. It held that once Parliament had sat, the Government could not by delegated power make law that it could not now make under primary emergency legislation; the Cabinet could not, said the Court, pull itself up by its own bootstraps.[79]

Shortly after this, moves were commenced to abolish the final appeal from Malaysia to the Privy Council. This proved to be a turning point. For the first 30 years of its post-*Merdeka* existence the Malaysian judiciary had proceeded along a smooth path, upholding a somewhat thin version of the rule of law and the Constitution, while allowing scope for executive power to operate its most important policies without what the Tunku had called 'too much legality'. Even the emergence of the developmental state did not change the position unduly. Following the

[77] T Thomas, 'Retrospective Pension for Chief Justice Zaki?', 9 September 2011, Malaysian Bar, www.malaysianbar.org.my/legal/general_news/retrospective_pension_ for_chief_justice_zaki_.htm.

[78] 'The RCIs Appear Useless', The Malaysian Insider, 25 October 2011, www.themalaysianinsider.com/sideviews/article/the-rcis-appear-useless-the-malaysian-insider.

[79] [1979] 1 MLJ 50; [1980] AC 458.

abolition of the Privy Council appeal, the Malaysian judiciary's reputation was more obviously at stake compared to pre-1985; but so was Mahathir's control over important levers of the developmental state. In asserting this control he found that in many respects the existing constitutional order placed obstacles in his path: political opposition, civil society, human rights, the Bar, Parliament, and even the internal democratic processes of his party. Added to this, from 1985 was the increasingly confident and activist judiciary of the Salleh court that gave impetus to all of those aspects of the constitutional order that obstructed the Government's notion of development.

The cataclysm that followed shook the nation and its constitutional order to its very foundations. The judiciary was tamed and trained to serve the needs of the developmental state, as if it were a department of the Federal Government answerable to the Prime Minister rather than the law. The decline of a once-proud institution into servility and corruption was dramatically precipitate. Within 10 years it had been completely transformed. As Mahathir's reign came to an end, the Bar's tenacity and solidarity finally began to reverse the order of events. Distancing themselves from the unconscionable actions of the 1980 and 1990s, Mahathir's successors have recognised a national interest in rescuing the judiciary. The acquittal of Anwar Ibrahim in January 2012 in the case that has come to be known as *Sodomy II* has created a new sense of optimism either that judicial independence survives, or that the Government is in effect compelled by events to sustain it at some level.[80] The cancer of the 1988 crisis has been removed. It is not to be expected however that in this situation the patient will make an immediate recovery, but it has a much better chance of survival than it appeared to have before. It will take more than a recklessly ambitious government at any future time to bring the judiciary back to where was after 1988.

FURTHER READING

CV Das (ed), *Justice Through Law: Fifty Years of the Bar Council of Malaysia, 1947–1997, A Pictorial Biography of the Legal Profession* (Kuala Lumpur, Bar Council of Malaysia, 1997).

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8

Religion and the Constitution

Introduction – Law and Religion: History and Context – Islamicisation and the Islamic State – Islam as the Official Religion – Religious Freedom – Conversion and the Courts – Conclusion

I. INTRODUCTION

'Lain lubok, lain ikan-nya'
(Different pools, different fish)

MALAYSIA'S PLURALISTIC SOCIETY has been seen in this book as the crucial factor guiding all analysis of contemporary constitutional issues. It is also the factor that makes the attempts to deal with pluralism in a constitutional fashion a matter of comparative interest in a world where the exclusively secular nature of states is no longer taken for granted, and religious pluralism is almost universal. There is in Malaysia, as we have seen, a profound even if not completely commensurate relationship between ethnicity and religion, particularly given that virtually all Malays are Muslim: indeed the definition of 'Malay' in the Constitution includes being Muslim.[1] Muslims comprise about 60 per cent of the total population of 28.6 million; Buddhists about 19 per cent; Christians about 9 per cent; Hindus about 6 per cent; Confucian/Taoists about 3 per cent; Sikhs about 2 per cent and others about 1 per cent. In recent years religion has played a larger

[1] Art 160(2). However, not all Muslims are Malay; they include Indian Muslims and Chinese, Indian and Sabah/Sarawak native converts.

role even than ethnicity in defining identity and interest in this complex and contested polity.[2]

This chapter, unlike other books in this series, singles out for attention the constitutional treatment of religion, which, as with ethnicity, is a fundamental defining element in Malaysia's multicultural environment. In doing this it is necessary to cut across the traditional division of constitutional law texts according to the familiar patterns of constitutional analysis. Accordingly we will, in this chapter, examine not just the actual state religious structures, but also the debates around religion and the Constitution, which have intensified significantly in the last decade. In particular we will consider the debate concerning Malaysia as an 'Islamic state'; conflict over the jurisdiction of the civil and syariah courts; and the related issue of religious freedom. In this sense consideration of religion is offered not merely by way of completeness of coverage, but because it is fundamental to complete understanding of the constitution as a whole.

II. LAW AND RELIGION: HISTORY AND CONTEXT

> 'Adat yang kawi, Shara' yang lazim'
> (Custom is the real law, Syariah is the ideal law)

To understand the constitutional consequences and importance of religion, and the contemporary debates around it, it is necessary to trace the place of religion through Malaysian history.

Pre-Islamic society in Malaysia was either largely Hindu or animistic; and law was based on custom (*adat*). Islam came to Malaysia in the fourteenth century by means of Arab merchants and Sufi missionaries. When the Malacca Empire was created in the early fifteenth century, its Hindu founder Parameswara converted to Islam and changed his name to Iskandar Shah. The royal houses of the Malay states derived culturally and politically from the Malacca Empire, which splintered following its destruction by the Portuguese in 1514 into riverine states roughly commensurate with the present states of peninsular Malaya. In these states the Malay Rajas (later usually styled 'Sultan', the name change itself a

[2] AJ Harding, 'Constitutionalism, Islam, and National Identity in Malaysia', ch 2.8 of R Grote and T Rode (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford, Oxford University Press, 2012).

nod towards Islam and a demotion of the Hindu past) linked themselves symbolically with the Arab mainstream Islamic tradition, attempting in general to base their laws and governments on a combination of Islamic principles and *adat*. Some formal traditions derived from Hinduism also remained. Sabah and Sarawak were originally parts of the Brunei sultanate which was also culturally related to the states of Malaya. Hence Islam was invariably the State religion and the Ruler was also the Head of Islam. This remained true from the Malacca Empire onwards, and indeed, as a result of the treaty provisions (discussed in chapter one and below), throughout the period of colonial rule, and up until today.[3]

Islamic law played an important role as the personal and religious law of Muslims (mainly family law, succession, the law relating to mosques and religious observance) while *adat* played an important role in criminal law and property, but only marginally in family law. There were no customary courts, and conflicts were usually judged by the *khadi* (Muslim judge) with the opportunity to appeal to the Ruler. Although the nineteenth-century legal systems of Malaya are described as Islamic, they were often very far in practice from any particular Islamic ideal, the position varying according to the power and the inclination of the Ruler, as well as the extent of local adherence to *adat*.[4] In Negri Sembilan and the Naning district of Malacca, for example, the matrilineal *adat perpatih* of the Minangkabau prevailed, which was contrary to Islam in several respects.[5]

As we saw in chapter one, the 1874 Treaty of Pangkor between the Crown and the Sultan of Kedah, which provided a precedent ultimately followed without variation in all the Malay states, required the Sultan to follow the British Resident's advice in all matters except those relating to Islam and Malay custom.[6] In so providing, the treaties reserved the special and official nature of Islam as the religion of the State, but also laid a foundation for the secularisation of the general law and legislation. The mention of 'advice' was clearly a legal figleaf to cover the reality of colonial ambitions in the context of indirect rule in these protected

[3] In Penang, Malacca and Sarawak, however, Islam is not the State religion, and the *Yang di-Pertuan Agong* serves as the Head of Islam.

