# THE SULTAN & THE CONSTITUTION

Muhammad Kamil Awang

Dewan Bahasa dan Pustaka
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# FOREWORD

It gives me great pleasure to warmly welcome this book entitled The Sultan and the Constitution.

The learned author Haji Muhammad Kamil Awang deserves our compliments and congratulations for this major effort on his part to crystallise his thesis into a book, which I think will be useful as a text-book for students studying law.

Haji Muhammad Kamil Awang is a graduate of London University and a Barrister of the Honourable Society of the Inner Temple London, and did a post-graduate course at the University of Kent at Canterbury, England. Upon graduation he joined the Judicial and Legal Service Malaysia. Subsequently, he was elevated to the High Court Bench. The publication of this book is not only a personal credit to him but equally a credit to the Malaysian judiciary.

I am sure everyone of us will find the book very useful and stimulating especially to the general reader who wants to know more of the history and development of the Constitution.

This book has been translated into Bahasa Malaysia, and it is also my hope that it will be revised from time to time to incorporate future amendments of the law.

I wish the book every success.

Tan Sri Dato' Seri Hj. Mohd. Eusoff b. Chin
Lord President
Malaysia

# PREFACE

In the indigenous Malay society the Malay ruler was an absolute monarch, but over the years a transformation has taken place in which the ruler has became a constitutional monarch. This was formalised when the Malay state received its first written constitution. The present study was undertaken to examine the position of the ruler in the constitutions of the Malay states and the development of the constitutions to their present day form. The work consists of four chapters and a conclusion.

Chapter One traces the acquisition of British jurisdiction in the Malay states and the formation of the Protected Malay States. It examines the evolution of the native administrative machinery before 1874 and, after that date, with the introduction of Western Residential and the Advisory Systems in the Malay States. The introduction under both the residential and advisory systems of the State Council is examined and discussed. These, and the functions of Malay authorities and their composition are examined in the light of similar institutions in a protectorate and colony.

The origin of the Legislative and Executive Councils as found in the State of Johore is discussed and the membership of these Councils is examined. Discussion also focuses on the changes in the composition of these Councils, and that of the Council of State with modified membership qualification to admit Europeans and other races to sit in the various Councils.

Movement towards closer union under the Residential System with the formation in 1895 of the Federated Malay States as sort of loose

federation is discussed. In the Federated Malay States the centralization of administration was achieved at the expense of the rulers and their State Councils, who lost most of their powers. The result of the efficient centralization thus achieved was not accepted with enthusiasm by the Rulers of the States, and the subsequent attempt at decentralization that followed in the Federated Malay States is examined and discussed.

A comparative study of the position of the rulers under the Residential and the Advisory System, the similarities and dissimilarities are examined and discussed.

Chapter Two deals with the Post World War II period; the introduction of the Malayan Union Scheme. The British Government's attempt under the Malayan Union Scheme was to create a unitary state in Malaya, bringing together all the Malay states and the Straits Settlements of Malacca and Penang into one state, where the identity of each of the constitutional states in Malaya would eventually be eradicated. The proposal for a Malayan Union, and the Malayan Union Plan are closely examined and discussed *vis-a-vis* the position of the rulers in the Union. The attempt at creating a colonial type of government and administration with a British overlord, though partially implemented was doomed from the start. The Legislative and Executive Councils of the Malayan Union as envisaged in the Malayan Union Plan with membership of the Councils open to all citizens in Malaya were never implemented. The liberal citizenship provisions would have enabled all residents in Malaya and Singapore to be citizens of the Malayan Union, and thus were unacceptable to the Malays. The Malay rulers and the Malay community as a whole strongly opposed the Malayan Union; the basis of their opposition was their special position, and the liberal franchise law which would have upset the Malay-Chinese balance. Above all, had the Malayan Union gone through, the Malay rulers might have been deprived of all their powers.

The unremitting opposition mounted against the Malayan Union by the Malay leaders including the rulers, which received the widespread support of the Malay community as a whole and of others such as ex-Malayan civil servants in Britain, was a stumbling block in the Union's way. This subsequently led to its failure, and the Malayan Union ceased to exist in February 1948. In its place was set up the Federation of Malaya.

Chapter Three deals with the Federation of Malaya; the Federation of Malaya Agreement 1948 is discussed. The Federation consisted of all the states in Malaya as in the Malayan Union, and had a federal form of government under a British Officer, called the High Commissioner. The Agreement provided for individual State Governments with the Rulers as Heads of State. The Agreement also provided for a much more restrictive citizenship than that in the Malayan Union. The period of internal self-government in the Federation of Malaya is examined and discussed. This is the prelude to the independence of the Federation in 1957.

On August 31, 1957, the Federation of Malaya achieved her independence, and a new Federation of Malaya Constitution 1957 was promulgated. The Report of the Constitutional Commission under the chairmanship of Lord Reid, contains the draft Constitution and recommendations upon which the Constitution 1957 was based. Under the Constitution the identity of each of the constituent states in the Federation is preserved. The rulers as heads of their respective states are maintained, and individual State Governments are established with defined legislative and executive powers. The legislative powers are divided into the Federal, State and Concurrent List, and the residuary powers remain with the states. The nature and extent of such Federal powers clearly reveal a federal preponderance, and matters of local importance are left to the states.

The position of the rulers is discussed in the federal context; the relationship between the rulers and the Federal Government. The Federal Constitution creates a unique institution, the *Yang di-Pertuan Agong*, as the symbol of unity in the country and the Supreme head of the Federation. One important responsibility of the *Yang di-Pertuan Agong* is to safeguard the position of the Malays and the legitimate rights of other communities in the Federation. Islam is declared as the religion of the Federation, and in the states which have rulers, the rulers are the heads of the Muslim religion in their respective states, though they may delegate to the *Yang di-Pertuan Agong* powers for the co-ordination of religious acts, observances and ceremonies, which the Conference of Rulers agrees to extend throughout the Federation.

The Constitution also provides for a parliamentary system of government, bicameral at the federal level, and a one chamber legislature in each state. The composition and membership of these legisla-

tures are examined and discussed.

Chapter Four deals with the formation in 1963 of Malaysia; the merger of the former Federation of Malaya with the three new states, the Crown Colony of Singapore, North Borneo (renamed Sabah) and Sarawak. The Report of the Commission of Enquiry (known as the *Cobbold Commission Report*) in respect of Sabah and Sarawak entry into the Federation of Malaysia is examined. This *Cobbold Commission Report* and other reports such as the *Inter Government Commitee Report 1962* form the basis of the constitutional position of these states in Malaysia. Numerous amendments were made to the Federation of Malaya Constitution, incorporating the various recommendations made, which formed the Constitution of Malaysia. The three states were each given a State Constitution.

In the Malaysian Constitution the relationships between the Federal and each of those new states are dissimilar and these are examined and discussed. In form and substance there is no change in the Constitution affecting the original states in the Mainland. The division of powers between the Federal Government on the one hand and each of the States Governments of Singapore, Sabah and Sarawak on the other, varies considerably. The State List (for Sabah and Sarawak) is more extensive, and for Singapore it was even more so.

Matters relating to religion, national language, immigration and the position of the natives of Sabah and Sarawak are set out in the Constitution and the *Inter-Governmental Committee Report.*

In respect of the Muslim religion, as new relationship between the *Yang di-Pertuan Agong* and the States of Sabah and Sarawak was effected, whereby the State Constitution made provision that Islam is the religion of the state and *Yang di-Pertuan Agong* is head of Islam in these states in line with that of the States of Malacca and Penang.

The conclusion deals with the ruler, from personal to constitutional rule; his position in the state and the Federal Constitution and Islam. The ruler as the *Yang di-Pertuan Agong*, his position in both the Federal and the State Constitution and Islam is examined. Though the form of ruler has changed, the ruler's functions in some ways are comparable to the pre-colonial system.

In the last decade there were several amendments which had been made to the Constitution and of these, six amendments were of great significance as they brought about fundamental changes to the institution of Sultanate. Extensive modifications and curtailments on the

role, functions, powers and jurisdiction of the *Yang di-Pertuan Agong* and the Rulers had been made, bringing into focus the constitutional position of the *Yang di-Pertuan Agong* or the Ruler of a State *vis-a-vis* the modern concept of a constitutional monarch. In view of these amendments, I have at the end of each topic included an annotation of the latest amendments in respect of the topic. By incorporating the latest amendments in the relevant topic it is thus brought up to the present state of the law concerning the particular topic as it stands today.

MUHAMMAD KAMIL AWANG

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In completing this book I have contracted many debts. I should like to express my thanks to the staff of the libraries of the University of Kent, the Institute of Advanced Legal Studies and the Institute of Commonwealth Studies, of the University of London, and the Public Record Office (London) for their assistance.

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MUHAMMAD KAMIL AWANG

# ABBREVIATIONS

| | |
|---|---|
| All ER | All England Report |
| AIR | All India Report |
| AC | Appeal Case |
| CA | Court of Appeal |
| CO | Colonial Office Papers |
| FC | Federal Court |
| FMS | Federated Malay States |
| FMSLR | Federated Malay States Law Report |
| JMBRAS | Journal of the Malayan/Malaysian Branch of the Royal Asiatic Society |
| JRAS | Journal of the Royal Asiatic Society |
| KB | King Bench Division |
| MLJ | Malayan Law Journal |
| PCM | Perak Council Minutes |
| PC | Judicial Committee of Privy Council |
| PD | Probate Division |
| SCM | Selangor Council Minutes |
| QB | Queen's Bench Division |

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# 1

# INTRODUCTION

## Traditional Malay Kingship

Early Malay society was simple and feudalistic, and in the Malay States of the Peninsula it was a peasant society. The Malaysians lived by subsistence agriculture based primarily on rice cultivation, fruit and vegetable gardens. The economy, however, was not self-contained; there was usually a local trade, an exchange of surplus food crops and livestock, and an export of jungle produce, tin and gold.[1] The system of rule and power in the pre-colonial period was typically diffuse with local traditional headman theoretically subordinate to dynastic rulers *(Raja* or *Sultan)* whose territory was concentrated on the coastal plains and river valleys of the Peninsula. Relations between sultan and local dignitaries were seldom cordial (see below) with each side attempting to increase or gain a monopoly of effective power. In some extreme cases royal sovereignty was little more than symbolic.

The Islamic religion, culture and beliefs influenced the development of the early Malay Kingship, and to an extent the integration of Islam into the indigenous Malay culture reinforced it. The introduction of Western administration and institutions into the Malay States in the latter part of the nineteenth century transformed the indigenous political system into a colonial protectorate. This intervention was a watershed in the history of the Malay states. We will show later the process to transformation and concretisation of the power-base of the sultanate, and

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1 J.M. Gullick, 1958. *Indigenous Political Systems of Western Malaya.* London: The Athlone Press, p. 20.

the consequent evolution from a feudal into a constitutional monarchy, within which the sultan exercises but a formal power. Islam and Malay custom continue to play a role in the modern sultanate.

In the post colonial period there were many fundamental changes in the Malay states; the sultanate has not only survived these changes but has now been entrenched in both the State and Federal Constitutions. The federal system of government does not in any way diminish the power of the sultan. In fact, in this unique Malaysian federal system it does not subject the sultanate to the central government and the sultan exists as a sovereign in his own state, within the wider framework of the federal system. Islam is the religion of the Federation but within a state the sultan is the head of the Islamic religion.[2] Malay custom, like Islam, has also been enshrined in the State Constitution, for example, in the Negeri Sembilan Constitution 1959, the Ruler is a "composite" concept consisting of the *Yang Dipertuan Besar* and the Ruling Chiefs, the *Undangs* (of whom there are four, the Undangs of Luak Sungai Ujong, Luak Jelebu, Luak Johol and Luak Rembau)[3] and the *Tunku Besar* of Tampin. The Ruler acts on behalf of himself and the ruling chiefs, and has the powers and functions of a constitutional monarch. The *Undang* is chosen on *adat* principles and in respect to that office *adat is* part of the State Constitution.[4] At the same time the government of the State is founded on universal suffrage from which the legislature draws its authority to pass laws affecting the *adat*.[5]

In this study we will show the relationship between the state and Federal spheres, *vis-a-vis* the position of the ruler in the Federal Constitution, the State Constitution and Islam.

The rest of this Introduction is devoted to outlining (i) the concept of Traditional Malay Kingship and (ii) Islam in the pre-colonial system.

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2 The Constitution of Malaysia, Article 3.

3 The Negeri Sembilan Constitution 1959, Article XL (2). In the Agreement of 1898 the four ruling chiefs, the *Undangs* of Luak Sungai Ujong, Luak Jelebu, Luak Johol, and Luak Rembau, acknowledged the Yang Dipertuan Besar (or *Yamtuan*) as *primus inter pares* among themselves and paramount ruler of the whole State of Negeri Sembilan. The Constitution has preserved these traditional offices, and their status and functions are governed by the rules of custom *(adat)* which have been written into the Constitution. *See* M. Lister, 1887. "Negeri Sembilan, Their Origin and Constitution", *Journal of the Malayan Branch of the Royal Asiatic Society*, (hereafter *JMBRAS*), vol. 19, 1887.

4 *Ibid.*, M.B. Hooker, 1971. "Law, Religion and Bureaucracy in a Malay State: A Study in Conflicting Power Centres". *American Journal of Comparative Law* 19.

5 *Ibid.*

## Traditional Kingship

The political system of the Malay state in the early nineteenth century was a hierarchy of authority, at the apex of which was the Ruler, the *Yang Dipertuan* (He who is made Lord), *Raja* or *Sultan*.[6] Next in descending order of authority was the district chief, under whose control came a number of villages, each of which was headed by a *Penghulu* (headman). The sultan in most states did not possess much power or administrative control.[7] He was generally only in control of a royal district the district chief, besides he was head of the "political" system of the state. The sultan's role was to personify and to an extent preserve the unity of the state. Thus he presided over a limited central government, conducted external relations and provided leadership in foreign wars. He was assisted by his royal kinsmen and a large number of executive assistants. The existence in the Malay states of district chiefs, some of whom were wealthier and more powerful than the sultan himself, constituted local power and influence. The district chiefs were often as much at odds with the sultan with each other. "Yet the hard facts of trade, national defence, the need for law and order over a wider area than a district dictated the preservation of peace if the state was not to disintegrate completely."[8]

The chiefs, except in Negeri Sembilan, derive the title of their authority from the sultan under the constitutional theory of the Malay state. They could not claim to hold office unless they had been appointed by the sultan. A chief's power was derivative and in controversial or important acts he sought the approval of the sultan. Thus the chiefs who planned the assassination of the first British Resident in Perak in 1875 obtained a letter of authority from the sultan and also money and munitions, the letter was the cachet of approval as well as the authorization of material aid.

There was contradiction in the relation between the sultans and chiefs. The chiefs, in whom most of the real power was vested, were obliged by the threat of external attack, the need of a larger trade unit than the inland district and by the sheer facts of geography, to preserve the state as a unit. The sultan was, like a European medieval king, the

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6 J.M. Gullick, *op. cit.*, p. 44.

7 *Ibid.*, E. Sadka, 1968. *The Protected Malay States 1874 –1895.* Kuala Lumpur: University of Malaya Press.

8 *Ibid.*, Philip Loh Fook Seng, 1969. *The Malay States 1877 – 1895: Political and Social Policy.* Kuala Lumpur: Oxford University Press.

fount of nobility and the source of all aristocratic life.

Finally, as has often been noted, what we might call the formal arrangements of administration in the Malay state, were derived from the Malacca Sultanate. Many of the Malay states had four great chiefs and eight major chiefs, and a similar preoccupation with the figure of four in the appointment of royal offices existed in the Malay court. In Perak, for example, the non-royal offices of state abided by the standard formula of four chiefs of the first rank, eight of the second and sixteen of the third.

Under the direction of the sultan and of the other princes of the royal house, the business of the government was carried on by ministers or executives *(menteri)* from the aristocratic but non-royal lineages. In the Malacca Code, there was a hierarchy of greater and lesser offices; the highest of the four officials of the first rank was the *Bendahara* (Chief Minister). He was described as the source of legislative authority throughout the sultan's domains. Besides him, a second among the almost-equal four, was the *Temenggung*, who was responsible for internal order, and was the principal police and judicial officer. The other two first rank nobles were the *Syahbandar* of chief of Port, and the *Laksamana* or Chief of the Fleet. Below the four were the eight lesser officials, and sixteen more below them. Near the bottom of the ladder was the *Penghulu* or headman of the village.

The sultan was drawn from a royal lineage. The possibility of becoming a ruler was confined to a single royal patrilineage distinct from the chiefly lineages. There was no automatic right of succession in favour of a son or younger brother of the late ruler. The choice of a successor from among the royal lineage vested with the chiefs. A sultan at the start of his reign had at least to be acceptable to the majority of the chiefs.

The second factor in the choice of a sultan was the status of his mother.[9] A person whose mother was of royal descent, especially if she was a daughter of a sultan, was preferred to a candidate who lacked this distinction. Sons who were royal by descent on both sides were known as *anak gahara* or (in Perak) as *waris benih dan tanah* (heir by the seed and the

9 R.O. Winstedt, 1961. *The Malays, A Cultural History*. London: Routledge and Kegan Paul Ltd., "A Malay ruler's heir was ... preferably the son of a royal consort", at p. 60, *ibid.*; J.M. Gullick, *op. cit.*, pp. 48 – 49.

soil). It was usual for a sultan to marry a woman of royal descent as his first wife and royal consort *(Tunku Ampuan)* sons, especially the eldest of this union, had the best claim among the sultan's children to succeed him.

Although the qualification for office was dynastic there were problems when the chosen heir proved unequal to his responsibilities. The problem became acute when the system, based on kingship and descent produced an heir who was entirely unsuitable. Malay history is not without examples of a sultan as despotic and insane as Sultan Mahmud Shah II of Johor.[10] Nevertheless the system be rigid and admit no solution except enforced abdication or assassination of a bad ruler. But some Malay states imported a measure of flexibility to permit the exclusion of a bad candidate or even the choice of a good one (i.e. good from the point of view of the electors, the chiefs). In the absence of any strict rule such as primogeniture among male heirs there was always likely to be a number of claimants to the office. The difficulty was relieved but not solved by instituting a system of rotation of office among the branches of the lineage such as developed in the Perak royal dynasty.[11] Members of the lineage who actually attained naturally had a desire office to transmit their rights to their children. In order to pass on the office to his descendants, an office-bearer and others who are closely associated with office bearing tended to form an exclusive coterie. Its members intermarried among themselves and tried to exclude from office the collateral branches of each generation. In effect the rotation was confined to a small part of the lineage only.

The concept of kingship in the Malay society drew many of its characteristic from the fourteenth century Javanese Kingdom of Majapahit, which was of Indian origin.[12] The Raja was the source of authority, and the welfare of the realm was his responsibility. He alone had the power to issue decrees. By the end of the fourteenth century Muslim Indian traders and Muslim missionaries had successfully spread their religion

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10 Sultan Mahmud Syah II of Johor is described as "having slain in the most fiendish manner those of his wives who had the misfortune to become pregnant." He was murdered in 1699: R.J. Wilkinson, *op. cit.*

11 J.M. Gullick, *op. cit.*, pp. 55 – 57.

12 R. Heine-Geldern, 1943. "Conceptions of State of Kingship in South East Asia", *The Far Eastern Quarterly* Vol. II, No. 1, p. 18; A.P. Rubin, 1974. *International Personality of the Malay Peninsula.* Kuala Lumpur: Penerbit University Press, p. 314; R.O. Winstedt, 1926. The Founder of Malay Royalty and His Conquest of Saktima, the Serpent, *JMBRAS.*

among the inhabitants of Malacca. These Muslim interests supported the succession to the rulership of Malacca of a half-Indian Muslim son of the third ruler, Raja Kassim (Sultan Mudzaffar Shah) A.D. 1446 – 1459, who accepted Islamic teachings in matters of State. Thus Islam advanced from being the faith of foreign traders to become the faith of kings and courts.[13] Islam was absorbed by the native cultures; there was an accomodation between Islamic and indigenous principles. We will return to this subject later.

The sultan was drawn from a royal lineage and invested with supernatural powers and dignity. The person of the sultan was sacrosanct. He was endowed with divine majesty *(daulat)* at his installation, acquiring a special *sacred* status through the performance of the magic rituals of enthronement.[14] He then became changed from that which he was before and from his royal kinsmen. It was believed that any Malay who infringed the sultan's status would suffer retribution from the impersonal forces of the outraged royal dignity (*timpa daulat*). It was also believed that like a Muslim saint he had white blood in his veins.[15]

The sultans's greatness was symbolized in the ceremonial regalia *(kebesaran)* which consisted of historic jewels, weapons, robes and other accountrements, royal drums, ritual ornaments and vessels, and articles of magic workmanship. The regalia was essential for without it no Malay could become a ruler. For instance on the death of Sultan Ali of Perak in 1871 the regalia was taken and kept by Raja Ismail, an outsider and aspirant to the throne, and as a result, Raja Muda Abdullah (i.e. the Heir Apparent) could not be installed as Sultan of Perak.

Certain colours, architectural devices, robes and furnishings were reserved for the sultan; there was a special vocabulary used for royalty, for example, *anugerah* (royal bounty), *murka* (wrath), *siram* (bathe), *gering* (sick), *titah* (command), and Ulu (head).

The unity of the ruler and his kingdom was expressed in symbolic ownership of land, of natural phenomenon and of rare and strange creatures e.g. albino buffaloes and illegitimate children. Albino buffaloes

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13 *Ibid.*, C.H. Wake, 1964. "Malacca's Early Kings and the Reception of Islam", *Journal of South-East Asian History* – 5; R.J. Wilkinson, 1971. "The Malay Sultanate", *Wilkinson's Papers on Malays Subjects*. Kuala Lumpur: Oxford University Press.

14 R.O. Winstedt, "Kingship and Enthronement", *JMBRAS*, Vol. XX, Part I, pp. 45–56.

15 *Ibid.*, p. 130; J.M. Gullick, *op. cit.*, p. 45.

were freaks and illegitimate children were members of society born contrary to its rules. They possessed and aura of abnormality and accursedness. A sultan with supernatural powers was the appropriate person to handle such beings.[16]

The Malay expression of majesty as a supernatural power is derived from Islam and indigenous factors. The adaptation of these elements into the political system in the nineteenth century Malay state, is evident in the social functions and institutions of that period. It was formerly believed that a Malay Raja was a reincarnation of a Hindu divinity or a *Boddhisattva*, the Buddhist enlightened being who renounces *nirvana* in order to remain in this world and assist the spiritual liberation of his fellow beings.[17] This belief can be seen in the ritual of enthronement of a Malay Ruler which is reminiscent of the Brahminical and Buddhist ceremony. In describing Malay court ritual, R.O. Windstedt noted the way the Perak ruler, when enthroned, was adorned in the *Vedic* manner, wore necklace and anklets as an Indian God, and listened to a Sanskrit formula read in his praise by a herald of Brahmin origin. A dagger of great ceremonial significance in the Minangkabau regalia has engraved upon it figures associated with the *Tantric Bhairava* cult.[18]

Negeri Sembilan, at the installation of the *Yang Dipertuan Besar*, the rites of Islam play an important role. Before the ceremony of obeisance of the *Undangs* (Ruling Chiefs), a prayer is recited by a court official, *Sri Amar Diraja*, an invocation to the angels of Islam to beseech *Allah* to enthrone the prince, and the four archangels of Islam to confer protection on the *Yang Dipertuan Besar*. At the conclusion of this ceremony the local *kadhi* (religious official) recites prayers, among which the most important are the following verse, "Lo, I have appointed a caliph to be my Vice-Regent upon earth", and a prayer beseeching *Allah* for guidance for the new caliph he has raised, the guidance he gave to Prophet Solomon. These prayers, according to R.J. Wilkinson, "... are a very essential feature of the ritual of an installation and invest the *Yamtuan* with the *daulat* or 'divine majesty of kings'."[19]

The early Malays considered themselves to be living not under a

16 J.M. Gullick, *op. cit.*, p. 46.

17 A.C. Milner, 1981. Islam and the Malay Kingship", *Journal of the Royal Asiatic Society* 1, p. 50.

18 A.C. Milner, 1983. "Islam and the Muslim State", *Islam in Asia, 21.*

19 R.J. Wilkinson, 1914. "Sri Menanti", *Wilkinson's Papers on Malay Subjects*, Series 2, No. 2 p. 44. "*Yamtuan*" is a colloquial name for *Yang Dipertuan Besar.*

divinely revealed law but under a particular *Raja*, an institution which, according to A.C. Milner, had taken deep roots in the Malay animistic and Indianized past. The Malay word to describe "government" and "state" is *"kerajaan"* which literally means "the condition of having a Raja". The Raja, not the Malay race or an Islamic *umat* (community) was the primary object of loyalty; he was central in every aspect of Malay life. It was not so much that he monopolized all military or economic power, but that all those pursuing military or economic ends did through the idiom of "Rajaship".[20]

Malays referred to themselves as the slaves *(patik)* of the raja, and the latter owned all the land in the territory. The law too, was said to be the raja's "possession". The *Hukum Kanun Melaka (Malacca Legal Digests)* describes the reigning sultan as owning *(mempunyai)* the laws, which were a blend of Islamic and customary law. The laws gained their authority, it would seem, from having been laid down by the raja and executed by his officials. These laws and customs were handed down from ruler to ruler, and were in the possession of *(diempunyai)* the reigning sultan. It was the raja's representatives (*wakil*) who were expected to administer the laws and customs.

In the preamble to the first written Constitution of a Malay state, the Constitution of the State of Johore 1895, it is stated that the Sultan is handing down the Constitution after securing the "advice, concurrence and assent of all members of the Council of Ministers and other Chiefs and Elders of the Country". Though the raja was the focus of the law he was generally portrayed as playing an active part in the legal process. In matters relating to the Islamic law the state religious officials, *e.g.* the *kadhis*, took the lead in administering the law.

To the extent that the ruler was involved actively in political life he was concerned primarily in ceremonial matters. Ceremony, like law, was "in his hands", he was the focus of ceremonial occasions and the giver of titles which determined where a man sat and how he was to be attired. Titles had implications for the state as well as this life (see below). In the Malay view, the ruler as the head of the ceremonial structure was the real substance of the Malay state and was thus able to assure his loyal subjects that their loyalty would be rewarded by God.[21]

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20 A.C. Milner, "Islam and Malay Kingship" *op. cit.*, p. 45.

21 R.O. Winstedt, 1938. *Sejarah Melayu* (Malay Annals), *JMBRAS*, XVI, p. 44.

## Islam

Islam came to South East Asia via the Indian sub-continent[22] and was tolerant popular native usage and belief which might not be in strict accord with Muslim orthodoxy. In the Malay state, a ruler had no real authority over any but a varying portion of his domain; within them, on the establishment of Islam it was possible to alter the texts and flavour of many digests. This was in fact was done.[23] Examples of this are conflicting provisions relating to penalties for various crimes and the varying standard of circumstantial or factual evidence required to prove an offence. In these provisions it is possible to distinguish rules having close affinities to Indian practice, to Islamic, mainly Shafii texts, and to a third group not distinguishable as either. There are also cases of Islamic texts misinterpreting the *Qur'an;* for example, the Pahang legal text translates *Surah XI,* 30, as stating not that God placed Adam on earth as his representative, but that he had "placed the raja on earth as his representative".[24] This angers the modern Muslim.

From Malacca and Malacca derived texts the origin of law in the Islamic ethic is identified by the authority responsible for promulgating the law. The laws are absolute, certain as to source and of universal scope. In all cases the emphasis is on the nature of sovereignty, and in many cases the aim of the Islamic texts was to legitimize the position of the ruler. The nature of these laws was thus determined on the principle of the ruler's prerogative as *berkhalifah* (Vice-Regent of God on earth). The sultan was the source of God's order on earth and the intermediary between God and men.[25]

The texts contain a mixture of legal rules and they attempt to state the basic rules of Islam in a form which is compatible with the local cultural patterns. The Islamic provisions represent an adaptation of Islamic principles to the facts of life at the period. The non-Muslim parts contain local rules, some of which have a relation with indigenous practice. In addition, there are the local customary *(adat)* laws, most of them in oral form, dealing with both private law (mainly land matters) and public

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22 G.E. Morrison, 1951. "The Coming of Islam to the East Indies", *JMBRAS,* XXIV, Part 1.

23 M.B. Hooker, 1973. "The Challenge of Adat Laws in the Realm of Comparative Law", *International and Comparative Law Quarterly,* Vol. 22, p. 496.

24 J.E. Kempt and R.O. Winstedt, 1948. "A Malay Legal Digests", *JMBRAS,* XXI, p. 25.

25 M.B. Hooker, *op. cit.*

law. There is no clear distinction between secular source and the divine source of the rules nor there is clearer distinction between a theory of absolute sovereignty and the reality of the law in day to day administration.

The legal texts also deal with the relationship between the ruler and the ruled, and they so described the form of political organization. The *Undang-undang Kerajaan* (Perak, the Laws of Kings) enjoin perfect obedience upon the ruler's subjects. The duty of obedience is dictated by reference to religion; this indicates the importance of belief as well as a duty to the ruler. The supreme religious authority of the ruler was thus fully recognized, and the ruler's place in the Malay Islamic world reinforced.

Some of the Islamic texts make reference to death, life after death and the Day of Judgement when everyone is resurrected and every good deed rewarded and evil deed punished. In this connection there is abundance of evidence in Malay literature of the Malay concern with death, and life after death, and by exploiting this consciousness a Malay ruler was able to convince his subjects that their loyalty would be rewarded by God.[26]

Formerly, in the Malay Islamic world, the ruler was regarded as the shadow of God on earth *(Zill Allah fi'l alam)*.[27] The Malay Raja was attracted to Islam first by Persian traditional kingship, a tradition which had been assimilated into medieval Islam. This was expressed in the form of titles and descriptive formulae from the Persianised Muslim world. This may not be evidence of Persian influence, it is argued that a Persian element in names *(Nurshirwan* and *Buzurjurhr)* which appear in Malay legal digest may be merely a geneological gambit, just as the Malayan texts suggest geneological connection to the Prophet Muhammad and from him back to Adam.[28] This is a form of validation by association, i.e. the texts drew authority from an actual or putative line to the source of power, in this case Islam, expressed in terms of Persian culture. Validation by association is common in South East Asia and there are examples from Java, Burma and Siam.

