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Dedication

To the memory of my late parents
Sahibzada Mohd Mustehsan Faruqi and Rasheeda Khatoon

To my wife Adibah binti Haji Mohd Adam

To my children Shiraz, Shareeza, Shuraifa, Shafeeq and Sameera

To Nurul Fathma Munap, Joshua Brancheau and Farah Zuleika Abas

To my grandchildren Mirza, Omār, Hamzah and Samer

To my siblings Dr Qamar Raoof, Afsar Mansoor, Farhat Khurshid, Fahim Faruqi,
Waseem Faruqi, Gul-e-Rana, Anjum, Ghazala and Naheed

and

To the memory of Tuan Haji Mohd Adam Anas and Hajah Asmah Baki

Our Constitution

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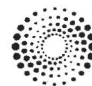

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30 January

KETUA HAKIM NEGARA
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CHIEF JUSTICE
FEDERAL COURT
MALAYSIA

Foreword

The Federal Constitution is our basic law and the yardstick for testing the constitutionality of all governmental action. Familiarity with and fidelity to its underlying values, principles, provisions and procedures is absolutely essential to the maintenance of our system of separation of powers, rule of law and constitutionalism.

Unfortunately, due to the infancy of Malaysian legal education, constitutional literacy within the citizenry and the bureaucracy is rather low. The Constitution is often subordinated to policies, politics and pragmatic considerations. As the author says: "The Constitution has not yet become the chart and compass and the sail and anchor of our nation's endeavours". Due to lack of knowledge of the Constitution's basic principles, division of powers and negotiated compromises, many citizen-state, federal-state and state government versus state government disputes end up in the courts. Judges do what they can to adjudicate issues in a constitutional light but they cannot always bridge the gap between legal theory and the existentialist realities on the ground. Internalisation of constitutional values within the community is a task for which the judiciary needs the help of the legal community to disseminate knowledge of the laws and the Constitution. This is where simple but learned books like Prof. Shad Faruqi's *Our Constitution* can help.

The author is a respected law teacher of constitutional law for over 45 years and has through his newspaper columns, articles and books, sought to bring our basic law to more homes and hearts. Thousands of students in this country have partaken of his passion and proficiency. Thousands more have read his articles and been touched by them. This book distills four and a half decades of immersion in constitutional law. I also find the author's views are moderate and well-reasoned though of course open to critical scrutiny by the readers.

Some chapters in this book, like Chapter 9.1 (Is Malaysia an Islamic or Secular State?), Chapter 29.5 (Reform of Parliament), Chapter 34 (Towards a Shared Destiny) and Chapter 36 (Rukun Negara as a Preamble), are quite original and may not be found in most constitutional law books.

There are of course many other riveting issues of constitutional law like the private sector and the constitution which can be included in a future edition. Constitutional law is a huge ocean and not every contentious issue can be included in a short book.

I am pleased to write this Foreword and to congratulate Prof Shad, his sponsors and publishers. I recommend this book to all lovers of constitutional law within the *rakyat*, the bureaucracy, and the legal community.

TAN SRI DATUK SERI PANGLIMA RICHARD MALANJUM
Chief Justice
Federal Court of Malaysia

30 January 2019

Istana Kehakiman, Aras 5, Presint 3, 62506 Putrajaya
Tel: 03-88803502 Fax: 03-88803507

Prefa

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Preface

The aim of this book is to provide laypersons and law students with a simple introduction to our Federal Constitution. The book is based on many articles and seminar papers I have written over the last two decades relating to constitutional law.

It is my hope that constitutional literacy about the basic features of our Constitution, its glittering generalities and its negotiated compromises will instil respect for our basic law and plant the seeds for constitutional patriotism over time.

The Federal Constitution is the fundamental law of our land. It contains the most important rules of our legal and political system. It is the repository of the nation's ultimate powers. It describes the manner in which the state is organised, government carried on and justice administered. It establishes the institutions of the state, defines and describes their powers and functions and prescribes the procedures for the exercise of authority by the organs of the state. It determines inter-governmental relationships.

It balances the might of the state with the rights of citizens. It protects our liberties and explains our obligations. It encapsulates the basic values on which society is founded. In a fragmented and divided society, it seeks to promote unity in diversity and to weld people into one common nationality.

In many respects, the Constitution is the chart and compass, the sail and the anchor of our nation's legal endeavours. Knowledge of its basic provisions is a prerequisite to good citizenship, to a government under the law, and to harmonious co-existence among the diverse races, religions, regions and communities. Regrettably, knowledge of our basic law is lacking within the citizenry, the police, the civil service and the members of parliament. The Constitution is not taught as a subject in secondary schools. Nor are its fundamentals covered adequately in

courses and programmes for public servants. This is despite a wealth of scholarly textbooks on the Constitution in the market. A simple introductory book may perhaps generate more interest.

This book is divided into nine parts. Part I is introductory. It provides an overview of what a Constitution is; the evolution and sources of our constitutional law; and the main features of our constitutional set-up. Seventeen main characteristics of the Constitution have been outlined in Chapter 4 and these should give a bird's eye-view of the constitutional landscape.

Part II gives an overview of our "Constitutional Fundamentals" which are stated to be constitutional supremacy, separation of powers, parliamentary government, federal system of government (with special provisions for Sabah and Sarawak), and Islam as the religion of the Federation. Part III is about the dynamic and developing issue of fundamental liberties. Part IV deals with acquisition and deprivation of citizenship.

Part V deals with our most important constitutional institutions – among them the Conference of Rulers, the Yang di-Pertuan Agong, the Malay Rulers in the States, the Prime Minister and the Cabinet, public servants, parliament and the judiciary. Part VI gives an overview of the electoral process – its principles, its working and how it can be reformed.

Part VII is about the "dark underbelly of constitutionalism" – the overriding, special powers against subversion and emergency. Part VIII looks at the Pre-Merdeka ethnic compromises, the knowledge of which is sadly lacking within those born and schooled in the post-1969 era. Part IX is aspirational and looks to a brighter future in which we all have a role to play.

I am deeply grateful to Yang Amat Arif Tan Sri Datuk Seri Panglima Richard Malanjum, Chief Justice of Malaysia, for his kind words in the Foreword. His Lordship's fidelity to the Constitution is well known. The spirit of his many scintillating judgments is also the spirit of this book. Many of his judgments, some dissenting ones, sought to restore the Constitution to the pedestal on which it was placed when Malaya began its tryst with destiny.

I wish to thank the able editorial team at Thomson Reuters for converting my chapter drafts into a more presentable and readable text.

Finally, I wish to acknowledge the generous financial support of the Program Pertūkaran Fellowship Perdana Menteri Malaysia which made the publication of this book possible. It is my hope that a translated version of *Our Constitution* in Bahasa Melayu will follow suit.

Shad Saleem Faruqi
Kuala Lumpur
January 28, 2019

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I. The Constitution: Concept, Evolution and Sources

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Chapter 1

Constitutions and Constitutionalism

A Constitution is a body of fundamental law which describes the manner in which the state is organised, government carried on and justice administered.

THE CONSTITUTION: ITS MEANING AND SIGNIFICANCE

Constitutions are born to mark stages in progression towards self-government, to establish the foundations of a newly independent state or to start afresh after a revolutionary or ideological upheaval.

Supreme law: A Constitution is the highest law of the land. It is the apex of the legal pyramid. It is of superior legal validity to all other laws of the land whether passed by the federal Parliament, State Assemblies or local authorities.

Foundational law: A Constitution is a fundamental law that describes the manner in which the state is organised, government carried on and justice administered. A Constitution is like a political architect's master-plan for the nation. It provides the legal foundation on which the structure of the state rests.

Creates organs of the state: At the structural or organisational level, a Constitution creates the various branches and institutions of the state.

It allocates powers and functions to the Executive, the Legislature, the Judiciary and other constitutional institutions like the Auditor General, the Election Commission and the Attorney General.

The Executive: The Executive is the largest branch. At the federal level it consists of the Conference of Rulers, the Yang di-Pertuan Agong (the federal King), the Prime Minister (PM), the cabinet, the civil service, the police and the armed forces. At the state level, the Executive consists of the State Sultans in the nine Malay states, the Governors of Penang, Malacca, Sabah and Sarawak, the state Chief Ministers, their State Executive Councils, employees of the state civil services in the non-federated Malay states, and local authorities.

The Legislature: In our federal system, there are separate legislatures at the federal and state levels. At the federal level, Parliament is bicameral and consists of the Dewan Rakyat and the Dewan Negara. Each of the 13 states has its own State Assembly.

The Judiciary: The country has legal pluralism – multiple systems of laws and multiple systems of courts. The judicial branch at the federal level consists of the Federal Court, the Court of Appeal, the High Court in Malaya and the High Court in Sabah and Sarawak. In addition, we have Sessions Courts, Magistrates Courts and scores of statutory tribunals (like the Industrial Court) created by ordinary law.

At the state level, each state has a hierarchy of Syariah courts to adjudicate on 24 topics of Islamic law specified in the Ninth Schedule, List II, Item 1. In Sabah and Sarawak, Native Courts exist to resolve disputes in areas assigned to the Native Courts by state laws.

Constitutional Commissions: In addition to the above three organs, the Constitution creates a number of other offices and Commissions like the Attorney General, the Auditor General, the Election Commission, the Public Services Commission, the Police Force Commission and the Education Service Commission.

Confers powers: Besides creating the institutions of the state, the Constitution describes the powers and functions of all institutions. It

concerns itself with the location of authority in the state. It tells us who can do what and subject to what procedure?

Prescribes procedures: The Constitution prescribes the procedures that must be followed when allocated powers are exercised.

Determines inter-governmental relationships: The Constitution prescribes rules about the relationship of the various branches and institutions with each other and with the citizen. For example, it describes the relationship between the Conference of Rulers and the Yang di-Pertuan Agong, the Yang di-Pertuan Agong and the PM,[1] the PM and the Cabinet, the Cabinet and Parliament, the Dewan Rakyat and Dewan Negara, the political executive and the civil service, police and armed forces.

Protects human rights: In the matter of human rights, the Constitution confers some basic rights on all citizens and imposes limits on state power to restrict these rights. Generally, the scheme of the Constitution is that human rights are inherent. It is power that needs legal justification. Officials of the state are not empowered to impose restrictions on human rights in their whims and fancies. The restrictions they impose must be derived from and permitted by the Constitution and laws. In order to secure liberty and preserve the democratic ideal of "limited government" and yet at the same time to ensure order and security, the Constitution (i) guarantees some human rights, (ii) specifies the permissible limits that may be imposed by law, and (iii) provides remedies whenever rights are infringed. Every balanced Constitution seeks to provide for a government sufficiently strong and flexible to meet the needs of the nation, yet sufficiently limited to protect the rights of citizens. A Constitution provides a balance between society's need for order and the individual's right to freedom. The might of the state and the rights of the citizens are sought to be balanced. Controlling the government without crippling it is an important goal of constitutional law.

Provides ideals and values: At the philosophical level, a Constitution supplies the fundamental or core values on which society is founded.

1 Article 40(1) and 40(1A) inform us that the King must act on the advice of the Prime Minister and the federal Cabinet except in those areas where the Constitution confers personal discretion.

These values are political, religious, moral, cultural and economic. They may be contained in a stirring preamble to the Constitution or may be implicit in the glittering generalities of the Constitution's Articles.

Balances idealism with realism: A Constitution is not just a legal document. It is linked with philosophy and politics. It has as its backdrop the panorama of history, geography, economics and culture. A Constitution is the vehicle of the community's legal and social life. More than other fields of law, a Constitution reflects the dreams, demands, values and vulnerabilities of the body-politic. A Constitution that will endure must not depart too far from the values, the spirit and the social and economic needs of the people. At the same time – and herein lies the great challenge – a Constitution must be idealistic, aspirational and transformative. A Constitution must contain within it seeds of change for a just, new social order. It must balance continuity and stability with the need for social change.

Promotes unity in diversity: In a fragmented and ethnically divided society (as Malaya was in 1957 and even more so in 1963) the Constitution must seek to weld people together into one common nationality, to build bridges where walls existed. In 1957 the Constitution walked the middle path of compromise, moderation and accommodation between the special needs of Malays and the legitimate interests of the minorities who made Malaya their abode.

Recognises legal pluralism: In a country if there are regions, states or provinces that exhibit significant differences from the rest of the country, then the Constitution must recognise their uniqueness, accept legal pluralism and maintain unity in diversity by granting special autonomy to such regions. For this reason, when in 1963 the Federation of Malaya merged with Sabah, Sarawak and Singapore to constitute the new and vastly enlarged nation of Malaysia, the three new states were admitted on terms and conditions that were far more favourable than were offered to the Peninsular states in 1957. The issue of the special rights of Sabah and Sarawak in the Malaysian federation is a matter of some constitutional controversy. But it is hardly a unique phenomenon. Quebec in Canada, Kashmir in India, Aceh in Indonesia and Mindanao in the Philippines are beneficiaries of special constitutional arrangements.

CONCEPT OF CONSTITUTIONALISM

Constitutionalism stands for some ideals of good governance. It refers to doctrines, principles and procedures that preserve the rule of law, protect human dignity and provide safeguards against oppression in all its forms and from whatever source – whether public or private, national or international.

The doctrines, principles and procedures that contribute to constitutionalism are numerous and include the following:

There must be limits on the powers of government: Constitutionalism rejects unlimited state sovereignty. It rejects an absolutist executive or an all-powerful, supreme Parliament.

The limits on state power may be supplied by the Constitution, by statutes or by unwritten conventions. The limits must be substantive (i.e. what the government can or cannot do) as well as procedural (i.e. the procedural manner in which the power of the state must be exercised).

There must be independent agencies to enforce limits on powers: These agencies may be independent courts, Parliament, the Auditor General, the ombudsman, the Election Commission, an independent public prosecutor and a vigorous, independent and responsible media. For example, the courts in the United States of America (USA), India and Malaysia have the power of judicial review of executive and legislative actions on the ground of constitutionality.

There must be respect for human rights: Human rights may be individual or collective. They include not only civil and political rights but also socio-economic protections because food is as important as freedom and bread as important as the ballot box. In a democracy the majority's right to rule must be accompanied by protections for the rights of minorities and indigenous groups.

Of special interest to the Constitution are guarantees for personal liberty, equality, property, free speech and freedom of conscience. The life and personal liberty of citizens must not be deprived save in accordance with law. There must be protection for free speech, right to

property, freedom of conscience and protection against discrimination on grounds of race, religion, gender or region. There must be a right to assembly and association and a right to participate in the affairs of the state. There must be a right to due process and a right to be heard before any legal right, interest or legitimate expectation is deprived. The courts and court processes should be accessible to all including the poor, the weak and the powerless.

In addition to civil and political rights all citizens must have a right to the basic necessities of life like food, water, shelter, roads, schools, the right to work, the right to minimum wages, social security, a clean environment and the right to sustainable development.

Constitutionalism recognises that human rights cannot be absolute. At the same time, it requires that the power of the state must not be unlimited. The power of the state to restrict human rights must be limited to specified grounds like public order and national security that are specifically prescribed in and permitted by the Constitution. Further, the laws that deprive us of our life, liberty and property must be just and fair and democratically enacted. Besides legality, governmental actions must have "just legality".

There must be an elected, representative and responsible government: Constitutionalism rests on a democratic electoral system that produces an elected and representative government that is responsible, accountable and answerable to the people or to the people's representatives.

The judiciary must be independent: In a constitutional democracy the role of the judiciary is to preserve, protect and defend the Constitution, uphold human rights, review exercise of executive discretion, resolve disputes between the various branches of government and between the citizen and the state.

Constitutional values must be internalised: Internalisation refers to a feeling of being bound in the absence of sanctions. The rules of the Constitution (whether written or unwritten, legal or conventional, political or moral) must be respected by the government as well as the citizens, especially the former. This feeling must extend to the letter as well as the spirit of the law.

The government's authority to govern depends on its observance of the limits on its powers. This is the essence of the "social contract" between the government and the governed.

Without the above ideals or arrangements, the country may have a Constitution but no constitutionalism. Examples are apartheid South Africa and Nazi Germany where there were elaborate constitutional documents but no constitutionalism.

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Chapter 2

Evolution of the Federal Constitution

The Malayan Union provided the spark to galvanise the Malays into the most powerful and organised political force the nation had ever seen. The year 1946 was the catalyst for Malay awakening.

CONSTITUTIONAL HISTORY OF THE FEDERATION OF MALAYA

The history of Malaya's emergence as a sovereign independent nation after centuries of colonial domination is a story with such a wealth of perspectives that it can be told and retold in many ways. The tapestry of history is engaging, fascinating and even controversial.

Colonialism was one of the most perverse forms of human rights violations and its progressive demise in Asia and Africa after World War II constituted some of the most glorious moments of the 20th century. Whether the collapse of colonialism in Asia and Africa restored the dignity and rights of the local population; whether it liberated souls and thought-processes; whether it wrought fundamental, structural changes in society or simply swapped one authoritarian government for another is, however, another question.

The first country in the Commonwealth to succeed in its struggle for independence was India in 1947. After that, rampart after rampart of colonial power fell to the onslaught of nationalistic sentiment sweeping

through the Third World. Though Malaya was one of the last in Asia to throw off the yoke of colonialism, what is remarkable is that she achieved her political emancipation without much political turmoil. Unlike the United States and India where the tree of liberty had to be watered by the blood of martyrs, Malaya's evolution towards independence was largely free of violence or war. But, of course, powerful forces were at work under the surface and were contained due to the tact and statesmanship of Tunku Abdul Rahman and his colleagues.

The mists of time: In the mists of distant time Malaya was inhabited by ancestors of Negritoes and Senoi, the Proto-Malays from South China and the Deutro-Malays from Yunnan in South West China. From the beginning of the first to the 13th century, migration from India resulted in the establishment of several Hindu and Buddhist kingdoms in Indo-China. The Buddhist Kingdom of Sri Vijaya in Sumatra around the seventh century and the Javanese kingdom of Majapahit in Sumatra in the 14th century are well known.[1] Muslim traders from India and the Arab peninsula introduced the Malays to Islam in the 14th century. In the 15th century prince Parameswara from Palembang, Indonesia, took refuge in Malacca and established the Malacca Sultanate. His conversion to the Islamic faith provided the impetus for the Islamisation of the entire peninsula and the gradual replacement of indigenous animistic practices and Hindu and Buddhist tenets with Islamic principles. The patriarchal *adat temenggong* (customary law of North Sumatra) easily absorbed principles of Islamic law. The legal system, however, continued to exhibit the richness and diversity of animistic traditions, Malay *adat*, Hindu and Buddhist feudal and princely traditions and Islamic tenets. By the time the Portuguese colonialists arrived in 1511, Islam had become the identifying feature of Malay society.

A remarkable development during the reign of Sultan Muzaffar Shah (1444-1456) was that orders were issued to compile laws into *Hukum Kanun* for the sake of promoting uniformity of justice. Between the 15th and 19th centuries, Digests and Codes were compiled – among them the *Undang-Undang Melaka* (*Risalut Hukum Kanun* 1523), *Undang Laut Melaka*, Pahang Digest 1596, Kedah Digest 1605, Johor Digest and the Ninety Nine Laws of Perak.[2]

1 Wu Min Aun, *The Malaysian Legal System*, Second Edn, 1999, Longman, p 3.
2 See fn 1 above at pp 5-6.

Portuguese, Dutch and British colonialism: From 1511 onward Malaya was colonised by the Portuguese (1511-1641); the Dutch (1641-1786); and the British (1786-1957).

In 1511, Malacca fell to the Portuguese who remained there for 130 years. In 1641, the Portuguese were replaced by the Dutch who stayed on and off till 1824. In 1786, Francis Light acquired Penang from the Sultan of Kedah to use as a British base. In 1800, Province Wellesly was ceded to the East India Company, and, in 1819, Raffles "founded" Singapore. The Anglo-Dutch Treaty of 1824 signaled the end of colonial competition in Malaya. The Dutch acknowledged Malaya as part of the British sphere of influence in return for Britain ceding its possessions in Sumatra to Dutch tutelage. Malacca became British. In 1824, the Sultan of Johore ceded Singapore to the East India Company.

Between 1874 and 1889, British administration was extended to Perak, Selangor, Pahang and Negeri Sembilan which were constituted as the "Federation of Protected Malay States" in 1895. Here were seeds of the federal idea that germinated in later constitutions in the Federation of Malaya. Between 1903 and 1909, Kelantan, Kedah, Terengganu and Perlis fell under British control. The last rampart of Johore fell in 1914. During the War, the colonies of Malacca, Penang and Singapore were organised as the Straits Settlements.

The 171 years of British colonial rule reshaped Malayan legal traditions and supplied a large corpus of statutory and common law to replace Malay customs and Islamic law that were prevalent in Malaya before the advent of the British. Opinions vary on the legacy of the British to the legal system of Malaysia[3] but what is certain is that British influence – both good and bad – is still felt 61 years after Merdeka.

The Malayan Union years: The most momentous years of Malay political history were the 11 years between 1946 and 1957. In April 1946, the nine Malay States plus Malacca and Penang were regrouped as the Malayan

3 Shad Saleem Faruqi, "Western Intellectual Imperialism in Malaysian Legal Education" *Decolonising The University, The Emerging Quest for Non-Eurocentric Paradigms*, edited by Claude Alvares and Shad Saleem Faruqi, Penerbit USM, Penang, 2012, pp 67-284. See also Shadrack Gutto, "Decolonising the Law: Do We Have a Choice?", in *Decolonising The University* above, pp 290-308.

Union that would be a colony like the Straits Settlements. The Malayan Union and the MacMichael Treaties deprived the Malay Rulers of their sovereignty. The proposed citizenship provisions would have resulted in non-Malay domination of the country. All in all, the Union would have deprived Malays of their privileges and represented abandonment of the pre-war policy of recognising Malaya as a Malay country. No wonder that the Malays, under the inspiration of United Malays National Organisation (UMNO) leader Datuk Onn, protested vehemently. In fact, the Malayan Union provided the spark to galvanise the Malays into the most powerful and organised political force the nation had ever seen. The year 1946 was the catalyst for Malay awakening.

Many non-Malay organisations were also in disagreement with the Malayan Union proposals because of the autocratic and illiberal aspects of the Union. The British relented. In July 1946, a Working Committee was appointed to have thorough consultations with the various communities and to make recommendations for change.

In February 1948, the Malayan Union was formally dismantled and the Federation of Malaya was established despite some protests from non-Malay organisations that saw the 1948 Federation as a return to the pre-war pro-Malay policy and a revival of the partnership between British imperialism and Malay feudalism.

Communist insurgency: In June 1948 the communist rebellion, styled the Emergency, began. But the communists failed to capture the hearts and minds of the populace. However, thousands of lives were lost and the experience of the insurgency resulted in the drastic provisions of Articles 149–151 to deal with subversion and emergency in the Merdeka Constitution.

Elections: In 1955, elections were held to the Federal Legislative Council. The Alliance (representing UMNO, Malaysian Chinese Association (MCA) and Malaysian Indian Congress (MIC)) secured 51 of the 52 seats available. Armed with its massive mandate, the Alliance demanded early independence.

Reid Commission: In January 1956, a conference was held in London to agree on the principles on which independence was to be granted and to appoint a Constitutional Commission to draft independent Malaya's first

constitution. The commission was headed by Lord Reid, a British judge; Sir Ivor Jennings, a British expert on Commonwealth constitutional law; Sir William McKell, former Governor-General of Australia; B Malik, a former High Court Chief Justice from India; and Justice Abdul Hamid of the West Pakistan High Court. The commission's terms of reference were to make recommendations for a federal constitution with parliamentary democracy, a bicameral legislature, a strong central government, safeguards for the position of the Rulers, common nationality and safeguards for the special position of the Malays and the legitimate interests of other communities.

The UMNO-MCA-MIC Alliance drew up a 20-page memorandum for the Reid Commission. Half of the memorandum dealt with communal issues and with the need to cater to Malaya's dazzling diversity. On most issues, the Reid Commission showed deference to the "social contract" negotiated by the communities. The Commission held 118 public and private hearings between June and October 1956. It made its recommendations on February 20, 1957, and submitted a draft Constitution which provided for the following: a supreme Constitution; an independent judiciary with powers of judicial review; a federal system of government with a heavy central bias; a Westminster-style of parliamentary democracy; and a constitutional monarchy at both state and federal levels. There were partially entrenched fundamental rights; extensive power to Parliament to suspend basic rights during times of subversion and emergency; special protection for the rights of Malay Rulers; protection for Malay special position; liberal rights of citizenship for all persons born in the Federation; and linguistic, cultural and religious rights for non-Malays.

Some of the Commission's proposals caused consternation within various sections of the political community. Among them were:

- Reid proposals on citizenship were criticised by Malays as so liberal that the country would be swamped by non-Malays.
- UMNO objected to the provision permitting dual nationality;
- UMNO rejected the proposal that Malay special position would be a temporary measure for 15 years;

- UMNO was troubled that no official religion was prescribed at the federal level;

- The Malay Sultans were displeased that the role of the Conference of Rulers was merely symbolic;

- UMNO objected to restrictions on creation of new Malay reserves. It sought to extend the Malay reservation law to Penang and Malacca; and

- The provision permitting multi-lingualism in the legislatures was regarded as too liberal.

Tripartite Working Party: As a result of the uproar caused by the Reid report, a tripartite Working Party was appointed to examine the Reid Commission Report. The Working Committee comprised four representatives each from the Rulers, the Alliance and the colonial government. With the clock ticking against it because the date for Merdeka had already been set, the Working Party held 23 meetings between February and April and made significant amendments to the Reid proposals.

- The 15-year time limit on Malay special position was removed. Malay privileges were made an integral and entrenched part of the Constitution.

- Islam was adopted as the religion of the Federation but with full freedom to other communities to practise their own faiths in peace and harmony. Documents indicate that there was clear agreement among the Working Party members that despite the adoption of Islam as the religion of the federation, the country was not to be a theocracy.

- The role and function of the Conference of Rulers was enhanced.

- The permission to use Tamil and Chinese in the legislatures was replaced with the provision that these languages could be used for non-official purposes and their teaching and learning would be allowed.

At the end of the Working Party negotiations, some issues remained unresolved. Among them were UMNO's desire to extend Malay reservation law to Penang and Malacca, the problem of dual citizenship and the manner of appointing the first governors of Malacca and Penang. All in all, changes made by the Working Party augmented the indigenous "Malay-Muslim features" of the Constitution. But there still was in the basic charter enough for everyone to relish and cherish. Malay special position was balanced by safeguards for other communities. The spirit that animated the Constitution was one of tolerance, compassion and compromise.

Ratification: Then followed a lengthy and extraordinary process of ratification of the Merdeka Constitution by the Federal Legislative Council, the Assemblies of the Malay States, the United Kingdom Parliament and the British Crown.

At the stroke of midnight on August 31, 1957, at Stadium Merdeka, the Duke of Gloucester, acting on behalf of the British Queen, handed over to the Tunku the constitutional documents signifying the independence of the Federation of Malaya. With the cries of "Merdeka, Merdeka, Merdeka," Malaysia's appointment with destiny had begun.

FROM MALAYA TO MALAYSIA

The regions of Sabah (North Borneo) and Sarawak have their own distinct ancestry and history. They were populated by Dayaks, descendants of the proto-Malays who had migrated across the Malay Peninsula between 2500 and 1500 BC. There were also Bataks of Sumatra, Negritoes or Senoi, deutro-Malays from the Peninsula and Chinese around the 15th century.[4]

By the 16th century the Borneo territories were under the loose sovereignty of the Sultan of Brunei. In 1841 Raja Muda Hashim, in exchange for assistance to suppress an uprising, installed British trader James Brooke as the Governor of Sarawak. This ushered the era of British colonialism through the White Rajahs – James Brooke 1841-1868, Charles Brooke 1868-1917 and Vyner Brooke 1917-1941. In 1847 Labuan

4 Wu Min Aun, *The Malaysian Legal System,* Second Edn, 1999, Longman, pp 28-31.

was ceded to the British. James Brooke was appointed British Consul-General for Brunei and Borneo. The British North Borneo Company was formed by Royal Charter in 1882. In 1888 Britain declared Brunei, Sabah and Sarawak to be protectorates. Though Codes of Law and Royal Charters were enacted, indigenous customs, native law and matters of religion were left untouched. British law was introduced only in 1928 through the Law of Sarawak Order.[5] The British ruled North Borneo (Sabah) and Sarawak for 123 years till 1963.

After World War II, as part of its de-colonisation process, the Labour government in Britain intended to give up its colonies in the Far East. It therefore opened negotiations with the Government of Malaya and representatives of North Borneo (Sabah), Sarawak, Singapore and Brunei to create an enlarged federation.

Cobbold Commission: In April 1962, a joint British-Malayan commission known as the Cobbold Commission investigated the proposal and reported that the people of the Borneo states wished to join Malaya and that the new federation would be in the best interests of North Borneo and Sarawak.

Inter-Governmental Committee: The Report of the Cobbold Commission led to the establishment of an Inter-Governmental Committee to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak. General elections were held in North Borneo in December 1962 and in Sarawak in 1963 and the proposal to form Malaysia won the support of the electorate. However, the Philippines and Indonesia opposed the formation of the new federation and rejected the legitimacy of the self-determination process. A Tripartite Summit was, therefore, held in Manila in 1963 to bring the parties together. It was agreed to invite the United Nations (UN) Secretary-General to ascertain the wishes of the people of Sabah and Sarawak and to determine the democratic legitimacy of the electoral processes in North Borneo and in Sarawak.

UN Mission: The Secretary-General's mission spent three weeks in Borneo and reported that the Malaysia proposal had the wide backing of the people of these territories. But the Indonesian and Philippines

5 See fn 4 above.

governments were not persuaded. Indonesia eventually resorted to an undeclared war ("the confrontation"). Philippines laid a claim to Sabah under international law.

Singapore: Though relatively advanced compared with the Borneo States, Singapore had compelling reasons for closer association with Malaya. There was need for economic security and the fear that an independent Singapore would succumb to communism. A merger referendum was conducted in Singapore and its result was affirmative.

Brunei: Though initially enthusiastic, Brunei backed out from the merger negotiations at the closing stages because of unresolved questions about the precedence of the Sultan of Brunei in the Conference of Rulers and the financial arrangements relating to Brunei's rich oil reserves.

Malaysia Act: In September 1963, the Malayan Parliament enacted the "Malaysia Act" to restructure the constitutional framework of Malaya. One hundred fifty-one amendments were made to the Federal Constitution. In many respects, the amendments created a totally new Constitution to accommodate the realities of a new, enlarged and more diverse nation. On September 16, 1963, the Federation of Malaya was transformed into the Federation of Malaysia, but not without opposition internationally and grumbles within.

The Government of Kelantan on September 10, 1963, challenged the impending Malaysia Day Agreement and the Malaysia Act on a number of grounds. First, that the proposed changes required the consent of each of the constituent states, including Kelantan, and this had not been obtained. Second, that the Ruler of Kelantan should have been a party to the Malaysia Agreement, and he was not. Third, that there is a constitutional convention that the Rulers of the individual states should be consulted before any significant modifications to the Merdeka Constitution are legislated. In a historic judgment,[6] the High Court ruled that Article 159 nowhere requires consultation with the states prior to the admission of new provinces into the Federation. As to the alleged constitutional convention, the court observed correctly that conventions are informal political practices not enforceable in a court of law.

6 *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* (1963).

And so, the Federation of Malaya expanded to 14 states. A new name (Malaysia) was emblazoned on the political firmament. Significant new rules were established to regulate the special relationship of the new entrants with the federal government. The consequent amendments to the Constitution departed from the cardinal principle of equality of status among the members of the Federation. In many respects, the new federation resembled a union of five unequal entities – the powerful federal government, the 11 West Malaysian States with limited autonomy and the specially privileged states of Sabah, Sarawak and Singapore with considerable freedom from federal control in areas specially designated by the Supplementary State List and the Supplementary Concurrent List in the Ninth Schedule.

Singapore's separation: Even before the celebrations of merger with Malaya ended, frictions developed between the Government of Singapore and the federal government. The overt disputes were primarily about "Malaysian Malaysia" – a Malaysia with equal rights for all or a Malaysia with special privileges for the indigenous Malays and the natives of Sabah and Sarawak. The differences became so irreconcilable that Prime Minister Tunku Abdul Rahman was left with only two choices: remove Lee Kuan Yew from power under many special powers available to the federal government or bring about an amicable separation. The democrat that he was, Tunku opted for the latter. The Malaysian Parliament enacted an amendment to remove Singapore from the Federation. Despite the racial tensions and the political drama, the separation was peaceful and dignified and every effort was made to provide equitable terms on which Singapore could embark on its new journey.

Special position: Sabah and Sarawak joined Malaysia on terms substantially better than the ones offered to the Malay States in 1957. Fifty-five years down the road this preferential treatment is often challenged. One must not forget that there were many factors that led to the special arrangements.

There were historical events like the Resolution of the Malaysia Solidarity Consultative Committee (1961), Resolution of the Legislative Council of North Borneo (1962), Report of the Cobbold Commission (1962), the Twenty-Point Manifesto of Sabah Alliance (1962), Report of the

Inter-Governmental Landsowne Committee (1963) and the Malaysia Agreement (1963).

Sabah and Sarawak have a clear cultural, linguistic, ethnic and religious distinctiveness from Peninsular Malaysia. They contribute huge territories to the Federation. Their combined area is 198,069 sq kms, exceeding Peninsular Malaysia's 131,681 sq kms. The coastline of the two States is 2,607 kms, against the Peninsula's 2,068 kms. Despite their huge resources, there are problems of poverty and underdevelopment in these states.

The 1963 "social contract" between the Federation of Malaya, Britain, North Borneo, Sarawak and Singapore was not merely a domestic political pact but an international agreement. There is a need to honour its terms to the full save to the extent mutually agreed upon.

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Chapter 3

Sources of Constitutional Law

A country's document of destiny is a rich blend of legal and political, formal and informal, "written" and "unwritten" sources.

A Constitution is not only a legal document. It is also a political, historical, economic, cultural and moral testament of the framework assumptions of society. Many streams feed the vast expanse of the nation's basic law. The constitutional law mosaic has many hues. A country's document of destiny is a rich blend of legal and political, formal and informal, "written" and "unwritten" sources. In Malaysia these sources are the following:

Historical documents: Constitutional law must always be read in the light of history. Many landmark events in constitutional development are consecrated in historical documents like the MacMichael Treaties (1945), the Malayan Union Proposals (1946), the Federation of Malaya Agreement (1948), the Reid Commission Report (1957), the Federation of Malaya Constitutional Proposals (1957), the Cobbold Commission Report (1962), the Malaysia Agreement (1963), the Twenty Points Declaration (1963) and the Rukun Negara (1970). None of the above documents have the status of law. But the ideas contained in them may help us to understand the reality today and to interpret our basic law in a historical context.

Federal Constitution: This is the supreme law of Malaysia and any law that conflicts with the Federal Constitution is void to the extent of the inconsistency: Articles 4(1), 128 and 162(6). The Federal Constitution is

the supreme law of the land, the law of laws, the *grundnorm*. It sits at the apex of our legal hierarchy. What was achieved by *Marbury v Madison* (1803) in the USA is explicitly provided for in Articles 4, 128 and 162(6) of Malaysia's Federal Constitution. Any law, whether post-Merdeka or pre-Merdeka, primary or secondary, federal or state, secular or religious, that violates the Constitution can be declared null and void by the courts. This is the power of constitutional review. It maintains constitutional supremacy by giving to the superior courts the power and duty to invalidate any legislative or executive act that violates any of the 183 Articles and 13 Schedules of the Constitution.

Regrettably, 61 years after independence the Constitution has not yet become the chart and compass, the sail and anchor of the nation's legal endeavours. Its imperatives have not become the aspirations of the people or the institutions of the state.

- The federal Parliament and the state legislatures often enact laws that confer absolute discretion on the Executive and, in addition, exclude judicial review through ouster clauses.

- In the last two decades, laws relating to Islamic matters are regarded by politicians, policy makers, the Syariah establishment and many civil judges as not subject to constitutional control and not amenable to the civil courts' jurisdiction. A parallel, religious legal system seems to be emerging though this was not the intention of the constitution-makers.

- A great deal of delegated legislation ignores constitutional limits.

- Most lawyers, perhaps due to unfamiliarity with constitutional jurisprudence, avoid raising constitutional challenges in the courts.

- Barring some honourable exceptions, most judges avoid or evade constitutional issues and convert issues of constitutional law into issues of administrative law.

- The area of non-reviewability of government actions by the courts is very wide.

- Constitutional safeguards are often made inapplicable because according to the courts, the case is one of private law to which public law principles are not applicable.

- Despite the protests of constitutional lawyers, government policies and circulars often trump the Constitution. Many decisions are regarded as part of royal prerogatives, not subject to judicial review.

State constitutions: Each state of the Federation possesses its own basic charter. But because of Article 71(4) of the Federal Constitution and the Eighth Schedule, it is mandatory for each state Constitution to contain certain essential provisions. These provide for Rulers (and Governors) to act on advice and for the existence of an Executive Council and a single-chamber, elected state legislature.

Federal legislation: Between 1946 and 1957, federal legislation was referred to as an Ordinance. It is now described as an Act of Parliament. The procedure for its enactment is a simple majority of the members present and voting in both houses of Parliament and the assent of the Yang di-Pertuan Agong. This simple majority procedure is not applicable to the extraordinary power to amend the Constitution. The latter generally requires special two-thirds majorities. In addition, the consent of the Majlis Raja-Raja is required for amendments to ten topics mentioned in Articles 159(5). For amendments that affect the rights of Sabah and Sarawak, the consent of the Governors of these states is required under Article 161E.

There are nearly one thousand federal statutes on record. All are printed in the *Government Gazette* and are accessible without cost to anyone who cares to obtain them. The government claims no copyright to its legislation.

Interpretation Acts supply a guide to statutory interpretation. The relevant laws are the Interpretation and General Clauses Ordinance 1948 applied for the interpretation of the Constitution and the Interpretation Acts 1948 and 1967 (Act 388). Though there is widespread codification, there is a great deal of overlapping legislation and consolidation is an unmet need.

In Malaysia, Parliament is not supreme and the legislative power of the federal government is limited to 27 topics in the Federal List and 12 topics in the Concurrent List of the Ninth Schedule.

Pre-Merdeka laws: Article 162 specifically provides that all existing laws on Merdeka Day shall continue to be applied until repealed. But any court applying them may apply them with such modification as may be necessary to bring them into accord with the Constitution. "Modification" includes amendment, adaptation and repeal.[1]

Emergency Ordinance: A special type of federal legislation is an Emergency Ordinance promulgated by the Yang di-Pertuan Agong under Article 150 of the Constitution. The King, acting on advice, possesses the power to promulgate Emergency Ordinances having the force of law (i) if there is an Emergency Proclamation in operation, and (ii) if both Houses are not in session concurrently.

State legislation: In our federal system, State Assemblies have the power to frame enactments on 13 topics in the State List and 12 topics in the Concurrent List. These Enactments can be made on any areas assigned to the State Legislature under the Ninth Schedule, Lists II and III. The State Assemblies of Sabah and Sarawak have additional powers under Lists IIA and IIIA.

In addition, State Assemblies have the power to amend the State Constitution.

All state enactments are subject to the Federal Constitution and to the state's own Constitution and there are several instances of state legislation being invalidated by the courts on constitutional grounds.

Subsidiary legislation: The federal Parliament and the State Assemblies are the primary but not the sole law-making authorities in their jurisdictions. A vast amount of legislation is made outside of legislative halls by delegates of the federal and state legislatures. However, such

1 *B Surinder Singh Kanda v The Government of the Federation of Malaya* (1962); *Aminah v Superintendent of Prisons, Pengkalan Chepa, Kelantan* (1968); *Assa Singh v Mentri Besar Johore* (1969); *Kerajaan Negeri Selangor v Sagong bin Tasi* (2005).

legislation is limited to the subject matter authorised by the parent law and is open to review by the courts on many grounds.

Federal subsidiary legislation exceeds parliamentary legislation by a ratio of 1:20. Regrettably it is not subject to much parliamentary control. Laying procedures and scrutiny committees are unknown in Malaysian legislatures.

Just like the federal Parliament, State Enactments may delegate power to any state institution including local authorities and to religious officials and committees to enact subsidiary legislation.

Judicial decisions: The Constitution recognises "common law" as a source of law. Under the Civil Law Act 1956 the term "common law" means British common law and equity subject to (i) cut-off dates, and (ii) a local circumstances proviso. The cut off dates are April 7, 1956 in West Malaysia; December 1, 1951 in Sabah; and December 12, 1949 in Sarawak. These dates reflect the pre-independence incorporation by the British of their legislation into the colonial territories of Malaya, Sabah (North Borneo) and Sarawak.

Along with British precedents we have our own judicial precedents. The decisions of the Federal Court bind all other courts in the country. But as an apex court, the Federal Court has the power to overrule its own previous decisions. In the interest of certainty, this power is exercised sparingly. The Federal Court has the power to overrule all other courts and this it does quite often.

The Court of Appeal is bound by the Federal Court, but all other courts are bound by the Court of Appeal. The Court of Appeal generally follows its own decisions but has the power, without overruling, "to depart" from its previous precedents.[2] It can overrule the High Courts.

The two High Courts are bound by the Federal Court and the Court of Appeal, but all inferior courts and tribunals are bound by the High Courts. The High Courts generally follow decisions of other High Courts

2 *Kerajaan Negeri Terengganu v Dr Syed Azman Syed Ahmad Nawawi (Nos 1 and 2)* (2013); *Government of the State of Sarawak v Chong Chieng Jen* (2016); *Utusan Melayu (Malaysia) Bhd v Dato' Sri DiRaja Hj Adnan Hj Yaakob* (2016).

but have the power, without overruling it, "to depart" from a previous precedent of the High Court. It can overrule the inferior courts on appeal as well on review.

It is noteworthy that the judicial decisions of superseded superior courts like the Supreme Court, the former Federal Court and the Judicial Committee of the Privy Council continue to have legal status and protection of the doctrine of binding judicial precedent.

Are judges law finders or law makers? It is now universally recognised that judges do not merely interpret the law; often they make and mould the law. The role of a judge is not simply that of a mid-wife, discovering what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often the judge has to reach out beyond formal rules to seek a solution to the problem at hand. In novel situations, he has to reach out into the heart of legal darkness where the flames of precedent fade and flicker and extract from there some raw materials with which to fashion a signpost to guide the law. When rules run out, as they often do, the judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust results or raises issues of public policy or public interest, judges around the world try to find ways of adding moral colours or public policy shades to the legal canvas. Statutes enacted in one age have to be applied in a time frame of the continuum to problems of another age. A present time-frame interpretation to a past time-frame statute invariably involves the judge in a time-travel from the past to the present. He has to cause the statute to leap-frog decades or centuries in order to apply it to the felt necessities of the times. The interpretive task is, in its functioning if not in its form, virtually indistinguishable from the law creating task. As Justice Holmes pointed out: "A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used. It is for the judge to give meaning to what the legislature has said." In interpreting the Constitution, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallise what is inherent. His task is creative and not passive. This is necessary to enable the Constitution to be the guardian of people's rights and the source of their freedom.

Islam: Article 160(2) of the Federal Constitution provides a definition of "law". In the context of Malaysia, "law" includes (i) written law, (ii) common law, and (iii) custom, to the extent recognised. Principles of the Islamic Syariah in the fields of public law, contract law, commercial law, crime and evidence are not, by themselves, part of the law of Malaysia unless incorporated into the legal system by legislation and judicial precedents. However, in recognition of the fact that Islam is the religion of the Federation, State Assemblies and the federal Parliament are authorised by the Ninth Schedule, List II, Item 1 to enact laws on Islam in 24 areas, mostly of personal law, and on matters of Malay custom.

Since Mahathir Mohamad and Anwar Ibrahim's Islamisation policy in the 80s, there has been a steady expansion of the Syariah in areas outside family law. Syariah authorities occasionally exercise jurisdiction beyond the 24 areas assigned to them by the Ninth Schedule, List II, Item 1. In addition, State Assemblies enact legislation that occasionally impinges on the fundamental rights of Muslims and non-Muslims. Judicial review of such excess of power is, however, rather rare.

Today there is talk of an "Islamic state", "two parallel legal systems" and "one country with two systems". The states of Kelantan and Terengganu have even tried (but unsuccessfully) to legislate hudud laws i.e. criminal laws with penalties prescribed in the Qur'an, Hadith and the *fiqh* (jurisprudence) of early Muslim scholars.[3]

The legal system is facing intractable disputes between Syariah-authorities and Muslims on such issues as Muslim apostasy, cross dressing, freedom of speech, "deviationist teachings" and Islamic education. Constitutional issues are often raised and more often than not rejected by the superior courts.

The steady expansion of Islamic laws and the widening jurisdiction of Syariah authorities have also brought them in painful disputes with non-Muslims over such issues as dissolution by Syariah authorities of non-Muslim marriages when one partner converts to Islam, unilateral conversion of the children of the marriage into Islam without the consent

3 The Syariah Criminal Code (II) Enactment 1993 of Kelantan sought to apply Islamic criminal law to all residents of Kelantan including non-Muslims. The provision on applicability to non-Muslims was later repealed.

of the non-converting spouse, and custody and guardianship of the children. Syariah authorities are also flexing their muscles in such matters as use of the term "Allah" by non-Muslims,[4] burials of non-Muslims who were suspected by the Syariah authorities to have converted to Islam before their death.

Since the eighties, Islamic law has been in resurgence and many laws enacted in the name of the Syariah and many actions by the Syariah authorities often raise the unresolved issue of the supremacy of the Constitution versus the supremacy of the Syariah. Only time will tell how this conflict will be resolved.

Malay adat (custom): Before the arrival of the British in 1786, custom was the dominant source of law in Malaya. For the Malay community, custom referred to the composite, indigenous Malay *adat* enriched by Hindu and Buddhist elements and overlaid with principles of the Syafie school of Islamic law. Though Malay adat (custom) and the Syariah (Islamic law) are distinct, the Malays often see them as synonymous. That is why Malay custom is enforced in Syariah courts! Unlike in Sabah and Sarawak, there are no separate courts in the Peninsula for Malay custom.

As colonialism took root, common law became the dominant law of Malaya and Malay *adat* and Islam were relegated to personal matters, and that too if not repugnant to British notions of natural justice, equity and good conscience.[5]

Malay customs have constitutional recognition in several articles of the Constitution including Articles 150(6A), 160(2) and the Ninth Schedule, List II, Item 1. However, there is no blanket recognition of customary law. Under Article 160(2) "law" includes only those customs and usages *having the force of law*. This means that customs are not law by their own strength. They need the kiss of life from a statute or a judicial precedent.

4 *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* (2014).

5 In *Sahrip v Mitchell* (1877), a land tenure case, the Malay custom of tithe or one-tenth of the total produce was accepted as reasonable. In *Jainah bt Semah v Mansor bin Iman* (1951) and Another (1951), the Malay custom of adoption in Pahang was recognised. But in *Mong binti Haji Abdullah v Daing Mokkah Daing Palamai* (1935), – a breach of promise to marry case – the court refused to apply Muslim law as that would lead to oppressive results. See Wan Arfah Hamzah & Ramy Bulan, *An Introduction to the Malaysian Legal System*, pp 151-155.

After independence, the role of Islamic law and Malay adat has been gradually enhanced and given statutory basis in the Syariah Enactments of all the states and in some other laws. Custom is occasionally elevated to the status of law by judicial recognition if the custom meets the criteria of morality, reasonableness and justice in the opinion of the court. What standards does the court apply? It is doubtful that 60 years after Merdeka English standards of reasonableness will apply lock, stock and barrel to customs in Malay society.[6]

Native law in Sabah and Sarawak: In Sabah and Sarawak, native law and custom have constitutional and statutory recognition as law. For example, the Sarawak Native Court Ordinance 1992 defines customary law as "customs or body of customs to which the law of Sarawak gives effect". There are many significant cases of native rights to land being litigated in the courts. Decisions have gone both ways.[7]

Native law in family matters is enforced by a hierarchy of Native Courts.

Constitutional conventions: These are rules of political practice which are regarded as binding by those to whom they apply but which are not laws as they are not enforced by the courts. They evolve because life is always larger than the law and no Constitution can provide for everything. Every Constitution, no matter how detailed, is supplemented over time by informal usages, understanding and practices. In Malaysia a large number of constitutional conventions have become inlaid into the constitutional edifice. For example, the post of the Deputy Prime Minister, the existence of Cabinet committees, the conventional allocation of time to the opposition during the question hour in Parliament and the notion of "Bumiputera" have no legal basis. Yet they are of great constitutional significance. As Sir Ivor Jennings says: "Conventions are the flesh which clothe the dry bones of the law." They supplement the law. They are the non-legal rules which make the legal rules work.

6 There is recognition in *Khoo Hooi Leong v Khoo Chong Yeok* (1930) that English law must be applied with modification to alien races.

7 *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* (1997); *Director of Forests Sarawak v TR Sandah Ak Tabau* (2017); *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* (2008); *Andawan Ansapi v PP* (2012); *Agi Anak Bungkong v Ladang Sawit Bintulu Sdn Bhd* (2010); *Racha ak Urud @ Peter Racha Urud v Ravenscourt Sdn Bhd* (2014); *TR Hillary Chukan ak Briak v The Enrich Timber Sdn Bhd* (2015); *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* (2001).

In the area of constitutional law, hundreds of constitutional customs (called conventions) have developed over the years. For example, there is a daily Question Time in Parliament. During a dissolution of the Dewan Rakyat, the Prime Minister who advised dissolution stays in office in a caretaker capacity till the new Prime Minister and government are inducted into office after the election.

As with all customs, these constitutional conventions are not laws and not enforceable in a court of law.[8] They are the political morality of the day. They are rules of political practice that are regarded as binding by those to whom they apply but no legal sanction attaches to their disobedience.[9] However, conventions can influence judicial decisions in two ways: first, a court may use a well-established convention as an aid to interpretation of statutory law.[10] Secondly, in some circumstances a court may adopt a constitutional convention as part of his judicial reasoning, thereby elevating the convention to the status of common law.[11]

Quasi-legislation: Quasi-legislation by way of Administrative Circulars, Notifications, Instructions, Schemes and Directives do not have the status of law unless framed under the authority of a parent law. In actual practice, these administrative directives are issued regularly and are regarded by the civil service as absolutely binding. Disregard of them can disqualify a citizen from applying for a job, licence, scholarship, loan, passport or permit. Disregard of Government Circulars by a public servant can expose him to internal proceedings for indiscipline though no court case for breach of law can be initiated if the Circular has no legal status and is mere administrative in nature. For a learned judicial decision on the distinction between Administrative Circulars and subsidiary legislation see *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* (2015).

8 *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* (1963); *Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1982).

9 Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia*, pp 101-110.

10 *R v Home Secretary, ex parte Hosenball* (1977); *Liversidge v Anderson* (1942); *Robinson v Minister of Town & Country Planning* (1947).

11 *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2)* (1986).

International treaties: In most legal systems, national law overrides international law. By far and large international law is like a light that does not shine and a fire that does not glow. In Malaysia, international law does not have any legal force because the definition of law in Article 160(2) of the Constitution does not encompass international law. However, in this age of globalisation, it is impossible to build dykes against the tide of international standards. In many areas like intellectual property and human rights, our Parliament has already accorded recognition to international norms. This trend is likely to continue. But it must be noted that in the definition of "law" in Article 160(2), international law is conspicuously left out. This means that norms of international law and practice are not part of our body of law unless they are formally converted (posited) into law. This can be done in four ways: First, by statutory incorporation into a local statute. An example is our Human Rights Commission Act which incorporates the Universal Declaration of Human Rights into our law subject to the Constitution. Second, international law can be admitted to our shores by our judges by treating it as part of international "custom or usage" which the judges have power to recognise under Article 160(2). Third, it is noteworthy that in the definitional clause in Article 160, the words of the Constitution are "law includes" and not "law means". The definition of law is inclusive, not exclusive. The courts have some discretion. Fourth, the courts can adopt a constitutional presumption that unless Parliament explicitly excludes international law, the norms of all international laws and treaties ratified by the government must be grafted on to every Malaysian statute even if Parliament has not adopted international law into local statutes. This is what happened in *Noorfadilla Ahmad Saikin v Chayed bin Basirun* (2012) and *Lai Meng v Toh Chew Lian* (2012).[12] Such a presumption is justified because in this age of globalisation, our government must be seen as committed to harmonising its practices and laws with the law of nations.

Hierarchy of sources: A difficult question about the sources of law is whether the multiple sources outlined above exist in a clear hierarchy or as competing streams of law? Theory supports the idea of a hierarchy with the Federal Constitution at the apex. In reality, however, the situation is exceedingly complex for many reasons. First, the Constitution is what the judges say it is. For example, Article 5(3) mandates that

12 But for a contrary approach see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* (2004).

every arrestee "shall be allowed to consult and be defended by a legal practitioner of his choice". But in *Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis* (1975) the court held that the right can be exercised only after police have completed their investigation. The glittering generalities of Article 5(3) have to be read in the light of judicial precedents which, functionally speaking, become integral parts of the Constitution. Second, the Constitution is often read in the light of other sources of law i.e. legislation, judicial precedents, customs, principles of the Syariah and even norms of international practice. A broad, holistic view of the law requires us to see the law as a coordinate whole rather than as separate, hierarchical set of rules.