[4] MG Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton, Princeton University Press, 2002) ch 1.

[5] MB Hooker, *Adat Laws in Modern Malaysia* (Kuala Lumpur, Oxford University Press, 1972).

[6] See further, ch 1; Iza Hussain, 'The Pursuit of the Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State' (2007) 32(3) *Law and Social Inquiry* 759.

states.[7] However, the reservation of Islam and Malay custom represented a genuine form of jurisdiction which the British had no interest in exercising. This arrangement also, of course, acted as a legal figleaf to cover the reality of creeping federalisation (see chapter one).

As a result of the extension of British power over Malaya during the last quarter of the nineteenth century and the first quarter of the twentieth, the degree of legal pluralism increased with the introduction of the common law and its institutions. This was achieved at first gradually, by stealth, via judicial decisions, and eventually decisively by the use of legislative power, so that the outcome was the adoption of the common law as the general law. The resulting subordination of Islamic law created a grievance which is now expressed in terms of proposals variously to base the general law of Malaysia on Islamic principles, to mix common law and Islamic law, or to raise the level of the syariah courts to that of equality with the civil (common law) courts.[8] The migration of people from South China and from the Indian subcontinent, who brought their own laws, customs, and religious beliefs, which in various ways came to be recognised by the legal system, added further elements to the prevailing legal pluralism. Fundamental rights were not enshrined in law until the *Merdeka* Constitution, as we saw in chapter one, but the plural nature of Malayan society was such that legislation interfering with religion was practically impossible and undesirable; indeed the increasing exercise of indirect power by the British in Malaya tended to result in statutory entrenchment and harmonisation of Islamic law alongside recognition of other forms of customary or religious law.[9] As a result, freedom of religion was a pervasive social fact rather than a legally guaranteed right, although the primacy of Islam was also a necessary consequence of the treaties and the system of indirect rule. By the time the legal 'reception' of the common law and equity was consolidated throughout the Federation on the very eve of *Merdeka*, by the Civil Law Act 1956,[10] the distinction between common-law based public and general private law, on the one hand, and

[7] R Emerson, *Malaysia: A Study in Direct and Indirect Rule* (New York, Macmillan, 1942).

[8] D Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change' XLII 2 and 3 *American Journal of Comparative Law* 233, 543; Farid Sufian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia* (Kuala Lumpur, Malayan Law Journal, 2003).

[9] Mohamed Azam Mohamed Adil, 'Law of Apostasy and Freedom of Religion in Malaysia' (2007) 2(1) *Asian Journal of Comparative Law*, art 6.

[10] Act 67, ss 3, 5.

Islamic personal law on the other hand, was firmly entrenched in legislation and legal practice. It was then further entrenched by the *Merdeka* Constitution. The failure to create a unitary state in 1946 and the adoption of federalism in 1948 were largely due to the unwillingness of the Malays to accept the dissolution of their traditional States and forms of governance. Part of their cultural attachment to their traditional States was the association of the States with religion. This meant that religion as a *State* matter was of necessity preserved by the constitutional settlements of 1948, 1957 and 1963, despite the simultaneous enshrining of Islam as the official religion of the Federation. The debates around this issue were discussed in chapter one.

The position was hardly different in the other territories which ultimately formed modern Malaysia in 1963. In the Straits Settlements colony (the territories now known as Penang, Malacca and Singapore) the common law, as a result of royal charters, was the general law from the early nineteenth century; Islamic law was recognised, as in the Malay States, but only as personal law for Muslims. Sarawak was under the rule of the White Rajahs for a century from 1841–1941: their policy, as also with British policy in the colony of North Borneo (Sabah) was to preserve native customs. In these two territories Islam was recognised but was not associated with the State, until they became subject to the Malaysian Constitution in 1963, and then only in the case of Sabah.[11]

Concerning the role of Islam, the Constitution therefore essentially entrenched the position which had applied under British rule in the Malay States. It was clear that an Islamic state as such was not contemplated and there was no proposal that the matter of religion be taken any further than Article 3, which provides that Islam shall be the religion of the Federation. This dispensation regarding the official religion has become increasingly contested in various ways, as we will now see.

III. ISLAMICISATION AND THE ISLAMIC STATE

'Let there be no compulsion in religion'

(*The Holy Quran*, verse 256 of *Sura al-Baqara*)

The constitutional changes of 1971 and the creation of the developmental state did not affect the issue of religion. However, during the 1980s,

[11] See Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, 2nd edn (Kuala Lumpur, Dewan Bahasa dan Pustaka, 1995) chs 1–4.

Malaysian society experienced a resurgence of Islam in the wake of the Iranian revolution of 1979. This is referred to as the '*dakwah* movement'.[12] During this period, the Islamic Party PAS made specifically legal claims at the boundaries where Islam and the common law met, working for the establishment of an Islamic state.[13] At the end of the 1970s for a short period PAS took over the State Government of traditionally Islamic Kelantan. During PAS' tenure of the State Government at that time and again from 1990 until today, PAS promoted Islamicisation so far as was consistent with State powers. It did so again, briefly, in Terengganu between 1999 and 2004. These measures involved, for example, regulation of public entertainments and public service dress codes, the sale of alcohol, and gambling. They also included the adoption of the Hisbah Enactment 2000 in Terengganu, which provides something resembling an Islamic ombudsman. Furthermore, a controversial attempt in both States to introduce *hudud* (Islamic criminal) law created a constitutional storm that has yet to die down.[14]

In response to the passing of the Syariah Criminal Code Enactment by the Kelantan State Legislative Assembly in 1993[15] there was a chorus of dismay, not just from lawyers, non-Muslim groups, and political parties, but also Muslim groups such as Sisters in Islam, who objected vigorously to the discriminatory effect of several provisions against women and its inconsistency with the concept of fundamental rights in the Constitution.[16] The Federal Government refused to enforce this law on the grounds that it was an unconstitutional exercise of States' powers, criminal law being reserved under Schedule 9 to the Federation. The matter has not been determined by the courts, but the law cannot be implemented in practice as it requires federal policing. The *hudud* law therefore remains a political project rather than effective law, requiring a

[12] Hussin Mutalib, *Islam in Malaysia: from Revivalism to Islamic State?* (Singapore, Singapore University Press, 1993).