In adopting these new titles and formulae enhancing kingship the

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26 M.A. Rauf, 1964. *A Brief History of Islam with Special Reference to Malaya*. Kuala Lumpur: Oxford University Press.

27 A.C. Milner, "Islam and Malay Kingship", *op. cit.*, p. 52; R.O. Winstedt. *Sejarah Melayu*, *op. cit.*

28 M.B. Hooker, "The Challenge of Adat Laws", *op. cit.*, p. 494; G.E. Morrison, 1955. "Persian Influence in Malay Life 1280 – 1650", *JMBRAS*, 27.

rulers legitimized their authority.[29] It is unlikely that these new titles and formulae were utilized initially to justify the ruler's position in the Malay community as the old Malay royal titles "Yang Dipertuan" or "Raja" were retained after Islamization and were not less splendid than "Sultan" nor would the position of "God's Shadow on earth" be seen as radically superior to *boddhisattva-hood*. These Islamic elements might have strenghtened the relationship with the foreign Muslim community in the port. Thus the acquisition of these titles and formulae permitted the ruler to explain his position in the polity to the Muslims, and might include Shari'ah elements in the Malay legal digests.

Secondly, the mystical concept of the "Perfect Man" attracted the Malay Ruler.[30] Both indigenous and European documents indicate that spiritual questions were important matters of state to a Malay Raja. It was his duty to obtain knowledge of the latest spiritual doctrines or techniques and to utilize them for the benefit of his subjects. The Raja in modern times summoned even Christian missionaries to discuss with them the "world to come".[31]

The Malay Raja's interest in the "Perfect Man", the saintly figure who has "fully realised his essential oneness with the Divine Being" and who, *boddhisattva-like*, guides his disciples along the path he had trodden,[32] can be traced from the fourteenth century Malay world. The *Hikayat Raja-raja Pasai (the Pasai Chronicles)* imply that in the fourteenth century the ruler of Pasai, one of the first Malay states to adopt Islam, gained magical powers as a consequence of being a Muslim. When an Indian Yogi, skilled in magic arts, comes into the sultan's presence and performs, miraculous tricks, the Yogi, overawed by the sanctity *(keramat)* of the sultan, falls to the ground.[33] *Keramat* is an Arabic word referring to magical gift of Muslim saints, men whose "ecstasy and rapture" are, in Professor Nicholson's words, an outward sign of their "passing away" from the phenomenal self.[34]

The *Sejarah Melayu (Malay Annals)* related that Sultan Mansur

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29 M.B. Hooker, 1978. *A Concise Legal History of South-East Asia*. Oxford: Clarendon Press, p. 50.

30 A.C. Milner, "Islam and Malay Kingship", *op. cit.*, p. 55.

31 M.B. Hooker, *A Concise Legal History of South-East Asia, op. cit.*

32 R.A. Nicholson, 1921. *Studies in Islamic Mysticism*, Cambridge.

33 A.H. Hill (ed.), 1960. *Hikayat Raja-raja Pasai. JMBRAS*, p. 64.

34 R.A. Nicholson, 1966. *The Mystics of Islam*. London: Routledge and Kegan Paul, p. 193.

(1456 – 1477) was particularly impressed by Maulana Abu Bakar, a student of Maulana Abu Ishak who, according to the text, was "very knowledgeable in the science of *Tasawuf* (mysticism)". Maulana Abu Ishak wrote a book, *Durr Mandzum*, which his student took to Malacca, and which aroused the interest of Sultan Mansur. The *Annals* provide further indications that the concept was influential in Malacca. Thus in the midst of the Portugese attack on the city in 1511 Sultan Ahmad is described as mounting his elephant, accompanied by his spiritual adviser, and "went forth onto the bridge and stood there amid a hail of bullets".[35] It was believed that his saintly powers would render him invulnerable.

Every Muslim believes in the unity of God *(tauhid)*, but the concept holds a special meaning for the mystic. To the mystic *tauhid* is understood as "the extinction of the ignorance of our essential and unmovable identity with the only Real"; preoccupation with *tauhid* is the characteristic of the "Perfect Man" who fully realizes his "essential oneness with the Divine Being".[36]

To an extent, *sufism* or mysticism in Islam must have played an important part in converting the Malay Rajas to Islam. It has been suggested that the ecstasy experienced by the *Sufis* during the *zikir*[37] (remembrance and mention of God's name) conducted to a rhythmic movement resembled the seance of the local shaman. This resemblance and the characteristic patience and simplicity of life of a *sufi*, and his performance of miraculous healing akin to the magic work of a *pawang* (traditional Malay spirit medium) probably helped to convince the Malay Rajas to embrace Islam.

In the past, Islam has been tended to be defined in terms of such Islamic institutions as Islamic Law (Shari'ah) and its administrators, *kadhi*, and *mufti*. Scholars have concluded that Islam had little initial impact on the Malay states. J.M. Gullick in his analysis of four nineteenth century Malay states concluded that Islam was "not to an extent a state religion". There were "no *kadhi* until the era of British protection" and no

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35 R.O. Winstedt, *Sejarah Melayu*, *op. cit.*, p. 127; "Some Malay Mystics, Heretical and Orthodox", *JMBRAS* 1, 1923; A.H. Johns, 1951. "Malay Sufism", *JMBRAS XXV*, Part II. The Malay Annals explain that the Sultan was studying the doctrine of the unity of God (*tauhid*) and his spiritual adviser, Makhdum Sadar Johan, clasping the saddle *with* both hands, cried to Sultan Ahmad, "Sultan, this is no place to study the unity of God. Let us go home", Winstedt, p. 191.

36 R.A. Nicholson, *The Mystics of Islam*, *op. cit.*, pp. 45 – 49.

37 The *zikir* practiced by the Malays is often accompanied by rhythmic physical movement but with no music accompaniment: M.A. Rauf, *op. cit.*

evidence exists that Islamic "legal doctrine" was effective law.[38] A.C. Milner seems to agree with this conclusion although he noted that the institution of *kadhi* was in existence in the Malay States.[39]

The religion of Islam is a whole which contains a social, a legal and a political order. Its precepts are found in the Holy *Qur'an*, the word of God revealed to Prophet Muhammad, and the *Sunnah*, the practice of the prophet. The Islamic legal theory is the understanding *(fiqh)* of the law of Islam. The law is therefore both a divinely given law and a Jurists law. A rule of law must derive either from the *Qur'an* or the *sunnah*. The nineteenth century Shafii jurists had exercised opinion *(ra'y)* and applied the principles upon which divine revelation had regulated similar cases, and this reasoning by analogy is known as *qiyas*. Thus a rule of law must derive from either the *Qur'an* or the *Sunnah*, or by analogical deduction from them. As is common to all legal systems, conflict arises between the strict "letter of the law" and its essential spirit. Strict analogy in a particular case could occasion injustice, and it was therefore permissable to decide an issue on *istihsan* or the search for a just solution.[40]

The Shari'ah is a code of law and a code of morals; a distinction between the two is not clearly drawn. Acts are classified as obligatory *(wajib)*, prohibited *(haram)*, or permissible *(mabah)*. The first two classes of acts have legal sanction, enforceable by the Shari'ah court. There are two kinds of acts which have definitive value: those which are recommended or praiseworthy *(mandub)* and those blameworthy *(makruh)*. Neither of these have legal sanctions. Thus it is praiseworthy for a *wali* (marriage guardian) to act upon the wishes of the ward, but if he does not do so, any marriage that he concludes on her behalf against her wishes, remains perfectly valid.[41]

The religion of Islam promulgates a value and purpose for all human life, and the law of Islam directs man's behaviour to the purpose of God. Law and religion are not, nor can they be, separated. The definition of law is not open to question, as to its nature and purpose, but its application has varied from time to time and from place to place. In Islamic law, any custom which contravenes an express text of the *Qur'an*

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38 J.M. Gullick, *op. cit.*, p. 139, he observed that there "were no public rituals of Islamic content".

39 A.C. Milner, "Islam and Malay Kingship", *op. cit.*, p. 61.

40 M.B. Hooker, *A Concise Legal History of South-East Asia*, *op. cit.*, pp. 78 – 84.

41 *Ibid.*

or the *Sunnah*, is void. The religion of Islam is the religion of the Malay states and, in its relationship with the indigenous cultures, the Shari'ah either conflicted with the indigenous laws and local thought, or an intermingling took place in which the local laws and customs became part of the Islamic influenced world.[42]

Where Islam is a legal system, it explicitly seems to be in opposition to some local customary (*adat*) laws.[43] For example, among the matrilineal Minangkabau Malays of Negeri Sembilan, the rules of marriage and distribution of property are contrary to Islam. The basis upon which obligation is distributed to individuals is different. The strict law of Islam had to adapt itself to the traditional customs and the political realities governing the life of its adherents. In actual practice, the Malays did not distinguish between customary and Islamic law; many of their customs were given the force of law, and many Islamic laws were set aside on account of contradiction to the prevailing custom of the day. In the *Undang-undang Mahkamah Melayu Sarawak* (the laws of the Sarawak Malay Courts), for instance, Islamic principles and local customary laws are intermingled in a sort of haphazard way, and the laws as a whole have worked satisfactorily for over a century.[44] Where the religion of Islam has been accepted, the indigenous customs tend to assimilate themselves to the Islamic law.

By accepting Islam, the ruler probably believed that he was in no way threatening the basis of the Malay raja-centred *kerajaan*. He was right but only for the short term. In the long term the process of "purification" which the Muslim world underwent during the eighteenth and nineteenth century was to have an important impact in the Malay lands. In Arabia, the followers of Ibn Abd al-Wahab, the *Wahhabis* declared war on the mystic's veneration of saints and denied the Ottoman Sultans the right to act as protectors of Islam orthodoxy.[45] In an attempt to return to the "traditional image of primitive Islam", the religion was to be

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42 *Ibid.*, "Adat and Islam in Malaya", *Bijdragen tot de taal, land en Volkenkunde* 130, pp. 69 – 90; *Adat Laws in Modern Malaya*, 1972. Kuala Lumpur: Oxford University Press, and P.P. de Josselyn de Jong, 1960. "Islam and Adat in Negeri Sembilan (Malaya)". *Bijdragen tot de taal, Land en Volkenkunde* 116.

43 P.P. Buss-Tjen. "Malay Law", *American Journal of Comparative Law* Vol. 7, No. 2, c. 265; N.J. Coulson, 1969. *Conflicts and Tensions in Islamic Jurisprudence*. University of Chicago Press, pp. 3 – 9; Said Ramadan, 1970. *Islamic Law*. University of Cologne, pp. 33 – 36.

44 M.B. Hooker, *A Concise Legal History of South-East Asia*, *op. cit.*, p. 113.

45 A.C. Milner, "Islam and Malay Kingship", *op. cit.*, p. 58.

purged of its "foreign" accretions, in accordance with the "Shari'ah-minded". The Islamic community (*umat*) would be governed by the one, divinely ordained law, a doctrine which left no room for human intercessors between man and God. It is in the eighteenth and nineteenth century that the influence of the "Shari'ah-minded" is constantly evident. And in emphasizing the rule of Shari'ah law as the foundation of the community, (*umat*), they offered an alternative to, and thus threatened, the raja-centred states of the Malays.

Through the *haj* or pilgrimage to Mecca, and by means of Arab settlers and travellers in Malay states, the ideas of the *Wahhabis* spread through the Archipelago. In Sumatra, for instance, following the *Paderi* war Tunku nan Rintjeh established an administration which, in the opinion of one modern scholar, bore "a striking resemblance to that of *Wahhabis*".

The impact of Wahhabism, however, was not limited to Minangkabau. In 1830 it is reported that the Arabs had succeeded in the "partial introduction of the Mohammadan Code of laws". By the 1900s, however, the pace of change was sufficiently fast for a British official to observe that "the native" of the Peninsular was becoming "less of a Malay and more of a Mussulman".[46]

Some of the Malay rulers who appreciated the importance of these Islamic developments compromised with the fundamentalists: we can see evidence of this in the changing inscriptions on Malay coins. The epithet *Khalifat al-Mu'minin* (Caliph of the Faithful) engraved on the eighteenth and nineteenth century Kelantan coins is replaced in the late nineteenth century by the word *Kerajaan Kelantan*. Similar changes occured in Terengganu and Brunei.

In Kelantan too in the early twentieth century the control of Islamic officials throughout the State was centralized and authority over them placed by the ruler in the hands of a *mufti*. When the sultan attempted to centralize the collection of religious tax, however, the *mufti* opposed him and determined to follow the injunction of the Prophet that "Obedience to man ceases when it involves disobedience to the Creator". The *mufti* was now called a traitor, and in 1951 the Islamic administration of the State was transferred to a Council of Religion and Custom. This Council was responsible solely to the sultan. The *mufti* soon resigned.

In their attempt to control Islam, the sultans were helped to some

46 R.J. Wilkinson, "Malay Beliefs" *JMBRAS* XXX, 1951.

extent by colonial rule. The British Government acknowledged and defended the sultan's sovereignty and supported their rights as protectors of Islam. Colonial rule also limited the sphere of Islamic law to family law, and introduced European law, with which Islam had to compete. Yet the British presence indirectly helped both Islamic and other forces hostile to the *kerajaan*.

This was the complex situation which existed in the mid-nineteenth century when British intervention commenced in the Malay states. Here the system of monarchy government and religion had nothing in common with the secular law and political system of Europe at the time. The foundations of monarchical authority and law were quite separate both in theory and in practice.

By the late nineteenth century, the Malay rulers had to compete also with new political concepts from Europe. With the expansion of European power and influence in the area many South East Asians began to view political life in terms of the nation-state community, a community which creates its own laws, lived within fixed boundaries, and is governed in secular, but not in religious matters by a bureaucracy.

In the Malay states the sultans fared better than their counterparts in Sumatra. Some Malay nationalists sought to preserve and honour all that was symbolic of the Malay past; and there occured what has been called a "renaissance" of Malay custom:[47] the bestowal of Malay titles was revived or increased and Malays engaged with enthusiasm in the ceremonies of state. However the ceremonies and titles of the *kerajaan* are as empty and as repugnant to Islamic fundamentalists as they are to Malay secular radicals.

The ceremonial Malay state has lost its force for many Malays, who have come to see government in modern, functional terms. Whether the Malay *kerajaan* with its roots firmly embedded in pre-Islamic time, will possess the necessary resilience to survive, at least in the form of a modern constitutional monarchy, or whether it will be pushed aside by a combination of Islamic fundamentalism, and Malay radicalism, is an open question.

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47 Mahathir Mohamad, "Interaction and Integration", *Intisari*. No. 1, p. 44.

## Summary: Traditional Kingship and Islam

The Malay ruler in his spiritual role was the protector of the religion of Islam; he was the Vice-Regent of God on Earth. He was the source of God's order on earth and the intermediary between God and man. The Islamic texts enjoin perfect obedience upon the ruler's subjects; the duty of obedience is dictated by reference to religion and the belief that their loyalty world be rewarded by God. The supreme religious authority of the ruler and his place in the Malay Islamic world was thus fully established and recognized.

The qualification for office of rulership was dynastic. The ruler had to be of royal blood, possess lineal descent, male and of the Muslim religion. He was elected to rulership by his chiefs.

The ruler was symbolic of the unity of the state, and was the apex of indigenous system of government. In theory, therefore, he was the source of law and the fount of honours and justice. But the presence of the district chiefs, who derived their office from the commissions given by the ruler, and in whom local power and influence resided, tended to jeopardize the unity of the state. The power of the ruler over his chiefs, some of whom were wealthier and more powerful than the ruler himself, was weak and in practice rarely effective.

Furthermore in the indigenous system there was no bureaucratic machinery that defined the power of the ruler. The ruler in the raja-based state was a *de facto* ruler but not an absolute one. This was the paradox of Malay rule: the absolute necessity for a state of people to have a ruler (see above, *kerajaan*) but with limits on his actual power to direct or govern the people. These limitations of course varied from time to time and place to place. It is not too much to say that the history of Malay rule is a history of competing elements in which there was an uneasy balance between actual and ideal.

# 2

# THE RULER IN BRITISH MALAYA 1874 –1942

## The Acquisition of Jurisdiction

The acquisition of jurisdiction over a territory is governed by the rules of international law. Various procedures for this are laid down; they include occupation, annexation, cession and prescription. Essentially all of these devices result in the acquisition of sovereignty over a territory, and the "parent" country then assumes responsibility for its external and internal affairs.[1]

The municipal law of a territory may or may not set out special rules for the transfer of a territory from one sovereignty to another. In the case of native tribes where there is no civilized system of government, customary law would play the role otherwise performed by consitutional law.

In any case, such customary law or constitutional law cannot have a direct effect upon international law governing a treaty because it cannot abolish existing rules of law of nations, nor create new ones. "But if such municipal rules contains constitutional restrictions on the government with regard to cession of a territory, these restrictions are so far important that such treaties of cession concluded by heads of states or

1 See *The Legal Status of Eastern Greenland*, 1933, Series A/B No. 53, PCIJ. The dispute arose out of the action of Norway in proclaiming the occupation of certain parts of Greenland. Denmark asked the Court to declare the proclamation by Norway invalid on the grounds that the area it referred to was under Danish sovereignty. Denmark produced various laws and administrative acts pertaining to the administration of the whole of Greenland. The Court held that Denmark had produced sufficient evidence to establish her title to the whole country. Its judgements was that Denmark exercised sovereignty over this area to the exclusion of other states.

governments as violate these rules are not binding."[2] The effect of such limitations on the powers of the government is to nullify the treaty, and, therefore, any subsequent dealings emanating from the execution of the treaty are to all intents and purposes, null and void. A treaty such as a treaty of cession, is, in international law, a bilateral treaty to which two independent states are parties. Such a transaction falls within the purview of the law of nations.

The British intervention in the affairs of the Malay states came at the request of the Malay rulers, at a time when there were disputes between the chiefs and the rulers, and among the rulers themselves. Each ruler believed that only the British alliance would strengthen his kingdom. Although there was opposition to the alliance from the natives led by the chiefs, various treaties were signed between 1874 and 1930, which gave the British the right of control not only over the external affairs but also the internal affairs of the Malay States.

The establishment of the protected Malay States – the Federated Malay States and the Unfederated Malay States, was not a deliberate long-term administrative policy of the Imperial Government but was a consequence of commercial undertakings in these states by British subjects. This fact supports the view of Furnivall that colonization arose out of commerce and not commerce out of colonization. He claims that the doctrine that trade follows the flag is quite modern, and concludes that in history "flag has usually followed trade".[3] This would seem an apt description of the evolution of the Imperial Government policy.

The British policy of non-intervention in the Malay states was vigorously followed from 1867 to 1873. The condition of the Malay states in the Peninsula at this time was far from happy and was growing increasingly worse. It was evident that disintegration was taking place which would bring a state of anarchy and civil war. Although little was known about the details concerning the interior of the Peninsula, the merchants of the Straits Settlements were convinced that it contained great natural wealth and could sustain a far larger trade than existed at the time. To the internal disintegration there was added the influx of a large number of unruly Chinese, primarily in search of tin.

This signalled the beginning of the British forward movement which began in the Malay Peninsula in 1874, in the Western Malay State of Perak, where the influx of Chinese miners had brought complete disorganization

2 L. Oppenheim, *International Law*, 8th Edition, Vol. 1, p. 547.
3 J.S. Furnivall, 1948. *Colonial Policy and Practice*, London, p. 4.

complicated by the customary disputed succession to the throne.[4] The centre of the disturbance was the inland district of Larut, where a large number of Chinese British subjects were expelled from the mines by a rival Chinese secret society supported by the Chief of Larut. By 1873 the situation was intolerable and it was evident that the civil war of the mainland would spread to the Straits Settlement of Penang, where the headquaters of the Chinese societies were located. One of the claimants to the Perak throne, Raja Muda Abdullah had asked for British protection and assistance in governing the country. The British felt it incumbent "to rescue these fertile and productive countries from ruin" and entered into the first of a series of treaties with the Malay states.

## Validity of Treaties

We shall now consider the validity of the treaties under three headings, (a) international law; (b) constitutional law; and (c) customary law.

### *International Law*

In international law the requirements of a valid treaty are, *inter alia*, that its terms must be fully understood by both sides. Lindley on this point states[5] that an agreement to which an ignorant chief has affixed his mark without understanding its legal implications has no validity and is not binding on either the natives or other powers. The Anglo-Malay treaties that we are about to consider have a different character, and therefore we are not concerned with the misunderstanding of the terms because (i) they are of defensive nature having regard to the political situations in the Malay states during this period, and (ii) the Malay rulers and chiefs had requested the British Government's assistance in the government of their country. The main question is whether these treaties were between subjects of international law or not. Only states are, under international law, subjects of the law of nations and individuals (which include corporate bodies) are its objects. A native state in which the executive authority is exercised by a ruler in Council, has in

4 J.M. Gullick, 1958. *Indigenous Political System of Western Malaya*. London; and Philip Loh Fook Seng, 1969. *The Malay States 1877 – 1895*. Kuala Lumpur: Oxford University Press.

5 M.F. Lindley, 1926. *The Acquisition and Government of Backward Territories in International Law*. London, p. 173.

recent times been considered an independent state having capacity to conclude treaties.

In *Mighell* v *Sultan of Johor*[6] the issue was whether the agreement between the British Government and the Malay ruler was a valid treaty. Although the validity of the treaty was not expressly contested in international law, it was implied from the decision of the Court. The Court held that although the Sultan had bound himself by the treaty not to exercise some attributes of sovereignty, he was nevertheless the independent sovereign of an independent state. A similar finding was made in respect of the treaty with the state of Kelantan;[7] where a letter from the Under Secretary of State for the Colonies stated that Kelantan was an independent state, and this statement was in no way qualified by the relevant treaty between the British Government and Kelantan.

### *Constitutional Law*

In technical terms, a protected state is a foreign country, and any treaty concluded by native chiefs with a British agent may be regarded, if approved by the Imperial Government, as an Act of State. The term "Act of State" is defined as "an act of the Executive as a matter of policy in the course of a state's relations with another".[8] This is a generally accepted term, and includes, *inter alia*, declaration of war, peace, treaty making, annexation and cession of territories, and recognition of states and their governments. Such Acts of State are outside the jurisdiction of the Municipal Court unless special statutory provisions are made to this effect.[9] In English constitutional law, a treaty making power is an executive power in the Crown. In so far as the municipal courts are concerned, its provisions cannot be questioned unless the conditions necessary for its validity are not complied with, for example, a treaty expressly made subject to Parliamentary confirmation.

An Act of State cannot be pleaded against a British subject who has

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6 [1894] IQB 149: The State of Johor received in the State a British General Adviser, whose advice must be asked and followed in all matters of administration save those touching the Muslim religion and Malay custom.

7 *Duff Development Co.* v *State of Kelantan I*[1924] AC 797; and see later under the heading "Sovereignty".

8 E.C.S. Wade, 1934. *British Year Book of International Law*, p. 103.

9 *Salaman* v *Secretary for India* [1906] IKB 613: "... an Act of State is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts ..." *per* Fletcher Moulton, LJ.

been wronged by the Crown through its agent.[10] Similarly, the subject of a State at peace with Her Majesty, is, whilst resident in the United Kingdom, entitled to the protection accorded to British subjects, therefore an Act of State cannot be pleaded if he is wronged.[11]

### *Customary Law*

Under Malay customary law the concept of land ownership as understood in the English Law does not exist. The ownership of land is vested in the corporate entity of a family or clan, and cannot be alienated without the consent of all those entitled to it. The Malay ruler is regarded as the residuary power, in the limited sense, of all the land held by a community. He holds the land as a trustee. He possesses no legal right even in theory, over the land; "he only enjoys an administrative right of supervisory oversight of the land for the benefit of the whole community". The ruler, being trustee cannot dispose of the land except with the consent of the people expressed through the Council of Chiefs. Similarly, in the case of treaty making, the consent of the chiefs is required to conclude any treaty concerning the community or state.

The legal basis of the Anglo-Malay treaties rested upon the three ambits of law we have been considering, and they were valid under the three systems.

## The Legal Status of the Malay State

In modern international law, a protected state is where the personality of the protected entity existed prior to the agreement, and this personality is not extinguished. Whether or not an entity has achieved an international personality will depend on an analysis of the circumstances existing when the treaty was made; and whether that status will survive the treaty will depend on the interpretation of its terms.[12]

Protected States, in English Constitutional Law, are those states under British protection whose external relations are controlled by the Crown usually through the Colonial Office and whose internal affairs are generally administered by native rulers. The Crown acquires these rights

10 *Nissan* v *Attorney-General* [1967] 2 All ER 1238: When British troops occupied the appellant's hotel in troubled Cyprus, a plea of Act of State was held by the Court to be no defence against the appelant's claim for compensation.

11 *Johnstone* v *Pedler* [1921] 1 AC 266.

12 D.W. Crieg, 1970. *International Law.* London: Butterworth.

by treaties made with certain states which have a civilized government and H.M. Government, or in cases where H.M. Government is allowed jurisdiction under the Foreign Jurisdiction Act, 1890.[13]

The true nature of the protected state, however, has not been defined by the Foreign Jurisdiction Act. It differs from a protectorate in that a protectorate is one "approximated in constitutional status to a Crown Colony, and the Crown has power to make laws for the peace, order and good government of the protectorate, and of all persons therein".[14] A protectorate is defined "as a country which is not within the British dominions, but as regards to its foreign relations it is under the exclusive control of the king so that its government cannot hold direct communication with any foreign power nor a foreign power with that government...."[15] This definition was approved by the Privy Council in *Sobhuza II* v *Miller*.[16] Like a Crown Colony,[17] in a protectorate the Crown has an exclusive power of administration through Her Majesty's agents – the Governors. The powers exercised in a protectorate have been described as "usually so complete that they are indistinguishable from those enjoyed in territory which is a part of Her Majesty's dominions".[18] This point was supported by the Court of Appeal in a later case of *ex parte M'wenye*.[19] The only difference emerges from the status of the native inhabitants of a protectorate, who, unlike the inhabitants of a Crown Colony, are not British subjects. As such they do not owe allegiance to the Crown because allegiance exists only in the relationship between a Sovereign and his subjects.

It seems that the Malay states were, after 1874,[20] protected states, with Great Britain as the protecting power, in accordance with the tests laid down by the interpreters of constitutional law. The state were foreign

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13 Philip O. Hood, 1973. *The Constitutional and Administrative Law.* 5th Edition. London: Sweet and Maxwell Ltd., p. 162.

14 *Per* Viscount Haldane in *Sobhuza* v *Miller* [1926] AC 518.

15 Sir H. Jenkyns, 1902. *British Rule and Jurisdiction Beyond the Seas.* Oxford, p. 165.

16 [1926] AC 518.

17 A Crown Colony has been defined as any part of Her Majesty's dominions, excluding the British Isles and the independent members of the Commonwealth: Philip O. Hood, 1957. *The Constitutional Law of Great Britain and the Commonwealth.* 2nd Edn. London: Sweet and Maxwell, p. 603.

18 *Per* Kennedy LJ, in *Sekgome's case* [1910] 2KB 576, p. 620.

19 [1960] IQB, 240.

20 British intervention in the affairs of the Malay States began in Perak in 1874 with the Pangkor Engagement, and there after progressed through successive treaties with the other states.

independent states, and the Malay rulers were independent sovereigns, thereof This will be discussed when we come to the heading "Sovereignty".

## Native Administration and Government Prior to 1874

In order to appreciate and understand the progress made before and during the British administration in the Malay states, and the position of the Malay ruler in the government, it would not be out of place to digress a little on the traditional system of government.

In every society, civilized or otherwise, there is always a recognized form of government, however rudimentary it may be. In the context of a Malay society the supreme executive was the ruler or sultan. There were instances of strong and effective government in Malaya before the advent of the Europeans, for example, the Malacca Sultanate in the fifteenth century.

The sultan's powers were by no means absolute. There were in existence political more limitations. He acted in consultation with the council of chiefs, in charge of the districts, in matters affecting the state or a district of a particular chief. This is, to an extent, akin to the position of a governor in charge of a colony or protectorate, who acts in accordance with the advice of an executive council. In the latter case, the Governor may act contrary to the council's advice, but he must report the circumstances to the Secretary of State. There is no evidence that a Sultan could disregard, or had, in fact, acted contrary to the advice of his council, even though he was not responsible to any higher authority. However, there were occasions such as an emergency or during war, when the interest of state would be placed above every other consideration, thus necessitating actions, which would infringe traditional rules.

The traditional Malay society was feudal in form; it was strong and integrated at the height of the Malacca Sultanate, but during subsequent countries weakened and disintegrated. Under the feudal system there existed two main strata in the society, the ruling class and the subject class. The distinction between the two was based on birth and clearly demarcated by custom and belief. In addition to those of royal descent, the Malay aristocracy consisted of a large number of those who claimed privilege in belonging to families which had a customary right to various chiefly offices. These officers, the appointment to which was authorized by the ruler, were based on a system held to have been in use at the time

of the Malacca Sultanate.[21] This group or class was rather small but had extensive political and economic power. Socially its members were highly respected and a refined form of language was used to address them.

The key to the political organization was the district chief, holding office under *tauliah* (or commission) from the sultan of the state, and usually based on a stretch of river, over which he exercised personal control. The basis and emblem of his authority was manpower, so his political weight depended on his ability to gather and retain a following both among his kinsmen and his peasants.[22] For the maintenance of his establishment he relied heavily on the peasantry. To supplement the agricultural labour supplied by the chief's kinsmen, the debt-bondsmen, use was made of the institution of *kerah* (or corvee), under which the inhabitants of the villages in the district were obliged to contribute labour for working the fields, for collection of forest products and for other public or private work, for example clearing paths or erecting buildings.

The sultan, like the district chief, was in control of his own district, and, besides, acted as *primus inter pares* among the chiefs. In addition to the income from his own district, he received to an extent tributes from the district chiefs in return for their benefices. But, proportionate to their powers, the chiefs commonly retained a great deal more income than they surrendered, and achieved positions closely rivalling that of the ruler. In a situation such as this, there were among the ruling class, jealousies and tendencies towards faction and strife and civil wars between, different chiefs, and between the chiefs and the ruler, were not uncommon.[23] The sultanate was maintained as a symbol of state, and the fount of titles, and for purposes of trade and defence. The real power of

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21 J.M. Gullick, *Indigenous Political Systems, op. cit.*, pp. 65 – 112; and W.R. Roff, 1967. *The Origins of Malay Nationalism.* Yale University Press, pp. 4 – 6.