So, do the above sources of constitutional law exist in a hierarchy with the Constitution at the apex or do they exist as competing streams? Theory supports the idea of a hierarchy. The reality is different. Constitutional law is, and will always remain, a rich blend of competing and coordinate sources.

Chapter 4

Main Characteristics of the Federal Constitution

"This nation shall be founded upon the principle of liberty and justice and ever-seeking the welfare and happiness of its people." Proclamation of Independence by First Prime Minister, Tunku Abdul Rahman.

At a theoretical level Malaysia exhibits all the marks of a developed and vibrant constitutional system. The 183 Articles and 13 Schedules on which the constitutional edifice rests embody the following basic characteristics.

A WRITTEN AND SUPREME CONSTITUTION

Supremacy of Federal Constitution: Unlike the United Kingdom where there is no written Constitution, Malaya in 1957 adopted a written and supreme charter. Articles 4(1) and 162(6) affirm the supremacy of the basic law over all pre and post-independence legislation. The Constitution is the supreme law of the Federation. It is the law on which all other laws rest. It is the apex of the legal hierarchy, and no law or executive action can violate its prescriptions.

Limits on Parliament's powers: There are substantive and procedural limits on Parliament's powers. A parliamentary enactment cannot violate any provisions of the Constitution in relation to human rights, federal-state division of powers or any other right, privilege, position or immunity granted by the Constitution. In addition to substantive limits

there are prescribed procedures which must be complied with in the enactment, amendment or repeal of laws. The 13 State Assemblies of the Federation are, likewise, limited in their legislative competence.

Controlled Executive: Like Parliament, the Executive is subject to the law of the Constitution.

Special amendment procedures: Unlike ordinary laws which can be amended or repealed by simple majorities of legislators present and voting, most constitutional provisions are entrenched against easy repeal. Special two-thirds majorities of the total membership are required. In respect of some provisions, the consent of the Conference of Rulers or of the Governors of Sabah and Sarawak is also mandated. However, unlike Australia, the amendment procedure does not require the consent of the people at a referendum. Further, there is no requirement, except in two areas, to obtain the consent of the 13 States of the Federation to a constitutional amendment. These two areas are: alteration of the boundaries of a State and amendments to the special rights of the States of Sabah and Sarawak.

Judicial review: The supremacy of the Constitution is supported by judicial review. The Constitution in Articles 4(1), 4(3), 4(4), 128(1) and 128(2) is explicit about the power of the superior courts to examine the constitutionality of all executive[1] and legislative actions.

All Malaysians have a right to go to the courts if a legislative, executive or judicial act infringes the glittering provisions of the Constitution. Courts have the power to nullify federal and state legislation if there is inconsistency with the supreme Constitution. On at least 20 occasions since Merdeka (independence), this power of judicial review was exercised with telling effect. Likewise, executive actions can be tested in the courts for their constitutionality.

Regrettably, Malaysian courts are generally reluctant to employ the instrument of unconstitutionality to review legislative action. However,

1 *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs* (1988); *Arunamari Plantations Sdn Bhd v Lembaga Minyak Sawit Malaysia* (2011); *Berjaya Books Sdn Bhd v Jabatan Agama Islam WP* (2014); *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* (2016).

a fair amount of case law has developed on constitutional challenges to the administrative actions of the Executive.

(i) In the area of federal-state division of powers we have cases like *Mamat Daud v Government of Malaysia* (1988). In this case section 298A of the federal Penal Code was held to be a trespass on the State List because it was about Islamic crimes which are within the jurisdiction of the states.[2]

(ii) In relation to unlawful interference with fundamental rights there are hundreds of applications to the courts. One prominent case is that of *Fathul Bari v Majlis Agama Islam* (2012). The plaintiff was prosecuted for lecturing on Islam without a letter of authority (tauliah) from the state authorities. He submitted, unsuccessfully, that the requirement of a prior permit was a violation of his freedom of speech and freedom of religion.[3]

(iii) On violation of constitutional amendment procedure there are cases like *The Government of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* (1963). In this case Kelantan argued, but unsuccessfully, that in admitting Sabah, Sarawak and Singapore into the Federation of Malaya to constitute the Federation of Malaysia, the consent of all states including Kelantan should have been obtained.[4]

2 For other instances, see *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* (1963); *The City Council of George Town v The Government of the State of Penang* (1967); *Government of Malaysia v Government of the State of Kelantan* (1968); *Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah* (1988); *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* (1997); *Robert Linggi v The Government of Malaysia* (2011); *Dato' Ting Cheuk Sii v Datuk Hj Muhammad Tufail Mahmud* (2009); and *Fung Fon Chen @ Bernard v The Government of Malaysia* (2012).

3 Some other prominent cases are: *PP v Yee Kim Seng* (1983); *Che Ani bin Itam v PP* (1984); *Tye Ten Phin v Menteri Hal Ehwal Dalam Negeri, Malaysia* (1989); *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* (2002); *Yii Hung Siong v PP* (2005); *Ooi Kean Thong v PP* (2006); *Muhammad Hilman bin Idham v Kerajaan Malaysia* (2011); *Nik Noorhafizi bin Nik Ibrahim v PP* (2013); *Nik Nazmi bin Nik Ahmad v PP* (2014); *Berjaya Books Sdn Bhd v Jabatan Agama Islam WP* (2014); *Mat Shuhaimi Shafiei v PP* (2014); *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* (2014); *PP v Azmi bin Sharom* (2015); *State Government of Negeri Sembilan v Muhammad Juzaili Mohd Khamis* (2015); *PP v Yuneswaran Ramaraj* (2015); *Pathmanathan a/l Krishnan v Indira Gandhi a/p Mutho* (2016); *ZI Publications Sdn Bhd v Kerajaan Negeri Selangor* (2016); *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* (2016); *Maria Chin Abdullah v PP* (2016); *YB Khalid Abdul Samad v Majlis Agama Islam Selangor* (2016); and *Khairuddin Abu Hassan v Kerajaan Malaysia* (2016).

4 See also *Robert Linggi v The Government of Malaysia* (2011).

(iv) On the exercise or abuse of emergency powers we have *Teh Cheng Poh v PP* (1979) and *Abdul Ghani Ali @ Ahmad v PP* (2001).

(v) On the Attorney General's exclusive power under Article 145 to commence prosecutions we have a dozen or so cases including *Subramaniam Gopal v PP* (2010).

A FEDERAL SYSTEM

Federal-state division of powers: Unlike the unitary system in the UK and Singapore where the whole country is under one central government which has supremacy over all matters, Malaysia has a federal (or dual) form of government. There is division of legislative, executive, judicial and financial powers between the Centre and the states though the weightage is very heavily in favour of the Centre. This division is protected by the Constitution and judicial review is available if federal or state agencies exceed their powers.

Existence of 13 State Constitutions: Malaysia has a written, supreme Constitution at the federal level as well as written Constitutions in all 13 states of the Federation. The Federal Constitution is supreme throughout the land.[5] The State Constitutions are supreme in the respective states but subject to the primacy of the Federal Constitution.[6] All State Constitutions are required to contain some "essential provisions" prescribed by the Federal Constitution's Eighth Schedule.

Special rights of Sabah and Sarawak: In 1963 Sabah, Sarawak and Singapore agreed to join the Federation of Malaya to transform it into a new nation by the name of Malaysia. Extensive changes were made to the 1957 Constitution to accommodate the special position of the new States. The East Malaysian regions of Sabah and Sarawak enjoy some executive, legislative, judicial and financial autonomy not available to

5 *Gobind Singh Deo v Yang Dipertua Dewan Rakyat* (2010); *ZI Publications v Kerajaan Negeri Selangor* (2016); *Gan Boon Aun v PP* (2016); *Tuan Mat bin Tuan Wil v Kerajaan Negeri Kelantan Darul Naim* (2016).

6 Federal Constitution, Article 71(4) and Part I of the Eighth Schedule.

the 11 Peninsular states. This asymmetrical arrangement for special treatment is entrenched in the 1963 amendments to the Constitution.[7]

Singapore: States have no right to secede but in 1965 Singapore was allowed to go its way and become a separate independent nation. To achieve this purpose, the Federal Constitution was amended to allow Singapore to attain a separate nationhood.

FUNDAMENTAL RIGHTS

In response to the humanitarianism of the era, the Constitution, in Articles 5 to 13 and elsewhere, protects a large number of political, civil, cultural and economic rights. It seeks to protect fundamental freedoms and to reconcile the irreconcilable conflict between the might of the state and the rights of the citizens. The chapter on fundamental liberties, the existence of an independent judiciary, the provision for judicial review, the institution of popular elections and representative parliament are clearly meant to create a democratic and responsible government under the law.

In his Proclamation of Independence, former Prime Minister Tunku Abdul Rahman encapsulated the constitutional dream beautifully: "This nation shall be founded upon the principle of liberty and justice and ever-seeking the welfare and happiness of its people."

The Constitution in Articles 5-13 confers a number of civil and political liberties, among them the right to life and liberty, abolition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality before the law, freedom of movement and protection against banishment, freedom of speech, assembly and association, freedom of religion, rights in respect of education, and right to property. Elsewhere in the Constitution, there is a right to vote and to seek elective office, protection for public servants, and some protection for preventive detainees. A number of ordinary statutes confer rights on women, children, workers, pensioners, consumers, trade unionists etc.

7 *Robert Linggi v The Government of Malaysia* (2011); *Fung Fon Chen @ Bernard v The Government of Malaysia* (2012).

However, it must be noted that fundamental rights are not absolute and are subject to extensive regulation by Parliament on such grounds as public order, national security and morality as permitted by the Constitution. So significant is Parliament's power to restrict fundamental liberties that their description as "fundamental" poses problems in political philosophy. At the same time, it must be noted that our judges are expanding the notion of human rights by interpreting the provisions of fundamental liberties in a creative, prismatic fashion. This is resulting in the rise of implied, non-textual, unenumerated rights.

POWERS TO COMBAT SUBVERSION AND EMERGENCY

The communist insurgency cast a dark shadow on constitutional development. The forefathers of the Constitution, through Articles 149 to 151, armed Parliament and the Executive with overriding powers to combat subversion and emergency. These special powers have been employed extensively to restrict many fundamental rights. For example, the emergencies of 1964, 1969, 1976 and 1977 were only lifted in 2011.

CONSTITUTIONAL MONARCHY

We have a constitutional monarchy at both the federal and state levels. As in the UK, the monarchs are bound by advice save in a few areas where royal discretion is explicitly permitted. The monarchy in Malaysia is quite unique in a number of ways:

(i) Malaysia has 10 Sultans or hereditary Rulers – one at the federal level called the Yang di-Pertuan Agong and nine hereditary Sultans/Rajas in the nine "Malay States". Four states without hereditary rulers have State Governors.

(ii) The federal monarchy is elected and rotational. The King is elected by his nine brother Rulers for a fixed period of five years.

(iii) The King can be dismissed by the Conference of Rulers.

(iv) The King and his brother Rulers are not immune from civil or criminal proceedings. However, any proceeding against them must be commenced in a Special Court under Articles 182-183.

The Yang di-Pertuan Agong and the State Rulers are required by federal and State constitutions to act on the advice of the elected government in the whole range of their constitutional functions, except in a small area where personal discretion has been conferred. Even in this area, constitutional conventions limit royal discretion. In the overall scheme of the Constitution, the monarchs are required to reign, not to rule.

Conference of Rulers: The primary function of this unique institution is to elect and remove the Yang di-Pertuan Agong, elect the Deputy Yang di-Pertuan Agong, consent or refuse to consent to some constitutional amendments, and to offer advice on some appointments.

A PARLIAMENTARY DEMOCRACY

Parliamentary government: Unlike the system of independent government in the United States which is built on a rigid, institutional separation between the Executive and the Legislature, in Malaysia the government is part of Parliament, is answerable, accountable and responsible to it, and can be dismissed on a vote of no-confidence by the Dewan Rakyat. We emulated the British, Westminster style of parliamentary government at both federal and state levels.

Democratic institutions: The legal system has most of the formal attributes of a democracy – elections to choose the federal and state governments; a bicameral Parliament at the federal level; a unicameral Assembly in each of the States; a well-developed electoral system; a system of political parties; a judiciary with safeguards for judicial independence; and constitutional protection for enumerated human rights in Articles 5-13.

But unfortunately, there is also constitutional permission for executive detention without trial; laws about sedition, treason, and official secrets; prior restraints on free speech through licences and permits for the media; police control over assemblies and processions; and censorship and banning of books and publications.

Elected parliaments: Popularly elected assemblies exist at both the federal and state levels.

At the federal level, the Parliament is bicameral – an elected House of Representatives and a non-elected Senate. Understandably, there is preponderance of power in the elected House of Representatives over the non-elected Senate. The Senate has 44 appointed members and 26 indirectly elected Senators – two from each State indirectly elected by the 13 State Assemblies.

All 13 State Assemblies are unicameral.

Electoral system: The Constitution mandates periodic elections, universal adult suffrage (right to vote) and an independent Election Commission. The Constitution and laws provide the main electoral principles.

- We have a single member constituency system so that there are as many constituencies as seats in the legislature.
- Every citizen of age 21 who has registered as a voter in a constituency is eligible to vote unless he/she suffers from an electoral disqualification.
- Right to seek elected office is likewise protected and no racial, religious, gender, educational or income criterion applies.
- Victory in a constituency is on a "simple plurality" vote. The candidate with the largest number of votes wins even if that vote does not exceed 50% of the votes cast.
- There are no reserved seats for the army,[8] police or any race or religion in the elected House of Representatives.
- A unique feature of the electoral landscape is that rural constituencies may have less than half of the population of urban constituencies.

8 Contrast this with Myanmar where 25% of the seats in Parliament are reserved for the armed forces.

- Regrettably we have no local authority elections though these did exist in the early years of independence.

INDEPENDENT JUDICIARY

Protection for judicial independence: The superior courts are separate from and independent of the Executive and the Legislature. The constitutional position of judges is that they are not regarded as civil servants and enjoy many special safeguards in matters of appointment and dismissal. Their terms and conditions of service cannot be altered to their detriment. They are insulated from politics. They have power to punish for contempt of court. In the performance of their functions they enjoy absolute immunity.

Access to the courts: In theory, the right of access to the courts for the enforcement of rights is regarded by some judges as part of the constitutional guarantee of personal liberty.

According to Justice Gopal Sri Ram JCA, as he was then, the right to go to courts is part of the constitutional right to personal liberty.

Regrettably, for 70% or so of the accused in lower courts who are unrepresented, the right of access is unenforceable because of the high cost of litigation and the infancy of legal aid and advice. In Malaysia, lawyers are not allowed to seek contingency fees, give rebates or advertise their services. These rules impact adversely on citizens' ability to seek legal redress.

No immunity for the government: Most remarkably, the King and the Malay Rulers are subject to the civil and criminal law and can be tried in a special court. The government is not immune from civil proceedings in contract or tort.[9] However, it enjoys some procedural advantages: the time limit in contract and tort to sue the government is reduced from six years to 36 months. Evidence may be withheld in the public interest. Facts may be suppressed under the Official Secrets Act 1972. Some remedies like injunction and specific performance are not available

9 *Kerajaan Malaysia v Ambiga Sreenevasan* (2016).

against the government. In some situations, the government may even have total immunity.

ISLAM AS OFFICIAL RELIGION

An official religion: Article 3(1) declares Islam to be the religion of the Federation. But there is protection for believers of all other faiths.

- Article 3(1) states that all other religions may be practised in peace and harmony.
- Non-Muslims cannot be subjected to Islam because their freedom of religion is guaranteed by Article 11.
- There is explicit provision in the Ninth Schedule, List II, Item 1 that Syariah courts have jurisdiction only over persons professing the religion of Islam.
- Muslims are, however, compulsorily subjected to the Syariah and to the jurisdiction of the Syariah courts.
- The Syariah law that is applicable in Malaysia is largely of the Shafie school of Islam with influences of Malay custom (adat).
- The formulation of Islamic Law Enactments is largely left in the hands of the State Assemblies each of which enacts laws for its territory. The three federal territories of Kuala Lumpur, Putrajaya and Labuan have separate, federal Syariah laws applicable to them.

Malaysia is neither a theocracy, nor a secular state: It must be noted that though Islam is the religion of the Federation, Malaysia is not a theocratic, Islamic state. The Federal Constitution is the highest law.

Islamic law applies compulsorily to all Muslims but only in 24 areas (primarily of family law) enumerated in the Ninth Schedule, List II, Item 1. In all other areas like crime, contract and tort, Muslims are governed by secular laws enacted by elected assemblies.

The adoption of Islam as the religion of the Federation was not meant to restrict the freedom of other communities to practise their own religions in peace and harmony.

However, since the 80s, a policy of Islamisation is in effect and some areas of federal legislation (like banking, insurance, loans) are being influenced by Syariah principles that are being posited into legislation applicable to all persons. There is increasing assertiveness by the Syariah establishment in many areas of social life that affect Muslims[10] as well as non-Muslims.[11] Some very painful and intractable conflict of jurisdiction cases between civil and Syariah courts remain unresolved.[12] Since the 90s, superior courts are increasingly incorporating principles of Islamic jurisprudence into their judicial decisions.

A secular concept of law: Article 160(2) of the Federal Constitution supplies an authoritative definition of law. It states that "law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

From the above definition, at least three categories of rules qualify as law in this country:

(i) Written law. This category includes the Federal Constitution, Acts of the federal Parliament, Emergency Ordinances by the Yang di-Pertuan Agong under Article 150, federal subsidiary legislation, 13 State Constitutions, Enactments and Ordinances of State Assemblies, state subsidiary legislation and local authority by-laws. In the context of Sabah and Sarawak, British statutes at cut-off dates may be applied as law if there is no local legislation. In the field of commercial law, British statutes at cut-off dates may be applied throughout the country if there is no local legislation.

10 *YB Khalid Abdul Samad v Majlis Agama Islam Selangor* (2016); *Tuan Mat bin Tuan Wil v Kerajaan Negeri Kelantan Darul Naim* (2016); *State Government of Negeri Sembilan v Muhammad Juzaili Mohd Khamis* (2015); *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan* (2012).

11 *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* (2014); *Berjaya Books Sdn Bhd v Jabatan Agama Islam WP* (2014); *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* (2016).

12 *Kerajaan Negeri Kelantan v Wong Meng Yit* (2012).

(ii) English common law and Malaysian judicial precedents. Unlike in the civil law system, judicial precedents formulated by Malaysian and United Kingdom (UK) judges in the course of deciding cases have the force of law and are honoured by a system of *stare decisis.*

(iii) Customs or usages. These become law if recognised by statute or common law.

It is noteworthy that under Article 160(2) religion, ethics, morality and custom are not law on their own strength or quality. Neither is there legal recognition for social practices, rules of international law and private law unless these are incorporated into or derived from a recognised source of law. However, religion, ethics, morality, custom, social practices, rules of international law and private law may be admitted into law by incorporation, adoption or being posited or formalised into a statute or a judicial precedent.

In practice statutory recognition of custom or religious precepts is quite frequent. In West Malaysia it is quite common to see Muslim family law statutes containing a clause to the effect that "the law on this point shall be the law of the Syafie school of Islam and Malay adat".

IMPARTIAL PUBLIC SERVICE

Civil servants are required to maintain a reserve in politics. Their term in office is unaffected by the rise and fall of governments. Under Article 135, they enjoy many procedural safeguards against arbitrary dismissal or reduction in rank.

CONSTITUTIONAL COMMISSIONS

The Constitution and laws have created a number of independent Commissions and Councils that are supposed to oversee particular aspects of governance. There is the Election Commission, Armed Forces Council, Judicial and Legal Services Commission, Public Services Commission, Police Force Commission, Education Service Commission, Anti-Corruption Commission and the Human Rights Commission.

In addition, we have the Auditor General and the Attorney General. Whether these Commissions and institutions act with integrity and independence or whether they are under the control of an omnipotent executive is a matter of opinion.

POWERFUL FEDERAL POLICE FORCE

The Police Force is a federal force and is charged with the responsibility of maintaining security, public order and investigating crime. However, the power to launch a prosecution lies with the Attorney General who doubles up as the government's chief lawyer as well as the Public Prosecutor.

CIVILIAN CONTROL OVER THE FORCES

Even during the communist insurgency (1957-1989) or during racial riots in 1969 or during the emergency (1964-2012) there has been civilian control over the army and the police. We have had no coup d'etats or "stern warnings" from the armed forces. Separation of the police force from the armed forces and a parity between the top echelons of the army and the police achieves an admirable check and balance between the two.

LEGAL PLURALISM

The Malaysian legal system consists primarily of secular Codes drafted by elected legislative authorities. But legal pluralism abounds in that there are different systems of law and different systems of courts which operate within their assigned spheres.

We have a hierarchy of civil courts, a different hierarchy of Syariah courts and another hierarchy of Native Courts in Sabah and Sarawak.

Unfortunately, conflict of laws between civil courts and Syariah courts in West Malaysia and Native Courts and Syariah courts in Sabah and Sarawak is endemic and increasingly the various streams of law compete with each other for ascendency.

There are Syariah laws for Muslims in 24 or so personal law matters enumerated in the Constitution. In addition, customs of the Malays are part of the personal laws for Muslims.

In Sabah and Sarawak a great deal of native custom is codified. At one time, Chinese and Hindu customs were recognised in family law relations. But due to the passage of the Law Reform (Marriage and Divorce) Act 1976, family law for non-Muslims has now been codified.

AFFIRMATIVE ACTION

One of the unique features of the Constitution is that affirmative action policies in favour of Malays and the natives of Sabah and Sarawak are entrenched in Article 153 of the basic law.

ETHNIC AND RELIGIOUS COMPROMISES

Nation-building in a plural and "divided" society poses special challenges everywhere. In some countries, the "melting pot" ideology is employed. This involves the effort, either by force or through encouragement and assimilation, for people of diverse backgrounds to come together, submerge their distinct identities in something bigger and evolve a new personality for at least some purposes.

The other model is that of a mosaic or a rainbow. This involves the recognition that the law cannot by force extinguish the special regard that a substantial number of people in every country have towards their religion, race, region, culture, language or tribe. Efforts to promote a national identity should involve the recognition that unity cannot mean sameness. It has to be a unity in diversity. We can all be friends but only in spots. In other areas where we do not see eye to eye, we have to live and let live, to permit diversity and differences and to tolerate these differences.

The leaders of Malaya's independence settled for the second approach. The various communities were allowed to maintain their distinct ethnic identities, cultures, religions, languages, lifestyles, dresses, foods, music, vernacular schools etc. Political parties and business and cultural

associations were allowed to be organised on ethnic lines. Vernacular schools were allowed. Malaya (later Malaysia) began its tryst with destiny looking a little bit like a rainbow in which the colours are separate but not apart. Barring a short period after 1969 when ethnic practices like Chinese lion dances were not permitted, and forced integration was experimented with, the overall effort of the last 61 plus two pre-independence years has been to find some areas of cooperation and to allow distinctiveness in other spheres of existence.

Malaysia's Federal Constitution was a masterpiece of compromise, compassion and moderation. In recognition of the fact that Malaya was historically the land of the Malays, the Merdeka Constitution incorporated a number of features indigenous to the Malay archipelago, among them:

- the unique system of multiple Malay monarchs;
- the unique institution of the Conference of Rulers;
- the system of Malay reserve lands;
- Islam as the state religion but freedom of religion for all other religions;
- the grant of a "special position" to the Malays and (in 1963) to the natives of Sabah and Sarawak by incorporating and entrenching affirmative action provisions in their favour;
- Protection for Malay customs (and in 1963 for native law and custom of Sabah and Sarawak);
- Bahasa Melayu as the national language;
- weightage for rural areas (which are predominantly Malay) in the drawing up of electoral boundaries;
- reservation of some top posts in the State Executive for Malays; and
- legal restrictions on preaching of other faiths to Muslims.

However, the Malay-Muslim features are balanced by other provisions suitable for a multi-racial and multi-religious society. The Constitution is replete with safeguards for the interest of other communities. Notable features are as follows:

- Citizenship rights are granted on a non-ethnic and non-religious basis. The concept of *jus soli* (citizenship by birth in the country) was part of the Constitution in 1957 and was used to grant citizenship to 1.2 million non-Malays. However, *jus soli* was removed from the Constitution in 1963. The requirements of citizenship are now more complex.

- The electoral process permits all communities an equal right to vote and to seek elective office at both federal and state levels. Race and religion are irrelevant in the operation of the electoral process.

- The chapter on fundamental rights (with some exceptions) grants personal liberty, protection against slavery and forced labour, protection against retrospective criminal laws and repeated trials, right to equality, freedom of movement, protection against banishment, right to speech, assembly and association, freedom of religion, rights in respect of education and right to property to all citizens irrespective of race or religion.

- At the federal level, membership of the judiciary, the Cabinet of Ministers, Parliament, the federal public services and the special Commissions under the Constitution are open to all irrespective of race or religion.

- Education is free at the primary and secondary levels and is open to all.

- University education is subjected to strict quotas. However, to open up educational opportunities for non-Malays, private schools, colleges and universities are allowed. Foreign education is available to whoever wishes to seek it. Government education scholarships are given to many non-Malays though this is an area where a large discontent has developed over the proportions allocated.

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- Even during a state of emergency under Article 150, some rights like citizenship, religion and language are protected by Article 150(6A) against easy repeal.

- The spirit of give and take between the races, regions and religions is especially applicable in relation to Sabah and Sarawak.

- Even where the law confers a special position on the Malays and the natives of Sabah and Sarawak, there is concomitant protection for the interests of other communities. For example, though Islam is the religion of the Federation, Malaysia is not an Islamic state. The Syariah does not apply to non-Muslims.

- All religious communities are allowed to profess and practice their faiths in peace and harmony. State support by way of funds and grant of land is often given to other religions. Missionaries and foreign priests are allowed entry into the country. Every religious group has the right to establish and maintain religious institutions for the education of its children.

- Though Bahasa Melayu is the national language for all official purposes, there is protection for the formal study in all schools of other languages if 15 or more pupils so desire. There is legal protection for the existence of vernacular schools and legal permission to use other languages for non-official purposes.

- Though Article 89 reserves some lands for Malays, it also provides that no non-Malay land shall be appropriated for Malay reserves and that if any land is reserved for Malay reservations, an equivalent amount of land shall be opened up for non-Malays. Alienation of or grant of Temporary Occupation Licence over state land to non-Malays is not uncommon.

- Article 153 on the special position of the Malays and the natives of Sabah and Sarawak is hedged in by limitations. First, along with his duty to protect the Malays and the natives, the King is also enjoined to safeguard the legitimate interests of other communities. Second, the special position of the Malays and natives applies only in the public sector and in only four prescribed sectors and services. Third, in the operation of Article 153, no non-Malay or his heir should be deprived of what he already has.

Fourth, no business or profession can be exclusively assigned to any race. Fifth, Article 153 does not override Article 136. Quotas and reservations are permitted at entry point but once a person is in the public service he should be treated equally.

In addition to the above legal provisions, the rainbow coalitions that have ruled the country for the last 61+2 years are built on an overwhelming spirit of accommodation between the races, a moderateness of spirit and an absence of the kind of passions and zeal and ideological convictions that in other plural societies have left a heritage of bitterness.

Culturally the country is a harmonious mosaic. Secularism and religion live side by side. Mosques and temples and churches dot the landscape. Despite the prohibitions for Muslims, non-Muslims are not forbidden from consuming alcohol, have gambling permits, rear pigs and dress in their own or the permissive ways of the West.

In the commercial and economic area, there is right to property, freedom of trade and commerce, a relatively open, globalised economy, encouragement to the non-Malay dominated private sector to invest in the economy, freedom to import and export, and to transfer funds to and from abroad.

In general, economic opportunities have given to everyone a stake in the country. The non-Malay contribution to the building of the economic infrastructure of the country has given the country prosperity as well as stability.

Sadly, dark clouds loom over the horizon. Unresolved disputes fester about many of the following issues:

- Planning permissions for non-Muslim places of worship.
- Forced relocation of some places of worship (some of which were constructed without prior planning permission).
- Disputes about the custody, guardianship and the religion of the child in a non-Muslim marriage where one party converts to Islam.

- The ban (now lifted) on Bibles in the Malay language.
- The ban on the use of the word "Allah" in Christian sermons.
- Missionary work of Christian evangelists from abroad.
- The infrequent but highly explosive issue of Muslim conversions out of Islam.
- The contentious issue about the Islamic state is tearing society apart. The hitherto supreme Constitution is being challenged by some Muslim groups who wish to create an Islamic state and implement the Islamic *hudud* laws.
- There is overzealousness in the enforcement of Article 153 quotas and abuse and diversion of Article 153 allocations for the benefit of the corrupt elite.
- Despite a Sedition Act, there are constant acts of incitement to religious and racial hatred in public speeches and internet discussions by some politicians and leaders of religious and social groups.
- A petro-dollar-driven, Saudi Arabian (Wahabist or Salafist) version of conservative Islam seems to be taking hold and is displacing the traditional Malay spirit of moderation.

However, the spirit of accommodation that has lasted 61 + 2 years can overcome the present problems. What is needed is leadership, patience, moderation and tolerance.

NATIONALITY

Nationality is not equated with ethnicity but with citizenship and exclusive allegiance. Double citizenship is not allowed.

NO PREAMBLE

It is noteworthy that unlike most Constitutions of the world, the Malaysian Constitution does not contain a Preamble – an opening statement encapsulating the values and ideals of the nation's document of destiny. These ideals and values do exist, of course, but have to be seen and felt in the glittering generalities of the 183 Articles of the Constitution.

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II. Constitutional Fundamentals

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Chapter 5

Constitutional Supremacy

The adoption of a written and supreme constitution as the chart and compass, the sail and anchor of a nation has a number of distinct implications.

In the days before Merdeka, when the edifice of the Constitution of the Federation of Malaya was being constructed, several alternative models were available for adoption by the drafters of our document of destiny. First, the British model of an unwritten constitution with a supreme parliament vested with unlimited legislative competence and unhindered by judicial review. Second, the United States' model of a written constitution with a limited legislature and an entrenched chapter on fundamental freedoms vigorously guarded by the courts. Third, the Indian model with a written and supreme constitution and a chapter on fundamental rights but with a parliament vested with extensive powers to curtail fundamental rights on the grounds permitted by the basic charter. Fourth, the theocratic model of giving primacy to the laws of God and making the Islamic Syariah the supreme law of the Federation. Fifth, returning to the days of the supremacy of the Sultans as during the Melaka Sultanate.

The drafters of the Malayan Constitution chose the third model. A written and supreme constitution was adopted as the fundamental and supreme law of the land but with extensive powers conferred on the federal Parliament to regulate human rights and to bypass some of the guarantees of the basic law in times of subversion or emergency.

The adoption of a written and supreme constitution as the chart and compass, the sail and anchor of a nation has a number of distinct implications.

A higher law: Implicit in the concept of a constitution is that of a higher law that has superiority over the institutions it creates, and that takes precedence over all other laws. In most states where there is a written constitution, a distinction is made between the law of the constitution and ordinary law. In case of a conflict between the two, the constitution prevails. The superior courts have the power to invalidate government action on the ground of unconstitutionality. Article 4(1) of our Federal Constitution states that "this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Article 4(1) is strengthened by Articles 128 and 162(6). Article 128 confers power on the superior courts to determine the constitutional validity of federal and state laws. Article 162(6) lays down that any court or tribunal applying the provisions of any pre-Merdeka law may apply it with such modification as may be necessary to bring it into accord with the Constitution.

A limited parliament: The implications of Articles 4, 162(6) and 128 are that in Malaysia all persons and authorities, including Parliament, are subject to the provisions of the Constitution. Their powers are limited and defined and are to be found in the Constitution itself. Any unconstitutionality is liable to be challenged and invalidated in the courts. The doctrine of the supremacy of Parliament is not part of Malaysian legal theory. In *Ah Thian v Government of Malaysia* (1976), Lord President Tun Suffian affirmed the supremacy of the Constitution in unmistakable language: "The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and the state legislatures in Malaysia is limited by the Constitution and they cannot make any law they please."

Federal set-up: Malaysia is a federation of states. There is a division of legislative executive, judicial and financial powers between the federal and State Assemblies. This division is entrenched in the scheme of the Constitution. In the legislative sphere, for example, Articles 74, 77 and the Ninth Schedule contain five legislative lists. List I contains topics

on which the federal Parliament has exclusive power to make laws. List II contains 13 topics on which the State Assemblies have exclusive jurisdiction to make Enactments. List III is a Concurrent List of topics on which both federal and state legislatures can frame laws but if there is a clash between the two, then according to Article 75, the federal law must prevail. In addition to these three Lists, there is a Supplementary State List and a Supplementary Concurrent List for Sabah and Sarawak giving them additional law-making competence. Sabah and Sarawak's autonomy in spheres allocated to them is quite pronounced.

Despite the division of powers, the Constitution permits some flexibility by permitting the federal government to act within the jurisdiction of the states in a number of circumstances, including a state of emergency under Article 150 and the concurrence of the states under Article 76.

Fundamental rights: In fidelity to the humanist tradition of the age, the Federal Constitution (in Articles 5 to 13) contains a chapter on fundamental liberties. Though Parliament is given extensive powers to regulate these liberties on a wide range of grounds, it cannot be denied that the constitutional provisions do create "obstacles in the path of those who would lay rash hands upon the ark of the Constitution."

Judicial review: Constitutional supremacy is maintained by giving to the courts the power to review executive and legislative acts on constitutional grounds. In the last 61 years hundreds of executive actions and decisions have been invalidated by the courts for violation of the requirements of the Constitution. These decisions affirm constitutional supremacy and enforce constitutional accountability.

However, when it comes to federal or state laws, a very small number, probably less than 20 have been invalidated by the courts in the 61 years since Merdeka. The number is indeed small but it illustrates the theory of constitutional supremacy and denies the omnipotence of Parliament and the State Assemblies.

Judicial review of legislation is difficult to achieve and sustain because of the existence of Parliament's special powers to combat subversion and emergency and the relative ease with which constitutional amendments have been accomplished by past governments that won more than two-third majority in 10 out of 14 General Elections. Judicial attitudes have

not helped either. Barring a few honourable exceptions, constitutional issues are avoided and evaded adroitly. Subjective powers are not always tested by reference to standards in the basic charter. The Constitution has largely operated on the peripheries of the legal system.

Special procedures for amendments: Though a Constitution is a special law, it must provide an internal mechanism for growth and change. This process must not be so difficult as to frustrate change (because a Constitution that will not bend will have to be broken) nor so easy as to weaken the safeguards of the basic law. In Malaysia, most constitutional amendments require a two-thirds majority of the total membership of each House. In addition, the consent of the Conference of Rulers and of the Governors of Sabah and Sarawak is required for some changes.

Subversion and emergency: The communist emergency cast a long shadow on constitutional development. The resulting special powers to combat subversion and emergency cause a partial eclipse of some of the gilt-edged provisions of the Constitution. However, it must be noted that even under Articles 149 and 150 there are certain limits on Parliament's competence. Article 149 permits departures from only four fundamental rights provisions. The powers of Article 150, unlimited though they seem, cannot violate provisions relating to six special topics consecrated in Article 150(6A).

In sum, it could be stated that the distinction between constitutional and parliamentary supremacy is still valid despite the fact that on present political reality the Constitution has not proved to be a significant fetter on executive and legislative powers.

A distinction has arisen between political and legal sovereignty. In law the Constitution is supreme. In practice, political supremacy rests with the elected Executive armed with a two-thirds parliamentary majority. The Executive is further authorised to enact laws to suspend human rights in order to combat subversion and emergency. Theory and reality have developed a wide gap. But if future governments continue to fall short of a two-thirds parliamentary majority, constitutional supremacy may reassert itself.

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Chapter 6

Separation of Powers

The ideal of separation of powers has a richness and a complexity that defies easy description. There is no one concept; there are many conceptions.

One of the greatest challenges of good governance is to divide and disperse power in order to prevent its concentration in the same hands. All modern constitutions seek to provide for a "limited government" i.e. a government without arbitrary powers. Institutions, principles and procedures are devised to allow some sort of check and balance between the branches of state. Power of one is used to check the power of another. Controlling the government without crippling it is the great challenge of constitutional and administrative law. An important way to achieve this purpose is the doctrine of separation of powers.

In its simplest form as propounded by French philosopher Montesquieu it means that there are three separate organs of state. Each is vested with one type of power. The legislature legislates. The judiciary interprets and applies. The Executive executes. No organ trespasses on the functions of another. Persons in one organ do not sit on another organ. There is separation of powers and personnel.

In France, for example, as part of a strict separation among the organs of the state, the judiciary is not allowed to interfere with the executive and legislative branches. Disputes between the citizens and the state go to special administrative courts that apply a special body of administrative law. Any questions about the constitutionality of legislation are determined by a special committee of the French Parliament.

In the US, the President and his Cabinet are not, and cannot be, members of their legislature (the Congress). The President and his Cabinet are not answerable to Congress and cannot be dismissed on a vote of no confidence.

This version of strict separation of powers by Montesquieu is, however, inapplicable in most legal systems. The executive, legislative and judicial functions are overlapping and cannot be separated in a water-tight way. Nor should they be rigidly separated. For example, legislation is passed by parliament but has to be drafted by executive officers in the Attorney General's office. In many situations, the executive is authorised by parliament to draft delegated (or subsidiary) legislation. The primary task of adjudicating disputes rests with the judiciary but in innumerable situations, disputes between citizen and the state are heard before administrative tribunals, licensing boards, and quasi (semi) judicial authorities.

Strict separation of powers is neither possible nor desirable. We have to aim for a check and balance. In most democracies, separation of powers means no more than independence of the judiciary. The power of the courts to provide check and balance and to review administrative and legislative decisions is the hallmark of democratic separation of powers. In the US and India, the effectiveness of judicial review of executive and legislative actions is the litmus test of the working of separation of powers. Does such a separation of powers or check and balance exist in Malaysia?

SEPARATION OF POWERS IN MALAYSIA

In the case of *PP v Kok Wah Kuan* (2008), which has since been departed from in the *Semenyih* case[1] of 2017, the Federal Court ruled that "the doctrine (of separation of powers) is not a provision of the Malaysian Constitution even though it influenced the framers of the Malaysian Constitution". With all due respect to the *Kok Wah Kuan* judges, a constitution is not mere black letters. It has a spirit and a soul. It is enriched by inarticulate values and assumptions. Separation of powers, rule of law, constitutionalism, independence of the judiciary, limited

1 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* (2017).

government, human dignity, fairness, justice and equity, though nowhere mentioned explicitly in the constitutional charter, are the heart and soul of constitutional law. Our Constitution is built on an imperfect version of the check and balance version of separation of powers.

Relationship of Judiciary and the Executive: In the relationship between the Judiciary and the Executive, the Constitution sought to ensure that the higher echelons of the Judiciary are separate from, and independent of, the Executive. The Constitution provides for the existence of the superior courts, the judicial hierarchy, the jurisdiction and composition of the courts, constitutional procedures for appointment of superior court judges, protection for security of tenure, favourable terms of service, insulation from politics, judicial power to punish for contempt and judicial immunities.

The principle of constitutionality and the administrative law principles of ultra vires and natural justice enable the courts to review executive actions. The courts have the power to ensure that no matter how high and mighty the functionary of the state may be, the law is always above him.

The gilt-edged provisions of the law on judicial independence have, sadly, not always worked well because of poor appointments, unprincipled promotions, lack of integrity at the top at various periods in the past, factionalism within the judiciary and a general unwillingness on the part of most judges to uphold the check and balance provisions of the Constitution. In the late 80s, Tun Salleh and five other Supreme Court judges were suspended and three were dismissed on political grounds.

There are other problems as well. Many executive actions like preventive detention are expressed by the law to be non-reviewable in the courts. Most judges interpret these provisions literally even though legal luminaries around the world have suggested many ways to denude "ouster clauses" of their effect. The 1988 amendment to Article 121(1) does indeed weaken the inherent powers of the courts to prevent transgressions of the law. The position of subordinate court judges as part of the Judicial and Legal Service is quite unsatisfactory. Magistrates and Sessions Court judges can be part of the hallowed halls of the judiciary one day and be transferred to the Attorney General's Chambers the next morning.

The absolute powers of the Attorney General over prosecutions, his right to pick and choose which law to apply, and his power to transfer cases laterally or horizontally have hitherto remained impervious to judicial review.

Relationship of Executive and Legislature: In Malaysia, the UK and India, we have a "parliamentary government". The motive force of the Constitution is a conjunction between the "parliamentary executive" and Parliament. The PM and his Cabinet are integral parts of the legislature; they are answerable, accountable and responsible to the Dewan Rakyat and can be voted out on a vote of no confidence. At the same time being leaders of the majority party or coalition, they control the legislature. If one were to examine the relationship between the Executive and the Legislature in Malaysia, there is neither a separation nor a check and balance. The Executive dominates Parliament politically and has captured the legislative process. Parliament legitimates; it does not legislate.

As in France, the Yang di-Pertuan Agong has an important and independent law-making power of his own under Article 150 of the Constitution to promulgate emergency ordinances. The Conference of Rulers has veto powers over 10 types of legislation. In addition, the Executive makes a great deal of subsidiary legislation which in amount exceeds parliamentary legislation by about 15 times. Clearly, the centre of gravity of the legislative process lies in Putrajaya and not in Parliament.

Relationship of legislature and judiciary: In Malaysia members of the judiciary are absolutely separate from Parliament. Judges are insulated from politics. Under Article 127 judicial conduct cannot be discussed in Parliament save on a motion for dismissal which is supported by one quarter of the members. In return judges do not generally investigate internal matters of Parliament which are left to parliamentary privilege. Articles 63 and 72 of the Federal Constitution state that the validity of any proceedings in Parliament or the Legislative Assembly of any State shall not be questioned in any court.

As part of check and balance, however, courts review parliamentary Acts on the ground of unconstitutionality. This is because Parliament is not supreme and the Constitution is the supreme law of the Federation.

All in all, the doctrine of separation of powers has a mixed record in Malaysia. Its main ingredient is independence of the judiciary to review governmental action.

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Chapter 7

Parliamentary Government

The most positive feature of a parliamentary system of government is that it produces strong and effective government. However, the great flaw of this system is that the Executive tends to "capture" the legislative process.

When Malaysia's document of destiny was being drafted, there was a choice of two contrasting models – the American model of "independent government" and the British model of "responsible government."

In the United States, the Executive, the Legislature and the judiciary are institutionally separated. Members of one branch are not allowed to be part of another branch. Government is so organised that the powers of one organ check and balance the powers of the others. For example, appointments by the President are subject to ratification by the Senate. The legislative power of Congress can be checked by the President through a veto. In turn, Congress can override the President's veto by a two-thirds majority in both Houses.

In the British system, on the other hand, there is no strict separation between the political Executive and the Legislature. The government is an integral part of Parliament and is required to be answerable to the representatives of the people.

The Washington and Westminster systems differ on a large number of scores:

Institutional separation: The US President and his Cabinet are not and cannot be part of Congress. There is strict institutional separation

between the Executive and Parliament. In Malaysia, on the other hand, Article 43(2) requires the Prime Minister to belong to the Dewan Rakyat and other Cabinet Ministers to belong to either House. The motive force of the Constitution is a conjunction and not a separation between the Executive and the Legislature.

Ministerial responsibility: In the US, the government is separate from and independent of the legislature. The President's advisors do not participate in congressional debates but conventionally they appear before congressional committees to explain policies and programmes. Scholars in the UK look with envy at the way the inquisitorial committees of the US Congress call the Executive to account. In Malaysia, the government is required by Article 43(3) to be collectively responsible to Parliament during debates and the daily question-and-answer session.

Divided government: In the US, a "divided government" is a distinct possibility with one party controlling Congress and another occupying the White House. For instance, though Presidents Clinton and Obama were Democrats, both Houses of Congress were, for much of their tenure, controlled by Republicans. This scenario is impossible in a parliamentary system in which the government must enjoy the confidence of the elected lower house as a pre-condition of its accession to and continuation in power.

Vote of no confidence: In America, the President cannot be removed from office on a vote of no confidence. The only way he can be dismissed is by impeachment (in the House of Representatives) and conviction by a two-thirds majority (in the Senate). From 1787 until today, no President has ever been removed through this process. President Andrew Johnson was impeached by the House in 1868 but escaped conviction by one vote in the Senate. Impeachment proceedings were aborted for Richard Nixon (1974) and William Clinton (1997). In Malaysia, Article 43(4) permits the Dewan Rakyat to dismiss the Prime Minister and his government by a vote of no confidence. At federal level, no Prime Minister has ever been voted out of office. But Stephen Kalong Ningkan in Sarawak in 1966, Datuk Harun Idris in Selangor in 1976, Datuk Haji Nasir in Kelantan in 1977 and Dato' Seri Hj Nizar in Perak in 2009 were the victims of no-confidence votes in their State Assemblies.

Security of tenure: The American President has security of tenure. He is elected for four years and that term is guaranteed. But in our system, under Article 43(4), the Prime Minister and his government may be voted out of office. Alternatively, his majority may disappear if his supporters "cross the floor" to join the Opposition. This is what happened to Datuk Pairin Kitingan in Sabah in the early 90s and to Dato' Seri Hj Nizar in Perak in 2009. The bane of party-hopping and no-confidence votes produce much instability in parliamentary governments.

Number of terms: The US President is limited to two terms of four years each. In parliamentary systems, there is no limit to the number of terms a Prime Minister may serve. Lee Kuan Yew of Singapore was at the helm for three decades. Tun Dr Mahathir Mohamad served more than two decades. Jawaharlal Nehru and Indira Gandhi of India and Margaret Thatcher of the UK led their nations for 13 to 15 years. Such lengthy tenures provide continuity of leadership but also personalise power.

Popularly elected Chief Executive: The American President is elected by the entire nation. This is in contrast with parliamentary systems in which the Prime Minister is appointed and not popularly elected. The Prime Minister is an ordinary Member of Parliament (MP) elected to represent a parliamentary constituency. He is appointed to the nation's top political post by the Yang di-Pertuan Agong under Article 43(2) on the ground that he and his party or coalition enjoy the confidence of the Dewan Rakyat.

Unified or split executive: The American President is both Head of Government and Head of State. In parliamentary systems, however, the Prime Minister is Head of Government but not Head of State. The existence of a "split executive" is a potential safeguard against abuse of power by the political executive. But it is also a source of conflict. The dismissals of Premiers Gough Whitlam by Governor-General Sir John Kerr in Australia, and of Benazir Bhutto and Nawaz Sharif by the Pakistani President, are cases in point. In Malaysia, the refusal by the Yang di-Pertuan Agong to assent to the Constitution Amendment Bill 1983 triggered a constitutional crisis that took several months to resolve.

Independent legislature: The Executive in the US cannot take Congress for granted on legislative and financial proposals. Disagreements between the two are common and often lead to crippling delays. For example, in

October 1990 the Bush government was temporarily paralysed because of failure to secure the passage of the Budget through Congress. But in our system, legislative cooperation between the Executive and the Legislature is assured. This ensures strong and effective government. There is a darker side, however. In parliamentary systems, the Executive dominates fiscal and legislative matters to such an extent that many commentators suggest that Parliament merely legitimates; it does not legislate. Law-making power has effectively shifted to the bureaucracy.

Dissolution of legislature: The American President cannot dissolve the Houses of Congress even in times of war. In Malaysia, however, the Constitution in Article 55(2) permits the Prime Minister to advise the Yang di-Pertuan Agong to dissolve the Dewan Rakyat prematurely. Under Article 40(2)(b) the Yang di-Pertuan Agong is not bound by this advice though, conventionally, he does not disregard it.

Cabinet's talent pool: Cabinet appointments in the US are from outside Congress and the President's talent-pool is as broad as the nation. In parliamentary systems, all Cabinet posts must be filled by MPs. However, the Prime Minister can recruit distinguished outsiders by appointing them to the Senate as a prelude to a Cabinet post.

The great merit of the American system of government is that it produces an effective check and balance between the organs of state. Power checks power. The great drawback is that it leads to constant clashes between the Executive and the Legislature. The delays and stalemates, the gridlocks and deadlocks often cripple the machinery of government.

The most positive feature of a parliamentary system of government is that it produces strong and effective government. If the parliamentary executive has a stable majority in the lower house, legislative cooperation between government and parliament is assured. However, the great flaw of this system is that the Executive tends to "capture" the legislative process. Though debates and motions allow MPs to have their say, in the end the Executive has its way. Despite the theory that Parliament is the "grand inquest of the nation," the reality is that a government once in power tends to control the legislature. Ministerial responsibility to Parliament is more nominal than real.

Chapter 8

System of Federal Government

Neither in the letter of the law, nor in its working, is the Malaysian federation a true federation in the sense in which this term is understood in the USA, Canada and Australia. This, however, is not meant to be a criticism. Federalism is not an end in itself. It is not synonymous with good or effective government.

INTRODUCTION

Malaysia is a federation of 13 states plus three "federal territories".

Geographically, the Federation consists of two non-contiguous separated areas: (i) the "original" 11 states of the Malay Peninsula in 1957. Together these 11 states occupy 131,681 sq kms (or 50,806 sq miles) of territory, and (ii) the two Borneo states of Sabah and Sarawak which together with the Peninsular states formed the nation of Malaysia in 1963. The Borneo states of Sabah and Sarawak are separated from the Peninsula by 800 miles of the South China Sea. Together these two states occupy 198,069 sq kms (or 76,775 sq miles) and are larger than the 11 Peninsular states! From 1963-1965, Singapore was part of the Federation of Malaysia but was expelled from the Federation in 1965.

Demographically, the states of the Malay Peninsula have a Malay-Muslim majority of about 60%. But Chinese, Indians and others constitute a significant 40% of the population. In Sabah and Sarawak, "natives" are in

an overwhelming majority. Sabah has a significant Muslim population but in Sarawak the non-Muslim population is in a majority. All in all, the Malaysian nation is characterised by tremendous racial, religious and regional diversity.

Sabah and Sarawak which joined the Federation of Malaya to constitute the new Federation of Malaysia in 1963 have many special privileges akin to Kashmir in India and Quebec in Canada.

CONCEPT OF FEDERALISM

There is no prototype federation and the many federal systems operating in the world today exist in diverse forms. But some generalisations about the essential attributes of federal governments may be made.

Association of states: A federation is an association of states. Article 1 of the Federal Constitution describes Malaysia as a federation of 13 states and three federal territories.

Dual government: There is duality of government – a central government at the federal level and a state government in each of the provinces, cantons, regions or states.

In Malaysia, the federal Executive consists of the Yang di-Pertuan Agong, the Prime Minister, the cabinet, the civil service, the police, the armed forces, the special commissions, councils and offices mandated by the Constitution and scores of statutory bodies. The State Executive consists of the Malay Rulers or Governors, the Menteri Besar or Chief Minister, the State Executive Council, the state civil service in the non-federated Malay states, the Syariah bureaucracy and local authorities.

At the federal level there is a bicameral Parliament consisting of an elected Dewan Rakyat and a non-elected Dewan Negara. The states, in turn, have an elected and unicameral State Assembly.

The federal judiciary consist of the Federal Court, the Court of Appeal, the two High Courts – one in Peninsular Malaysia and the other in Sabah and Sarawak, the Sessions Courts and the Magistrates Courts. In addition, there are many specialised tribunals known by many names

to adjudicate disputes in specified areas. At the state level in Peninsular Malaysia, the judiciary is confined to Syariah and Malay customary matters. In Sabah and Sarawak, Native Courts exist to handle issues of native law.

Division of powers: There is a clearly defined demarcation of powers between the federal and state governments in the legislative, executive, judicial and financial fields. In Malaysia this demarcation is elaborately spelled out in five legislative lists in the Ninth Schedule.

- List I (Federal List) contains 28 areas including external affairs, defence, internal security, civil and criminal law, finance, trade and commerce which are the exclusive preserve of the federal Parliament.

- List II (State List) contains 13 areas like Islamic personal law, land, agriculture and forestry which are within the jurisdiction of the states.

- List III (Concurrent List) contains 14 topics covering social welfare, town and country planning, public health, housing, culture and sports on which both federal and state legislatures may enact law but in case of a conflict, Article 75 provides that the federal law shall prevail.

- In addition to the three main lists, the Ninth Schedule has a Supplementary State List for Sabah and Sarawak with 8 topics like native law, ports and harbours.

- There is also a Supplementary Concurrent List for Sabah and Sarawak with 9 topics including personal law, shipping under 15 tons, charities and charitable trusts.

All in all the federal Parliament has competence over 42 areas; the states have jurisdiction over 13 exclusive plus 14 concurrent areas. Sabah and Sarawak have additional competence over 17 supplementary areas.

Constitutional guarantees: The above division of powers between the states and the federal government is constitutionally guaranteed.

Autonomy: The states, provinces or cantons exist as semi-autonomous units due to the constitutionally entrenched division of powers in the legislative, executive, judicial and financial fields.

Constitutional amendment: The states have some control over amendments to the Federal Constitution: Articles 2(b) and 161E. However, except for Sabah and Sarawak, this control is very weak: *Government of the State of Kelantan v Government of the Federation of Malaysia* (1963).

Equality: A general rule of most federal systems is that there is equality among the constituent states of the Federation. This principle of equality was embedded in our Constitution in 1957 but when there was merger with Sabah, Sarawak and Singapore, the three new territories were admitted on terms that gave them greater autonomy than the states of the Peninsula.