[13] Liew Chin Tong, 'PAS Politics: Defining an Islamic State' in ET Gomez (ed) *Politics in Malaysia: The Malay Dimension* (Abingdon, Routledge, 2007) 112; J Stark, 'Constructing an Islamic Model in Two Malaysian States: PAS Rule in Kelantan and Terengganu' (2004) 19(1) *Sojourn* 51.

[14] Mohammad Hashim Kamali, *Punishment in Islamic Law: An Enquiry into the Hudud Bill of Kelantan* (Kuala Lumpur, Institut Kajian Dasar, 1995).

[15] Two members of the opposition also voted for the Bill. For further analysis and comments on the *hudud* issue, see Mohammad Hashim Kamali, ibid.

[16] Rose Ismail (ed), *Hudud in Malaysia: the Issues at Stake* (Kuala Lumpur, SIS Forum, 1995).

constitutional amendment providing for it before it could become valid. However, even after joining the PR, the multi-ethnic opposition coalition, PAS still maintains its intention to accomplish *hudud* law in Kelantan.[17]

With the aim of undercutting PAS' Islamist appeal, the BN Government mounted its own programme of Islamicisation.[18] This involved initiatives in Islamic education and Islamic finance.[19] With regard to the legal system, it has pursued the harmonisation of Islamic law (family law, and the law of evidence, for example) and institutional reform (the syariah courts and legal profession, and the religious bureaucracy). In 1988 it succeeded in obtaining the amendment to Article 121 of the Constitution that, as we saw in chapter seven, divided the syariah courts from the civil courts by providing that the civil courts could not exercise jurisdiction in any case falling under the syariah courts' jurisdiction. Article 121 has proved highly problematical in terms of religious freedom, as is discussed in detail below.

The electoral successes of PAS and its legislative proposals created a new and controversial environment for the discussion of the role of Islamic law in more general terms. In recent years, for example, there has been public debate about the concept of an Islamic state,[20] which started in 1999 and intensified following an announcement by Prime Minister Dr Mahathir in June 2002 that Malaysia was an 'Islamic state'. He went even further to say (with obvious exaggeration) that Malaysia was a 'fundamentalist, not a moderate Islamic state', and was also a 'model Islamic state'.[21] These statements sparked great controversy.[22] Catholic bishops and non-Muslim parties, for example, denounced them as creating a climate of fear and discrimination in a society that has always embraced religious and ethnic pluralism, and as being factually and legally incorrect. A similar response greeted a remark by the

[17] 'Hudud Feud: Anwar Backs it, Karpal Says No, but Kelantan MB Remains Adamant', The Star, 23 September 2011, thestar.com.my/news/story.asp?file=/2011/9/23/nation/9559730&sec=nation.

[18] Joseph Chinyong Liow, *Piety and Politics: Islamism in Contemporary Malaysia* (Oxford, Oxford University Press, 2009).

[19] The Islamic Banking Act 1983.

[20] AJ Harding, 'The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia' (2002) 6 *Singapore Journal of International and Comparative Law* 154.

[21] CNN, 18 June 2002, edition.cnn.com/2002/WORLD/asiapcf/southeast/06/18/malaysia.mahathir, accessed 6 January 2010.

[22] T Thomas, 'Is Malaysia an Islamic State?' [2006] 4 *MLJ* xv.

current Prime Minister Najib Tun Razak, when he was Deputy Prime Minister in 2007 that Malaysia 'has never been a secular state'. In this issue the Bar has become increasingly vocal, basing its view that Malaysia is a secular state on the Constitution and the social contract of 1957.[23] It responded even more angrily when confronted with the then Chief Justice's view that the common law system should be brought into conformity with Islamic law:

> [L]et there be no mistake. Any attempt to dismantle the common law system is a direct attack on our Federal Constitution. It is a backdoor attempt to rewrite it and to move Malaysia towards becoming a theocratic state which our founding fathers and recently our Prime Minister have recognised we are not. It violates the social contract. That it comes from those who ought to uphold the law and the constitution is all the more regrettable.[24]

PAS, however, while adhering to the concept of an Islamic state, has been forced to reach political accommodation with other opposition parties (DAP and PKR), and their PR coalition obtained success in the 2008 elections (see chapter three). For this reason it has refrained from making clear what an Islamic state would look like, and accepts that its proposals need to be negotiated in terms of the existing Constitution and political process. Its publication 'The Islamic State Document'[25] has been described as doing 'little more than state general principles drawn from classical Islamic sources and identify areas of government policies that need to reflect these principles'.[26]

We have seen here and in chapter one how Islam came to be adopted as the official religion of the Federation despite the absence of any recommendation in this regard by the Reid Commission, and despite the continuance of Islam as a State matter, as guaranteed by Schedule 9, which divides Federal and State powers. Given the lack of any current political project, let alone consensus, to amend the Constitution on the

[23] Bar Council Press Statement, 'Malaysia is a Secular State', 18 July 2007.

[24] Bar Council Press Statement, 'Leave the Common Law Alone', 24 August 2007, quoted in AJ Harding and A Whiting, '"Custodian of Civil Liberties and Justice in Malaysia": The Malaysian Bar and Moderate State', ch 7 of T Halliday, L Karpik and M Feeley (eds), *Fates of Political Liberalism in the Post-Colony: The Politics of the Legal Complex* (Cambridge, Cambridge University Press, 2012) 247.

[25] Issued in 2003: see kurzman.unc.edu/files/2011/06/pas-islamic-state-2003.pdf.

[26] Nazish Ansari, 'Malaysia: Limitations of the Human Rights Discourse and the Deployment of Rights in a Religious Identity Debate' (2004) 1(1) *Muslim World Journal of Human Rights* 14.

matter of religion, which we can safely attribute to its continually deepening sensitivity, the interpretation of the Constitution as it is has become the weapon of choice in a fierce struggle over the constitutional position regarding religion. As we will see, the role of the courts has become crucial in this respect.