22 A typical chiefs household consisted of his dependent kin performing the necessary task of administering his lands and acting as secretaries and tax gatherers; of mercenaries and volunteers, who provided a permanent, if often idle, armed force; and of debt-bondsmen and slaves who filled a variety of service roles from household domestics and concubines for the chief and his followers to boatmen and gardeners. The usual size of an average household of a chief was between 30 and 50 followers: E. Sadka, *The Residential System, op. cit.*, p. 30.

23 There were commonly disputed customary successions, for example the succession dispute in Perak in 1873, which divided the Perak chiefs into two groups; one supported the Raja Muda Abdullah, while the second group supported Raja Ismail, J.M. Gullick, *op. cit.*, p. 11 – 12; and the struggle between the Menteri of Larut and the Sultan, for possession and control of tinbearing areas in the Kinta Valley, Perak: E. Sadka, *op. cit.*

the ruler might be a little greater in political and economic terms than some of the senior chiefs, and there was a general acceptance of the ruler as the formal head of state.

Forming a vital link between the peasants and their chiefs was the *penghulu* (or headman) of a village who was nominally appointed by the ruler, and belonged more often to the peasant class. The office was hereditary and his duties were many, and included the keeping of peace, collecting tax, organizing *kerah* labour, and keeping the district chief informed about the village. He also dealt with matters pertaining to land.

At the base of the system was the ordinary Malay cultivator, owing undivided loyalty and obedience to his local chief. The peasants provided a range of goods and services[24] for the ruling class in return for the protection and perpetuation of their general welfare. They commonly held rights to land in terms of occupation and use, though these rights were revokable at will by chief or ruler. Accumulation of wealth where it occured, was prone to envious expropriation by the chief, and indebtedness frequently led to the form of personal servitude known as debt-bondage.[25]

Although almost all of the Malays were Muslim, the influence of traditional beliefs was still strong among them. Manifestations of these animistic beliefs could be seen in all aspects of Malay life.[26] These beliefs were diametrically opposed to Islam, yet survived and existed along side and in some cases integrated with the religion, and could be observed in rituals, functions and doctrines. In each case there existed the process of conflict and accommodation between traditional life and Islam.

Islam was spread in this region in an informal and rather unsystematic way. During the peak of the Malacca Sultanate, Islam was closely linked with the power of the kingdom. The sultan played an active and important role in the propagation of Islam.[27] The common people, subjects of the sultan, were merely followers and never gained a sophisti-

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24 Under the system of tribute to their local chief, villagers collected forest produce such as rattan, bamboos, gutta percha and resin which were traded for imported textiles, tobacco, salt and iron tools. In addition there was a valuable ore trade, which spread to several states and a much smaller one in gold, the two products for which Malaya was known beyond her shores: Paul Wheatly, 1962. *The Golden Khersonese*. London: MUP, xxx – iv.

25 J.M. Gullick, *op. cit.*, pp. 98 – 104.

26 G.E. Morrison, 1951. "The Coming of Islam to the East Indies". *JMBRAS*, 24, Part I.

27 *Ibid.*

cated understanding of the laws and theology of Islam. By the time of the decline of the kingdom, Islam had become an integral part of Malay life and culture.

It was along side this system of rule and within the context of a Muslim population that the British had to govern once intervention had been decided upon.

## Native Administration After 1874

### *Direct or Indirect Ruler*

The concept of indirect rule is no where to be found in the principles of local government in Great Britain. The term is a product of British administration in Africa. It was first introduced in what was then known as the Protectorate of Northern Nigeria in 1903, and was subsequently adopted in all British dependencies in Africa.[28]

The term "indirect rule" means "a rule through the native chiefs who are regarded as an integral part of the machinery of the government, with well defined powers and functions recognized by government and by law, and not dependent on the caprice on an executive officer".[29] In other words, it is a method through which native administration is carried on by natives for the natives with the minimum control by the colonial authority. It is thus a native government based on indigenous law and custom.

In 1920 indirect rule had come to mean not rule by traditional authorities, but the incorporation of the natives into the administrative hierarchy, albeit with European shadows, right up to the level of Resident or Provincial Commissioner.[30]

The system of government in the Malay states after 1874 was "the very antithesis of the Nigerian System". In the Federated Malay States, for example, it was only the *penghulus* who, ranking below the district officers, were incorporated into the administration of the Resident, while the rajas were stripped of all real powers at the first possible opportunity.[31] "From the first to the last the theoretical independence of the

28 Swettenham claimed that the Residential System was a precursor of Indirect Rule as practiced by Lugard in Nigeria: F.A. Sweettenham, 1941. *Footprints in Malaya.* London: Hutchinson and Co., p. 2.

29 Lord Lugard, 1918. *Political Memoranda*, p. 296.

30 Sir Anton Bertram, 1930. *The Colonial Service.* Cambridge.

31 H. Clifford, 1898. *Studies in Brown Humanity.* London: Grant Richards, p. 126. Both Swettenham and Clifford did not deny the correctness of this observation.

states was the governing factor in the system evolved in Malaya. The so-called 'Resident' was in fact a Regent, practically uncontrolled by the Governor or Whitehall, governing his "independent state by direct personal rule with or without the co-operation of the native ruler".[32]

In respect of Malaya, Lord Lugard's above comments on the Residential System may not wholly be correct. Under the system their rule was often indirect in the sense that the Residents found a measure of consultation with Malay authorities and certain concessions to local sensibilities, both expedient and enjoyable. This consultation started as a necessary tactic and became in time, a deliberate policy. The amount of time which the Residents were prepared to spend in convincing the sultans or rajahs of the advisability of a course of action before putting it into effect,[33] was an indication of the indirectness of their rule even if indirect rule was only a question of the spirit in which the rulers acted.

However, there were two aspects of rule which were wholly direct. First, it was aimed exclusively at "the establishment of European institutions and modes of thought among the natives as rapidly as possible", never at "assisting the native to develop that which he can himself evolve".[34] Secondly, the Residential System was direct rule in the sense that it was effectively in European hands from district officer level upwards.

At the time of British intervention in the affairs of Malay States, government and administration as understood by the European, did not exist. There was no centralised authority in a Malay State, and no centralised system of taxation.[35]

The ruler was an absolute sovereign, and was the sole repository of executive and legislative power in the state. He ruled by his will alone without legislative and executive councils. He combined in himself the supreme legislative and executive authority, and was the fount of justice and honour. The difference between legislative and executive authority was in no way recognized; all important acts were embodied in the *titah* (or royal command), which had full force and validity throughout

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32 Lord Lugard, 1992. *The Dual Mandate in British Tropical Africa*. Edinburgh, pp. 130 – 131.

33 F.A. Swettenham, *Footprints in Malaya*, *op. cit.*, p. 103; J. de V. Allen, "Two Imperialists: A Study of Sir Frank Swettenham and Sir Hugh Clifford", *JMBRAS*, Vol. 37, Part 1, p. 49.

34 I.C. Temple, 1918. *Native Races and Their Rulers*. Cape Town. Temple was a subordinate and disciple of Lord Lugard.

35 J.M. Gullick, *Indigenous Political Systems of Western Malaya*, *op. cit.* *See also* Introduction.

the state. What the ruler considered his own power to be may be seen by reference to the *Titah of Sultan of Pahang* in 1889, in which he gave his son powers "in consultation with the British Resident to enact laws and issue regulations with reference to all matters concerning the administration of the Government ... conferring upon him full and complete authority so that all our chiefs and headmen must absolutely obey whatever commands issued by him...."

The original settlement with the Malays, based on the conciliation of the ruling class, had a somewhat ironic effect of rendering *de facto* a system of authority which had previously existed *de jure*. The British elected the sultan to a position of real as well as ritual authority in a Malay society by effectively centralizing power in each state and emasculating that of the independent district chiefs.[36] Provided with a privy purse and substantial personal allowances, increased from time to time as prosperity in the state grew,[37] the sultans lived in palaces, erected at the state's expense.[38] Within the traditional elite itself, adjudication of allowances and pensions, appointments to ranks and titles, came increasingly into the hands of the sultan and his palace official advisers. Thus "the status of the native ruler has not only been maintained but has been strenghtened."[39]

The State government, under the British organization, was carried on by the ruler, acting on the advice of the British Resident who was responsible not to the ruler but the governor, and subject to the general authority of the Secretary of State for the Colonies. In each state there established a State Council, with the ruler as President, and members appointed by the sultan, one of whom was the British Resident. All executive and legislative acts were promulgated by the Ruler in Council, and in the words of High Commissioner Clifford, "In the Federated Malay States we have always worked through the chiefs ... everything was done in the name of the sultan with the advice of the British Resident, and through the village headmen".

### *Treaties*

As the result of the Perak War in 1876 the British chose to protect the

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36 E. Sadka, "The Residential System", *op. cit.*, p. 209.
37 CO 273/445, November 30, 1894.
38 CO 273/281, September 11, 1902.
39 CO 273/189, August 2, 1893.

Malay State and/or to annex it. Thus she entered into the *Pangkor Engagement of 1874*,[40] Article VI of which provided:

> That the Sultan receive and provide a suitable residence for a British Officer to be called Resident, who shall be accredited to his Court, and whose advice must be asked and acted upon on all questions other than those touching Malay religion and custom.

The Engagement also stipulated that all revenues were to be collected and all appointments made in the name of the sultan, and the collection and control of revenues and the general administration of the state to be regulated under the advice of the British Resident.[41]

Selangor was next to be protected, and a Resident was sent there in 1875. In an exchange by letters, and a Proclamation[42] the sultan accepted two British Officers, one of whom was a Resident to assist the sultan "to open up and govern his country and to protect the lives and property of the dwellers in, and traders to Singapore."

Negeri Sembilan, a collection of nine small states, came under British protection at various dates.[43] By the Agreement of 1889,[44] they confederated and in confirmation of various written and unwritten agreements placed themselves under the protection of the British Government and "received the assistance of a British Resident in the government of the said confederation". In 1895 they entered into a further agreement,[45] by which they "desire that they may have the assistance of a British Resident in the administration of the Government of the said Confederation and they undertake to follow his advice on all matters of administration other than those touching the Mohammadan religion".

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40 Agreement entered into by the Chiefs of Perak at Pulau Pangkor, 20th January 1874 (known as the Pangkor Treaty), Maxwell and Gibson, *Treaties and Engagements, op. cit.*, pp. 28–30; and Khoo Kay Kim, "Pangkor Treaty", *JMBRAS* Vol. XIVII, Part 1, 1974.

41 Articles V and X, *Pangkor Treaty, 1874.*

42 The Proclamation of 25th January 1875, Maxwell and Gibson, *op. cit.*, p. 36.

43 Agreement between the British Government and Sungai Ujong, 21th April 1874; Jelebu, 24th August 1883; Rembau, 17th September 1885; and Yamtuan of Sri Menanti, 4th June 1887, Maxwell and Gibson, *op. cit.*, pp. 37–38, 53–55; 51–52 and 61–62 Yamtuan acted with the consent of and for the Penghulu Jempul, Teraci, Gunong Pasir, Inas, Johol, and Muar, with whom they confederated by the Treaty of 23th November 1876. Maxwell and Gibson, pp. 60 – 61.

44 Agreement between The British Government and the Rulers of Negeri Sembilan, 13th July 1889, p. 63 art. 1 and 2.

45 Agreement between the British Government and the Rulers of Negeri Sembilan, 20th June 1895, p. 64 – 65 art. 2.

There was a further treaty in 1898[46] whereby the *Yang Dipertuan Besar* agreed that every matter that arose in each State of Confederation, was to be settled in consultation with the British Resident of Negeri Sembilan and not subject to the command of the *Yamtuan*.

In 1887 British protection was extended to Pahang and the sultan received a British Resident "in order that he may assist us in matters relating to the government of the country, on a similar system to that existing in the Malay States under British protection".[47] The advice of the Resident was to be sought and acted upon on all questions other than those touching the Muslim religion and Malay custom.

The intention and policy of the British Government in concluding these treaties, were well reflected in the Colonial Office Instructions of 1876 and 1878:

> The Residents are not to interfere more frequently or to greater extent than is necessary with the minor details of the Government; but their special objects should be, the maintenance of peace and law, the initiation of a sound system of taxation, with the subsequent development of resources of the country, and the supervision of the collection of revenue, so as to ensure the receipt of funds necessary to carry out the principal engagements of the Government, and to pay for the costs of British officers and whatever establishment may be necessary to support them.[48]

And two years later:

> The Residents have heen placed in the native states as advisers, not as rulers, if they upon themselves to disregard this principle, they will most assuredly be held responsible if trouble springs out of their neglect of it.[49]

The obligations imposed by these treaties, together with their statements of policy, bound the British Government in their relations with the Malay sultans to respect the sovereignty of the sultans, the autonomy of their states and the Muslim religion and Malay custom.

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46 Agreement between the Yamtuan and the Four Law-givers 24th April 1898 pp. 65–66 art. 3.

47 Agreement between the British Government and Pahang, 1887, Maxwell and Gibson. *op. cit.*, pp. 66–69; a letter dated 24th August 1888 from HH Sultan of Pahang to the Governor requesting British Resident for Pahang.

48 Carnarvon to Jervois, 135 of June 1, 1876, No. 70.

49 Colonial Secretary to Residents, May 17, 1878; E. Sadka, *The Malay States 1874 – 1895*, *op. cit.*, p. 102.

### *State Council*

In 1877 the Sultan of Perak, acting on the advice of the British Resident, constituted a State Council, and thereafter at different dates similar councils were set up in Selangor, Negeri Sembilan and Pahang. The Council was originally intended to be an advisory body, to advise the British officer in the government of the state in the name of the sultan. It came to be an essential instrument under the Residential System, and provided a constitutional basis for the government of a protected state administered by British officers but not directly under the Crown.

The Council consisted of the sultan as president, the British Resident, Malay chiefs and other members[50] appointed by the sultan acting on the Resident's advice. Subsequently the sultan merely confirmed the nominees of the Resident.[51]

The Council was set up in an informal way. Powers were not delegated to it by written instrument. Though all legislation thereafter was by Sultan in Council, there seemed to be nothing to prevent the sultan from enacting laws without its advice or consent. In the absence of a written constitution the position was rather obscure. It is probable that the State Council was merely advisory, and that the legislative power in the state resided in the sultan. An eminent jurist summed up the position of the Council thus:

> The Council's juristic position after its constitution seemed to be that the legislative powers in each state were exercised by the Ruler in Council. The only legal force possessed by an executive act performed by and legislation passed by a State Council is derived from assent thereto by the ruler. Thus the System of Government throughout the four states in 1895 was therefore one of government by Ruler in Council acting upon the advice of the British Resident.[52]

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50 Chinese members representing the commercial sector were later appointed to the Council. The Council consisted of the sultan, the Residenl and leading Rajas and chiefs from 1870 to 1886: E. Sadka, "The Residental System", *op. cit.*

51 F.A. Swettenham, 1899. *The Real Malay.* London: The Bodley Head, the appointment of Shaik Ma Taib to The Perak State Council in 1877, for example, was strongly opposed by the Regent, who was President of the Council, but the Council overruled the objection: The Journal of Sir Hugh Low, Perak 1877, *JMBRAS*, Vol. xxvii, Part 4, 1954, p. 9.

52 R. Braddel, 1931. *The Legal Status of the Malay States.* Singapore: Malaya Publishing House.

However, two matters were outside the competence of the State Council; the annual estimates which were prepared by the Resident and approved by the Governor, and the non-Malay establishment. The governor of the Straits Settlements was also the High Commissioner for the Malay States. The British Resident/Adviser was responsible to the governor, who in turn was responsible to the Colonial Office in London. The annual estimates after having been approved by the Governor, were sometimes submitted to the Council for general information. Pensions and gratuities for non-Malays and non-Europeans were submitted for the approval of the Council.[53]

The Council was subject to the overriding powers of the Governor, who, on his own discretion or under the instructions of the Secretary of State, could disallow any legislative or executive act taken by the Council. The extent of the control over the Councils by the Governor, varied from state to state, and from time to time. In the state administration the Resident was responsible to the governor, who, in normal circumstances acted through the Resident. This did not, however, prevent the Governor from intervening directly in matters of administration and in the State Council, if and when the occasion so warranted.[54]

The ruler did not in practice, initiate legislation nor bring matters of primary importance to the Malay community before the Council. His independence was constrained by treaty obligation – to accept the Resident's advice, and that of the other Malay members of the Council. As ruler, he gave royal assent to bills passed and other executive acts taken by the State Council, but did not appear to possess much knowledge of the contents of State documents.

In theory, the ruler had full authority over matters affecting the Muslim religion and Malay custom. But, in practice it was always difficult to draw the line between these and other administrative matters

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53 S.W. Jones, 1953. *Public Administration in Malaya*. London: Royal Institute of International Affairs.

54 For example, the summary dismissal from the Selangor State Council in 1881 of an important Malay chief for alleged corruption was disapproved by the Governor, who ordered the reinstatement of the Chief on the Council without any loss of his allowance: *SCM* dated 21st April 1881; petty regulations made by the State Council were revoked by the Governor: *SCM* dated 22nd January 1882; and on yet another occasion the Governor intervened in the State administration and made grants of pensions to individual Malays in the State: *SCM* dated 4th December 1897. See E. Sadka, *The Protected Malay States 1874 – 95, op. cit.*, pp. 119 – 155.

when they all embraced things of importance to the community. The State administration was in the hands of the Resident and his staff, and in the State Council the Resident's initiative extended to matters affecting Malay life, such as appointments, jurisdiction and allowances of *penghulus* (village headmen) and *kadhis* in the Muslim courts. In fact, the supervision and disciplinary control of *penghulus* at district level were in the hands of British collectors and magistrates, who also made recommendations to the government for the better administration of the Muslim and Malay *adat* laws.

### *Ruler*

Before 1874 the major Malay chiefs and the royal family had played an influential role in deciding succession. In 1874 and thereafter the British political interest dominated the choice of a ruler. The choice was from candidates who were eligible according to local custom, and usually the candidate with the most obvious natural claim was allowed to succeed. But on occasions British power was used to impose a candidate or remove an incumbent the British objected to.

Succession to rulership had to be sanctioned by the Secretary of State;[55] for example, Raja Yusof who was made Regent of Perak in 1876 by the British, was so unpopular among the Malay chiefs that they by-passed him twice in the succession to the throne of Perak.[56] It was only because they were persuaded that the British Government "intend to take care that he should be powerless that Yusof was accepted as Regent, and later Sultan of Perak".

The ruler was hereditary and held office for life unless removed from office on ground of misbehaviour or misconduct.[57] He had to be a

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55 This sanction originated in 1880 on the election of *Dato' Klana*. By custom, succession to klanaship descended through the female line. The late *Klana* had left a will securing the succession of his descendants. The Resident of Negeri Sembilan wanted to confirm the will but it was rejected by electors. A candidate was chosen according to the Sungai Ujong custom, and approved by the Governor and the Secretary of State: E. Sadka, *The Protected Malay States 1874–95*, *op. cit.*, p. 151.

56 There was no evidence that Raja Yusof was made the Raja Muda by the Chiefs, prior to his appointment as Regent, although he was eligible in the normal turn in Perak.

57 Sultan Abdullah of Perak in 1875, together with ex-Sultan Ismail, were found to have been implicated in the assassination of the Resident in 1875, and were removed from the throne and exiled to the Seychelles.

Malay, of the Muslim religion, and usually of royal descent. On the ruler's, demise, he was succeeded by his heir; in most cases, the heir-apparent or *Raja Muda*.

The appointment of the Resident and the constitution of the State Council do not seem to have any compromising effect upon the sovereign power of the ruler. The appointment of the Resident did not circumscribe the rulers' prerogative but merely guided its use by advice which had to be taken, and the State Council attempted to direct its use by advice, which might or might not be taken. The enacting clause of State laws was that:

> It is hereby enacted by H.H. the Ruler in Council as follows.

In practice the ruler never legislated without the formal assistance of the State Council, though it might be argued with considerable force that even then in a matter only effecting the State, a *titah* or royal proclamation, would have full legislative force. For example, the *titah of the Sultan of Pahang in 1889*, in which he appointed his son to represent him and conferred upon him full powers to rule the State in consultation with the British Resident.[58]

In addition to the exercise of the executive and legislative power, the ruler had other formal roles, such as the ceremonial role in opening State Council's meetings, and providing the ceremonial focus of State Government.[59] He gave royal assent to bills passed by the State Council, and made appointments to the State Council, the judicial bench and the Religious Council.

Under the treaty, the Muslim religion and Malay custom were under the jurisdiction of the ruler; but this jurisdiction was by no means absolute. By tradition he was *"berkhalifah"* (God's Vice Regent) and stood at the head of the Muslim religion in the state.[60] In matters concerning the Muslim religion and Malay *adat* he was the final court of appeal. Assisting him in this function, there was established in each state

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58 *See* above p. 29.

59 Other important achievements by the Government such as the completion of an important section of the railway, were celebrated with ceremonial pomp, dignified by the presence of the ruler, and on specific Malay occasions such as the election or installation of the ruler, by the presence of British officers.

60 R.J. Wilkinson, Sri Menanti, *Papers on Malay Subjects*, Second Series, No. 2, p. 15.

a religious council or department,[61] which was the centre of atl religious affairs and Malay customs. The Council had a president, a secretary and other members, all of whom were appointed by the ruler. In the administration of Muslim matters in the State, there were the *mufti; and* at district level, the *kadhis* who were also judges in the Muslim courts. The *mufti* usually headed the administration and he also gave opinions (*fatwa*) and views on various matters concerning the Muslim religion.

The ruler's state was maintained by a civil list, and in practice, other prerequisites were approved and given by the State Council.

The administration of justice, based on the Straits Procedure and Straits Criminal Law, was generally in the hands of British judges, appointed by the sultan on the Resident's advice. One ruler who took on an important role in the administration of justice in the state, was Raja Idris. Prior to becoming the Sultan, he held the post of Chief Justice of Perak, and as Sultan later on, he continued for quite some time "to sit in court in all important cases" and "take on most of the native business of the State".[62] However, he did not enjoy an exclusive jurisdiction in civil and criminal cases, and the few references indicated that he sat with British officers when hearing cases.[63] In the magistrates' courts, the Sultan appointed both British and Malay magistrates.

The constitutional relations between the ruler and the British Resident gradually evolved into those of a modern sovereign with his prime minister. The ruler was head of state, and ruler in council was the source of both legislative and executive authority and the final court of appeal in the state. Instruments of government and documents of title bore his seal. Orders and regulation were issued in his name. The ruler became a monarch possessed of symbolic power while the real power was in the hands of the British Resident. As one governor so rightly said of the theory of the residential system, in which the ruler ruled on the advice of the British Resident, "practically it is not, and cannot be strictly observed". But "all the same the fiction (if such you prefer to call it)

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61 In Kelantan, the *Majlis Agama Islam dan Adat Istiadat Melayu*, in addition organized religious schools in the State in the early 20th century; later these schools were taken over by the Government.

62 *Annual Report Perak 1888.*

63 He sat with the Assistant Resident when hearing cases in late 1870. *PCM* 24th October 1878; 18th December 1878 and 20th December 1879. In the trial of the Red and White Flag Secret Societies, he sat with the Superintendent of Lower Perak and two Malay Chiefs, and submitted a report of the proceedings to the State Council: *PCM* 19th October 1882.

that the Residents are advisers must be kept". In fact, the provisions of the Pangkor Treaty were completely reversed.

## The Federated Malay States

Until 1895 the four states carried on their administration independently of each other, each being governed on the advice of their respective British Residents. These officers reported independently to the Governor of the Straits Settlements, under whose authoritv they acted. But his political control was slight in all matters.

In 1896 the four states were brought together to form a federation, known as the Federated Malay States for the purposes of administration but "no pain should be spared to safeguard the position and dignity of the native rulers".[64] By the Treaty of the Federation[65] the rulers severally places themselves and their states under British protection, and agreed "to accept a British offiice to be styled as the Resident-General as the general agent and representative of the British Government under the Governor of the Straits Settlement ... and to follow his advice in all matters of administration other than those touching the Muhammadan religion".

Treaty contained a saving clause 5:

> Nothing in this Agreement is intended to curtail any of the powers or

64 *CO 717*, col. 88. According to Swettenham, the intention ofthe Federation was to strengthen the status of the Malay rulers, "who would be stronger, more important, their views more likely to receive consideration should a day come when their views happened to be at variance with the supreme authority, whether that be the High Commissioner at Singapore or The Secretary of State in England": F.A. Swettenham, *British Malaya, op. cit.*, p. 273; Other considerations were the benefits of a common administration and a common purse, which would result in greater efficiency and economy, and by which the stronger state would help the weaker, and the prosperous the less developed. E. Sadka, *The Protected Malay States 1874 – 1895, op. cit.*, p. 396; A.C. Milner pointed that besides financial arrangement, other factors were security, administrative efficiency, the economy, the fashion of the day, and strategic considerations. The Federation Decision, 1895 *JMBRAS* Vol.. XVII, Part I, 1970; E. Thio, 1967. "Some Aspects of the FMS 1896 – 1901" *JMBRAS* 40; and E. Chew, F. Swettenham and the Federated Malay States, 1968 *Modern Asian Studies*, Vol. 2, 51 "Swettenham and British Residential Rule in West Malaya", *Journal of Southeast Asian, History*, Vol. 5, No. 1974.

65 Treaty of Federation, 1895, between the Britsh Government and the Rulers ol Perak, Selangor, Negeri Sembilan and Pahang, Maxwell and Gibson *Treaties and Engagements, op. cit.*, pp. 70 – 71. Besides the Yamtuan, the four Undangs and Tunku Besar Tampin also signed this Treaty.

> authority now held by any of the above-named Rulers in their respective States, nor does it alter the relations now existing between any of the States named and the British Empire.

The appointment of the Resident-General did not in any way affect the obligations of the Malay rulers towards the British Residents. The rulers continued to exercise their power and authority in their respective states; and the legislative power was still vested in the Ruler in Council, though it was usual to pass legislation intended to have force throughout the Federation, in identical terms in each state.

The administration of the state remained unchanged, and every State Head of Department was answerable to the British Resident. One important change, however, was the creation of a Federal head of department for every important department in the state, and the Federal head was responsible not to the Resident but the Resident-General, in whom the executive power in the Federation was vested.[66]

In a federation, said L. Le Marchant, a division of sovereignty between federal and state governments is the backbone of federalism, which in the distribution of the legislative powers, means that whatever is not expressly conceded to the federal authority is reserved to the State.[67] In the Federation Treaty 1895 there was no clearly defined division of powers between Federal and State Governments. No division was laid down for financial or revenue matters.[68]

In 1909 a new Treaty was signed between the four rulers and the British Government, which established a Federal Council with the power of making law, and it provided, *inter alia*, "for the joint arrangement of all the matters of common interest for the Federation or affecting more than one state and for the proper enactment for all laws intended to have force throughout the Federation or in more than one state". Clause 11 of the Treaty had exactly the same words as are found at the end of Clause 5 of the Federation Treaty 1895.

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66 The governor's control was maintained and formalised with the title of High Commissioner, but the increasing responsibilities imposed by the Colony and the States were held to be beyond the powers of one man. The Resident-General was created who was responsible to the Governor-High Commissioner and acted as an intermediary authority and channel of communication between the High Commissioner and the British Residents; S.W. Jones, *op. cit.*, R. Braddell said that the executive power of the Federation was not vested in but assumed by the Resident-General.

67 L. Le Marchant, *Constitutional Laws of the British Empire*, pp. 138–147.

68 K.C. Wheare, 1963. *Federal Government*. London: Oxford University Press.

The Federal Council consisted of the High Commissioner, the Resident-General, the four Rulers, the four British Residents and four Unofficial Members appointed by the High Commissioner. The Treaty introduced a strange anomaly. The Council was under the Presidency of the High Commissioner, and the rulers were ordinary members of it, each with one vote. The rulers had no right not possessed by the other members except that of representation. There was no indication that they had to give their assent to legislation as rulers, so that presumably, even if a ruler voted against a bill in council, which never ever happened, it would still be passed and become law within his state. Enactments when duly promulgated would have the force of law in the state of the dissenting ruler as fully as elsewhere in the Federation. But there was nothing that could give it such force except the prerogative of the dissenting ruler. The Enactments of this period contained the following enacting cause:

> It is hereby enacted by the rulers of the Federated Malay States in Council as follows.

and signed by the High Commissioner as President of the Council. As a matter of fact, the personal presence of the rulers or any of them did not affect the passage of bills in the Council. The significance of the Treaty was that each ruler had delegated his prerogative of legislation in matters affecting the Federation as a whole to the four rulers in Council, because they each had given the Council power to legislate in the particular state in defiance of the ruler of that state. The legislative power in the Federation had in fact passed out of the hands of the rulers and the State Councils to the High Commissioner save in matters of trivial importance.

The Federal Council, declared the High Commissioner,[69] was intended to be no more than an advisory body to the rulers of the States as a whole, as were the State Councils to the rulers in their respective states. This was not wholly correct. Curiously enough, express words were lacking in the Treaty to give power to the Federal Council to legislate though it was obvious that this was the intention of the Treaty, as implied in Clause, 8, which referred to "every law proposed to be enacted by the Council" and in Clause 9, which referred to "any law passed

69 The speech of the High Commissioner at the first session of the Federal Council *F.C. Proceedings*, 2nd November 1910; R. Emerson, *Malaysia, op. cit.*, p. 179.

by the Federal Council". In interpretating a treaty, according to Wheaton,[70]

> The general principle is that treaties, being compacts between nations, are not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators.

and

> The intention of parties must prevail over defective wording where the contents are clearly expressed.

There can be no doubt that the intention of the Treaty was to set up a Federal Council with legislative power.

This anomalous position ended in 1927 when the Federal Council was reconstituted, and the rulers ceased to be members of the Council.[71] This Treaty radically altered the constitutional position of the rulers, and restored to them the prerogative of legislation which was delegated by the 1909 Treaty, though henceforth they agreed to exercise it only with the advice and consent of the Federal Council. By Clause 10 of the Treaty, a new enacting clause, provided:

> The Council shall pass all laws intended to have force throughout the Federation. Laws passed by the Council shall be enacted as follows: "It is hereby enacted by the rulers of the Federated Malay States by and with the advice and the consent of the Federal Council", and shall be signed by each of the rulers before coming into force, provided the *Yang Dipertuan Besar* of Negeri Sembilan shall sign on behalf of the Undang of the Negeri Sembilan.