"Cooperative federalism": This principle enables consensual sharing or delegation of power from one tier to another. Thus, Article 76 gives power to the federal Parliament to legislate on topics in the State List for the purpose of implementing international treaties, promoting uniformity of laws or if requested by the states. Article 76A permits Parliament to delegate its powers to the states.

Judicial review: There is provision for judicial review if there is any trespass by the federal government into the powers of the states, or by a state government into the jurisdiction of the federal government or by any state into the jurisdiction of another state. Fifteen or so such disputes have been adjudicated by our superior courts.[1]

1 *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al Haj* (1963); *Government of Malaysia v Government of the State of Kelantan* (1968); *The City Council of George Town v The Government of the State Penang* (1967); *Mamat bin Daud v Government of Malaysia* (1988); *Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah* (1988); *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* (1992); *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* (1997); *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* (2002); *Datuk Hj Mohammad Tufail bin Mahmud v Dato Ting Check Sii* (2009); *Re Mohamed Azahari bin Matiasin* (2011); *Robert Linggi v The Government of Malaysia* (2011); *Fung Fon Chen @ Bernard v The Government of Malaysia* (2012); *Fathul Bari bin Mat Jahya v Majlis Agama Islam Negeri Sembilan* (2012); and *A Child v Jabatan Pendaftaran Negara* (2017) (*Re Bin Abdullah*).

DEPARTURES FROM FEDERAL MODEL IN MALAYSIA

The drafters of the Federal Constitution in 1957, while showing fidelity to the federal model, wished to create a very powerful central government that can control the states in some ways.

But when Malaya transformed to Malaysia, the states of Sabah, Sarawak and Singapore were given considerable autonomy and were admitted on special terms which were not applicable to the Peninsular states. The overall picture is that except in relation to Sabah and Sarawak, the Constitution creates a very powerful central government.

Power of amending the Constitution: The power of amending the Constitution belongs largely to the federal Parliament subject to procedures in Articles 2(b), 159 and 161E. Except in relation to two matters – (i) territorial changes to the boundaries of the States under Article 2(b), and (ii) the rights of Sabah and Sarawak under Article 161E – the states have absolutely no power to prevent a constitutional amendment from going through the federal Parliament. In 1963 when Malaya was being enlarged to Malaysia, Kelantan strenuously objected to the merger with Sabah, Sarawak and Singapore. But in *Government of Kelantan v Government of the Federation of Malaya* (1963) the court held that under the amendment procedure of Article 159, the federal government was not required to obtain the consent of Kelantan to the admission of new states to the Federation.

Emergency: Emergency provisions can be utilised by the federal government to suspend state rights under Article 150(2B), (5) and (6) as happened in Sarawak in 1966 and Kelantan in 1976.

International treaties: To enforce international treaties the federal government can encroach on the state field as permitted by Article 76(2).

Uniformity of laws: With the consent of the states, the federal government has the power to promote uniformity of laws on matters in the State List: Article 76(1)(b). Land, for example, is in the State List but the National Land Code 1965 is a federal law. The Local Government Act 1976 is another uniform law on a matter in the State List.

Power to amend state constitution: There is federal power to amend a State Constitution if there is non-compliance by a state with the Federal Constitution: Article 71(3).

Policy-making agencies: There are several supervisory or policy-making bodies of the federal government whose advice is binding on the states: Among them are the National Land Council (Article 91); National Council for Local Government (Article 95A); National Finance Council (Article 108); the Auditor General (Article 105) and the Election Commission (Article 114).

Development plans: Under Article 92(1) the federal government has control over development plans and over inquiries, surveys and statistics (Article 93).

Acquisition of state land: Under Articles 83 and 85, if the federal government is satisfied that a state land is required for federal purpose, it can, after consultation with the state, require the state to make a grant of the land to the federal government subject to payment of quit rent and premiums.

Financial resources: In the financial field, the central government's preponderance of power over the states is even more evident. The Federal Constitution has been so devised that almost all the important direct and indirect taxes belong to the centre. Most of the lucrative sources of income like income tax, customs and excise duties, sales tax, licenses for motor vehicles, banking, foreign exchange, capital issues, passports, visas and other immigration charges are assigned to the federal exchequer.

The constitutional guarantee of some sources of revenue to the States is insufficient to meet state needs. All in all, total state revenues come to about 10% of federal revenues! These state revenues come from the following sources:

- Capitation grant: Article 109(1)(a)
- State road grant: Article 109(1)(b)
- Conditional grants: Article 109(3)

- Contingency grants: Articles 109(5) and 103
- State Reserve Fund: Article 109(6)
- Taxes and fees over lands, mines, forests, and development plans: Article 110
- Loans: Article 111.

Civil servants: Though the states are free to choose their own civil servants, many important posts in the states – the "designated posts" – are filled by federal officers on secondment to the states. The states of Malacca, Negeri Sembilan, Penang and Perlis do not have their own State Service Commissions and appointments to state posts are made by the federal Public Service Commission.

Inconsistency between federal and state law: Under Article 75 "If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void."

SPECIAL POSITION OF SABAH AND SARAWAK

Due to their geographical size, ethnic and religious uniqueness and the problems of under-development, Sabah and Sarawak entered the Federation on many special terms not available to the 11 Peninsular states. This special position was justified for many reasons:

- The 1963 pact between the Federation of Malaya, the UK, North Borneo (Sabah), Sarawak and Singapore was drawn up after a lengthy process of bargaining and negotiations. The delegates of these states made very clear to the Inter-Governmental Committee (IGC) headed by Lord Lansdowne, with then deputy prime minister Tun Abdul Razak as the deputy chairman, that special treatment was a pre-condition for constituting Malaysia. Sabah summarised its demands in the famous "20 points". Sarawak expressed them in 18 points.
- The sanctity of the IGC Report and Malaysia Agreement has been reiterated by our courts in several cases: *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* (2002), *Datuk Hj Mohammad*

Tufail bin Mahmud v Dato Ting Check Sii (2009), and *Robert Linggi v The Government of Malaysia* (2011).

- Sabah and Sarawak's cultural and religious distinctiveness from Peninsular Malaysia justifies special treatment.
- They contribute huge territories and massive resources to the Federation. Their combined area is 198,069 sq km, exceeding Peninsular Malaysia's 131,681 sq km. The coastline of the two States is 2,607 km compared to the Peninsula's 2,068 km.
- There are severe problems of poverty and under-development in these states.
- It is submitted by some that the 1963 pact between the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore was not a mere domestic agreement but an international treaty giving international law basis to the guarantees for Sabah and Sarawak.

For the above reasons, the Federal Constitution was amended significantly in 1963 to accommodate the demands of the new states for more autonomy. Nearly 151 amendments were incorporated into the 1957 charter to define Sabah and Sarawak's special relationship with the federal government.

Legislative lists: The Supplementary State List confers additional powers on these States in eight matters including native law and custom, ports and harbours and, in Sabah, the Sabah Railway.

The Supplementary Concurrent List for Sabah and Sarawak extends the legislative competence of these states to cover nine matters including shipping under 15 tons, charities and theatres.

Federal power to have uniformity of laws: Parliament may legislate on state matters for promoting uniformity of laws of two or more states: Article 76(1)(b). This power of the federal Parliament is not applicable to Sabah and Sarawak: Article 95D. Land, agriculture, forestry and local government are exclusive to Sabah and Sarawak.

Federal power in relation to international treaties: Under Article 76(1)(a) Parliament may make laws with respect to any matter enumerated in the State List for implementing any treaty with a foreign nation or any decision of an international organisation. If the law affects Islamic law or the custom of the Malays or native law and custom in Sabah and Sarawak, then there is a duty to consult with the States concerned: Article 76(2). But the duty to "consult" does not impose a duty to obey.

Amending the Constitution: The power of amending the Constitution which belongs to the federal Parliament is not as extensive in relation to Sabah and Sarawak as it is in relation to the West Malaysian States. Under Article 161E(2) the consent of the Governors of Sabah and Sarawak is required to a constitutional amendment affecting the special position of these states: *Robert Linggi v Government of Malaysia* (2011). It must be noted, however, that the state Governors are federal appointees and are unlikely to side with the states against the federal government despite a constitutional obligation to follow the advice of the Chief Ministers. Note also that despite Article 2(b) which requires the consent of the state legislature and of the Conference of Rulers to the alteration of the boundaries of a State, the federalisation of Labuan was easily accomplished by the federal government in 1984.

Native courts: In Sabah and Sarawak, besides Syariah courts there is a system of native law and Native Courts.

High Court for Sabah and Sarawak: The federal High Court has two wings – one in Malaya and the other in the States of Sabah and Sarawak. Appointment of the Chief Judge of the Sabah and Sarawak High Court requires consultation with the Chief Minister of these States: Article 122B(3).

Appointment of Judicial Commissioners: Prior to 1994 it was the law that Judicial Commissioners in the High Court for Sabah and Sarawak shall be appointed by the Yang di-Pertua Negeri on the advice of the Chief Justice of Sabah and Sarawak. Accordingly, Article 122AB (as amended in 1994) to transfer this power to the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court is unconstitutional and null and void: *Robert Linggi v Government of Malaysia* (2011).

Representation in Parliament: Ideally, a state's representation in the elected House should be proportionate to the state's population. Sabah has 25 MPs; Sarawak 31. Together, Sabah and Sarawak have 56 out of 222 or 25.2% of the MPs in the Dewan Rakyat. This is disproportionately large based on their population. However, it must be noted that it is lesser than the 33% envisaged for Sabah, Sarawak and Singapore in 1963 in order to give these states protection against amendments requiring a two-thirds majority.

Emergency powers: Even during an emergency under Article 150, the native law or customs of Sabah and Sarawak cannot be extinguished by emergency law: Article 150(6A).

Development plans: In relation to national development plans, Article 92(1) empowers the Yang di-Pertuan Agong to proclaim an area of a state as a "development area". Thereupon Parliament has power to give effect to the development plan notwithstanding state powers on the matter. Under Article 95E(3) Sabah and Sarawak are excluded from national plans for land utilisation, local government and development unless the consent of the Yang di-Pertua Negeri is obtained.

Policies of the National Land Council and National Council for Local Government are not binding on Sabah and Sarawak: Article 95E(2).

Fiscal federalism: "Money represents power". The federal government's stranglehold over most of the lucrative sources of revenue is not as strong in relation to Sabah and Sarawak as it is in relation to other states. In several areas Sabah and Sarawak enjoy fiscal privileges that are not available to the Peninsular States:

Loans: Under Article 112B, Sabah and Sarawak are allowed to raise loans for their purposes with the consent of Bank Negara.

Special sources of revenue: These states are allocated special revenues to meet their needs above and beyond what other States receive: Article 112C(1)(b). Sabah and Sarawak are also entitled to earnings (taxes, fees and dues) from ports and harbours and state sales tax: Article 112C and the Tenth Schedule, Part V.

Special grants: These States enjoy some special grants: Articles 112C(a) and 112D.

Audits: There are special rules about state audits: Article 112A.

Article 153 protection: Under Article 153, the natives of Sabah and Sarawak enjoy a special position similar to that of the Malays of Peninsular Malaysia. Article 153 is, however silent about whether the special protection has applicability throughout Malaysia or has a limited territorial reach only within Sabah and Sarawak.

Immigration: Article 161E(4) of the Federal Constitution and Part VII of the Immigration Act 1959/1963 give to Sabah and Sarawak a special right to regulate entry into, residence in and migration of non-residents to Sabah and Sarawak. The special right of these states to regulate immigration cannot be amended except by the special procedure of Article 161E(2).

Lawyers: There is restriction on non-resident lawyers practising before the courts of Sabah and Sarawak: Article 161B.

English and native languages: Sabah and Sarawak enjoy special protection in relation to the use of English and native languages (Article 161).

Malay reserves: There is non-application of Malay reserve lands to these States: Article 161A(5).

DEVELOPMENTS SINCE 1963

Fifty-five years down the road, not all is well with the (former) Borneo states' relationship with the centre. In many areas Sabah and Sarawak's autonomy has suffered retreat due to constitutional and political developments. A case in which Sabah's grievances were unsuccessfully sought to be articulated is *Fung Fong Chen @ Bernard v The Government of Malaysia* (2012). The main grievances are the following:

Politics: Despite the autonomy of states in prescribed areas, the federal government controls political and administrative processes in

Sabah and Sarawak. The federal government manipulated the political processes to remove popularly elected Chief Ministers in Sarawak in 1966 and in Sabah in 1994. In order to topple Stephen Kalong Ningkan the federal government went to the extent of resorting to a declaration of emergency in 1966.

Administration: There are complaints about poor implementation of laws, policies and promises. Borneonisation is proceeding too slowly. The federally appointed Governors do not always protect the special interests of these regions.

Constitutional amendments: Many constitutional amendments have diluted the special rights of Sabah and Sarawak. Labuan has been taken away from Sabah and converted to a federal territory. Federalisation of critical state matters such as water and tourism has taken place.

Islamisation: The native character of Sabah and Sarawak has been diluted over the years and Islamisation has been a key policy of the federal government since the 80s. This arouses deep discontent within the largely non-Muslim natives of Sarawak. In 1963 there was no state religion in Sabah or Sarawak. But the Constitution of Sabah was later amended to make Islam the official religion of Sabah.

In 1963 the Federal Constitution contained Articles 161C and 161D but these were deleted in 1976. Article 161C provided that that if financial support is given by the federal government for Islamic institutions and Islamic education in the Borneo states, the consent of the state Governor must be obtained. Further, an equivalent amount will be allocated for social welfare in these states.

Article 161D (now repealed) provided an exception to Article 11(4). In the Borneo states a state law restricting the propagation of any religious doctrines to Muslims may not be passed without a special two-thirds majority.

Laws have been enacted to provide that in the case of Muslims, native law will not apply and the Syariah courts shall have jurisdiction. This has led to conflicts between Syariah and Native Courts. Authorities in West Malaysia have imposed hurdles in the path of import into Sabah

and Sarawak of Bibles in Bahasa Melayu. The Kalimah Allah controversy raised in the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* (2014) has aroused the anger of Christians in the Borneo states.

Special position of natives: It is alleged that the protection of the special position of the natives under Article 153 is not vigorously enforced in contrast with strong affirmative action for Malays throughout the nation.

Definition of a "native": This has aroused problems. For Sarawak Article 161A(7) requires that a native must (i) belong to one of the named 28 races, or (ii) be of mixed blood derived exclusively from these races. Many Sarawakians are descended from one native but the other parent does not belong to one of the 28 named races. For Sabah, Article 161A(6) defines a native in a gender biased way by emphasising male descent and ignoring the ethnicity of the mother.

Financial allocations: There is discontent about inequitable sharing of resources and lack of fiscal federalism. It is alleged that federal allocations to the Borneo states do not take into account the huge direct and indirect federal earnings from these states. Of special interest is the meagre 5% oil royalty these states receive. The federal government's answer is that under the Constitution, oil and oilfields are in federal hands. The states are entitled only to import duty and excise duty on petroleum products. The 5% royalty on oil for Sabah and Sarawak is derived from the Petroleum Development Act 1974, the Petroleum Mining Act 1966 and the assignment deed between the states and Petronas.

Strength in Parliament: Sabah and Sarawak's strength in Parliament has declined. In 1963 when Singapore was part of the Federation, 35% of the MPs belonged to these three states. Together they could block a constitutional amendment. With the separation of Singapore, Sabah and Sarawak have only 25% of the seats in the Dewan Rakyat.

Immigration: It is alleged that the constitutional right of the Borneo states to control immigration has been defeated by naturalisation of millions of illegal immigrants into Sabah.

Sabah's 20-points: It is alleged that these fundamental points of agreement have not been honoured. Specifically, the autonomy in matters of religion, language and immigration have weakened. It must be noted however that on the issues of state religion and the use of English, it is the Sabah government and not the federal government that amended the Sabah State Constitution.

CONCLUSION

The overall picture is that neither in the letter of the law, nor in its working, is the Malaysian Federation a true federation in the sense in which this term is understood in the USA, Canada and Australia. This, however, is not meant to be a criticism of the way things are working in Malaysia. Federalism is not an end in itself. It is not synonymous with good or effective government. From an ordinary citizen's point of view, labels or descriptions of Malaysia as a "federation with a central bias", or a "quasi-federation", or a "unitary state with some federal features" are not of much consequence. To the ordinary citizen, "all is well that works well". The relationship between the federal and state governments worked fairly well from 1957-2008 except in Sarawak in 1966, Kelantan in 1976, Sabah in 1994 and Perak in 2009 when the federal government succeeded in toppling the elected state leaders.

Since the 2008 General Election a number of disputes between the opposition-controlled states and the federal government have emerged and these require deft handling. There are disputes about petroleum royalties, water resources, local authority elections and federal attempts to control state roads. There are conflicts between federal law and state law over freedom of information. Article 121(1A) has caused conflicts between Syariah and civil courts. Some opposition states complain that the federal government tries to put hurdles in the way of international investment coming to their states.

Sabah and Sarawak have stirrings of autonomy and separatism. There is even talk of secession which, quite clearly, is not permitted under the federal or state constitutions. There are complaints about insufficient progress in the Borneonisation of the public services in Sabah and Sarawak. The naturalisation of illegal immigrants in Sabah is a sore point

of Sabah-federal relationship. There are also issues about attempted "Malay-nisation" and "Islamisation" of Sabah and Sarawak.

What can be done to douse the embers of controversy? Leaders of the federal government must recognise that Sabah and Sarawak's restiveness is real and must be addressed. Balancing the concerns of equity and efficiency in intergovernmental financial relations is paramount. Petrol royalty issues have triggered separatist movements in many federations.

There is a need to strengthen institutional mechanisms for regular, non-partisan dialogue between the centre and Sabah and Sarawak so that the inevitable tensions that are inherent in a federal set-up can be resolved with the least friction. We need to recapture the spirit of accommodation, moderation and compassion that animated the leaders of the Malaysia Agreement in 1963.

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Chapter 9

Islam as the Religion of the Federation

Malaysia is neither a full-fledged Islamic state nor a wholly secular one. As a multi-racial and multi-religious society, it walks the middle path of tolerance and accommodation.

Islam has a very exalted position under the Constitution of Malaysia. Article 3(1) provides that Islam is the religion of the Federation but all other religions may be practised in peace and harmony.

Twenty-five or so other provisions in the Constitution confirm the exalted position of Islam not only in the personal life of Muslims but also in the political life of the nation. The Yang di-Pertuan Agong and the Malay Rulers must all belong to the Islamic faith. The Yang di-Pertuan Agong is the head of the religion of Islam in the three federal territories of Putrajaya, Kuala Lumpur and Labuan; in Malacca, Penang, Sabah, Sarawak and his home state. To assist him in the task, the Constitution in Article 3(5) provides for an Islamic Religious Affairs Council.

The Malay Rulers head the religion in their own territories. All state constitutions in the Malay states prescribe that the Ruler must be a person of the Islamic faith. Some state constitutions require that the Mentri Besar and officials like the State Secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

Islamic courts have been established and thousands of Syariah officials are hired by the state. The jurisdiction of the Syariah courts is protected by Article 121(1A) against interference by ordinary courts.

In 24 areas enumerated in the Ninth Schedule, List II, Item 1, State Assemblies are permitted to enact Islamic civil and criminal laws. Laws enacted relating to the 24 areas enumerated in the Ninth Schedule, List II, Item 1 are compulsorily applied to all Muslims. A Muslim cannot opt out of Islamic law. In the 24 enumerated areas like marriage, divorce, inheritance and legitimacy, that are found in List II of the Ninth Schedule, a Muslim is compulsorily subjected to the exclusive jurisdiction of Syariah officials and Syariah courts.

Criminal law is mostly in federal hands but states have limited jurisdiction to punish "offences against the precepts of Islam" unless the offences are covered by federal law. Most state enactments seek vigorously to enforce Islamic morality amongst Muslims. In 2017 the then federal government announced its intention to enhance the jurisdiction of the Syariah courts and to include in the Syariah Courts (Criminal Jurisdiction) Act 1965 some "hudud penalties" of classical Islamic criminal law.

Since the 90s, civil courts are in many instances subjecting the supreme Constitution to the principles of the Syariah. Fundamental rights granted by the Constitution are being increasingly subjected to limits imposed by Syariah legislation enacted by the states. Many judges of the civil courts subordinate the constitutional rights of Muslims to the provision of Article 3(1) that Islam is the religion of the Federation. For example, in the case of *Lina Joy* (2007) a Muslim woman's claim that her freedom of religion under Article 11 includes her right to leave Islam was rejected. The Federal Court held that she must obtain the permission of Syariah authorities for her intended act of apostasy.

The definition of a "Malay" in Article 160(2) includes the requirement that the person must be a Muslim.

Taxpayers' money is utilised to promote Islamic institutions, build mosques and hold Qur'an recital competitions. The annual allocation of the Federal Territory religious authorities runs to about RM1.3 billion. State-supported Islamic institutions abound. There is a National Council for Islamic Affairs, State Councils of Muslim Religion, Fatwa Committees,

the Islamic Research Centre, the Department of Religious Affairs, International Islamic University, Tabung Haji and Institut Kefahaman Islam Malaysia (IKIM).

In the financial field, Islamic monetary institutions abound. Islamic banking, the halal industry, Islamic loans and Islamic insurance have become multi-million dollar industries.

Missionary activity amongst Muslims is regulated by state law to ensure that only the officially sanctioned version of Islam is preached, promoted and observed: Article 11(4).

Islamic education and way of life are promoted by the state for the uplifting of Muslims. The *azan* and Islamic programmes are aired over television. Islamic salutations and prayers are offered at most government functions. Islamic form of dressing has become mainstream.

In the political sphere the policy of Islamisation, Islam Hadhari and Islamic state have become important electoral planks for the ruling party.

IS MALAYSIA AN ISLAMIC OR SECULAR STATE?

In the light of the above features, is Malaysia an Islamic theocracy or a secular state? A simple answer to the question is not possible because the words "secular" and "Islamic" have no fixed, universal meaning.

Secular state: If secularism implies that there must be separation of the state from religion; that the state must be neutral as between all religions; that there is no legally prescribed official religion; that no state aid is given to any religion for any religious purposes; and that religion is left entirely to private religious establishments, then clearly Malaysia is not a secular state. Besides Article 3(1), we have the Rukun Negara which declares faith in God as a cardinal principle of state policy. In relation to the 60% Muslim majority population that is compulsorily subjected to state sanctioned religious rules, Malaysia is far from an American style secular state.

A theocracy: However, not being a secular state does not mean that we are an Islamic theocracy. Things are not always black or white and there is a large area of grey in between.

- Looking at historical documents, there is undeniable historical evidence that the country was meant to be secular and the intention in making Islam the official religion of the Federation was primarily for ceremonial purposes.

- Under Article 4(1), the Constitution is the supreme law of the Federation.

- It was held in *Che Omar Che Soh v PP* (1988) that though Islam is the religion of the Federation, it is not the basic law of the land and Article 3 (on Islam) imposes no limits on the power of Parliament to legislate.

- Islamic law is not and was never the general law of the land either at the federal or state level.

- Islamic law applies only to Muslims and only in areas outlined in item 1 of List II of the Ninth Schedule. In the law of evidence, for example, the Evidence Act 1950 applies to the exclusion of Islamic law: *Ainan v Syed Abu Bakar* (1939).

- The Syariah courts have jurisdiction only over persons professing the religion of Islam.

- Article 160(2) of the Constitution, which defines "law," does not include the Syariah as part of the definition of law.

- Though Islam is adopted as the religion of the Federation, it is clearly stated in Article 3(4) that nothing in this Article derogates from any other provision of the Constitution.

- If by a theocratic state is meant a state in which the temporal ruler is subjected to the final direction of the theological head and in which the law of God is the supreme law of the land, then clearly Malaysia is nowhere near a theocratic, Islamic state. Syariah authorities are appointed by state governments and can be dismissed by them. Temporal authorities are higher than

religious authorities. Except for those areas in which the Syariah is allowed to operate, the law of the land is expounded and administered by secular officials.

- Though under the Ninth Schedule, List II, Item 1 the states have a power to create and punish Islamic offences, this power is subject to a number of significant limitations. First, State legislative authority in respect of "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion" is limited by the words "except in regard to matters included in the Federal List" "or covered by federal law". Among matters included in the Federal List are civil and criminal law and procedure. The administration of justice, corrupt practices, murder, theft, robbery, rape, incest, betting, lotteries, unnatural sex, are all offences in Islamic law but they are clearly in federal hands because of the Ninth Schedule, List I, Items 4(f), 4(h) and 4(l) and the federal Penal Code. Likewise, tort, contract, banking, or commercial law are in the hands of civil courts and Syariah courts have no jurisdiction to try these civil or contractual matters. The clear intention of the 1957 Constitution was to allocate almost all penal powers to the Federation and to confer on the states only residual powers over Syariah offences like khalwat, zina, skipping of Friday prayers and failure to observe the compulsory fasts during Ramadan. Second, under the Ninth Schedule, List II, Item 1, Syariah courts are permitted to exercise jurisdiction only over persons professing the religion of Islam. A non-Muslim cannot be subjected to the Syariah or compelled to appear before the Syariah courts. Even if he consents, the Syariah court has no jurisdiction over him because jurisdiction is a matter of law, not of consent or acquiescence. Third, in an Islamic state, Islamic criminal laws including hudud apply to all citizens. That would pose a great challenge to our existing constitutional jurisprudence and our provisions on freedom of religion. Fourth, what punishments may be imposed by the Syariah courts? The Ninth Schedule, List II, Item 1 states that Syariah courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". The relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965. It confines Syariah court jurisdiction to such offences as are punishable with maximum three years' jail, RM5,000 fine and six lashes. Any state law,

including a hudud law, imposing larger penalties would be ultra vires the Act of 1965 and unconstitutional.

CONCLUSION

The Islamic state discussion is riddled with the error that a state must be either theocratic or secular. In fact, many hybrid versions exist and ideological purity – even if desirable – is not easily possible. All in, it can be said that Malaysia is neither a full-fledged Islamic state nor wholly secular. On the one hand, the legal system maintains Islam as a state religion and is deeply committed to the promotion of Islam in the life of the nation. On the other, it places secular officials like the Yang di-Pertuan Agong and the Sultans as heads of the religious hierarchy. It adopts supremacy of the Constitution as the basic rule of the legal system.

The constitutional system permits legal pluralism. Muslims are governed by divinely ordained laws in a number of chosen fields. In other fields, their life and the life of non-Muslim citizens is regulated by non-ecclesiastical provisions enacted by democratically elected legislatures. As a multi-racial and multi-religious society, the Constitution walks the middle path of tolerance and accommodation. This is not a bad way of doing things.

III. Fundamental Liberties

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Chapter 10

Overview of Human Rights

"This nation shall be founded upon the principle of liberty and justice and ever seeking the welfare and happiness of its people." – Proclamation of Independence.

In keeping with the humanist tradition of the era, the drafters of Malaysia's document of destiny incorporated into the basic charter a special chapter on fundamental liberties.

Articles 5 to 13: These Articles of the Federal Constitution guarantee the following basic rights:

- Right to life and personal liberty – Article 5(1).
- Right to the writ of habeas corpus – Article 5(2).
- Right to know the grounds of arrest – Article 5(3).
- Right to be allowed to consult and be defended by a legal practitioner of one's choice – Article 5(3).
- Right (subject to some exceptions) to be produced before a magistrate within 24 hours – Article 5(4).
- Abolition of slavery – Article 6.
- Protection against backdated criminal laws – Article 7(1).
- Protection against repeated trials – Article 7(2).

- Right to equal protection under the law – Article 8.
- Prohibition of banishment and freedom of movement – Article 9.
- Freedom of speech and expression – Article 10(1)(a).
- Freedom of assembly – Article 10(1)(b).
- Freedom of association – Article 10(1)(c).
- Freedom of religion – Article 11.
- Rights in respect of education – Article 12.
- Right to property – Article 13.

Other constitutional rights: Besides Articles 5-13, many other Articles of the Constitution grant such civil and political protections as:

- Citizenship rights – Articles 14-22.
- Right to contest a seat for the Dewan Rakyat – Articles 47-48.
- Right to vote – Article 119.
- Right not to be taxed without the authority of Parliament – Article 67.
- Protection for Malay reservation and customary lands – Article 89.
- Protection for the customs of the Malays and the natives of Sabah and Sarawak even in times of emergency – Article 150(6A).
- Special protection for the rights of Sabah and Sarawak in the federal set-up – Articles 161-161E.
- Protection against dismissal or reduction in rank for public servants – Article 135.
- Protection against racial discrimination in the public services – Article 136.

- Pension rights – Article 180.
- Safeguards for preventive detainees – Article 151.
- The right of citizens to sue their government – Article 167(6).
- The right to sue the Malay Rulers – Articles 182-183.

Protection by ordinary laws: There is a human rights dimension to many ordinary laws like the Criminal Procedure Code, the Evidence Act 1950 and the Courts of Judicature Act 1964. Under these laws there is a right to bail. Arrestees have a privilege against self-incrimination. A caution must be administered before a confession is recorded. Forced confessions can be rejected by the courts. Anyone convicted of a crime has a right of appeal. Courts are open to the public. Judicial proceedings are subject to the requirements of openness, fairness, impartiality and fair procedure.

Socio-economic rights: Equally, social welfare laws like the Employment Act 1955, Employees Provident Fund Act 1991, Industrial Relations Act 1967, Trade Unions Act 1959, Aboriginal Peoples Act 1954, Child Protection Act 1991, Consumer Protection Act 1999, Domestic Violence Act 1994, Education Act 1996, Employees Social Security Act 1969, Environmental Quality Act 1974, Women and Girls Protection Act 1973, Workmen's Compensation Act 1952, Workers' Minimum Standards of Housing and Amenities Act 1990 and Occupational Safety and Health Act 1994 are also important for the human rights quest. This is because socio-economic rights are just as central to the human rights quest as civil and political liberties.

International rights: In an age of globalisation the international law on human rights is becoming increasingly relevant. The Universal Declaration of Human Rights has gained recognition in our Human Rights Commission Act 1999. The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, though not yet ratified, will undoubtedly influence future legislative thinking.

Enforcement mechanisms: Rights without remedies are like lights that do not shine and fires that do not glow. An effective enforcement mechanism is crucial to the human rights quest. In Malaysia, human rights provisions contained in local laws are enforceable in the courts on the petition of any aggrieved party. Denial of personal liberty without authority of law can attract habeas corpus. Violations of liberties can also be investigated by the Human Rights Commission and by special tribunals and enquiries appointed for the purpose. Investigative journalism, proceedings in Parliament, and the intervention of non-governmental organisations (NGOs) and service centres run by political parties can also help to provide an informal means of redress against human rights abuses. In modern times many international human rights agencies intercede on behalf of aggrieved individuals or groups.

Restrictions: The Constitution of Malaysia subordinates individual rights to the need for social stability, security and public order. It permits the Executive and the Legislature to impose restrictions on fundamental freedoms in the following ways:

1. Restrictions may be imposed by ordinary legislation enacted under the authority of the constitutional provision conferring the right. For example, police powers in relation to public assemblies and processions under the Peaceful Assembly Act 2012 are derived from Article 10 of the Constitution which grants the rights to assembly but subjects it to security or public order.

2. Fundamental rights may be curtailed by legislation against subversion enacted under Article 149.

3. Legislation to combat an emergency may suspend all fundamental rights except freedom of religion. This vast power, authorised by Article 150, can be employed to eclipse most of the gilt-edged provisions of the Constitution.

4. Constitutional amendments may be enacted to curtail or abolish a right guaranteed by the basic law.

In sum, it can be stated that the chapter on fundamental liberties authorises Parliament to restrict fundamental rights on many grounds including public order and national security. It is understandable

that a constitution drafted during the communist insurgency would show deep concern for security and stability. Nevertheless, the overall scheme of the Constitution appears to put some fetters on the powers of the state; to entrench some human rights; to endow the courts with some power to safeguard citizens' entitlements against unauthorised encroachment; and to reject the supremacy of the Executive and the Legislature. Clearly the Constitution was meant to create a strong but not an absolutist government. Controlling the government without crippling it was the aim of the basic charter. In actual practice, however, a number of factors have contributed to the eclipse of some human rights provisions. Among them are the state of emergency from 1964 to 2011; existence of overriding powers to combat subversion and emergency; and judicial willingness to interpret the government's wide, subjective powers literally. The former ruling coalition's success at achieving a two-thirds majority at 10 out of 14 general elections made it possible for it to amend the Constitution as and when it felt necessary. In changed political circumstances, however, the vast, unrealised potential of the human rights provisions of the Constitution may unfold.

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Chapter 11

Life and Personal Liberty: Article 5(1)

Personal liberty does not merely mean liberty of the physical body. It means much more than a right not to be subjected to unlawful arrest, imprisonment or physical coercion.

In the constellation of human rights, life and personal liberty are the most precious of all entitlements. If they are deprived, all other freedoms suffer an eclipse as well. In support of these rights, Article 5(1) of the Constitution ordains that "no person shall be deprived of his life or personal liberty save in accordance with law." Over the years, judicial construction of the static clauses of Article 5(1) has helped to map out the terrain covered by this constitutional grant.

Person: The term "person" refers to citizens as well as non-citizens. It may, conceivably, even include artificial persons like ships or aircraft on whom the law can confer legal personality.

Life: The word "life" does not refer merely to the animal existence of breathing and living. It covers the right to live with human dignity. The idea of dignity as part of life becomes relevant if a prisoner complains of torture or inhuman conditions of detention like solitary confinement. In India it has been held that "life" includes such necessities as adequate nutrition, clothing, shelter, facilities for reading and writing, protection against torture, mutilation and amputation, grant of minimum wages to workers and the right to livelihood. Even the handcuffing of a prisoner when handcuffing is not reasonably necessary can bring about

judicial censure because arrestees have a right to dignity. In Malaysia too it has been held in *Tan Tek Seng*[1] and *Hong Leong Equipment*[2] that "life" in Article 5(1) includes the right to live in a reasonably healthy and pollution-free environment and the right to continue in public or private service employment subject to removal for good cause.

A contentious issue in some jurisdictions is whether the right to life includes the right to terminate one's life through suicide or active euthanasia. There are currents and cross-currents and only time will settle the debate.

Personal liberty: This does not merely mean liberty of the physical body. It means much more than a right not to be subjected to unlawful arrest, imprisonment or physical coercion. In the Indian case of *Kharak Singh*[3] it was held that police surveillance and police visits to a person's house at night to verify his movements are an invasion of personal liberty. Right to privacy is part of personal liberty. In *Lim Hai Sun*,[4] an order to reside at a drug rehabilitation centre was held to constitute a denial of liberty. The Malaysian approach in *Government of Malaysia v Loh Wai Kong*[5] is that "personal liberty" does not include the right to travel overseas nor the right to own a passport. It merely means "liberty relating to or concerning the body of the individual." In contrast, in *Sugumar Balakrishnan*[6] it was held that Article 5(1) includes a person's right to seek judicial review.

In accordance with law: These words imply that the functionaries of the state have no inherent power to deprive any person of his liberties. Freedom is inherent. It is power that needs legal justification. Any arrest of or order to a person to stop and submit himself to a breathalyser test, search or questioning must be derived from a valid law. Of course, a plethora of laws like the Penal Code, Criminal Procedure Code, Arms Act 1960 and Road Transport Act 1987 empower law enforcement agencies to interfere with personal liberty.

1 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996).
2 *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* (1996).
3 *Kharak Singh v State of Uttar Pradesh* (1963).
4 *Lim Hai Sun v Officer-In-Charge, Drug Rehabilitation Centre* (1992).
5 *Government of Malaysia v Loh Wai Kong* (1979).
6 *Sugumar Balakrishnan v Pengarah Imegresen Negeri Sabah* (1998).

In earlier years, there was an issue over whether the words "in accordance with law" refer merely to substantive law (relating to rights, powers and duties) or whether they also encompass procedural law. In *Karam Singh*,[7] an arrest under a valid preventive detention law was challenged on the ground that the procedural requirements of Article 5(3) to communicate the grounds of arrest and allow consultation with a lawyer were not complied with. The Federal Court brushed aside the arguments with the words "the errors, if any, were of form, not of substance." Fortunately, a torrent of cases beginning with *Koh Yoke Koon*[8] and culminating in *Tan Tek Seng*[9] have affirmed that "law" in Article 5(1) refers to both substantive and procedural law so that a detention in violation of procedures will be a nullity.

Does the word "law" refer to any valid law (no matter how unjust) or only to a law that is fair and reasonable? A minority view, expressed in *Ong Ah Chuan v PP*,[10] is that "law" refers to a system of law that incorporates fundamental rules of natural justice. But the majority view exemplified in *Comptroller General of Inland Revenue v NP* (1973) and *Nallakaruppan*[11] is that "save in accordance with law" refer merely to enacted law and not to general concepts of law. Thus in *Che Ani Itam*[12] and *Lau Kee Hoo*,[13] it was held that a mandatory life sentence is not inconsistent with Article 5(1). In *PP v Yee Kim Seng*,[14] the constitutionality of the death sentence was upheld. "Whether or not the death sentence is morally right or wrong is a matter not for the courts but for Parliament to decide." This narrow approach clashes with the broad definition of law in Article 160. Its unfortunate implication is that the protection of Article 5(1) is available against executive arbitrariness only and not against a law passed by Parliament and the State Assemblies – no matter how harsh, oppressive or unreasonable the law may be.

Grounds of arrest: Article 5(3) requires that where a person (other than an enemy alien) is arrested, he shall be informed as soon as may

7 *Karam Singh v Minister of Home Affairs, Malaysia* (1969).
8 *Koh Yoke Koon v Minister of Home Affairs Malaysia* (1988).
9 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996).
10 *Ong Ah Chuan v PP* (1981).
11 *Nallakaruppan a/l Solaimalai v Ketua Pengarah Penjara, Malaysia* (1999).
12 *Che Ani bin Itam v PP* (1984).
13 *PP v Lau Kee Hoo* (1983).
14 *PP v Yee Kim Seng* (1983).

be of the grounds of arrest. In *Re PE Long @ Jimmy*,[15] it was held that oral communication of the grounds is sufficient. Strict legal terminology need not be used but enough must be made known to the arrestee: *Chong Kim Loy*.[16] In a number of interesting cases like *Lee Gee Lam*,[17] the order of detention stated a number of grounds on which the detainee was apprehended with the word "or" and not "and" in between. The court held that the statement of grounds in the alternative denied the detainee his constitutional right to know precisely the reason why he was being arrested.

Legal representation: The second limb of Article 5(3) requires that every arrestee shall be allowed to consult and be defended by a legal practitioner of his choice. In a string of cases like *Ooi Ah Phua*[18] and *Hashim Saud*,[19] the courts have held that consultation with a lawyer in a police lock-up can be postponed pending police investigation. In *Theresa Lim Chin Chin*,[20] it was held that in order to show breach of Article 5(3), the detainee must show that the police have obstructed a detainee from exercising his right. Generally, police views on why the right must be postponed carries great weight with the courts. But in *Abdul Ghani Haroon*,[21] the High Court was persuaded that malice was indeed present and habeas corpus should issue. What is also remarkable is that the learned judge held that the guarantees of Article 5(3) apply even in Internal Security Act (ISA) detention cases. These rights are not automatically displaced by the ISA unless the law says so explicitly. Likewise, the right to be represented in court, as opposed to consultation after arrest, was enforced strictly in *Saul Hamid v PP*.[22]

Production before a magistrate: One of the important safeguards for personal liberty is that, subject to some exceptions, all arrests must be reported to the judiciary. Article 5(4) requires that an arrestee shall within 24 hours (excluding travel time) be produced before a magistrate and shall not be further detained without the magistrate's authority.

15 *Re PE Long @ Jimmy; PE Long v Menteri Hal Ehwal Dalam Negeri Malaysia* (1976).
16 *Chong Kim Loy v Timbalan Menteri Dalam Malaysia* (1989).
17 *Menteri Hal Ehwal Dalam Negeri v Lee Gee Lam* (1993).
18 *Ooi Ah Phua v Officer-In-Charge Criminal Investigation, Kedah/Perlis* (1975).
19 *Hashim bin Saud v Yahaya bin Hasim* (1977).
20 *Theresa Lim Chin Chin v Inspector General of Police* (1988).
21 *Abdul Ghani Haroon v Ketua Polis Negara* (2001).
22 *Saul Hamid v PP* (1987).

However, there are some exceptions to the rule – detainees under restricted residence laws and aliens are excluded from its benefit. For non-citizens arrested under immigration laws, the 24-hour period is extended to 14 days.

Order of habeas corpus: Rights without remedies are like lights that do not shine and fires that do not glow. The safeguards for personal liberty in Article 5(1) are strengthened by the provision for a remedy in Article 5(2).The Constitution requires that "where a complaint is made to a High Court or any judge that a person is being unlawfully detained, the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

Article 5(2) provides a remedy to any one detained unlawfully. The writ (order) of habeas corpus requires a person having custody of a prisoner to explain to the court the reasons for the detention. If the reasons are "not in accordance with law," the court has the duty to order the detainee to be released.

The burden of proving that the detention is in accordance with law is, in the first instance, on the detaining authority: *Re Tan Sri Raja Khalid Raja Harun*.[23] This burden is discharged simply by producing the detention order. The onus then shifts to the detainee, especially if he alleges bad faith: *Karam Singh*.[24] A person released on habeas corpus can sue for damages for the period during which he suffered unlawful imprisonment.

23 *Re Tan Sri Raja Khalid bin Raja Harun; Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* (1988).
24 *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* (1969).

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Chapter 12

Prohibition of Slavery and Forced Labour: Article 6

In the crevices and unlit paths of many otherwise enlightened societies, slavery and forced labour exist in modified and milder forms.

In Article 6(1), the Federal Constitution states "no person shall be held in slavery." The prohibition is absolute. It applies to both the public and private sectors. It forbids Parliament and the Executive from contemplating any measure that may amount to slavery. Unfortunately the term "slavery" has nowhere been defined and one has to look to its earlier manifestations. Historically, slavery referred to an institution under which one or more human beings were the property of another. Slavery was a form of involuntary servitude or forced, free labour so that those in bondage toiled under coercion to satisfy the desires of their owners. Slaves could not marry, have a family, testify in court, own property or receive education. Fortunately, our legal system has never been shackled by such inhumanity.

Forced labour: Article 6(2) prohibits all forms of forced labour subject to three qualifications. First, Parliament may by law provide for compulsory service for national purposes. State assemblies have no such jurisdiction. The Executive has no inherent power to require compulsory service except under the authority of law. Further, the work in question must be for "national purposes." Admittedly, the words are open to a variety of interpretations but it does appear that compulsory military service, a Rukun Tetangga scheme, a Peace Corps type of programme, mandatory government service that is required of doctors are within

the constitutional authorisation. But forced labour that is merely for the purpose of a statutory body or local authority is proscribed. Many universities wish to impose community service orders on their students in lieu of disciplinary punishments but are held back by the prohibition in Article 6(2).

Second, work incidental to the serving of a judicial sentence of imprisonment shall not be taken to be forced labour: Article 6(3). It is noteworthy that the Constitution only permits work incidental to a sentence of penal servitude. Prisoners cannot be forced to work in mines, factories or construction sites without their consent and without payment. If they are exposed to hazardous labour or if the working conditions are oppressive, then a constitutional challenge under Article 5(1) could possibly be mounted. Article 5(1) requires that no person shall be deprived of life or liberty save in accordance with law. The term "life" does not refer to mere animal existence but includes the dignity of life.

Third, if under the authority of law, the functions of one public authority are transferred to another, Article 6(4) permits the transfer of employment of workers from the first public authority to the second. This type of "secondment" is, in practice, never forced. Workers in this situation are given an option and some incentives.

Old evils: To the extent that slavery means ownership of one human by another, this institution is obviously a matter of the past. But we must remember that history rarely evolves in a linear fashion. It moves in circles or spirals. Institutions and ideas rarely die; often they re-emerge to haunt the present. In the crevices and unlit paths of many otherwise enlightened societies, slavery and forced labour exist in modified and milder forms.

In feudal societies with concentration of agricultural land in the hands of landlords, indentured labour and serfdom have replaced slavery. The bonded individual is almost always a dependent peasant who is obliged to perform services to pay off a debt or settle arrears of rent on leased land. During the period of debt-bondage, he is not free to leave. During the colonial period, unskilled and uneducated coolies were imported as contract labourers for a period of indenture. In our time, blue-collar workers from abroad are often forced by middlemen – the *tekongs* – to

surrender the first few months' salary. A few years ago there was news of an estate in the hinterland of Pahang where workers lived in sub-human conditions and were allegedly paid salaries in coupons exchangeable for goods from the estate provision shop. This was clearly in violation of section 25 of the Employment Act 1955 which requires wages to be paid in legal tender. The sex industry exploits millions of women and children for commercial sex and buys and sells them like chattels. According to a UNICEF report, India (400,000 victims), the US (325,000) and Thailand (200,000) are the worst afflicted. Wherever the caste system lingers, it condemns the "untouchables" to the lowest of the lowly professions. Feminists point out that unpaid domestic work constitutes a form of slavery. A male-biased legal system adroitly defines "employment" in such a way as to exclude labour in the home. Around the world, domestic servants face long hours of work without the rights and safeguards available to other workers. In the American case of *United States v Ingalls* (1947) a California couple was convicted of-enslaving a maid because she was wholly under the control of her employer. In many societies, professional athletes are bought and sold – sometimes at exorbitant prices – as if they were valued chattels.

In sum, it can be stated that there are degrees of slavery. In order to honour the spirit of Malaysia's document of destiny we need to look afresh at institutions and practices that approximate the abominations of the past. Historically, slavery arose as a result of the unwillingness or unavailability of local labour thereby necessitating import of economically vulnerable people from abroad. In many developed societies such a situation is re-emerging. Enlightened measures are needed to outlaw these evils.

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Chapter 13

Protection Against Backdated Criminal Laws: Article 7(1)

No one should be prosecuted, punished or held liable except for a distinct breach of a known and pre-existing law.

At what point in time does an enacted law come into operation? Section 19 of the Interpretation Acts 1948 and 1967 provides that the commencement of an Act or subsidiary legislation shall be the date provided in the law or, where no date is provided, the day following the gazetting of the law. Most of the time when an enactment provides for its commencement, it provides a date or event in the future. Most laws are prospective in their application. But it is not uncommon to come across legislation that is enacted with retrospective operation – with effect from a date earlier than the date on which it is enacted.

Backdated laws: Retrospective legislation is gravely objectionable because it imposes a new complexion on events that have already taken place. A backdated law can validate illegalities or invalidate acts that were legal at the time they were committed. It can criminalise what was innocent at the time of its commission. This is a fundamental departure from the principle that no one should be prosecuted, punished or held liable except for a distinct breach of a known, pre-existing law. For the above reasons many legal systems forbid retrospective legislation. But it is justified in some circumstances.

- In times of war or crises, public officials often commit wrongful acts to safeguard national security and public interest. In the UK during World War II, the Home Minister ordered many detentions that were later adjudged to be ultra vires his powers. To protect the minister against a torrent of civil suits, Parliament enacted the Arthur Jenkins Indemnity Act 1952 and gave it retrospective effect to the time when the wrongful acts were committed.

- Sometimes there is need to grant retrospective recognition to marriages or to the legitimacy of children; to confer status, awards or degrees; to validate illegal contracts or flawed transactions.

- Often, sales tax statutes are given effect back in time in order to prevent or punish hoarding of goods.

- Procedural rules are often backdated to cover pending cases.

Article 7(1): The Constitution of Malaysia does not contain a total ban on retrospective legislation. But in the interest of a fair criminal process, Article 7(1) creates two safeguards against backdated legislation. First, a law creating a new penal offence cannot have effect back in time. Second, if the penalty for a criminal offence is enhanced, the law increasing the penalty cannot be applied retrospectively.

Creating new offences: Article 7(1) states that "no person shall be punished for an act or omission which was not punishable by law when it was done or made." This means that if Parliament creates a new criminal offence, it is prohibited from giving retrospective effect to the provision. A substantive criminal statute must always be prospective in operation. In legal jargon, *ex post facto* criminal laws are forbidden by the Constitution. In criminal proceedings, the law applicable to the charge must be the law existing at the time of the commission or omission of the act and not the law applicable at the time of the trial or verdict. The criminality of an act must be judged by reference to norms at the time of the wrongdoing and not by later developments in the law. Thus, if a statute criminalises the giving or taking of dowry, the new provision cannot be used to punish participants in this nefarious social practice before commencement of the new law.

The English position is different. In the absence of a supreme constitution, Parliament's power to legislate retrospectively has no limits. Even common law courts are known to add to the list of criminal offences. In *DPP v Shaw*,[1] the defendant had printed and sold a directory of prostitutes. He was charged with "conspiracy to corrupt public morals." His lawyer argued that the alleged offence was unknown to the law of England. But the House of Lords ruled that the courts have a residual power to superintend the moral life of the community by establishing new criminal offences. The court recognised the new offence, applied it retrospectively and convicted Shaw. In Malaysia, Article 7(1) would not permit such judicial activism.

Increasing the penalty: The second limb of Article 7(1) provides that "no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed. " If the penalty for a criminal offence is enhanced, the amending law cannot be applied retrospectively. However, if a penalty of a different nature is legislated, as when a fine is substituted with a "community service order," it is not clear whether the latter amounts to a greater punishment. In *PP v Mohamed Ismail* (1984), the defendant was charged with drug trafficking which was punishable with life imprisonment or death under section 39B(1) of the Dangerous Drugs Act 1952. While his trial was pending, the law was amended to provide for a mandatory death penalty. At the close of the trial, the public prosecutor invited the court to impose the enhanced penalty. In refusing the request, the judge held that the amendment could not apply to the defendant's case as it was enacted after the offence had been committed. A similar conclusion was drawn in *PP v Hun Peng Khai* (1984) – the Dangerous Drugs (Amendment) Act 1983 cannot apply to pending cases commenced prior to the coming into force of the amending Act.

Permissible exceptions: Article 7's prohibition against retrospectivity applies only to laws that create new criminal offences or enhance penalties for existing crimes. A number of situations are not caught by the constitutional ban.

1 *R v Shaw* (1961); affirmed on appeal in *Shaw v DPP* (1961).

- The word "punishment" in Article 7(1) has been interpreted in *Loh Kooi Choon v Government of Malaysia*[2] to refer to criminal sanctions and not to civil penalties. Laws dealing with non-criminal matters such as maintenance or tax liability can be backdated.

- Amendments to the Constitution are of a civil nature and can be legislated retrospectively. Indeed, some alterations to the basic law have been backdated to Merdeka Day. For example in *Loh Kooi Choon* it was held that a retrospective constitutional amendment to Article 5(4) was valid with the effect that a pending appeal will be governed by the new law.

- Article 7(1) forbids retrospective alteration of substantive criminal laws that provide for offences and penalties. But penal laws of a purely procedural nature can be backdated. In *Lim Sing Hiaw*,[3] the court upheld a retrospective amendment that converted a trial by jury to trial by judge alone. In *Gerald Fernandez*,[4] extradition procedures were amended retrospectively to facilitate the return of a fugitive to Singapore for an offence committed in the republic before the amendment. In *Haw Tua Tau*,[5] rules of procedure were amended after the commission of the alleged crime but before the start of trial. The court held that the protection of Article 7(1) is against conviction and sentence only and not against the procedure for trial.

- In *PP v Musa*,[6] it was held that reducing the scope of judicial review of a preventive detention order by retrospective legislation does not violate Article 7(1).

- Criminal laws decreasing the penalty for an offence or abolishing an offence can be backdated. An accused can take advantage of the beneficial provisions of *ex post facto* laws.

2 *Loh Kooi Choon v Government of Malaysia* (1977).
3 *Lim Sing Hiaw v PP* (1965).
4 *Gerald Fernandez v Attorney-General, Malaysia* (1970).
5 *Haw Tua Tau v PP* (1980).
6 *PP v Musa* (1970).

- Like most provisions of fundamental rights, Article 7(1) can be departed from by emergency legislation like the Emergency (Essential Powers) Act 1979 which was backdated to 1975.

In sum, the protection against backdated laws is subject to so many qualifications that one is left wondering whether the exceptions are more important than the gilt-edged rule. The law has become such because the courts have relied on rigid, doctrinaire distinctions between civil and criminal proceedings and substantive and procedural laws. Such artificial distinctions may not survive the fires of scrutiny.

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Chapter 14

Protection Against Double Jeopardy: Article 7(2)

All persons have immunity from repeated trials and convictions for the same offence.

No one who has been tried in a criminal court for a criminal offence and has been acquitted (found not guilty) or convicted (found guilty) can be tried again and again for the same offence. This is the safeguard against double jeopardy contained in Article 7(2) of the Federal Constitution, which states that "a person who has been acquitted or convicted of an offence shall not be tried again for the same offence." The gist of this provision is that all persons have immunity from repeated trials for the same offence. No person should be imperiled by subsequent criminal prosecutions if he/she has been tried in a criminal court and has been adjudged to be guilty of the offence. Likewise, an acquittal is a permanent bar to a new trial for the same offence on the same set of facts. It is a principle of justice that after the appeal process has been exhausted there should be finality to a judicial verdict. So strongly is this rule entrenched in the firmament of criminal justice that even if the law is subsequently amended; even if new evidence comes to light; even if an acquitted person voluntarily makes a confession; or even if defence witnesses go back on their evidence, the earlier trial cannot be reopened. The verdict in the earlier trial is final.