IV. ISLAM AS THE OFFICIAL RELIGION

> 'Ai ka-lagi-lagi, bagai Belanda minta tanah'
>
> (More, more! Like a Dutchman asking for land – a Perak proverb)

In the last two decades, as a result of Islamicisation, there has emerged a considerable religious bureaucracy as well as a plethora of legislation intended to harmonise Islamic law across 14 jurisdictions (13 State, and one Federal), and improve the position of the syariah courts with respect to the civil courts.[27]

In each state the Ruler has retained his function as Head of Islam and is also primarily responsible for the enforcement of *adat*. He is advised by the Religious Council (usually called the *Majlis Agama Islam dan Adat Melayu*[28]), which is chaired by a *Mufti* and is competent to promulgate *fatwas*[29] which are binding on Muslims. These Councils comprise mainly religious teachers (*ulamak*) and officials of the *Jabatan Hal Ehwal Agama* (the State Department for Religious Affairs). The Departments for Religious Affairs were established in each State after World War Two, and are responsible for the syariah courts and other syariah matters; for the appointment of judges; and for the enforcement of Islamic law in general, including some policing functions. They are assisted by *Pejabat Agama* (Religious Offices) at the district level. As part of extensive reforms of the system of Islamic law from 1984, the syariah courts were separated from the Departments for Religious Affairs, and the practice of Islamic law placed on a professional footing equivalent to that for ordinary lawyers. The syariah courts in each state are now divided into

[27] Sharifah Zaleha Syed Hassan and Sven Cederroth, 'Institutionalization of the Syariah in Malaysia', ch 2 of *Managing Marital Disputes in Malaysia* (NIAS, Copenhagen, 1997).

[28] Literally, Council of the Religion of Islam and Malay Custom.

[29] MB Hooker, 'Fatwa in Malaysia 1960–1985: Third Coulson Memorial Lecture' (1993) 8 *Arab Law Quarterly* 93; Ahmad Hidayat Buang (ed), *Fatwa di Malaysia* (Petaling Jaya, Academy of Islamic Studies, University of Malaya, 2004) (in Malay).

the Syariah Subordinate Court, the Syariah High Court, and the Syariah Court of Appeal, as a result of legislation in all States during 1984–91.[30] The Judges are appointed by the *Yang di-Pertuan Agong* on the advice of the minister after consulting with the Majlis Agama (Religious Council). In 2010 the first two female syariah court judges were appointed.[31]

The State (or for federal territories the Federal) Government is responsible for Islam, which is defined exhaustively in Schedule 9 (but paraphrased briefly here) as including the personal and family law of Muslims, including succession, marriage and divorce; charitable and religious endowments, institutions, and trusts; Islamic religious revenue; mosques or any Islamic public places of worship; creation and punishment of offences by Muslims against precepts of that religion; the constitution, organisation and procedure of syariah courts; control of propagating doctrines and beliefs among Muslims; and the determination of matters of Islamic law and doctrine and Malay custom.

Beyond this structure of religious jurisdiction, Article 3, while enshrining Islam as the religion of the Federation, adds that 'other religions may be practised in peace and harmony'. To understand Article 3 further we need to refer also to Article 11, which guarantees freedom of religion and is discussed further in the next section.[32] Under Article 11, 'Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.' Clause (4) provides that 'State law and in respect of the Federal Territories . . . federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.' Article 11 also attaches religious freedom to religious communities by guaranteeing the rights of religious communities to manage their own affairs.[33] Under Article 12, discrimination against any citizen on the grounds of religion is prohibited in relation to the administration of public education, and every religious group has the right to establish and maintain institutions for educating children in its own religion. It is however lawful under Article 12 for the Federal and State Governments to

[30] Horowitz, above n 8 at 260.

[31] 'A First for Women Syariah Judges', Malaysian Bar, 4 July 2010, www.malaysianbar.org.my/legal/general_news/a_first_for_women_syariah_judges.html.

[32] Jamila Hussain, 'Freedom of Religion in Malaysia: The Muslim Perspective', ch 5, and Poh-ling Tan, 'Prime Suspect or Potential Witness? Paying the Price for Religious Freedom: A Non-Muslim Perspective', ch 6 of Wu Min Aun (ed), *Public Law in Contemporary Malaysia* (Longman, Petaling Jaya, 1999).

[33] Art 11(3); see also art 12(2).

maintain Islamic institutions. However, no person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.[34]

These provisions have in practice raised a number of problems. What are the consequences, if any, of an official religion, especially under a federal system? Does Article 3 indeed make the state Islamic, as has been argued, and if so, in what sense? To what extent do adherents of religions other than Islam enjoy freedom of religion where the state does not treat Islam equally with other religions? What is the impact of this on the lives of individuals and families, and also religious communities, Muslim and non-Muslim? These questions will now be explored.

To deal with the general issue of the official religion, the enshrinement of Islam as the religion of the Federation clearly means at least that the Federation exercises over federal territories powers equivalent to those of the States. Other than this, it appears that Islam is confined to a ceremonial role. The Reid Commission's Report, where it considered the Alliance Memorandum asking for Islam to be the religion of the Federation, and even the dissenting note of Justice Abdul Hamid (which as we have seen in chapter one was adopted in the final version of the Constitution), envisaged that this provision would not imply that the State was not secular. Article 3(2) also heavily implies that in providing Islam to be the religion of the Federation, only 'acts, observances and ceremonies' are affected, and 'all the rights, privileges, prerogatives and powers' of the Rulers as Heads of Islam 'are unaffected and unimpaired'. Moreover Article 3(4) provides that '[n]othing in this Article derogates from any other provision of this Constitution'. In practice Article 3(1) is observed by, for example, the *doa* (Muslim prayers) and *halal* food at official events. Any other federal role for Islam would undermine the powers of the States and their Rulers, which was a concern of the Rulers that was met with assurances, when Article 3 was introduced (hence the provision in Article 3(2) that their powers are not affected). It would also undermine freedom of religion, to which we turn in the next section, and upon which assurances were also given to non-Muslims which were set out in Articles 3, 11 and 12.

This position was recognised by the Supreme Court in *Che Omar bin Che Soh v Public Prosecutor* in 1988.[35] It was argued in this case that the

[34] The provisions are arts 12(1), (2) and (3) respectively.

[35] [1988] 2 MLJ 55.

death penalty for drug-trafficking was contrary to Islam and therefore prohibited by Article 3. The Court, rejecting the idea that legislation could be struck down as being contrary to Islam, pointed out that, although Islam is a complete way of life covering all fields of human activity, Article 3 did not make Malaysia an Islamic state, but merely provided for a ritualistic and ceremonial role. In doing so, the Court indicated that the Constitution draws a distinction between public and private (Islamic personal) law.[36] However, this position remains in doubt in the light of more recent cases, such as *Lina Joy* (discussed below). In one High Court decision the judge took the opposite view to the Court in *Che Omar*, stating that

> Islam in the Constitution [is] a complete way of life and not just a mere set of rituals . . . [it] is the primary religion which takes precedence over other religions in Malaysia, and this is the implication of the stipulation of Islam as the religion of the Federation.[37]

V. RELIGIOUS FREEDOM

> 'Kalau ayer tenang, jangan di-sangkakan ta'ada buaya'
>
> (Still water does not mean there are no crocodiles)

The constitutional provisions relating to religious freedom were set out in the last section, where it was noted that Article 11, while providing for freedom of religion, draws a sharp distinction between the *profession and practice* of religion on the one hand, and its *propagation* on the other hand. There are indeed relevant laws in nine of the 13 States prohibiting propagation of religions other than Islam amongst Muslims,[38] so that the Constitution both restricts freedom of religion and discriminates in favour of Islam in the way it restricts that freedom. In a society where religion is of great importance and there is fierce competition for adherents, naturally the position regarding propagation and conversion is objected to by non-Muslim religious groups. As a result, non-Muslim religions have organised themselves to secure religious freedom: the Malaysian Consultative Council of Buddhism, Christianity, Hinduism,

[36] See further, Mohamed Azam, above n 9 at 10–11.