It was clear that the legislative authority was issued by the rulers. Moreover, the signature of the ruler was essential; although the failure of any single ruler to sign would prevent the enactment from coming into force throughout the whole Federation, an enactment of the Federal Council must derive its force in any particular state from the prerogative of the ruler of that state.

Nothing could be law which had not been passed by the Federal Council and assented to by the rulers. The contention that the Federal Council was a purely advisory body and its enactments derived their legal force solely from the assent of the rulers, does not give a true pic-

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70 Wheaton, *International Law*, 6th Edition, p. 522.

71 The Agreement for the Reconstitution of the Federal Council, 24th April 1927.

ture. The rulers could only assent to measures which have been passed by the Federal Council. Even if they assented to a measure which had not been passed by the Council, such a measure would not be law, and would have no legal effect. Clause 10 of the Treaty makes it clear that the Council was a legislative as well as an advisory body. Clause 14 confirms the view that the Federal Council was the same as before its reconstitution in 1927, and it states:

> Nothing in this Agreement shall affect the validity of any act done or law passed by the Federal Council as constituted before the execution of the Agreement.

The Federal Council was in fact a constituent part of the legislature of the Federation.

The effect of both the 1909 and 1927 Treaties was to limit the absolute sovereignty of the rulers by transferring part of their legislative power to the Federal Council. They retained a limited legislative power in their own states. Each ruler might enact laws in his own state provided that the said laws did not conflict with or have a bearing on any Federal Enactment.[72] The ruler's legislative power in the Federation was limited to assenting to measure which had been passed by the Federal Council. From 1909 onwards the Malay rulers were constitutional sovereigns.

Besides the Federal Council, there were two other bodies, which played an important role in the Federated Malay States; the Conference or Durbar of Rulers, and the Residents Conference. The former, an august body, consisted of the four rulers, members of the State Councils, Malay chiefs, the Resident-General, and the four British Residents, under the Presidency of the High Commissioner. The four British Residents, the Resident-General and the high commissioner were members of the latter, which met as often as the meetings of the Federal Council. No legislative or executive power was delegated to these bodies; they were convenient forms within which common problems in the States could be freely discussed, and more importantly, where the policy of the Federation was hatched.[73]

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72 "... laws passed or which may hereafter passed by the State Council shall continue to have the full force and effect in the State except insofar as they may he repugnant to the provision of any law passed by the Federal Legislature". The State Council was not given any definite power by this Treaty. R. Emerson, *Malaysia, op. cit.*, pp. 170–173.

73 S.W. Jones, *Public Administration in Malaya, op. cit.*

## Decentralization

By 1930 the Federated Malay States had made great economic advances. As industry expanded, particularly tin and rubber, exports grow and the revenue of the states rose. Transport developed rapidly, and by the turn of the century 300 miles of railways and 1500 miles of metalled roads traversed the western side of the Peninsula. There was an increase in population in the four states, the greater part of this due to immigration, predominantly of Chinese.[74] However, the great rubber estates attracted large numbers of Tamil immigrants from South India.[75] The need to maintain the Federal structure was vital to Western Malaya's economic interests, which came to be identified not with the Malays but with the immigrant races.[76]

Increasing effeciency and uniformity in the central government caused the individuality and independence of individual states to become submerged, contrary to the treaty obligations of the British under the Anglo-Malay treaties. In an attempt to remedy the situation, and restore power and responsibility to the rulers a scheme of decentralization was introduced into the Federated Malay States.

In practice it was not possible to return to the *status quo ante* that is, the situation that pertained in the days before British protection. Decentralization in the 1930s meant little more that (1) reasserting the powers of the British Residents as in the pre-Federation days, and (2) recognizing the political claims of the non-Malay inhabitants of the States.

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74 V. Purcell, 1948. *The Chinese in Malaya*. London: Oxford University Press, pp. 143–144; N.S. Ginsburg & C.F. Roberts, 1958. *Malaya*. Seattle, p. 254.

75 Kernial Singh Sandhu, *Indians in Malaya: Immigration and Settlement 1786 – 1951*. Cambridge University Press, p. 48; I.M. Cumpton, 1953. *Indians Overseas: 1838–1854*. London, p. 7; and C. Condapi, 1951. *Indians Ovesea: 1838 –1949*. New Delhi, pp. 3 – 4.

76 The first quarter of a century of British rules saw rapid and far reaching changes ... which hardly touched the traditional Malay life in the rural areas. The ready availability of unlimited supplies of cheap labour from South China and South India permitted the exploitation and expansion of mineral and agricultural resources of the Western States without obliging the Malays themselves to share significantly in either task or its reward: R.N. Jackson, 1921. *Immigration, Labour Development of Malaya 1786 – 1926*. Kuala Lumpur; and Philip Loh Fook Seng, *The Malaya States, op. cit.* The Federation was almost in every respect the creation not of the Malays but of others who had come to Malaya. It was the British in the political sphere, and the British, Chinese and Indians in the economic sphere – who found the bounds of the States too small to encompass their activities and so raised above them the larger federal structure: R. Emerson, *op. cit.*, p. 179.

The constitutional system remained unaltered, except for a return of some services from the Federal to the State Governments. To the former were reserved control over railways, ports, post, telegraphs, surveys, customs and central educational, health and research institutions. Services transferred to the states such as agriculture, co-operatives, education, medicine, mining and public works, were to be co-ordinated by directors of the services in the Straits Settlements and advisers in the Malay States.[77]

The State Councils were given enlarged legislative and financial powers in the states, and revised membership with ex-officio members and Malay elements together decidedly outnumbering the other members. The state were to receive annual grants instead of revenue from specified sources. While surrendering to the State Councils powers which gave them body and spirit, the Federal Council yielded little of its supreme authority under the High Commissioner in the Federation.[78] The Chief Secretary of the Federation was replaced by a Federal Secretary, whose functions were reduced to that of a co-ordinating officer of the various state administrations.[79]

There was an attempt to involve more Malays in the running of the Federation by accepting them into the administrative service.[80] However they were only allowed to occupy minor roles. The restoration of state's rights as the late 1920s and early 1930s was largely fictitious, as the state administrations were still run by British officials responsible to the High Commissioner. In addition there was a refusal to recognize the changing demographic structure of resident Chinese.

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77 For example, in each state in the Federated Malay states, there would be a Senior Medical Officer heading the state medical service, but he would be under the supervision of a Central Medical Adviser who co-ordinated the work as a whole for the Federated Malay States and the Straits Settlements.

78 S.W. Jones, *Public Administration in Malaya, op. cit.*, pp. 86 – 87.

79 The post of Chief Secretary was abolished and its place filled by the Federal Secretary, much lower in status and salary than the former. He dealt in lesser federal matters, where the issue had clear decision he acted on his direction. In state matters, he had discretion to approve the British Residents' recommendation, but had no authority to disapprove without the consent of the High Commissioner.

80 For this purpose, there was established in Perak in 1905 a Malay College, run on the same lines as the famous English public school, Eton School, for the sons of royalty and the Malay aristocracy, to prepare them for eventual service in the Government. It later opened its doors to other Malay children as well: Philip Loh Fook Seng, 1973. "Malay Precedence and the Federal Formula in the Federated Malay States 1909 –1939", *JMBRAS.* Vol. 45, p. 32.

There was no change in the constitutional position of the rulers. The effect of the decentralization was minimal[81] and did not involve any increase in the actual share in the government by the rulers. From the earliest days of British protection, the administration had been in the hands of the British Resident and his staff, and neither the ruler nor his State Council had any substantial role. This state of affairs remained unaltered until World War II broke out, and cannot be better summed up than by the Secretary of State for the Colonies who stated in the House of Commons in 1933, that:

> ... in future exactly the same (British) officers will conduct the administration of all these departments as they are being conducted today. There will be no rajahs, there will be British civil servants and they will be answerable to the High Commissioner (whose responsibility to the Secretary of State remained unchanged). It is a question more convenient and more practicable that the same British officers with the same responsibility should act through the conduct pipe of the Chief Secretary or be responsible to the High Commissioner: that is what the honourable gallant gentleman calls handing over exclusive control to a number of rajahs.[82]

## Unfederated Malay States – Johor

Great Britain had various agreement with Johor from 1818 to 1885 but it was not until the latter year that Johor can be said to have come fully under British protection. Under the Agreement of 1885[83] the British Government recognized the independence of the State of Johor, obtained

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81 The State budget had been increased and a number of services transfered to state control, but these services were not of such a nature as to cause much enthusiasm or attract much attention. A Malay journalist wrote that "decentralization, which has been declared for at least ten years to be necessary, has been carried out to the extent that the State Governments now control Sanitary Boards, museums, bands, game wardens and a few other things.... All that remains of the independence of Selangor, after thirty odd years of federation, is the control of a dozen services, and the only government of which enlightened public takes any notice of is the Federal Government." "A Journal in the Federal Capital", *Straits Times*, 31st August, 1932; R. Emerson, Malaysia, *op. cit.*, p. 325.

82 House of Commons Debate, 14th July 1933.

83 The Agreement between the British Government and The State of Johor dated 11th December 1885, Maxwell and Gibson, *Treaties and Engagements*, *op. cit.*, pp. 132–133. It provided "for co-operation between the two governments in cordial

rights over its external affairs, and appointed in the state a resident British Consular Agent.

In 1914, by the Agreement of that year, Johor accepted a British officer, called the General Adviser, "whose advice must be asked and acted upon on all matters affecting the general administration of the country and on all questions other than those touching the Malay religion and custom". The control and collection of state revenue were regulated by the advice of the General Adviser, as in the other Malay states.[84] This brought Johor in line with the rest of the protected Malay States.

Johor was the first Malay state to have written constitution promulgated in 1895. The Constitution declared that the Sultan handed down the Constitution, after securing "the advice, concurrence and consent of all the Members of Our Council of Ministers and of Our Council of State and Other Chiefs and Elders of the Country", to make and grant laws and regulations for the use of the Government, subjects and inhabitants of Johor.[85]

The constitution provided for the Sovereign, his allowance and election, and the descendants of the Sovereign. There were three Council to assist the Sovereign; the Council of Ministers, the Council of State and the Executive Council.[86] This Constitution has to be read together with the Agreement of 1885 which was amended by the Agreement of 1914.

Under the Constitution, the ruler "shall be a person of Malay nationality, of royal blood, a descendant of Johor Sovereigns, a male and of the Muhammadan faith". The heir was to be chosen from among his sons, all of whom were eligible for the consideration unless disqualified by "some great and serious defect derogatory to the quality of a sovereign",

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settlement of peaceful population" in their respective territories, and joint defence from external attacks etc. For this purpose the British had a free access to Johor territorial waters as defined by Article I.

84 The Agreement between the British Government and the State of Johor dated 12 May 1914 in which, for Article III of Agreement 1885, was substituted a new Article 111.

85 The preamble to the Constitution of the State of Johor with *Supplements* (Government Printing Office 1931). Emerson observed that the constitution was essentially a regularization of the political structure of Johor as it existed at that time ... which slightly tempered the traditional oriental despotism: R. Emerson, *Malaysia*, *op. cit.*, p. 203.

86 II Supplement to the Constitution of the State of Johor AH 1330 (17 September 1912) *see* below under "Executive Council".

that is to say, any infirmity such as insanity, blindness, dumbness or possessing some disability on account of which he would not be permitted by Muslim law to become a sovereign.

The general power to elect a sovereign rested with the principal personages, known as the supporters of the country, together with the Council of Ministers,[87] who might appoint a Regent during the minority or temporary absence from the state, of the Ruler.

The ruler's main functions were: Granting of the royal assent to bills passed by the Council of State before becoming law, and the appointment of members of the three Councils and the judicial bench. The ruler possessed a veto power, though not absolute, with which he could delay the passing of bills through the Council of State.[88] He was President of the Executive Council but was not bound by the Council's advice. The important power of amending the constitution was reserved to the ruler, who exercised it with the advice and approval of the Council of State.

There were constitutional limitations imposed by the Constitution upon the ruler, the most severe of which was that the ruler "may not in any manner surrender or make agreement or plan to surrender the country or any part of the country and the State of Johor to any European state or power, or any other state of nation". For a breach of this provision the penalty was the loss of his throne.[89] Further the ruler must not appropriate for his own use a single *duit* (or cent) more than the sum fixed from time to time by the Council of State.[90]

## The Council of Ministers

Ministers of State, not less than eight and not more than twelve in number, were members of the Council. They had to be Johor subjects, of Malay nationality and of Muslim religion. They were appointed by the

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87 Supplement of AH 1373(2), which substituted for the Council of State, the Council of Ministers. The supporters of the country could consider an outsider to the succession, if and only if, there was a lapse of heirs: Article V.

88 *See* under heading "The Council of State".

89 Article XV of the Constitution. Similiar limitations were placed upon the supporters of the country and ministers.

90 This provision did not apply to Sultan Abu Bakar, who "with the voluntary approval and consideration of Our Council of State" had in practice expanded more than the sum fixed for him by the state.

ruler, and owed an individed loyalty to the Sovereign and State. On their appointment they took an oath of allegiance to the Sovereign and State.[91]

As members of the Council and individually they were assistants and co-adjutors to the Sovereign, and "it is expedient, necessary and advantageous to the Sovereign to take the advice, opinion and counsel of that body in all affairs and cases concerning the interests of the country and people."[92]

Matters concerning the Muslim religion and Malay custom were dealt with by this Council, and it provided advice to the ruler in these matters.

## The Council of State

The Council consisted of ex-officio members of the Council of Ministers and other principal officers and Elders of the State, appointed by the ruler with the advice and concurrence of the Council of Ministers. They were not less than sixteen in number, and were Johor subjects although not necessarily Malay or Muslim. After 1914 the Council was opened to additional members who were not required to be Johor subjects nor take the oath of allegiance.[93]

The Council was the legislative body of the state, under the Presidency of the Chief Minister. In the exercise of its legislative power, it was subject to the veto power of the sultan. This power was not absolute, and it could be overcome by the passage of the same Bill in three successive meetings of the Council, and its repassage after a lapse of one year."[94] Bills approved by the Executive Council, came to this council where they were debated and passed. Thereafter, they were submitted to the ruler for the royal assent.

Appointments of European members were made to the Council of State, the Executive Council and the judicial bench, if such appointments were, in the Government's view, necessary and the particular

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91 Articles XXVII and XXX of the Constitution.

92 *Ibid.*, Article XIII.

93 IV Supplement, AH 1332 (12th May 1914). This provision was made to admit to the Councils new British officers and their members. Emerson, *op. cit.*, pp. 205 – 206.

94 II Supplement, AH 1330, *op. cit.*, Prior to this date, the Council of State performed dual functions; that of a legislature and an advisory body: *see* original Article XLIX.

nominees personally suitable. The governor was not to raise any objection to any appointment in such circumstances.

### The Executive Council

Members of the Executive Council were appointed by the ruler and sat at his pleasure. He presided over the Council's meetings but he was not bound by its advice, but in such a situation, he was required to record in writing his grounds for dissent.[95]

The functions of the Executive Council, contained in the Order of the Sultan of 29th June 1914, were very wide, covering almost all matters of government; the initiation of legislation and "other matters of importanace", in addition to the more specific duty of considering applications for agricultural and mining lands, and all contracts and tenders of public works. Bills drafted by the Legal Adviser in consultation with the executive officers concerned, were when necessary, submitted first to the Executive Council before the Council of State. After they had been approved by the former, they were then submitted to the latter.

### Islam and Malay Custom

The Constitution declared that Islam was the religion of the state, and the ruler was responsible for the maintenance of the state religion. There was no mention that he was the head of the religion, but by tradition, he stood as the head of the Muslim religion. Freedom to practise other religions in the state was maintained, and some fundamental liberties were written into the Constitution.[96] The ruler was to rule in accordance with law, as Article LVIII provided that:

> All laws and customs of the country shall be carried out and exercised with justice and fairness by all the Courts of Justice and by all the officers and servants of the country and the aliens who sojourn and reside under its protection, whether for a season or for a lengthened period, that is to say, without their entertaining in the least degree more sympathy or regard or partiality towards those who confess the religion of the country, namely the Muslim religion or making any difference between those who are subjects of the state and those who are not.

95 Ahmad Ibrahim, "The Position of Islam in the Constitution", *The Constitution of Malaysia, Its Development: 1957–77*, *op. cit.*, p. 43.

96 Supplement to the Constitution, AH 1326 (22nd July 1908).

There was no mention of Muslim law here.

It has been held that the ruler was not above the law. Instead he was under the Constitution, and by virtue of the declaration of 1908 (which amended the Constitution) and section 392 of the Civil Procedure Code the Courts of State were competent to pronounce upon the legality of the ruler's executive acts.[97] But according to Article LXIV of the Constitution the Courts had no jurisdiction to declare that an Enactment of the Legislature duly passed by the Council of State and assented to by the ruler was *ultra vires* the Constitution.[98] This Article LXIV was later repealed."[99]

## The Agreement of 1914

Under this Agreement a General Adviser was to assist the ruler in carrying out the duties of government. The powers of the General Adviser in Johor were identical to that of the British Residents and Adviser in other Malay states. Except for matters relating to the Muslim religion and Malay custom, all important affairs of the states passed through the advisers hands. "The administration is carried on by the Malay *Menteri* or Prime Minister with the Malay State Secretary as the Government's official spokesman and a number of Malay officials; the policy and executive action being subject to the scrutiny and approval of the General Adviser who is assisted by various British officers".[100]

However, there were formal differences between this Agreement and those current in the other Malay states. The title of the British ad-

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97 *Wong Ah Fook* v *State of Johor*, Civil Suit No. 13/1915, where the plaintiff requested a declaration that he had an absolute right to admit all persons to game at the gaming farm held under a concession from the Johor Government and that he was entitled to the refund of all moneys which, he alleged, were paid under duress under agreements which he had been forced to sign. The defendant claimed that the state was not liable for the acts of the ruler as the supreme authority, and that the Constitution placed no restriction on the ruler's authority. The defence plea failed, and the judgement given was that the plaintiff was entitled to the declaration asked for.

98 *Anchom Binte Lampong* v *Public Prosecutor* [1940] MLJ 22, where the Court of Appeal held that even though Enactment 47 of 1937 was contrary to the provisions of the Constitution, it had no power to make such a declaration.

99 *Supplement* to the Constitution AH 1376, which substituted for Article IXIV a new Article LXIV, giving the court power to make such a declaration.

100 The Annual Report for the Straits Settlements for 1909; R. Emerson, *Malaysia*, *op. cit.*, p. 211.

viser was "General Adviser" not "British Resident" or simply "Adviser". The Adviser's residence retained its Malay name as in Kedah, and no Union Jack was to be flown over it. The ruler addressed himself not the high commissioner but to the governor. These differences were necessary to maintain the outward appearance of the independence of the Sovereign.

General practises in Johor were formalised unlike in the other Malay states. For instance, any disagreement between the ruler and the General Adviser submitted with the State Council's opinion on the matter, to the governor, and in cases of serious state conflict between the two authorities, touching on fundamental issues, referred from the Governor to the Secretary of State was likely.[101]

In the state administration the Malay administrative structure existed alongside a parallel British administrative structure. This system of parallelism was most evident in local administration; the Malay state commissioners worked alongside the British district officers, known in Johor as Assistant Advisers. As these two sets of officers had formally identical jurisdiction, the burden of administrative work and decision fell primarily on the British.

Most of the technical services were headed by British officers of the Malayan Civil Service and the big joint department of the Federated Malay States and the Straits Settlements. Beneath the departmental heads there were British officers occupying executive posts as well as Malays. In the lower posts in Johor service, preference was for Malays but as elsewhere in Malaya, many Chinese and Indians held office.

European officers appointed or seconded to Johor with the approval of the governor, became Johor officers, liable to be dismissed by the ruler for unsatisfactory work or misconduct. British and Malay officers in Johor service were to be given equal treatment, but in the employment to the service, preference was given to suitable qualified Malays.[102]

### *Terengganu, Kelantan, Kedah and Perlis*

The states of Terengganu, Kelantan, Kedah and Perlis had been under the sovereignty of the Siamese Government until 1909 and by the Treaty

101 The exchange of letters on 11th May 1914 between the Ruler and the Governor of the Straits Settlements, which preceded the signing of Agreement in 1914, provided for all these: Maxwell and Gibson. *op. cit.*, pp. 134 –135.

102 The Exchange of Letters, 11th May 1914, *op. cit.*

of Bangkok 1909[103] the Siamese Government transferred to the British Government "all rights of sovereignty, protection, administration and control whatsoever which they possess over the states".

It would appear that these four states were *de jure* dependencies of Siam until 1909 and had been so treated,[104] and by the Treaty of 1909 they became dependencies of Great Britain, which made their legal status different from that of Johor and the Federated Malay States.

The legal assimilation of these states to the status of the other protected states in the Peninsula proceeded by gradual stages. Both Terengganu and Kelantan entered into new agreements with the British Government, but in the case of Terengganu provision was made for a British agent and a supplementary agreement was necessary to complete the process.

### *(a) Terengganu*

The first of a series of agreements was between the British Government and the State of Terengganu in 1910, modelled on the Johor Agreement 1885 and using almost the same wording. This agreement provided for a British Agent with functions similar to that of a Consular Agent.[105] This provision was amended in 1919. The Agent became a British Adviser "whose advice must be asked and acted upon in all matters affecting the general administration of the country and all questions other than those touching the Mohammadan religion".[106]

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103 Treaty between Great Britain and Siam dated 10th March 1909, Maxwell and Gibson, *op. cit.*, pp. 88 – 95. Juristically the status of the four states were equal, but the *de facto* control of Siam over them differed in degree.

104 The 1897 treaty with Great Britain recognized the sovereignty, of Siam over Kelantan and Terengganu, and under the Declaration and Draft Agreement dated 6th October 1902, Great Britain again recognized Siamese sovereignty over the two states: Maxwell and Gibson, pp. 85 – 88.

105 The Agreement between H.M. Government and the Government of Terengganu on 22nd April 1960, Maxwell and Gibson, pp. 112 – 113. Article 11 of the Agreement was similar to Article 11 of Johor Agreement 1885. Evidence that the term "self governing" in the Agreement meant "independent" is provided by R. Braddell, *Annual Report Trengganu 1919, op. cit.*, p. 28.

106 The Agreement between H.M. Government and the Government of Terengganu on 22nd May 1919, Maxwell and Gibson, *op. cit.*, pp. 113–114.

*(b) Kelantan*

The Agreement between the British Government and Raja Kelantan made provision for a British Adviser whose advice must be asked and followed in "all matters of administration other than those touching the Mohammadan religion and Malay custom".[107] It provided also that the British would not interfere with the internal administration so long as peace and order were maintained in the State.[108]

Although the word "sovereignty" was not mentioned, the terms and wording of the Agreement were consistent with a state of sovereignty. Neither the Kelantan nor the Terengganu Agreement in any way lessened the British right of sovereignty over either state.

*(c) Kedah and Perlis*

The Agreements between the British Government and the state of Kedah in 1923,[109] and the State of Perlis in 1930,[110] were identical in every aspect to those of Terengganu and Kelantan. The Perlis Agreement followed closely that of Kedah.

The Agreements provided for the reception by the State of a British Adviser "to advise on all matters connected with the Government of the States other than matters relating to Malay custom an Mohammadan religion" and the ruler was to give effect to the advice. The ruler was to gov-

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107 The Agreement between H.M. Government and the Raja of Kelantan on 22nd October 1910, Maxwell and Gibson, *op. cit.*, pp. 109–111.

108 The Declaration and Draft Agreement 1902, Kelantan and Terengganu, governed the relations between Siam and Kelantan before 1909. Its central clause was that the "Raja must follow the Adviser's advice in all matters of administration save the Mohammadan religion and Malay custom, and that Siam would not interfere with the internal administration of the state so long as there was no treaty violation, peace and order were maintained, and the state was ruled humanely and justly". Articles II and V, Maxwell and Gibson, *op. cit.*, pp. 85 – 88.

109 The Agreement between British Government and the State of Kedah on 1st November 1923, Maxwell and Gibson, *op. cit.*, pp. 104–105.

110 The Agreement between British Government and the State of Perlis, 1930. Before 1841 Perlis was part of Kedah, which in turn was ruled by Siam. In 1841 Siam created Perlis, and in 1843, Kedah under separate sultans. In a series of treaties in 1826 and 1869 Britain recognized Siamese sovereignty over both states. When both states were transferred to Britain in 1909, Perlis' debt under the Loan Agreements of 1905 and 1907 was taken over by the Federated Malay States. When Perlis paid the final instalment of her debt, she admitted that the state could not survive without outside assistance. On this basis the Agreement 1930 was signed to legitimize the position of the British Adviser in the state: Emerson, *op. cit.*, p. 246.

ern the state with the assistance of a State Council.[111] This gave the State Council a definite constitutional role in the organization of the state instead of being merely an advisery body as the State Councils were in the Federated Malay States and curiously enough in Terengganu and Kelantan.

The state was to continue to be under the protection and sovereignty of Great Britain and she covenanted "not to transfer or otherwise dispose of her rights of sovereignty" nor "merge or combine the State of Kedah and her territories with any other state or with the Colony of the Straits Settlements without the written consent of H.H. the Sultan in Council".[112]

## The State Council

The supreme authority in each state was the Ruler in Council. In each state there was a State Council, consisting of members[113] appointed by the ruler, one of whom was the British Adviser. The Council was under the Presidency of the Ruler, except in the case of Terengganu, where it was under the Presidency of the Chief Minister.

The Council exercised both the legislative and executive authority in the state. It passed state legislation, approved state finances and acted as the court of appeal in all disputes over matters concerning the Muslim religion and Malay custom.

Bills were drafted by the Legal Adviser in consultation with the British Adviser, who examined them in detail, and having satisfied himself as to their content presented the Bills before the Council. The Bills would then be referred to an Enactment Committee of the Council, which consisted of the State Secretary, the Legal Adviser and a Malay judge. When approved by the Committee, they were resubmitted to the Council and passed without further discussion. Thereafter, they were submitted to the ruler for the royal assent. Most major items of legislation passed conformed to laws already in existence in the Federated Malay States and the Straits Settlements.

111 Article 6, Kedah Agreement, 1923.

112 Article 1 and 3, *ibid.* Kelantan and Terengganu had no such protection.

113 The number varied in each State Council; in Kedah, for example, the Council, when first constituted in 1905, had five members while in Terengganu the number of members was fifteen. In both cases the British Adviser was one of the Council's members.

## The Residential and the Advisory Systems

Sir George Maxwell drew a sharp distinction between the residential system and the advisory system as:

> A Resident administers the government of the state on behalf of the rulers and issues orders in his name, and carries them out. An Adviser is consulted by the ruler but issues no order of any kind.

This was a lone voice, one certainly not shared by the other British administrators. Indeed, the Colonial Office refuted it with the following statement:

> No intentional distinction can be drawn between the status of the British Residents in the Federation and of the British Advisers in the Unfederated Malay States.

The extent of British control under the two systems just described was substantially the same, and the degree of the British rule under each is in fact not easy to measure except in terms of its general spirit and direction. In both cases it was British officials who wielded the power in the administration and determined policy and its execution. It was they, not the ruler or his State Council, who conceived and executed policy, but in shaping the policy their chief concern was the well-being and development of the Malays over whom they ruled. In matters of general imperial concern, they bent to the will of their superiors in Singapore or London, but even here they did battle to safeguard as far as possible what they conceived to be the local Malay interest.

Under the residential system, although the form of protectorate was maintained, the spirit and actual development was indistinguishable from that of a colonial regime – the maintenance of an efficient administration for the purpose of furthering the modern economic development of the four states. The British officers carried out a speedy reconstruction of the states along European lines. While endeavouring to preserve indigenous forms and institutions they centralised government and organized it to serve colonial economic ends.[114] Economic development took place largely outside the Malay sector, using alien capital and labour,

114 In describing the economic development under the Residential and Advisory System, Emerson said that "The Federation represents an experiment in the superimposition of a modern economic structure over a simple agrarian people, whereas Kelantan and Terengganu are experiments in raising people by the development of its own forces from within." R. Emerson, *Malaysia*, *op. cit.*, p. 249.

without making demands on Malay land, manpower or revenue contributions which would have disrupted Malay society and probably generated unnecessary opposition.[115]

Under the advisory system, the development of the Malay state was gradual. Basic economic control remained in the hands of the Malays, whose economy was self-sustaining, while political structure remained simple and attuned to the Malay needs and capacities. Malays themselves gradually assumed a real share in the government.

The Chief Secretary, the Federal heads of departments and the Federal bureaucracy acquired the bulk of the powers formerly exercised by the British Residents, while in the Unfederated Malay States, the secretary to the high commissioner was little more than a co-ordinating agent and the mouthpiece of the high commissioner, who rarely intervened in state affairs. There was a general agreement among the Advisers that in their work Singapore had given them a free hand.

Under both residential and advisory system it was made out that the Malay rulers actually governed the country helped and guided by British Residents and Advisers. The illusion was perpetuated that the states, whose industry, administration, chief institution, and even a sizeable proportion of whose population were by now predominantly alien, nevertheless represented a Malay culture and society. British officials pretended to identify their administrational with the Malay life and spirit, and the Malay rulers as heads of state provided a fascade behind which Britain ran Malaya according to economic interests of its own.

## Sovereignty

Sovereignty is defined as the supreme authority in an independent political society. It is essential, indivisable and illimitable.[116] Externally however, sovereignty is limited by the possibility of a general resistance, internal sovereignty is paramount power over all actions within, and is limited only by the power itself.[117]

Normally the modern nation state is deemed to possess independence and sovereignty over its subjects and its affairs, within its territorial

115 E. Sadka, *The Malay State 1894 – 1895, op. cit.*

116 John Austin, 1954. *The Province of Jurisprudence Determined.* Sovereign power or sovereignty is that power in a state to which none other is superior: Earl Jowitt, 1977. The *Dictionary of English Law.* 2nd Edition, p. 1678.