However, as in life so in law, no rule is ever absolute. Article 7(2) does not forbid retrial in a number of situations.

Discharge: A discharge does not amount to acquittal. A discharge is a decision to discontinue a trial because of various reasons, such as failure of prosecution witnesses to appear, or difficulty in obtaining evidence, or repeated requests by the prosecutor for postponement. In cases of discharge, the substantive issues are not looked into and a retrial is a distinct possibility.

Earlier trial quashed: The rule against double jeopardy does not apply if the previous trial was quashed and a re-trial ordered. This is provided for in Article 7(2) and affirmed in the cases of Sau *Soo Kim v PP* (1975) and *Fan Yew Teng v PP* (1975). In the latter case, an MP was prosecuted and convicted of sedition. On his application, the whole proceeding was quashed because of a failure to hold a mandatory preliminary enquiry. Subsequently, the MP was prosecuted again for the same offence and it was held that the first trial having been quashed, the retrial does not violate the principle of autre fois convict (double jeopardy).

Different offence: If in the subsequent trial, the accused is tried for a different offence, there is no violation of the Constitution. In *Jamali Adnan v PP* (1986), it was held that "different offence" means an offence whose ingredients are not the same. In *Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* (1994), it was held that the different offence could be based on the same set of facts as were relied upon in the first trial. This decision is difficult to reconcile with section 302(i) of the Criminal Procedure Code.

Technical errors: If the detention order was wrongly made out, or if the law authorising detention did not apply to the detainee, the detainee may be released. But it was held in *Datuk James Wong Kim Min* (1976) that this release will not bar a subsequent detention order which is properly made out under the correct law.

Appeals: If a person is acquitted and the prosecutor files an appeal under section 5 of the Courts of Judicature (Amendment) Act 1976, there is no double jeopardy.

Preventive detention: In *PP v Musa* (1970), it was held that if the detainee was previously under administrative detention under the Internal Security Act 1960, there is no bar to a subsequent criminal trial on the same set of facts. Likewise, if a person is acquitted, there is no bar

to a subsequent preventive detention order as in the case of *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia* (1975).

A second disciplinary proceeding: In *Dato Hj Kusaini v Ali Suman* (2012) a secondary teacher was subjected to disciplinary proceedings for molesting three female students and was given a warning and a transfer. Three years later he was again asked to show cause and was dismissed. It was held that the second proceeding was a clear violation of the spirit of Article 7(2).

Disciplinary proceeding along with criminal trial: The rule against double jeopardy forbids repeated criminal trials for the same offence. If the subsequent proceeding is non-criminal in nature and is in a forum different from a criminal court, there is no violation of the Constitution. Thus, if a person who has been acquitted or convicted in a criminal court, is subsequently subjected to disciplinary proceedings, there is no double jeopardy. In *Mohd Yusoff Samadi v Attorney General* (1975), a school teacher was acquitted of outraging the modesty of his pupils, but subsequently tried, convicted and dismissed for bringing disrepute to his profession.[1] However, this approach was not followed by the Privy Council in the Singapore case of *Harry Lee Wee v Law Society of Singapore* (1985). A lawyer's clerk had defrauded the firm of some money. In return for the stolen money being returned, the lawyer did not report the crime to the police. The lawyer was prosecuted and convicted for not reporting a crime in return for consideration. Subsequent to that the Singapore Law Society commenced disciplinary proceedings against the lawyer. The Privy Council held that the criminal and civil proceedings were both on substantially the same facts and there was, therefore, double jeopardy.

Multiplicity of proceedings: Trial in one court on charges also pending in another court does not amount to double jeopardy because the constitutional guarantee is activated only after a person has been acquitted or convicted, as in *Teh Cheng Poh v PP* (1979).

Concomitant criminal and civil proceedings: Imposition of a criminal penalty is no bar to a civil action. Thus, if a motorist is convicted of criminal negligence, this does not bar a civil action in tort for compensation. In

1 See also *Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia* (2001).

the case of OJ Simpson in the United States, an acquittal in a murder trial did not immunise the accused against a later civil action for recovery of damages.

The exceptions to the rule against double jeopardy are so immense that one is left wondering about the real worth of this immunity. The law has come to be so because of literal and pedantic interpretation by the courts of the constitutional promise. It is true that in strict legal theory, a distinction can be drawn between sentences imposed by criminal courts and sentences imposed by disciplinary tribunals; between incarceration under a court order and deprivation of liberty under a preventive detention order; between criminal prosecutions and civil suits; and between two or more charges for separate offences on the same set of facts. But lay persons are unlikely to be impressed by such esoteric distinctions. To them, forms and forums are less important than the end-result, which should be that no person is punished twice for the same wrong. Maybe in this area we need to drink from the cup of common law, which supplies a better protection against double jeopardy.

Chapter 15

Equality Before the Law: Article 8

Though inequalities are a fact of life, the law, especially constitutional law, cannot pander to existentialist realities. It hitches itself to stars. It pegs its provision to ideals distilled from philosophy or morality.

No constitutional ideal is as worthy, yet as unattainable, as the ideal of equality before the law. Philosophers have spoken of it as the "supreme condition of liberty and humanity" and as the "final end of the social art." The American Declaration of Independence (1776) eulogised the equality of all men as a "truth" that is "self-evident."

In fact, there is nothing self-evident about equality. Nature's sovereign law is subordination and dependence. In a state of nature, big fish eat small fish; the strong prey over the weak; only the fittest survive. Throughout history, the rich, the powerful and the privileged have held sway over society and have misused laws, institutions and procedures to their advantage. Behind the beautiful dream of egalitarianism, the brutal reality is that enslavement of fellow beings and nations, persecution of religious minorities, de-humanisation of sections of society on ground of their "inferior" caste or culture, denial of rights to women, discrimination on grounds of race, religion, gender, wealth, caste and birth have blighted human civilisation for as long as we can remember.

Even today, such atrocities are continuing in subtle forms in many parts of the world. No nation has an entirely clean record though some, because of their mastery of the media and their stranglehold over international

institutions, are able to camouflage repressive, racist and exploitative policies under acceptable guises.

Constitutional law: Though inequalities are a fact of life, the law, especially constitutional law, cannot pander to existentialist realities. Understandably it hitches itself to stars. It pegs its provision on ideals distilled from philosophy or morality. Almost all modern constitutional instruments contain equal protection clauses. The Universal Declaration of Human Rights in Article 7 and the Malaysian Constitution in Article 8(1) declare that "all persons are equal before the law and entitled to the equal protection of the law." Article 8(2) enjoins that except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, sex, descent or place of birth. In Article 8(3) discrimination against the subjects of a Ruler, in Article 8(4) differentiation on ground of residence and in Article 136 unequal treatment of public servants on the ground of race are forbidden.

Equality before the law: Article 8 of the Constitution is a generic provision whose impact on the administrative and legislative processes of the country has not yet been fully explored. Among other things, it requires absence of any special privileges in favour of the rich and the powerful. It mandates equal subjection of all classes to the ordinary law of the land. Equal justice to all is its dominant theme. All persons in like circumstances should be treated alike. Article 8(1) applies to both legislative power as well as administrative discretion. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan*,[1] it was laid down that Article 8(1) can be used to challenge as unconstitutional any unguided and unrestricted power. The court held that Article 8(1) "strikes arbitrariness in state action and ensures fairness and equality in treatment." In *Hong Leong Equipment v Liew Fook Chuan*,[2] the court held that the equality clause of the Constitution can be used to require public administrators to observe the duty of procedural fairness towards all citizens. Adjudicators must give reasons for their decisions. Penalties imposed must be proportionate and not harsh and oppressive.

In some common law countries like the United States and India, the equality provision has been relied on to require legal aid for all

1 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996).
2 *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* (1996).

unrepresented accused in criminal cases on the rationale that there can be no equal treatment if a trained public prosecutor is allowed to ensnare a hapless, unrepresented accused. In India the government's tender exercises have been subjected to the judicial ruling that an arbitrary or unprincipled preference for one applicant over another offends the duty to treat everyone equally. In American electoral law, the rule of "one person, one vote" rests on the principle that every person is to count for one and no one is to count for more than one. In the US, equality before the law requires that all electoral constituencies be about equal in population size. The traditional practice of permitting rural electoral districts to have smaller number of voters than urban districts was condemned as unconstitutional in *Baker v Carr* (1962). In India and the US, as part of the commitment to egalitarianism, the state does not confer any titles or special ranks on its citizens.

Non-discrimination: Article 8(2) forbids discriminations on five grounds – religion, race, sex, descent or place of birth. But it also provides that such discrimination may be expressly authorised by the Constitution. For example, the special position of Malays and natives of Sabah and Sarawak has been woven into the constitutional fabric by Article 153. What if the Executive or the Legislature differentiate between groups of persons on a ground other than one prohibited by Article 8(2)? What if the legislative classification is based on wealth (as in income tax law), or on age (as in the pension law) or on profession (as in different statutes for lawyers and doctors)?

The judicial attitude to this is that Article 8 does not require that all persons, in all circumstances and everywhere, must be treated alike. All that it requires is that like should be treated alike. A person in one class should be treated on par with another person in the same class. The legislature is permitted to differentiate citizens into various classes. But the classification should not be based on constitutionally forbidden grounds or on arbitrary or irrational differences. The court is the final arbiter on the question whether the classification is intelligible; whether it reasonably distinguishes persons or things grouped together in the class from others left out; and whether the differentiation adopted has a rational relationship to what is to be achieved by the statute in question. The spirit of the Constitution is that all discrimination is illegal unless expressly permitted by the basic law or adjudged by the courts to be reasonable.

Departures: Article 8 has a vast, civilising potential for requiring humane and fair treatment in all aspects of government. In real life, however, the equal protection ideal faces many treacherous problems and contradictions. First, Article 8 does not forbid "reasonable" legislative classification. What is reasonable is often a matter of subjective opinion and judicial decisions in this area do not always inspire admiration. For example, in *Malaysian Bar v Government of Malaysia*[3] the court upheld a provision that lawyers of less than seven years standing are forbidden from serving the Bar or even its committees. The law on mandatory retirement in the public sector arbitrarily sets the age at 60 at which a worker, no matter how healthy or productive, must be put to pasture.

Second, the constitutional protection afforded by Article 8 appears to be available against state action only. The private sector does not seem to be required to honour the constitutional value of equality. Third, legal equality is of little use unless the citizen has the socio-economic means to make use of the constitutional grant. For the ideal of equality to have any meaning requires massive affirmative action on the part of an activist state to create the socio-economic prerequisites on which legal equality can thrive.

Fourth, many laws and structures of society institutionalise exploitation and hierarchies. Laws against begging and vagrancy criminalise poverty and homelessness. Salary structures perpetuate hierarchies. The judicial process is so expensive that it is not suitable for the poor. Fifth, legal parity between those who are inherently unequal tends to favour the strong over the weak. It perpetuates an unjust status quo. In recognition of the need to create a level playing field, the law of many states, notably India and Malaysia, incorporates provisions for protective discrimination. Renowned philosopher John Rawls refers to affirmative action policies as "just inequality."

Sixth, all constitutions permit some privileges and immunities in favour of MPs, judges and foreign diplomats. The Crown enjoys some prerogatives. The state passes laws to favour itself over private litigants. Special courts and procedures abound.

3 *Malaysian Bar v Government of Malaysia* (1987).

In sum, the ideal of equality before the law is unsurpassed in its beauty and potential. But it is such a complex bundle of contradictory ramifications that its goals will remain only partially and formally realised.

Gender equality: The ideal of sex equality is so complex and contradictory, that everywhere it is buffeted by currents and cross-currents.

On the positive side Malaysian society has plenty of institutions, laws, principles and policies to secure justice for women. At the policy level, the government is officially committed to the Third Millennium Development Goal to empower women. A federal Cabinet post oversees women's affairs. The country invests heavily in education and female literacy rate is about 91%.

Malaysia has acceded (though with some reservations) to a number of international instruments on gender equality among them the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In 2001, our Constitution was amended in Article 8(2) to outlaw discrimination on ground of gender in some (though not all) fields. The Employment Act 1955 requires maternity leave in most sectors. There is prohibition of night work and underground work for women. The Domestic Violence Act 1994 and the Penal Code provide protection against violence in the home. Non-Muslim family law has evolved significantly towards equal treatment.

The Penal Code has been amended repeatedly in the last few years to take note of feminist thinking on issues of rape, incest and abortion. The plight of unwed mothers and victims of domestic violence has attracted state support.

Some judges have heard the beckoning of justice in gender equality cases. In *Noorfadilla Ahmad Saikin v Chayed Basirun* (2012) the court held that terminating a trainee teacher on the ground that she is pregnant was a violation of our Constitution and our international commitments under CEDAW.

To prevent sexual harassment there are women-only carriages in trains, buses and taxi services in some parts of the country.

Despite the above helpful developments, there are many areas where the rays of equality do not reach.

In citizenship for children, Articles 14, 15, 24, 26 and Part III of the Federal Constitution emphasise the father's citizenship or residence. The mother's status does not matter. In laws relating to permanent residence for a spouse there is discrimination against Malaysian females with foreign spouses. In Article 161(6) the status of a "native" of Sabah is dependent on descent from the father.

Under Article 8(5) "personal laws" are exempted from the equality requirement.

In Article 12(4) the religion of a child for the purpose of education is determined by a parent or guardian. In the past, several courts interpreted Article 12(4) to mean "any one parent or guardian" despite the interpretation clause 2(95) in the Eleventh Schedule that "words in the singular include the plural". The devastating effect was that some fathers unilaterally converted their children to another religion without the consent of the aggrieved mother. The error was recently corrected in the February 2018 case of *Indira Gandhi*.[4]

Some provisions of the Law Reform (Marriage and Divorce) Act 1976, the Women and Girls Protection Act 1973 and the Immigration Act 1959/63 affect women adversely though unintentionally. Domestic servants, who are almost all females, are not protected adequately by the Employment Act 1955. Child marriages are common. Sexual harassment in the work place is widespread. Rape remains a scourge. The basic principles of the Penal Code reflect male psychology e.g. the laws on provocation, self-defence and enticement. Judicial practice has not always helped women's rights. In *Beatrice Fernandez v Sistem Penerbangan Malaysia* (2005), the dismissal of an air hostess because she became pregnant was upheld as permissible under the collective agreement.

4 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* (2018).

Besides the provisions of the law, there is the practical dimension. Formal equality does not always result in functional equality. Formal equality does not always produce substantive justice. Intent and outcomes do not always match. Despite the equal right to vote and to seek political office, only 13% of the 222 MPs are women. In the federal Cabinet, state EXCOs and the civil service, only 15% of decision-making posts are filled by women.

In the corporate sector, government linked companies and statutory bodies, a similar pattern of under-representation at the top is discerned even though female enrolment in tertiary education stands at about 60%. On the university rolls of honour girls do as well, if not better, than boys. Why are they then holding jobs mostly at the middle and lower rungs of our workforce?

There is a dilemma about whether women should have equal rights or separate rights. Differential treatment perpetuates negative perceptions but is nevertheless needed as an aspect of affirmative action to remedy injustices of the past.

It is alleged that female dominated vocations like teaching are deliberately allocated low salaries and allowances. There is a call that "equal pay for equal work" should evolve towards "equal pay for equal work of equal value".

Everywhere in the world a wide gap exists between the law in the book and the social, cultural, religious and economic realities on the ground. Legal provisions are necessary but not enough. They do not significantly dent pervasive patterns of bias and oppression. We need to put our heads together to see how our patriarchal past can accommodate the contemporary demand for equality and dignity. The panorama of possibilities is vast if we listen to each other with open hearts.

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Chapter 16

Protection against Banishment and Freedom of Movement: Article 9

A citizen's protection against banishment must be read in the light of the government's power to terminate the citizenship of its nationals on a number of grounds.

Article 9 of the Federal Constitution confers three separate but related rights on all citizens – protection against banishment, freedom of movement and right to reside in any part of the Federation.

Protection against banishment: The right of people to live, to work and to pursue their dreams in the land of their birth is one of the most precious of all rights. Most Constitutions forbid governments from barring entry of or expelling, deporting or banishing their own citizens. In Malaysia Article 9(1) of the Federal Constitution proclaims that "no citizen shall be banished or excluded from the Federation". As the protection avails only to citizens, the question whether the complainant possesses nationality under the laws of Malaysia is of great significance. In cases like *Re Hoon Tye Wan* (1965) and *Kung Aik v PP* (1970) the courts reversed the government's decision to expel the applicants on the ground that the applicants, being citizens by operation of law, could not be subjected to the Banishment Ordinance 1959.

Deprivation of citizenship: A citizen's protection against banishment must, however, be read in the light of the government's power to

terminate the citizenship of its nationals. The Constitution of Malaysia provides for five exceptional circumstances in which citizenship can be withdrawn. First, if any citizen has acquired by registration, naturalisation or other voluntary and formal act the nationality of another country, his/her Malaysian citizenship may be withdrawn: Article 24. Second, anyone who is a citizen by registration or naturalisation may be deprived of his citizenship on a number of grounds listed in Article 25 including disloyalty and trading or communicating with an enemy in times of war. However, powers of deprivation under Article 25 cannot be exercised in relation to those who are citizens by operation of law under Article 14(1)(a) and Part I of the Second Schedule. Third, citizens by registration or naturalisation may be deprived of their status if their certificates were obtained by fraud or false representation: Article 26(1). Fourth, if a woman's citizenship was acquired due to her marriage to a Malaysian and the union dissolves within two years, her citizenship may be withdrawn: Article 26(2). Fifth, children below 21 may be deprived of their citizenship if the citizenship of a parent is withdrawn or renounced: Article 26A. Under Article 23(1) any citizen above 21 may renounce his/her citizenship. The effect of renunciation or deprivation is that the protection to citizens against banishment provided by Article 9(1) ceases to have any applicability.

Freedom of movement: Article 9(2) states that every citizen has the right to move freely throughout the Federation. In the words of Justice Azlan Shah in *Assa Singh v Mentri Besar, Johore* (1969) this Article was meant "to remove all internal barriers in the country and to make it as a whole the dwelling places of all citizens." It must be noted, however, that the guarantee of freedom of movement is applicable only within the territories of Malaysia. The attempt by lawyers in *Government of Malaysia v Loh Wai Kong* (1979) to expand the horizons of Article 9(2) to encompass a right to a passport, a right to leave the country and to travel overseas was rejected by the court. Another gallant effort in *Assa Singh v Mentri Besar, Johore* (1969) to bring the right to travel abroad under the protection of personal liberty in Article 5 also failed. This is in contrast with the approach in India that protection of personal liberty includes the right to travel abroad: *Maneka Gandhi v Union of India* (1978). In Malaysia the grant of passports is a discretionary function under the Passports Act 1966. Like all discretionary functions it is subject to judicial review as in the British case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* (1989).

Right to residence: Article 9(2) confers a right on all citizens to reside in any part of the Federation. The right to choose one's place of residence is strengthened by Article 8(4) which forbids public sector discrimination on the ground of residence.

Limitations: Despite constitutional protection for the right of movement and of residence, a broader look at the Constitution indicates the presence of many significant limits on these freedoms. Article 9(2) permits Parliament to regulate these rights on four grounds - security, public order, public health or the punishment of offenders. Article 4(2)(a) provides that no law can be challenged if it imposes restrictions on the rights mentioned in Article 9(2) but does not relate to the four permissible grounds specified therein. The implication of Article 4(2)(a) is that in relation to freedom of movement, Parliament is supreme. It's power is unchallengeable in a court of law. It's authority to regulate this freedom is further augmented by Articles 149 and 150 which authorise legislation to deal with subversion and emergency.

Immigration: Under Article 9(3) Parliament may impose restrictions on the rights of West Malaysians to move to or reside in Sabah and Sarawak. Parliament has exercised this power by adding a Part VII to the Immigration Act 1959/1963 on Special Provisions for East Malaysia. Sabah and Sarawak's exclusive control on immigration is further strengthened by Article 161E(4). However, the exercise of this or any other power can never be totally immune from judicial review as was demonstrated in *Sugumar Balakrishnan v Pengarah Imegresen Negeri Sabah* (1998). In this case the entry permit of a West Malaysian lawyer was withdrawn and he was ordered to leave Sabah within seven days. In a far-reaching judgment the Court of Appeal held that the executive decision was ultra vires in that it lacked fairness and proportionality. The court also invoked the Constitution's promise of equality before the law as a means of taming naked power. It observed that "Article 8 of the Constitution strikes at the heart of arbitrariness in public decision making and imposes a duty upon a public decision maker to act fairly". Unfortunately for the plaintiff, the Federal Court in 2002 overruled the Court of Appeal and held that on immigration matters the discretion of Sabah and Sarawak is not subject to judicial review. The same approach was taken in 2018 by the Federal Court in relation to the travel ban by Sabah on former Malaysian Bar President Ambiga Sreenivasan.

Restricted Residence Enactment:[1] This law was the most significant restraint on freedom of movement. It permitted the making of orders to exclude a citizen from a particular area, to require him to reside in a designated place and to not leave the area without prior police permission. The law was enacted in 1933 as part of a preventive criminal measure to curb activities of secret societies, to remove criminal elements from areas in which they exerted a malignant influence and to act against trouble makers who could not, because of the guarantees of the law, be banished from the Federation. The constitutional validity of the Enactment was challenged in *Assa Singh v Mentri Besar, Johore* (1969) but the court held that the law was a valid measure to promote public order and security. In *Cheow Siong Chin v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* (1986) a gallant effort to graft the requirement of prior hearing on a restriction order failed in the court. In 1976, the law's importance in the state's armoury was underlined by an amendment to the Constitution's Article 5(4) to provide that anyone detained or arrested under any law providing for restricted residence need not be produced before a magistrate within 24 hours. More recently the law has been employed for such diverse purposes as restraining football bookies!

All in all, the law relating to banishment, freedom of movement and right of residence leaves citizens quite vulnerable. Fortunately, banishment provisions are subjected to some judicial safeguards. The Restricted Residence Enactment has now been repealed.

1 The Restricted Residence Enactment has since been repealed.

Chapter 17

Freedom of Speech and Expression: Article 10(1)(a)

Freedom of speech and expression is a combination of many rights in many forms. However, Parliament has been given such wide powers to impose restrictions on this right that it is difficult to describe free speech as a "fundamental right".

The right to speech and expression and the restraints on this fundamental liberty are provided in Article 10(1)(a) of the Federal Constitution which states that "subject to clauses (2), (3) and (4) every citizen has the right to freedom of speech and expression." However, there is no elaboration of the scope and extent of this right or its constituent parts.

Many forms: In constitutional law it is generally understood that freedom of speech and expression is a combination of many rights in many forms. Communication by word of mouth, signs, symbols and gestures and through works of art, music, sculpture, photographs, films, videos, books, magazines and newspapers are all part of free speech. The guarantee of free speech covers not only the political but also the artistic and aesthetic field.

Press freedom: There is no mention of freedom of the press or freedom of the electronic media in the Constitution. Though not in Malaysia and Singapore, in India a long line of cases, among them *Bennet Coleman v Union of India* (1973), has upheld the notion that freedom of speech and expression includes freedom of the press. In *Romesh Thappar v State of Madras* (1950) it was held that freedom of the press is a "species of which

freedom of expression is a genus." If a law seeks to peg the number of pages of a newspaper to its price or to restrict the circulation or printing of new editions, in India that is unconstitutional.

Symbolic speech: Even "symbolic speech" like the manner of one's dressing and grooming can be treated as part of one's freedom of expression.[1] In the USA in the case of *Texas v Gregory Lee Johnson* (1989) flag-burning was treated as an expression of free speech protected by the Constitution! A US District Court Judge once held that begging is a form of free speech and expression protected by the First Amendment and therefore New York City's ban on begging on public streets and in parks was unconstitutional!

Right of association: In many countries the guarantee of free speech also covers the right of citizens to organise themselves into associations, assemblies or processions. In Malaysia, however, freedom of association and assembly are enumerated as distinct rights in themselves. Their scope and extent and the permissible limits on their exercise are distinct and separate from the provisions on speech and expression. Right to assemble peaceably and without arms is covered by Article 10(1)(b) and 10(2)(b). Right to form associations is articulated in Articles 10(1)(c), 10(2)(c) and 10(3).

Right to information: Does Article 10(1)(a) include the right of access to information? There is no direct authority on point in Malaysia. But in the Singapore case of *Dow Jones Publishing v Attorney General* (1989) it was held that the right of access to information is not part of the constitutional guarantee of free speech. This is likely to be the position in Malaysia as well.

Advertisements: A difficult issue is whether commercial expressions are protected by the Constitution? In India the Supreme Court has held that advertisements for purely commercial purposes do not come within the scope of the constitutional guarantee of free speech: *Hamdard Dawakhana v Union of India* (1960). In Malaysia and Singapore, legal regulation of the advertising industry is quite widespread. Cigarette advertisements and commercials on buildings, walls and streets are

1 The Court of Appeal decision in the case of the cross-dressers: *Muhammad Juzaili Mohd Khamis*.

regulated by the law. Advertisements for legal services and promotion of medicines for certain types of diseases are banned.

Who is eligible?: Freedom of speech is available not only to natural persons who are citizens of the country but also to legal persons like companies, corporations and statutory bodies if they are incorporated or established under Malaysian law. However, in the Singapore case of *Dow Jones Publishing v Attorney General* (1989) it was affirmed that a foreigner or a foreign publication lacks the constitutional protection of free speech. Likewise in Malaysia it is not a violation of Article 10(1) for the Printing Presses and Publications Act 1984 to prohibit foreign publications or to restrict their circulation in the country or generally to subject aliens to stricter controls than are applied against citizens. This follows from the language of Article 10(1) which bestows the right on "citizens" and not on "all persons".

Permissible restrictions: The right in Article 10(1)(a) is not confined to oral speech and expression. Its horizons are far wider though it is subject to many significant legal restraints. The Constitution in Articles 10(2)(a) and elsewhere authorises Parliament to impose such restrictions on free speech as it deems necessary or expedient on the following grounds:

1. *Security of the Federation or any part thereof*: Some important examples of laws under this head are the Official Secrets Act 1972, Printing Presses and Publications Act 1984, Protected Areas and Protected Places Act 1959, Public Order (Preservation) Act 1958, the Sedition Act 1948 and Communications and Multimedia Act 1998.

2. *Friendly relations with other countries.*

3. *Public order*: Relevant laws under this head are the Sedition Act 1948, Police Act 1967 and the Printing Presses and Publications Act 1984. Among other offences, the 1984 Act has a severe offence called "malicious false news". A news is malicious if the defendant cannot prove that prior to publication he took reasonable measures to verify the truth of the news: section 8A(2). In *Lim Guan Eng v PP* (1998), it was held that a news is false if it is factually untrue beyond all reasonable doubt. The meaning of the words must be adjudged by the standards of the ordinary person on the

street and what the offensive words convey to such a person. For this offence, the printer, publisher, editor and the writer may all be prosecuted. The Attorney General's consent to the prosecution is necessary: section 8(3). This section was inserted as a response to a string of very serious and unsubstantiated allegations in the media against the government for instance that the government intended to sell Limbang in Sarawak to Brunei. It was felt that the press was indulging in irresponsible and sensational journalism simply to boost its circulation even though its unproved allegations were undermining public confidence in the government. In subsequent years, the section has been invoked in a number of highly publicised cases. In *Lim Guan Eng* a 16-year old girl had been sexually violated by several men. She was detained by the police but not placed in a lock-up. Subsequently she was put in protective custody at a rehabilitation centre. The accused, a Member of Parliament, published a pamphlet which contained the words "victim imprisoned, criminal free." The words "victim imprisoned" were adjudged by the courts to amount to false news that had been maliciously published. Irene Fernandez, a woman activist, who published information about the alleged abuse of illegal immigrants in detention centres was prosecuted under this section. A journalist who wrote about domestic violence cases and quoted some complaints of alleged police reluctance to accept reports filed by the victims, was the subject of a police report against her under this section and was questioned by the police. The section is indeed a very powerful weapon against hasty publication of unverified allegations. The constitutional validity of this section was challenged in *PP v Pung Chen Choon* (1994) on the ground that it imposes a blanket restriction on false news without requiring any nexus with the permissible restrictions under Article 10(2). The challenge was unsuccessful.

A relevant law on this point is the Sedition Act as amended in 2015. Under this law it is an offence to –

- bring into hatred or contempt or to excite disaffection against any Ruler. Disaffection does not mean absence of affection and regard but refers to disloyalty, enmity and hostility: *PP v Param Cumaraswamy* (1986).

- excite subjects to seek alteration other than by lawful means of any matter by law established.

- bring into hatred or contempt the administration of justice in the country. In *Lim Guan Eng v PP* (1998) an opposition leader was convicted of this charge. But in *PP v Param Cumaraswamy* the defendant's criticism of the Pardons Board for not applying uniform standards in considering applications for mercy was held not to constitute sedition. This subsection was repealed in 2015.

- raise discontent or disaffection among the subjects. In *PP v Ooi Kee Saik* (1971) an opposition leader had accused the government of gross partiality in favour of one race against another.

- promote ill-will, hostility and hatred on ground of religion between races, classes or religions.

- question the provisions dealing with language, citizenship, the special position of the Malays and natives of Sabah and Sarawak and the sovereignty of the Rulers. In *Melan bin Abdullah v PP* (1971) the editor-in-chief of *Utusan Melayu* had published an MP's speech with the sub-heading "Abolish Tamil or Chinese medium schools in the country."

In *Param Cumaraswamy*, it was held that intention to incite to violence, tumult or public disorder is not a necessary ingredient of the crime. As long as the words were intentionally published and they had a tendency to cause ill-will, the offence is complete. The prosecution need not prove that the act, speech, words or publication in question actually caused hostility, ill-will or disaffection. A tendency is sufficient. Whether the publication has a seditious tendency or not is for the judge to decide. There is no trial by jury in Malaysia. It is no defence for the accused to argue that his words were, in fact, true and honest: *PP v Ooi Kee Saik* (1971) and *Fan Yew Teng v PP* (1975).

4. *Morality*: Legislation permitted under this head includes the Betting FM Ordinance 1953, Films (Censorship) Act 1952, Indecent Advertisements Act 1953, Lotteries Act 1952, Medicines

(Advertisement and Sale) Act 1956, Printing Presses and Publications Act 1984 and Perbadanan Kemajuan Filem Nasional Malaysia Act 1981.

5. *Privileges of Parliament or of any Legislative Assembly*: The Houses of Parliament (Privileges and Powers) Act 1952 and the Standing Orders of each House of Parliament are derivable from Article 10(2)(a).

6. *Contempt of court*: The restrictive provisions of the Judicial Proceedings (Regulation of Reports) Act 1962 and the Courts of Judicature Act 1964 are justifiable under Article 10(2)(a).

7. *Defamation*: The Defamation Act 1957 is derived from this constitutionally permissible restriction on free speech.

8. *Incitement to any offence*: Offences like obscenity (sections 292 to 294 of the Penal Code) or causing disharmony, disunity on grounds of religion (section 298A) and many other Penal Code offences which are restrictive of freedom of speech and expression are legally derivable from this limb of Article 10(2).

9. *Sensitive matters*: In addition to the restrictions in Article 10(2)(a), Article 10(4) provides that Parliament may pass laws prohibiting the questioning of four politically sensitive matters. These are right to citizenship under Part III of the Constitution; status of the Malay language; special position of the Malays and the natives of Sabah and Sarawak; and prerogatives of the Malay Sultans and the Ruling Chiefs of Negeri Sembilan.

10. *Special powers legislation*: The right to free speech can be further eclipsed by the special provisions of Articles 149 and 150 relating to subversion and emergency. Article 149 authorises legislative action designed to stop or prevent subversion, organised violence and crimes prejudicial to the public. The Internal Security Act 1960 (now repealed) was derived from this provision. Article 150 permits any legislative action required by reason of emergency.

The grounds enumerated above permitting curtailment of free speech are so broad and comprehensive that in 61 years only one Act of Parliament

has ever been found by the courts to have violated the Constitution. Despite the theory of constitutional supremacy, parliament's legislative power in this area appears to be virtually unlimited.

Judicial review of legislation: A wealth of case law affirms the power of the courts to test the validity of parliamentary legislation. A number of principles have been articulated to guide judicial decisions. Parliament is not supreme. The Constitution supplies the ultimate yardstick against which every law can be measured. In *Dewan Undangan Negeri v Nordin Salleh* (1992) it was held that Parliament may restrict free speech only on the grounds specified in the Constitution. Similarly, *Madhavan Nair v PP* (1975) ruled that any condition limiting freedom of speech not falling within the four corners of Article 10 clauses (2), (3) and (4) cannot be valid. Thus, the general grounds of "public interest", "good government", "state necessity", "public policy", "efficiency" and "common sense" are not constitutionally permitted grounds for depriving a citizen of his right. Restrictions on free speech must be confined to those articulated in the Constitution. In *PP v Pung Chen Choon* (1994) it was held that where a law authorises restrictions in language wide enough to cover restrictions both within and outside the permissible limits, the law cannot be upheld. In the same case it was provided that in order to determine whether a particular piece of legislation falls within the orbit of permitted restrictions, the objects of the law must be sufficiently connected to the eight restrictions enumerated in Article 10(2)(a). The connection must be real and proximate, not far-fetched or problematical.

Side by side with these liberal sentiments, courts have also articulated a number of principles of self-restraint. There is a strong presumption of the constitutional validity of legislation. The burden of proof lies on the party seeking to establish the contrary. If certain provisions construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court should lean in favour of the former: *PP v Pung Chen Choon* (1994). The protection of Article 10 of the Constitution is available to citizens only. A non-citizen or a foreign company or news agency cannot lay claim to this right: *Attorney General v Wain (No. 1)* (1991). Article 10(1)(a) of the Constitution which guarantees the right to speech and expression must be read in the light of other Articles of the Constitution which curtail this freedom. For instance, Article 126 empowers the courts to punish speech or action that amounts to contempt of court. Articles 63(4) and

10(4) subject parliamentary proceedings to the law of sedition. Mr Mark Koding, MP,[2] found this out to his discomfort when he was convicted for a parliamentary speech demanding the closure of Chinese and Tamil schools. Under Article 25(1)(a) an order to deprive a person of his citizenship can be based on his disloyal conduct as manifested in his speeches irrespective of the fact that free speech was his constitutional right.

Judicial review of Executive discretion: Even if a parliamentary law is constitutionally valid, executive action under its authority may be challenged if it infringes the Constitution or violates the doctrine of ultra vires or the principles of natural justice. In *JB Jeyaretnam* (1990) it was held that a power given to restrict free speech must not be arbitrary and untrammeled.

In the *SIS Forum* case,[3] the famous Muslim women's group, Sisters in Islam, sought judicial review of the Home Minister's decision to ban their book *Muslim Women & the Challenges of Islamic Extremism*. The book was published in 2005 and was sold freely and peaceably for over two years until it was banned by the minister who purported to act under section 7(1) of the Printing Presses and Publications Act 1984. The law in section 7(1) is simple and severe. If the minister is satisfied that any publication contains anything which is prejudicial to public order, morality, security, public interest or national interest or which is contrary to any law or is likely to alarm public opinion, he may in his absolute discretion, prohibit that and any future publication by the publisher. If one looks at the Act literally, the minister's discretion is absolute. He is not required to give to the party concerned any prior notice or any prior hearing.

Despite the above law, Justice Ariff made a number of rulings that would warm the heart of any constitutional lawyer. He held that the minister's discretion "is not to be regarded as final although the statutory formula may appear to indicate so". It is "open to an objective assessment in order to determine whether the pre-condition for its exercise has been satisfied on the facts". The court was empowered to enquire into reasons why the book was banned in order to form an opinion whether there has been an

2 *PP v Mark Koding* (1983).
3 *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar* (2010).

error of law or any abuse of discretion. Relying on a number of previous authorities like *Merdeka University*[4] and *Darma Suria Risman Shah*,[5] he held that the deciding authority must have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds.

The learned judge acknowledged that SIS Forum's fundamental right to free speech was at stake and he warmly endorsed some recent path blazing judicial decisions by Justice Gopal Sri Ram that fundamental liberties must be generously interpreted and restrictions on fundamental rights must be read restrictively. The restrictions must be reasonable.

In a most significant ruling, Justice Ariff also held that objections and fears of organisations like Jakim that the book would confuse some Muslim women was not a sufficient ground to exercise powers under the Act. The minister must bring the case under the permitted ground of public order. On the totality of the facts, the judge was not satisfied that any threat to public order was proved. The book had been in circulation for two years. There are passages in just seven out of 215 pages that people had objected to. No disorder had resulted for the two years.

The administrative law principle of proportionality was also employed. The minister's reaction to the offending passages was wholly disproportionate to the concerns expressed and was vitiated by the administrative law principles of illegality and irrationality.

Though the Act gives to the parties no right to a notice or hearing, the judge held that when a book has been in circulation for over two years, it can give rise to a legitimate expectation not to have it prohibited without hearing the party affected. On this issue the learned judge is entirely in line with emerging jurisprudence that principles of natural justice are not mere rules of common law but implied aspects of due process and equality guaranteed by the supreme Constitution.

All in all, the decision is most commendable. However, it needs to be said that the restoration of fundamental rights requires a continuing journey and continuous judicial vigilance. I hope and pray for the day when

4 *Merdeka University Bhd v Government of Malaysia* (1981).
5 *Darma Suria Risman Saleh v Menteri Dalam Negeri, Malaysia* (2010).

some other aspects of the Printing Presses Act will be examined by our superior courts. There are serious questions of constitutionality about those provisions of the Printing Presses Act that confer on the minister a number of absolute discretions. All absolute discretions are an affront to Article 10's guarantee of free speech and Article 8's promise of equality. The grounds on which the Printing Presses Act permits the minister to interfere with or ban free speech are wider than those permitted by the Constitution. This is unconstitutional. In the exercise of his discretion, the minister is entitled to consult any one and to consider all points of view. But he is not allowed to abdicate his responsibility and pass his legal powers to some other authority and to act on that authority's fiat. It is legally improper for the minister to act on the dictation of another and to ban a book because it infringes the guidelines set by someone else, no matter how high and mighty. The buck stops at the minister's door and he must exercise his mind to the issue before him. I believe that the *SIS Forum* decision is a great advance and paves the way for a future decision on the legislation itself.

In *Minister of Home Affairs v Persatuan Aliran* (1990) an admirable sentiment was expressed by the Malaysian Supreme Court that even though section 12(2) of the Printing Presses and Publications Act 1984 gives to the minister an absolute discretion to refuse an application for a licence or permit, the minister's discretion is, nevertheless, subject to judicial review on the principles of illegality, irrationality and procedural impropriety – principles of judicial review re-formulated in the British case of *Council of Civil Service Unions v Minister for the Civil Service* (1985). Unfortunately, such liberal sentiments are not always reflected in actual decisions. In the *Aliran* case the plaintiff, the publisher of a bilingual quarterly, wished to publish another magazine solely in Malay. As the permit was refused, he invoked Article 8 (equality before the law), Article 10 (freedom of speech) and Article 152 (Malay as official language) to back his application. The Supreme Court summarily rejected the constitutional arguments and concentrated on the administrative law issue of abuse of power of which there was no proof.

Cyber age: A Constitution drafted in 1957 could not have anticipated the cyber age. The advent of computers has globalised the flow of information. At the same time it has facilitated abuse of free speech through electronic means. The Computer Crimes Act 1997 and the

Communications and Multimedia Act 1998 seek valiantly to retain some control over cyber communication. Tensions are also developing between the ideal of free speech and the proprietary interests of copyright, patent and trade mark holders. How far constitutional law can cope with free speech in an electronic age remains to be seen.

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Chapter 18

Freedom of Assembly: Article 10(1)(b)

Previously, everything was prohibited unless permitted. Now everything is permitted unless prohibited. This is a significant shift in human rights thinking.

Freedom of speech and assembly are essential pillars of a democratic set up, the life-blood of a free society. One of the most effective ways of exercising this freedom is for like-minded people to organise themselves into an assembly or procession in order to give wings to their ideas or concerns. The Constitution in Article 10(1)(b) is supportive of these vital rights subject, however, to the power of Parliament to impose restrictions permitted by the basic charter.

Constitutionality of legislation: In Malaysia, Parliament is not supreme and any legislation can be tested before the courts on the touchstone of the Constitution. The Constitution in Article 10(2)(b) permits Parliament to regulate freedom of assembly on two permissible grounds – security of the Federation and public order. In addition, Articles 149 and 150 authorise restraints in order to combat subversion and emergency. Though there is a technical possibility of judicial review of parliamentary legislation on the ground that the fetters imposed were not authorised by the Constitution, the reality is that in 61 years, only one legislative enactment on freedom of assembly has ever fallen foul of the basic law. In *Datuk Yong Teck Lee v PP* (1993) a gallant effort by the plaintiff to invalidate section 27(5) and 27(8) of the Police Act 1967 failed in the courts. In this case, a Sabah Assemblyman who was also the Deputy Chief

Minister was prosecuted for participating in an unlawful procession and disobeying the OCPD's order to disperse. He argued that if convicted under the Police Act and fined RM2,000 or more or imprisoned for one year he shall be disqualified from membership of the Assembly thereby suffering a heavier penalty than an ordinary member of the public. Such differential treatment would be a violation of Article 8's promise of equal treatment under the law. The court rejected this plea, and rightly so, because Article 8 does not require that all persons be treated alike; only that persons in one class should be treated the same as another person in the same class. The court, therefore, held that the penal provisions of section 27(5) and 27(8) are valid and constitutional.

Judicial review of Executive discretion: Unlike parliamentary legislation which has never been judicially censured for violation of Article 10, Executive discretion under section 27 of the Police Act[1] is quite amenable to judicial review. In *Chai Choon Hon v Ketua Polis Daerah, Kampar* (1986) a political party was granted a permit for a solidarity dinner and lion dance in a public place on the condition that speeches should not touch on political issues! This condition was condemned by the courts as unconstitutional because it violated the fundamental right to free speech in Article 10(1)(a). In *Madhavan Nair v PP* (1975) the police had imposed a condition that speeches should not touch on MCE results (which, that year, showed massive failures in the Bahasa Malaysia paper) and the status of Bahasa Melayu as the national language. The court upheld the constitutionality of the conditions.

In addition to constitutionality, police discretion is also subject to judicial review under the doctrine of ultra vires in administrative law. This doctrine requires that an exercise of power must not suffer from illegality, irrationality and procedural impropriety.

Peaceful Assembly Act 2012: Previously under section 27 of the Police Act, citizens had to apply for a police permit for gatherings or processions of more than three people. Under the new Act there is no requirement for a police permit. Instead, organisers of assemblies must notify the authorities 10 days in advance under section 9(1). No notice is required for meetings in designated places or if the assembly is an exempted

1 The law on assemblies and processions in the Police Act 1967 is now replaced by the Peaceful Assembly Act 2012.

assembly. If, in response to a notification, the police do nothing, then, under section 14(2) silence is deemed consent. Previously, everything was prohibited unless permitted. Now everything is permitted unless prohibited. This is a significant shift in human rights thinking.

No power to ban: Under the Police Act, assemblies and processions could be prohibited outright or conditions imposed. The new Act in section 15 permits the OCPD to impose significant restrictions and conditions including the date, time and place of the assembly. However there is no power to say an outright "No" before the assembly takes place.

Time limits: Just as citizens are required to give notification of 10 days in advance, police response must also be communicated within the stated time limit of five days: section 14(1). An appeal to the minister must be decided within 48 hours: section 16(2).

Designated places: The Act permits the minister to designate places where assemblies can be held without notification to the police. Critics have charged that this is an attempt to isolate opposition gatherings in far away and un-impactful places. This is an overly cynical view. Actually it is a good idea to designate some fields, stadiums and Speakers' Corners for public assemblies.

What would be improper is if the owners of designated places indulged in selective grant or refusal of permission. If there is such abuse, judicial review is likely on the Article 8 principle of equality or the administrative law principles of reasonableness, irrationality or abuse of power.

Exempted assemblies: This Act does not apply to election campaigns, strikes, lock-outs and pickets under the Industrial Relations Act 1967 and the Trade Union Act 1959: section 1(3). It is also inapplicable to religious assemblies, funeral processions, weddings, open houses, family get-togethers, family days and meetings of societies or associations: Third Schedule, Para 9(2)(b). The words "meetings of societies and associations" are very broad and permit vast possibilities.

Right to object: All persons likely to be affected by a proposed assembly have a right to be informed and to raise objections. On a matter of principle this is acceptable. However, there is a perception that the

police may pander to extremist groups; subordinate minority rights to majority concerns; and discourage lawful but unpopular assemblies. This perception needs to be proved wrong.

Judicial review: Mercifully the Act has no ouster clauses for excluding judicial review.

Counter assemblies: The Act takes admirable note of counter and simultaneous assemblies and seeks to regulate them by giving preference to the assembly first in place and by providing for alternative sites, times and dates for the counter or simultaneous assembly.

Spontaneous gatherings: These are not contemplated by the law and are presumably not illegal.

Involuntary presence: The definition of "participant" leaves out anyone who is unintentionally or involuntarily present at an assembly. This will be a useful defence to a citizen who is the subject of a prosecution.

Despite the above wholesome features, the reformed law still bristles with some controversial provisions.

Street protests: These are a form of an assembly in motion, a procession or a demonstration. They were permitted subject to regulation under section 27 of the Police Act. They are now absolutely banned. The law has taken a more restrictive stand than before.

Other ambiguous aspects of the law are that a street protest by definition involves "walking in a mass march or rally". So, if there is no walking but a motorcade of cars or bikes, that will not be caught by this law and the authorities may have to use section 268 Penal Code or some provision in the Road Traffic Act 1987.

Further, though "street protests" are banned, the Act refers here and there to "processions" and "assemblies in motion". One has to struggle to understand the distinction between a lawful procession and an unlawful street protest.

Police discretion: Under the Police Act police discretion to grant or withhold a permit was more or less unfettered and the power to impose conditions was very wide though subject to occasional judicial review as in *Chai Choon Hon v Ketua Polis Kampar* (1986) and *P Patto v Chief Police Officer, Perak* (1986). Similar to the Police Act, the new law in section 15 still confers on the men in blue very wide discretion to impose "restrictions and conditions", arrest without a warrant any person failing to comply with a restriction or condition, or order the assembly to disperse. It must be acknowledged however that such wide discretion is known in other jurisdictions like the UK, Finland and Queensland but subject to external review.

External control: Unlike the recent Security Offences (Special Measures) Act 2012 which subjected the powers of the police and the minister to judicial control, this Act makes no effort to subject police discretion to external, non-executive control. An appeal lies to the minister which basically means there is an appeal from the executive to the executive. Fortunately however, there is no ouster clause and judicial review on the first principles of administrative law is a possibility.

Public place: These are defined too broadly to include a private place that is open to or used by the public by the express or implied consent of the owner or on payment of money. This means that private premises, hotels and halls to which the public is invited or permitted are deemed public places!

Constitutionality: It remains to be seen whether the courts will review the constitutionality of some parts of this law. Issues germane for discussion may be the following:

The total ban of street protests without linking it to public order and national security may well fall foul of Article 10(2).

The ban on people under-21 organising an assembly may be challenged as a violation of Article 10 (free speech) and Article 8 (equality). It is noteworthy that case law has established that parliamentary restrictions on human rights must be reasonable by objective standards: *Muhammad Hilman Idham*.[2]

2 *Muhammad Hilman bin Idham v Kerajaan Malaysia* (2011).

One of the grounds on which the police can exercise the power to regulate assemblies is "the protection of the rights and freedom of other persons" (sections 2, 3 and 15). These words of limitation do not occur in Article 10(2) and may therefore said to be an extra constitutional limitation. It is submitted however that in most countries including the USA and Malaysia courts have accepted implied limits on human freedoms and have often carved out common law restrictions on fundamental freedoms.

In sum, the Act has many wholesome features. But it is defective in that it imposes no objective restraints on police and ministerial discretion. Nevertheless, as judicial review is not excluded, courts may provide a proper balance between police powers and fundamental freedoms. Whether the courts will play such a balancing role remains to be seen.

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Chapter 19

Freedom of Association: Article 10(1)(c)

Freedom of association is subject to regulation by Parliament on one or more of the following grounds: security of the Federation or any part thereof; public order; morality; laws relating to labour; laws relating to education; legislation to combat subversion; and legislation to combat an emergency.

Under Article 10(1)(c), all citizens have the right to form associations.

Scope: This constitutional grant encompasses all types of groupings including political parties, trade unions, non-governmental organisations, academic, cultural, professional, sports and commercial bodies, clubs, societies and religious groups. Freedom of association includes the right to refuse to associate. A person cannot be compelled to enrol in a club, union, society, cooperative or a political party. "Closed-shop" agreements whereby it is mandatory for an employee to join the in-house trade union as a precondition of remaining in employment would be unconstitutional in Malaysia.

The right to form associations includes the right to dissolve an existing association. It also includes the right to resign from an association. In the case of *Dewan Undangan Negeri Kelantan v Nordin Salleh* (1992) the Supreme Court struck down an amendment to the Kelantan Constitution that required an assemblyman to vacate his seat if he defected from the party on whose ticket he had won his seat. A similar "anti-hopping" law in Sabah was questioned in the case of *Tun Dato Haji Mustapha v Legislative Assembly of Sabah* (1993).

The right in Article 10(1)(c) is strengthened by Article 11(2)(b), which confers on every religious group the right to establish and maintain institution for religious or charitable purposes. Further, Article 12(2) grants to every religious group the right to establish and maintain institutions for the education of children in its own religion. The Trade Unions Act 1959 and the Industrial Relations Act 1967 govern labour relations and grant rights to form trade unions, organise industrial action and, in some circumstances, to resort to strikes.

In *Dewan Undangan Negeri Kelantan v Nordin Salleh* it was held that a restriction can be challenged if it directly affects the fundamental right or the restriction's inevitable consequence is such that it makes the exercise of fundamental rights ineffective or illusory. The same case also affirmed that the power to restrict fundamental rights belongs to the federal Parliament and not to the State Assemblies.

Legislative restrictions: Rights are always accompanied by restraints. Under the authority of the constitution, freedom of association is subject to regulation by Parliament on one or more of the following grounds: security of the Federation or any part thereof; public order; morality; laws relating to labour; laws relating to education; legislation to combat subversion; and legislation to combat an emergency. The power to enact restrictive legislation belongs to the federal Parliament and not to the State Assemblies: *Dewan Undangan Negeri Kelantan v Nordin Salleh* (1992). In enacting restrictive legislation, Parliament's power is not unlimited. The existence of specific, enumerated restrictions implies that no law restricting freedom of association can be valid if it does not fall within the permissible restrictions recognised by the Constitution. In Malaysia, Parliament is not supreme. Courts have the power of judicial review if a law abridging the constitutional freedom does not fall into one of the enumerated restraints mentioned in the basic charter.

Relying on constitutional authority, Parliament has enacted a number of significant restraints on freedom of association e.g. the Societies Act 1966. This Act was originally intended to eradicate secret societies. In the past, social and sports clubs were exempt from its provisions. But as a result of amendments, the Act now requires all societies to be registered with the Registrar of Societies. A "society" includes "any club, company, partnership or association of seven or more persons whatever its nature or object, whether temporary or permanent". But the Act is

not applicable to those companies, partnerships, business associations, trade unions, universities and societies of an educational nature that are established under other specific laws. Thus, companies and partnerships are regulated by the Companies Act 2016 and Partnership Act 1961 respectively.

The Societies Act gives wide powers to the Registrar of Societies and to the minister to refuse or cancel registration or to ban a society on a number of grounds relating to security, public order and morality. A significant feature of the Societies Act is that internal disputes within a society are required to be resolved by the society itself or by the Registrar of Societies. Courts of law are not allowed to intervene. This provision was added to the Societies Act after the de-registration of UMNO as a result of the case of *Mohd Noor Othman v Mohd Yusof Jaafar* (1988).

Laws on education: The Universities and University Colleges Act 1971, the Educational Institutions Discipline Act 1976 and the Universiti Teknologi MARA Act 1976 bar students, while on campus, from expressing sympathy or support for any political party, trade union or organisation outside the educational institution. However, students are allowed when not on the campus to associate with lawful organisations outside the campus. Though elected and representative student associations are allowed, they are subject to significant operational controls by university authorities.

Other limitations: The constitutional right to association is available only to citizens. Non-citizens desiring to form associations are, however, not prevented from establishing organisations to promote common causes. They are not barred from registering a society under the Societies Act.

The right to form an association does not confer an absolute right to membership of a club or party of one's choice. Joining an association is a matter for the rules of the association and an outsider refused admission can get very little help from the Constitution: *Tierney v Amalgamated Society of Woodworkers* (1959).

It was held in *Malaysian Bar v Government of Malaysia* (1986) that the right to form an association does not include the right to manage its affairs. Thus, legal practitioners of less than seven years standing can be

forbidden by the Legal Profession Act 1976 from holding office in the Bar Council.

The right to establish a trade union does not carry with it any constitutional right to take industrial action or to go on a strike. These matters are for the Industrial Relations Act 1967 to regulate.