[37] *Meor Atiqulrahman bin Ishak v Fatimah binte Sihi* [2000] 5 MLJ 375.

[38] See, further, Mohamed Azam, above n 9. These laws, passed between 1980 and 1991 are, however, rarely enforced in practice.

Sikhism and Taoism was set up in 1983. While it can be seen that, in the Malaysian context, attempts to proselytise amongst Muslims might be incendiary, it is hard to see why this would not also be true for proselytisation amongst non-Muslims. If there is in such activities a serious threat to social stability, one wonders why four States have neglected to join the other nine in passing laws restricting religious propagation. Indeed in *Minister for Home Affairs v Jamaluddin bin Othman* the Supreme Court struck down a detention order issued under the Internal Security Act against a Malay convert to Christianity who had converted several Muslims to Christianity, reasoning that even national security could not prevail over freedom of religion.[39]

The constitutional provisions raise acutely the question of how far religious freedom is in practice guaranteed. Whilst actual religious observance of all kinds can be seen throughout Malaysia, and holy days of all major religions are observed as public holidays (even Diwali, when only 6 per cent of the population is Hindu), religious freedom as such is clearly restricted in several respects.[40] For example, Article 11(5) allows legislative restrictions on religious freedom on the basis of maintaining public order, public health or morality. An example of this is the case of *Halimatussaadiah v Public Service Commission*, in which the court upheld on the basis of public order a prohibition on a public servant while on duty wearing a veil that covered her face. However, in so finding the court took into account the evidence of the Mufti that this form of dress was not mandated by Islam.[41] This can be contrasted with *Meor Atiqulrahman v Fatimah binte Sihi*, in which the High Court overturned the dismissal from school of three Muslim boys for wearing a *serban* (turban) rather than a *songkok* (black hat) as required by the school authorities. In this case no issue of public order of morality arose.[42] The following issues which have arisen in recent years illustrate the problem of religious conversion and its effect on religious freedom.

[39] [1989] 1 MLJ 418.

[40] Jaclyn Ling-Chien Neo, 'Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia' (2006) 13 *International Journal of Minority and Group Rights* 95.

[41] [1992] 1 MLJ 513.

[42] [2000] 5 MLJ 375; and see Abdul Aziz Bari, 'Islam in the Federal Constitution: A Commentary on the Decision of Meor Atiqulrahman' (2000) 2 *MLJ* cxli; Thio Li-ann and Jaclyn Neo Ling-Chien, 'Religious Dress in Schools: The Serban Controversy in Malaysia', (2006) 55 *International and Comparative Law Quarterly* 671.

In 2009 objections were made about a Catholic publication, the *Herald*, which in its Malay edition used the word 'Allah' to indicate the Christian God. The Minister for Home Affairs, using his powers under the Publications and Printing Presses Act 1984, banned the publication. The publishers of the *Herald* applied for judicial review, and in December 2009 the High Court issued a powerful judgment striking down the Minister's ban on the ground that it violated the right to practise religion 'in peace and harmony' under Article 3(1), and the right of freedom of expression under Article 10.[43] The Government appealed the decision, but the case had not been heard at the time of writing. Again there was a link with conversion, as it was claimed that the word was used to obtain conversions. The situation was dealt with, at least temporarily, by the Conference of Rulers issuing a statement expressing 'sadness' over the use of the word 'Allah', emphasising the role of the Rulers in protecting Islam 'without neglecting the rights and religious freedoms of the other races [sic]', and deploring attacks which had taken place on places of worship.[44]

A similar issue arose in August 2011 when the JAIS (religious police of the State of Selangor) raided the Damansara Utama Methodist Church (DUMC) where a dinner was being held that included 12 Muslims. It was alleged that attempts were being made to convert Muslims, although the organisers claimed that the dinner was to raise funds for HIV/AIDS patients. Non-Muslims were offended by the invasion of a sacred place. The Sultan of Selangor issued a statement saying that nobody would be prosecuted as a result of this incident, but also indicated that the JAIS had acted properly within their powers (this latter proposition is disputed). The Sultan's statement appeared to reduce tension over the incident, but left questions as to the legal rights involved, the interpretation of the law, and the appropriate policy with regard to policing the issue of propagation. It also raised questions as to the role of the Rulers (for which see chapter four) in dealing with religious disputes. The 12 Muslims were sent for counselling 'to restore their faith', and the Sultan, echoing the constitutional provisions, warned non-Muslims not to propagate their religions amongst Muslims, but to

[43] 'High Court Grants Catholic Publication Herald the Right to Use "Allah" Word Again', *The Star*, 1 January 2010, thestar.com.my/news/story.asp?file=/2010/1/1/courts/5399211&sec=courts.

[44] *The Star*, 2 February 2010, thestar.com.my/news/story.asp?file=/2010/2/11/nation/20100211164940&sec=nation.

protect their own religious freedom within the law: 'This freedom has been practised in harmony in this state. We wish that this harmony, which has existed for a long time, will continue to exist.'[45] As with many other such issues, the immediate matter seems to be resolved in a de facto sense; and yet the underlying issues have not been confronted in a manner that is either wholly satisfactory or upholds the Constitution and the rule of law.

In another incident in early 2011 relating to religious texts, the importing of 35,000 Malay-language Bibles into Malaysia resulted in the Government stamping all of these with the words 'for the use of Christians only, by order of the Home Ministry', and providing each with a serial number and an official seal. This was argued by Christian leaders to be tantamount to desecration and an interference with religious freedom.[46]

The restrictions on religious freedom extend to Muslims as well as non-Muslims. The religious and other State authorities in Malaysia, an orthodox Sunni country, are highly suspicious of what are regarded as deviant forms of Islamic doctrine and observance. For example, in 1994, the Darul Arqam movement, an apparently harmless neo-Sufist, anti-state Muslim community, formed by Ashaari Muhammad and having about 100,000 members and 48 residential communities in Malaysia, was declared deviant by the National Fatwa Council and ordered to disband. It was later declared an unlawful society under the Societies Act 1966, and its leaders, including Ashaari, were detained under the Internal Security Act and forced to confess on television their deviance from Islamic teachings.[47] In another episode in 2005 an eccentric non-Muslim sect formed by Ayah Pin, called the 'Sky Kingdom', set up its own community in Terengganu and was distinguished mainly by its belief in the power of tea (its settlement featured a gigantic symbolic tea pot), and its recognition of many forms of religious belief. This community was also disbanded. Ayah Pin escaped but several members of the sect were

[45] 'Sultan: Insufficient Evidence for Prosecution in JAIS Raid', *Free Malaysiakini*, 11 October 2011, www.freemalaysiakini.com/?p=16355.