117 Osborn, *A Concise Legal Dictionary.* 5th Edition, p. 297.

limits. Sovereignty has a much more restricted meaning today than the eighteenth and nineteenth century when, few limits on state autonomy were acknowledged. At the present time there is hardly a state which, in the interests of the international community has not accepted restrictions on its liberty of action. Thus most states are members of the United Nations and the International Labour Oganization, in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is more accurate today to say that the sovereignty of a state means a residuum of power which it possesses within the confines of international law.[118]

In a practical sense, sovereignty is also largely a matter of degree. Some states enjoy more power and independence than other states. This leads to the familiar distinction between independence or sovereign states, and non-independent or non-sovereign states or entities, such as protectorates and colonies. Even here it is difficult to draw a line. Although a state may have accepted important restrictions on its liberty of action, in other respects it may enjoy the widest possible freedom. "Sovereignty" is therefore a term of art rather than a legal expression capable of precise meaning.[119]

Lord Atkin defined a sovereign state as a state which exercises *de facto* administrative control over a country and is not subordinate to any other governmental authority in that country.

> By 'exercising *de facto* administrative control' or 'exercising effective administrative control', I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting and imposing laws regulating the religious of the inhabitants of the territory to another and to the government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or mechanical ships. In those circumstances it seems to me that the recognition of a government as possessing all those attributes in a territory while not subordinate to any other government in that territory is to

118 J.B. Saunders, 1969. *Words and Phrases Legally Defined*. 2nd Edition. London: Butterworth, p. 92. It is of interest to note that this concept resembles the doctrine of early writers on international law, who treated states as subordinate to the law of nations, then identified as part of the wider "law of nature".

119 J.G. Starke, 1967. *An Introduction to International Law*. 6th Edition. London: Butterworth, pp. 94 – 95.

> recognize it as a sovereign, and for purposes of international law as a foreign sovereign state.[120]

A sovereign has been defined as the chief or supreme person of sovereign state.[121]

The rule of international law is that a foreign sovereign will not be impleaded in the English Courts unless he voluntarily submits to the jurisdiction of the Court. In the case of *Mighell* v *Sultan of Johor*[122] the status of the sultan as an independent sovereign was challenged in view of the Agreement which the sultan had concluded with the British Government giving the latter the right of control over the external affairs of the State of Johor.[123] The Court held that although the Agreement of 1885 deprived the sultan of the most essential attribute of a ruling sovereign, he was still an independent foreign sovereign.

In the case, the defendant whilst residing in the United Kingdom under an assumed name, was sued for breach of promise of marriage to one Mighell. The defendant pleaded immunity from the Court's jurisdiction on grounds of being a foreign sovereign. The Court caused a communication to the Colonial Office in order to ascertain the status of the defendant. In answer to that communication a letter was written to the Court by an official of the Colonial Office, purporting to be written by the direction of the Secretary of State for the Colonies, and informing him that Johor was an independent state and territory in the Malay Peninsula and that the defendant was the present sovereign ruler thereof; that the relations between the sultan and H.M. The Queen were relations of alliance and not of sovereignty and dependence, and regulated by a Treaty made in 1885. By that Treaty, it was agreed that the British should protect the sultan's territory from external hostile attacks, and that the sultan bound himself not to negotiate treaties, or enter into any engagement with any other foreign state. Further, the letter stated that the sultan had raised and maintained armed forces by sea and land, had organized a postal system, dispensed justice through regularly constituted courts, had founded orders of knighthood, conferred titles of honour, and generally speaking exercised without question the usual attributes of a sovereign ruler.

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120 *The Arantzazu Mendi* [1939] AC 256; *per* Lord Atkin at pp. 263–265.
121 Lord Jowitt, *op. cit.*
122 [1894], IQB 149.
123 Maxwell and Gibson, *Treaties and Engagements*, *op. cit.*, pp. 132–133.

It was argued by the plaintiff that under the treaty the sultan, who had bound himself not to negotiate treaties, or enter into any engagement with any foreign state, had deprived himself of the *jus legationis*, which is the most essential attribute of a ruling sovereign.[124] The Court held that the sultan had bound himself not to exercise some of the rights of a sovereign ruler except in a particular way, but that did not deprive him of his character as an independent sovereign.[125] The court said,

> The agreement by the sultan not to enter into treaties with other powers does not seem to me an abrogation of his right to enter into such treaties, but only a condition upon which the protection stipulated for is to be given. If the sultan disregards it, the consequence may be the loss of protection, of possibly other difficulties with his country: but I do not think that there is anything in the treaty which qualifies or disproves the statement in the letter that the Sultan of Johore is an independent sovereign.[126]

The Court also held that the status of a foreign sovereign is a matter which the English courts take judicial cognizance – that is, a matter which the court is either presumed to know or has the means of discovering. It said that:

> When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign.[127]

It was further argued by the plaintiff that, assuming he was an independent foreign sovereign, he had waived his immunity as he had laid down his character as a prince and put on that of a private individual at will and was therefore answerable to the jurisdiction of the court. Therefore he had lost as it were his privilege as an independent sovereign and made himself subject to the jurisdiction. The argument failed, and the court held that the rule of international law was that a sovereign or a sovereign state, its government or its property were not subject to the jurisdiction of the Court, and affirmed the principle as laid down in *The Parliament Belge*.[128]

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124 Marten's *Law of Nations*, translated by Corbett, 4th Edition, book IV Cl SS 5, 6, p. 127, was quoted as the authority to settle the argument.

125 [1894], 1QB, 149, *per* Will J, at p. 153.

126 *Ibid.*, *per* Kay LJ, at p. 162.

127 *Ibid.*, *per* Esher MR, at p. 158; affirmed by the Privy Council in *Duff Development Co. v Government of Kelantan* [1924] AC 1977.

128 5 PD 197.

> The principle to be deduced from all these cases is that, as a consequence of every sovereign authority, and of the international community which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every territorial jurisdiction over the person of any sovereign or of any state which is destined to public use, or over the property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

The status of the ruler was again tested in court in another case; this time in respect of the status of the Sultan of Kelantan. In *Duff Development Co.* v *Government of Kelantan*,[129] the court communicated with the Colonial Office as to the status of the sultan, and in reply to the Court the Secretary of State for the Colonies stated that Kelantan was an independent state in the Malay Peninsula and that the sultan was the present sovereign ruler thereof; that Kelantan has formerly been recognized as a dependency of Siam; that the Siamese Government had by the Treaty of Bangkok 1909 transferred to the British Government all its rights over Kelantan, and that by the agreement of 1910, referred to in the letter from the Secretary of State, the Raja (afterwards styled as Sultan) of Kelantan had agreed to have no political relations with any foreign power except through the medium of the King of England and to follow in all matters of administration (save those touching the Muslim religion and Malay custom) the advice of an adviser appointed by His Majesty.

The distinguishing mark of an independent sovereign power is that it reserves to itself the right to manage its own internal affairs; but under the terms of the agreement regulating the relations between Great Britain and Kelantan, the King of England had a right to appoint a resident official to tell the Sultan of Kelantan how he was to manage the internal affairs of his country. This was wholly inconsistent with the idea of an independent sovereign as that term is understood by jurists of repute,[130] argued the plaintiff.

The Court rejected the argument, saying that:

> ... engagement entered into by a state may be such a character as to limit and qualify, or even destroy, the attributes of sovereignty or inde-

129 [1924] AC 797.

130 Kluber, *Droit les Gens Moderne de L'Europe*, SS 21, 22, 24 and 33; Vallet, *Le Droit des Gens* and Calvo, *Le Droit International* were cited.

> pendence;[131] and the precise point at which sovereignty disappears and independence begins may sometimes be difficult to determine. Where such a question arises it is desirable to be determined not by the courts, which must decide on legal principles only, but by the government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a state as sovereign state has itself a close bearing on the question whether it is regarded as sovereign in our court.[132]

The Court accepted that the statement of the Secretary of State was conclusive on this point. Thus, a government recognized as sovereign by His Majesty's Government is no less exempt from the jurisdiction of English courts because it has agreed to restrictions in the exercise of its sovereign rights.

The Court further stated that:

> It is obvious that there is a certain amount of independence, but it is not in the least necessary for sovereignty that there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain aspects be dependent upon another Power; the control, for example of foreign affairs may be completely in the hands of the protecting Power, and there may be agreements or treaties which limit the power of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power.
>
> In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. Under the Agreement of 1910, the Sultan is bound not to have relations with any foreign power except through His Majesty the King, and to follow the advice given to him by advisers appointed by His Majesty "in all matters of administration, other than those touching the Mohammadan religion and Malay custom".

This the Court contends did not destroy the sovereignty, for:

> Where there are extensive limitations upon its independence, they do not negate the view that there is quite enough independence left to support her claim of sovereignty.[133]

131 Wheaton, *International Law*, *op. cit.*, p. 50; Halleck, 4th Edition, p. 73.
132 [1924] AC 797, *per* viscount Cave, pp. 807 – 808.
133 *Ibid.*, *per* viscount Finlay, pp. 815 – 816.

In another case, *The Pahang Consolidated Co. Ltd.* v *The State of Pahang*,[134] regarding the sovereignty of the State of Pahang, the Court's decision was similar. The plaintiffs were successors to a company which had obtained extensive mining rights under a lease from the State of Pahang – An Enactment of the Federated Malay States in 1931 would have severely restricted the company's operation, and in these proceedings they sought an exemption from the enactment or, if they were not exempted, they sought declaration that the State of Pahang was liable to reimburse them for damages resulting from the enforcement of the enactment and that any assent given by the Sultan of Pahang to laws restricting export by the company would constitute an infringement of the lease.

Before 1888 the State of Pahang was an independent state, and the ruler of Pahang was sovereign in the state. The State of Pahang came under British protection in 1888, and under a treaty with the British Government the ruler of Pahang was to receive a British Resident whose advice had to be asked and followed on all matters other than the Muslim religion and custom of the Malays. In the following year a State Council was constituted, and presided over by the ruler, and as a matter of usage ever since its formation all enactments had been formally passed by it.

The ruler of Pahang together with the rulers of Perak, Selangor, and Negeri Sembilan, entered into a treaty of Federation in 1895, with the British protection. Clause 5 of the Treaty stated that:

> Nothing in this agreement is intended to curtail any of the power or authority now held by any of the abovenamed rulers in their respective states.

In 1909 a new treaty was signed between the four rulers and the British Government for the establishment of a Federal Council of the Federated Malay States with the power of making laws intended to have force throughout the Federation or in more than one state. The provision of clause ll of this treaty was exactly the same as in Clause 5 of the 1895 treaty.

In 1927 there was a new treaty reconstituting the Federal Council on slightly different lines, clause l0 of the treaty states that "The Council shall pass all laws intended to have force throughout the Federation, ...

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134 FMS Appeal Court [1931–1932] FMSLR 131; affirmed by the Privy Council (1933) *MLJ* 247.

and shall be signed by each of the rulers before coming into force". Clause 15 of this treaty had identical words to the 1895 and 1909 treaties to the effect that there was no curtailment of the rulers power.

The Court held that "the legislature of the Federated Malay States was a sovereign legislature and is legally as omnipotent as the British Parliament, and that it is competent to overrule the lease by Enactment".[135] Furthermore the Court held that although the State of Pahang was bound by all the treaties of the Federation, and in spite of the limitations imposes by these treaties, the State of Pahang remained an independent state, and the ruler of Pahang an independent sovereign thereof.

In the case of *Sultan of Johor* v *Tunku Abu Bakar & Others*[136] the Court (following the decision of *Duff Development Co. Ltd.* v *Government of Kelantan*), held that a letter from the Secretary of State of the Malay rulers, of whom the appellant was one, in which it categorically asserted that "His Majesty's Government regard Your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned" contained the necessary and conclusive information from the proper quarter, accepted by the Board who took judicial notice of the fact so certified, that the appellant was at the relevant time an independent sovereign entitled to the immunities in respect of litigation which are attached to that status.

*To Summarize:* Before the British intervention in 1874 the Malay state was an independent sovereign state, and the ruler a despotic monarch ruling by his will alone without legislative or executive council. He combined in himself, and in himself alone the supreme legislative and executive authority, and he was the fount of justice and honour. It is apparent that the difference between legislature and executive was not in any way recognized, but the more important acts whether legislative or executive were embodied in royal proclamations (known as *titah*) which had full force and validity throughout the State.

With the British intervention the ruler accepted a British Adviser whose advice had to be asked and followed on all matters other than those touching the Muslim religion and Malay custom. A State Council presided over the ruler, was constituted in each state, and henceforth all

135 *Ibid., per* Burton J, pp. 238 – 239.
136 [1952] AC 318, p. 319.

enactments were formally passed by it. The government of the state had been by Ruler in Council.

The appointment of the British Adviser to the court of the sultan and the constitution of a State Council did not have any prejudicial effect on the sovereign power of the sultan. The appointment of the Adviser did not confine the sultan's prerogative but merely guided its use by advice which had to be taken, and the State Council attempted to direct its use by advice, which might or might not be taken.

As a matter of usage the sultan never legislated without the formal assistance of the State Council, though it might be argued with considerable force that even then in a matter affecting only the state a *titah* would have full legislative force.

The position remained unaltered in the Malay states, and in the Federated Malay States, until the constitution of the Federal Council in 1990, except that the title "Order in Council" was altered to "Enactment in 1896".

The Federation of the four Malay states, Perak, Selangor, Negeri Sembilan and Pahang, was first constituted by the Treaty of 1895, but this Treaty only provided for the acceptance of a Resident-General otherwise it left matters as they were. The legislative power remained in the State Councils, and it was usual to pass legislation intended to have force throughout the Federation in identical terms in each state. The treaty contained a saving clause that there would be no curtailment of any of the powers or authority now held by any of the four rulers.

In 1909 a Federal Council of the Federated Malay States was constituted with a high commissioner presiding over it, and the Resident-General, the four rulers, the four British Residents and four unofficial members. The rulers were ordinary members of the Council. There is no indication that the rulers had to give their assent to legislation as rulers. By this Treaty it would appear that each ruler had delegated his prerogative of legislation in matters affecting the Federation to the four rulers in Federal Council, because they each had given the Council power to legislate in a particular state in possible defiance of the will of the ruler of that state.

In this Treaty the provision safeguarding the rights of the rulers in their own states was repeated. It is arguable that the effect of his provision was that except for the express delegation of powers decribed above, the legislative and the executive authority of the ruler in his own state was untouched. The autocratic exercise of their executive powers

may have been fettered by the rulers' undertaking to act on the advice of the British Resident and Resident-General, and the delegation of the greater part of their legislative power. But acts of both the legislative and executive authorities still derived binding legal force from the prerogative of the ruler in his state.

In 1927 this anomalous position was corrected by the Treaty of that year, reconstituting the Federal Council. The treaty radically altered the constitutional position of the rulers, and restored to them the exercise of the prerogative of legislation which was delegated by the 1909 Treaty, though they agreed to exercise it only with advice and consent of the Federal Council. The legislative authority issued from the rulers. Moreover, the signature of the ruler was essential; the failure of any single ruler to sign would prevent the Enactment from becoming law throughout the Federation; and an Enactment of the Federal Council must derive its force in a particular state from the prerogative of the ruler of that state.

The position of the Malay states remained unchanged until the outbreak of World War II. It is essential that we bear in mind that the Malay people were, and are, still strongly bound by ties of sentiment and tradition and by religious allegiance to the ruling dynasties of the states. The Malay sultans are heads of the national religion of each state, and the traditional protectors of Malay custom which is so dearly cherished by, and which determines the manner and life of all classes of Malays. The courts of the sultans and rajas preserve a measure of dignity and colour loved by the masses.

# 3

# THE RULER AND THE MALAYAN UNION 1946 – 1948

After World War II a new scheme was drawn up for a unitary state in the Malay Peninsula. Under the scheme the pre-war Federated and Unfederated Malay States, and the Straits Settlements of Malacca and Penang, were consolidated into a new, integrated political unity, called the Malay Peninsula.[1] Under the scheme the pre-war Federated and state and a British Colony, and was ruled not by a High Commissioner but by a Governor. The Malay rulers were to retain their ancient position, ruling with an Advisory Council appointed by them, but subject to the approval of the Governor. They were given limited legislative powers over matters concerning the Muslim religion but not the collection of *zakat* (tithe) and such legislation by the ruler required the assent of the Governor.

The scheme was formulated by the Malayan Planning Unit established by the War Office but operating in close consultation with the Colonial Office.[2] Among the creations of the Malayan Planning Unit

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1 Singapore was not included in the scheme on the grounds of its economy, racial structure and strategic importance: Malayan Union and Singapore, Statement of Policy on Future Constitution, Cmd. 6724, London, 1946, p. 3. It has been pointed out that its inclusion in the Malayan Union would have given the Chinese an ethnic majority in the country as a whole, which would at this stage have been quite unacceptable to the Malays: R. Allen, 1968. *Malaysia, Prospect and Retrospect* London: Oxford University Press, p. 83; and J.M. Gullick, 1963. *Malaya.* London: Ernest Benn, pp. 88 – 89.

2 The Malayan Planning Unit personnel were drawn from both departments, while the Chief Planner/Chief Civil Affairs Officer designate, Major General R.H. Horne, personified the combination of military and colonial service: Martin Rudner, "The Organization of the British Military Administration in Malaya", *Journal of South-East*

was The Key Plan, which provided for a military administration for the anticipated successor states, *viz.* the Malayan Union and Singapore. According to this Plan, the British Military Administration was to be a dual venture, with the War Office exercising overall control in the interest of territorial pacification and delegating the non-military political and economic matters to the Colonial Office. But because of Japan's sudden surrender in August 1945 and the peaceful reoccupation of Malaya, the purely military operation of the British Military Administration was minimized and its political and economic aspects came to the forefront. According to plan, the military administration proceeded to unify Malaya into single division structurally distinct from Singapore though certain pan-Malayan[3] functions performed at the centre continued to link the two. The arrangement lasted until the creation of the Malayan Union and the Colony of Singapore in 1946.

A constitutional provision was also made for a Governor General "to ensure the co-ordination of policy and administration" between Malaya, Singapore, Brunei, Sarawak, and North Borneo, but the Governor General's real political role remained unclear.[4]

The Malayan Union consisted of a typical colonial government with governor, Legislative and Executive Councils. At first the governor was to rule with an interim Advisory Council until the two permanent organs could be properly constituted. However proposals for its Legislative and Executive Councils were still born, and the governor continued to rule until February 1948, with an expanded Advisory Council, consisting of the governor as President, the Chief Secretary, the Financial Secretary, the Attorney-General, the Economic Adviser and other members appointed by the governor "on a basis as broadly representative as conditions in this phase allow".[5] In its final form the

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*Asian History*, Vol. IX, No. 1, p. 97. Also included in the Malayan Planning Unit were representatives of British commercial enterprises in the States of Malaya: *British Malaya*, Vol. XIX, No. 6, November 1944, p. 66; T.H. Silcock and U.A. Aziz, 1953. "Nationalism in Malaya", *Asian Nationalism & the West*. Ed. Holland, New York: Macmillan; and Martin Rudner 1970. "The Political Structure of the Malayan Union", *JMBRAS*, Vol. 43, Part I.

3 The general responsibility for directing and co-ordinating departmental actions in both the Mainland and Singapore Divisions was the Chief Civil Affairs Officer, who also directed administrative control of pan-Malayan departments of economic significance such as trade and industry, rationing and food control and labour.

4 Cf. Cmd. 7184, London, 1946, and *Colonial Office List, 1948*, Colonial No. 226, p. 333.

5 Clause 20(a), Malayan Union and Singapore: A Summary of Proposed Constitutional Arrangements, Cmd., 6749, London, 1946.

Advisory Council's unofficial members broke down in racial terms as follows: Chinese 7, Indians 3, British 3, Ceylonese 1, Eurasian 1, and an Indian representing the Muslim community. The Malay community was not represented as its communal leaders absolutely refused to serve on government bodies.[6]

In order to implement the Malayan Union scheme, it was essential for the British Government to acquire the necessary jurisdiction in the Malay States. This would mean the transfer to the British of the sovereign rights over these states, with the Malay rulers ceasing to have the sovereign rights in their own states. The transfer of the sovereign rights from the rulers to the Crown was achieved by the conclusion of a series of treaties, known later as the MacMichael Treaties,[7] between the Malay rulers and the British Government, by which the former surrendered their sovereign rights to the Crown, and accepted "such future constitutional arrangements for Malaya as may be approved by His Majesty". Having secured jurisdiction over the Malay states, the British Government by the Malayan Union Order-in-Council, 1946, and the Royal Instructions of 27th March 1946 (collectively known as the Malayan Union Constitution),[8] proclaimed the Malayan Union on the 1st April 1946. The Union comprised the states of Perak, Selangor, Negeri Sembilan, Pahang, Johore, Kelantan, Terengganu, Kedah, Perlis, Malacca and Penang. Sir Edward Gent was made governor. The British monarch retained full power to legislate for peace, order and the good government of the Union, the constitution of which would be amendable or revokable only at his will.

However, only a part of the Malayan Union constitution was ever brought into operation, the remainder was never brought into operation at all. The Union proved to be short-lived and had, by 1st February 1948, ceased to exist.[9]

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6 Owing to their rank hostility towards the Malayan Union Scheme, the Malays refused to co-operate and organized protests and demonstrations against the Government.

7 Sir Harold MacMichael was appointed as H.M. Special Representative to visit Malaya and to conclude with each ruler on behalf of H.M. Government a formal agreement by which he was to cede full jurisdiction in his state to His Majesty: Great Britain, Report on a Mission to Malaya: October 1945 – January 1946, by Sir Harold MacMichael, Colonial No. 194, London, 1946, p. 4.

8 Tun Mohd. Suffian, 1970. *An Introduction to the Constitution of Malaysia.* Kuala Lumpur: Government Printer, p. 7 – 10.

9 The Malayan Union was replaced by the Federation of Malaya, by the Federation

## The Malayan Union Plan

Under the Malayan Union, the executive and legislative power was to rest in the governor. There would be two Councils, the Executive and the Legislative Councils in the Union. The former would consist of the governor as President, the chief secretary, the Attorney-General, the Financial Secretary and seven other members to be appointed by His Majesty or in pursuance of His Majesty's instructions. In the exercise of the executive power in the Union, the governor would be advised by the Executive Council, but he was not bound by such advice nor obliged to seek such advice. The latter council would consist of the governor as President, the ex-officio members, official and unofficial members to be appointed by the governor or on the instructions of His Majesty. The governor in the exercise of the legislative power would act with the advice and consent of the Council; and Bills passed by the Council would no longer require the assent of the rulers but only of the governor.

The Union judiciary consisted of the Chief Justice of the Supreme Court of the Malayan Union, who was to be appointed by His Majesty or the Governor on His Majesty's instructions, and of the judges who were to be appointed in the same way as the Chief Justice or in any other way as might be provided either by regulations under the Governor or law under the order. The prerogative power of pardon in the Malayan Union would rest with the Governor.

The most complicated and controversial part of the Plan was the proposal to create a new Malayan Union citizenship. All persons who were born in Malaya or in Singapore, irrespective of race or creed, and immigrants who had been resident in Malaya or Singapore for a period of ten out of fifteen years prior to 15th February 1942 would be eligible for citizenship,[10] and thus for membership of the Malayan Union executive and Legislative Councils, and of the State and Settlement Councils,[11] and for positions in the public service.[12]

To complete this policy of political equalization of Chinese, Malays

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of Malaya Order-in-Council 1948, which repealed the Malayan Union Order-in-Council 1946, and the Royal Instructions of 1946: Federation of Malaya, Summary of Revised Constitutional Proposals. Cmd., 7171, London 1947.

10 Clause 23, Cmd. 6749. *op. cit.* Under this provision Japanese nationals were barred from obtaining Malayan Union Citizenship.

11 *Ibid.*, Clauses 6(*a*) and 9(*a*).

12 F.G. Carnell, 1952. "Malayan Citizenship Legislation", *International and Comparative Law Quarterly*, October, p. 507.

and Indians, it was proposed that members to any council other than of the Council of Rulers and the Malay Advisory Councils in the State, should take an oath of allegiance not to the Malay rulers but to the British monarch.[13]

There was no provision for separate individual State Governments. However, in such State or Settlement, there would be British officer, called Resident Commissioner, who would be appointed by His Majesty, and who would be responsible for the administration in the State. He would not be answerable to the ruler of the state but to the Governor. The Commissioner would be assisted in the state administration by a State or Settlement Council, which consisted of the Resident Commissioner as President, the ex-officio members, official and unofficial members to be appointed by the Governor, and elected members.[14]

The State or Settlement Council would possess powers over local administration as might be prescribed by Statutes of the Union or as might be allocated to it by the Governor in Council. Powers over matters of a purely local nature might be delegated to the Council by the Malayan Union legislature. Any Bill which was passed by the State or Settlement Council would have no legal force unless assented to by the Governor.[15] Laws passed by the Council would be liable to be amended or repealed by the Malayan Union legislature, and would be void without formal repeal if repugnant to the laws of the Union.[16]

All state assets in the Malay states including land, except those connected with the Muslim religion and with the rulers' personal property, would cease to belong to the state, and be vested in the Union. In the case of unoccupied land in the state, Crown grant over it could be obtained from the Governor.[17]

## The Ruler

Under the Malayan Union, the Malay rulers, stripped of almost all of their powers, were to be retained as figure heads of the state. Thus the

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13 Clause 13, Cmd. 6749, *op. cit.*

14 There was no indication as to the number of elected members in each State or Settlement Council.

15 Clause 6(*e*) Cmd. 6749, *op. cit.*

16 *Ibid.*, Clause 9(*b*).

17 *Ibid.*, Clauses 12(*a*) and (*b*).

ruler was to lose the traditional right of sovereignty over his own state[18] He would no longer preside over the State Council nor would he have a place in it. He would be a ruler in name only, and retain other outward signs or symbols of rulership such as his throne, palace and privy purse. He would have an Advisory Council, of which he would be the President, and whose members would be appointed by him. The Advisory Council would possess a limited power in the state, mainly over Muslim affairs but without the right to impose, collect or remit any *zakat* or tax. The imposition of tax, whether religious or secular would be regulated by legislation which required the assent of the Governor.[19] Legislation on Muslim matters passed by the Advisory Council, however, required the prior approval of the Council of Rulers.

At the Federal level, the rulers would not be members of the Executive and the Legislative Councils of the Union, nor would they take any part in them. They would only be members of the Council of Rulers, which was to consist of the Governor as President, the Malay rulers, and ex-officio members. This Council would have neither executive nor legislative power. It was merely to be a consultative body. Its main functions were to consider legislation solely on matters of the Muslim religion and to advise the Governor on any subject which he might refer to this Council, or which he would permit a ruler to bring up for discussion in the Council.[20] The rulers' absolute authority in matters relating to the Muslim religion and Malay custom, guaranteed under the earlier Anglo-Malay treaties which governed the relations between the British Government and the Malay rulers, were to be swept away. Under the former treaties the rulers were to rule the country with the advice of the British Advisers, thus preserving the character and form of Malay society. These treaty obligations were abrogated by the new MacMichael Treaties, which reduced the authority of the rulers in their respective states to a minimum. The special privileges and treatment of the Malays would be extended to all races. With the exception of lands reserved under the Malay Reservation Laws, which would for the time being remain Malay. Thus the pre-war protected Malay states would exist no more, and in their place would stand the new British colony, the Malayan Union.

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18 *Sultan of Johor* v *Tunku Abu Bakar* [1952]. AC 318. This case is discussed in detail below.

19 S.W. Jones, *Public Administration in Malaya*, *op. cit.*, p. 315.

20 *Ibid.*, pp. 335 – 338.

The status of the ruler came up for argument in the Privy Council. In the case of *Sultan of Johor* v *Tunku Abu Bakar and Others*,[21] the appellant, in proceedings instituted by him in a Japanese court in Singapore during the occupation of Singapore by the Japanese, obtained in that court in 1945 a judgement to the effect that he was the sole beneficial owner of certain piece of land in Singapore. After the Japanese occupation had ended the respondent, together with others, took an originating summons under the Japanese Judgements and Civil Proceedings Ordinance 1946,[22] claiming that they were persons aggrieved by the Japanese decree in 1945, and applying to set it aside, or alternatively, asking for liberty to appeal against it. The appellant thereupon sought to have the originating summons set aside and all further proceedings under it to stay on the ground that he was an independent foreign sovereign over whom the court had no jurisdiction. The Court did not deal directly with the sultan's status under the Malayan Union but on the case the Attorney-General expressed the view that had the Malayan Union gone through it might very well have destroyed the sultan's sovereignty.[23]

The other view taken by some writers is that the Malayan Union did not alter the ruler's position because the power had in fact been in British hands since the Anglo-Malay treaties. A.G. Stockwell wrote:

> Sovereignty, however is not synonymous with power. Power is a fact which men wield or submit to, a commodity which can be gained, lost or transferred; while sovereignty is a concept which cannot be lost or acquired, eroded or increased. To equate sovereignty with power is fallacious but to dismiss sovereignty as irrelevant fiction and to reason merely in terms of real power and actual government processes is to neglect the political potency of the concept. For, sovereignty is a concept which men in certain circumstances have applied – a quality which they have attributed or a claim which they have counterposed – to the political power which they and other men are

21 *See* note 18 above.

22 Section 3 of the Japanese Judgements and Civil Proceedings of Singapore stated that:

(1) Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may ... apply in the prescribed manner to the appropriate court for an order –

(a) that such decree be set aside either wholly or in part; or

(b) that the applicant be at liberty to appeal against such decree.

23 [1952] AC 318, *per* Sir Lionel Heald, Attorney-General, p. 322.

> exercising. Moreover, it has been the source of greatest preoccupation and contention when conditions have been producing rapid changes in the scope of government or in the nature of society or in both.[24]

He may well be right but his view does not coincide with the traditional Malay view of the ruler's sovereignty. The traditional Malay view of the sultan's status is as follows:

> In Islam ... the sultan is both emperor and pope. Viewed from the traditional side he is the sultan; from the spiritual side he is a caliph – 'God's shadow'.[25]

Traditionally therefore a Malay ruler was regarded as the fount of all laws and government, and head of the religion; he defended the Malay custom and the structure of the Malay society. The concern of the ruler was with the trappings of power and its symbolic content rather than its actual exercise. Others might exercise his power, carry out his duties and guide him in his policies but the justification for all the authoritative actions lay in the sovereignty of the Malay ruler. Under the Advisory System, sovereignty resided in the ruler though the exercise of *de facto* power was by the British.