All in, it can be said that the legal system does permit citizens to organise themselves into political parties, NGOs and trade unions. Despite many restraints on freedom of association, a large number of political parties thrive and contest periodic elections at federal and state levels. Out of 35 political parties nationwide, 24 are opposition groups. Four of them are represented in the federal Parliament. A large number of non-governmental organisations (NGOs) exist and some have an impact on legislation and policy formulation. Many register under the Companies Act 2016 to avoid controls under the Societies Act 1966. The effectiveness of many NGOs like the Bar Council of Malaya rebuts the allegation that Malaysian society lives by government or politics alone. As an integral whole it brings about important developments on its own.

Chapter 20

Freedom of Religion: Article 11

In relation to religion every person has the right to three things – the right to profess, to practise and, subject to Article 11(4), to propagate his religion.

At the very outset, it needs to be stated that Malaysia has a record of religious tolerance that should be the envy of all plural societies. Mosques, temples, churches and gurdwaras dot the landscape. Citizens celebrate each other's religious festivals. Financial allocations and tax exemptions are granted to all religions. Foreign priests and missionaries are allowed to work in the country. Christian and Hindu festivals are marked by national holidays. Missionary schools abound. Christian missionary teachers are often retained till age 65 – a privilege not enjoyed by other religious teachers. Though Islam is the religion of the Federation, seven separate laws provide for non-Muslim religious institutions. Among them is the Superior of the Institute of the Franciscan Missionaries of Mary (Incorporation) Ordinance 1957. But there are areas of concern which need to be examined.

Cults: Does the concept of "religion" refer merely to established and ancient religions? Or does it include cults and sects with distinct philosophies and rituals of their own? The issue is as yet untested in our courts. The practice up to now has been to prosecute any Muslim or non-Muslim who is involved in "deviationist" teachings and practices. History is replete with instances of innocent people being condemned as heretics and hounded to death. For this reason it is submitted that criminalisation of religious beliefs should be a matter of last resort. But it

is understandable if a religious establishment, in order to safeguard the purity of its doctrine, resorts to ex-communication of people it regards as violators of the fundamental precepts of the faith.

Atheism: Does "religion" include non-theistic creeds such as agnosticism, free thought, atheism and rationalism? Western theory supports a broad view of religion. It is likely that in a traditional society like Malaysia with an official religion and a Rukun Negara which affirms a commitment to belief in God, atheistic practices may not receive much sympathy in the courts.

Belief in God: Is belief in God an essential aspect of religion? Our thinking on this point must be global. Not all religions are centred around God. Buddhism is an example. The Constitution should protect all faiths whether theistic or not.

Non-mandatory practices: Does freedom of religion extend only to those practices and rituals that are essential and mandatory or does it also cover practices that are optional? *Halimatussaadiah Kamaruddin v Public Service Commission Malaysia* (1992) implies that a non-mandatory practice (like wearing purdah) is not protected by Article 11. However, *Meor Atiqulrahman Ishak v Fatimah Sihi* (2000) correctly holds that the constitutional freedom extends to practices which, though not mandatory, are part of the religious tradition.

Islam: Under Article 3(1), Islam is the religion of the Federation. But all other religions may be practised in peace and harmony. However, Article 3(4) states that nothing in Article 3 derogates from any other provision of this Constitution. This means that no right guaranteed by the Constitution is extinguished as a result of Article 3(1). Also, the adoption of Islam as the religion of the Federation does not convert Malaysia into an Islamic or theocratic state. In *Che Omar Che Soh v PP* (1988) it was held that though Islam is the religion of the Federation, it is not the basic law of the land and Article 3 imposes no limits on the legislative power of Parliament.

Scope of freedom: In respect of religion, Article 11(1) gives to every person three things – the right to profess, to practise and, subject to Article 11(4), to propagate his religion. Under Articles 11 and 12, the right is available not only to individuals but also to groups and associations.

Every religious group has the right to manage its own affairs; to establish and maintain institutions for religious purposes; to acquire and own property; to administer property; to establish and maintain institutions for religious education. It must be noted, however, that the above rights are subject to local authority laws on planning permission. Under Article 11(1), freedom of religion is available to citizens as well as to non-citizens. There is no compulsion on anyone to support a religion other than his own. No person shall be compelled to pay any tax, the proceeds of which are specially allocated to a religion other than his own – Article 11(2). The implication is that imposition of tax to support one's own religion is constitutional. For example, a Muslim cannot refuse to pay *zakat* and *fitrah*. There is to be no discrimination on the ground of religion in relation to the rights of students to education or in public support for educational institutions – Articles 12(1) and 8(2). 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/her own – Article 12(3). However, a person can voluntarily participate in other people's religious activities.

There can be no discrimination on the ground of religion against employees in the public sector; in the acquisition, holding or disposition of property; and in any trade, business or profession – Article 8(2). A preventive detention order cannot be issued on the ground that a person is involved in a programme for propagation of Christianity among Malays – *Minister for Home Affairs, Malaysia v Jamaluddin Othman* (1989). Freedom of religion cannot be violated even in times of emergency – Article 150(6A).

Limitations: Like all freedoms, the right to follow one's conscience cannot be absolute.

- Under Article 3(1), the practice of religion must not disturb peace and harmony.
- Under Article 11(5), all religious freedom, whether of Muslims or non-Muslims, is subject to public order, public health, and morality.

- The restrictions on freedom of speech, assembly and association in Article 10 and on educational rights in Article 12 are also relevant because religious freedom is a bundle of many attributes.

- Propagation of one's religion to others is part of the constitutional right under Article 11. However, this right is subject to one important limitation. Missionary activity among Muslims may be regulated. State and federal law may restrict the propagation of any religious doctrine among Muslims – Article 11(4). This Article is directed not only at proselytising activities by non-Muslims, but also at propagation to Muslims by unauthorised Muslims. The purpose of this law is to protect Muslims against well-organised and well-funded international missionary activities. The restriction on proselytism has more to do with the preservation of public order and social harmony than with religious priority. Malays are deeply attached to their religion. Any attempt to weaken a Malay's faith may be perceived as an indirect attempt to erode Malay power. Conversion out of Islam would automatically mean deserting the Malay community due to the legal fact that the definition of a Malay in Article 160(2) contains four ingredients – professing the religion of Islam is one of them.

- Article 12(3) implies that persons can be required to receive instruction in or to take part in any ceremony or act of worship of his own religion. This appears to pose problems for the constitutional rights of non-believers.

- Article 11(2) implies that we may be required to pay taxes to support our own religion.

- Freedom of religion does not confer a right to refuse to take part in patriotic activities. Thus, a policy requiring teachers to take a national pledge and sing the national anthem does not violate freedom of religion – *Nappali Peter Williams v Institute of Technical Education* (1999).

- Under Article 12(3), the religion of a person under 18 years is to be decided by his parent or guardian – *Teoh Eng Huat v Kadhi, Pasir Mas* (1990). This position is in accordance with international law as contained in Article 18(4) of the International Covenant

on Civil and Political Rights 1966. American jurisprudence is, however, more tolerant of a minor's right of conscience if the minor has arrived at the age of discretion. In the US, the parent's right of control has to yield to the child's constitutional right.

Contentious issues: In the field of religious freedom, a number of contentious issues have divided society. Foremost among them are "deviationist practices"; propagation of other religions to Muslims; use of the holy term "Allah" by some Christian groups in their sermons; and attempted conversions by some Muslims out of their faith.

Deviationism: Religious groups, whether Muslim or non-Muslim, who are not mainstream face severe scrutiny for "deviationist" activities. The law is particularly severe on Muslims who violate the basic precepts of their faith. As Islam is the religion of the Federation and Malays are, by constitutional definition, required to be of the Muslim faith, they are liable to prosecution if their conduct is violative of Islamic precepts. No Muslim can lay a claim to opt out of Syariah laws – the constitutional guarantee of freedom of religion notwithstanding. The notion that freedom to believe includes the freedom not to believe is unlikely to be accepted in Malay society and in national courts. Despite international norms to the contrary, the impact of local culture and beliefs cannot be discounted. Nevertheless, it is conceivable that state enactments that criminalise deviationist activities may be challenged as violative of Article 11 of the Constitution which gives to every person, including a Muslim, the right to profess and practise his religion save to the extent that he/she does not endanger public order, public health or morality. The difficulty is that for Muslims the freedom in Article 11 is qualified by Item 1 of the State List in the Ninth Schedule. State enactments are permitted to create and punish offences by persons professing the religion of Islam against precepts of that religion. However, the power to punish relates only to those who "profess the religion of Islam". A Muslim who abandons and migrates away from his faith is no more professing the religion and it is arguable that he is therefore not subject to the jurisdiction of the Syariah courts. It is submitted, therefore, that despite the existence of the Ninth Schedule, the proper recourse against deviationist activities is to resort to ex-communication and not to criminalisation. Ex-communication should be resorted to after the parties concerned have been given a full and fair opportunity to defend themselves and to explain their conduct.

Right to convert: The right to convert out of one's faith is not mentioned explicitly in the Malaysian Constitution though it is alluded to in Article 18 of the International Covenant on Civil and Political Rights 1966. The practice of the Malaysian legal system has been to regard the right to convert as part of the religious liberty. But lately, several states have enacted laws to prevent Muslims from converting or to forcibly rehabilitate Muslims who opt out of their faith. Variously referred to as Restoration of Aqidah or apostasy or murtad laws, these enactments shake constitutional theory to its roots. They pit state law against the Federal Constitution and national law against international law. They pose a challenge to constitutional supremacy on religious grounds. From a constitutional law point of view, apostasy laws raise important constitutional issues under Articles 11, 5, 3, 10 and 12.

The freedom in Article 11(1) is broad enough to permit change of faith. Though Article 11(4) restricts propagation of any religion to Muslims, the law nowhere forbids voluntary conversion of a Muslim to another faith. Forced rehabilitation will be an interference with personal liberty guaranteed by Article 5(1). Habeas corpus may be applied for. The problem is that due to Article 121(1A), civil courts may be reluctant to interfere with a matter also in Syariah court hands. The *aqidah* (basic faith) laws cannot be saved by Article 3's declaration that Islam is the religion of the Federation because Article 3(4) clearly states that "nothing in this article derogates from any other provision of this Constitution." This means that Article 3 cannot override Article 11. Article 10(1)(a) guarantees speech and expression. A *murtad* (convert out of Islam) may claim that the rehabilitation law violates his rights under Article 10 unless aspects of public order can be used to defend the murtad law. Article 10(1)(c) guarantees the right to associate. Inherent in this right is the right to disassociate. Article 12(3) says that no person shall be forced to receive instruction or take part in any ceremony or act of worship of a religion other than his own. The forced rehabilitation laws will fall foul of this guarantee.

In sum, it is certain that the *aqidah* laws will trigger a massive constitutional debate that will pit religion against the Constitution and may disturb the delicate social fabric that has held us all together for 61 years.

Chapter 21

Rights in Respect of Education: Article 12

Whether education should be public or private, elitist or populist, in the national language or in the pupils' mother tongue, of liberal or professional bias – these are issues that challenge educators everywhere. What has remained constant since Merdeka is the government's determination to use education as a tool of social engineering and as an engine and catalyst for development.

The International Covenant on Economic, Social and Cultural Rights 1966 in Article 13(2) requires that "primary education shall be compulsory and available free to all" and that secondary, technical, vocational and higher education shall be made accessible to everyone. Malaysia complies with international law on this point to an admirable degree. Since Merdeka, primary and secondary education has been absolutely free. Tertiary education is highly subsidised. In the year 2000, student enrolment in public institutions from pre-school to university topped 5,701,576.

However, there is no constitutional right to receive free education. Constitutional provisions on education have more to do with federal-state relations in this area, equality and non-discrimination in public institutions of learning, respect for the linguistic rights of minorities, respect for the rights of parents to choose their children's education, medium of instruction and affirmative action policies.

Federal-state division: Under Item 13, List I of the Ninth Schedule, power to enact laws on education belongs to the federal Parliament.

Parliament has erected a phalanx of laws to regulate all aspects of formal education. Prominent statutes in this area are the Universities and University Colleges Act (UUCA) 1971, Universiti Teknologi MARA Act 1976, Education Act 1996 and the Private Higher Educational Institutions Act 1996.

Islamic education: An engaging and unresolved issue is whether Islamic religious education is in federal or state hands. One perspective is that the federal power in the Ninth Schedule in relation to "elementary, secondary, university, vocational and technical education; promotion of special studies and research..." encompasses all types of education including Islamic religious education. The other view is that under the Ninth Schedule, List II, Item 1, States have exclusive jurisdiction over "the control of propogating doctrines and beliefs among persons professing the religion of Islam." This indirectly vests the States with jurisdiction over Islamic education. Further, as Islamic religious education is not explicitly mentioned in the legislative lists of the Ninth Schedule, it can be treated as a "residual" matter that, under Article 77, falls in State hands.

Non-discrimination: Article 12(1) provides that there shall be no discrimination against any citizen on the ground only of religion, race, descent or place of birth in the administration of any educational institution maintained by a public authority or in the admission of pupils or in the payment of fees. The Article also forbids discrimination on the above grounds in providing out of the funds of a public authority, financial aid for students in any institution whether maintained by a public or private authority. In a similar vein, regulation 5 of the First Schedule of the Universities and University College Act 1971 (UUCA) requires that, subject to Article 153, membership to the universities, whether as an officer, teacher or student shall be open to all persons irrespective of sex, race, religion, nationality or class.

Article 153: Article 153(8A) provides that it shall be lawful for the King to give such directions to any university, college or institution providing education after Sijil Pelajaran Malaysia to ensure the reservation of such proportion of places for Malays and the natives of Sabah and Sarawak as the King may deem reasonable. Two engaging issues of law and politics gallop around the outskirts of Article 153. First, what proportion of places can be allocated on an ethnic basis? Specifically, can a programme or an institution cater exclusively for one ethnic

group? In India, where reservations and quotas are also permitted, the courts have ruled that no reservation should exceed 50% and that the reasonableness of the quota is reviewable by the courts: *T Devadasan v The Union of India* (1964). In Malaysia the language of Article 153(8A) – "such proportion as the Yang di-Pertuan Agong may deem reasonable." – allows greater subjectivity and discretion. Differences have always been resolved outside the courts in behind-the-scenes negotiations and compromises.

A second contentious issue is whether quotas apply to specific courses of study in which imbalances exist or to the university as a whole? Can the massive ethnic disparities in private centres of learning and in the citadels of education abroad be used to determine what is a reasonable quota for local public universities? In sum, can the public education system be used to remedy the ethnic weightage in private sector and overseas education?

Religious education: Under Article 12(2) every religious group has the right to establish and maintain institutions for the education of children in its own religion. Laws relating to such institutions shall not discriminate on the ground of religion. However, by virtue of the fact that Islam is the religion of the Federation under Article 3(1), federal and state governments are permitted to establish, maintain or assist Islamic institutions. Article 12(3) provides that no person shall be required to receive instruction or to take part in any ceremony or act of worship of a religion other than his own. Article 12(4) clarifies that for the purpose of religious instruction, the religion of a person under the age of 18 years shall be decided by his parent or guardian. The Constitution does not enlighten us as to which parent has the preferential right to determine the faith of a child. This is likely to produce controversies if the father and mother belong to different religions. It was established in *Teoh Eng Huat v Kadhi Pasir Mas* (1990) that infants have no constitutional right to receive instruction in any religion other than their own or to convert to another faith without the permission of a parent or guardian.

Private schools and universities: The educational landscape in this country has, since colonial days, been dotted with vernacular schools conducting instruction in Malay, Chinese or Tamil. Some of these schools have a fine reputation. They are open to all races and many Malays and Indians are known to enrol their kids in Chinese vernacular institutions.

Whether vernacular schools are part of our rich cultural mosaic or a hindrance to national unity are open questions. What is important is that, though not provided for in the Constitution, they are recognised by the Education Act 1996. The Act in section 28 allows "national type" schools to exist and to conduct instruction in a language other than Malay. The Act also allows private educational institutions to exist under section 73 and gives them considerable autonomy. Private universities have not fared so well. Section 6 of UUCA 1971 confers exclusive power on the Yang di-Pertuan Agong to establish a university. In 1981, the application of Merdeka University Berhad was rejected by the government on many grounds. Amongst them is that the university would use Chinese as the medium of instruction and that the setting up of a university by the private sector would be contrary to national policy. A challenge to the government's decision failed in the courts. The decision in *Merdeka University v Government of Malaysia* (1982) has, however, been overtaken by events. Private universities are now allowed by the Private Higher Educational Institutions Act 1996.

Language of instruction: Under Article 152(1), the Malay language has been declared to be the national language. However, it is also provided that except for official purposes no person shall be prohibited or prevented from using, teaching or learning any other language. Section 2 of the Education Act 1996 furthers this liberal rule by requiring that in all national schools, Chinese or Tamil languages shall be made available if parents of 15 pupils in the school so request. But in *Merdeka University v Government* (1982) it was held that every university – whether public or private – falls within the definition of "public authority" under Article 160(2). Its purpose would accordingly be an "official purpose" for which Malay must be employed under Article 152.

The rule that Malay must be the language for all official purposes is subject to some exceptions. The Yang di-Pertuan Agong may permit the continued use of English for such official purposes as may be deemed fit. In addition, the Minister of Education under section 17(1) of the Education Act may exempt any educational institution from use of Malay as the main language.

In every dynamic society, the educational scene is in a state of flux. Whether education must be public or private, elitist or uniformly structured, in the national language or in the pupils' mother tongue,

of liberal or professional bias – these are issues that challenge educators everywhere. What has remained constant since Merdeka is the government's determination to use education as a tool of social engineering and as an engine and catalyst for development.

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Chapter 22

Right to Property: Article 13

Only a ghost can exist without material property; only a slave can work with no right to the product of his effort – Ayn Rand

Property is as ancient as human society. But the importance of property as the foundation of civil society began to grow only when early people evolved from huntsmen to herdsmen and went on to the agricultural stage. In modern, liberal, democratic and capitalist societies, the right to property is regarded as indispensable for the development of the human personality. Property gives to people a sense of security. It rewards ability. It enables an industrious person to reap what he has sown and to own the products of his toil. It contributes powerfully to the production of wealth. Proponents of this right argue that if citizens are to count for anything in the state, the grant of personal freedoms is not enough. The citizens' individuality must be founded on something material over which they must have sovereign possession.

Not everyone is, however, in agreement about the ethics of private property. Marxism sought to strangulate this right by strict regulation. Social democrats and proponents of the welfare state express disquiet about the concentration of property in the hands of few and the power that this accumulation gives to a small minority to control the lives of the majority. Due to such misgivings, many economic systems place ceilings on ownership of various types of property. Taxes are used as an indirect device to redistribute wealth. Monopolies and cartels are discouraged. Prices of essential commodities are regulated. Governments often resort

to nationalisation of essential services. Private lands are often acquired or requisitioned for public purposes on payment of compensation.

Article 13: The drafters of the Merdeka Constitution sought to ensure that private property is protected but that social claims may, when necessary, trump individual claims. In Article 13, property rights of citizens and foreigners are made subject to state regulation. Article 13(1) provides that "no person shall be deprived of property save in accordance with law." Article 13(2) requires that "no law shall provide for the compulsory acquisition or use of property without adequate compensation." The impact of these clauses depends to a large extent on the meaning and scope of the terms "person," "property," "in accordance with law," "acquisition," "use" and "adequate compensation."

"Person": This includes all persons, whether natural or artificial. Thus, companies, partnerships, businesses, clubs, societies, political parties, cooperatives, NGOs, universities and other entities are just as protected in their ownership of property as humans.

"Property": With some exceptions, the right to property involves not only the physical thing itself but also the surrounding inherent rights such as exclusive use of one's possessions, the right to alienate them by sale, gift or exchange, and the right to bequeath. The right covers property in all its forms – corporeal and incorporeal, movable and immovable, tangible and intangible. Corporeal property includes material things like land and house. Incorporeal rights refer to claims like the right of way and the right to redeem mortgaged property. Chattels are movable property. Land is the best example of an immovable property. Tangible property includes money, land, dwellings, furniture and ornaments. Intangible property refers to interests like copyright, patent and trademark. Regrettably, "goodwill" was not recognised as within the protection of Article 13 in *Selangor Pilots Association v The Government of Malaysia* (1975). In this case, the pilotage business run by the association was legislated out of existence through nationalisation and handed over to the Lembaga Pelabuhan Kelang. The association's claim for compensation for the goodwill of its business succeeded in the Federal Court but was rejected by the Privy Council on the questionable ground that goodwill is not property and that, on the facts, goodwill had not been acquired. In *Station Hotels Berhad v Malayan Railway*

Administration (1977), the claim that a long-term lease is within the meaning of "property" was rejected.

In the notion of property, the landscape of the law becomes more and more slippery as one moves from the core to the periphery.

- Does "land" include all the space that is above and all the earth that is below it or only to a reasonable height and depth? The decision would have a bearing on the ownership of treasures and minerals found below the soil and on whether an overhanging branch or power cables running across a land constitute trespass?

- Does ancient use and possession of a land confer title to it or is ownership an exclusive matter of formal grant recorded in the land registry? This is a relevant issue relating to native, tribal or aboriginal lands. The recent court decision to regard the orang asli of Kampung Bukit Tampoi, Dengkil, as owners of their traditional territory breaks new ground. Under existing law, a squatter on a public or private land is a trespasser who is liable to criminal prosecution and civil suit. But if he plants crops on the land and the crops are ripe for plucking but are forcibly cleared, is the squatter entitled to any compensation on equitable grounds? The Islamic concept of *ihya al-mawat* permits a squatter, who revives dead public land, to receive an equitable interest in it. Malaysian courts grappled with the thorny issue in a Penang case and held to the contrary.

- Is a tenured public office, a job in which one is confirmed, a right to pension, a right to vote and a right to one's reputation within the perimeters of proprietary rights that are protected by the Constitution? There is little doubt they cannot be deprived save in accordance with the law.

"Law": The sanctity of property is protected against executive arbitrariness. In *S Kulasingam v Commissioner of Lands, Federal Territory* (1982) and *Philip Hoalim v State Commissioner, Penang* (1974), it was emphasised that executive acts causing deprivation of property may be challenged on the ground that they were not "in accordance with the law." In *Pengarah Tanah dan Galian v Sri Lempah Enterprise* (1979), a planning permission was granted subject to the condition that the

applicant exchanged its freehold title for a 99-year lease. The condition was declared unconstitutional. In *Pemungut Hasil Tanah v Ong Gaik Kee* (1983), it was held that inordinate delay in holding the statutory inquiry can invalidate the acquisition exercise. But what if the law is unreasonable or unjust? In *Arumugam Pillai v Government of Malaysia* (1975) and *Kulasingam v Commissioner of Lands* (1982), it was held that the words "in accordance with law" carry no element of natural justice or the American concept of due process. Whenever a competent legislature enacts a law within its jurisdiction, a citizen whose property is destroyed or deprived as a result cannot question the reasonableness of the law by invoking Article 13(1). This view came under challenge in *Ong Ah Chuan v PP* (1981) but remains entrenched. Within its jurisdiction, Parliament can enact any law to destroy, deprive, acquire, require or regulate private property. The only restrictions on its powers are that if there is compulsory acquisition or requisition, Article 13(2) requires payment of adequate compensation.

Article 13(1): It states "no person shall be deprived of property save in accordance with law." Whatever the manner of deprivation of property, the Executive must base its actions on the law. All safeguards available to property owners – whether substantive or procedural, statutory or common law, constitutional or ordinary – must be followed to the hilt. The doctrine of ultra vires and the principles of natural justice are applicable to ensure that the Executive stays within its competence, exercises its power for the purpose for which it was granted (and for no other collateral purpose), and complies with all mandatory procedural requirements. For example, in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise* (1979), planning powers were abused to pressurise the proprietor to exchange his freehold title for a leasehold title without compensation. This was an abuse of power. It was also a violation of Article 13(2) that requires adequate compensation for all property acquired. In *Lai Tai v The Collector of Land Revenue* (1960), notice of the intention to acquire and notice of the award of compensation were not served on the occupier as required by the law. The judiciary took notice of the violations.

Adequate compensation: In addition to the checks supplied by administrative law against unlawful government interference with private property, in Article 13(2), prescribes that "no law shall provide for the compulsory acquisition or use of property without adequate

compensation." Unlike in some countries like India where the quantum of compensation cannot be challenged in court, Article 13(2) and the Land Acquisition Act 1960 provide for detailed procedures for assessment of the compensation that must be paid on account of the acquisition. If the opinion of valuation experts is not acceptable to the owner, a judgment of the court can be sought. It was held in *Hock Lim Estate v The Collector of Land Revenue, Johore Bahru* (1979) that the safest guide to what fair compensation should be is the evidence of recent sales of similar lands in the vicinity. Under the Land Acquisition Act 1960, other factors that may be considered are the effect on the owner's other properties or the necessity of relocating his residence or business. But increase in the value of the acquired land because of the intended use to which it will be put in the post-acquisition period cannot be taken into account when determining compensation. Compensation is based on the market value of the property before the acquisition. The government is not made to pay for the appreciation in value of the acquired land if the appreciation is entirely due to its development plans.

What if there is delay in paying compensation? In *Tan Boon Bak v Government of the State of Perak* (1983), the plaintiffs had agreed to the award in 1974 but were offered the money only in 1981. The High Court held that this delay did not vitiate the compulsory acquisition order.

Statutory purpose: In many constitutions, the concept of "eminent domain" guarantees that private property will not be acquired or required save for a public purpose. This concept is not embedded in Article 13 but may be inferred from the Land Acquisiton Act.

Prior hearing: Under the Land Acquisition Act, there is a right to a post-acquisition hearing on the quantum of compensation. But the law is silent on the need to give a hearing before the decision to acquire the property. It was argued in *S Kulasingam v Commissioner of Lands* (1982) that the requirement of Article 13(1) that "no one shall be deprived of his property save in accordance with law" imports the natural justice rule of hearing. But the court held that "law" refers merely to enacted law and natural justice is not part of Article 13(1). This reasoning is not convincing if we turn to the definitional clause in Article 160(2) where the term "law" is defined to include common law. As common law is the foundation from which natural justice flows, it follows that natural justice is part of our legal heritage and should be allowed to fill the gaps

left by legislators. Even a cursory survey of the administrative process in relation to such decisions as demolition of dwellings in disrepair, increase of property assessments, and revocation of licences indicate that natural justice is applicable to any decision that adversely affects proprietary rights.

Within what time frame must the compensation hearing take place? Article 13(2) is silent on the matter. In *Pemungut Hasil Tanah v Ong Gaik Kee* (1983), it was held that the hearing should be convened with "all convenient speed." A seven-year delay was so manifestly unreasonable that it vitiated the acquisition exercise.

Acquisition and requisition: A number of statutes, among them Land Acquisition Act 1960 and Electricity Supply Act 1990, grant power to acquire or use private property for public purposes subject to compensation. It must be noted, however, that under Article 13(2) of the Constitution, there is no requirement to pay compensation in those situations in which the interference with property is distinguishable from acquisition. Examples of such non-compensation measures are regulation, taxation, forfeiture and destruction.

Regulation: Many laws permit the federal and state governments to regulate and restrict the use, enjoyment and alienation of private property. The Town and Country Planning Act 1976 permits the imposition of conditions and restrictions to ensure orderly development of local authority areas. No compensation is payable if, as a result of denial of planning permission or refusal of application to convert land to a different usage, the property owner suffers a loss. However the principles of ultra vires and natural justice will apply to control abuse of executive power in this area.

The Antiquities Act 1976 provides for the control and preservation of ancient and historical monuments, archaeological sites, and regulates dealings in and export of historical objects. Many regulations safeguard the public against dangerous premises and machineries. Licensing and permit requirements abound in relation to farms, factories, restaurants, hotels and places of public entertainment.

Forfeiture: Under customs and excise laws, forfeiture of prohibited or smuggled items is not subject to compensation under Article 13(2).

Nevertheless, a forfeiture order's reasonableness can be reviewed under the doctrine of ultra vires: *Oriental Insurance v Minister of Finance* (1992). The Printing Presses and Publications Act 1984, the Internal Security Act 1960, and the Customs Act 1967 permit the seizure of obscene and undesirable publications. The Dangerous Drugs (Forfeiture of Property) Act 1988 allows confiscation of harmful drugs.

Destruction: In order to control epidemics or dangerous diseases, animals and plants may be destroyed. In *Miller v Schoene* (1928), destruction by the US Government of one person's ornamental trees that were hosts to a parasite injurious to the apple orchards of others was held to be non-compensative.

Taxes: All tax measures expropriate our property. Licences and duties raise millions of ringgit from citizens. Fines burn big holes in our pockets. What proportion of our income can be forcibly seized through direct and indirect taxes has never been litigated.

Other restraints: The list of laws that impinge on property rights is very long. Rules relating to wills and succession fetter our freedom to deal with our possessions. Malay reserve land cannot be alienated to non-Malays. Laws of nuisance and negligence have a bearing on our enjoyment of our land. Everywhere in the world, police and other enforcement agencies have wide powers to enter private property and search and seize goods.

In sum, the right to property was cherished throughout history but has now become residual in nature. Parliament can impose as many restrictions on it as it deems necessary. The residue is for the citizens to enjoy.

IV. Citizenship

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Chapter 23

Grant and Termination of Citizenship

Under the Federal Constitution, there are four avenues through which citizenship can be acquired – by birth and descent; by registration; by naturalisation; and by incorporation of new territory into the Federation.

PROTECTION IN RETURN FOR ALLEGIANCE

Citizenship or nationality stands for the relationship between an individual and a state by which the individual owes allegiance and the state owes protection. It refers to the civil, political and social rights that the state confers upon certain individuals in a territory over which it has control. Corresponding to citizenship rights are reciprocal duties. Everywhere, citizens are subject to the law of treason. Some countries have provisions for compulsory conscription; others impose a duty to vote. In the Indian Constitution, along with a chapter on fundamental rights, there is a chapter on fundamental duties.

Principles and trends: Conditions of citizenship are determined within each state according to its own laws. But within an evolutionary perspective, one can note a number of principles and trends. First, birth within the boundaries of the state (*jus soli*) is regarded in many countries as the primary basis for citizenship. This concept was recognised in Malaya till 1962 but was found to be too broad as it ignored the importance of ancestral links with the country. Second, almost everywhere, lengthy residence within a state may qualify an

alien for citizenship by naturalisation. Third, in some countries like China prior to 1974, the concept of *jus sanguinis* or right of blood, allowed all Chinese, whether born within or outside China, to be regarded as citizens. In Islam, the concept of the *ummah* includes all Muslims of all races or territorial divisions. Fourth, many colonial countries had a concept of common citizenship for all subjects of the "mother country" and her colonies. Fifth, modern patterns of education, employment, trade and commerce are resulting in many people living, marrying and procreating in adopted homelands. Many economic and political groupings like the European Union are increasingly giving rise to dual or multiple citizenships. Many countries, but not Malaysia, permit dual nationalities. Dual citizenship leads to thorny issues if the states within which the individual maintains dual or multiple citizenships go to war with each other. Rules as to which citizenship has priority have not yet been developed. Sixth, in a globalised world, it is conceivable that the future will see the growth of a new type of international citizenship.

Malaysian laws: As a result of the "social contract" between the various races, millions of migrants to British Malaya were bestowed with citizenship by the Merdeka Constitution. It is believed that the number of non-Malay citizens in Malaya increased by 2 million at the stroke of midnight on August 31, 1957, due to the constitutional grant. Since then, however, the law has been considerably tightened. The law is found in Articles 14-31, the Second Schedule of the Constitution and the Federation of Malaya Agreement 1948.

Constitutional protection: Citizenship provisions are so deeply entrenched that under Articles 159(5) and 161E, any amendment to these provisions requires a special two-thirds majority in Parliament plus the consent of the Conference of Rulers and of the Governors of Sabah and Sarawak. Even in times of emergency, Article 150(6A) bars any tampering with citizenship rights.

Four categories: Under the Federal Constitution, there are four avenues through which citizenship can be acquired – (i) by birth and descent; (ii) by registration; (iii) by naturalisation; and (iv) by incorporation of new territory into the Federation.

Birth and descent: This type of citizenship is also referred to as citizenship by operation of law. Its complex details are found in Article 14(1)(a) and

the Second Schedule, Part I. It confers an automatic right of citizenship without oath and without any official discretion on the following categories of persons. First, all citizens of the former Federation of Malaya who were citizens under the pre-Merdeka Federation of Malaya Agreement 1948. Second, all persons born within Malaya on or after August 31, 1957, and before October 1962, except those whose fathers were non-citizen diplomats possessing diplomatic immunity. Third, all persons born within Malaya after September 1962 if they are descended from at least one parent who was, at the time of the birth of the child, either a citizen or a permanent resident of the country. Such persons must not be born citizens of any other country and must not be descended from a father who is a non-citizen diplomat. Fourth, persons born outside the Federation on or after Merdeka Day if their father was a citizen at the time of (the child's) birth or the father was then in government service with the Federation or a state. Fifth, every person born outside the Federation if his father was a citizen at the time of the child's birth and the birth was registered at a Malaysian consulate within one year or such time as is allowed by federal law. Sixth, persons ordinarily resident in Sabah, Sarawak or Brunei on Malaysia Day (September 16, 1963) if they were before Malaysia Day citizens of the United Kingdom and colonies and either were born in Sabah and Sarawak or had become citizens in these states by registration or naturalisation. Seventh, persons born in Singapore if at the time of the birth of the child, at least one parent was a citizen of Malaysia.

Registration: This method of acquiring citizenship applies to four categories of persons. First, a foreign woman married to a Malaysian citizen is entitled to be registered as a citizen if she is of good character, has resided in the Federation for two years preceding her application and intends to reside permanently. The two-year "residence" has been interpreted to mean two years' permanent residence. Critics refer to this as the "kitchen-route" to citizenship. It is not available to foreign males who wed Malaysian females and settle down in this country. Second, under Article 19(1)(b) a person under the age of 21 can be registered as a citizen if at least one of his parents is a citizen of Malaysia. Third, in exceptional circumstances, the federal government may make any person under the age of 21 a citizen. Fourth, any person over 18 who was born in Malaysia before Merdeka Day is entitled to citizenship if he has resided in Malaysia for an aggregate of five years in the seven

years preceding the application, is of good character, has elementary knowledge of Malay, and intends to reside here permanently.

Naturalisation: Under Article 19, residence for 10 out of the 12 years immediately preceding an application, together with good character and sufficient knowledge of Malay, may qualify a person of 21 years and above for naturalisation.

Incorporation of territory: If any territory is admitted into the Federation, Parliament may by law determine what persons are to be citizens by reason of their connection with that territory.

Gender bias: The Malaysian law on citizenship is riddled with sex bias and has become irreconcilable with the amendment to Article 8(2) of the Constitution that forbids discrimination on the ground of gender. The two most important weaknesses of the law are that for some categories of citizenship, descent from a male citizen is required. Descent from a Malaysian female carries no weight. Second, male citizens marrying foreign females are privileged to have their wives acquire nationality after two years of residence. Female citizens tying the knot with foreigners have no such privilege. Their husbands have to wait 12 years to be eligible for a discretionary grant. How far these aspects of the law will be modified to accommodate the tide of gender equality remains to be seen.

TERMINATION OF CITIZENSHIP

Just as citizenship can be acquired, so can it be terminated by renunciation or deprivation.

Renunciation: Under Article 23(1) any citizen above 21 who is of sound mind may renounce his citizenship if he is, or is about to become, a citizen of another country. Married women who wish to renounce may do so even below age 21. A declaration of renunciation can be rejected by the federal government in times of war. This is to prevent citizens from escaping conscription and compulsory service for national purposes which are permitted under Article 6(2).

Deprivation: The laws of many countries provide for exceptional circumstances in which the state can deprive its subjects of their citizenship. This is because nationality carries with it a duty of allegiance and, when allegiance ceases, the state's reciprocal duty of protection can also be withdrawn. Under the Constitution of Malaysia, there are five broad grounds to permit the withdrawal of a citizen's nationality.

Acquisition of foreign citizenship: If any citizen has acquired by registration, naturalisation or other voluntary and formal act (other than marriage) the citizenship of any other country, Article 24(1) permits the withdrawal of his citizenship. If any citizen has claimed and exercised in a country outside the Federation, any rights which are given exclusively to citizens of that country, this is a ground for deprivation under Article 24(2). Examples of such rights are the right to vote and the application for, or the holding of, a foreign passport. Malaysian law does not permit dual nationality. If a woman, who is a citizen by registration under Article 15(1), acquires the citizenship of any country outside the Federation by virtue of her marriage to a non-citizen, the federal government may under Article 24(4) deprive her of citizenship.

Disloyalty: Anyone who is a citizen by registration (under Article 16A or 17) or naturalisation (under Article 19) may be deprived of citizenship on a number of grounds listed in Article 25. First, if he has shown himself to be disloyal or disaffected towards the Federation. Second, if he has traded or communicated with an enemy during war. Third, if within five years of gaining citizenship by registration he has been imprisoned in any country for more than 12 months or fined more than RM5,000 or its equivalent. Fourth, if he has, without the federal government's approval, served a country or agency outside Malaysia in a job that required him to take an oath of allegiance. Fifth, if he has been continuously absent from Malaysia for five years. The above grounds are not applicable to citizens by operation of law.

False representation: Citizens by registration or naturalisation can, under Article 26(1), be deprived of citizenship if their certificates were obtained by fraud or false representation etc.

Marriages of convenience: Under Article 26(2), a woman can be deprived of her citizenship if she acquired citizenship by virtue of her marriage and the marriage dissolves within two years.

Children of person losing citizenship: If a person's citizenship is terminated under Article 24(1) or 26(1)(a), his or her child below 21 may also be deprived of his citizenship: Article 26A.

Safeguards: Of all the rights available to a citizen, the right of citizenship is the most basic of all. If this right is taken away, most other rights suffer eclipse as well. The Constitution has, therefore, provided a number of safeguards to all persons facing deprivation orders.

No uniform power: The government's power to revoke citizenship is broader or narrower depending on which category of nationality a person holds. A citizen facing a deprivation order may contest that the power being exercised does not apply to his category of citizenship.

Statelessness: Under Article 26B(2), a deprivation order cannot be made against a person "if the government is satisfied that as a result of the deprivation he would not be a citizen of any country." The purpose of this safeguard is to prevent people from becoming stateless. This is, unfortunately, what happened in *Minister of Home Affairs v Chu Choon Yong* (1977). But the court refused to interfere on the ground that, on the date of the deprivation order, the minister was satisfied that statelessness would not result. What happened afterwards did not invalidate the order. This decision deprives Article 26B(2) of all effect.

Notice: Under Article 27(1), notice in writing must be given informing the person concerned of "the ground" on which the order of deprivation is proposed. In *Lim Lian Geok v The Minister of the Interior, Federation of Malaya* (1964), it was argued that Article 27(1) requires the government to inform the person concerned of the particulars or the details of what was alleged against him. The Privy Council dismissed this argument. "The word 'ground' refers to that part (or those parts) of Articles 24, 25 or 26 which is (or are) being involved..." The result of this decision is that there is no requirement to give particulars at this preliminary stage.

Inquiry: Under Article 27(2), the person concerned has a right to have his case referred to a Committee of Inquiry. If the person concerned applies to the Committee, the federal government has a duty to appoint such a Committee consisting of a Chairman with judicial experience and two other members. The Committee shall hold an "inquiry." At the inquiry, principles of natural justice shall apply. The person concerned shall have

a "right to be heard." Particulars shall be supplied to him at this stage: *Lim Lian Geok* (1964). But in *Mak Sik Kwong v Minister of Home Affairs, Malaysia* (1975), it was held that confidential information such as intelligence reports, transcripts of the proceedings before the Committee, and the Committee's report need not be shown to the citizen if such disclosure would be prejudicial to public interest.

Report: The Committee has a duty to submit a report to the government and the government "shall have regard to the report." However, "shall have regard" does not imply a duty to follow the recommendations of the Committee: *Liew Shin Lai v Minister of Home Affairs* (1970).

Citizenship rights abroad: In relation to deprivation orders under Article 24(2), the minister is required to satisfy himself that a citizen has voluntarily exercised, in a country outside the Federation, rights which are available exclusively to citizens of that country. But in *Mak Sik Kwong* (1975), the court held that the question as to whether residence and education in China were rights exclusively available to Chinese citizens was for the minister, and not for the court, to decide.

Finality of decisions: Section 2, Part III of the Second Schedule states that a decision of the federal government (relating to deprivation) "shall not be subject to appeal or review in any court." Does this ouster clause prevent the courts from examining the validity of a deprivation order? In several cases, the courts have held that judicial review is not totally barred. In *Soon Kok Leong v Minister of Interior, Malaysia* (1968), it was held that the section 2 did not prevent the application of an order of certiorari if there was excess of jurisdiction or error of law. A similar power was asserted by the courts in *Re Soon Chi Hiang* (1969), *Mak Sik Kwong* (1975) and *Mak Sik Kwong (No. 2)* (1975).

In sum, it can be stated that despite some judicial assertiveness, the federal government enjoys vast, and mostly, unreviewable powers to grant or deprive nationality. Matters of citizenship are, everywhere in the world, so politically sensitive that they constitute an area in which courts are reluctant to review ministerial discretion.

V. Constitutional Institutions

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Chapter 24

The Conference of Rulers

The Conference of Rulers has been invested with a number of critical constitutional functions that can protect constitutional supremacy, rule of law and the position of Islam in the legal system. The Conference is well suited to promote good governance and protect the social contract on which this nation was founded.

INTRODUCTION

The mystique of the monarchy is best reflected in the unique institution of the Conference of Rulers which consists of Their Royal Highnesses, the nine Malay Rulers and the Governors (Yang di-Pertua-Yang di-Pertua Negeri of the States of Malacca, Penang, Sabah and Sarawak). This august assembly dates back to July 1897 when it met for the first time in Kuala Kangsar, the citadel of the Sultan of Perak.

Under the Federal Constitution, the Conference of Rulers has been invested with a number of critical constitutional functions that can protect constitutional supremacy, rule of law and the position of Islam in the legal system. The Conference is well suited to promote good governance and protect the social contract on which this nation was founded. Whether it performs these functions or not is, however, another matter.

When the Conference meets to elect the Yang di-Pertuan Agong and the Deputy Yang di-Pertuan Agong, to remove the Yang di-Pertuan Agong, to deliberate on a matter relating solely to the privileges, position, honours

and dignities of Their Royal Highnesses or to decide on religious acts, observances or ceremonies, the four state Governors take no part in the deliberations.

CONSTITUTIONAL FUNCTIONS

The main functions of the Conference are as follows:

Election of the King: Under Article 38(2) the Majlis Raja-Raja has the important constitutional function of electing the Yang di-Pertuan Agong and the Deputy Yang di-Pertuan Agong. The significance of this power to elect the King is that the Yang di-Pertuan Agong is in some respects the delegate of the Majlis Raja-Raja at and is accountable to the Majlis.

Dismissal of the King: The Majlis Raja-Raja has the great and dramatic power to dismiss the Yang di-Pertuan Agong. Though never exercised, this remarkable power under Article 38(6) probably exerts a significant pressure on the King to respect the wishes of his brother rulers.

Legislative veto: The Majlis Raja-Raja has the power to veto federal legislation and constitutional amendments on ten critical and sensitive issues.

(i) Any law affecting the privileges, position, honours or dignities of the Rulers: Articles 38(1), 159(5).

(ii) Any law altering the boundaries of a state: Article 2(b).

(iii) An amendment to Article 70 of the Constitution that deals with the precedence of Rulers.

(iv) An amendment to Article 71(1) that guarantees rights and privileges of the Ruler to succeed to the state throne.

(v) An amendment to Article 10(4). Article 10(4) permits restrictions on the questioning of "sensitive issues".

(vi) An amendment to Articles 63(4) and 72(4) of the Constitution that forbid seditious speeches on the floor of Parliament and State Legislative Assemblies.

(vii) An amendment to Article 152 dealing with Bahasa Melayu as the national language.

(viii) An amendment to Article 153 on special position of Malays and the natives of Sabah and Sarawak.

(ix) Any amendment to provisions of Part III regarding citizenship.

(x) Any amendment to the procedure of Article 159(5) that requires consent of the Conference of Rulers.

Constitutional appointments: The Majlis Raja-Raja has the right to be consulted before several critical federal posts are filled. Among these are: judges of the superior courts, the Auditor General, and chairpersons and members of the Public Services Commission, Education Service Commission and the Election Commission. Though "consultation" does not amount to "consent", a constitutional convention seems to have developed that if the Conference has reservations about an appointment, the Yang di-Pertuan Agong will withhold his assent to it despite his general duty to act on the advice of the Prime Minister under Article 40(1) and 40(1A).

Religion of Islam: Though the Sultans are the head of Islam in their states, the Conference, in order to promote unity, can agree or disagree to the extension of any religious acts to the Federation as a whole.

Special position of Malays and natives: Article 38(5) requires that the Conference be consulted before any changes in policy relating to privileges of the Malays and the natives of Sabah and Sarawak are made.

Pardon: Under Article 42(5) the Conference may exercise the power of pardon in relation to the Yang di-Pertuan Agong, the Sultans and their consorts after considering any written opinion of the Attorney General.

Special Court: If the Yang di-Pertuan Agong or a Sultan is subject to judicial proceedings in a civil or criminal court, Article 182 requires that the action be commenced in a Special Court of five judges, two of whom shall be nominated by the Majlis Raja-Raja.

National policy: Under Article 38(2), the Conference has been given the power to deliberate on questions of national policy and "any other matter it thinks fit". The matter may relate to a federal or state power or a secular or religious issue. This role contains tremendous potential. In relation to it, the Constitution invests the conference with a unique unifying and advisory role.

It is notable that this function is non-discretionary because the rulers are accompanied by the prime minister and the chief ministers and are bound by any advice tendered. Further, the views of the Conference are not binding on the federal government.

Nevertheless, the very fact that the Constitution explicitly authorises the Conference of Rulers to deliberate on questions of national policy and on "any other matter it thinks fit" points to the possibility that the Conference can ask the government to supply information and justify policies. The Official Secrets Act 1972 cannot be used to withhold information from the Conference of Rulers.

Scrutiny by the Conference can supply check and balance and promote openness and transparency in government. There is some potential for influencing the nation's goals and policies, for promoting unity and reducing inter-ethnic conflicts. One must remember that even in the UK the constitutional monarch is not prevented from "advising, cautioning and warning".

Because of the prestige of their offices, and the long years on the throne, the Sultans can bring to bear on the deliberations of the Conference, a large fund of expertise in public affairs. There is a large potential for statesmanship, for providing a check and balance in government and for providing a unifying, dignifying and stabilising influence.

Chapter 25

The Yang Di-Pertuan Agong

Most of the constitutional powers of the King are not personal prerogatives but exercisable under Article 40(1) and 40(1A) on the advice of the Prime Minister or other constitutional agencies. The overall constitutional position is that the Yang di-Pertuan Agong performs two categories of functions: non-discretionary functions exercised on advice and a small number of critical discretionary functions.

Malaysia has a unique system of an elected, rotational monarchy at the federal level. Under Article 38(2) the Yang di-Pertuan Agong (the federal monarch) and the Deputy Yang di-Pertuan Agong are elected by their brother Rulers for a fixed period of five years.

Despite the august position of the King, the law in Article 38(3) provides that the Yang di-Pertuan Agong can be removed from office by the Conference of Rulers. The King shall also cease to exercise the functions of his office if charged with an offence in the Special Court. He can also resign under Article 32(3).

Hundreds of provisions in the Federal Constitution and federal laws confer on the Yang di-Pertuan Agong (YDPA) vast powers in relation to the executive branch, the legislative branch, the judicial branch, matters of Islam, emergency proclamations and the armed forces. For example:

- Under Article 43(2)(a) the YDPA shall appoint a Prime Minister (PM) to preside over the Cabinet "a member of the House of Representatives who *in his judgement* is likely to command the confidence of the majority of the members of that House".

- Under Article 43(2)(b) he appoints other ministers and deputy ministers on the advice of the PM.

- Under Article 41 the YDPA is the supreme commander of the Armed Forces.

- Under Article 150(1) he has the power to proclaim an emergency: "If the Yang di-Pertuan Agong is satisfied that a grave emergency exists ... he may issue a Proclamation of Emergency ..."

- Under Article 66 [but subject to 66(4A)] his assent is required before a Bill can become law.

- He appoints 44 Senators to the Dewan Negara: Article 45(1).

- He appoints judges of the superior courts: Article 122B.

- He can remove judges in accordance with Article 125.

- He is the head of Islam in eight regions of the Federation – the three Federal Territories, his own state, Malacca, Penang, Sabah and Sarawak.

The above provisions are subjectively worded and, if read literally, appear to confer clear discretionary powers on the Yang di-Pertuan Agong in the whole field of government. It is as if the country is ruled by an absolute monarch. Actually, the constitutional position is quite different. Most of the above powers of the King are not personal prerogatives but are exercisable under Article 40(1) and 40(1A) on the advice of the Prime Minister or other constitutional agencies. The overall constitutional position is that the Yang di-Pertuan Agong performs two categories of functions:

A. Non-discretionary functions exercised on advice.

B. Discretionary functions.

NON-DISCRETIONARY FUNCTIONS EXERCISED ON ADVICE

As a constitutional monarch the Yang di-Pertuan Agong reigns, he does not rule. He is Head of State but not Head of Government. He is the *de jure* head of state but the *de facto* head of the government is the Prime Minister. A King is generally bound to act on the advice of his elected political executive or some other agency (like the Pardons Board) specified in the Constitution and federal laws. This conclusion is based on Articles 40(1), 40(1A) and 39:

Article 40(1): This is a generic and over-arching provision which reads that "in the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong *shall* act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet..." Article 40(1) must be read into or grafted onto every provision, whether in the Federal Constitution or in any federal law that confers on His Majesty any power or function. No legal provision conferring power on the King must be read in isolation. All Articles conferring power on the King must be read in the light of Article 40(1).

There is considerable case law to support this view: *Stephen Kalong Ningkan v Tun Abang Haji Openg* (1967); *Stephen Kalong Ningkan v Government of Malaysia* (1968); *Karam Singh v Menteri Hal Ehwal Dalam Negeri* (1969); *N Madhavan Nair v Government of Malaysia* (1975); *Teh Cheng Poh* (1979); *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia* (1981); *Dato Seri Anwar Ibrahim v Perdana Menteri Malaysia* (1998); *Abdul Ghani Ali* (2001).

Article 40(1A): Article 40(1) is further reinforced by Article 40(1A) that the Yang di-Pertuan Agong shall act on advice.

Article 39: This Article states that "the executive authority of the Federation shall be vested in the Yang di-Pertuan Agong". But it is qualified by the following words:

Executive authority is "exercisable subject to the provisions of any federal law and of the Second Schedule". Executive authority is exercisable "by him or by the Cabinet or any Minister authorised by the Cabinet".

"Parliament may by law confer executive functions on other persons". According to Sheridan & Groves "Article 39 makes clear, there is a distinction between the person in whom executive authority is vested and the person or body of persons by whom it is exercisable". [*The Constitution of Malaysia*, 4th Edition, p 133.]

The above non-discretionary functions of the Yang di-Pertuan Agong are divisible into three categories:

1. Functions exercisable on the advice of the PM under Article 40(1), 40(1A) and 39. Most of the functions of the King fall under this category.

2. Functions exercisable on the advice of the PM but after "consultation" with the Conference of Rulers. Consultation is not the same thing as "consent". Nevertheless, the Conference is not a rubber stamp. It is known that its wishes often make or break a decision because, despite Article 40(1) the King is unlikely to go against the wishes of brother Rulers.

3. Functions exercisable on the advice of other constitutional bodies like the Islamic Religious Affairs Council under Article 3(5) and the Chief Justice of the Federal Court under Article 122(1A).

DISCRETIONARY FUNCTIONS

Within a narrow field, the Constitution places on the shoulders of the monarch the awesome burden of making critical decisions on affairs of state in his personal wisdom. These situations are divisible into three overlapping categories:

- Three Article 40(2) powers in relation to which the Constitution explicitly confers a discretion: Article 40(2)(a), (b) and (c).

- "Any other case mentioned in the Constitution": Article 40(2).

- Matters not explicitly covered by the Constitution but which may be regarded as "reserve", "inherent", "residual" or "prerogative" powers of a Head of State permitting personal discretion.

Three Article 40(2) powers: In unmistakable language the Constitution confers on His Majesty the Yang di-Pertuan Agong some discretionary powers that can change the course of national politics. Among them are the following:

(i) *Appointment of the Prime Minister under Article 40(2)(a) and 43(2)(a)*: It is expressly stated in Article 40(2)(a) that appointment of the PM is a discretionary power. Under Article 43(2)(a) "the Yang di-Pertuan Agong shall first appoint as ... Prime Minister to preside over the Cabinet a member of the House of Representatives who *in his judgement is likely to command* the confidence of the majority of the members of that House".

Note, however, that though the discretion is undoubted, it is not absolute. The PM must come from the lower House. He must be likely to command the confidence of the majority in that House. If a party or coalition has an absolute majority, its leader has a democratic right to be commissioned as PM and the King has no personal discretion. But note some difficult precedents from the States. A majority of the scholars believe that at the federal level, only if there is a "hung Parliament" or a loss of majority due to the death, defection, resignation or disqualification of MPs, does the King's discretion come alive.