[46] 'Home Ministry Proceeds with Release of Malay Bibles', *The Herald*, 16 March 2011, www.heraldmalaysia.com/news/Home-Ministry-proceeds-with-release-of-Malay-bibles-8355-2-1.html.

[47] Abdullahi An-Na'im, 'The Cultural Mediation of Human Rights Implementation: Al-Arqam Case in Malaysia', in J Bauer and D Bell (eds), *Human Rights in East Asia* (New York, Cambridge University Press, 1999).

prosecuted and jailed under State laws for apostasy, including Kamariah Ali who in 2008 was sentenced under State law to two years' imprisonment for apostasy. However, members of a mob that attacked and destroyed the settlement were not punished. The teapot was destroyed for being erected in breach of planning laws.[48]

What seems conspicuously lacking in these episodes is any constitutionally mandated process whereby the various religious communities can negotiate a mutually acceptable solution to issues such as proselytisation, conversion, doctrinal schisms, and the use of religious texts. Litigation and media wars seem to encourage paranoia rather than tolerance. Evidence suggests that since 1980 more than 100,000 Malaysians have converted to Islam (mainly natives of Sabah or Sarawak converting to Islam), but those renouncing Islam have been very small in number. A socio-legal study of conversions between 1999 and 2003 shows that 750 Muslims (mainly themselves converts to Islam) applied to the National Registration Department to change their names to non-Muslim names; only 220 of these succeeded. Only 100 people applied to the syariah court to renounce Islam between 1994 and 2003. This is allowed only in the State of Negri Sembilan; of these applicants only 16 appear to have succeeded. Five States have passed laws making it an offence for a Muslim to renounce Islam, with a maximum penalty of three years' imprisonment. These laws are plausibly unconstitutional in the light of Article 11(1). However, in Negeri Sembilan the law allows a person to apply to the syariah court for a declaration that he or she renounces Islam, provided he or she first undergoes counselling.[49]

Nonetheless there seems to be a fear amongst some Muslims that unless there are severe limits on conversion from Islam, very large numbers of people will desert the faith.[50] Recommendations to the Government from both *Suhakam* (the Human Rights Commission) and civil society groups to form an inter-faith consultative body were not initially acted upon. In 2006 a forum held by a civil-society coalition called 'Article 11' was disrupted by Muslim protesters; similar events were then banned by the Government on grounds of public order.[51]

[48] 'Sky Kingdom Member Gets Two Years for Apostasy', *The Star*, 4 March 2008, thestar.com.my/news/story.asp?file=/2008/3/4/courts/20519214&sec=courts.

[49] Mohamed Azam Mohamed Adil, above n 9.

[50] 'Very Few Have Abandoned the Faith', *New Sunday Times*, 19 November 2006.

[51] 'In Malaysia, Too Sensitive for Debate', *Asia Times*, 4 August 2006, www.atimes.com/atimes/Southeast_Asia/HH04Ae01.html.

However, in response to these recent incidents and in an attempt to provide a mechanism for non-confrontational resolution of inter-religious differences, in 2010 the Government set up, under the Prime Minister's Department, a 'Special Committee to Promote Understanding and Harmony Among Religious Adherents', comprising 35 representatives of various religious organisations.[52]

Where issues of actual as opposed to feared apostasy or conversion are concerned, the legal rights and interests of individuals are potentially deeply affected. It is in this area that conflict between the two legal systems, civil and syariah, is most evident, and it has taken the form of litigation over the syariah courts' jurisdiction. The implications of this extend beyond immediate family law issues, affecting profoundly Malaysia's constitutional architecture.

VI. CONVERSION AND THE COURTS

'Katuk bawah tempurong'

(A frog under a coconut shell)

In 1988 the controversial constitutional amendment mentioned earlier introducing Article 121(1A) provided that the High Courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts'. The ostensible reason for this was that the civil courts had on occasion reversed a decision of the syariah courts, even though the civil judges, as common lawyers, are not required to be qualified in Islamic law. This amendment has raised issues of public concern in the area of conversion and religious freedom.

Due to religious friction and fear of erosion of the numbers of adherents, conversion, especially of minors, and even religious contact short of conversion is always controversial in Malaysia.[53] Two much-discussed child custody cases involving Hindu women – Shamala's case[54]

[52] The Committee encountered a number of difficulties at the iteration of this process: 'Interfaith Panel Back in Saddle Next Month, Says New Chief', *The Malaysian Insider*, 17 October 2011, www.themalaysianinsider.com/mobile/malaysia/article/interfaith-panel-back-in-saddle-next-month-says-new-chief.

[53] AJ Harding, 'Islam and Public Law in Malaysia: Some Reflections in the Aftermath of *Susie Teoh*'s Case' (1991) 1 *Malayan Law Journal* xci.

[54] *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 648.

and Subashini's case[55] – both related to children whose father had converted them to Islam when they themselves converted. The civil courts interpreted Article 121(1A) in such a fashion as to deny a remedy to the mothers, who feel between the jurisdictions of the civil courts and the syariah courts. The civil courts held that only the syariah courts could decide if the children were converted, but the syariah courts could not entertain any application by the mothers as they were not Muslims. As a result of these cases an NGO coalition called 'Article 11' was established to highlight the injustice to these two women and uphold freedom of religion as guaranteed by Article 11 of the Constitution. A campaign by Article 11 also highlighted the problem, arising from Article 121(1A), of conflict between families of deceased alleged converts and religious authorities over custody of the body for burial.[56] Related issues were forcible 're-education' of apostates from Islam;[57] and the rights of Muslims wishing to renounce Islam (including the highly publicised *Lina Joy* case, to which we now turn).

The case law on Article 121(1A) reached a critical juncture with the decision of the Federal Court in the case of *Lina Joy v Federal Territory Islamic Council* in May 2007 relating to an attempt by a Muslim woman to change her religion.[58] Lina Joy was brought up as a Muslim, but as an adult she converted to Christianity. When requested to change her National Identity Card to show a new name and religion, the National Registration Department (NRD) refused to accept her statutory declaration that she was now a Christian, saying that she should obtain further documentary evidence such as a statement of apostasy from the Syariah Court saying that she was no longer a Muslim. This she was unwilling to do, relying on

[55] *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2007] 4 MLJ 97. For discussion of these cases see A Whiting, 'Desecularising Malaysian Law?' in P Nicholson and S Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff, Leiden, 2008).

[56] *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan* [2006] 1 MLJ 685; *Latifah bte Mat Zin v Rosmawati bte Sharibun* [2007] 5 MLJ 101.

[57] This applies under so-called *aqidah* laws in Penang, Malacca and Sabah; see Mohamed Azam Mohamed Adil, above n 9 at 22ff.