The British Government, for its part, did not admit in public that the drastic change in the ruler's status was intended or effected by the Malayan Union Policy. When two successive British Secretaries of State were later called upon to supply information on the position of the rulers under the Malayan Union they did not deny the rulers "attributes of sovereignty" to enable them to conclude the Federation of Malaya Agreement.[26] There were ambiguous pronouncements made on the concept of sovereignty which suited British policy. The Secretary of State wrote that "His Majesty's Government regard Your Highnesses as independent sovereigns insofar as your relations with His Majesty are concerned."[27]

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24 A.G. Stockwell, "British Policy and Malay Politics During the Malayan Union Experiment 1942 –1945", *JMBRAS*, No. 8, pp. 74 – 75.

25 L.R. Wheeler, 1928. *The Moden Malay*. London.

26 Secretary of State Creech Jones' letter to Mr. Justice T.A. Brown, 9th June 1948 and Lord Listowel to High Court Singapore, 12th November 1948.

27 Secretary of State's letter on 1st December 1951; compare the Attorney-General's view cited in Privy Council [1952] AC 138, p. 322.

This declaration side-stepped the issue of the rulers' status as it would be under the Malayan Union.

Whatever may be the reasons[28] or policy, the Malayan Union was introduced at a time when the Malay community was uncertain of its future. The *Kampung* Malays did not think in pan-Peninsular terms, were indifferent to constitutional niceties, already saw a menace to their way of life from economic hardship, the violence of banditary and the incursion of other races. They imagined, or were told by their leaders that the transfer or sovereignty by the Malay rulers would put an end to their rights and real power.

The British attempt to foist the Malayan Union scheme upon the Malays was made in haste without adequate consideration of the rulers traditional role in Malay society and of the Malay fears of domination by the other races.[29] The Malay leaders were not even consulted. Indignation over this served to unite the leaders of Malay society, and precipitate the formation of the United Malay National Organization(UMNO), set up to conduct unremitting opposition to the Malayan Union. This aroused the ex-Malayan Civil Servants, who joined into oppose the Union. UMNO organized widespread demonstration and boycott all official functions[30] and councils meetings, which alarmed the British and led to the subsequent change of policy – the beginning of the negotiations exclusively with the Malays and the recommendation of the British-Malay working committee not only for a federal constitution but also for a far more restrictive citizenship.

The Malayan Union scheme failed because it was deliberately forced upon the Malay rulers without adequate consideration of the Malay attitudes and political forms, thus arousing united Malay and ex-Malayan Civil Servants' opposition, while at the same time it failed to gain

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28 S.W. Jones, *op. cit.*, states that the real reasons were first the overwhelming need, occasioned by the trend of international affairs, to create a national unity, which could speak as and for Malaya in an assembly, and secondly, the need for a central political authority which could evolve in the direction of self-government.

29 The Malayan Union liberal citizenship provisions, which many have suggested were in some sense a reward to the non-Malays for their loyalty during the war and a punishment for the Malays for their alleged disloyalty, would have given the Chinese and the Indians an overall majority over the Malays. For details of the various sets of citizenship proposals, see F.G. Carnell, 1952. "Malayan Citizenship Legislation", *International and Comparative Law Quaterly.* 1st October 1952.

30 The Malay rulers, leaders and the Malay community as a whole boycotted the inauguration ceremony of the Malayan Union and the installation of the Governor. *See* AG. Stockwell, *op. cit.*, p. 71.

support among the Chinese and Indians.[31] The Malayan Union was eventually replaced by the Federation of Malaya which safeguarded the traditional leadership role of the Malay rulers, and allayed the Malay fears of "alien" domination while at the same time offering generous citizenship rights to the non-Malays.

31 A.V. Purcell, 1964. "Malayan Union: The Proposed New Constitution", *Pacific Affair* Vol. XIX, No. 1, wrote on p. 38, that "it is important to note that at this stage (March – April 1946) the Union proposal evoked absolutely no sign of interest from any of the other communities"; M.R. Stanson, 1969. "The Malayan Union and the Historians", *Journal of Southeast Asian History* Vol. X, No. 2, p. 346; and J. de V. Allen, 1967. *The Malayan Union*. Yale University Southeast Asia Studies, Mimeograph No. 10, pp. 41 – 56.

# 4

# THE FEDERATION OF MALAYA

## The Establishment

The Constitution of the Federation was based upon the Federation of Malaya Agreement, 1948, between the Crown and the rulers jointly, and upon a series of agreements between the Crown and the nine rulers individually. These aggreements were brought into effect by the Order-in Council on the 1st February 1948. By the Federation Agreement, there was established the Federation of Malaya, consisting of the nine Malay states and the Settlements of Penang and Malacca with a strong central government. The separate States Agreements provided for the governments of the Malay states in accordance with a written constitution. In respect of Penang and Malacca, the Federation of Malaya Order-in-Council, 1948 was promulgated conferring a written constitution upon both of these settlements. Subsequently each state in the Federation was to ratify both the Federation and States Agreements.

Under the Federation Agreement, the Crown would retain complete control of the defence and external affairs of the Federation; and the rulers would preserve the prerogatives, powers and jurisdiction enjoyed prior to the Japanese occupation subject to the provisions of the Federation and States Agreements. The preamble to the 1948 Agreement declared that there should be a common form of citizenship in the Federation to be extended to all those who regard the said Federation or any part of it as their real home and the object of their loyalty, and that it was the desire of His Majesty and the rulers that progress should be made towards eventual self government, as a first step towards this end it was envisaged that as soon as circumstances and local conditions permit,

legislation should be introduced for the election of members to the several legislatures[1] (i.e. the Federation Legislative Council and the States and Settlements Councils).

The head of the new Federation Government was the High Commissioner, who had wide legislative and administrative powers. In some respects he acted purely as a representative of His Majesty; in other respects he acted in pursuance of authority jointly delegated to him by His Majesty and Their Highnesses the Rulers.[2]

Under the 1948 Agreement, a Federal Legislative Council was set up, consisting of the High Commissioner as President, three ex-officio members, the Chief Secretary, the Attorney-General and the Financial Secretary, the nine Chief Ministers of the Malay states and one representative from each of the Settlements Councils, who would be unofficial members. The remaining eleven official and fifty unofficial members were all to be appointed by the high commissioner. The fifty unofficial members were allocated thus: six labour; six plantations: rubber and oil palms (three public companies, and three small holdings); four mining; six commerce; six agriculture and husbandry; four professional, educational and cultural; nine states; two Settlements; two Chinese; and one each from the Indian, Ceylonese and Eurasian communities. This allocation was made mainly on a non-racial basis.

In the first Federal Legislative Council all eleven officials were Europeans and of the fifty unofficials, twenty-two were Malays, fourteen Chinese, seven Europeans, fifteen British civil servants, five Indians, one Ceylonese and one Eurasian.[3] This distribution gave the Malays an overall total of thirty-one seats, i.e. twenty-two unofficials and nine chief ministers, making them the largest racial minority in the Council of seventy-five members. One curious provision was that without being a Federal citizen, a British subject was eligible for the membership of the Federal Legislative Council whenever the High Commissioner considered such an appointment was desirable.[4] The official languages of the Council were to be Malay and English. The Council's parameters included defence, foreign affairs, public order, the judiciary, commerce, communications and, apart from minor taxes, finance. The division of powers

1 Federation of Malaya Order-in-Council 1948, Second Schedule, p. 46.
2 Report of the Federation of Malaya Constitutional Commission 1957 (known as the Reid Commission Report), Colonial 330, Clause 23, p. 11.
3 *British Malaya*, Vol. XXII no, 11th March 1948, pp. 352 – 53.
4 Federation of Malaya Order-in-Council 1948, *op. cit.*, Clause 40.

required constant consultation between the Federation and the eleven subordinate governments.[5] The Federal Legislative Council, however, would pass laws on subjects within the competence of the states so far as it was necessary to ensure a common policy throughout the Federation.

The 1948 Agreement also provided for the establishment of a Conference of Rulers, consisting of all the nine Malay rulers, to be presided over by the high commissioner. The Conference would consider draft legislation, new draft salary schemes or a major reorganization of any department or service of the Federal Government. It was the duty of the high commissioner to explain to the rulers the Federal Government's policy on matters of importance to all the states and to ascertain their views on such matters. In the same way it was the responsibility of each ruler to inform the high commissioner of all matters, which in the opinion of the ruler, were either conducive or detrimental to welfare of his state as a whole so that the high commissioner could ascertain the view of the Conference upon such matters. The rulers could comment on Bills, but they also undertook to accept the advice of the high commissioner in all matters connected with the government of the Federation save as except in Clause 5 of the Agreement (i.e. matters pertaining to Muslim religion and Malay custom). Also reserved to the high commissioner was power to give effect to any Bill or motion which the Council failed to pass within reasonable time, whenever he considered it in the public interest to do so.[6] Under a special provision regarding immigration, which was a Federal subject, high commissioner was required to consult the Conference of Rulers from time to time, especially if "any major change of policy" was contemplated by the Federal Government. "Major change of policy" was defined by the constitution as "any change in policy except a change which, in the opinion of the high commissioner, is too unimportant to require consultation with Their Highnesses the Rulers".[7] Should the majority of the rulers oppose such a change, the proposal would be referred to the Federal Legislative Council for confirmation or rejection on a resolution on which only unofficials could vote although all might speak.[8]

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5 L.A. Mill, 1959. *Malaya: A Political and Economic Appraisal.* Connecticut: Greenwood Press.

6 Statutory Instrument no. 108, Second Schedule, Parts I – IV, London, 1948.

7 Federation of Malaya, Report of the Committee Appointed to Review the Financial Provisions, Federation of Malaya Agreement 1948, Chapter II.

8 S.W. Jones, 1953. *Public Administration in Malaya.* London, *op. cit.*

A Federal Executive Council was set up consisting of the High Commissioner as President, three ex-officio members as in the Federal Legislative Council, a maximum of four official members, and a minimum of five and a maximum of seven unofficial members, all of whom were to be appointed by the high commissioner. The executive authority of the Federal Government would extend to all matters on which it was empowered to legislate and would be exercised by the high commissioner either directly or by delegating it to the proper authorities. The Second Schedule to the Federation Agreement provided for the compulsory delegation of executive authority to the states and Settlements over a number of matters and in certain other cases it provided that the executive authority should be exercised by the states and Settlements, insofar as the Federal Legislative Council might consider it to be appropriate.[9] There was also a general provision in Clause 18 of the Agreement authorizing the high commissioner to delegate either conditionally or unconditionally, to the governments of the Malay states with the consent of the ruler, or to the government of a Settlement or to their respective officers, function in relation to any matter over which the executive authority of the Federation extended.[10] Among the special responsibilities attached to the executive authority of the high commissioner were the protection of the rights of the Malay states or any settlement, and the rights, powers and dignity of the rulers, and the safeguarding of the special position of the Malays and the "legitimate interests of the other communites".[11]

Each state was to set up constitutional machinery similar to that of the Federal Government, with a Council of State and an Executive Council, presided over the ruler. Both councils were to have nominated official and unofficial members. The states had very limited legislative powers. The Council of State would be empowered to make any law on any subject omitted from the Second Schedule and which did not encroach upon the legislative powers of the Federal Government and on any subject to which by virtue of a law made by the Federal Legislative Council they were for the time being authorized to pass laws.[12] It could legislate on matters relating to Muslim religion and Malay custom. Bills passed by the Council of State would require the assent of the ruler. The

9 Reid Commission Report, *op. cit.*, Clause 25, p. 12.
10 *Ibid.*
11 S.W. Jones, *op. cit.*, p. 141.
12 Reid Commission Report, *op. cit.*, Clause 26, p. 12.

ruler had reserved powers in respect of state affairs similar to those of the high commissioner in respect of Federal affairs. The rulers undertook to govern their states under written constitutions. According to the state constitution the ruler was the legal source of authority in his state, the new state constitution not imposed upon him but drawn up with his consent. The rulers also accepted the responsibility of encouraging the education and training of the Malay inhabitants in their respective states so as to fit them to take a full share in the economic progress, social welfare and government of the states or of the Federation. State administrations under chief ministers were set up in each of the former Federated Malay States and were continued in each of the former Unfederated Malay States. A British Adviser was appointed in each state and the rulers undertook to accept the advice of these Advisers on all state matters other than those relating to the Muslim religion and Malay custom. The State of Johor had in fact been granted a Constitution in 1895 and the Terengganu Constitution dated back to 1911. Appropriate amendments were made in these Constitutions, while the remaining states received their Constitutions in 1948 following the 1948 Agreement.

In the Settlements of Penang and Malacca just as in the Malay States, a State Council and a Nominated Council were set up with functions similar to those exercised by the Council of State and the State Executive Council. The chief executive officer in each Settlement was the Resident Commissioner and executive action was taken in the name of the High Commissioner. The powers reserved to the rulers in these states belonged to the high commissioner in the Settlements.[13]

The states finance was by grants-in-aid. Wheare's classical concept of federal finance requires that "both general and regional governments must each have under their own independent control of financial resources sufficient to perform their exclusive jurisdiction",[14] but the Federal Constitution's financial provisions did not conform to this principle. Some kinds of revenue allocation between Federal and State Governments were adopted. Thirteen heads of revenue were assigned to the states and the Settlements but they were purely local in character; all other revenue deriving from any source, inside or outside the Federation

13 *Ibid.*

14 K.C. Wheare, 1962. *Federal Government.* 3rd Edition. London: Oxford University Press, p. 97.

accrued to the Federal Government.[15] The states and Settlements were responsible for twenty-five heads of expenditure including subjects such as local government, land, agriculture, drainage and irrigation, education, medical and health, and rulers and chiefs, while the Federal Government was responsible for sixty-five enumerated times.[16] If the State Governments could not balance their budgets, then budgetary deficits were to be met by Federal grants. Thus they had to submit their annual budgets for approval to the high commissioner who would make recommendations to the Federal Legislative Council on behalf of the States Governments "as he thinks fit". The Council would in turn allocate to the needy government such sums "as it thinks fit". A curious Clause in the constitution stipulated that any money which the States and Settlements Governments had not spent at the end of the fiscal year would revert to the Federal Government.[17] This and the absence of a firm and understandable basis for financial allocation became a source of contention and there were annual wrangles between the States and Settlements Governments on one hand and the Federal Treasury on the other. Following the 1948 Committee Report,[18] provision for Federal grants to States and Settlements took the form of (a) a capitation grant (b) a proportion of the import duty on petrol, and (c) special allocations, which in the case of poor states and Settlements, took the form of two more grants, the Development Grant and the Special Transitional Grant.[19] No radical change was made in respect of independent revenues. The Federal Government had assumed financial responsibilities for education, health, drainage and irrigation, and bore the full cost of these services.

## Citizenship Prior to 1948

Prior to the Federation of Malaya Order-in-Council, 1948, there was no Federal citizenship.[20] An inhabitant of Malaya was either a citizen of one of the states or a British citizen if born in the Crown Colony. The provisions for Federal citizenship under the Federal Constitution were com-

15 Federation of Malaya Order-in-Council, *op. cit.*, Clause 11(1) & (2), and Third Schedule.
16 *Ibid.*, Fourth Schedule.
17 *Ibid.*, Clause 121.
18 Report of the Committee to Review the Financial Provisions, *op. cit.*
19 *Ibid.*
20 Statutory Instrument No. 108, *op. cit.*, 1238.

plex but basically they were decidedly more restrictive as far as the non-Malays were concerned than those of the Malayan Union scheme. Federal citizenship was described in the 1948 Agreement as follows:

> It (citizenship) is not a nationality, neither can it develop into a nationality. It will not affect or impair, in any respect whatever, the status of the British subjects in the Settlements or the status of subjects of the rulers in the Malay states. It is an addition to, and not a substraction from, nationality and can be a qualification for electoral rights, for membership of Councils and for employment in Government service and it can confer other privileges and impose obligations.[21]

Those who automatically became Federal citizens were:

(a) any subject of the ruler of any state;
(b) any British subject born in the Settlements of Penang and Malacca, who had continuously resided for fifteen years in the Federation;
(c) any British subject born anywhere in the Federation, whose father had himself been born in the Federation or had lived there continuously for fifteen years;
(d) any person born in the Federation, who habitually spoke the Malay language and conformed to Malay customs; and
(e) any person born in the Federation, both of whose parents were born in and had resided in the Federation continuously for fifteen years.

Any person could become a Federal citizen by naturalization if:

(a) he had been born in the Federation and had resided there for not less than eight years of the twelve years preceding his application; or
(b) he had resided in the Federation for not less than fifteen years out of the twenty years immediately preceding his application.

Furthermore the applicant had to have attained the age of eighteen years, be of good character, declare his intention of residing permanently in the Federation and be possessed of an adequate knowledge of the Malay or English language. A naturalized alien was required to take a citizenship oath, but not to forswear allegiance to his own country. This was the unique feature of the Malayan citizenship; it was not a nationality but an addition to nationality. The reasons for this remarkable provision were that the Chinese laws insisted: "Once Chinese, always Chinese". A large part of the Chinese and Indian population in Malaya, including an unknown number of those born there, gave their loyalty to China and India. They were willing to accept any benefit

21 Malayan Union, Constitutional Proposals for Malaya, Report of Working Committee Appointed by a Conference. London, 1946.

(e) any person who was already a Federal citizen.

(b) Citizenship by Registration

The procedure here was as follows:

> A person of full capacity born in the Federation who is not a citizen of the Federation, and is a citizen of the United Kingdom and colonies, shall, on applying to the High Commissioner and taking the oath that he will exercise only the rights, powers and privileges of a citizen of the Federation or a citizen of the United Kingdom and Colonies, or a subject of a Ruler of any Malay state and none other, and absolutely and entirely renounces and abjures all loyalty to any country, state or sovereign other than the Federation of Malaya, His Majesty and the ruler of any Malay state and swears to be a true, loyal and faithful citizen of the Federation and to give due obedience to all lawful authorities constituted in the Federation, be entitled to be registered as a citizen of the Federation of Malaya.[23]

(c) Citizenship by Naturalization

The high commissioner was empowered upon application in the proper form by any person who was a citizen of the United Kingdom and Colonies and who was of full capacity, to grant to such a person a certificate of naturalization if he satisfied the high commissioner that he –

(a) had within the preceding twelve years
  (i) resided in the Federation for a period of not less than ten years, and
  (ii) resided in the Federation throughout the two years immediately preceding the date of his application;
(b) was of good character;
(c) was not likely to become chargeable to the Federation;
(d) was able to speak the Malay or English language with reasonable proficiency; and
(e) had made a declaration that he intended, in the event of a certificate being granted to him, to settle permanently in the Federation.

Any such person was obliged take an oath similar in terms to that taken by a citizen by registration.

A subject of the ruler was defined by the various state enact-

23 S.W. Jones, *op. cit.*, pp. 202 – 204.

ments.[24] They laid down that the following persons "shall be the subjects of the ruler" (and as such, nationals of the state) by operation of law:

(a) any person who belonged to an aboriginal tribe who was in the state;
(b) any Malay born in the state;
(c) any person born in the state, one of whose parents was born in the Federation of Malaya;
(d) any person who by application in the state had already acquired a Federal citizenship and was still a Federal citizen;
(e) any person, wherever born, whose father either–
    (i) was born in the state and at the time of the birth of such person, was within the provisions of the enactment, or would have been, had the said provisions been then in force, a subject of the ruler, or
    (ii) was at the time of the birth of such person, a subject of the ruler by registration or naturalization.

Provision for registration as a subject of a ruler upon application in the prescribed manner was made but no person was entitled to be registered as a subject of the ruler unless he satisfied the ruler that he was able to speak the Malay or English language with reasonable proficiency, was of good character, and had taken an oath similar in terms to those required under the Federal law.

Provisions relating to the acquisition of a certificate of naturalization were laid down and were similar to those under Federal law except that the candidate for registration had to have resided in the state for a minimum of two years immediately preceding the date of application.

A further provision laid down that a person who had absented himself from the Federation for a continuous period of five years would not be entitled to be registered as a subject of a ruler unless he was certified by the ruler as having maintained a strong connection with the Federation.

Within a few months of its birth the new Federation of Malaya was faced with a serious problem of law and order. The communists started their armed attack on the civilian population and the fabric of the government in the Federation. On 18th June 1948 a State of Emergency was declared by the Federal Government. This delayed the introduction of

24 Federation of Malaya, *Gazette* Supplement, 12th April 1951.

the elections contemplated in the 1948 Agreement, although it was possible in 1951 to introduce, under the "Member System" some devolution of authority by giving some of the unofficial members of the Federal Legislative Council responsibility for certain departments and subjects.[25] Under this system nine of the nominated members were made responsible for various departments and functions of the government with portfolios such as home affairs, education and health. The system was quasiministerial, and one of its advantages was it enable the conduct of public business to be decentralized from the Chief Secretary and at the same time ensured that all departments of government were directly represented through their respective members in the Federal Legislative Council. In the following year an amendment to the 1948 Agreement provided for the Federal Executive Council to be expanded so that all the members with portfolios could become members of the Executive Council. Later new portfolios were created and other adjustments were made up to the time of the first elections to the Federal Legislative Council which were held in July 1955.

It was not until 1953 that an improvement in the security situation made possible the introduction of measures to initiate elections to the States and Settlements legislatures. This showed the seed of inter-racial political co-operation. The United Malays National Organization (UMNO) and the Malayan Chinese Association (MCA) founded in 1949, supported each others candidates, and carried a number of States and Settlements elections. Later in 1953 the two parties, UMNO and MCA, formed a political coalition, the Alliance, which was joined by the Malayan Indian Congress in the same year. In 1954 the Alliance pressed for an effective majority of elected members in the Federal Legislative Council. The British Government temporized, and the consequence was a boycott of public activities by the Alliance members and a partial retreat by the British authorities.[26] In July 1955 the first Federal Elections were held, and the Alliance won 51 out of a total of 52 seats and an overall majority in the Federal Legislative Council. The Parliamentary system was then a reality and Tunku Abdul Rahman became the Chief Minister of the new Government.

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25 Report of the Federation of Malaya Constitutional Conference in London, January 1956, Cmd., 9714, London, 1956.

26 R. Allen, 1968. *Malaysia, Prospect and Retrospect; The Impact and Aftermath of Colonial Rule*, London: Oxford University Press, p. 105.

In addition to the elected members, the new Council consisted of a speaker, appointed by the high commissioner, with the concurrence of the rulers, the ex-officio members, the chief ministers of the Malay states, one representative for each of the Settlements and thirty-two appointed members. These last consisted of twenty-two "members for scheduled interest", three "members for racial minorities" and seven "nominated members". Of the members for scheduled interests, six were representatives of commerce, six of plantations, four of mining, two of agriculture and husbandry, and four of trade unions. The members for Racial Minorities were chosen by the High Commissioner to represent the Ceylonese community, the Eurasian community and the Aborigines. Two of the nominated members were officials and the other five were chosen by the High Commissioner after consultation with the chief minister.[27]

Side by side with these developments arrangements were made for the election of members to the States and Settlements Councils, and by the end of 1955 all the legislatures in the country had a proportion of elected members directly representing the people.

The 1948 Agreement gave very wide powers to the central authorities, who could if they so desired legislate against the wishes of the State Governments on almost all questions other than those touching the Muslim religion and Malay custom. There was a provision to enable the Federal Government to override the State Governments on administrative issues. While the Federal authorities had the power to carry out any policy they wished the convention had developed that they did not exercise these powers. Instead there was consultation between the Federal and the States and Settlements Governments. The Federal Government had never introduced either a major change of policy or a legislative measure without first obtaining the agreement of all the states and Settlements concerned. The Federal ministers met the chief ministers of the states and the Resident Commissioners of the Settlements at conferences for consultation, especially before each meeting of the Federal Legislative Council. The Conference, although it had no legal status, played an important part as a means of achieving consultation and coordination between the several governments. Agreement reached on the attitude to be adopted by the Federal Government on all matters was then set down for consideration at the following Council meeting. The

27 Reid Commission Report, *op. cit.*, Clause 32, p. 14.

solution of problems had been found by discussion in the states themselves, in the Conference of Federal executives, or at meetings between the high commissioner with his advisers and the Conference of Rulers with their advisers.

In 1956, it was agreed that the Federation Agreement be amended to enable the Alliance Government to operate more as a Cabinet Government than it had done previously. It was also agreed that the Amendment make provision for the Office of Chief Minister and that the members of the Federal Executive Council except the Chief Secretary and the Attorney General should be appointed by the high commissioner after consultation with the chief minister. Members of the Legislative Council who were not officials were appointed as Minister of Finance, Minister of Commerce and Industry, and Minister of Internal Security to take the place of civil servants who had previously carried out the functions now assumed by these ministers. The Chief Secretary was to remain responsible for matters relating to the public service, for the administrative work involved in the constitutional changes which were to take place, and for external affairs. H.M. Government retained responsibility for external defence, and special arrangements were made in this respect to cover the interim period until 31st August 1957, which was designated as *Merdeka Day*. Finally it was agreed, looking ahead to the time when the Federation would be independent, that the Agreement should be amended to provide for the establishment of a Public Service, a Police Service and Judicial Commissions; that a Federation Armed Forces Council should be set up, and that a compensation scheme should be worked out for loss of career in respect of public servants.[28]

## The Constitution

Discussion began in August 1955 between the British Secretary of State for the Colonies the Malay rulers and the new Alliance ministers on the next step towards self-government.[29] In January 1956, a *Merdeka Mission*, headed by the Chief Minister left for London to negotiate independence. A Constitutional Conference was held from 18th January to 6th February 1956, attended by four representatives of the Malay rulers and four representatives of the Alliance Government: The High Commis-

28 *Ibid.*, Clause 35, pp. 15–16.
29 Reid Commission Report, *op. cit.*, paragraph 2, p. 5.

sioner, Federation of Malaya, the Colonial Secretary and the British Minister of State. The Conference resolved the basic principles upon which Independence would be achieved. It also recommended that an independent constitutional commission should be appointed "to make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth". Five members were appointed and served on this Commission; they were Lord Reid, a Lord of Appeal in the Ordinary as Chairman; Sir Ivor Jennings, Master of Trinity Hall, Cambridge; Sir William Mckell QC, a former Governor-General of Australia; Mr. B. Malik, a former Chief Justice of Allahabad High Court; and Justice Abdul Hamid of the West Pakistan High Court.[30]

The terms of reference for the Commission, which was appointed in the name of Her Majesty the Queen and Their Highnesses the Rulers, were as follows:

> To examine the present constitutional arrangements throughout the Federation of Malaya, taking into account the positions and dignities, of Her Majesty the Queen and Their Highnesses the Rulers, and to make recommendations for a federal form of constitution for the whole country as a single, independent self-governing unit within the Commonwealth, based on Parliament democracy with a bicameral legislature.[31]

The new Constitution was to include provisions for:

(a) the establishment of a strong central government with States and Settlements enjoying a measure of autonomy;
(b) the safeguarding of the position and prestige of Their Highnesses the Rulers;
(c) a constitutional Head of State for the Federation, to be chosen from the Malay Rulers;
(d) a common nationality for the whole of the Federation; and
(e) the safeguarding of the special position of the Malays and the legitimate interest of the other communities.

The Reid Commission began work in Malaya in 1956. It received 131 memoranda from organizations and individuals, and held 31 meetings to consider the memoranda.[32] It visited each State and Settlement;

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30 The Canadian Government was unable to make a nomination in time (to replace her first nominee who was taken ill); *ibid.*, paragraph 2, p. 5.
31 Reid Commission Report, *op. cit.*, paragraph 3, p. 6.
32 *Ibid.*, paragraphs 7 & 8, p. 7.

conferring with officials, British and Malays, and met informally other officials and private persons. Having gathered the information and material required, the Commission went to Rome, a neutral ground, to prepare its report.[33]

When drawing up the new constitution framework, the Commission had two objectives in mind:

(a) that there must be the fullest opportunity for the growth of a "united, free and democratic" nation; and
(b) that there must be every facility for the development of the resources of the country, and the maintenance and improvement of the standard of living of the people.[34]

In making its recommendations, the Commission had borne in mind that the new provisions "must be both practicable in the existing circumstances and fair to all sections of the community". These recommendations were contained in the Reid Commission Report together with a draft constitution, which was formally submitted to Her Majesty the Queen and Their Highnesses the Rulers on 21st February 1957.

The Reid Commission Report was examined in the Federation by a Working Party, consisting of the High Commissioner, four representatives of Their Highnesses the Rulers, four representatives of the Alliance Government, the Chief Secretary and the Attorney-General. This party held a series of meetings, which concluded with reports submitted to the Conference of Rulers and to the Federation Executive Council in May 1957. At the same time the United Kingdom too was studying the Report. When the Working Party in the Federation had agreed upon the recommendations contained in the Report, a delegation consisting of the high commissioner, the chief minister, the Attorney-General and representatives of the rulers and the Government of the Federation left for London for a conference with the British Government, to discuss the Reid Commission Report and work out the final details of the new constitution. The Draft-Constitution (as contained in the Reid Commission Report) was reviewed and amended, both in substance and form, but the basic principles of the Constitution remained. Thus a new Federation of Malay Constitution was borne; its provisions follow the draft as

33 *Ibid.*, paragraphs 5 – 10, pp. 6 – 7.
34 *Ibid.*, paragraph 14, p. 8.

recommended by the Reid Constitutional Commission.

The Federation of Malaya Agreement between the British Government and the Federation of Malaya Government, was signed in 1957. The new Agreement contained the new Federation Constitution and the Constitutions of the States of Penang and Malacca. It also revoked the previous Federation of Malaya Agreement 1948. In the United Kingdom, the Federation of Malaya Independence Act 1957 was passed and an Order-in-Council was made there under, giving force of law to the Constitution set out in the Schedule to the Federation of Malaya Agreement, 1957, and revoking the Federation of Malaya Order-in-Council 1948.

In the Federation the Federation Constitution Ordinance 1957 was enacted by the Federal Legislative Council, and in each of the Malay States, a State Enactment was passed, approving and giving the force of law to the Federation Constitution.

The new Federation Constitution came into force on 31st August 1957 with the Proclamation of Independence. Its details may be set out in the following manner.

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## Fundamental Liberties

Human rights guaranteed under the constitution are grouped into five sections: Liberty of the person; equality; freedom of speech, assembly and association; freedom of religion; protection of property from acquisition without adequate compensation.

### *Liberty of the Person*

This is treated under (a) freedom from arbitrary arrest; (b) prohibition of slavery and forced labour; (c) freedom from repeated criminal trials; and (d) freedom of citizens from banishment and restrictions of movement.

#### *(a) Freedom from arbitrary arrest*

No person shall be deprived of his life or personal liberty save in accordance with law.[35] "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 and usage having the force of law in the Federation or any part

35 Article 5(1).

thereof.[36] The term "in accordance with law" has not been the subject of judicial interpretation in the Federation of Malaya.