The law is similar for the Sultans and the Governors in the States though there have been some spectacular, instances of royal assertiveness in this area. In Terengganu in 2008 the incumbent leader with majority support, Dato' Seri Idris Jusoh, was not appointed by the Sultan. In Perlis in 2008, Shahidan Kassim, the incumbent Menteri Besar was refused appointment. In Selangor in 2015 Dr Wan Azizah, the choice of the ruling Pakatan coalition, was bypassed by the Sultan. These precedents arouse the belief that in the states the Sultans have a personal discretion as to who to appoint.

(ii) *Dissolution of Parliament*: Under Article 40(2)(b), the King has undoubted power to refuse a premature dissolution of the Dewan Rakyat. Thus, if a PM loses his majority in the House and wishes to return to the people for a fresh mandate but the King is satisfied that an alternative government is viable, he may refuse dissolution. However, if a PM is firmly in the saddle, and wishes

to call an early election, then conventionally the monarch does not stand in the way and lets the PM choose the timing of the dissolution.

(iii) *Requisitioning of the Conference of Rulers under Article 40(2)(c)*: The King may act in his discretion in the requisitioning of the Conference if it is concerned solely with the privileges, positions, honours and dignities of Their Highnesses.

Any other case mentioned in this Constitution: Under Article 40(2) this "any other case" category is not clearly defined, explained or precisely explicated. It is submitted that what is meant is that discretion exists (i) in any other case mentioned *explicitly* in this Constitution, or (ii) because of necessary implication. One has to scan the entire Constitution to determine these areas. A partial list would be:

(i) *Right to ask for any information from the government: Article 40(1).* This means that there is no Official Secrets Act 1972 against the YDPA. This provision is of tremendous significance to ensure openness and accountability. In India, Rajiv Gandhi was almost dismissed because he tried to withhold the Bofours Arms bribery scandal report from the President.

(ii) *Delaying legislation for 30 days under Article 66(4A).*

(iii) *Some constitutional appointments*: Appointments to the Public Service Commission under Article 139(4) and to the Education Service Commission under Article 141A(2) are in the King's discretion but only after he has considered the advice of the PM and consulted with the Conference of Rulers. Likewise, in appointing members of the Election Commission the King "shall have regard to the importance of securing an Election Commission that enjoys public confidence": Article 114(2).

Un-enumerated, residual, prerogative, reserve, inherent powers: In addition to the constitutionally conferred discretionary powers mentioned in Article 40(2), there are probably other instances where residual, reserve, prerogative and inherent powers of the Yang di-Pertuan Agong may come into play. We have to remember that life is

larger than the law and no Constitution is exhaustive or can anticipate every contingency. The residual power situations may be the following:

(i) *Appointment of caretaker government*: The Constitution is thunderously silent about who manages the affairs of state during the dissolution of Parliament. Constitutional conventions in the UK dictate that the government that advised dissolution continues in a caretaker capacity. Nevertheless, the appointment of a neutral caretaker government during a dissolution is within the realm of possibility under Article 43(2). Appointment of a neutral caretaker government during the dissolution of the Dewan Rakyat is something that has never been done before but is within the realm of possibility under Article 43(2).

(ii) *Advice of caretaker government*: The case of *Public Prosecutor v Mohd Amin bin Mohd Razali* (2002) ruled that in the interim period after a dissolution, the monarch is not bound by the advice of a caretaker government.

(iii) *Dismissal of a Prime Minister*: Article 43(5) mentions the power of the King, acting on the advice of the Prime Minister (PM), to remove "Ministers *other than the Prime Minister*". To some scholars, this implies that the PM, once appointed, is never removable by the King. He is only removable only if he loses the confidence of the majority of the members of the Dewan Rakyat. To this proposition some exceptions must be noted:-

    First, after the decision in *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* (1966) it was the law that this dismissal must be done only by a vote of no-confidence in the state legislative assembly (or Dewan Rakyat under Article 43(4)). However, the Perak precedent of 2009 (the *Nizar* case)[1] laid down that the members' loss of confidence can also be expressed in other ways e.g. by informing the Sultan outside the Assembly of their lack of confidence in the Menteri Besar.

    Second, the *Nizar* decision is worthy of support for a number of reasons:

1 *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin* (2009)

- A Prime Minister facing a vote of no confidence may seek to avoid facing Parliament by advising the King to adjourn Parliament for up to six months under Article 55(1).
- A politically partisan Speaker may disallow a resolution for a vote of no confidence to be introduced.
- A politically partisan Speaker may suspend some opposition MPs from the House or bar them from attending (as happened in Perak in 2009) in order to prevent the vote of no confidence from passing.
- The PM may lose the confidence of the Dewan Rakyat; advise dissolution; fail to secure the King's consent to a dissolution; and yet refuse to step down contrary to Article 43(4). In such a situation, the King has no choice but to remove him from office. This is similar to the *Nizar* case in Perak.
- If the caretaker PM (who called the General Election) fails to obtain a majority of the lower House seats but refuses to step down, the King can force him to resign.
- If at the ruling party's internal election, the PM loses his party's leadership position but does not resign a PM, or if he is expelled from the party, then the King may be constitutionally justified in sacking him. The "doctrine of necessity" may assist the unusual exercise of power.

Lately, a view has been expressed that the Yang di-Pertuan Agong can dismiss a PM for abuse of power or if the PM loses the confidence of the general population even though he maintains a majority in the Dewan Rakyat. It must be stated that the population at large has no power to dismiss a PM except at an election. There has been no example of a Malaysian Ruler dismissing an incumbent simply because of abuse of power.

However, the Commonwealth has many examples of the Head of State dismissing the PM even without a vote of no confidence by the MPs. In Australia in 1975 Governor-General Sir John Kerr dismissed PM Whitlam even though Whitlam had a majority

in the House of Representatives. Whitlam's "failing" was that his annual budget was defeated in the Senate and there was, therefore, a financial crisis in the country. In India in 1987 the President contemplated dismissing PM Rajiv Gandhi because of Gandhi's refusal to supply the full report on the Bofors defence scandal that implicated Gandhi. In Pakistan President Ghulam Ishaq Khan sacked PM Benazir Bhutto (1990) and PM Nawaz Sharif in 1993 on alleged corruption.

(iv) *Grant of honours*: The Federal Constitution, unlike State Constitutions, is silent on this matter of honours. The power is, therefore, a prerogative power.

(v) *Power of pardon*: This power and the manner of its exercise on the advice of the Pardons Board are specifically provided for in Article 42. Yet, the Supreme Court in *Superintendent of Pudu Prison v Sim Kie Choon* (1986) stated that pardon is a discretionary, prerogative power.

(vi) *Refusing consent to unconstitutional legislation*: Suppose the government and Parliament try to pass laws in disregard of constitutional safeguards. Is the Yang di-Pertuan Agong bound to give his consent under Article 40(1) or does he, as part of the check and balance mechanism, have a right to demand compliance with procedural provisions.

- Article 2(b) requires the consent of the State Assembly and the Majlis Raja-Raja before the boundary of a State is altered.

- Article 159(3) requires a two-thirds majority for most constitutional amendments.

- Article 159(5) requires a two-thirds majority plus the consent of the Majlis Raja-Raja to 10 types of constitutional amendments.

- Article 161E mandates the prior consent of the Governors of Sabah and/or Sarawak to amendments that affect our East Malaysian States.

Some commentators argue that the King is absolutely bound by advice and it is for the courts to set things right. It is submitted that this is too narrow a view of the Malaysian monarch's powers. His Majesty's oath includes fidelity to the laws and the Constitution and this requires him to ensure that the Constitution is never subverted.

(vii) *Other unconstitutional conduct by the Executive*: In other situations of blatantly unconstitutional conduct by the political executive, the King may have to exercise his reserve power to safeguard the Constitution. The influence of a constitutional monarch can never be undermined though this will have to be in an exceptional or revolutionary situation where the survival of the state is at stake.

Our learned and late Sultan Azlan Shah, writing in 1986, summed up the situation beautifully. "A King is a King, whether he is an absolute or a constitutional monarch...It is a mistake to think that the role of a King...is confined to what is laid down by the Constitution. His role far exceeds those constitutional provisions".

Chapter 26

The Malay Rulers in the States

The political powers of the State Rulers under their State Constitutions are similar to the constitutional powers of the Yang di-Pertuan Agong under the Federal Constitution. However, State Rulers have larger powers than the Yang di-Pertuan Agong over such matters as Islam, Malay adat, appointment of a Menteri Besar and conferment of honours.

The Rulers in the nine Malay States are known as "Sultans" in the states of Johore, Kedah, Kelantan, Pahang, Perak, Selangor and Terengganu, "Raja" in Perlis and "Yang di-Pertuan Besar" in Negeri Sembilan.

Historical position: In the early history of Malay monarchy, the Rulers had nearly absolute powers. But from 1511 to 1946, successive Portuguese, Dutch, British and Japanese colonial administrations reduced the Malay Rulers to a ceremonial role except in matters of Islam and Malay *adat*. The turning point came in 1946 when Dato' Onn Jaafar (the founder of UMNO, the United Malay National Organisation) galvanised Malay opposition to Britain's Malayan Union proposal which would have marginalised Malay Rulers further.

The Merdeka Constitution: The Merdeka Constitution restored the dignity and some of the powers of the Malay Sultans. It provided for a constitutional monarchy but with important discretionary powers. It conferred on the Majlis Raja-Raja some critical, constitutional roles and functions. It gave iron-clad guarantees of the rights of Rulers under their State Constitutions.

Post-Merdeka developments: The 1971 Constitutional Amendments after the race riots of 1969 entrenched the royal position further by making it seditious to question the powers of the monarchy. However, in the Mahathir era royal powers suffered a steep decline.

The 1983/1984/1994 amendments to Article 66 of the Federal Constitution provide that if the King refuses or delays the signing of a Bill, Parliament can bypass the Yang di-Pertuan Agong in the legislative process after 30 days.

The 1994 constitutional amendment went to the extent of applying this provision to the Malay Rulers in their States. To some commentators, the constitutionality of the 1994 amendment affecting State Rulers is open to question as the amendment may not have obtained the assent of the Conference of Rulers under Article 38(4) and Article 159(5).

The 1993 amendment to Article 181 and the insertion of Articles 182 and 183 deprived the Yang di-Pertuan Agong and the Rulers of their absolute legal immunity from civil and criminal proceedings in their personal capacity.

Lately, however, a new public awareness is developing that despite adverse constitutional changes in 1983, 1984, 1993 and 1994 the Conference of Rulers, the Yang di-Pertuan Agong and the State Rulers have important check and balance functions in our constitutional set-up.

Federal guarantees: The Federal Constitution defines and guarantees the rights of all State Rulers. All States are allowed to have their own unique State Constitutions subject, however to some "essential provisions" prescribed by the Eighth Schedule of the Federal Constitution. These provisions require the Ruler to act on advice, appoint an Executive Council and to have an elected state legislature.

The political powers of the State Rulers under their State Constitutions are similar to the constitutional powers of the Yang di-Pertuan Agong under the Federal Constitution.

However, State Rulers have larger powers than the Yang di-Pertuan Agong over such matters as Islam, Malay *adat*, appointment of a Menteri Besar and conferment of honours.

All State Constitutions confer on the Ruler vast personal, prerogative powers unknown to the Yang di-Pertuan Agong.

In addition, the Federal Constitution in Article 71(1) guarantees the right of a Ruler to succeed, hold and enjoy the rights of a Ruler according to his State Constitution. Any dispute as to title shall be determined solely by state authorities under the State Constitution: Article 71(1).

Unlike the Yang di-Pertuan Agong who is limited to a term of five years under Article 32(3), a Ruler has a life-term.

A contentious area is the 1994 constitutional amendment to the Eighth Schedule, section 11(2A) and (2B) to bypass the State Rulers in the legislative process after 30 days. There is criticism that the 1994 amendment was not assented to by the Conference of Rulers in accordance with Articles 38(4) and 159(5) and was, therefore unconstitutional. The belief is that the 1994 constitutional amendment was enacted under the wrong procedure of Article 66(4B) which relates to ordinary legislation and not constitutional amendments.

Though the Constitution and the laws confer on the Conference of Rulers, the Yang di-Pertuan Agong and the State Rulers a vast range of powers and functions in the executive, legislative and judicial fields, in reality most of these powers belong to the elected government of the day. Unlike the monarchy in Brunei or Arabia, the monarchs in Malaysia are constitutional monarchs.

However, comparisons with the largely ceremonial monarchy in the UK are not appropriate for a number of reasons.

First, our unique institution of Conference of Rulers has been conferred with significant powers to deliberate on issues of principle and policy that would be outside the powers of the British monarch.

Second, our State Sultans have considerable personal powers that the UK monarch does not possess.

Third, constitutional conventions in the UK transformed an absolutist monarch into a constitutional and ceremonial head of state. In Malaysia the role of conventions has been the opposite. The Rulers in the States have from time to time exercised vast discretion in the matter of appointment of Menteri Besar e.g. Perlis in 2008, Terengganu in 2008 and Selangor in 2014. Their Majesties often give directions in matters of economic and development policies. For example, in early August 2017, the Sultan of Johore gave explicit instructions to go back to the drawing board on the design of the "crooked" and elevated railway Rapid Transit System between Johor and Singapore. The political executive and the people accept such royal interference and this leads to the growth of constitutional conventions. One must remember that to the ordinary populace, "the Constitution is what happens. If it works, it is constitutional"! In general, the State Sultans exercise a power and influence which is based on the royal history of absolutist monarchy and not on the post-Merdeka law of constitutional monarchy.

Fourth, the Yang di-Pertuan Agong, though generally bound by advice of the political executive does not tamely rubber stamp the political and legal decisions of the government if the Conference of Rulers instructs him otherwise. The Yang di-Pertuan Agong's power to caution, warn, delay and, in the last resort, to reject political advice cannot be discounted.

Fifth, as in all other countries with a split executive (King-Prime Minister, President-Prime Minister) the Yang di-Pertuan Agong and the Sultans have some reserve, inherent, prerogative, non-statutory powers which can be exercised in exceptional situations in order to save the nation. The nature and extent of such powers is, however, a matter of great controversy.

Chapter 27

The Prime Minister and the Cabinet

No serious constitutional scholar today can deny that since the 1920s cabinet government has been transformed into prime ministerial government. However, there are many unseen political and conventional correctives that limit the powers of a Prime Minister.

CONSTITUTIONAL POSITION OF THE PRIME MINISTER

The Cabinet and the office of the Prime Minister evolved in the UK in the 18th century. In the later part of the 19th century, the authority of the Prime Minister became firmly established due to the outstanding personalities of Disraeli and Gladstone and the rise of a two-party system. In all parliamentary democracies today, the Premier has become the keystone of the constitutional arch. He is likened to an "elected monarch" and a "chief executive more powerful than the American President." His pre-eminence at the heart of the political system is best understood by examining his relationship with the other functionaries of state.

Appointment: Unlike in the United States or France where the President is chosen by the electorate at a nation-wide poll, the Prime Minister in a Westminster-style democracy is appointed, not elected. Before his appointment as the Chief Executive Officer of the nation, he is an ordinary MP elected by the voters of a single parliamentary constituency. The power to appoint him is vested in the Yang di-Pertuan Agong with

two guidelines provided in Article 43(2). First, the appointee must be a member of the Dewan Rakyat. Second, he/she must, in the judgment of the Yang di-Pertuan Agong, be "likely to command the confidence of the majority of the members of that House."

Prime Minister must belong to Dewan Rakyat: Despite the explicit language of Article 43(2) that the Prime Minister must belong to the Dewan Rakyat, it is possible to envisage situations in which a Senator or a person from outside Parliament may be anointed with the task. One must remember that the law of the Constitution is often supplemented by customs, usages, understandings and practices that "provide the flesh to clothe the dry bones of the law." Constitutional conventions from the UK indicate that in 1963 after the resignation of Prime Minister Harold Macmillan because of ill health, Lord Home, a member of the House of Lords, was deemed by the party stalwarts as the most acceptable successor. He was, therefore, appointed by the Queen to take over as Prime Minister. Lord Home resigned his peerage and was given the title Sir Alec Douglas-Home. A by-election was engineered for his sake and he won a seat in the House of Commons, thereby satisfying the constitutional rule that the PM must belong to the elected, lower House. In Selangor a few decades ago, Datuk Abu Hassan, a federal minister who was not even a member of the State Assembly, was nominated to fill the vacancy arising out of the resignation of Tan Sri Muhammad Muhammad Taib as Mentri Besar. Datuk Abu Hassan sought and won a seat at a by-election, thereby satisfying the constitutional requirement of membership of the State Assembly.

Prime Minister must enjoy Dewan Rakyat's confidence: When a vacancy in the office of the Prime Minister arises, the question as to who is likely to command the confidence of the majority of the members of the Dewan Rakyat is a political and not a legal question. If there is a majority party or coalition in the Dewan Rakyat and if the party or coalition is united behind a chosen successor, then the Yang di-Pertuan Agong's role in appointing a new Prime Minister is merely symbolic and nominal. But if the "vacancy" arose due to the government's defeat at a General Election or the Prime Minister's loss of a vote of no confidence in the Dewan Rakyat, or due to internal dissension within the ruling party or coalition, or if there is no political group commanding a clear majority in the Dewan Rakyat after an election, then the Yang di-Pertuan Agong's discretion acquires significance.

Other qualifications: Aside from requiring that the Prime Minister must belong to the Dewan Rakyat and must be likely to command the confidence of that House, the Constitution does not specify any other pre-requisites. Ethnicity, gender or region are not legally relevant considerations. It is within the realm of legal possibility for a non-Malay or a woman or a Sabahan or Sarawakian to inherit the mantle of leadership in some distant future. Whether ethnic and political realities will ever throw up such a possibility is, however, a separate issue. The Constitution does not require that the Prime Minister must be a member of a political party or leader of a majority party. In India, it is common for the party presidency and the prime ministership to be held by two different persons. The permutations of politics are many. In India in the early 70s, Prime Minister Indira Gandhi of the Congress Party was expelled by her party elders. But she retained her prime ministership due to continuing support of MPs in the Lower House.

Royal discretion: Article 40(1) and 40(1A) lay down that in the exercise of his functions under the Constitution or federal law, the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a minister acting under the general authority of the Cabinet. But Article 40(2)(a) provides that the Yang di-Pertuan Agong may act in his discretion in the performance of a number of functions including the appointment of a Prime Minister. This means that on the issue of appointment of a new premier, the King is not bound by the advice or wishes of an outgoing Prime Minister. However, it does not mean that the King can act as he likes.

- If there is a party or coalition enjoying an absolute majority in the Dewan Rakyat, the King has no choice but to appoint its leader as the Prime Minister.

- But if general elections do not result in any party winning a clear parliamentary majority, then unlike in Nepal, where the leader of the largest party must be given the first bite of the cherry, the Yang di-Pertuan Agong is not bound to choose the leader of the largest party. If the leader of any other party is able to forge a viable coalition that could command the confidence of the Dewan Rakyat, the Yang di-Pertuan Agong has discretion under Article 40(2)(a) to accept his claim to prime ministership. In a "hung Parliament" – a Parliament in which no party commands

an absolute majority – the monarch's discretion to choose the person who is likely to command the confidence of the Dewan Rakyat can have significant implications for the nation's leadership.

- A similar discretion would exist in other extreme or unusual cases, for example if the ruling party or coalition is deadlocked on the choice of a leader, or if the entire political leadership is wiped out in a terrorist attack or if during a dissolution of the Dewan Rakyat the caretaker Prime Minister dies or resigns before election results throw up a new leadership. The Article 43(2) guidelines – membership of the Dewan Rakyat and confidence of the House – are obviously not applicable in such unusual situations. A judicious exercise of discretion and a careful regard for political impartiality would guide His Majesty.

The Prime Minister and the King: The Yang di-Pertuan Agong is the symbolic head of state but the Prime Minister is the actual head of government. Executive power effectively resides in his person. The Premier is appointed by the King but cannot be dismissed by him as long as he enjoys the confidence of the Dewan Rakyat. The relationship between the Yang di-Pertuan Agong and the PM is governed by Article 40(1) and 40(1A) which provide that the King is a constitutional monarch who is bound by the advice of the Cabinet in the entire range of his functions except as to a few matters mentioned in Article 40(2). Conventionally, "advice of the Cabinet" means "advice of the Prime Minister" because the Prime Minister is the channel of communication between the Cabinet and the King. He has the exclusive right of audience with the Yang di-Pertuan Agong. This exclusive contact with Istana Negara enhances the prestige of his office. The King, while bound by advice, is free to seek further information and to advise, caution and warn. But it is not the King's constitutional function to verify the consensus within the Cabinet. The Prime Minister determines what the collective view of the Cabinet is that is to be communicated to the monarch.

Prime Minister and Parliament: Though legislation is the constitutional function of Parliament, the reality is that the Executive is more important than Parliament in the legislative process. A Prime Minister with a comfortable majority in Parliament tends to dominate the legislative sphere. It is often said that because of his control of

Parliament, the Prime Minister in a parliamentary system has much more operational efficacy than the US President. The Prime Minister chooses the 43 senators who are appointed by the King to the Senate under Article 45(1). The summoning, prorogation or dissolution of the Dewan Rakyat is on the Prime Minister's advice. Only in relation to dissolution does the Constitution in Article 40(2)(b) give to the Yang di-Pertuan Agong a right to reject the Prime Minister's advice. If the Dewan Rakyat is dissolved for an election, the Prime Minister and his Cabinet continue in office in a caretaker capacity for the 120 days the Dewan may be in dissolution under Article 55(4).

Prime Minister and Cabinet: The Prime Minister's power to appoint his Cabinet colleagues without any constitutional need for approval by Parliament (as in the US) or by his party is his most decisive weapon. Under Article 43(2)(b), the Prime Minister presents a list of his proposed ministerial colleagues to the Yang di-Pertuan Agong. He is entitled to insist on his choice. The PM has the power to choose, switch, promote, demote and dismiss his colleagues and place them in order of seniority. He may create a new ministerial office or wind up one. He may transfer functions from one minister to another. He may designate one of his ministers to the extra-constitutional post of Deputy Prime Minister. Parliamentary secretaries and political secretaries are appointed by the Prime Minister without prior reference to the King. The Premier may require a minister to resign at any time and for any reason he thinks fit. If the minister refuses to comply, the Prime Minister may advise the Yang di-Pertuan Agong to dismiss him. In *Dato' Seri Anwar bin Ibrahim v Perdana Menteri, Malaysia* (1998) the Court held that the letter of dismissal need not come from the King. It was sufficient for the monarch to be informed before the Prime Minister dismisses his colleague. The Prime Minister can determine when the Cabinet shall meet and what shall or shall not be discussed. He is entitled to say what issues shall be referred to him personally for decision outside the Cabinet. Inter-departmental disputes or deadlocks in Cabinet committees may be resolved by his informal rulings. The Prime Minister is not bound by Cabinet advice. He may by personal initiative confront his colleagues with a fait accompli. Many decisions are taken by the Prime Minister alone or by him after consulting one or two ministers in his "inner Cabinet." In budget proposals, in foreign policy initiatives, on advice to the monarch to dissolve the Dewan Rakyat and on major appointments, the Cabinet may not be consulted. For example, in 1956 British Prime Minister Anthony Eden ordered British forces to invade

Egypt without prior consultation with his Cabinet. The Prime Minister can create committees of the Cabinet, choose their membership, prescribe their terms of reference and give them decision-making power. He may preside over some committees. He may create an advisory body of outsiders to counsel him on any particular matter. These developments mark a diminution in the position of the Cabinet as the ultimate seat of executive power. The Prime Minister is an international figure besides being a national leader. In a globalised world, the centrality of foreign trade and foreign relations has augmented the prestige and power of the Prime Minister. His visits overseas, his speeches to the public and appearances on television, his answers or interventions in the Dewan Rakyat attract a degree of attention which no other politician can hope to achieve.

Posts and patronage: The Prime Minister figures prominently in the appointment of all important constitutional posts. Among these are judges of the superior courts, Attorney General, 43 appointed senators, Governors of Malacca, Penang, Sabah and Sarawak, Datuk Bandar of Kuala Lumpur and Labuan, Auditor General, chairmen and members of the Council on Islamic Religious Affairs, National Finance Council, Election Commission, Armed Forces Council, Judicial and Legal Service Commission, Public Services Commission, Police Force Commission, Education Service Commission and Human Rights Commission. No important public service appointment, whether of a vice-chancellor or chairman of a statutory body can be made without the consent of the Premier even if legally the power belongs to an individual minister. In addition to the above, the Prime Minister enjoys, by convention, substantial powers of patronage. If he does not give a political office to someone he wishes to reward, he may give him a place on the honours list, or confer on him chairmanship of a statutory corporation or an advisory or consultative body, a royal commission, a commission of inquiry or an ambassadorship. The scale of his power of patronage is astounding and no medieval monarch could compare with it, either in numbers or in importance.

Prime Minister and party: As leader of his party or coalition, he has a powerful organisation behind him to project his image in a most favourable light. In recent decades, the fortunes of political parties have fluctuated with the image that the Prime Minister creates in the minds of the electorate.

Prime Minister and the civil service: The Chief Secretary to the government is the Prime Minister's personal choice. Through him, the Prime Minister is able to control the top echelons of the civil service.

In sum, no serious constitutional scholar today can deny that since the 1920s cabinet government has been transformed into prime ministerial government. Parliamentary governments headed by the likes of Jawaharlal Nehru, Indira Gandhi, Lee Kuan Yew, Golda Meir, Margaret Thatcher, Mahathir Mohamad and Najib Razak illustrate that a Prime Minister with a comfortable majority in the Dewan Rakyat is not just *primus inter pares* (first among equals). He/she is like "a sun around which the planets revolve." But what must not be forgotten is that there are many unseen political and conventional correctives that limit the powers of a Prime Minister.

The Deputy Prime Minister: The post of Deputy Prime Minister is nowhere mentioned in the Constitution and can be regarded as a matter of constitutional convention. There is no legal requirement that after the death or resignation of a Prime Minister, his deputy must automatically ascend to the post. Whether the mantle of leadership in the party and in government will devolve on a Deputy Prime Minister depends on politics. His elevation rests largely on his party or coalition rallying behind him to convince the King that under Article 43(2) the deputy now commands the confidence of the Dewan Rakyat.

MINISTERIAL RESPONSIBILITY

A cardinal principle of the parliamentary system of government we inherited from Britain is that the government is part of Parliament and is answerable, accountable and responsible to it for the way it steers the ship of state. The doctrine that governs the constitutional relationship between the Cabinet, Parliament and the civil service is the doctrine of ministerial responsibility. In England, this doctrine is not founded on law but on conventions of the constitution.

Over the centuries, the doctrine developed two related but incompatible aspects – the convention of individual ministerial responsibility and the convention of the Cabinet's collective responsibility. In Malaysia, collective responsibility is explicitly acknowledged in Article 43(3) of

the Federal Constitution. But individual responsibility is founded on unwritten conventions and political norms.

Individual responsibility: This convention refers to a number of rules and practices.

1. Policy culpability during parliamentary debates, motions and question time rests on the minister's shoulders. A minister is required to answer questions, supply information and justify his department's policies. He must accept responsibility for all policy and administrative errors in his department even if he himself was not involved in the administrative bungling that is the subject of parliamentary scrutiny.

2. A minister is vicariously responsible to Parliament for the acts of his civil servants. This convention preserves the anonymity of civil servants and shields them from political attack on the floor of the Houses of Parliament.

3. A minister is politically responsible for the formal acts of the monarch in which the minister participated.

4. The minister must open debate on departmental legislation.

5. The minister must resign if a vote of censure is passed against him. Such votes are, however, rare. Unless the minister's conduct is so reprehensible that it will dent severely the government's standing with the electorate, the government tends to stand behind a beleaguered colleague. This means that collective responsibility hinders individual responsibility.

Collective responsibility: This convention refers to the following understandings and usages:

1. Under Article 43(2), the Prime Minister and his Cabinet must belong to Parliament (the former to the Dewan Rakyat) in order to ensure answerability to Parliament.

2. All ministers must observe the convention of public unanimity. They must speak with one voice; they must present a united front to the public, to Parliament and to the Yang di-Pertuan Agong.

The advice to the monarch should be unanimous so that the "indivisibility of the executive" is preserved. If a minister does not agree with a Cabinet decision, he has three alternatives – keep quiet about it, resign, or have his dissent recorded in Cabinet minutes. This duty applies even if the minister did not take part in or concur with the decision.

3. The government must maintain the confidence of the Dewan Rakyat as a condition of its survival. Article 43(4) provides that if defeated on a vote of no-confidence or on a "matter of confidence," the Prime Minister shall tender the resignation of his Cabinet. Alternatively, he may advise the Yang di-Pertuan Agong to dissolve the Dewan Rakyat and call fresh elections. The monarch is not bound by this advice.

4. Both under law and conventions, ministers have a duty to observe secrecy in relation to all Cabinet deliberations.

5. The Cabinet owes a political responsibility to the Yang di-Pertuan Agong for the general conduct of government. Under Article 40(1), the monarch has the right to all information about the government. He has the right "to caution, to advise and to warn."

Theory versus reality: How effective is the doctrine of ministerial responsibility? Opinions vary.

- Critics of Parliament allege that question-time is nothing but a ritual exercise in evasion. On any particular day, two-thirds of the oral questions slated for reply are not answered due to shortage of time. Answers are often refused on security or other grounds.

- Secrecy in government is so widespread that Parliament is unable to extract much information from the government.

- Government powers have grown so much that the day-to-day administration of departments of state cannot be scrutinised. In any case, parliamentary time is inadequate to scrutinise the government thoroughly.

- The convention that a minister who is seriously criticised in Parliament must resign has not taken hold because the

government usually rallies behind a minister who is being criticised in Parliament.

- Collective responsibility defeats individual responsibility.

- There are genuine doubts about the extent to which ministers should be personally responsible for operational matters as opposed to policy issues.

- In some areas like foreign policy, nationalised industries (especially non-financial institutions like Petronas), financial policy and national security, responsibility is difficult to ensure and enforce either in Parliament or in parliamentary committees. The rule that the government must maintain the confidence of the Dewan Rakyat is a central feature of our parliamentary system. Three resignations at the state level since Merdeka illustrate the vitality of this rule (Stephen Kalong Ningkan in Sarawak in 1966; Datuk Harun Idris in Selangor in 1976; and Datuk Mohammad Nasir in Kelantan in 1977). In the 1976 incident, a partial breach of the doctrine of collective responsibility seems to have occurred. The defeated MB stepped down but, contrary to well-established practice, his exco did not tender its resignation.

- The efficacy of the doctrine is reduced because what amounts to "a matter of confidence" is not very clear. Also, a government defeated on a snap vote may not resign but may put the issue before the House a second time. Sometimes clear defeats are overturned at subsequent votes, for example in Britain in the 80s, Prime Minister John Major lost the vote on the Maastricht Treaty. A few days later, after a threat to dissolve the House, he put the matter to the vote again and won.

- The convention of secrecy is under pressure from the demand for more open government. One cannot also discount the possibility of deliberate leaks to embarrass one's opponents.

In sum, the doctrine of ministerial responsibility is an imperfect tool for enforcing responsibility in government. But it is not insignificant. Its effectiveness depends on a number of variable factors: whether the issue is such that the press will take it up; the personalities of the people

involved; strength of the opposition in Parliament; the popularity of the Prime Minister and government; the state of the economy and the state of public opinion on the matter. To facilitate greater scrutiny of government action under this doctrine, draft Bills should be supplied to MPs well in advance. To assist MPs in their legislative and oversight functions, non-partisan legislative support structures ought to be established. MPs should be assigned research staff and legislative assistants. Live coverage of question-time in Parliament should be considered. A system of well-integrated and well-serviced investigatory committees as in the US and the Philippines holds the key to enabling Parliament to become the "grand inquest of the nation."

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Chapter 28

Public Servants

The vast increase in the functions and powers of the Executive in the welfare state has substantially enhanced the impact that high-level administrators can have on the quality of life of the population.

Around the world, the civil service exhibits a number of salient features. There is a group-spirit, an *espirit de corps* reflecting a sense of pride and honour in the profession. At the higher levels, there is professionalism and specialisation.

Except for those holding political or contractual posts, civil servants enjoy security of tenure and a steady and assured income. Appointments are to grades that are organised into categories and groups reflecting a hierarchy. Appointees are required to observe a neutrality and reserve in politics and are expected to give their best no matter which party is in power. Civil servants do not go out of office when a minister or government is replaced. Another significant feature is political anonymity. When a ministry is criticised in Parliament, the minister concerned must take the rap and the civil servants involved are not exposed to political vitriol. Service conditions are generally laid down in statutes or subsidiary legislation. Free negotiations, as in the private sector, play very little role. Qualifications and procedures are pre-prescribed and benefits (like loans and pensions) and liabilities (like asset-declaration) are a matter of law, not of contractual agreement. Matters of training, promotion and discipline are, likewise, governed by elaborate rules and procedures.

Control and accountability: The performance of the Malaysian civil service compares favourably with public services in other Asian and African societies. But there is no dearth of criticisms. It is alleged that government service is marked by lack of initiative and imagination. There is mechanical application of rules and over-devotion to precedents and red-tape. There is lack of coordination between departments performing related tasks. What could be accomplished at a one-stop centre often requires a run-around through many corridors of power. Some civil servants are not so civil. There is a feeling of self-importance. Elitism and remoteness from the rest of the community are not uncommon. There are occasional cases of over-zealousness, bias and negligence. Some sectors and services are riddled with delays and corrupt practices. In one case, *Wong Cheong Kim v PP* (1962), the learned judge observed that an unreasonable delay in granting a licence or permit raises the inference that a bribe was expected.

To remedy these defects, institutions and procedures exist to ensure that professionalism is improved and wrongdoing is punished. The government invests heavily in retraining and upgrading its staff. Many rewards and incentives have been put in place though these do not always reach the deserving.

Procedures for internal supervision, planning, programming, budgeting, management by objectives, job-evaluation, job-description, auditing, cost-benefit analyses and departmental discipline seek to provide internal controls.

External controls are available by way of ministerial responsibility to Parliament; judicial control of administrative discretion under the doctrine of ultra vires and the principles of natural justice; and investigations by the Public Complaints Bureau and the Auditor General. There are laws to regulate corruption; to set up commissions of inquiry and to facilitate proceedings against the government in tort and contract.

Such extra-legal checks as service centres run by political parties and "letters to the editor" columns in major newspapers do much to help citizens against mal-administration.

Appointments: Given the importance of the administrative services, it is important that public servants must possess abilities commensurate with their duties. Recruitment should be based on merit rather than on patronage so that the civil service does not become the dumping ground of the non-ambitious, indolent and worthless. In many countries, examinations are used to choose entrants into government service. In Malaysia the Constitution in Articles 137-144 provides for independent service commissions to control appointments, confirmation, transfers, promotions, discipline and dismissal of employees in public services. Article 136 states that all persons of whatever race in the same grade in the service of the Federation shall be treated impartially. Difficult issues arise because Article 136 has to be read along with Article 153 which permits reservations and quotas in favour of Malays and the natives of Sabah and Sarawak. The late Tun Suffian was of the opinion that the combined effect of Articles 136 and 153 is that at entry point the ethnic factor can be taken into consideration. But once in service, promotions or appointments must be based on merit. Regrettably, due to the politicisation of the public services, Article 136 is often disregarded.

Public services: These are defined in Article 132 to include the armed forces, judicial and legal service, the general public service of the Federation, the police force, federal-state joint services, the public service of each state and the education service. Judges of the superior courts, employees of statutory bodies, universities, local authorities and companies that are owned by the government, the Speaker or members of Dewan Rakyat, president or members of Dewan Negara, members of commissions and councils, certain diplomatic officers, the Attorney General and staff of Istana Negara are not, in law, members of public services.

Legal position of public servants: In line with English common law, Article 132(2A) states that all public servants hold office "during the pleasure" of the Yang di-Pertuan Agong or Ruler or Governor. This means that there is no security of tenure and removal from office is a distinct possibility. The Crown's right to terminate the services of its employees is implied in any contract of employment. The terms of service of a public servant may be altered without his consent. Post-entry requirements may be imposed. There is no absolute right to pension, gratuity or other allowances. Under the Pensions Act 1980, the Yang di-Pertuan Agong

may reduce or withhold pension if he is satisfied that the public servant is guilty of negligence, irregularity or misconduct.

However, a civil servant can sue the government for recovery of arrears or for damages in torts if the government or a public authority had caused him a loss. If a public servant has proof of malice or bad faith by his superior, he can institute a civil action for malicious falsehood against the officer, though not the government. Article 147 protects pensions, gratuities and other allowances for members of the public services, their widows, children, dependents or personal representatives. In addition to the above substantive rules there are three important procedural safeguards under Article 135.

- Article 135(1) requires that no member of the public services (except members of the armed forces) may be dismissed or reduced in rank by an authority subordinate to that which had the power to appoint.

- Article 135(3) provides that no member of the services performing a judicial function shall suffer any disciplinary measure without the concurrence of the Judicial and Legal Services Commission.

- Under Article 135(2), no public servant may be dismissed or reduced in rank without being given a reasonable opportunity of being heard. There are so many exceptions to this principle that the law in this area law become a maze and not a motorway.

Chapter 29

Parliament

Members of Parliament are not only legislators. They are problem solvers, social workers and spokespersons for their areas.

DEWAN RAKYAT – THE GRAND INQUEST OF THE NATION

September 2019 will be the 60th anniversary of our Parliament. On April 24, 1959, the then Federal Legislative Council met for the last time before being replaced by the Malayan Parliament. On August 19, 1959, independent Malaya held her first general election. On September 12, the first post-independence Parliament was summoned to session by the Yang di-Pertuan Agong. As Parliament nears its six decades, the time is ripe for an examination of its constitutional role and for an evaluation of how far theory and reality converge or diverge.

In political theory an elected and representative legislature is the central pillar of a democratic polity. In the Malaysian context, our Parliament is supposed to perform the following constitutional roles:

Representing the people: The Dewan Rakyat is a chamber of the people and is wholly elected by universal adult franchise. Each state is divided into a number of electoral constituencies and each constituency elects one Member of Parliament. In 1959 we began with 104 constituencies but today we have 222. Sarawak has 31, Johor 26, Sabah 25, Perak 24, Selangor 22, Kedah 15, Kelantan 14, Pahang 14, Penang 13,

Kuala Lumpur 11, Negri Sembilan 8, Terengganu 8, Malacca 6, Perlis 3, Labuan 1 and Putrajaya 1.

Representing the states: The Dewan Negara represents the States. It has 26 Senators — two from each State. In addition, it has 44 Senators appointed by the Yang diPertuan Agong to represent various sectors of the population including minorities and orang asli.

Giving legitimacy to the government: In our parliamentary system, the Prime Minister and the Cabinet are drawn from Parliament and their right to rule is derived from their ability to command the confidence of the majority of the members of the elected chamber: Article 43(2). If this confidence is lost, the government must resign —: Article 43(4).

Making laws: In constitutional theory, legislation is the function of Parliament. Whether it is an ordinary law under Articles 66-68, a constitutional amendment under Articles 159 and 161E or an emergency Act under Article 150(5), no legislative proposal can become law without going through the fires of scrutiny in Parliament. To this principle a number of qualifications must be noted. First, Parliament's role in the legislative process is undermined by cabinet dominance in Parliament. In the legislative sphere the Executive draws up the agenda, drafts the legislation and determines the schedule. Parliament merely legitimates; it does not legislate. Second, during an emergency the Yang di-Pertuan Agong acquires a parallel power to promulgate Emergency Ordinances if the two Houses of Parliament are not in session concurrently —: Article 150(2B). Though the Houses have the power to annul an Emergency Ordinance by the Yang di-Pertuan Agong, executive dominance has prevented the exercise of this power. Third, due to shortage of time Parliament often delegates its legislative power to members of other branches. Subsidiary legislation outnumbers parliamentary legislation by 15:1.

Control over finances: Under Articles 62, 66-68 and 73-79, taxes cannot be raised, the army cannot be maintained and money bills cannot become law without the authority of Parliament. Money for government programmes must come from Parliament. In addition to this, Parliament remains informed of matters of national expenditure through the Dewan Rakyat's Public Accounts Committee (PAC). The committee relies heavily on the Auditor General's annual admonishments of departments

that fail to live up to financial prudence. All in all, because of the political reality of cabinet dominance over Parliament, Parliament fails to influence how much tax is to be raised and where it is to be spent. Through the Auditor General and the PAC it exercises mild control only over the administration of finances.

Scrutiny of the Executive: In the parliamentary system of government, which is adopted by Article 43 of the Constitution, the federal Parliament has the role of enforcing responsibility, accountability and answerability in the Executive. Through laws and traditions this role is performed in the following ways: The doctrine of collective and individual ministerial responsibility, question time in Parliament, debates and motions on the floor of the House, and parliamentary committees. Till 2008, with Barisan Nasional's steamroller, two-thirds majority, Parliament's control over the Executive was more nominal than real. However, with more than 80 opposition MPs in the Dewan Rakyat today, questions, debates and motions have become more penetrative and Parliament's "grand inquest of the nation" role has acquired greater significance. Much, however, depends on the impartiality of the Speaker.

Redress of citizens' grievances: Members of Parliament are not only legislators; they are problem solvers, social workers and spokespersons for their areas. A large amount of their time is spent on particularised demands of their constituents.

Control of emergency powers: An emergency proclamation and all emergency ordinances are required to be laid before both Houses of Parliament and Article 150(3) empowers the Houses to annul a proclamation or an Ordinance.

Electoral boundaries: Under the Thirteenth Schedule, Part II, sections 10-11, the ultimate power to approve the Election Commission's recommendations on constituency lines belongs to the Dewan Rakyat.

Malay reserves: A State Enactment to de-reserve a Malay reservation does not become a law unless approved by resolution of each House of Parliament: Article 89(1)(b).

Exercise of parliamentary privileges: In the performance of their parliamentary functions all members and officers of Parliament are entitled to some privileges, immunities and powers under Articles 53, 62 and 63 of the Federal Constitution and the Houses of Parliament (Privileges and Powers) Act 1952.

In relation to the above functions, Parliament's institutional efficacy remains very weak because of the existence of an omnipotent executive. Far-reaching reforms are needed if the Constitution's dream of a Parliament that is a countervailing force to the Executive is to be realised.

DEWAN NEGARA

The federal Parliament is composed of the Yang di-Pertuan Agong, Dewan Rakyat and Dewan Negara. This bicameral composition is a departure from the pre-Merdeka Federal Legislative Council, which consisted of one chamber only. The fully elected and representative Dewan Rakyat is the main channel of democratic impulses in the country. The Dewan Negara, in contrast, represents geographical areas and special interests rather than voters. It has 70 members – 44 appointed by the King on the advice of the Prime Minister, and 26 indirectly elected state senators to give equal representation in the Dewan Negara to each of the 13 states of the Federation.

Relationship with Dewan Rakyat: In its composition and functions, the 70-member Dewan Negara has significantly lesser power and authority than Dewan Rakyat, which has 222 members. The Prime Minister must belong to Dewan Rakyat, but other ministers can belong to either House. Under Article 67, Bills involving taxation and expenditure cannot commence their legislative journey in the Senate. Under Article 68, the Senate can delay but not defeat a House of Representatives Bill. After one month (in the case of money Bills) and one year (in the case of non-money Bills), the Senate can be bypassed in the legislative process. Unlike Dewan Rakyat, Dewan Negara cannot dismiss the government by a vote of no-confidence.

The role of the Senate is to serve the interest of the states, minorities and sectoral groups. In contrast, the House of Representatives represents electoral constituencies that are delineated roughly on the basis of

population. The Dewan Rakyat is fully elected; the 70-member Dewan Negara is mostly nominated.

Senators must be at least 30 years old. Interestingly, representatives in the more powerful Dewan Rakyat may be much younger (21 or above).

The term of office of a senator is three years and can be renewed only once. Members of the Dewan Rakyat are elected for five years and there is no bar to the number of terms they may serve.

Dewan Rakyat is dissolved every five years or earlier. Members of the Senate have a fixed tenure that is not affected by the dissolution of Dewan Rakyat.

Relationship with the political executive: Previously, a senator's term was six years. In 1978, this period was changed to three years with a possibility of one renewal. This amendment has increased the Executive's power of patronage and may have affected the independence of the senators.

Constitutional role: The Constitution of Malaysia and the Standing Orders of the Senate envisage the following functions for the Dewan Negara.

1. The legislative function of making and revising laws.

2. The "federal function" of representing the 13 states of the Federation and the federal territories and protecting their rights. This aim is achieved by providing for two members from each state to sit in Dewan Negara. The problem, however, is that "state senators" do not always vote and speak as "instructed delegates" of the states. They speak and vote according to their own views or party affiliations. A greater coordination between state senators and state governments is necessary if the voice of the states is to be effectively heard.

3. The sectoral representative function of enabling experienced and talented persons, members of minorities and orang asli and other special groups to sit in Parliament without going through the electoral process. Many professionally qualified

people have a distaste for politics. But they can contribute their bit to the legislative process by being appointed senators under Article 45(1).

4. The "deliberative" function of examining government policy and keeping the government in check. Along with Dewan Rakyat, Dewan Negara provides a valuable constitutional safeguard to check and limit the power of the government. This is achieved through "question time" in which ministers must supply information, answer questions, justify policies. Dewan Negara debates on topics of contemporary importance can provide the government with an important second opinion on issues of concern to the nation.

5. Legislative function: The Dewan Negara is an essential component of Parliament and except as provided in Article 68, its assent is necessary for the passage of legislation in Parliament. On important constitutional amendments that require a two-thirds majority, the Dewan Negara cannot be bypassed by Dewan Rakyat under Article 68. Under Article 89, a state law to de-reserve a Malay Reservation must be approved by a resolution passed by special majorities in both Houses of Parliament. The Dewan Negara cannot be bypassed. The Dewan Negara can revise, improve or delay Dewan Rakyat Bills. As a second debating chamber, it can act after mature, non-political and calm consideration. Because it operates in a less political way than Dewan Rakyat, a more objective examination of legislative proposals is possible. Unfortunately, this hope remains unrealised.

6. The Merdeka Constitution provided for 22 state senators and 16 appointed senators. In Article 45(4), it provided permission to increase the number of state senators from two to three; decrease the number of appointed senators and provide for direct elections to the Dewan Negara. Post-Merdeka developments point the other way. Through several constitutional amendments, the 26 state senators became overwhelmed by 44 appointed senators. Such an unfavourable ratio is not conducive to democratic legitimacy.

All in all, the role of the Dewan Negara is to revise, improve or delay Dewan Rakyat Bills. As a second debating chamber, it can act after mature, non-political and calm consideration. Because it operates in a less political way than Dewan Rakyat, a more objective examination of legislative proposals is possible. Unfortunately, this hope remains unrealised. Constitutional reality has digressed vastly from constitutional theory. The ineffectiveness of Dewan Negara has led many critics to suggest that there is no place in a modern democratic constitution for a non-representative second chamber. This criticism is short-sighted. Like the House of Lords in England and the Rajya Sabha in India, Dewan Negara, with some reforms, can play a valuable role in the parliamentary set-up of the country.

PROCEDURE FOR CONVERTING A BILL INTO LAW

Discussion before decision is the precondition of a democratic legislative process. All Bills (legislative proposals) must go through the fires of parliamentary scrutiny before they pass into the statute book. In the two Houses of Parliament, the representatives of the people must be allowed to speak and debate fearlessly on any legislation under consideration. The more democratic a political system is, the more accommodative it is of participation by concerned citizens in the legislative process.

In many political systems, the devices of Referendum, Initiative and Recall are provided for to give the people a direct power to ratify, initiate or repeal legislation. Citizens are allowed to articulate their views at the committee stage of a Bill in Parliament. The Federal Constitution and the Standing Orders of both Houses seek to achieve some of the above aims. However, theory does not always march alongside political reality as we examine a Bill's rite of passage into law.

Types of Bills: There are three types of Bills – public, private and hybrid Bills.

Public Bills deal with matters of general public interest such as crime and taxation. Public Bills can be introduced by the government or private members. But some Public Bills like those dealing with money must be initiated by the government. On other matters of public interest a Bill may be sponsored either by the government or by private members.

For example, in 1987 Tengku Razaleigh Hamzah introduced a private member's Bill to amend the Societies Act to revive Umno. His Bill was defeated. In 2017-18 YB Hadi of PAS introduced an amendment Bill to enhance penalties that can be imposed by the Syariah courts.

Private Bills deal with matters of private or local concern. The initiative for this type of Bill comes from individuals, associations, corporate bodies or NGOs outside of Parliament. They draft the Bill, advertise a statement of its general nature in the *Gazette* and in one newspaper at least one month before seeking leave to introduce the Bill in Parliament through any MP. If leave is granted, the sponsors are heard at the Select Committee stage. Sadly, such Bills are unheard of in Malaysia.

Hybrid Bills involve matters of public interest, which also affect adversely the interest of some private persons. These persons are heard at the Select Committee stage.

Origin: Under Articles 66-67, Bills can originate in either House. But taxation and expenditure measures must commence in the Dewan Rakyat.

Procedure: The normal procedure for enacting legislation is that a Bill is passed by a simple majority of the MPs and Senators present and voting in the Dewan Rakyat and Dewan Negara. The Bill is then submitted to the Yang di-Pertuan Agong for assent. Once that is received, the Bill is published in the Warta Kerajaan prior to enforcement. A deeper look at the legislative process reveals the following stages:

Pre-parliamentary stages: These involve delicate and lengthy negotiations among the various interested parties – the sponsoring government department, NGOs, senior officials of the ministries concerned, the minister who will pilot the Bill through Parliament, the Drafting Unit of the Attorney General Chambers, the Cabinet Committee on Legislation and, ultimately, the Cabinet. It is at these pre-parliamentary stages that the Bill takes shape and its policies and principles are hammered out.

"Readings" in the First House: The requirement for readings is not provided for in the law, but is laid down in the Standing Orders of each

House. Readings permit a Bill to be scrutinised, debated and, if required, to be amended.

First Reading: This is a mere formality. In the case of a government Bill, the minister concerned presents the Bill to the House. The title of the Bill is read. There is no debate and no voting. The Bill is then circulated to all members.

Second Reading: This is a crucial stage. There is vigorous debate by the Opposition and the backbenchers on the merit and principles of the Bill. But no amendments are allowed. The minister concerned is allowed to reply to points raised on the floor. Voting takes place.

Committee Stage: This is often called the amendment stage. After the Second Reading, a Bill is committed either to a Committee of the Whole House or to a Select Committee. These committees may make such amendments as they think fit. A debate takes place. Votes are taken on each proposed amendment. If the Bill is considered by a Select Committee, outsiders may be invited to give evidence. Regrettably, this democratic practice is rarely resorted to.

Report Stage: At the conclusion of the committee stage, the Bill is reported to the House. Further amendments may be proposed. The Bill may be re-committed to a committee of the Whole House, which may at the end of its proceedings, re-report to the House.

Third Reading: This is the final debate on the principles of the Bill. No substantive amendments are allowed. Voting takes place. If a Bill crosses this stage, it is deemed to have "passed" the House. "Readings" in the Second House. The procedure in the first Chamber of Parliament is then repeated in the second Chamber. Resolution of disagreements between the two Houses: If the two Houses are not in agreement over some clauses of the Bill, any differences between them are resolved by appointment of a joint committee of both Houses under Article 66(3).

Consent of the King: Under Article 40(1) and 40(1A), the Yang di-Pertuan Agong has a constitutional duty to act in accordance with the advice of the Prime Minister.

Publication: Under Article 66(5), every Bill is required to be published in the Warta Kerajaan before enforcement. Special procedures. In most Parliaments of the world, the normal rule is that legislative decisions can be made by a simple majority of the members present and voting in both Houses plus the consent of the head of state.

To the above common procedure for enacting legislation some exceptions must be noted.

1. Under Article 68, Dewan Negara can be bypassed by Dewan Rakyat. The period is one month in the case of money Bills and one year for non-money Bills. This exceptional procedure was borrowed from the Parliament Acts of 1911/1949 in the UK and will be useful if the result of a general election is that the party controlling Dewan Rakyat does not have a majority in Dewan Negara.

2. Under Article 66, the Yang di-Pertuan Agong can be bypassed in the legislative process if he does not assent to a Bill within one month after it was presented to him.

3. Some types of Bills require special majorities for enactment. For example, under Article 89, a decision to de-reserve Malay reservation land must be made by two-thirds of those present who must also constitute a majority of the total number of MPs. Under the Thirteenth Schedule of the Constitution, the delimitation of electoral constituencies requires "not less than half of the total number of members."

4. Any amendments to the Constitution under Articles 159(3), 159(5) and 161E require special two-third majorities.

5. Some types of Bills require the consent of persons or authorities outside of Parliament. For example, constitutional amendments to "sensitive issues" under 159(5) require the assent of a majority of the members of the Majlis Raja-Raja. Under Article 38(4), no Bill directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.

6. Under Article 161E, a constitutional amendment affecting the position of Sabah and Sarawak requires the assent of the Yang di-Pertua Negri of Sabah and/or Sarawak.

7. Under Article 2(b), a law altering the boundaries of any state shall not be passed without the consent of that state expressed by a law made by the legislature of that state and the Conference of Rulers.

All in all, the quality of deliberations in Parliament are a mirror of the state of constitutionalism and democracy in a country.