[58] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585. Commentary on this issue can be found in Thio Li-ann, 'Jurisdictional Embroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution', ch 14 of A Harding and HP Lee (ed), *Constitutional Landmarks in Malaysia: The First 50 years, 1957–2007* (Kuala Lumpur, LexisNexis, 2007); and B Dawson and S Thiru, 'The Lina Joy Case and the Future of Religious Freedom in Malaysia' [2007] *Lawasia Journal* 151.

her freedom of religion under Article 11. The application for judicial review of the NRD's decision continuously preoccupied and inflamed public opinion as it proceeded through the courts during 2004–07. A majority of the Federal Court (two to one) ultimately rejected the application, deciding that the NRD had acted lawfully.

The majority judgment proceeded on the basis that if a Muslim wanted to leave Islam, this was a question of Islamic law which had its own jurisprudence on apostasy. Article 3 was stated to 'have a far wider and meaningful purpose than a mere fixation of the official religion'. Article 11, despite providing for freedom of religion, was interpreted as meaning that Islamic law determined the method of converting into and out of Islam; under Article 121(1A) apostasy, as a matter relating to Islamic law, was within the jurisdiction only of the syariah court. By so deciding the court had in effect by reference to Article 121(1A) elevated the official religion above freedom to choose one's religion, and given a practical effect to Article 3 in determining the rights of citizens. However a passionate dissent was registered by Justice Richard Malanjum (the only non-Muslim judge hearing the appeal), according to whom it was of critical importance that the superior civil courts should not decline jurisdiction because of Article 121(1A), which only protected the jurisdiction of the syariah courts in a matter which did not include the interpretation of provisions of the Constitution.[59] Where the restriction of fundamental rights was involved only express authorisation would suffice. The majority view fails to grasp that the jurisdiction of Islamic law itself depends on the freedom of an individual's choice of religion. At the root of this is the (constitutionally entrenched) identification of Islam with being Malay, which means that a Malay who leaves Islam also abandons, legally, her ethnic identity.[60]

This case created an unprecedented degree of passion amongst the public. For many Muslims the suit represented an attack on Islam which could lead to unrestricted apostasy. The plaintiff, her fiancé and a human rights lawyer were the objects of death threats.[61] For many non-Muslims

[59] The majority (in Malay) and dissenting judgments (in English) can be found at www.malaysianbar.org.my/index.php?option=com_docman&task=cat_view&gid=380&Itemid=120, 30 May 2007.

[60] Article 160(2).

[61] 'Death Threats Against Lina Joy, Fighting for her Life and Religious Freedom', Asia News, 29 August 2006, www.asianews.it/news-en/Death-threats-against-Lina-Joy,-fighting-for-her-life-and-religious-freedom-7065.html.

the decision undermined the secular state and their constitutional right to freedom of religion.[62] The outcome is that in these recent cases the jurisdiction of the syariah courts has been increased by resolving any doubts in their favour.

VII. CONCLUSION

'Ada-kah duri di-pertajam?'
(Does one sharpen thorns?)

The Malaysian Government's efforts over the years towards inter-ethnic reconciliation, social stability, and economic development have to be recognised. However, the historical basis and practical consequences of this reconciliation seem not to be accepted by newer generations of Malaysians. For centuries Malaysian society has embraced a culture of mutual tolerance, and the principle of non-interference in religious affairs is deeply rooted. Pluralism has been a characteristic of many Islamic societies, but Malaysia is in this respect an outstanding present-day example because the country lies in a part of the world, South East Asia, where pluralism is a penetrating fact that deeply influences Islam along with other social phenomena. Development, education and urbanisation have also brought about closer proximity, more conversions, and larger numbers of religiously mixed marriages. The position of Islamic law in relation to national law and the Constitution has now become a matter of intense political conflict. The 2008 elections have created new politics on both sides of the political equation, in which Islam is just one of several issues which appear to be intertwined in complex ways. However, the issue of the religious nature of the state has re-emerged in the form of a struggle waged in the courts to define the respective jurisdictions of the civil and syariah courts. These decisions have tended to undermine the jurisdiction of the civil courts to enforce the fundamental right of freedom of religion.

The liberal-democratic order implied in the Constitution has been partially maintained, not least due to its dogged defence by the legal

[62] Thio Li-ann, 'Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation' (2006) 2 MLJ i.

profession as we saw in chapter seven,[63] but at the expense of restrictions on religious freedom, and the privileging of Islam over other religions. The religious dispensation presently obtaining has been hotly disputed, and not just in the context of *Lina Joy* and similar cases. For example, in 2007 unprecedented and widespread protests by Malaysia's Hindu minority, based on religious and socio-economic discrimination, were suppressed by the Government.[64] Non-Muslim groups cite instances where places of worship have been bulldozed by the authorities, or permission has not been given for construction of places of worship in predominantly Muslim areas.[65] In one ugly incident Muslim protesters placed a cow's head at the gate of a State Government building in Selangor in protest against the construction of a Hindu temple; they were convicted and fined under the Sedition Act.[66]

The success of the legal cultures of South East Asia over hundreds of years in absorbing and melding various legal worlds indicates that a syncretic, creative, and peaceful solution to the problem of religion and the Constitution is by no means impossible, and Malaysia is potentially a notable location for such solution to take root. At present it seems as though such an ideal outcome is nonetheless fraught with ever-changing political controversy, a good deal of intellectual confusion, and little in the way of actual legal reform, even on quite practical issues such as the failure to provide a remedy for plaintiffs caught between the conflicting demands of two legal systems. Nonetheless, we should not ignore the fact of historically peaceful cohabitation of Islam and other conceptions of state and law in Malaysia over several centuries, as we saw in Malacca at the beginning of this book. The apparent contemporary polarisation along religious lines, rendered complex by the new politics

[63] See, further, AJ Harding and A Whiting, '"Custodian of Civil Liberties and Justice in Malaysia": The Malaysian Bar and Moderate State', ch 7 of T Halliday, L Karpik and M Feeley (eds), *Fates of Political Liberalism in the Post-Colony: The Politics of the Legal Complex* (Cambridge, Cambridge University Press, 2012); A Whiting, 'Secularism, the Islamic State and the Malaysian Legal Profession' (2010) 5(1) *Asian Journal of Comparative Law* art 10.

[64] Aliran Press Statement, 'Aliran AGM Deplores High-handed Police Action at Hindraf Assembly', 25 November 2007.

[65] Lee Min Choon, *Freedom of Religion in Malaysia* (Kuala Lumpur, Khairos Research Centre, 1999) 65.