One who believes that his detention is unlawful may make complaint, or complaint may be made for him, to a High Court or any judge thereof that he is being unlawfully detained. The Court must inquire into the complaint, and unless it is satisfied that the detention is lawful, shall order that he be produced before the Court and released. The complaint is in the nature of *habeas corpus;* but the Constitution prescribes no form of words or procedure for the complaint.[37]

When a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by the legal practitioner of his choice.[38] In the case of *Chia Khin Sze* v *Menteri Besar, State of Selangor,*[39] the High Court held that the right to counsel presupposed a right to be heard, and where the Court found in the legislation, which predated the Constitution, no right to be heard, it denied the right to counsel. There is considerable reason to doubt that is correctly interpreted the scope of the constitutional protection. The appellant in the case was detained pending an enquiry being held under the Restricted Residence Enactment,[40] which gave the respondent *Menteri Besar* power to detain and the discretion as to whether to hold an enquir,v. The dispute was over the appellant's right to be represented by counsel at the enquiry. The judge (Sutherland J) held that Article 5(3) of the Constitution did not apply to detention and enquiry under the said Enactment. Firstly, he thought that Article 5(3) was confined to arrest on a criminal charge under the Criminal Procedure Code.[41] This is because the Code contains a similar provision,[42] because the Reid Constitutional Commission stated: "The rights which we recommend should be defined and guaranteed, are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection under the Constitution",[43] because Article 5(4) gives an arrested person the right to be

36 Article 160 (2).
37 Clause (2) of article 5 writes *habeas corpus* into the Constitution.
38 *Ibid.*, Clause (3).
39 [1958] 24 *MLJ* 105.
40 Federated Malay States Cap. 39 as amended by Restricted Residence (Amendment) Ordinance 1948 and as further amended by the Restricted Residence (Amendment) Ordinance 1958.
41 Criminal Procedure Code.
42 *Ibid.*, there are similarities between section 28 and Article 5(4) of the Constitution.
43 Reid Commission Report, *op. cit.*, p. 70.

produced before a Magistrate within twenty-four hours, which could not apply to the Restricted Residence Enactment; and because the *Menteri Besar* was acting in an executive capacity and had an absolute discretion as to whether to hold an enquiry or not.[44] One writer commented that there is little precedent in interpreting a Constitution in the light of ordinary laws, for restricting a Constitution to a declaratory function because the parent commission took a rosy view of the previous state of affairs or for using a Clause safeguarding an arrested person to encourage executive detention.[45]

The second line of Sutherland J's reasoning, on law inconsistent with the Constitution, carries further this question of construing the Constitution in the light of ordinary laws. Article 4(1) specifies that "any law passed after *Merdeka Day* (the day the Constitution took effect) which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void". Nothing is specified of the laws in force before *Merdeka Day*. Relying on Article 4(1), the judge emphasized that it was any law passed after *Merdeka Day* which "is inconsistent with the Constitution, which is void to the extent of inconsistency". He did not refer to Article 162. Article 4(1) is governed by Article 162, which states that any court or tribunal applying the provision of any existing law "may apply it with such modifications as may be necessaly to bring it into accord with the provision of the Constitution". This had received the attention of the Judicial Committee of the Privy Council in a later case,[46] which reached a different conclusion.

Where a person is arrested and not released, he shall be taken without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) before a magistrate and shall not be further detained in custody without the magistrate's authority. Except that an enemy alien is not entitled to be informed of the grounds of his arrest, to be defended by the counsel of his choice, or to be produced before magistrate, the above protection applies to all.

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44 [1958] 24 *MLJ* 105, p. 106.

45 L.A. Sheridan, Right to Counsel (1958) *Malayan Law Journal xli; Federation of Malaya Constitution*, University of Malaya Law Review, Singapore, 1961.

46 *Surinder Singh Kanda* v *The Government of the Federation of Malaya* [1962] 28 *MLJ* 169 (PC).

*(b) Prohibition of slavery or forced labour*

No person shall he held in slavery.[47] This is absolute. All forms of forced labour are prohibited but Parliament may by law provide for compulsory service for national purposes.[48] But work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken as forced labour.

*(c) Freedom from repeated criminal trials and retrospective legislation*

No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence that was prescribed by law at the time it was committed.[49] This is a constitutional prohibition on retrospective penal legislation, not on the judicial precedent of holding an offence to exist where previously it was doubtful or where there was believed to be none.[50]

A person who has been acquitted or convicted of an offence shall not be tried again for the said offence except where the conviction or acquittal has been quashed and a retrial has been ordered by a court superior to that by which he was convicted or aquitted.[51] This is an entrenchment of the pleas of *autrefois acquitor convict.*

*(d) Freedom of citizens from banishment and movement*

No citizen shall be banished or excluded from the Federation.[52] Every citizen has the right to move freely throughout the Federation and to reside in any part thereof, subject to any restriction imposed by any law relating to the security of the country, public order, public health or the punishment of offenders.[53]

Non-citizens may be banished, and legislation has been enacted giv-

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47 Article 6(1).
48 *Ibid.*, Clause (2); National Service Ordinance 1952, *L.N. 320/63.*
49 Article 7(1).
50 L.A. Sheridan, *Federation of Malaya Constitution, op. cit.*, p. 12.
51 Article 7.
52 Article 9(1).
53 Clause 2, Article 9.

ing the power to a Cabinet Ministers[54] to order banishments of non-citizens.

Freedom of movement of citizens throughout the Federation is subject to limitation for one of four basic reasons: (1) security; (2) public order; (3) public health; and (4) punishment of offenders.

Security is a matter of Federal competence. In the interest of the security of the Federation, the Government may make laws to restrict the movements of citizens in the Federation, and such laws must meet the constitutional requirement such as that of equality,[55] unless they are enacted under the Government's special security or emergency powers.[56] Under the Restricted Residence (Amendment) Ordinance 1948 a ruler may for a term of the life of the person concerned require him to reside in a particular district or locality or exclude him from such district or locality as may be specified. Under the Internal Security Act 1960, the minister for Internal Security has power to forbid entry into areas defined as "danger" areas and to prohibit residence in "controlled" areas: and an Officer Commanding Police District may exclude persons from a security area in his district and may impose curfew regulations. The Government may limit movement under its vast emergency powers.[57]

Public order and public health are also matters of Federal competence. The Public Order (Preservation) Ordinance 1958 and the Prevention of Crimes Ordinance 1959 are two laws passed under the public order provision. In the former a Chief Police Officer may exclude any person or class of persons from any area in the district under his charge provided a danger to public order has been declared in such an area by the minister with the responsibility for internal security. Control may also be exercised by the Officer over persons, requiring them to reside inside or outside the proclaimed area, or otherwise restricting their movements. Under the latter, persons may be arrested without warrant, subject to police supervision for an indefinite period, expressed in five years renewable intervals. Under such an order, a person may be required to remain indoors between specified hours and not permitted to travel from the area except with permission.

Incarceration upon conviction of crime is a traditional punishment

54 Banishment Ordinance 1959.
55 Article 8.
56 Articles 149, 150 and 151.
57 *Ibid.*

for offenders, and naturally results in a limitation for a specified period for, of the convicted person's freedom of movement and residence. Exercising such a power is the function of the judiciary.

### *Equality*

All persons are equal before the law and entitled to equal protection of the law.[58] The constitution emphasizes the two faces of equality: Positive and negative. Equality in its positive aspect means that each person in a similar situation should have equal access to the benefits the law confers. In its negative aspect it means that no person should bear a burden placed on him greater than that placed on other persons in a similar situation. If a law confers a benefit, all are entitled to the benefit except if one falls into a category which permits of constitutional exclusion. One may ask whether the concept of equal protection of the law extends to the prohibition of a private act of discrimination or to the redress of social or economic inequalities. The more favoured constitutional view[59] seems to be that while the principles of equality before the law and equal protection by the law, where applied, may render an inquisitions law unconstitutional, the same principles will not compel Government action in place of inaction, nor will they extend to the adjudication of the actions of private individuals. However they may support legislation which itself prohibits private acts of discrimination, or through classification of beneficiaries seeks to redress social and economic unequalities. For example, a graduated income tax or legislation making government legal aid available only to the poor for example may be upheld under these principles.

Equality before the law is guaranteed by some Constitutions. For instance, Section One of the Fourteenth Amendment to the United States Constitution states that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws". Malaya has both equality before and equal protection of, following Article 14 of the Indian Constitution: "The state shall not deny any person before the law or the equal protection of the laws within the territory of India". Both constitute restrictions on the legislature, and both seem to be aimed against arbitrary discrimination. Clause (1) does not proclaim that all persons

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58 Article 8(1), *see* H.E. Groves, "Equal Protection of the Laws of Malaysia and India, 12" in *American Journal of Comparative Law*, p. 385.

59 L.A. Sheridan, *Federation of Malaya Constitution*, *op. cit.*, p. 14.

must be treated alike, but that persons in like circumstances must be treated alike.[60]

The Constitution generally seeks to prevent affirmative acts of discrimination of a governmental or public body only if it is for one of six specific reasons: religion, race, descent, place of birth, being a subject of a ruler, residence or place of carrying on business.[61]

The forbidden governmental action may be either legislative or executive. So any law which discriminates on the basis of religion, race, descent, place of birth, status of being a subject of a ruler, unless otherwise authorized, will be held to be unconstitutional. And so would discriminatory executive action if it is concerned with (a) appointment to any office; (b) employment under a public authority; (c) administration of law relating to the acquisition, holding or disposition of property or to the establishing or carrying on of any trade, business, profession, vocation or employment; (d) the administration of any educational institution maintained by a public authority; in particular as to the admission of pupils or students or the payment of fees; (e) the provision out of public funds of financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority or whether within or without the Federation).

Laws may provide for private administration of religious educational institutions. Neither in these laws as such nor in the administration of them, may there be discrimination on the grounds of religion.

Discriminatory action in favour of one because he is a subject of a ruler is forbidden whatever the nature of the discrimination.[62] Discrimination on grounds of residence or place of carrying on business remain beyond the scope of constitutional restraint, except where executive action by public authorities is involved.

*Exceptions, to grant of equility*

The Constitution itself makes certain exceptions to the general principle of equality. The exceptions authorized by the Constitution are those con-

60 *Ibid.* What constitutes a circumstance entitling a legislature to discriminate and what constitutes discrimination are questions of political values to be decided by the Court. These values may change from time to time: *Plessy* v *Ferguson* [1896] 163 U.S. 537.

61 Article 8(2).

62 *Ibid.*, Clause (3).

tained in (a) Article 8(5); (b) Article 43(7); (c) Article 89, dealing with Malay Reservations, (d) Article 90, dealing with restrictions on alienation of customary lands in Malacca and Negeri Sembilan, and special provisions for Malay holdings in Terengganu; and (e) Article 153, dealing with reservations of quotas for Malays in respect of position in the public service, permits, licences, scholarships, etc. Clause (2) of Article 8 is apparently designed to give Federal citizens[63] protection additional to that given by Clause (1) to all persons.[64]

*(a) Article 8(5).* It is permissible for laws or administrative practice to restrict office or employment connected with the affairs of any religion or of any institution managed by a group professing any religion, to persons professing that religion. The constitution provides for the protection, well-being and advancement of the aboriginal people of the Federation under this provision the aborigines are able to be guaranteed a reasonable proportion of suitable positions in the public service. Secondly it sustains the legality of the aborigines People Ordinance 1954 by which aborigines have exclusive rights to the land in aboriginal areas and reserves and other persons may be excluded thereform. Residence in a state or part of a state may be made a qualification for election or appointment to any authority having jurisdiction only in that state or part, or for voting in such elections. Discriminatory Articles in the State Constitution which were in force immediately before *Merdeka Day* retain their validity as if new Articles if they correspond to these which were then in force. Thus such an Article as that of the Constitution of Johore which reserves the position of Counsellor of the Royal Court to Malays or Muslims does not violate the Federation Constitution.[65] The law may also restrict enlistment in the Malay Regiment to Malays.

*(b) Article 12(2).* Federal and State laws may provide for special financial aid for the establishment and maintenance of Muslim institutions or the instruction of Muslim religion of persons professing that religion. Preferential laws such as the Kelantan Religious Studies[66] and Negeri Sembilan Muslim Religious Scholarship[67] enactments acquire their validity from this exception.

*(c) Article 43(7).* This Article excludes citizens by naturalization or

63 Article 160(2).
64 *Ibid.*
65 Constitution of Johor, Part 1, Article xxx.
66 Kelantan Islamic Religious Studies Scholarship Fund Enactment 1961.
67 Negeri Sembilan Muslim Religious Scholarship Fund Enactment 1961.

registration under Article 17 from the opportunity of becoming Prime Minister.

*(d) Exceptions for Malays*[68]

*(i) Article 89.* States may continue to designate lands as Malay Reservations, if such lands bore this status prior to *Merdeka Day*, and furthermore may acquire additional land for this purpose. State Governments may also acquire land for the settlement of Malays or other communities and establish trusts for that purpose.

*(ii) Article 90.* This Article guarantees the validity of any restrictions imposed by law on the transfer of a lease of customary land in the States of Negeri Sembilan or Malacca, or the transfer of any interest in such land. It also validates existing law in Terengganu with respect to Malay holdings until such law is changed by the state legislature. Furthermore it states that any such enactment may include provisions corresponding to existing law in force in any other state of a ruler.

*(iii) Article 153.* The reservation for Malays of such proportion as the *Yang di-Pertuan Agong* may deem reasonable of positions in the public service (other than that of the states), of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and any permit or licence for the operation of any trade or business as required by Federal law, which will then be subject to the provisions of that law and this Article. His Majesty may give such general directions as may be required for that purpose, to the Public Service Commission, the Judicial and Legal Service Commission, the Police Force Commission and Railway Service Commission, or to any authority charged with the responsibility for the grant of such scholarship, exhibitions or other educational or training privileges or special facilities, and the Commission or authority shall duly comply with such directions.

Where, by an existing Federal law, a permit or licence is required for the operation of any trade or business, or where such a law gives general directions for the authority charged with the grant of such permit or licence, directions may be given to ensure the reservation of such propor-

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68 The term Malay denotes a person who professes the Muslim religion, habitually speaks the Malay language, conforms to Malay custom and
(a) was before *Merdeka Day* born in the Federation or born of parents one of whom was born in the Federation, or is on that day domiciled in the Federation; or
(b) is the issue of such a person: Article 160(2).

tion of permits or licences for Malays as may be deemed reasonable, and the authority shall duly comply with these directions.[69]

Where, by any Federal law a permit or licence is required for the operation of any trade or business that law may provide for the reservation of a proportion of such permits or licences for Malays.[70]

Article 153 does not override Article 136 which requires that all persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially. This discrimination in favour of the Malays applies in the initial employment by Government, but the Constitution does not sanction discrimination once employed.[71]

### *Freedom of Speech, Assembly and Association*

Perhaps the least entrenched of the "fundamental liberties" are those of speech, assembly and association, which are protected against executive influence in the absence of any specific law. However Parliament's power to restrict them by ordinary legislation is practically limitless. These rights are by Article 10(1) confined to citizens[72] and it would therefore be constitutional for Parliament to prohibit by ordinary Act the publication, attendance at meetings or membership of trade unions by aliens, commonwealth citizens (other than Federal citizens) and the citizens of the Republic of Ireland.

This Article is overriden by Article 4(2)(b) which provides that "The validity of any law shall not be questioned on the grounds that ... it imposes restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article." Despite Clause (2) of Article 10 coupled

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69 Article 153(6).

70 *Ibid.*, Clause (8). For example, the Commercial Vehicles Licensing Board Act 1987, Act 334, section 52 provides, with alia, that the *Yang di-Pertuan Agong* may give directions to the Licensing Board for the reservation of licenses for Malays and natives in such proportion if the licenses to be granted under this Act as the *Yang di-Pertuan Agong* may deem reasonable.

71 Article 153 vests in the *Yang di-Pertuan Agong* the responsibility not only of safeguarding the special position of the Malays hut also safeguarding the "legitimate interests of other communities".

72 Article 10(1), compares with Article 19(1) of the Indian Constitution.

with Article 4(2) *(b)*, Clause (1) does impose restrictions on the power of Parliament.[73]

It is arguable, however, that the words "such restrictions" in Article 4(2) *(b)* refer to restrictions on the rights mentioned in Article 10(1) and not restrictions imposed thereon in any particular interest. If that is a true interpretation, then nothing in Article 10 restricts the power of Parliament.[74]

Artide 10 is closely patterned on Article 19 of the Indian Constitution, and both are in marked contrast to the First Amendment to the United States Constitution because of extensive exceptions to the liberty granted and the omission of an express reference to freedom of the press.[75] Laws exist controlling the importation of printed matter and films and controlling domestic press and films.[76] Under these laws the Government may prohibit the importation of any publication which it considers would be contrary to public interest, and the order of prohibition may be prospective in the case of periodicals, operating without the necessity of examining the actual writings. It may also prohibit all future publications from a specified publishing house, agency, or other sources.[77] The Government has the discretion to grant or withdraw any permit or licence for the operation of press or printing or publishing of newspapers, and this law has a breadth sufficient to include any publication of public interest produced at regular or irregular intervals, regardless of format.

Under the Internal Security Act 1960 the Minister[78] may prohibit printing, publication, sale, issue, circulation or possession of any document or publication which appears to him to contain any incitement to violence, to counsel disobedience to the law or to any lawful order, to be calculated or likely to lead to a breach of peace or to promote feelings of hostility between difference races or classes of the population, or to be

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73 L.A. Sheridan, *Federation of Malaya Constitution, op. cit.*, p. 16.

74 *Ibid.*

75 H.E. Groves, 1964. *The Constitution of Malaysia.* Singapore: Malaysia Publications, p. 207.

76 Cinematograph Films Ordinance 1952 as amended by Cinematograph Films (Amendment) Ordinance 1958; Printing Presses Ordinallce 1948 as amended by Printing Presses (Amendment) Ordinance 1957.

77 Control of Imported Publication Ordinance 1958; Undesirable Publications (Prohibition of Importation) Order 1958 as amended.

78 Charged with the responsibility for printing presses and publications.

prejudicial to the national interest, public order or security of the Federation.[79]

The Sedition Act 1948 renders one liable to imprisonment and fine for an act, speech, words or publication or other acts which have a seditious tendency.[80] Some restrictions of freedom of speech appear in the Defamation Ordinance 1957, which codifies the common law of libel and slander. The Public Order (Preservation) Ordinance 1958 permits the Minister[81] to authorize the telecommunication authority in any area proclaimed by the Minister as one where a danger to public order exists to withdraw totally or partially the use of all or any telecommunication facilities from any person or dass of persons or the public at large.

Freedom of assembly is also limited. The Minister may proclaim in any area the existence of danger to public order, and the Officer Commanding the Police District may by order prohibit absolutely or subject to such conditions as he may think fit, any procession, meeting or assembly of five or more people in any public place in any area or in any specified place or building whether public or private, in that area.[82] The Minister may also close any entertainment or exhibition if he is satisfied that it is or is likely to be detrimental to the national interest, or if there has been a refusal to furnish in advance as required particulars about the entertainment or exhibition, or to comply with conditions that the Minister

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79 Internal Security Act 1960, section 28 provides, "Any person, who by word of mouth or in writing or in any newspaper, periodical, book, circular or other printed publication or by any other means, spreads false report or makes false statements likely to cause public alarm shall he guilty of an offence...." It will be appreciated that this restriction on freedom of speech and of the press is very broad; see H.E. Groves, *The Constitution of Malaysia*, *op. cit.*, p. 208.

80 Seditious tendency is defined as a tendency "(a) to bring into hatred or contempt or to excite disaffection against any Ruler or any Government; or (h) to excite the subjects of any Ruler or the inhabitants of any territory governed by such Government to altempt to procure in any territory of such Rulers or governed by such Governmeńt, the alteration otherwise than by lawful means, of any matter as by law established; or (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in the federation or in any ... State ...; or (d) to raise discontent or disaffection among the subjects of His Majesty or of the Ruler of any ... State or among the inhabitants of the Federation or in any ... State...; or (e) to promote feelings of ill-will and hostility between different races or classes of population of the federation."

81 In charge of internal security.

82 Public Order (Preservation) Ordinance 1958.

has required with reference to it.[83]

Freedom of association is restricted by the Societies Ordinance 1949 (as amended), The Public Order Preservation and The Prevention of Crime Ordinances, and the Internal Security Ordinance. The Societies Ordinance requires that any club, company, partnership, or association of ten or more persons, whatever nature or objective, be registered by the Registrar of Societies except those exempted.[84] The Registrar may refuse to register or cancel the registration of any society if he is satisfied that it is affiliated or connected to a group of a political nature outside the country, or it appears to him that the society is likely to be used for unlawful purposes or for any purpose prejudicial or incompatible to the peace, welfare or good order of the Federation. Any appeal against a decision of the Registrar lies with the *Yang di-Pertuan Agong*, whose decision is final.

The Public Order Ordinance[85] stipulates that one may be liable for a crime by consorting with or being found in the company of another if that other is himself committing or attempting to commit an act forbidden by the Ordinance or if that other has recently committed or attempted to commit such offence. A person registered under the Prevention of Crime Ordinance may not consort or habitually associate with any other registered person without the permission of the officer commanding the police district in which he lives.

The 1960 Internal Security Act forbids any association of persons organized, trained or equipped for the purpose of enabling them to be employed in usurping the function of the police or of the armed forces or to be employed for the use or display of physical force in promoting any political or other object or in such a manner as to arouse reasonable apprehension that they are organized or trained or equipped for that purpose.

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83 Internal Security Act 1960.

84 Companies registered or chartered under any other appropriate law; lodges of Freemasons instituted under the governing bodies of the Freemasons in the United Kingdom; trade unions, companies, associations or partnerships consisting of not more than twenty persons formed for the sole purpose of carrying on any lawful business; any registered co-operative society; and any organization or association which forms part of a curriculum of a school.

85 Public Order (Preservation) Ordinance 1958.

### *Freedom of Religion*

Article 3(1) proclaims Islam to be the religion of the Federation but it preserves the right to practice any other religion in peace and harmony. Clause (3) requires the two states, Penang and Malacca, without hereditary Muslim rulers, to make provisions[86] in their Constitutions for conferring upon the *Yang di-Pertuan Agong* the position of head of Islam in those states. The Constitution permits state law to control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.[87]

The Constitution also provides that Act of Parliament or state law may make provisions for special financial aid for the establishment or maintenance of Muslim institutions or the instruction of the Muslim religion to persons professing that religion.[88]

There seems to be no constitutional protection against anti-religious propaganda beyond such as accorded to citizens by Article 10.[89]

Article 8(5)(b) upholds any rules restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

The religion of a person under the age of eighteen years shall be decided by his parent or guardian.[90] No person shall be obliged to receive instruction in or take part in any ceremony or act of worship of a religion other than his own.[91]

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86 This has been done by Article 5(1) Malacca Constitution and Article 5(1) Penang Constitution and the power of pardon, reprieve and respites in respect of, or the power to remit, suspend or commute sentences imposed by any court established under any law regulating Muslim religious affairs in these States.

87 Article 11(4); First Section, State List, of the Nineth Schedule to the Federation Constitution.

88 Article 12(2).

89 Unlike the Constitutions of the United States of America (First Amendment) and Australia, Article 116, that of the Federation does not restrict or prohibit the establishment of any religion.

90 Article 12(4). In Susie Teoh; *Teoh Eng Huat* v *Kadhi of Pasir Mas Kelantan & Anor.* [1986] 2 *MLJ* 228, Abdul Malek J held that a child had the right to choose his own religion if he does it on his own free will. However, the decision was reversed by the Supreme Court in Civil Appeal No. 220 of 1986.

91 *Ibid.*, Clause (3).

***Protection of Property from Acquisition without Adequate Compensation***

No person shall be deprived of property save in accordance with law,[92] and no law shall provide for the compulsory acquisition or use of property without adequate compensation.[93]

However it has come to be accepted that the Government has wide powers of regulation of property for which compensation is not obligatory. In *Lai Tai* v *Collector of Inland Revenue*[94] the court held that the words "in accordance with law" require that the intention as well as the provisions of a statute authorizing the acquisition of property be observed. The court extended period of grace for one whose land was acquired by the Government, on a finding that inadequate notice had been given to the landowner of the action of acquisition. The court's view was that there had been a clear breach of a statutory requirement governing the acquisition of land. Even in the absence of such a requirement the rules of Natural Justice would apply unless excluded by statute.

Adequacy of compensation is a matter for the Court, and there is no litigation under this Clause (2) in the Federation. The Land Acquisition Act 1960 provides that the basis for determining the adequacy of compensation is the market value of the property concerned, but other factors may be considered, such as the effect on the value of other property of the ownership, or the cost of relocating his residence or business.

The wording of the Article is comparable to that of the United States Constitution.[95] There it has been held that not all inteference with property ownership is "taking" or acquisition.[96]

## Citizenship in the Federal Constitution

Part III of the Federal Constitution is based on the whole of the Reid Constitutional Commission's recommendation on citizenship, it said:

> Many different proposals have been submitted to us in memoranda and in evidence with regard to qualification for citizenship of the Fed-

92 Article 13, *cf.* Article 19(5) of the Indian Constitution expressly stipulates that the State may impose "reasonable restrictions" on property rights.
93 *Ibid.*, Clause (2).
94 [1960] 26 *MLJ* 82.
95 United States Constitution, Fifth Amendment.
96 *Miller* v *Schoene* 276 U.S. 272, 72 L.Ed. 568 (1928).

> eration. We have carefully considered them all and we have come to the conclusion that the best proposals for dealing fairly with the present situation are those put forward by the Alliance. The parties of the Alliance have given full consideration to this matter and apart from a few minor points they have reached agreement. We are satisfied that this agreement is a reasonable and proper compromise between the views of the parties each of which has the most widespread support from the race which it represents, and we are further satisfied that this agreement is a better way of doing justice between the races than any other that has been suggested or has occured to us.[97]

Three ways of acquiring citizenship are provided: operation of law, registration and naturalization.

### *By Operation of Law*

All persons who were citizens of the Federation of Malaya before *Merdeka Day* (i.e. 31st August 1957) became citizens of the Federation.[98] Further, every person born in the Federation on or after *Merdeka Day* became a citizen.[99] This unqualified principle of *jus soli* was applied in the Federation for the first time (except in cases of birth in the Straits Settlements as provided under the earlier laws).[100] Any person born outside the Federation on or after *Merdeka Day* was also entitled to be a citizen of the Federation if at the time of his birth his father was (a) born in the Federation, or (b) in the service under the Federation or State Government;[101] or if the father of such a child did not fulfil requirements of (a) or (b), the father was a citizen of the Federation at the time of the birth and such birth had been registered at a Malayan Consulate within one year.[102]

By the Constitution (Amendment) Act, 1962, it was provided that from the date of coming into force of the Act,[103] a person would not ac-

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97 Reid Commission Report, *op. cit.*, paragraph 36, p. 16.

98 Article 14(1)*(a)*.

99 *Ibid.*, Clause (1)*(b)*.

100 Citizens of the United Kingdom and Colonies in the former Straits Settlements and the Federation. Professor L.A. Sheridan observed that "there is no omnibus provision for citizenship by operation of law for those born within the Federation before *Merdeka Day*". *Federation of Malaya Constitution*, p. 24.

101 Article 14(1)*(c)*.

102 *Ibid.*, Clause (1)*(d)*.

103 Constitution (Amendment) Act 1962 *(No. 14)*, came into force on the 1st October 1962 – *L.N. 164/62*.

quire citizenship by operation of law by reason of his birth in the Federation if at the time of his birth neither of his parents was a citizen of the Federation. However, if these qualifications could not be fulfilled and as a consequence a child would be stateless, then such a child was able to become a citizen by operation of law.[104] This, it was pointed out by the Solicitor-General, "curbed resort to the malpractice of a woman entering into the Federation merely to give birth to a child to have it acquire the status of Federal Citizenship."[105]

A new Clause (3) to Article 14 provides for the infrequent occasions of births on ships and aircrafts. One "born aboard a registered ship or aircraft shall be deemed to have been born in the place in which the ship or aircraft is registered, and a person born on board an unregistered ship or aircraft of the government of any country shall be deemed to have been born in that country."[106] One writer[107] observed that the purpose of this Clause was also to remit the *jus soli* principle because its effect would be to negate the claim of Malayan citizenship for one born in a non-Malayan airship at a Malayan airport or within Malayan air space.

### *By Registration*

#### *(a) Wives*

A woman who is married to a citizen is entitled upon making an application to the Federation Government to be registered as a citizen subject to firstly, the marriage having been registered in accordance with any written law in force in the Federation,[108] including any such laws in force before *Merdeka Day;* secondly, that she had not renounced or has been deprived of her citizenship under the Constitution or any earlier law.[109] It is also laid down that citizenship acquired under this provision may be lost if the marriage to the citizen is terminated within two years.[110] There is no similar provision for granting citizenship to husbands who are mar-

104 Amended Article 14(2).

105 Salleh Abbas, Amendment of the Malaysian Constitution, [1977], *Malayan Law Journal Supp.* p. XXIV.

106 *Op. cit.*

107 H.E. Groves, Constitutional (Amendment) Act 1962, 4 *Malaya Law Review* 2, 1963.

108 Article 15(3).

109 Article 18(2).

110 Article 26(2). This amendment was introduced largely to eliminate the possibility of acquisition of citizenship by a formal marriage of convenience entered into purely to enable the acquisition of a Federal citizenship by a woman.

ried to women who are citizens of the Federation.

The 1962 Amendment Act imposed as from 1st October 1962 further limits. The Federation Government must now be satisfied that the wife;

(a) has resided continuously in the Federation for a period of not less than two years immediately preceding the date of application;
(b) intends to reside in the Federation permanently; and
(c) is of good character.[111]

Good character is defined in Article 18(4).

*(b) Children*

Any parent or guardian may apply to register as a citizen any child whose father is a citizen of the Federation provided the Federation Government is satisfied that such a child is ordinarily resident in the Federation and that he is of good character.[112] Article 15 was amended[113] by adding a new Clause (2), which provides that the Federation Government may cause any person under the age of twenty-one years, being the child of any citizen (either parent, or if deceased, was a parent), to be registered as a citizen upon an application made to the Federation Government by his parent or guardian. The previous rule that only children whose father was a citizen could be registered, and that the children must ordinarily reside in the Federation and be of good character, were removed.