PROCEDURES FOR CONSTITUTIONAL AMENDMENTS

A Constitution is an armour of defence against the passions of men. It is the chart and compass, the sail and the anchor of a nation's endeavours. It is not written in the sands, to be washed away by each wave of new parliamentarians blown in by each successive political wind. Yet, at the same time, its words are not carved out in granite so as to be too sacred to be amended. Like all other laws, the Malaysian Constitution has an inherent capacity for growth and change to accommodate the felt necessities of the times. According to the Reid Commission, the guiding philosophy behind the amendatory process is that the method of amending should not be so difficult as to produce frustration, nor so easy as to weaken seriously the safeguards of the Constitution.

Amendatory procedures: Under Articles 2(b) 38, 66, 159 and 161E, five separate procedures are prescribed for bringing changes to specified parts of the basic charter. Three of the five procedures require the consent of institutions or persons outside of Parliament, thereby giving credence to the proposition that, in some areas, the framers of the Constitution erected bulwarks against parliamentary majorities and safeguarded some core, constitutional values against the power of Parliament. The five procedures are:

Simple majority: Under Article 159(4), amendments to some of the Schedules of the Constitution and any amendment in connection with the admission of a state to the Federation may be passed by a simple majority of the members present and voting in Dewan Rakyat and Dewan Negara and assented to by the Yang di-Pertuan Agong.

Two-thirds majority: Under Article 159(3), most of the Articles of the Constitution can be modified by an amending Act which has been passed by a special two-thirds majority of the total membership of each House on the second and third readings and assented to by the King.

Assent of Conference of Rulers: Under Articles 38(4) and 159(5), the Majlis Raja-Raja has the power to block amendments to nine key provisions of the basic charter. These provisions are: restrictions on free speech prohibiting the questioning of sensitive issues in Article 10(4); citizenship rights in Part III; privileges, position, honours or dignities of the Rulers in Article 38; applicability of the law of sedition to legislative and parliamentary proceedings in Articles 63 and 72; precedence of Rulers in Article 70; Rulers rights of succession in Article 71; special position of the Malay language in Article 152; privileges of the Malays and the natives of Sabah and Sarawak in Article 153; and special procedure for amending the Constitution under Article 159(5).

Any amending Act that touches the above matters must be supported by a special two-thirds majority in both House and receive the consent of a majority of the members of the Conference of Rulers. Twice in history – once in August 1983 over the proposal to bypass the King and the Rulers in the legislative process and then in January 1993 over royal immunities – the Conference withheld consent and it took several months to work out alternative drafts to satisfy the Rulers.

In relation to the consent of the Conference of Rulers, a number of interesting issues have shored up from time to time. First, if an amendment curtails the powers of the Yang di-Pertuan Agong, does it require the consent of the Majlis Raja-Raja? In *Phang Chin Hock* (1980), the court held that the position of the federal King is distinct from the position of the state Sultans. As such, an amendment to abolish judicial appeals to the Yang di-Pertuan Agong does not have to be submitted to the Majlis. Second, at what point in time must an Amendment Bill under Article 159(5) be submitted to the Majlis for its assent? Is it before the

Bill begins its journey in Parliament, or after the two Houses have given their seal of approval? Scholars and politicians are divided on the issue. Third, Article 38(4) applies only if an amendment affects the privileges, position, honours or dignities of the Rulers directly. The exact meaning of "directly" is open to debate.

Assent of Governors: Under Article 161E, any modification to the special rights of Sabah and Sarawak requires a two-thirds majority, assent of the Yang di-Pertuan Agong, and of the Governors of Sabah and Sarawak. In giving or withholding consent, the Governors are bound by the advice of their Chief Ministers.

Other modes of constitutional change: In addition to the four procedures above, the Constitution can undergo reconstruction in three indirect ways. First, through creative interpretation, judges can distil out of the static clauses of the Constitution that which was merely implicit but not explicit in the basic law. They can expand the horizons of freedom or constrict them. For instance, Article 5(3) gives to every arrestee the right to consult and be defended by a legal practitioner of his choice. In *Ooi Ah Phua v Officer-In-Charge, Criminal Investigations, Kedah/Perlis* (1975), the court held that this constitutional guarantee applies only after police has completed its investigation. Secondly, constitutional conventions can supply the flesh to clothe the dry bones of the law. The office of the Deputy Prime Minister is purely conventional. Description of Bahasa Melayu as Bahasa Malaysia and of Malays as bumiputras is a political gloss to the law. The existence of Cabinet committees; the various readings of Bills in Parliament; the daily question-hour; and the conventional allocation of time to the opposition during parliamentary proceedings are matters of conventional, not legal practice. Thirdly, emergency legislation under Article 150 can suspend most constitutional guarantees other than six items mentioned in Article 150(6A). In view of the fact that an emergency proclamation has no time limit, HP Lee of Monash University argues that emergency legislative power can be used to amend the Constitution. With respect, this view ignores Article 150(7), which specifically provides that once an emergency ends, all emergency laws shall cease to operate six months after the end of the emergency.

Other aspects of amendatory process: Unlike in countries like Australia, there is no requirement of a public referendum in Malaysia. Except for Sabah and Sarawak, and the consent of the affected State

on territorial readjustments under Article 2(b), the states have no say in the amendment of the Federal Constitution. This reality was underlined by the famous case of *Government of Kelantan v Government of Malaya* (1963), in which the Kelantan government unsuccessfully sought to prevent the transformation of Malaya into Malaysia.

The amendment process itself can be amended. But any proposal to delete the requirement of consent of the Conference of Rulers in Article 159(5) will itself have to go through the Conference of Rulers. Likewise, any tampering with the requirement to obtain the consent of the Governors of Sabah and Sarawak under Article 161E must be submitted to the Governors for assent. Law must be passed in accordance with law.

Amendments can be retrospective and it is not uncommon for some amendments to be backdated to Merdeka Day!

REFORM OF PARLIAMENT

In our system of parliamentary democracy, the legislature is supposed to perform a myriad of functions, four of which can be highlighted.

The enacting, amending and repealing of laws: This should include the scrutiny of subsidiary legislation and participation in law reform. Regrettably, the political executive dominates the legislative agenda, determines the timing of legislation and uses its whips to bulldoze legislative proposals without much scrutiny. Private MPs are not allowed much role. All in all, Parliament legitimates; it does not legislate.

Oversight of the Executive to ensure accountability, answerability and responsibility of the political executive to Parliament: In our system of "responsible government," the political executive is part of Parliament and is required to answer questions, supply information and justify policies. In extreme circumstances the Dewan Rakyat can dismiss the government on a vote of no-confidence. In actual practice, Parliament has become subordinate to the Executive. Question time is often a ritual exercise in evasion. In the last Parliament a brazenly partisan Speaker prevented votes of no confidence from being introduced. Due to time constraints, not all questions listed on the Daily Order Paper are answered.

Control over national finance: This should include (i) oversight of financial policy and examination of the use of financial resources optimally, (ii) allocation of the annual budget, and (iii) review of the reports of the Auditor General to examine how the allocations were utilised. Despite the formality of budget debates, the Executive monopolises economic policies and determines how much tax is to be raised and how it is to be spent.

Supplementary budgets are common and often modify significantly the thrust of the main budget. Parliament merely legitimates. The 1MDB scandal clearly illustrates how ineffective Parliament can be in checking Executive malfeasance in the financial field.

The constituency function of redressing constituents' grievances: Most MPs return to their constituencies often to remain in touch with the pulse beats of their constituents. Individual MPs run Service Centres. However, MPs, especially opposition MPs, are hampered in their constituency function because of lack of funds, lack of office space in parliament and lack of legislative assistants. These needs should be met.

To enhance Parliament's institutional efficacy in the above areas requires a number of reforms.

In the making of laws

Policy papers: To enable MPs to be better informed and to enable citizens and affected interests to work with MPs, the government must issue policy papers on proposed Bills to enable citizens to provide feedback.

Lifting the secrecy surrounding Bills: Copies of Bills should not be embargoed and covered by the Official Secrets Act.

Giving MPs time to read Bills: Draft copies of Bills must be supplied to all MPs at least two weeks before the first reading.

Select committees: Bipartisan parliamentary committees to examine Bills before or after the second reading must be appointed as is permitted by the Standing Orders of Parliament. The committees should invite experts to give evidence.

Private MPs' Bills: Private Members' Bills are allowed by Standing Orders and should be encouraged as these may involve participation by NGOs and reflect the democratic impulses of society.

Scrutiny of subsidiary legislation: Subsidiary legislation outnumbers parliamentary legislation by a ratio of 1:20 or more. Yet it goes unscrutinised. A Joint Committee of both Houses on Subsidiary Legislation must be appointed to advise Parliament on whether to accept or annul a subsidiary law.

Legislative assistants: As in most democracies, including those in Asia, MPs must be supplied with research staff to assist them to perform their parliamentary work. This proposal has significant financial implications. In the short range, Parliament can work with universities to recruit volunteer students and staff to assist Parliament.

Law reform: The two Houses should set up a Joint Select Committee on Law Reform. An independent Law Reform Commission should report to this committee to ensure that the elected representatives have a say in keeping the law responsive to the felt necessities of the times.

Increasing the number of parliamentary sittings: The Malaysian Parliament meets about 80 days in one year. The British Parliament meets approximately 180 days in a year. Increase in the number of parliamentary sittings will allow more time to be spent on legislative business.

Legal and financial implications: Most of the above recommendations require no amendment to the Constitution, no enactment of any law. Administrative practices, constitutional conventions and utilisation of existing Standing Orders of each House will be sufficient to achieve the reforms. However, hiring legislative assistants will have financial implications. Setting up an independent Law Reform Commission will require a new Law Reform Commission Act.

Oversight of the Executive

Questions on the Daily Order Paper: There is a suspicion that controversial questions are deliberately placed towards the end of the Daily Order Paper so that they will not get reached during the limited time allocated for questions. Some transparent guidelines ought to be adopted to

determine the order of questions on the Daily Order Paper to ensure political impartiality.

Written replies: If questions are not reached, there should be written replies to these questions within a specified time limit.

Prime Minister's time: Once a week the PM must be required to face the House for at least half an hour.

Departmental Committees: Departmental Committees to evaluate the performance of each federal ministry (or a group of like ministries) must be set up.

Scrutiny of Executive appointments: A Special Standing Committee on Executive Appointments must be created to scrutinise the PM's nominees for all key institutions (other than the judiciary for which purpose a Judicial Appointments Commission exists). Alternatively, a Special Commission on Executive Appointments must be established to vet the nominees and to ensure that only those with ability and integrity are appointed. The Judicial Appointments Commission supplies a model.

Non-partisan Speaker: The Speaker and Deputy Speakers should retire from party membership once they are elected to the posts. One of the Deputy Speakers should, prior to his appointment, be from among the members of the Opposition.

Opposition business: Opposition business must be allocated special time at least one hour a week.

Broadcast: Subject to the power of the Speaker to expunge un-parliamentary or inflammatory words and speeches, parliamentary proceedings must be broadcast live to enable the people to know what is happening in their august, elected assembly.

Legal and Financial Implications: Setting up Departmental Committees and providing support staff will have economic implications. But the rest of the above proposals require no allocations or amendments to the laws. The Standing Orders can be internally amended to provide

for the above proposals. Resolutions of the Houses can be passed and constitutional conventions can be developed.

Scrutiny of national finance

A new committee of financial policy: To strengthen Parliament's scrutiny, a Select Committee on Financial Policy and Expenditure must be set up to examine the thrust of government's monetary policies.

Public Accounts Committee: The jurisdiction of the Public Accounts Committee (PAC) must cover all institutions receiving or generating funds, whether a Ministry, a statutory body, a government-linked company, a Syariah authority like JAKIM or an "off-budget agency".

Opposition member to head the PAC: As in the UK, a member of the opposition must chair the PAC. The Pakatan Government has implemented this proposal.

Inapplicability of the OSA: No audit reports should be withheld from Parliament under the Official Secrets Act 1972 (OSA). Parliamentary proceedings are not subject to the OSA.

Legal and financial implications: To extend parliament's scrutiny over all national income and expenditure, the administrative practice of declaring some institutions as "off-budget" or "Non-Financial Institutions" must cease. That will subject these institutions to audit by the Auditor General and scrutiny by the Public Accounts Committee.

Redressing citizens' grievances

Creation of an Ombudsman: The existing Public Complaints Bureau should be replaced by an independent ombudsman to investigate maladministration by the Executive. The ombudsman should report to a Select Parliamentary Committee. Legislation is needed to secure the powers of the Ombudsman. Delicate issues about federal-state division of powers will have to be considered. A federal ombudsman has no right to demand access to information on matters which are in the State List.

Staff: A Parliamentary Committee on the Ombudsman must be set up to receive reports from the Ombudsman.

Financial aid for service centres: Service centres will need support-staff. Each MP should be given financial assistance to set up a Service Centre in his constituency. Monetary aid for service centres has obvious financial implications. The allocation to all MPs must be equal in line with Article 8's rule of equality before the law. Rules of ethics will have to be evolved to subject MPs to transparent and proper use of funds allocated.

Other reforms

Committee system: The key to parliament's institutional efficacy lies in a strong committee system. All committees should be bipartisan. A Committee on Selection should be established with the Speaker in the Chair and with the power to allocate each MP to at least one committee. MPs should be allowed to volunteer.

The PAC must be chaired by the Opposition. Chairpersons of other committees should be selected by the members through secret ballot. The committees must be assisted by experts and empowered to hold public hearings. The committees should invoke their privilege to compel ministers and civil servants to appear before committees. All this can be accomplished without changing any laws.

A Parliamentary Services Act: Parliament should have the power to hire its own staff under a re-enacted Parliamentary Services Act. Such a law is needed to enable Parliament to recruit staff for its committees and (in the long range) for its MPs.

Institute of Parliamentary Affairs: An Institute of Parliamentary Affairs on the lines of Institut Latihan Kefahaman dan Perundangan and Institut Tadbiran Awam Negara should be established to train MPs in the Constitution and laws of Parliament. This will have financial implications. The cost can be reduced by teaming up with a university.

Fixed term parliament: As in modern England, the PM's power to dissolve Parliament prematurely must be replaced by a fixed term Parliament subject to two exceptions: (i) there is a successful vote of no-confidence, or (ii) a two-thirds majority on the floor requests early election.

Party-hopping: Anti-hopping law should be enacted to discourage party-hopping. In view of the judicial decision in *Dewan Undangan Negeri*

Kelantan v Nordin Salleh (1992) this reform will require amendments to Article 10(1)(c).

Reform of the Senate: Article 45(4) provides that Parliament may by law (i) increase from two to three the number of members elected for each State, (ii) provide for direct vote of the electors, and (iii) abolish or decrease the number of appointed members.

No constitutional amendment is needed to bring this reform. Ordinary legislation under Article 45(4) will be sufficient. It is proposed that the direct election of Senators be on the proportional representation system as opposed to the first past the post system.

Caretaker government: To promote fair and free elections, a remarkable (but now repealed) innovation from Bangladesh deserves our consideration. During a dissolution pending a general election, the PM must resign and the King must appoint an impartial, retired or serving luminary to lead the country during the electoral contest. Article 43(2) which permits the appointment of a new, interim Prime Minister from the previous Dewan Rakyat during a dissolution will have to be amended.

Rules must be evolved to determine the limited, caretaker, "night-watchman role" of a caretaker Prime Minister.

With these reforms, the legitimacy and institutional efficacy of Parliament can be enhanced and Parliament can act as a check and balance against the omnipotent executive.

Chapter 30

The Judiciary

In a constitutional state the judiciary supplies the cornerstone of the constitutional arch.

ROLE OF THE JUDICIARY IN A DEMOCRACY

In all democracies the judiciary occupies a central place in the constitutional set-up of the land. Judges are tasked to perform a myriad of critical functions.

- Enforce constitutional supremacy.
- Provide a fair balance between human rights and the interests of the state.
- Safeguard federal-state division of powers.
- Enforce the criminal law in a fair and just manner so that justice is not only done but seen to be done.
- Adjudicate disputes between citizen and citizen.
- Adjudicate disputes between citizens and the state. In a rule of law state it is the prime function of the judiciary to utilise the principles and methods of public law to tame the naked power of the state; and to provide remedies whenever rights are infringed.

- In its interpretative task, the judiciary must provide a consistent, coherent and just interpretation of the multiple but interconnected sources of law. Wherever there are defects, ambiguities or gaps in the law, judges must not wring their hands in despair. They must set about to iron out the creases, to interpret the law creatively and to take note of the felt necessities of the times. Vast empires of executive power have been created. Almost all traditional techniques of accountability have failed. Judicial control of the administration must therefore be strengthened. Citizens' political, civil and economic rights must be seen as an interconnected whole. In the exquisite language of Justice Gopal Sri Ram, a judge must give a prismatic interpretation to the static clauses of the law and make explicit what is implicit in the chapter on human rights.

Satisfactory performance of the above functions requires independence, courage, integrity, erudition, impartiality and the emotional maturity to rise above the timberline of the trivial.

CONSTITUTIONAL PROTECTION

In the Federal Constitution the following safeguards for judicial independence have been incorporated.

Institutional separation: The superior civil courts are distinct from and independent of the other branches of state. But regrettably, the inferior courts are part of a fused Judicial and Legal Service on which the Public Services Department (JPA) Head and the Attorney General have significant influence: Article 138. This must be rectified. To the ordinary citizen, justice is what happens in lower courts which hear 80% of the cases. The image of the lower courts as an appendage of the Executive must be rectified.

A tamper-proof court system: The existence of courts, the judicial hierarchy, and the jurisdiction and composition of the courts are prescribed by the law and are not open to tampering by the Executive. The Constitution prescribes the maximum number of judges for the superior courts (106) so that it is not easily possible for the government to pack the courts with political nominees: Articles 122, 122A and 122AA.

The maximum number of judges for the Federal Court is 11.[1] For the Court of Appeal, it is 22.[2] The membership of the High Court in Malaya should not exceed 60.[3] In the High Court in Sabah and Sarawak the number should not exceed 13.[4]

However in a contradictory move the Constitution gives power to the King to increase the number of superior court judges.[5] This may arouse suspicion that court packing is possible even though the noble intention of the law is to permit the King to increase judicial manpower to cope with the backlog of cases.

Proper qualifications: The Constitution in Article 123 prescribes two formal rules of eligibility for appointment to the Federal Court, Court of Appeal and the High Courts. First, the nominee must be a citizen whether by operation of law, registration or naturalisation. Second, he or she must possess the minimum professional experience of being "for the ten years preceding his appointment ... an advocate of (the) courts ... or a member of the judicial and legal service of the Federation or of the legal service of a State..." If need be, the law should be amended to expand the circle of legally trained persons who are eligible to be elevated to the Bench. Given the problem of quality at the Bench, it appears unwise to bar distinguished academicians and legal officers in public corporations and statutory bodies from being considered for judicial appointments.

Procedure for appointment: Around the world judicial appointments follow one or more of the following procedures:

- Aspiring candidates apply or are nominated.
- A Judicial Nominating Commission scrutinises the applications or nominations and recommends two or three best qualified candidates to the Executive.

1 Increased to 11 by Constitution of the Federal Court (Judges) Order 1982, PU(A) 114/82.
2 Increased to 22 by the Constitution of the Court of Appeal Order 2006, PU(A) 385, October 4, 2006.
3 Increased to 60 by the Constitution of the High Courts (Judges) Order 2006, PU(A) 384, October 4, 2006.
4 Increased to 13 by the Constitution of the High Courts (Judges) Order 2006, PU(A) 284, October 4, 2006.
5 Refer to Articles 122(1), 122A(1) and 122AA(1).

- The Executive makes the formal appointment.
- There is a procedure for confirmation by the Senate (as in the USA) or by some other confirming body.
- In the USA, State judges are elected by the people.

In Malaysia, there is a special body, the Judicial Appointments Commission, to nominate judges. In addition, Article 122B requires an extensive, multi-layered process of consultation. When a vacancy arises, other than to the post of the Chief Justice of the Federal Court, the Prime Minister must take counsel with the Chief Justice: Article 122B(2). In addition, the President of the Court of Appeal and the Chief Judges of the High Courts are consulted by the Prime Minister on appointments to their courts: Article 122B(4). For the appointment of the Chief Judge of the High Court in Sabah and Sarawak, the Chief Ministers of the States are also taken into confidence: Article 122B(3).

The Prime Minister then advises the Yang di-Pertuan Agong. His Majesty is required to act on advice but only "after consulting the Conference of Rulers": Article 122B(1). The Conference's role is one of check and balance. It has the power and duty to scrutinise, to call for further information, to delay, to caution and to warn.[6] However, it does not have the power to veto the government's proposals. Consultation is not the same thing as consent. The Prime Minister has a duty to give due consideration to the views of the Conference, the Chief Justice, the President of the Court of Appeal, the Chief Judges of the High Courts and the Chief Ministers of Sabah and Sarawak but none of them has the right to insist that his views must be obeyed. How much weight must be assigned to each view is a matter of constitutional convention and not of law.

The above extensive consultative procedures do not apply to the appointment of Judicial Commissioners and Additional Judges.

Promotion: In the matter of promotion from the High Court to the Court of Appeal and to the Federal Court, there are no clear-cut

6 It is rumoured that in 2007, the Conference of Rulers rejected the Prime Minister's recommendation for the vacant post of the Chief Judge of Malaya. The post remained vacant from January 2007 to August 2007. See *The Star*, August 11, 2007, pp 1 & 3.

guiding principles. The discretion of the Chief Justice to make any recommendation to the Prime Minister appears paramount. The views of the Judicial Appointments Commission are not binding on the PM.

Security of tenure: Unlike civil servants, superior court judges have permanency in their tenure. They cannot be removed from office by Parliament as in the USA and UK. Nor can the Executive dismiss judges summarily as was the colonial practice in the days before Merdeka: *Terrell v Secretary of State for the Colonies* (1953). Under Article 125 clauses (3) and (4), if representations are made to the Yang di-Pertuan Agong that a judge ought to be removed on the ground of breach of the Code of Ethics, inability from infirmity of body or mind or any other cause to discharge the functions of his office, the Yang di-Pertuan Agong may appoint a judicial tribunal of not less than five local or commonwealth judges, either retired or serving, to investigate the allegation and to make recommendations on the case to the King. The Constitution admirably requires that judges must be investigated by their brother or sister judges and not by the Executive or the Legislature.

The constitutional safeguards against unfair dismissal of judges were severely tested in the tragic events of 1998 when six superior court judges were suspended and three were dismissed in disregard of constitutional standards. Our judiciary has not yet recovered fully from that shock.

Favourable terms of service: Superior court judges enjoy terms of service that are more favourable than those of civil servants. Under Article 125(1) their retirement age is 66 years and can be extended by six months by the Yang di-Pertuan Agong. Under Article 125(7), judicial salaries and other terms of service including pension can be improved but cannot be changed to their detriment.[7] Under Article 122C the Yang di-Pertuan Agong cannot transfer a High Court judge except on the recommendation of the Chief Justice who, in turn, consults the Chief Judges of the High Courts.

Insulation from politics: To protect the judiciary against politically inspired criticisms, Article 127 bars parliamentary discussions of the conduct of judges save on a substantive motion supported by not less

7 Refer to the Judges Remuneration Act 1971 (Act 45).

than one quarter of the members. Under Article 125(6) the remuneration of judges is charged on the Consolidated Fund and is thereby excluded from the politically charged budget debate. By statute judges are disqualified from membership of either House of Parliament or the State Assemblies. Conventionally they refrain from any activity that would draw them into controversy. But the rigor of this convention varies from country to country.

Power to punish for contempt of court: Article 126 of the Constitution confers on the courts the power to punish for contempt any person who, by word or deed, interferes with the administration of justice or challenges the dignity or independence of the courts.

Judicial immunity: In the performance of their judicial functions all judges are immune from the law of torts and crime. The purpose of this law is to enable judges, counsel and witnesses to speak and act fearlessly in the interest of justice and to condemn inequity in appropriate language without fear of being sued or prosecuted.

THREATS TO JUDICIAL INDEPENDENCE AND INTEGRITY

In traditional constitutional theory, independence of the Judiciary connoted independence from the Executive. In most legal systems, including ours, there are many safeguards against executive interference with the Judiciary. Sadly, however, it must be noted that there are many other threats to the proper functioning of our judiciary which are not guarded against or openly discussed.

Pressures from within: We learnt a few years ago that a judge's freedom of action can be threatened by pressures from his superiors within the judiciary (e.g. the Likas election case of *Haris Mohd Salleh v Ismail Majin* (2000).

Corrupt lawyers: We learnt after a Royal Commission Report that judicial integrity can be compromised by influence-peddling lawyers. Despite the Royal Commission Report no one has yet been prosecuted. In addition, there are corrupt corporations prepared to do anything to delay or defeat justice.

Religious intimidation: Lately there has been attempted intimidation on religious grounds of judges who are hearing religion-based cases. Demonstrations are often held outside court precincts. A police report was filed against the Chief Justice who wrote the judgment in *the Meor Atiqulrahman* case.[8] Yet no action in contempt of court was instituted.

Ideological zeal: In a number of inter-religious disputes, civil court decisions appear extremely lop-sided. The Constitution is avoided or evaded and the civil courts turn a blind eye towards the suffering of the applicant caused by manifest excess of jurisdiction by the Syariah court. If judges subordinate their duty to uphold the law to their race, religion or region, then there is not much that the Constitution can do. The Constitution provides safeguards for judicial independence. But whether judicial appointees have the character and the moral capacity to transcend the prides, prejudices and temptations that afflict ordinary mortals cannot be guaranteed.

Power to empanel: An inadequately discussed area is the seemingly absolute power of a court's presiding judge to empanel a hand-picked bench that is ideologically inclined towards one side. A chief judge with the power to pick and choose who should hear a particular case can exert a powerful influence on the outcome. The present Chief Justice, Tan Sri Richard Malanjum, has laid down some ground rules to promote impartiality and transparency.

Attorney General's powers: Some rules of the Constitution for example Article 145(3A) which gives power to the Attorney General to choose the venue at which judicial proceedings will commence or be transferred to, arouse some discomfort. Article 145 most inadvisedly unites the powers of the Attorney General and the Public Prosecutor in the same person.

Infancy of our culture of rule of law: Judicial independence requires a culture of rule of law. Citizens as well as officials must show fidelity to the law. Judicial decisions must be respected and enforced by the politicians and the police. Regrettably we know that in some types of cases, judicial decisions are ignored or not enforced.

8 *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* (2006).

Article 121(1A): This amendment was inserted in 1988 to confer autonomy on Syariah courts "in respect of any matter within the jurisdiction of the Syariah courts". The amendment's intention was noble. However, it has resulted in grave injustices in those cases when Syariah legislation raises issues of unconstitutionality or violation of fundamental rights or trespass on federal jurisdiction. Syariah courts occasionally dissolve civil law marriages in which one party has converted to Islam and determine custody, guardianship and religion of children who were born in such civil law marriages. Some of these judgments devastate the lives of non-Muslims. When a challenge is raised in civil courts, most civil judges look the other way because they feel bound by Article 121(1A). This has destroyed many people's faith in the independence and impartiality of superior court judges.

It is submitted that jurisdictional conflicts between civil and Syariah courts must be viewed in the light of the Ninth Schedule, List II, Item 1 which confers jurisdiction on State Assemblies and the Syariah courts subject to the following restrictions.

- Syariah courts have no jurisdiction over non-Muslims.
- In matters of civil law, Syariah courts are constitutionally limited to 24 personal and family law matters enumerated in List II, Item 1. Contracts, torts, banking, employment, intellectual property and commercial matters are not within their jurisdiction.
- In criminal law, State Assemblies may create and punish offences against the precepts of Islam provided the offence is not in the Federal List or dealt with by federal law.[9]
- The jurisdiction of the Syariah courts must be conferred by federal law. A relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965 which limits the power to impose penalties to three years' imprisonment, five thousand ringgit fine and six lashes.

Issues of conflict of jurisdiction between civil and Syariah courts need to be resolved. It was not the intention of Article 121(1A) to authorise the States to enact Syariah legislation that runs foul of the Constitution or

9 Ninth Schedule, List I, Item 4(h), Ninth Schedule, List II, Item 1 and Article 75.

to permit Syariah courts to ignore constitutional limits. In the ground-breaking 2018 *Indira Gandhi*[10] decision the Federal Court held that despite Article 121(1A) the High Court is not barred from examining the legality of Syariah court decisions.

Additional judges: Under Article 122(1A) the Yang di-Pertuan Agong, acting on the advice of the Chief Justice, may appoint Additional Judges "for such purposes or for such period of time as he may specify". In 2017, this power was used to appoint two retiring judges as Additional Judges; the two were then immediately elevated to the post of Chief Justice and President of Court of Appeal. The result was that the nation's top two judges were holding office at the pleasure of the Executive and had no security of tenure and safeguards as conferred by Article 125. Subjecting the Judiciary to such executive patronage and control is an abuse of Article 122(1A) and destructive of public confidence in the independence of the judiciary.

Ouster clauses and absolute powers: Despite the supremacy of the Constitution, there is no dearth of authoritarian laws like the Official Secrets Act 1972, the Printing Presses and Publications Act 1984, the Danaharta Act 1998, the Sedition Act 1948 and the Prevention of Terrorism Act 2015 that confer absolute discretion and subjective powers on the functionaries of the state. These powers are often shielded from judicial review by "ouster clauses" to the effect that "the decision is final and conclusive and not to be questioned, reviewed or quashed in any proceedings". Our judges are divided on how to preserve constitutionalism in the face of such arbitrary powers. Some courageous judges subject subjective powers to objective considerations and do not allow ouster clauses to oust the Constitution, the doctrine of ultra vires and the rules of natural justice. Other executive-minded judges interpret subjective powers and ouster clauses literally. Whenever the latter happens, judicial independence and impartiality take a beating.

All in all, it may be stated that in the law relating to judicial independence not all the nitty gritty details are satisfactory. But despite some flaws in the laws, judges are as free to walk the path of justice as their conviction beckons them to. Many do. Ultimately the issue is of one character, courage and integrity.

10 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* (2018).

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VI. The Electoral Process

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Chapter 31

Electoral Democracy

Though democracy is the best form of government, there can be no denying that behind the folklore of democracy stand many myths and many utilitarian compromises.

The idea that the government must be representative of the people and answerable, responsible and accountable to the wishes of society is a firm pillar of democracy. Elections are one aspect of this accountability.

Unfortunately, the electoral exercise is so colossal, involves so many details, so many people (240,000 workers for the 13th General Election in Malaysia) and so much money (RM400 million) that it is extremely vulnerable to manipulation and malpractice. The conduct of elections requires thorough planning and a high degree of administrative efficiency and integrity. The political passions that are aroused are not always easy to keep in check. To conduct a general election peacefully, freely, fairly and efficiently is a marvel. A fair and free electoral exercise necessitates an array of legal, structural institutional and procedural pre-requisites. It requires effective participative and informational processes. It requires impartiality and integrity on the part of those who register voters. The democratic exercise relies on a huge outlay of financial and human resources. It relies on the courage, honesty and independence of the army of those who on election day, receive, count, tabulate and declare the results without partisanship.

Despite democracy's undoubted virtues, the sordid realities of the electoral exercise need to be noted and rectified. Even in the liberal democracies of the North Atlantic, the ideals of representative

government are realised only imperfectly. Elected assemblies are not always representative. Rules surrounding democratic elections often lead to undemocratic results.

A genuinely democratic electoral process must possess the following salient features:

LAWS PROVIDING FOR ELECTED ASSEMBLIES

There must be in existence constitutional provisions for the existence, composition and tenure of legislative assemblies. These are provided for in detail in our federal and state constitutions.

INDEPENDENT ELECTION COMMISSION

In Malaysia, the authority responsible for the delineation of constituencies is an independent Election Commission whose chairman and members are vested with many of the safeguards available to superior court judges. Under Article 144, they are appointed by the King after consultation with the Conference of Rulers. They hold office until the age of 66. The Commission is charged with the duties of carrying out annual registration of electors and the revision of electoral rolls; conducting general elections to the Dewan Rakyat and State Assemblies and by-elections arising out of casual vacancies. The commission reviews parliamentary and state constituencies at intervals of not less than eight and not more than 10 years in order to accommodate population shifts.

The Commission does not have total freedom to redraw the electoral map. Article 46 prescribes the number of MPs for each state. The Thirteenth Schedule declares the principles relating to the delimitation of constituencies. Public inspection of the Commission's recommendations is allowed. If more than 100 electors protest, an enquiry must be conducted. However, it was held in *Teng Chang Khim v Suruhanjaya Pilihanraya, Malaysia* (1994) that complainants are not allowed to be represented by lawyers at the inquiry. The Commission's recommendations on delineation are not final. As in the UK, Australia, Canada and Malawi, our commission reports to the Dewan Rakyat

whose decision on the drawing up of constituencies is final. Wherever parliaments are involved in the drawing up of electoral districts, suspicions are aroused about the possibility of gerrymandering, i.e. delineation of constituencies in such a way as to favour the party in power.

AN ELECTORAL SYSTEM

One of the major challenges of electoral systems is to determine how best to allot parliamentary seats to reflect the votes cast by the electors. There must be a fair and representative electoral system that translates votes into parliamentary seats. Many electoral systems and their hybrids exist around the world.

Simple plurality system: Malaysia's electoral laws are fashioned on the simple plurality, first-past-the-post system that is current in the UK and India. The hallmark of this system is that all electoral districts are single-member constituencies so that there are as many electoral districts as there are seats in the elected chamber. This is in contrast with multi-member constituencies in many countries including Singapore. Each person is entitled to only one vote. Only one ballot is held and the candidate obtaining the most votes is declared elected. There is no requirement that the winner must obtain more than half of the votes polled. The candidate with the largest vote wins. If there is multi-cornered contest, the winner may have the support of only a small proportion of the voters (a relative majority). In Malaysia one-third and in the UK up to half of the candidates do not obtain a clear majority in their constituencies. This casts a doubt on the legitimacy of their mandate. In this winner-take-all, single member constituency system, voters who cast votes for unsuccessful candidates receive no representation in Parliament. Thus, if in a three-cornered contest, candidates A, B and C receive 40%, 31% and 29% votes respectively, the "winning" candidate will be A even though he receives only 40% of the votes. In that constituency, 60% of the electors have no voice in Parliament.

In addition to non-representative outcomes in individual constituencies, the simple plurality system permits a massive disparity at the national level between percentage of votes polled and percentage of

parliamentary seats won. In the UK in the 70s, the victorious Labour Party won only 37% of the popular vote, but a working majority in Parliament. In 1983, the ruling Conservative Party received 42% of the votes and 61% of the seats. Labour won 27% of the votes and 32% of the seats. The Liberal/SDP alliance captured 25% popular support but only 3.5% of the places in the House of Commons! The electoral result was obviously unrepresentative of the level of popular support for the Liberal/SDP alliance.

In Malaysia, in the last 14 General Elections, there have been vast disparities between the ruling party's share of the popular vote and its share of Dewan Rakyat seats.

From a utilitarian point of view, this system is beneficial because it favours large parties and coalitions and eliminates small groupings. It produces large majorities in Parliament, enables stability in government and ensures easy passage of legislation through Parliament. But it also leads to undemocratic results in individual constituencies and disproportionate representation in legislative assemblies.

Proportional representation: In contrast with the simple plurality system, in the proportional representation system, parliamentary seats are given to parties in proportion to the percentage of popular votes obtained by them. There are many varieties of proportional representation – the Single Transferable Vote System, which is also called the Preferential System, the List System and Cumulative Vote System.

Single transferable vote system: Its basic characteristics are that the constituencies are large in area and they return several members (minimum three, maximum 15). Unlike the ordinary rule whereby a candidate securing the largest number of votes gets elected, under this system a candidate is elected only if he obtains a quota of the votes cast. The quota is determined by dividing the total number of votes cast by the number of seats to be filled. Constituencies are multi-member but the voter has only one ballot. He is required to mark out his preference against the names of the candidates. At first, each candidate is given all the ballots on which he is marked number one. If, on this counting, a candidate gets more votes than the quota, he is declared elected, and the excess of his votes over the quota is transferred to other candidates

according to the preference of the voter. This goes on through many countings until the required number of candidates obtains the quota to get elected.

List system: Each party is allowed to put up a list of candidates equal to the number of seats to be filled. The voter gives his vote to the whole list en bloc. The total number of votes polled by each party is then divided by the quota (determined by the total number of votes divided by the total number of seats). The resulting figure determines the number of seats each party is allocated. Suppose the quota is 10,000 and a particular party list gets 60,000 votes, the first six names in the party's list are declared elected.

The cumulative system: The voter possesses as many votes as there are seats to be filled. But the voter may give all his votes to one candidate or he may distribute them to other candidates. In this way, minority parties are given a chance of getting some representation by accumulating all party votes for the party candidates.

The proportional representation system has been adopted with some variations in Belgium, France, Norway, Germany, Sweden and Switzerland. The main advantage of the proportional representation system is that it secures a mathematically exact representation of the electorate in the legislature. Every section of opinion is duly represented. Minorities are protected. The positive outcome is that the legislature is truly representative.

But the negative features of a proportional representation system are that a large number of political parties join the fray. No single party secures an absolute majority in the legislature. Coalition governments, political instability, frequent change of government and gridlock result. Italy's misadventure with proportional representation after World War II led to yearly changes in government. Law-making becomes difficult. The tie between the elector and the "representatives" is bound to be less direct because the electoral areas are large and constituencies are multi-member. There is no provision for by-elections.

In the list system, winners are selected from party lists rather than directly by voters. Party leaders thereby acquire a disproportionate influence over the choice of MPs representing the party in Parliament.

Group Representation Constituencies: In Singapore's 83-member, single chamber legislature, there are only nine single-member constituencies. All others are Group Representation Constituencies (GRCs), which are large electoral districts run by a team of three to six MPs. According to scholar Kevin Tan, the idea of GRCs "resulted from the government's observation that there was a voting trend which showed young voters preferring candidates who were best suited to their own needs without being sufficiently aware of the need to return a racially-balanced party slate of candidates." At least one of the candidates in each GRC belongs to a racial minority. The voter elects the team rather than an individual. In addition to the GRC MPs, Singapore's Constitution allows up to six non-constituency MPs who are appointed from among the losing opposition candidates who polled the highest votes. This innovation was meant to enable alternative voices to be heard in Parliament. There are also six nominated, non-constituency MPs to represent the professions and the arts. In Malaysia, this is achieved through appointed members in the Dewan Negara.

DRAWING UP OF CONSTITUENCIES

The establishment of electoral districts should be based on one cardinal principle that constituencies should be about equal in population size so as to give reality to the principle of one person, one vote, one value. This principle is an offshoot of the rule of equality before the law. That is why in the US case of *Baker v Carr* (1962), weightage for rural constituencies was held to be a violation of the equal protection clause of the Constitution. However, the *Baker v Carr* rule does injustice to geographically large but sparsely populated areas where agriculture, forestry or fishing are the primary occupations. This rule gives to parliaments a primarily urban bias. For this reason many countries including Sri Lanka, Australia and Malaysia allow rural constituencies to be smaller in population size than urban electoral districts.

In Peninsular Malaysia a further factor is significant: rural weightage has ethnic implications because of the concentration of Malays in rural areas. But population patterns are changing. Rural areas are dwindling from 66% in 1980 to 49% in 1990. In time the ethnic significance of rural weightage may diminish.

What is "rural" or "urban" is, however, not defined in the Constitution. How much weightage may be given to a rural area is nowhere specified and wide disparities exist. The largest parliamentary constituency is Kapar, Selangor with 144,369 voters; the smallest is Putrajaya with 15,355 voters – i.e. 9.4 times smaller. In Perak, the largest is Gopeng with 97,243 electors; the smallest is Padang Rengas with 28,572 – a difference of 3.4.

THE ELECTORAL REGISTER

In some countries, the roll is drawn up by local authorities. In others, national authorities such as the Supervisor of Elections (Fiji), the Minister of Interior (Kuwait), the Election Commission (Malaysia) and members of the judiciary (Brazil) have this onerous task assigned to them. What is required is that the electoral register is dawn impartially; no one is denied the right to vote; there are no phantom voters or persons who have died; no non-citizens are allowed to register; voters satisfy the requirement of residence in their constituency, and no one registers in more than one electoral district.

Improper refusal to register a vote may be challenged in court and may also amount to a tort in civil law. The frequency of revision may be continuous or annual or every two to five years or for each election. In Malaysia, it is annual. Political parties are often allowed to help in distributing registration forms.

RIGHT TO VOTE – THE CONCEPT OF ADULT FRANCHISE

In the last century, the concept of universal adult suffrage won wide acceptance. But in every country, a series of qualifications are provided for by the law. Age, nationality (except in the UK where many categories of non-citizens are allowed to vote), registration with the Election Commission, and residence (except as to postal ballots) are normal prerequisites of a right to vote. In Malaysia, under Article 119 of the Federal Constitution, a voter at both the federal and state levels must satisfy the following qualifications:

Citizenship: All categories of citizens, whether by operation of law, naturalisation or registration are eligible to vote.

Age: An elector must be 21 years of age on the "qualifying date". This date is neither the date of the election, nor the date of registration but the date on which the registration is confirmed. Normally six months elapse between registration and confirmation. If a 21-year old registered as an elector in November 2017, he was too late to vote for the May 2018 GE14 and will only be eligible to vote for the 15th General Election in 2023 by which time he will be 26!

A survey of 222 nations or regions where regular elections take place shows a range of voting ages:

- 16 years in seven nations, including Austria and Brazil.
- 17 years in six countries, including Indonesia and Sudan.
- 18 years in 188 countries.
- 19 years in South Korea.
- 20 years in four countries, among them Japan, Taiwan and Tunisia.
- 21 years in 15 countries.
- 25 years in Uzbekistan.

Registration: A voter must be registered on the electoral roll in the constituency in which he resides on the qualifying date. Those who fail to register get disenfranchised.

According to the Election Commission out of a total population of 32,258,900,[1] only 18,609,588, million Malaysians (or 57.6% of the total population) were above 21 years of age and therefore eligible to vote in federal and state elections. However, only 14,940,624 voters (80.28% of

1 https://en.wikipedia.org/wiki/Malaysian-general-election,_2018. Voter registration is updated quarterly and those who entered the registry in the last quarter of 2012 were in time to vote for the May 2018 elections.

those eligible), took the trouble as of end of 2017 to register as ordinary, early or postal voters. This means that 3,668,964 million eligible electors opted to forfeit their right to participate in democracy's showcase event.

A possible solution is that every citizen of age according to National Registration Department records must be automatically registered at the address on his identity card. If he wishes to change his residence and his voting constituency, as is his right, the burden should be on him to fill the necessary forms. Alternatively, advance enrolment between 16 and 18 should be permitted. Australia allows it at 17.

Residence: A voter must be resident in a constituency on the qualifying date. This is necessary to prevent a massive influx of outside voters in hotly contested constituencies. However, it deprives thousands of citizens who are out of town on election day of an opportunity to cast their vote. Also, the homeless lack a regular address and may be unable to register. Regrettably, electoral law stigmatises poverty and homelessness!

The residence requirement must be viewed afresh either by vastly expanding the postal registration eligibility under the Election (Postal Voting) Regulations 2003 or by permitting early voting.

Disqualifications: A citizen is not eligible to vote if he is, on the qualifying date, detained as a person of unsound mind or serving a sentence of imprisonment for an offence in any part of the Commonwealth and was sentenced to death or to imprisonment exceeding 12 months and has not on the qualifying date served out his sentence or been pardoned.

In *Yazid Sufaat v Suruhanjaya Pilihanraya Malaysia* (2006) it was held that preventive detainees are not convicted prisoners and are entitled to postal voting if they had registered for such voting. This law is in contrast with Canada where in the case of *Sauve v Canada* (2003) all prisoners were held entitled to vote because of a constitutional right.

Disqualification also attaches to bankruptcy. This disqualification is morally questionable because many bankrupts are innocent guarantors. In any case the right to franchise should have no connection with one's financial status as was the case in early societies. Fortunately, our

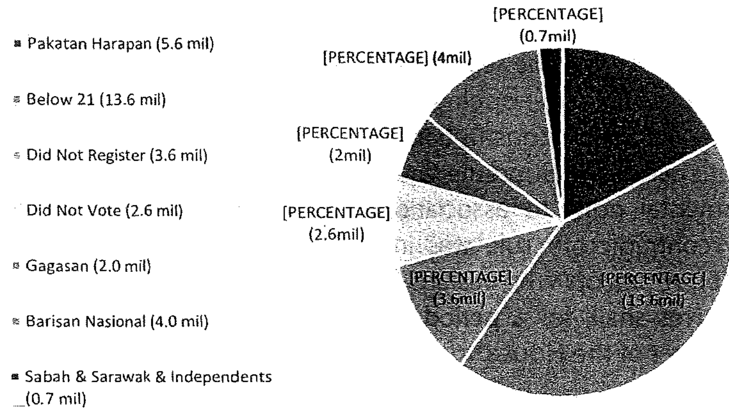
election law today does not, as in the past in some countries, impose any requirement of "literacy test" or educational level.

Voting not compulsory: Unlike countries such as Australia, Bolivia and Singapore where voting is compulsory, in Malaysia voters face no sanction if they refuse to go to the electoral booths. Twenty to twenty-five percentage of eligible voters do not exercise their right to vote. The combined effect of all the above factors is that nearly 62% of the total population does not take part in national or state elections! This is an embarrassing reality and has obvious implications for democratic legitimacy.

Reform: In Malaysia the population is 32,258,900 as of the 4th quarter of 2017. Due to the high voting age, the number of citizens eligible to vote is only 18,609,588 (only 57.6% of the total population). Due to freedom of choice, 3,668,964 (19.7% of those eligible) failed to register. The total electorate at end of 2017 was 14,940,624 which equals to 46.3% of the total population. Subtract from the 14,940,624 voters, an average of 25% electors who for the last 14 elections failed to vote on election day. This leaves us with about 38% of the population that actually takes part in democracy's iconic five-yearly exercise! Lowering the voting age, making registration automatic and making voting compulsory, will immediately expand the number of voters and improve the legitimacy of the government in power. At GE-14 the electoral support[2] for the triumphant Pakatan Harapan coalition was about 46.5% of the votes cast;[3] 37.5% of the registered voters and 17.4% of the total population. These unimpressive figures can shoot upwards dramatically if the electorate is enlarged.

2 It must be acknowledged that "electoral support" is not synonymous with "popular support". The latter may be much larger due to the ineligibility of many supporters to participate in elections.

3 Malaysia GE: Full Results", *The Straits Times* May 17, 2018, October 1, 2018. https:graphics.straitstimes.com/STI/STIMEDIA/Interactives/2018/05/Malaysia-general-elections-live-results/index.html. "GE14: Sarawak", The Star Online, October 1, 2018, https:election.thestar.com.my/Sarawak.html.).



Malaysian data indicates that 70% of our population is urbanised, and 54% uses the internet. Total adult literacy rate is 92%. A 16-year old can be tried in the courts as an adult. An 18-year-old may get married; may join the army; may start a company, invest in stocks and pay income tax. It does not appeal to reason that in a country with nearly 90% literacy, and a statutory age of majority at 18, the right to vote must be withheld till age 21.

After the regime change on May 9, 2018 Malaysia should contemplate a thorough reform of the electoral process, especially the age of voting.

ELIGIBILITY OF CANDIDATES

There must be legal rules for the eligibility of candidates and for the nomination of contestants. Eligible candidates must not be unfairly barred from contesting as happened to some candidates in GE14.

The requirements for eligibility to contest an election are generally more stringent than the requirements for voting. Around the world, the required age for electors is between 18 and 21. But for candidates, age eligibility can be from 18 to 40. In Malaysia, under Article 47, a Senator must be at least 30 years old; a Dewan Rakyat member must be at least 21. Around the world, candidates for parliamentary office suffer from

some disqualifying factors – unsoundness of mind, bankruptcy, holding an office of profit, commission of election or other serious criminal offences. In India, an elected representative who resigns from a party on whose ticket he won the seat, must resign and seek a fresh mandate from the people. This anti-hopping, anti-defection law was inserted into the Kelantan and Sabah constitutions in the early 90s but was declared unconstitutional by the Supreme Court on the ground that it infringed the fundamental right to association under Article 10. However, a seemingly contradictory rule was introduced by an amendment to Article 48(6). A person who resigns his membership of the House of Representatives shall, for a period of five years, be disqualified from being a member of the House.

In most countries, particular categories of persons are ineligible to contest for Parliament. The list of such categories is long and varied and includes civil servants, members of the forces and members of the judiciary. In Malaysia, the Federal Constitution bars a person from concurrent membership of both Houses of federal Parliament or from election to more than one federal or more than one state constituency. However, there is no bar to the concurrent holding of a seat in a State Assembly as well as Parliament.

CARETAKER GOVERNMENTS

There must be rules about the limits on the powers of caretaker governments. In the case of *PP v Mohd Amin Razali* (2002), the court provided some guidance. We could also emulate conventions from the Commonwealth.

CONDUCT OF CAMPAIGNS

Legal and conventional rules must exist for the conduct of election campaigns, duration of the campaign period, and the right of political parties to reach out to the electorate. Regulations in this area are aimed at restricting the duration of the election campaign, overseeing the use of propaganda (especially broadcasting) and the control of election expenses. Any limits have to be within the framework of the supreme Constitution which guarantees freedom of speech, assembly and

association. There is scope for judicial review of any unconstitutional restraints. Restraints on the candidates' freedom of action are also imposed by the ordinary laws of the land: the law on public order, defamation, obscenity, sedition, treason and official secrets. In Malaysia public rallies have been banned since before the 1978 general election on security grounds. In the period since the ban, indoor gatherings have been allowed with the prior permission of the police. In most countries the duration of the campaign is limited to a number of days. In Malaysia, under the Elections (Conduct of Elections) Regulations 1959-82, the campaign period has been progressively shortened. In the historic 1955 election, the period was 147 days. Now the minimum period is 11 days. Some countries forbid the use of opinion polls, newspaper advertisements and house-to-house campaigns. In Austria, broadcasting time is distributed among political parties. Giving of free transport, food and bribes to the electorate is forbidden. But government after government gets around the law by promising or delivering "development aid" just before the election.

ELECTION EXPENSES

Election expenses must be controlled so that the electoral exercise does not degenerate into a battle of cheque books. In Malaysia, the law puts a ceiling on the expenditure by individual candidates (RM100,000 for state and RM200,000 for federal seats) and imposes a duty to maintain a record of contributions and filing of audited statements of expenditure. However, there is no control on what a party may spend in a candidate's constituency. Further, there are no requirements for parties to submit audited accounts and to disclose the source and amount of donations received. This has aroused the criticism that electoral battles have degenerated into struggles between cheque books.

In countries like Israel and Monaco, subsidies are provided to parties to meet the election costs

FREEDOM OF SPEECH, ASSEMBLY AND ASSOCIATION

It is difficult to envisage a democracy without the aid of mobilising organisations like political parties. Some authoritarian states are one-party states but even in these states other associations and organisations like firms, industries, trade unions and religious organisations exist and together they help to create and mobilise public opinion. In Malaysia, political parties are allowed but they must apply for registration under the Societies Act 1966. Nearly 36 political parties are registered.

In many democratic countries there are provisions for equal access to the media for all contestants. In Malaysia media monopoly is a serious problem. The internet is, however, open to everyone and provides an alternative, though not always reliable, source of information.

INTEGRITY OF THE COUNTING PROCESS

Responsibility at each polling station is in the hands of public servants or in the hands of elected members of local authorities. In Belgium, the judiciary appoints polling station authorities. All countries allow postal voting. In some, even proxy voting is allowed under strict regulation. The place of counting can be the polling centres themselves or a centralised designated area. In either case, representatives of candidates are allowed to observe the counting. There are rules for recounting where the winning margin is less than 2% of the total votes cast, or where the counted votes for all candidates do not tally with the number of ballot papers by 1% or more. There must be no cheating and rigging in the process of counting of votes. In many countries those who vote, count less than those who count the votes!

SECRECY OF THE BALLOT

In the matter of ballot papers, a contentious issue is the secrecy of the ballot paper. In most countries the law requires such secrecy. But administrative practices in many countries (among them India and Ireland) allow each counterfoil to bear a number which also appears on the ballot paper. Presiding officers write the elector's register number on

the counterfoil. In *McMahon v Attorney General* (1972) – an Irish case – it was held that this practice offends the spirit of the constitutional rule of secrecy of the ballot.

ELECTION APPEALS

In some countries, it is not uncommon to have special election authorities (as in Bulgaria) or the Parliament itself (as in Norway) to deal with election disputes. In Malaysia, Article 118 permits election results to be challenged in the High Court. The High Court's decision is appealable through the court hierarchy.

REFORMS

Though democracy is the best form of government, there can be no denying that behind the folklore of electoral democracy stand many myths and many utilitarian compromises. Every where in the world electoral reform is being called for. Unfortunately there are no quick-fix, simple solutions. The challenges are many and, in some cases, fundamental. There are no ideal systems and no quick-fix solutions to the defects. The law walks a tightrope between what is ideal and what is workable; what is just and what is feasible.

The electoral system needs to be made more democratic. Parliament's representative character needs to be improved. At least some multi-member constituencies with proportional representation should be introduced. Sectoral representation may solve the problem of under-representation of marginalised sectors of society. The preferential vote system can resolve the problem when in a particular constituency the "winner" does not obtain more than half of the vote.

Simple reforms like extension of postal votes to those abroad will improve the democratic nature of the exercise.

VII
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VII. Powers to Combat Subversion and Emergency

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Chapter 32

Power to Combat Subversion

The special powers against subversion under Article 149 are quite independent of a state of emergency.