[66] 'RM1000 Cow Head Fines a Warning Says Hindu Sangam', *The Malaysian Insider*, 27 July 2010, www.themalaysianinsider.com/malaysia/article/rm1000-cow-head-fines-a-warning-says-hindu-sangam.

of the period post-2008, should not obscure this history. There have been and continue to be significant skirmishes conducted principally in terms of legal struggles over jurisdiction. These skirmishes, given the extent of public anger on both sides, are clearly far more than lawyers' turf wars. They even seem likely to veer towards more intense forms of conflict. There are, however, far-reaching compromises on both sides: Islam largely concedes, in practice and for the time being, that Islamic law is not the fundamental basis of the constitutional and legal order, while the constitutional order itself concedes that strict equality for Muslims and non-Muslims will not apply.

The Malaysian example is certainly one of inter-religious conflict, but this conflict is largely expressed in terms of the media and litigation. Although feelings have run high, violence is rare and so far has affected only property, not persons. The Constitution and the institutions of the common law have provided the means whereby accommodation between two fundamentally contradictory conceptions of legality, one secular, the other religious, has been achieved. Whether this will continue to be so remains, of course, to be seen.

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Conclusion

'Jahit sudah, kelindan putus'

(The sewing is done, the thread is snapped)

WRITING ABOUT THE Malaysian Constitution in 1996 the author concluded a 'constitutional audit' with the following words:

> the progress of the rule-of-law state throughout the Asia Pacific region in the last decade presents a paradox: why does Malaysia appear to be proceeding in the opposite direction? The answer is perhaps that Malaysia is approaching the problem of democracy from the opposite side of the spectrum from many of its neighbours, having succeeded previously in establishing democracy where other countries had failed. It is therefore to be expected that, in the long term, although perhaps not in the short term, the general trend in the region will be reflected in Malaysia too. If and when this happens, Malaysia will be well placed to advance the rule of law and democracy because it has the benefit of long-established traditions of constitutional government.[1]

The situation reflected in those comments has changed considerably in the last decade and a half. The trends across Asia, already seen in Taiwan, South Korea, the Philippines, Indonesia, Thailand, and elsewhere, even, recently, in Myanmar, are indeed being reflected in some measure, at last, in Malaysia. We have seen in this book a number of important, albeit sometimes contradictory, trends in the working out of Malaysian constitutionalism twenty-first-century style. In particular, 2008 seems to have been some kind of a watershed, and many of the most prominent changes have occurred since the political landscape changed with the March 2008 elections.

Undeniably, the state looks more Islamic due to the effect of Article 121(1A), but inter-religious conflict, although more intense, has kept within the bounds of reasonable discourse and embraced violence only

[1] AJ Harding, *Law, Government and the Constitution in Malaysia* (The Hague, Kluwer, Kuala Lumpur, Malayan Law Journal, 1996) 274.

against property. If there is, as many fear, a serious threat to religious freedom, it is also true that many of those who advocate a more Islamic constitution are in favour of more democracy and more social justice.

We have seen the recognition of the injustice of the 1988 sacking of the judges. Several judicial decisions since 2008 have renewed confidence, lost ever since 1988, in the judiciary. Civil society and elements of many political parties, including BN parties, have demanded constitutional and governance reforms. The Bar has remained as steadfast and as solid as ever in its defence of the Constitution, the rule of law and human rights. Minorities, ethnic and religious, have stood up for their rights in spite of the social contract. The courts have advanced the claims of indigenous people. Malaysians are willing to protest against unconstitutional actions and employ new media in doing so, to an unprecedented degree.

For its part, the Government has to some extent redesigned the social contract in ways that make it less significant than it was, and is embarked on a process of reform. The opposition has shown how a consociational approach can work for it as well as those in government, thereby offering the electorate a genuine choice and forcing parties to satisfy voters of different communities in their search for power. This has, of course, intensified political competition. A change of guard in some cases at the State level has resulted in some reforms and, again, voter choice and more democracy. Local government elections are in the offing. The Government has started a process of removing the apparatus of the authoritarian developmental state as it seeks no less than the transformation of government itself and a broader definition of development in which not just economic expansion and inter-ethnic economic redistribution are inscribed, but rights and governance too. This process, too, has raised the bar in terms of expectations of the conditions of democracy and governance.

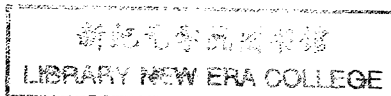
These developments can be stated in counterpoint to some negative developments. However most of these can be called incidents rather than trends. The most marked trend here is the escalation of inter-religious conflict, which lies at the root of more incidents and more wars of words than ever before. Human rights abuses still often go uncorrected in many instances. There are still concerns about the impartiality and independence of the judiciary. Many highly repressive and unjustifiable laws remain on the statute book, whether or not they are routinely enforced. The fact is that if present trends are the beginning of a reform process there is a great deal to do, and it will take a very long time to decide basic directions

and assumptions and work through the maze of issues that require to be addressed in such a process. But a start has been made.

Having said all this, the statement remains true, that Malaysia is 'well placed to advance the rule of law and democracy because it has the benefit of long-established traditions of constitutional government'. 'The principles of the Constitution', the author continued in 1996, 'have been eroded and limited to an extent where no further erosion or limitation can occur without affecting the very bone marrow and life-blood of the Constitution itself'.[2] The Constitution has been subjected to more than 600 textual changes since *Merdeka*. In these terms it seems, however, as if the bone marrow and life-blood of the Constitution have been spared (perhaps only just) and the patient has turned the corner. The Constitution is no longer, for example, threatened by a two-thirds majority in Parliament. In his kind Foreword to that book the former Lord President, the late and greatly missed Tun Mohamed Suffian, upbraided the author for suggesting that the Constitution should be reviewed. Like many people the Tun did not want to see fundamental constitutional issues addressed directly as a matter for decision, because he feared that the Constitution he had striven to uphold all through his life and judicial career would in this way be eroded even further than it already was. This of course assumes that there was sufficient that remained and was effective for it to be worth defending in this particular way. The Bar seems to have been consistently of this view. In the circumstances of the time perhaps the Tun was right. But if he were alive today he would, one imagines, be hopeful concerning some of the developments, and would perhaps be more open to discussion of constitutional reform. However that may be, it seems that constitutional change, whether one sees it as reform or not, is happening anyway, even without a concerted holistic discussion. Malaysians seem to prefer their politics as a form of opportunistic sniping from entrenched positions, and so this is probably how they would prefer to do constitutional reform. Currently the reform process itself evidences a deep distrust of the Government's intentions, and controversy over most aspects of the emerging laws, for example the law on freedom of assembly.[3] There may indeed be much merit in different actors and processes at different levels (at the State level, for example, or in Suhakam, or in inter-religious discourse) dealing with different aspects of reform. After all, this book began with a hymn to the diversity of Malaysian society expressed in Malacca's history and culture. Whatever changes are in store for it, there is little reason to think that in this defining characteristic at least – its kaleidoscopic and often baffling diversity – Malaysia will change.

[2] ibid.

[3] A Whiting, 'Assembling the Peaceful Assembly Act', New Mandala, 6 December 2011, asiapacific.anu.edu.au/newmandala/2011/12/06/malaysia-assembling-the-peaceful-assembly-act.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