An unusual feature of the Malaysian Constitution is that special powers to deal with crises are bifurcated into two – the authority to deal with subversion under Article 149 and the power to combat emergency under Article 150. The nature and extent of the powers under the two Articles are quite different. So is their impact on constitutionalism and rule of law.

Subversion distinguishable from emergency: The special powers against subversion under Article 149 are quite independent of a state of emergency. Whether a proclamation of emergency under Article 150 is in operation or not, legislative action to combat subversion, organised violence and acts and crimes prejudicial to the public can be undertaken as and when the need arises. "Subversion" has been defined in Article 149(1) to refer to the following: causing people to fear organised violence; exciting disaffection against the government; promoting feelings of ill-will between classes of the population in such a way as is likely to cause violence; prejudicing the maintenance of any supply or service to the public; or causing prejudice to public order or national security. The definition of subversion is of such a broad, catch-all nature that even vigorous criticism of official policies, industrial action like strikes and call to taxpayers to withhold payment could conceivably fall within the perimeters of subversion. Only the good sense of those in power is a safeguard against overzealous use of this law's omnicompetence. The constitutional distinction between subversion and emergency and the independence of the former from the latter means that laws like

the Internal Security Act 1960, which are derived from Article 149, can continue to exist even if the state of emergency comes to an end.

Procedure: To activate the vast potential of Article 149, all that is needed is for an Act of Parliament to recite that "action has been taken or threatened by any substantial body of persons, whether within or outside the Federation," to cause fear of subversion. With this magical incantation, a whole new legislative vista opens up to the federal legislature. What is most remarkable is that passing a law under Article 149 requires a simple majority of those present and voting in the two chambers of Parliament. No special majorities are needed. The concurrence of the Conference of Rulers and/or the Governors of Sabah and Sarawak is not prescribed. The requirement of consultation with the states under Article 79 for topics in the Concurrent List does not apply.

Scope of subversion laws: Article 149 augments the powers of Parliament to enact special legislation to combat subversion. But it does not endow the Executive with similar legislative competence. In contrast, Article 150 authorises Parliament as well as the Yang di-Pertuan Agong (if the two Houses are not in session concurrently) to frame crisis laws. In addition to legislative powers, Article 150 allows the federal Executive to take all administrative measures it deems fit to combat crises and exigencies. In contrast, the powers under Article 149 are narrowly defined. They relate to legislation, not to executive action. They empower Parliament, not the Yang di-Pertuan Agong.

As under Article 150, laws enacted under Article 149 can violate fundamental rights. But the perimeters of legislative power under Article 149 are much tighter. A law under Article 149 is permitted to violate fundamental rights contained in Articles 5, 9, 10 and 13. These Articles relate to personal liberty, freedom of movement, speech, assembly, association, and property. Legislative competence under Article 150 is much larger. An emergency law can suspend or violate most provisions of the Constitution including all fundamental rights (except freedom of religion) and all federal features. The only fetters are that on six hallowed topics enumerated in Article 150(6A), the easy recourse to emergency legislation by simple majority cannot be resorted to. The six entrenched topics are: Islam, religion in general, customs of the Malays, customs of the natives of Sabah and Sarawak, language and citizenship. Amending legislation on these special topics will have to satisfy the requirements

of a special two-thirds majority and the consent of the Conference of Rulers and/or the Governors of Sabah and Sarawak. Legislation under Articles 149 and 150 must not violate the safeguards for preventive detainees entrenched in Article 151. Though preventive detainees do not have the right to be tried in an open court, they are entitled to information as to the grounds of arrest and the allegations of fact upon which the detention is based. They must be given the opportunity of making representations to an independent Advisory Board.

It is a debatable issue whether a law under Article 149 can tamper with the federal structure of the country or trespass into matters assigned to the states. The language of Article 149(1) appears broad enough to authorise intrusions into state powers in order to combat subversion. Prominent instances of Article 149 laws are the Internal Security Act 1960 and the Dangerous Drugs (Special Preventive Measures) Act 1985, both of which authorise preventive detention. The Restricted Residence Act 1933 provides for the making of orders regarding residence and exclusion from certain areas. The Sedition Act 1948 imposes significant restraints on free speech in relation to the "sensitive issues" of Malaysian politics. The Dangerous Drugs (Forfeiture of Property) Act 1988 makes provisions for the seizure and forfeiture of ill-gotten property without compensation.

Duration: Before 1960 a law made under Article 149 automatically expired one year after the date of its coming into force. But that provision has now been repealed. The present position is that laws enacted to combat subversion have no time limits and do not cease to operate even if the threat that provided the impetus for the law has ceased. However, there are four ways in which the sands of time can run out on an anti-subversion law. First, by a parliamentary repeal. Second, by a resolution of both Houses annulling the law. Third, the enacting measure may contain a time frame at the end of which the law will automatically lapse. Fourth, the enactment may require periodic parliamentary review and confirmation. Such is the case with the Dangerous Drugs (Special Preventive Measures) Act 1985.

Judicial review: The efficacy of judicial review is the litmus test for the existence of rule of law in the country. Though there are no decided cases invalidating parliamentary legislation under Article 149, the number of instances of judicial review of executive actions in pursuance

of subversion laws runs into the hundreds. In *Teh Cheng Poh* (1979), the Privy Council hinted that legislation under Article 149 must be enacted bona fide for the purpose of stopping or preventing subversive acts of the kind referred to in Article 149(1). Whether this implies that Article 149 legislation can be invalidated on the ground of mala fide is a matter of debate. It is submitted that the powers of Parliament under this Article are so broad and subjective that there is no realistic chance of judicial review on the ground of mala fide. But judicial assertiveness has not been lacking when an Article 149 law (in this case the ISA) is used to curtail the applicant's freedom of religion. In *Minister for Home Affairs, Malaysia v Jamaluddin Othman* (1989), a convert out of Islam who was actively engaged in seeking to convert others to his new-found faith was detained under the ISA. The Court held that Article 149 authorises curtailment of rights under Articles 5, 9, 10 and 13, not the right to religion under Article 11. In *Inspector-General of Police v Tan Sri Raja Khalid* (1988), a preventive detention order against a banker was held to be mala fide because there was a misuse of preventive detention power for a purpose not contemplated by the law. In *Lee Mau Seng v Minister for Home Affairs, Singapore* (1971), it was held that the guarantees of Articles 5, 9, 10 and 13 continue to apply unless explicitly excluded by the anti-subversion law. This point was dramatically illustrated in the recent case of *Abdul Ghani Haroon v Ketua Polis Negara* (2001) in which Justice Hishamudin held that nothing in the ISA explicitly excludes a detainee's right in Article 5(3) to consult and be defended by a legal practitioner of his choice.

The Act of Parliament to combat subversion must contain a recital. If such a recital is not made, the court may rely on the Irish case of *R (O'Brien) v Military Governor of North Dublin Union* (1924) to hold that the absence of the condition precedent invalidates the law. Alternatively, the court may relegate the law to the status of an ordinary law that is not protected by the extraordinary powers of Article 149. Article 149 legislation cannot violate the safeguards for preventive detainees enshrined in Article 151.

In sum, the power of the courts to enforce constitutionalism is not totally ousted.

Chapter 33

Power to Deal with Emergencies

Once a proclamation of emergency is gazetted, the floodgates are opened and legislative and executive powers of the federal government gush forth in exuberance.

When the edifice of the Constitution of Malaya was being built, the dark shadow of communist insurgency lay over the land. For this reason, the forefathers of the Constitution armed Parliament and the Executive with overriding powers to combat emergencies.

Emergency provisions to override the normal operation of the constitutional system are common to most legal systems. In fact, the British ruled Malaya (1948-1957) under an emergency proclamation issued on July 13, 1948. This proclamation continued beyond Merdeka and was ended only on July 29, 1960. As a result of the 1948 proclamation, regulations were enacted to allow for preventive detention up to two years; establish "new villages" to supervise the rural Chinese population; punish whole communities suspected of harbouring terrorists; impose restrictions on citizens' movement; order closure of shops and schools; and reduce rice rations. Nothing in post-independence Malaya matches the severity of the restrictions during British rule.

Definition of emergency: Under Article 150(1), the term "emergency" refers to threats to the security, economic life or public order of the Federation or any part thereof. There need not be actual violence or breach of peace. Threat or imminent danger is enough. The Privy

Council broadened the conceptual perimeters of emergency by declaring in *Stephen Kalong Ningkan v Government of Malaysia* (1968) that "emergency" is not confined to the unlawful use or threat of force. It includes wars, famines, earthquakes, floods, epidemics and collapse of civil government.

Who may declare emergency? The federal power to declare emergency belongs to the Yang di-Pertuan Agong who acts in accordance with the advice of the Prime Minister under Article 40(1). He can declare emergency throughout the Federation or in any one or more parts of the country. Four such proclamations have been issued since Merdeka – on September 3, 1964, due to the confrontation with Indonesia; on September 14, 1966, in Sarawak due to the political deadlock between Chief Minister Kalong Ningkan on one side and the State Assembly and Governor Tun Abang Haji Openg on the other; on May 15, 1969, due to the May 13th racial riots; and in Kelantan on November 8, 1977, due to the collapse of Datuk Mohamed Haji Nasir's government in the state. All subsisting emergencies were formally annulled by Parliament only on November 24, 2011.

Duration of the proclamation: Under the Constitution, there are only two ways in which a Proclamation of Emergency can cease – if the Yang di-Pertuan Agong revokes it; if the two Houses annul it by resolution. The Privy Council in *Teh Cheng Poh* (1979) added a third ground: a later proclamation impliedly repeals a previous proclamation. This means that the 1969 emergency impliedly repealed the 1964 emergency. However, this view is now set aside by addition of clause 150(2A) to the Constitution which states that more than one proclamation of emergency can exist concurrently. In India, courts have held that an emergency cannot last forever and lapses due to efflux of time. In *Johnson Tan Han Seng* (1977), Justice Harun Hashim relied on Indian precedents to hold that the proclamation of 1969 had lapsed due to passage of time. But the Federal Court, in overruling him, held that a proclamation once issued can go on indefinitely even if the facts that led to the declaration of the emergency have ceased.

Parliamentary control over a proclamation: Though the Constitution in Article 150(3) requires the Yang di-Pertuan Agong to lay the Proclamation of Emergency before both Houses of Parliament which are given the power to pass resolutions to annul them, the Executive

can enforce its will on Parliament by issuing a fresh proclamation and even proroguing or dissolving Parliament under Article 55(2) to enable the government to rule the country by executive fiat. For all practical purposes, a proclamation of emergency by the King is not subject to adequate control by Parliament. The control became even weaker after the deletion by Act A514 (1980) of the previous Article 150(2) that had provided that if Parliament is not in session when emergency is declared, the two Houses shall be summoned to session as soon as may be.

Effect of emergency: Once a proclamation of emergency is gazetted, the floodgates are lifted and legislative and executive powers of the federal government gush forth in exuberance.

King's power to legislate: If the two Houses of Parliament are not sitting concurrently when emergency is declared, the Yang di-Pertuan Agong may act under Article 150(2B) to promulgate ordinances having the force of law. An emergency ordinance is an extra-parliamentary measure and requires no procedures and no votes in Parliament. It represents the only instance under the Constitution when the Executive acquires primary and parallel legislative functions. The power of the Yang di-Pertuan Agong to promulgate ordinances in this period is as wide as that of Parliament: *PP v Ooi Kee Saik* (1971). An Emergency Ordinance has no fixed time duration. It can last as long as it is not revoked by the King, annulled by Parliament or has not lapsed due to cessation of the emergency proclamation.

Extension of legislative powers of Parliament: During an emergency, the legislative authority of Parliament becomes greatly widened due to conferment of very wide powers under Article 150(5) and (6). In the enactment of emergency legislation, constitutional provisions requiring consultation with the states or the consent of any authority outside of Parliament do not apply. The consent of the Conference of Rulers and the Governors of Sabah and Sarawak is not needed. Moreover, emergency legislation can be enacted by a simple majority of those present and voting. No special majorities are required. Judicial review on constitutional grounds becomes difficult if not impossible because of Article 150(6) which states that no provision of an emergency law shall be invalid on grounds of inconsistency with any provision of the Constitution. Article 150(8) bars judicial review of emergency legislation. Parliament or the Yang di-Pertuan Agong can

enact legislation to contravene almost the entire Constitution including the chapter on fundamental rights. The Emergency (Public Order and Prevention of Crime) Ordinance 1969, the Emergency (Essential Powers) Act 1979 and the Emergency (Essential Powers) Ordinance No. 45 of 1970 are examples of such legislation. The last mentioned law restricted freedom of speech by prohibiting the questioning of the "sensitive issues" of Malaysian society. The federal features of the Constitution can be ignored. Parliament (or the King) can encroach on the powers of the states. For example, the Emergency (Essential Powers) Ordinance 1969 (Ordinance 1) suspended all elections to and meetings of State Assemblies. The Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 amended the Sarawak Constitution. The Kelantan (Emergency Powers) Act 1977 imposed federal rule over Kelantan.

Whatever Parliament can do, it can authorise others to do on its behalf. This leads to the startling proposition – upheld in *Eng Keock Cheng v PP* (1966) that during an emergency, fundamental rights can be violated even by way of delegated legislation framed under the authority of an emergency law. In *Johnson Tan Han Seng v PP* (1977) even a sub-delegation to the Attorney General which violated a fundamental right was upheld as permissible.

Extension of executive powers of federal government: While a proclamation is in force, the executive authority of the Federation extends to any matter within the legislative authority of a state. Under Article 150(4), the federal government can give directions to the states or any of its officers. This means that the constitutional separation between the federal and the State Executive can be ignored.

In sum, it can be stated that emergency powers in Article 150 provide the basis for a special legal system that is parallel to and superior than the legal order established under the Constitution. It is a remarkable aspect of the legal landscape that, except for the period July 30, 1960 to September 2, 1964 and November 24, 2011 to the present, Malaysia has lived under the shadow of one or more emergency proclamations. Whether any legal, political, parliamentary or judicial checks exist to restrain these remarkable powers requires further investigation.

Substantive limits: The Yang di-Pertuan Agong's power to promulgate an emergency Ordinance can be exercised only if two conditions under

Article 150(2B) are met. First, there must be in operation a proclamation of emergency. Second, the two Houses of Parliament must not be in session concurrently. In practice, however, these requirements do not impose any significant fetter. All subsisting emergency proclamations were annulled only in 2011. As to the sessions of Parliament, the common practice is for one House to meet only after the other has adjourned. This means that during an emergency, even if one house of Parliament is holding meetings, the Executive has powers under Article 150 to seize the initiative in the legislative field. However, there are some topics outside the Yang di-Pertuan Agong and Parliament's legislative competence during an emergency. Under Article 150(6A), the power of Parliament and of the Yang di-Pertuan Agong does not extend to matters of Islamic law, custom of the Malays, native law or custom in Sabah and Sarawak, religion, citizenship and language. On these critical matters, if legislation is needed, it has to be enacted subject to the extraordinary procedures and special majority requirements of Articles 159 and 161E.

All emergency legislation, whether by Parliament or the Yang di-Pertuan Agong, has to comply with the requirements of Article 151. This Article deals with safeguards for preventive detainees. It was held in the celebrated Privy Council case of *Teh Cheng Poh v PP* (1979) that the power of the Yang di-Pertuan Agong to promulgate Ordinances comes to an end the moment Parliament reconvenes. After Parliament has come back to session, the King cannot continue to make law under Article 150(2B), either by way of an Ordinance or in the disguise of delegated legislation authorised by an executive Ordinance. If emergency comes to an end, it is provided in Article 150(7) that any laws made during the emergency will cease to have effect after a grace period of six months beginning with the date on which the proclamation of emergency ceases.

It is submitted that emergency legislation can suspend but cannot cause permanent alterations to the Constitution due to the explicit provision in Article 150(7) that, on the cessation of an emergency proclamation, all emergency legislation must come to an end after a grace period of six months. For amendments to the Constitution, the special procedures prescribed in Articles 159 and 161E must be followed and no easy recourse to Article 150 is possible.

Procedural controls: Legislation under Article 150(2B) and 150(5) must contain the recital prescribed by Article 150(6) – "the law appears to Parliament to be required by reason of the emergency." If such a recital is absent, several alternative approaches are possible. First, in the absence of a recital, the legislation may be deemed to be part of the ordinary legislative powers of Parliament under Articles 73-79 and be subject to judicial review like any other law. Second, the recital may be regarded as a mandatory procedural requirement violation of which results in nullity. Third, the recital may be regarded as a non-binding procedural requirement disregard of which does not affect validity. In *N Madhavan Nair v Government of Malaysia* (1975), where an Ordinance was challenged because it did not bear the royal seal and the customary recitation, it was held that the Constitution does not require a magic incantation. The court has to see whether the substance of the requirement is there.

Parliamentary control: The Constitution subjects an emergency proclamation to parliamentary control. Article 150(3) requires that a proclamation of emergency must be laid before both Houses of Parliament. Failure to lay could be treated as a fatal defect, causing the emergency proclamation to lapse. Alternatively, laying may be treated as a directory requirement, violation of which may not result in nullity. In *Lim Woon Chong & Ng Foo Nam v PP* (1979), there was an allegation that the May 15, 1969, Proclamation was not submitted to Parliament's scrutiny when it reconvened in 1971. But the court found that the proclamation of emergency had in fact been laid and, therefore, the legal issue was adroitly evaded.

Within what time after Parliament reconvenes must a Proclamation be laid before both Houses? No time limit is prescribed by the Constitution and one has to presume that the judicial test will be "as soon as is reasonably practicable." Under Article 150(3), a proclamation of emergency laid before both Houses shall cease to have effect if resolutions are passed by both Houses annulling such proclamation. But there is nothing to prevent the Yang di-Pertuan Agong from issuing a new proclamation, thereby causing Parliament's resolution to lose its sting. Just as with the proclamation, an Ordinance by the Yang di-Pertuan Agong under Article 150(2B) must also be laid before both Houses, and the Houses may, by resolution, annul it. But what if there is failure to lay an Ordinance before Parliament? In *Inspector-General of Police v Lee Kim Hoong* (1979), the applicant was detained under the Emergency (Public Order and

Prevention of Crime) Ordinance 1969. He argued that the Ordinance, not having been laid before Parliament, did not have the force of law. At the High Court, Justice Harun Hashim held that the laying requirement is mandatory and the effect of non-compliance is that the Ordinance ceases to have effect after Parliament convenes. At the Federal Court, however, new evidence was adduced that the Ordinance had, in fact, been presented to both Houses and the validity of the Ordinance was affirmed.

Judicial control: Is the proclamation of emergency reviewable by the courts? There was much difference of judicial opinion prior to 1981. However, with a constitutional amendment that year and the insertion of Article 150(8), judicial review of an emergency proclamation is now constitutionally ousted. Emergency Ordinances and emergency Acts of Parliament are likewise immunised from judicial review by Article 150(8). However, in a country with a supreme Constitution, questions of unconstitutionality can never be removed from judicial purview. It is part of the judicial tradition in rule of law states to interpret ouster clauses restrictively and to hold that if a decision or action is declared by law to be "final and conclusive," it is non-reviewable only if it is within the law. The word "decision" refers to a valid decision. An invalid decision is a nullity. In the context of Article 150, it is crystal clear that Article 150(6A) imposes fetters on emergency powers. Six sensitive issues cannot be trifled with under emergency powers. If Parliament or the King frame unconstitutional legislation relating to these six issues; if an Ordinance is promulgated while the two Houses are in session concurrently; if a preventive detention law violates the requirements of Article 151; and if subsidiary legislation under an emergency law violates the terms of the parent legislation, courts are unlikely to wring their hands in despair.

Further, there are some judicial presumptions that an emergency law does not automatically intend to violate the Constitution. It has been held that Article 150(2B) and 150(5) authorise inconsistencies with the Constitution that are express, not implied: *Lee Mau Seng v Minister for Home Affairs, Singapore* (1971). This means that, during an emergency, the Constitution is not automatically suspended. Parliament is not required to be sent off on prorogation. Fundamental rights are not automatically rendered ineffective, though Parliament acquires the power to abridge most of them. The courts of the land remain in operation and are not replaced by special courts. Provisions of the Constitution can be eclipsed

but not repealed, and will revive six months after the emergency ceases. Habeas corpus is not suspended. All rights and privileges and all institutions and procedures remain in effect unless an emergency law explicitly says to the contrary. Despite the continuing state of emergency from 1964 to 2011, there was a presumption in favour of ordinary law.

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VIII. Pre-Merdeka Ethnic Compromises

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Chapter 34

Towards a Shared Destiny: Nation Building in a Divided Society

Malaysia's Federal Constitution was a masterpiece of compromise, compassion and moderation.

Nation-building in a plural and "divided" society poses special challenges everywhere.

Melting pot ideology: In some countries, the "melting pot" ideology is employed. This involves the effort, either by force or through encouragement, for people of diverse backgrounds to come together, submerge their distinct identities in something bigger and evolve a new personality for at least some purposes.

Permitting a mosaic: The other model is that of a mosaic or a rainbow. This involves the recognition that the law cannot by force extinguish the special regard that a substantial number of people in every country have towards their religion, race, region, culture, language or tribe. Efforts to promote a national identity should involve the recognition that unity cannot mean sameness. It has to be a unity in diversity.

We can all be friends – but only in spots. In other areas where we do not see eye to eye, we have to live and let live, to permit diversity and differences and to tolerate these differences.

Malaya 1957 and Malaysia 1963: The leaders of Malaya's independence settled for the second approach. The various communities were allowed to maintain their distinct ethnic identities, cultures, religions, languages, lifestyles, dresses, foods, music, vernacular schools etc. Political parties and business and cultural associations were allowed to be organised on ethnic lines.

Vernacular schools were allowed. Malaya (later Malaysia) began its tryst with destiny looking a little bit like a rainbow in which the colours are separate but not apart.

Barring a short period after 1969 when ethnic practices like Chinese lion dances were not permitted, and forced integration was experimented with, the overall effort of the last 61 plus two pre-independence years has been to find some areas of cooperation and to allow distinctiveness in other spheres of existence.

Some success has indeed been achieved to discover that which unites us and to tolerate that which divides us. Recently we scored fairly well on the World Peace Index, being ranked 19 out of 153 states evaluated.

LEGAL BASIS FOR INTER-COMMUNAL HARMONY

Malaysia's Federal Constitution was a masterpiece of compromise, compassion and moderation.

In recognition of the fact that Malaya was historically the land of the Malays, the Merdeka Constitution incorporated a number of features indigenous to the Malay archipelago, among them:

- the Malay Sultanate,
- Islam as the religion of the Federation,
- the grant of a "special position" to the Malays and the natives of Sabah and Sarawak,
- Malay reservation land,
- Bahasa Melayu as the official language,

- special protection for the customary laws of the Malays and the natives of Sabah and Sarawak,

- weightage for rural areas (which are predominantly Malay) in the drawing up of electoral boundaries,

- reservation of some top posts in the State Executive for Malays, and

- legal restrictions on preaching of other faiths to Muslims and apostasy by Muslims.

However, the Malay-Muslim features are balanced by other provisions suitable for a multi-racial and multi-religious society. The Constitution is replete with safeguards for the interest of other communities. Notable features are as follows:

- Citizenship rights are granted on a non-ethnic and non-religious basis. The concept of *jus soli* (citizenship by birth in the country) was part of the Constitution in 1957 and was used to grant citizenship to 1.2 million non-Malays. However *jus soli* was removed from the Constitution in 1963. Now the requirements of citizenship are more complex.

- The electoral process permits all communities an equal right to vote and to seek elective office at both federal and state levels. Race and religion are irrelevant in the operation of the electoral process.

- The chapter on fundamental rights (with some exceptions) grants personal liberty, protection against slavery and forced labour, protection against retrospective criminal laws and repeated trials, freedom of movement, protection against banishment, right to speech, assembly and association, rights in respect of education and right to property to all citizens irrespective of race or religion.

- At the federal level, membership of the judiciary, the Cabinet of Ministers, Parliament, the federal public services and the special Commissions under the Constitution are open to all irrespective of race or religion.

- Education is free at the primary and secondary levels and is open to all.

- University education is subjected to strict quotas. However to open up educational opportunities for non-Malays, private schools, colleges and universities are allowed. Foreign education is available to whoever wishes to seek it. Government education scholarships are given to many non-Malays though this is an area where a large discontent has developed over the proportions allocated.

- Even during a state of emergency under Article 150, some rights like citizenship, religion and language are protected by Article 150(6A) against easy repeal.

- The spirit of give and take between the races, regions and religions is especially applicable in relation to Sabah and Sarawak.

- Even where the law confers special rights or privileges on the Malays and the natives of Sabah and Sarawak, there is concomitant protection for the interests of other communities. For example, though Islam is the religion of the Federation, Malaysia is not an Islamic state. The Syariah does not apply to non-Muslims.

- All religious communities are allowed to profess and practice their faiths in peace and harmony. State support by way of funds and grant of land is often given to other religions. Missionaries and foreign priests are allowed entry into the country. Every religious group has the right to establish and maintain religious institutions for the education of its children.

- Though Bahasa Melayu is the national language for all official purposes there is protection for the formal study in all schools of other languages if 15 or more pupils so desire, legal protection for the existence of vernacular schools and legal permission to use other languages for non-official purposes.

- Though Article 89 reserves some lands for Malays, it is also provided that no non-Malay land shall be appropriated for Malay reserves and that if any land is reserved for Malay reservations,

an equivalent amount of land shall be opened up for non-Malays. Alienation of or grant of Temporary Occupation Licence over state land to non-Malays is not uncommon.

- Article 153 on the special position of Malays is hedged in by limitations. First, along with his duty to protect the Malays, the King is also enjoined to safeguard the legitimate interests of other communities. Second, the special position of the Malays applies only in the public sector and in only four prescribed sectors and services. Third, in the operation of Article 153, no non-Malay or his heir should be deprived of what he already has. Fourth, no business or profession can be exclusively assigned to any race. Fifth, Article 153 does not override Article 136. Quotas and reservations are permitted at entry point but once a person is in the public service he should be treated equally.

A POLITICAL CULTURE OF ACCOMODATION AND MODERATION

In addition to the above legal provisions, the rainbow coalitions that have ruled the country for the last 61+2 years is built on an overwhelming spirit of accommodation between the races, a moderateness of spirit and an absence of the kind of passions and zeal and ideological convictions that in other plural societies have left a heritage of bitterness.

Culturally the country is a harmonious mosaic. Secularism and religion live side by side. Mosques and temples and churches dot the landscape. Despite the prohibitions for Muslims, non-Muslims are not forbidden to take alcohol, have gambling permits, rear pigs and dress in their own or the permissive ways of the West.

USING THE ECONOMY TO BIND PEOPLE

In the commercial and economic area, there is right to property, freedom of trade and commerce, a relatively open, globalised economy, encouragement to the non-Malay dominated private sector to invest in the economy, freedom to import and export, to transfer funds to and from abroad.

In general, economic opportunities have given to everyone a stake in the country. The non-Malay contribution to the building of the economic infrastructure of the country has given the country prosperity as well as stability.

DARK CLOUDS OVER THE HORIZON

Sadly, dark clouds loom over the horizon. Unresolved disputes fester about many of the following issues:

- planning permissions for non-Muslim places of worship
- forced relocation of some places of worship
- disputes about the custody, guardianship and the religion of the child in a non-Muslim marriage where one party converts to Islam
- the ban (now lifted) on Bibles in the Malay language
- the ban on the use of the word "Allah" in Christian sermons
- missionary work of Christian evangelists from abroad
- the infrequent but highly explosive issue of Muslim conversions out of Islam
- the contentious issue about the Islamic state is tearing society apart. The hitherto supreme Constitution is being challenged by some Muslim groups who wish to create an Islamic state with hudud laws
- there is overzealousness in the enforcement of Article 153 quotas and proportions
- Lately there have been constant acts of incitement to religious and racial hatred in public speeches and internet discussions.
- A petro-dollar-driven, Saudi Arabian (Wahabist or Salafist) version of extremist Islam seems to be taking hold and is displacing the traditional Malay spirit of moderation.

However, the spirit of accommodation that has lasted 61 plus 2 pre-Merdeka years can overcome the present problems. What is needed is leadership, patience, moderation and tolerance. Malaysia after GE14 offers new hope.

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IX. Looking to the Future

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Chapter 35

The Constitution at a Crossroad

In the new Malaysia after GE14, there is hope that the rule of law will be strengthened and our Constitution's imperatives will become the aspirations of our people.

In 1957, the monumental challenge was to reconcile the seemingly irreconcilable conflict of interests between the major races, religions and linguistic groups through a Constitution and a legal system that would encourage unity in diversity.

In many countries lip service is paid to minority rights. But in Malaya in 1957 the "minorities" were nearly 45% of the population with well-organised political structures and a stranglehold (along with the British) over the economy. The Malay-Muslim features of the Constitution (which were demanded by UMNO) were, therefore, balanced by other provisions suitable for a multi-racial and multi-religious society. Malay privileges were offset by safeguards for the interests of other communities. This "social contract" has largely survived the fires of politics for 61+2 pre-Merdeka years. In 1963 special protections for Sabah and Sarawak were added to the basic charter.

All in all, the spirit that animates the Constitution is one of moderation, compassion and compromise. With all its flaws, our Constitution is a carefully balanced document. Sixty-one years into independence, the Federal Constitution, though amended significantly in many parts, is still the apex of the legal hierarchy. It has endured. It has preserved public

order and social stability. It has provided the framework for Malaysia's economic prosperity. It has reconciled the seemingly irreconcilable conflict of interest between ethnic and religious groups in a way that has few parallels in Asia and Africa.

The armed forces have been kept under check. There have been no coup d'etats. Social engineering under the Constitution is progressing peacefully. We have had 14 General Elections and a peaceful transition of power in 2018 from a deeply entrenched UMNO dominated coalition to a multi-racial coalition united under the Pakatan Harapan banner. Women's emancipation is progressing well though gender equality still faces many challenges.

All in all, Malaysia has a well-developed constitutional and legal system. However, new thinking is needed to achieve global standards of constitutionalism, administrative justice, good governance, accountability and democracy.

Constitutional supremacy is a legal myth: Despite the explicit provision for constitutional supremacy in Article 4(1), the legal system is replete with federal and state laws that confer absolute, subjective and unconstitutional powers on the functionaries of the state. Citizens' challenges in the courts to these laws are generally unsuccessful. Judicial review of parliamentary and state laws is not a significant feature of our constitutional scene. However, there are winds of change and judicial review of Executive acts has produced some scintillating judicial decisions. But judicial review of legislative enactments is rare. The judiciary has not fully recovered from the suspensions and sackings in the late 80s.

The "Islamic state" movement: Within a sector of the Muslim population and even in some judicial minds, supremacy of the Constitution must give way to the supremacy of the Syariah. The "Islamic state" sentiment is widespread and though it has no basis in the Constitution,[1] its political appeal amongst the rural and even urban Malays is immense. Even within the judiciary a commitment to the Constitution is not unanimous and many civil court judges are swimming in the tide of the Islamic state. This is manifesting itself in a number of ways.

1 *Che Omar bin Che Soh v PP* (1988).

- A few judges have expressed views that Article 3(1) on Islam is more important than Article 4(1) on constitutional supremacy.
- The explicit provision in Article 3(4) that "nothing in this article derogates from any other provision of this Constitution" is being ignored.
- Fundamental rights in Part II are being denied to Muslims who challenge the constitutionality of Syariah laws and actions because some judges hold that the chapter on fundamental rights must be read subject to Article 3(1) on Islam.
- State powers to enact laws on Islam are being interpreted very broadly and are not being confined to the enumerated topics in the Ninth Schedule, List II, Item 1. Many State Assemblies are emboldened to punish Islamic crimes like homosexuality and betting and lotteries that are within the sole jurisdiction of the federal Parliament.
- Till the Federal Court decision in *Indira Gandhi v Pengarah Jabatan Agama Islam Perak* (2018), Article 121(1A) was being interpreted so broadly as to confer immunity on Syariah courts even when they acted outside their jurisdiction. Constitutionally, Syariah courts are independent of the civil courts only as long as the Syariah courts stay within their jurisdiction.
- In situations where a non-Muslim spouse converts to Islam, Syariah courts accept jurisdiction and give ex parte decisions on the dissolution of the marriage, custody and guardianship of the children and the children's unilateral conversion to Islam. These decisions have caused grave injustice, created social unrest and brought a bad name to Islam.
- The role of the State Rulers in the matter of Islam is often undermined by federal Syariah authorities that issue fatwas which are then followed by the public services throughout the country.

The Constitution appears to be in flux and is undergoing silent, unwritten changes. Only time will tell the shape of things to come. There are currents and cross-currents.

Federal-state division of powers: This is under serious challenge in a number of areas.

- The federal-state division of power over matters which have an Islamic content has broken down. Under the Constitution not all matters of Islam are in state hands. Islamic personal law is in the State List but all other matters of Islam like contract, tort and crime are under federal control. Regrettably, many State Assemblies are breaking free of constitutional limitations, are trespassing on matters in the Federal List and are violating the fundamental rights of Muslims and non-Muslims alike. Most of the time the civil courts ignore Article 3(4) which states clearly that nothing in Article 3(1) derogates from any other provision of the Constitution. The judicial tendency is that on any matter with a whiff of Islamic law, the Syariah courts have unlimited jurisdiction. State Assemblies are passing laws on many matters like betting, gambling, and homosexuality which are outside their jurisdiction.

- The 2017 fire tragedy in Kampong Dato' Keramat reminds us about the uncontrolled mushrooming of Islamic religious schools. Islamic religious schools are not in state hands. All education is a federal matter as provided in the Ninth Schedule, List I, Item 13. What is happening is that extra-legally the state religious authorities are exerting control over everything that has an Islamic content. The federal government looks the other way.

- There are many tensions in the federal government's financial, political and administrative relationship with the former Borneo states of Sabah and Sarawak. These state's grievances need to be looked into.

Jurisdictional conflicts: The last three decades have seen painful, unresolved disputes between civil and Syariah courts. Article 121(1A) gives autonomy to Syariah courts *in matters within their jurisdiction.*

The problem is that even when the 14 powerful Syariah establishments exceed their powers or violate the Constitution or infringe fundamental rights, most civil judges refuse jurisdiction to entertain the complaint. This is so even when there are issues of constitutionality and the rights of non-Muslims are being breached by the actions of Syariah authorities. However, one must note a principled exception to the above trend in the 2018 Federal Court decision in the *Indira Gandhi* case. The apex court held that the conversion of Hindu children to Islam by the Registrar of Converts in violation of the procedures prescribed by the state law was illegal and ultra vires. The court also held that in the matter of conversion of a person below 18, the consent of both parents is necessary.

Human rights: The jurisprudence of human rights is developing but is still in its infancy. Many liberties like free speech remain curtailed. Many laws enacted by Parliament ignore constitutional limits and confer absolute power on the Executive. There is strengthening of the apparatus of the state at the cost of individual freedoms. As in many parts of the world the Executive has become omnipotent.

Fundamental rights do not apply in the private sector. The international law on human rights is largely kept at bay.

However, there are also many encouraging decisions on human rights. In *Sivarasa Rasiah v Badan Peguam Malaysia* (2010), *Lee Kwan Woh* (2009) and *Shamim Reza Abdul Samad* (2009), the Federal Court held that fundamental rights provisions must be generously interpreted. A prismatic approach to interpretation must be adopted. Provisions that limit a guaranteed right must be read restrictively. In line with this new jurisprudence, the terms "life" and "liberty" in Article 5 are being interpreted broadly to encompass many implied, un-enumerated and non-textual rights. The expression "life" in Article 5(1) includes the right to livelihood and the right to continue in public or private service subject to removal for good cause and by resort to fair procedure.[2] The concept of liberty in Article 5(1) is the basis of a right of access to the courts: *Sugumar Balakrishnan v Director of Immigration, Sabah* (1998). Alternative remedies are not a bar to habeas corpus. Article 5(2) is the

2 However, no livelihood was at stake when a non-Muslim lawyer wishes to practise in a Syariah court and is barred from doing so on the ground of her religion: *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* (2016).

basis of habeas corpus and therefore the existence of other remedies cannot be the ground for refusing habeas corpus: *Sukma Darmawan v Ketua Pengarah Penjara Malaysia* (1998). In *Michael Philip Spears v Ketua Pengarah Penjara Kajang* (2017) a 14-year delay in carrying out the death sentence is cruel and oppressive.[3] More so, if the inmate has begun to suffer from mental sickness due to his situation on death row. Execution of a mentally sick inmate is a violation of Article 5.[4] Inhumane and degrading treatment raises issues under Article 5 and the High Court was ordered by the Court of Appeal to retry these issues. In *Selvi Narayan v Koperal Zainal Mohd Ali* (2017) members of the family have visitation rights. The police have a duty of care to safeguard the health of all detainees. Police are liable for negligence resulting in the death of a sick detainee.[5]

In the *SIS Forum case*[6] it was held that the restriction imposed by Parliament on free speech must be confined to the permissible, enumerated grounds in Article 10(2). The law restricting rights must be precise and not vague: *PP v Pung Chen* (1994). The restriction imposed must be reasonable and proportionate: *Sivarasa Rasiah*[7] and *Mat Shuhaimi Shafiei*.[8]

The Constitution must be read as a whole. Article 10 (on free speech) must be read along with Article 8 (on equality) because equality requires fairness: *Dr Mohd Nasir*.[9] A Constitution is a living and organic thing: *Tan Tek Seng*.[10] Fundamental rights are part of the basic structure of the Constitution: *Semenyih* (2017).[11] Laws against subversion are being interpreted purposively. In *Teresa Kok Suh Sim v Menteri Dalam Negeri*[12] the plaintiff was detained by the police under section 73 of the Internal Security Act. She was denied her right to see a lawyer, was

3 Indian case of *Triveniben v State of Gujarat* AIR 1989 SC 1335 was referred to.

4 Indian case of *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1 was referred to.

5 *Mohd Hady Ya'Akop v Hassan Marsom* (2016) and (2018).

6 *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar* (2010).

7 *Sivarasa Rasiah v Badan Peguam Malaysia* (2010).

8 *Mat Shuhaimi bin Shafiei v PP* (2014), (2017) and (2018).

9 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* (2006).

10 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996).

11 *Lembaga Lebuhraya Malaysia v Pentadbir Tanah Daerah Hulu Langat and Semenyih Jaya Sdn Bhd (Third Party)* (2007), (2010), (2014) and (2017).

12 *YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar* (2016).

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13 *Re Mohamad Eza*

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15 *Sagong bin Tasi v*
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kept in solitary confinement and under inhumane conditions and was prevented from contacting the family. The court was not satisfied that any reasonable and fair grounds existed to justify her detention under section 73. It emphasised that an objective test should be applied to evaluate police detentions (as opposed to a subjective test to evaluate ministerial decisions under section 8 of the Internal Security Act 1960). This was in line with Federal Court decision in *Mohamed Ezam's* case.[13] The court awarded exemplary damages.

In *PP v Khairuddin Abu Hassan*[14] the accused were charged under the Penal Code (sections 124L and 34) for trying to sabotage the banking and financial services in Malaysia. They were tried under the special procedures of sections 12-13 of the Security Offences (Special Measures) Act 2012 (SOSMA) which deny any right to bail contrary to the Criminal Procedure Code. The court was of the view that sabotaging essential services is not a security offence under SOSMA. SOSMA was enacted to combat terrorism and as such any ambiguity in SOSMA should be resolved in favour of fundamental rights. SOSMA did not apply to their charge.

***Orang asli*:** Despite affirmative action provision for the aboriginal people of the Malay Peninsula in Article 8(5)(c), the *orang asli* remain forgotten and marginalised. There is however some judicial recognition of their customary rights to land though judicial decisions have gone both ways.[15]

Parliament: In our system of parliamentary democracy, Parliament is supposed to perform a number of democratic functions among them the making of laws, the control of national finance, and the enforcement of accountability and answerability on the political executive. Regrettably,

Parliament is largely a rubber stamp to the Executive. It legitimates; it does not legislate.

13 *Re Mohamad Ezam bin Mohd Nor* (2001), (2002), (2003) and (2013).
14 *PP v Khairuddin Abu Hassan* (2017).
15 *Sagong bin Tasi v Kerajaan Negeri Selangor* (2002); *Adong bin Kuwau v Kerajaan Negeri Johor* (1997).

Powers to combat emergency and subversion: Preventive detention, anti-subversion and anti-terrorism laws under Article 149 abound. The ISA has been replaced with equally strict laws. Emergency laws under Article 150 lasted for about 47 years from 1964-2011. Emergency became the norm. Normalcy became the exception.

Electoral process: The process of drawing up electoral lists, cleaning them up of unauthorised voters and delineating the constituencies in a fair and impartial manner is under the control of a supposedly impartial Election Commission. There is no transparency, impartiality and accountability about the Commission's work. Parliament rubber stamps the Election Commission's political proposals. Voters' attempts to seek judicial review of the Commission's delineation proposals consistently fail in the courts. Judges are not willing to enter this political thicket. During the General Election of May 9, 2018 the electoral process fell seriously short of democratic ideals.

Affirmative action: Article 153 on the special position of the Malays and the natives of Sabah and Sarawak and the legitimate interests of other communities is a balanced and moderate provision of affirmative action hedged in by many limitations. Unfortunately, it has been used overzealously and employed by the elites to enrich themselves. Also, the system of affirmative action seems to have forgotten the orang asli and the natives of Sabah and Sarawak. Article 153's implementation needs careful fine tuning and balancing to honour its original purposes.

Hooligan politics: In the last 15 years hate speech, hooligan politics, religious extremism, enforced disappearances and political murders have marred our landscape.

Check and balance: In the last few decades, politicisation of all check and balance institutions seems to have taken place. The Election Commission, the police, the Attorney General, the Auditor General, Parliament's Public Accounts Committee, the civil service, the judiciary especially in the lower courts, and the Malaysian Anti-Corruption Commission do not arouse confidence in their impartiality and independence.

Remedies: The law on remedies is well developed but due to the technicality and cost of court proceedings, justice is not accessible to most citizens. The remedial aspects of the legal system need to

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16 See *Beatrice a/p A*
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be strengthened. Indigenous, non-legal, informal, inexpensive and expeditious remedies against wrongs need to be created.

Corruption: There is a serious problem of corruption and the looting of public revenues by politicians and the higher echelons of the civil service. Corrupt practices hurt the poor and advantage the rich.

Public law-private law: The legal system is built on the traditional but artificial distinction between public law and private law. This distinction does not serve us well. Constitutional rights are not always available in private or contractual relationships between employer-employee,[16] school-pupil, university-student and parent-child relationships. In one case, our national carrier, Malaysian Airlines System, dismissed Beatrice Fernandez,[17] an air hostess, because she got pregnant contrary to a collective agreement between the union and the airline. Her complaint of gender discrimination contrary to Article 8(2) was dismissed because according to the court, gender equality is guaranteed only in public employment.

Reception of international law: Our legal system is built on the dualistic theory of international law that the national and international systems of law are distinct and independent. In an age of globalisation, we must dismantle the legal dykes we have built against the reception of international law.

Arabisation of Malay society: A conservative, obscurantist and aggressive version of Islam from Saudi Arabia is replacing the tolerance and compassion that were the hallmark of Malay society and the Malay archipelago. The increasing "Arabisation" of Malay society and the subordination of the Constitution to religious oligarchies are undermining the Constitution and impacting negatively on the rights of Muslims and non-Muslims. The religious oligarchy seems to have emerged as a "state within a state" with powers far larger than the Constitution envisaged.

16 See *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* (2004).
17 *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* (2005).

Are we moving towards a Saudi version of an Islamic state? Are we going to have one-country-two-systems; two systems of laws and two systems of courts for the Muslims and non-Muslims?

Opinions vary on the desirability of the above. What needs to be pointed out that this is not what was envisaged by the Constitution.

No internalisation of ideals: The ideals of rule of law, separation of powers, openness and accountability in government, protection of human rights and constitutionalism have not taken roots in our legal system. A large number of lawyers, judges, law teachers and students are legal technicians and lack a social conscience and a social perspective.

Despite the above, one can harbour the hope that on the solid legal foundation that already exists we can build institutions, principles and procedures to strengthen constitutionalism and rule of law in our nascent democracy.

In the new Malaysia after GE14, there is hope that the rule of law will be strengthened and our Constitution's imperatives will become the aspirations of our people.

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Chapter 36

Rukun Negara as a Preamble to Our Constitution

The Rukun Negara and the Federal Constitution complement each other. A greater understanding of the Rukun Negara will restore, not weaken the Constitution.

Preambles are opening statements that express the aims and objects, dreams and demands, values and ideals of a nation. In the words of Durga Das Basu, "a Preamble is a declaration, a firm resolve, a pledge, an undertaking and ... a dedication".[1] Preambles are "glittering generalities" and polestars for action. They provide the guiding light for interpreting the Constitution and are its chart and compass.

In some parts of the world, a Preamble is not by itself enforceable in a court of law. It is a mere guide to the legal interpretation of the Constitution where the language is found to be ambiguous.[2] But in France, Germany, Ireland, Poland, Estonia, Bosnia, Canada, Columbia, Nicaragua and South Africa, the Preamble is used as a guide to constitutional review. In India and Pakistan the Preamble is regarded as equivalent to the Directive Principles of State Policy.

Almost all the 180 Constitutions of the world possess Preambles. But our Constitution lacks one. Our basic law's rich ideals, values and goals

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1 Durga Das Basu, *Introduction to the Constitution of India*, 17th edn, pp 20-21.
2 *Re Berubari Union* (1960).

have, therefore, to be extracted and distilled from the 183 Articles and 13 Schedules that constitute our supreme law.

Can this flaw in our basic law (the lack of a Preamble) be remedied by adopting our venerated national ideology – the Rukun Negara – into the Federal Constitution as its Preamble? It is submitted that the objectives and principles of the Rukun Negara are substantially in line with the provisions of our supreme Constitution. In fact, the Rukun Negara distils the essence of our Constitution.

History of the Rukun Negara: The Rukun Negara was drafted in 1970. After the convulsions of May 1969, a National Consultative Council (NCC) of 67 distinguished persons was assembled under the chairmanship of Tun Abdul Razak Hussein, then Deputy Prime Minister and chairman of the National Operations Council, to draft our blueprint for national unity. Some of the towering personalities on the NCC were Tun Dr Ismail Abdul Rahman, Tun Tan Siew Sin, Tun VT Sambanathan, Tun Ghazali Shafie, Datuk Harun Idris, Datuk Haji Mohamed Asri, Tun Datu Mustapha Harun, Tun Hussein Onn, Dr Syed Hussein Alatas, Prof Ungku Abdul Aziz, Tan Sri Syed Jaafar Albar, Tengku Ahmad Rithauddeen, Tun Dr Lim Chong Eu, Tan Sri Dr Aishah Ghani, Tan Sri Lim Phaik Gan, Datuk Seri SP Seenivasagam, Tun Sakaran Dandai, Tan Sri Ong Kee Hui, Datuk Stephen Kalong Ningkan, Bishop Gregory Yong and Rev Datuk Denis Dutton.

The NCC drew from all races, religions and regions, the ruling Alliance and opposition parties (except one), federal and state governments, Sabah and Sarawak, civil society groups and minorities. Regrettably, women were under-represented by only two members.

The Rukun Negara was launched by the then Yang di-Pertuan Agong on August 31, 1970. Like the Pancasila of Indonesia, the Rukun Negara was meant to be the sail and anchor of our nation and its guiding philosophy. Unfortunately, it could not be presented to Parliament because the Emergency Proclamation of May 15, 1969, had sent Parliament into dissolution.

Objectives and ideals of the Rukun Negara: The NCC chiseled out five stirring objectives of our nation. These were:

- Unity;

- A democratic way of life;
- A just society where the prosperity of the country can be enjoyed together in a fair and equitable manner;
- A liberal approach towards our rich and varied cultural traditions; and
- A progressive society that will make use of science and modern technology.

Supporting the objectives were five transcendental ideals:

- Belief in God;
- Loyalty to King and country;
- Supremacy of the Constitution;
- Rule of law; and
- Courtesy and morality.

Shared ground: The Rukun Negara distils the essence of our Constitution and provides direction for legislative, judicial and administrative action. The Rukun Negara's "supremacy of the Constitution" is provided for in Article 4. "Belief in God" is honoured in Articles 3 and 11. "Loyalty to King and country" are required by innumerable provisions including Articles 32-38. "Rule of law" is implied in provisions for judicial review of governmental action in Articles 4 and 128. "Morality" is safeguarded by empowering Parliament in Articles 10 and 11 to enact laws to safeguard morality. "Democratic way of life" is promoted by innumerable provisions conferring personal liberties and providing for elected and representative assemblies. "Rich and varied cultural traditions" are protected by provisions for freedom of religion, right to native language and traditions, customary rights, freedom of speech, assembly and association, and the special rights of Sabah and Sarawak in our federal set-up.

Objections: Some Syariah groups, Malay rights organisations and individuals are opposed to the initiative to make the Rukun Negara into our Constitution's Preamble. Their primary objections were as follows:

Affirmative action policies: Some detractors like the Malay rights group PERKASA alleged that adoption of the Rukun Negara will question policies that prioritise the Bumiputeras. PERKASA concluded that the "Rukunegara Muqaddimah Perlembagaan" (RMP) campaign "would be detrimental to Malay and Bumiputera interests".

The answer to this objection is that the special position of the Malays and the natives of Sabah and Sarawak is entrenched in the Constitution. The Rukun Negara's emphasis on "supremacy of the Constitution" implies acceptance of the Constitution as a whole, including the Constitution's provisions on the "social contract" i.e. the special position of the Malays and natives of Sabah and Sarawak, plus the legitimate interests of other communities.

If Article 153 is enforced in the spirit in which it was drafted, it will obliterate identification of ethnicity with economic function and will bring the Bumiputeras of the Peninsula and Sabah and Sarawak into the mainstream of economic life, while at the same time permitting the other communities to pursue their vision of the good life within the limits of the law. This will in the long term promote greater prosperity, stability and unity.

A retired Chief Justice expressed the amazing opinion that "all laws, regulations, orders and executive actions which give privileges to Malays and natives of Sabah and Sarawak will be unconstitutional and void the minute the Rukun Negara becomes the preamble". Most respectfully this view is legally incredible and politically inflammatory. First, a preamble can never override explicit provisions of the Constitution. A preamble by itself is not legally enforceable and cannot be made the basis of a legal claim. It consists of glittering generalities, broad and sweeping statements that encapsulate the ideals and aspirations contained in the Constitution.

A preamble is like a guiding light, a moral compass and an aid to interpretation. If the provisions of a Constitution are vague then the preamble can be summoned to aid interpretation. But if the law is clear

and unambiguous and explicitly confers a right or imposes a duty, a preamble cannot stand in the way.

Second, there is no clear conflict between the Rukun Negara and Article 153. The Rukun Negara's principle number 3 "upholding the Constitution" and its objective number 3 of "creating a just society in which the wealth of the nation is equitably shared" are consonant with the affirmative action provisions of Article 153. Upholding the Constitution includes fidelity to all its provisions including those on inter-ethnic relations.

Third, even if there was a conflict between a general preamble and a specific, explicit provision, the suggestion that the rule of interpretation that "later in time overrides former" will apply is not correct. The explicit provision must prevail and the preamble must give way. Besides the rule "later overrides former" there are other rules of interpretation like "harmonious construction" and "special overrides general". Article 153 is special and the preamble is general.

It is submitted that nothing in Article 153, which deals with the special position of Malays and the natives of Sabah and Sarawak, will be adversely affected by incorporating the Rukun Negara as a Preamble to the Constitution. Article 153 is one of the longest articles of the Constitution consisting of nearly 781 words spread over 12 clauses. It is so deeply entrenched that it cannot be amended by Parliament except by a two-third majority of the total membership in both Houses, the consent of the King and the consent of the Conference of Rulers.

Islam: The 1957 Constitution gave to Islam an exalted position but did not make the Syariah the supreme law of the land. Instead, Article 4(1) chose constitutional supremacy. Article 3(1) recognised "other religions". Article 11 gave freedom of religion to all persons. The Rukun Negara honours the Constitutional scheme of religious pluralism. Though the Rukun Negara does not specifically mention Islam, its respect for God is consistent with Article 3(1) on Islam.

Atheists: Will the Rukun Negara's "Belief in God" violate the rights of atheists, agnostics and animists? It is submitted that the Rukun Negara does not compel anyone to believe in God. All it does is to reflect the

spirituality of the bulk of the population. It is also in line with Article 3(1) (on Islam) and Article 11 (on freedom of religion).

In sum, the allegation that incorporating the Rukun Negara into our Constitution will undermine the special position of Islam and the Malays is unfounded. It is based on the politics of fear-mongering. One must not forget that the Rukun Negara was formulated by a council headed by Tun Abdul Razak whose concern for Malay empowerment can hardly be doubted. The council was composed of many towering, iconic personalities from all races, religions and regions.

The Rukun Negara's teachings have been drilled into our children's minds for 48 years. Suddenly, a group of patriots are finding the Rukun Negara's principles and objectives a hidden threat to their well-being and a contradiction with some core provisions of the Constitution!

In fact, the Rukun Negara and the Federal Constitution complement each other. A greater understanding of the Rukun Negara will restore, not weaken the Constitution.

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