The Government may in special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.[114] There is no definition of "special circumstances" in Article 15A. It appears that the Government may register any child under the age of twenty-one years to be a citizen without any qualification at all.

*(c) Persons Born in the Federation before* Merdeka Day

Any person above the age of eighteen years who was born in the Federation is entitled on application to be registered as citizen if he has re-

111 Article 15(2): a qualification which was in force under the Federation of Malaya Agreement 1948, Clause 27, and which is present in other cases of registration: Articles 16 and 17.

112 *Ibid.*

113 Amended Article 15(2) which came into force on 1st October 1962, *L.N., 164/62.*

114 Article 15A was by Act 14/1962, section 4, in force from 1st October 1962.

sided in the Federation during the seven years immediately preceding the application, for a period of not less than five years[115] and who intends to reside permanently in the Federation and is of good behaviour. Where the application is made within one year of *Merdeka Day*, the applicant must have an elementary knowledge of the Malay language.[116]

### (d) *Person reside in the Federation before* Merdeka Day

Such a person was entitled to be citizen provided that he was eighteen years old or more, had resided in the Federation for an aggregate period of eight years out of the previous twelve years; intended to reside permanently in the Federation and was of good behaviour; and possessed an elementary knowledge of the Malay language. Where the applicant was forty-five years old and made his application within one year of *Merdeka Day* he was not required to have an elementary knowledge of the Malay language.[117]

The 1962 Amendment Act[118] repealed this Article, but without prejudice to any application under the Article before 1st July 1963. A short period of grace was given before the effective deletion of Article 17 to enable those who had not done so to register as citizens under the Article.[119]

### *By Naturalization*

An applicant who has attained the age of twenty-one years, has resided in the Federation for an aggregate period of ten years out of the preceding twelve years, intends permanently to reside therein, who is of good character and has an adequate knowledge of the Malay language, may apply to the Federal Government for registration as a citizen[120] of Article

115 Article 16(*a*).
116 *Ibid.*, Clause (*d*).
117 Article 17, H.P. Lee, Constitutional Amendments in Malaysia, 18 *Malaya Law Review* 8, 1976.
118 Contitutional (Amendment) Act No. 14 of 1962; which came into force on 1st July 1963 (*LN 105/63*).
119 This Article was absolete. It was argued that Article 17 was intended to be temporary to enable persons who were permanently resident at the time of *Merdeka* to obtain citizenship if they so wished, and that the time lapse of four years was more than ample enough for these people to apply for citizenship if they had so wished: H.P. Lee, *op. cit.*
120 Article 19.

19(*e*) provides that the applicant must have been in continuous residence in the Federation for a period of not less than one year immediately preceding the date of the application.[121] Article 21 also requires that he should take and oath of allegiance to the *Yang di- Pertuan Agong*.

At the time of *Merdeka* any member of the prescribed armed forces of the Federation or anyone who had been discharged from such a force normally not more than five years before his application (in particular cases this period could be extended) was eligible to apply for registration as a citizen provided the applicant satisfied the Federal Government that he had served satisfactorily in any such force for three years of full-time service or four years of part-time; and intended to reside permanently in the Federation if the Certificate of Naturalization was granted.[122] The granting of a Certificate of Naturalization was mandatory. The 1962 Amendment provided that he had to show that he had resided continously in the Federation for a period of not less than one year immediately preceding the date of the application.[123] The Article was repealed on the 1st February 1963 as absolute.[124]

### *Citizenship by Incorporation of Territory*[125]

If a new state or territory joins the Federation, Parliament may by law determine what persons are to be citizens of the Federation and the dates when such persons are to become citizens.

## Termination of Citizenship

Citizenship under the Constitution may be terminated in two ways: renunciation and deprivation.

### *Renunciation*

A citizen aged of twenty-one years and over (or a woman under the age of twenty-one years who has been married) who is of sound mind and

121 A new Clause (*e*) was added (effective from 1st October 1962 – *LN 164/62*) by Act 14/1962 to ensure that the applicant "must have made this country, his home", *Parliamentary Debate, Dewan Rakyat*, col. 4171, 29th January 1962.

122 Article 20.

123 *Ibid.*

124 This Article was repealed as obsolete as "citizens are now required for enlistment in the Armed Forces" *Parliament Debate, Dewan Rakyat*, col. 4171, 29th January 1962.

125 Article 22.

who is or is about to become[126] a citizen of another country may renounce his citizenship of the Federation by making a declaration to that effect, registered by the Federation Government and shall thereupon cease to be a citizen.[127] However, a declaration made during a war in which the Federation is engaged, would not be registered without the approval of the Federation Government.[128]

### *Deprivation*

#### *(a) Deprivation of citizenship on acquisition or exercise of foreign citizenship*

If the Federation Government is satisfied that any citizen has at any time after *Merdeka Day*, acquired by registration, naturalization or any other voluntary or formal act (other than marriage),[129] or has voluntarily claimed or exercised in a foreign country any right available to him under the laws of that country, such rights being accorded exclusively to the citizen of that country, the Federation Government may by order deprive such a person of his citizenship.[130] Where a law in force in any part of the Commonwealth for conferring on the citizens of that part of the Commonwealth, rights not available to other Commonwealth citizens, then an exercise of that right by a Malayan citizen in such part of the Commonwealth would be treated as though it was exercised in a foreign country. Otherwise the term a "foreign country" did not at that time include any part of the Commonwealth or the Republic of Ireland: Article 160(2).

The 1962 Amendment lays down that any citizen exercising a right to political election in any place, other than the Federation of Malaya or any citizen who applies for the issue or renewal of a passport to the authorities of a foreign country, or uses a passport issued by that country as a travel document shall be deemed voluntarily to claim and exercise a

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126 Prior to 1962, a citizen could not renounce his citizenship unless he was actually a citizen in another country. However, a certain foreign country debars individuals from becoming citizens of that country until any previous citizenship has been renounced. The amendment to Article 23 was aimed at facilitating that process – *op. cit., Parliamentary Debate, Dewan Rakyat.*

127 Article 23.

128 *Ibid.*, Clause (2).

129 Article 24 (1).

130 *Ibid.*, Clause (3).

right available under the law of that place, being a right accorded exclusively to the citizens of that place.[131]

In the case of a woman who is a citizen by registration under Article 15(1) and who has acquired a citizenship of any foreign country by virtue of her marriage to a person who is not a citizen of the Federation, the Federation Government if satisfied, may by order deprive her of her citizenship.[132]

*(b) Deprivation of citizenship by registration under Article 17 or by Naturalization*

The Federation Government may by order deprive a person of citizenship registered under Article 17 or by naturalization if it is satisfied that:

(i) he has shown himself by act or speech to be disloyal to the Federation;[133]

(ii) he has during any war in which the Federation is currently or was previously engaged, unlawfully traded or communicated with any enemy or has been engaged in or associated in any business which to his knowledge was carried on in such manner as to assist an enemy in that war;[134] or

(iii) he has within five years of the date of registration or the grant of the certificate, been sentenced in any country to any imprisonment for more than twelve months or a fine of more than RM5000.00 or the equivalent in the currency of that country and has not received a free pardon in respect of the offence for which he was sentenced;[135]

(iv) he is ordinarily been resident in any foreign country for a continuous period of five years[136] during which time he has not (a) been at any time in the service of the Federation or of any in-

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131 A new Clause (3A) to Article 24 was added (effective from 1st October 1962) by Act 14/62.

132 Article 24(4). It is observed that there is no Clause in the 1962 Constitutional (Amendment) Act obliging the Federation Government to he satisfied that it is not condusive to the public good that such a person should continue to be a citizen of the Federation as in the other provision dealing with deprivation.

133 Article 25(1)(*a*).

134 *Ibid.*, Clause (1)(*b*).

135 *Ibid.*, Clause (1)(*c*).

136 Originally "seven" years, amended by Act 14/1962.

ternational organization of which the Federation Government is a member; (b) registered annually at a Consulate of the Federation of his intention to retain his citizenship;[137]

(v) he has obtained citizenship by registration or certificate of naturalization by fraud, false representation, or the concealment of material facts or his citizenship was granted by mistake.[138]

In addition the 1962 Amendment stipulates that he may be deprived of his citizenship if he has without the approval of the Federation Government accepted, served in or performed the duties of any office, post or employment under the Government of any foreign country or any political subdivision thereof, or any agency of such government, in any case where he has taken an oath, affirmation or declaration of allegiance in respect of that post, office or employment.[139]

No person shall be deprived of his citizenship under Article 25 (i.e. citizenship by registration under Article 17 or by naturalization) unless the Federation Government is satisfied that it is not condusive to the public good that he should continue to be a citizen, or if as a result of such deprivation a person would not be a citizen of any country outside the Federation.[140]

The 1962 Amendment lays down that with effect from 1st October 1962, if the citizenship of the parent's of a child, registered under Article 15(2) is terminated as a result of either of the parent's acquisition of some other citizenship as set out in Article 24(1) or because the parent obtained his Federation citizenship by means of fraud, false representation or the concealment of the material facts,[141] then the Federation Government may deprive that child of his citizenship.[142] Only minors who are citizens by registration under Article 15(2) are affected by this amendment.

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137 Article 25(2). S. Jayakumar suggests that residence abroad before *Merdeka Day* may be taken into account.

138 Article 26.

139 Article 25(1A), added by Act 14/1962, effective from 1st October 1962, *LN 164/62*

140 *Ibid.*, Clause (3).

141 Article 26(1)(*a*).

142 Article 26A.

*(c) Procedure under Article 27*

This Article sets out the procedure as to deprivation of citizenship. Before making the deprivation order the Federation Government shall give the person notice in writing informing him of the grounds on which the order is proposed to be made and informing him of his right to have his case referred to a Committee of Inquiry. It is a committee consisting of a chairman (being a person possessing judicial experience) and two other members appointed by the Government. Either the citizen concerned or the Government can cause the case to be so referred and the report of the Inquiry is not binding, but the Government is to have regard to the report before it makes the order of deprivation.

A decision of the Federation Government to terminate the citizenship of a person shall not be subject to appeal or review of any court. However in the case of *Lim Lian Geok* v *Minister of Interior, Federation of Malaya*,[143] the Court held that this constitutional limitation did not prevent the courts from assuming the traditional control over administrative agencies carrying out a judicial function.

## The Rulers

The Federation of Malaya Constitution provides for a parliamentary democracy, and a representative government responsible to an electorate closely modelled on that of the Constitution of India. Both directly and derivatively, the Constitutions of Great Britain and the United States of America have influenced that of the Federation of Malaya. Others have inspired portions of the Constitution. Modifications to the Constitution represent responses to indigenous factors; by the time of the great win of Malaysia the 1957 Constitution had already been amended four times: in 1958, 1960, 1962 and 1963. Of these, the amendments of 1960 and 1962 are of particular significance.

### *Conference of Rulers*

One unique institution in Malaysia, incorporated into the 1957 Constitution, is the Conference of Rulers.[144] The Conference is independent

143 [1962] 28 *MLJ* 159 (CA).

144 Article 38. Section 1 and 7 to the Fifth Schedule of the Constitution. It is believed that it originate from the imperfect federation of the old Federated Malay States.

of the Federal and State legislatures and the executive organs of government. It has a variety of functions. It is composed of the Malay rulers and the Governors of Penang and Malacca but the two Governors do not take part in the election of the *Yang di-Pertuan Agong* and the *Deputy Yang di-Pertuan Agong*, or in the discussions of the privileges, position, honours and dignities of the rulers. The Conference can block certain Bills, and has to be consulted on certain appointments including that of the Lord President, the Chief Justices and judges of the Supreme Courts. Its main function, however is the selection, and possible removal of the *Yang di-Pertuan Agong* and His Deputy.[145] The Conference also can deliberate on questions of national policy, and when so deliberating, the *Yang di-Pertuan Agong* is accompanied by the Prime Minister and every other ruler or governor by his *Menteri Besar* or Chief Minister.[146]

## The *Yang di-Pertuan Agong*

An important feature of the Constitution, and a unique one in modern government, is the institution of the elected monarch. The *Yang di-Pertuan Agong* ("He who is made Chief Lord") is the Head of State of the Federation and is elected from among the nine Malay rulers to serve for a term of five years. His election is on a rotation basis.[147] In order to be eligible to be elected to the office of the *Yang di-Pertuan Agong*, a ruler must be an adult, he must consent to be elected and be free from any physical or mental defect which might render him unsuitable for office. He must be the first on the election list and receive the support of at least five other rulers.

Once he is elected the *Yang di-Pertuan Agong* must, before he exercises his functions, take and subscribe before the Conference of Rulers and in the presence of the Chief Justice of the Supreme Court the oath of office as set out in Part I of the Fourth Schedule. The executive authority of the Federation is then vested in the *Yang di-Pertuan Agong*,[148] though in

145 Article 32(2), Part III, Third Schedule, *op. cit.*

146 *Ibid.*, Clause (3).

147 Clearly the inspiration behind this unique royal institution is from the Minangkabau of Negeri Sembilan whose territorial chiefs elected the *Yang Dipertuan Besar*, observed H.E. Groves, 1962. "Notes on the Constitution of Federation of Malaya", *Papers on Malayan History*, Singapore, pp. 268 – 271; also R.O. Winstedt, 1950. *The Malays, A Cultural History*. London, p. 87.

148 Article 39.

practice this authority is for the most part exercised on his behalf by the Cabinet or any Minister authorized by the Cabinet.[149]

The Constitution provides that the *Yang di-Pertuan Agong* must be elected by the Conference of Rulers in accordance with the provisions of the Third Schedule.[150] An important feature of this schedule is the election list.[151] In the first election in 1957 the list consisted of all the rulers of the constituent states in the order in which Their Highness recognized precedence among themselves.[152] But for subsequent elections, the list has been varied so that the state whose ruler is the present king is omitted from the list, and after each election any states preceding on the list the state whose ruler was elected are transferred (in the order in which they were then on the list) to the end of the list.[153] Whenever there is a change in the ruler of a state in the list that state is also transferred to the bottom of the list.[154] If there comes a time when all the rulers have been at some time the *Yang di-Pertuan Agong* or when no ruler of a state then on the list is qualified for election or accepts office, the list must then be reconstituted. A wide discretion is given to the Conference of Rulers to exclude any of their member from office of the *Yang di-Pertuan Agong* on the grounds of "unsuitability by reason of infirmity of mind or body or for any other cause"[155] and there is no appeal for the ruler who is so excluded.[156]

The *Yang di-Pertuan Agong* although elected for a term of five years may at any time resign his office by sending his resignation letter to the Conference of Rulers.[157] He may be removed from office at any time and for any reason by a resolution of the Conference of Rulers, and such de-

149 Constitutional (Amendment) Act 1962, No. 14/62 which is deemed to have come into force on *Merdeka Day*.

150 Article 32(3).

151 For the purpose of electing the *Yang di-Pertuan Agong*, the list consists of the *Yang Dipertuan Besar*, Negeri Sembilan, the Raja of Perlis and the seven sultans of the other Malay States.

152 Article 38(2)(*a*). Section 4(2)(*a*). Part I, Third Schedule: The Order of precedence was based on the dates of accession to the thrones of the rulers of the several states. In 1957 the list was as follows: Johor, Pahang, Negeri Sembilan, Selangor, Kedah, Perlis, Kelantan, Terengganu, Perak.

153 Second 4(2) Part I, Third Schedule.

154 This is in accordance with the principle upon which the first election list was compiled, i.e. dates of accession to the throne of a ruler of a state determines priority on the list.

155 Section 1(1)(*c*) Part I, Third Schedule.

156 Article 38(6)(*a*).

157 Article 32(3).

cision of the Conference cannot be overruled.[158] He also automatically ceases to hold office if and when he ceases to be the ruler of his state.[159] His immunity from the legal process is complete and unqualified, and applies both to civil and criminal proceedings and to acts done both in an official and personal capacity.[160]

During the period that a ruler holds the office of *Yang di-Pertuan Agong* he is not permitted to carry out his functions as ruler of his state except that of head of the Muslim religion.[161] Exceptions to this are that he is allowed to weild as ruler of his state any power vested in him to amend the Constitution of his state, and to appoint a Regent or a member of a Council of Regency in case during his period of office as *Yang di-Pertuan Agong* the Regent or a member of the Council of Regency dies or becomes incapable of performing his function.[162] He cannot receive emolument of any kind from the state of which he is the ruler[163] and may not hold any office of profit.[164] He also may not "actively engage in any commercial enterprise". Finally he may not be absent from the Federation without the consent of the Conference of Rulers for more than fifteen days, unless he is on a state visit to another country.[165]

The *Yang di-Pertuan Agong* must act as a constitutional monarch and seek the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.[166] He may appoint the Cabinet[167] which will advise him in the exercise of his functions and he is entitled to receive any information concerning the government of the Federation which is available to the Cabinet.[168]

The *Yang di-Pertuan Agong* may use his discretion in the appointment

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158 Article 38(6)(*a*). There is no safeguard, as a proposal to remove the *Yang di-Pertuan Agong* and *Timbalan* needs only the support of five rulers.

159 Article 32(3).

160 Article 32(1). The ruler of a state is immune from legal proceedings brought against him in his personal capacity: Article 181(2).

161 Article 34(1).

162 *Ibid.*, Clause (8)(*a*) and (*b*).

163 *Ibid.*, Clause (4). Under Article 35 Parliament is required to provide a Civil List for the *Yang di-Pertuan Agong*, which is to be charged on the Consolidated Fund. This list cannot be diminished during His Majesty's period of office; *Civil List Ordinance 1957*.

164 *Ibid.*

165 *Ibid.*, Clause (5).

166 Article 40(1).

167 Article 43(1).

168 Article 40(1).

of a Prime Minister,[169] and may withhold consent to a request for the dissolution of Parliament.[170] He also has the power to call a meeting of the Conference of Rulers. But this applies only to meetings concerned solely with the privileges position, honours and dignities of Their Highnesses. The Constitution ensures that Federal law will not usurp or qualify the discretionary functions of the *Yang di-Pertuan Agong*.[171] Finally, he may appoint members of the Public Services Commission, and the Railway Service Commission, after considering the advice of the Prime Minister and consulting the Conference of Rulers;[172] and may appoint members of the commissions constituted under Part X of the Constitution for a term shorter than the normal five years.[173]

His Majesty exercises certain functions in nearly all of the public service[174] and, subject to Federal law, he can regulate the qualifications for appointments and conditions of service of persons in the public service[175] save of those persons in the public service of each state. He is the Supreme Commander of the Armed Forces of the Federation[176] and responsible for the appointment of most members of the Armed Forces Council including the Chief of the Armed Forces Staff.[177] He is empowered to grant pardons reprieves and respites in respect of all offences which have been tried by Court Martial.[178] He appoints the Chairman and three members of the Election Commission,[179] members of the Judicial Service, the Chairman and Deputy Chairman of the Public Services Commission.[180] Until 1960, when it was abolished, he appointed members of the legal service. However he is bound to consider the advice of the Prime Minister and consult the Conference of Rulers in all these appointments.

The *Yang di-Pertuan Agong* is one of the constituent parts of Parlia-

169 *Ibid.*, Clause (2)(*a*).
170 *Ibid.*, Clause (2) (*b*).
171 *Ibid.*, Clause (3)(*a*).
172 Articles 139 and 141.
173 Article 142.
174 Article 132.
175 *Ibid.*
176 Article 41.
177 Article 137(3).
178 Article 42(1).
179 Article 115(1).
180 Article 139(4).

ment.[181] He can summon, prorogue or dissolve Parliament.[182] He may address either House of Parliament or both House jointly. [183] He may appoint sixteen[184] Senators from persons who in his opinion had rendered distinguished public service or had achieved distinction in the professions, commerce, industry, etc. He may remove a disqualification for membership of either House of Parliament[185] which has been incurred because of an election offence,[186] or a conviction for any other offence.[187] He may appoint the Clerks to the Senate and the House of Representatives.[188] Bills which have been passed by both Houses of Parliament require the royal assent before becoming law;[189] and he signifies his assent to Bills by causing a public seal[190] to be affixed to the Bills.[191] Unlike in England or India where the Queen or President may refuse assent to a Bill, there is no such provision in the Federal Constitution.

Islam is the religion of the Federation.[192] Each ruler as head of the Muslim religion in his own state can authorize the *Yang di-Pertuan Agong* to represent him in any acts, observances or ceremonies with respect to which the Conference of Rulers had agreed should be extended to the Federation as a whole. The Constitution requires the Constitutions of the States of Penang, Malacca, Sabah and Sarawak to make provision for conferring on the *Yang di-Pertuan Agong* the position of Head of the Muslim religion in those states.[193]

It is his responsibility to safeguard the special position of the Malays and the legitimate interests of other communities in accordance with the provisions of Article 153. He has very wide emergency powers under Part X of the Constitution.

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181 Article 44
182 Article 55.
183 Article 60.
184 Article 45(1)(*b*).
185 Article 48(3).
186 *Ibid.*, Clause (1)(*d*).
187 *Ibid.*, Clause (*e*).
188 Article 65(2).
189 Article 66(1).
190 Article 36.
191 Article 66(4).
192 Article 3(1).
193 *Ibid.*, Clause (3): *See* Article 5(1) Malacca Constitution; Article 5(1) Penang Constitution, Article 5A Sabah Constitution, and Article 4A Sarawak Constitution.

He is responsible for appointing an Attorney-General[194] and an Auditor-General for the Federation.[195]

## The Deputy *Yang di-Pertuan Agong*

The Constitution provides for the post of *Timbalan Yang di-Pertuan Agong*, who must carry out the functions and have the privileges of the *Yang di-Pertuan Agong* during any vacancy in the office of the latter, or during any period which the *Yang di-Pertuan Agong* is unable to exercise the functions of his office owing to illness, absence from the Federation or for any other cause.[196] The *Timbalan* (Deputy) may only exercise those functions if the period of absence exceeds fifteen days.

Like the *Yang di-Pertuan Agong*, the *Timbalan* must be elected[197] by the Conference of Rulers for a term of five years, or if elected during the term of the *Yang di-Pertuan Agong*, for the remainder of the term.[198] He may resign his office at any time by writing a letter addressed to the Conference of Rulers. The Conference may remove him from office in the same way as it may the *Yang di-Pertuan Agong*. He also ceases to hold office on ceasing to be a ruler. During his term of office, should a vacancy occur in the office of the *Yang di-Pertuan Agong*, his term will expire with the filling of the vacancy.[199]

Parliament may by law provide for the exercise by a ruler of the functions of the *Yang di-Pertuan Agong* in cases where that office would fall to the *Timbalan* but cannot be exercised because of a vacancy in the office of the *Timbalan* or his illness, absence from the Federation or any other circumstance; but such a law must not be passed without the consent of the Conference of Rulers.[200]

## Parliament

Under the Constitution the legislative authority of the Federal Government is in a bicameral Parliament, consisting of the *Yang di-Pertuan Agong* and two Houses; a House of Representatives (*Dewan Rakyat*) and

194 Article 134.
195 Article 105.
196 Article 33(1).
197 *Ibid.*, Clause (4), Part II, Third Schedule of the Constitution.
198 *Ibid.*, Clause (2).
199 *Ibid.*, Clause (3).
200 *Ibid.*, Clause (5).

a Senate.[201] The normal life of Parliament is five years from its first meeting, whereupon it stands dissolved. It may be dissolved at any time within its period of normal life by the *Yang di-Pertuan Agong* acting on his discretion or upon the request of the Prime Minister.[202] A Cabinet is appointed by the *Yang di-Pertuan Agong* from members of Parliament and is collectively responsible to Parliament.[203] The machinery of the Government is closely modelled on that of Great Britain.

The *Dewan Rakyat* is fully elected, and elections are by secret ballot, the electorat being divided on the basis of Federal constituencies consisting of all adult citizens, not subject to any special disqualification.[204]

The *Dewan Rakyat*, first constituted in 1959, originally had 104 members,[205] so making it slightly larger than the Federal Legislative Council which functioned from *Merdeka Day* until its abolition in 1959. This has been excluded because it says nothing concrete.

As for the Senate, it consists of twenty-two members from the States, each of the eleven States Legislatures electing two senators, and another sixteen appointed by the Federal Government.[206] Of these thirty-eight senators, nineteen were appointed in 1957 for a term of three years only,[207] and the rest for the standard term of six years. This was to ensure that these would be a turn-over of half the Senate once in every three years. All subsequent appointments and elections of members were for the full six years period.

The relations between the two Houses is similar to that between the House of Commons and House of Lords in the United Kingdom. Thus the Senate has virtually no power to oppose financial legislation which it may delay for one month only, while it may delay the passing of other legislation for one year.[208]

Constitutional and statutory provisions confer on both Houses of

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201 Article 44.
202 Article 55.
203 Article 43; The *Yang di-Pertuan Agong* shall first appoint as Prime Minister to preside over the Cabinet member of the *Dewan Rakyat* who in his judgement is likely to command the confidence of the majority of the members of the *Dewan Rakyat* and on the advice of the Prime Minister appoint other ministers from among the members of either House of Parliament.
204 Articles 46 and 47.
205 Article 46(1).
206 Article 45(1).
207 Section 6, Part II Seventh Schedule of the Federation Constitution.
208 Article 68(1) and (2).

Parliament and its members many privileges, immunities and powers similar to those held, enjoyed and exercised by the British Parliament and its members. All parliamentary privileges, immunities and powers are part of the general and public law of the Federation, of which the Courts must take cognizance.[209] The Constitution provides that the validity of any proceedings in either House of Parliament or any committee thereof, must not be questioned in any court.[210] A verified certificate of the presiding office or clerk of either House that a matter is being inquired into and published by order or under the authority of the House or any committee thereof, is conclusive evidence for the court of such publication and results in an immediate suspension of proceedings instituted thereto.[211]

## The States

In the Federation of Malaya there were altogether eleven states. In nine of these states the head of the state is an hereditary ruler. In the remaining two states, Penang and Malacca, the head of state is a governor, appointed by the *Yang di-Pertuan Agong* for a term of four years.

Each state has its own constitution, and the ruler or governor is bound by the State Constitution[212] to act on the advice of the State Council. Without exception, every state constitution provides for a wholly elected one-chamber legislature, from among whose members are appointed the *Menteri Besar* or Chief Minister, and also the other members of the State Executive Council. Most states have their own administrative services, and all states appoint their own subordinate officers.[213]

Article 71 of the Federation Constitution lays down that every State Constitution must have certain provisions, which are termed as "essential" provisions, and which are set out in the Eighth Schedule to the Constitution. If a state constitution does not conform to this model, the Federal Parliament is empowered to legislate to amend that state's constitution accordingly. Inconsistent constitutional law may be removed, or

209 Article 63.

210 *Ibid.*, Clause (1).

211 *Ibid.*, Clause (3). This gives absolute immunity from civil and criminal proceedings along the same lines as the (English) Parliamentary Papers Act 1840. Whether it gives protection against executive action is doubtful.

212 Article 71.

213 There is an understanding that some state posts will accept Federal officers.

a requested Article added.[214] This is notwithstanding anything set down in the Federal Constitution. Any Federal law made for a state in pursuance of Article 71, unless repealed by the Federal Parliament, ceases to have effect on the day that a new Legislative Assembly, constituted in that state under the Federal Law,[215] fulfils the constitutional requirement by passing its own organic legislation.

The "essential" provisions of a State Constitution are as follows:

### *Ruler or Governor*

In the exercise of his functions under the State Constitution, in carrying out any law, or as a member of the Conference of Rulers, a ruler or governor must act on the advice of the Executive Council or a member of the Council acting under its general authority, except as otherwise determined by the Federal or State Constitution. Nevertheless he is entitled at his request, to any information concerning the Government of the State which is available to the Executive Council.[216]

He may however act on his discretion, in addition to those powers cited in the Federation Constitution:[217]

(a) in appointing a *Menteri Besar* or Chief Minister;
(b) in withholding consent to a request for the dissolution of the State Legislative Assembly;
(c) in making a request for a meeting of the Conference of Rulers concerned solely with the privileges, position, honour, and dignities of Their Highnesses or religious acts, observances, or ceremonies;
(d) in his capacity as Head of the Muslim religion or on any matter relating to Malay custom;
(e) in the appointment of an heir or heirs, consort, Regent or Council of Regency;
(f) in the appointment of persons to Malay customary ranks, titles, honours and dignities and the designation of the functions appertaining thereto; and
(g) in the regulation of royal courts and palaces.

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214 Article 71(3) and (4).
215 *Ibid.*, Clause (6).
216 Section 1(1), Part I, Eighth Schedule of the Federation Constitution.
217 *Ibid.*, section 1(2).

State law may empower the ruler or governor after consultation with or on the recommendation of any person or body of persons other than the Executive Council, to carry out any of his functions other than

(a) functions exercisable on his discretion; and
(b) those which provision is made in the Federal or State Constitution.[218]

### *The Executive Council*

The ruler or governor must appoint an Executive Council,[219] with a *Menteri Besar* or Chief Minister to preside over the Executive Council. He must on the advice of the *Menteri Besar* or Chief Minister, appoint not less than four and not more than eight members to the Council, from Members of the State Legislative Assembly. A person who is a citizen by naturalization or registration under Article 17 of the Federation Constitution, may not be appointed *Menteri Besar* or Chief Minister. In appointing a *Menteri Besar,* the ruler of a Malay state may in his discretion appoint any member of the Legislative Assembly who in his opinion is likely to command the confidence of a majority of the members of the Assembly.[220] The Executive Council is collectively responsible to the State Legislative Assembly.

If the *Menteri Besar* ceases to command confidence or the majority of the members of the Legislative Assembly, unless at his request the ruler dissolves the Legislative Assembly, he must tender the resignation of the Executive Council.[221]

A member of the Executive Council must not engage in any trade, business or profession connected with any subject or department for which he is responsible. So long as he is thus engaged, he may not take part in any decision of the Council relating to that trade, business or profession or any decision likely to affect his pecuniary interest therein.[222]

There are three appointed members of the Executive Council. They are the State Secretary, the State Legal Adviser and the State Financial

218 *Ibid.*, section 1(3).
219 *Ibid.*, section 2(1).
220 *Ibid.*, section 2(4). The ruler may appoint a non-Malay to be a *Menteri Besar* just as in the state of Penang, Malacca, Sabah and Sarawak.
221 *Ibid.*, section 2(6).
222 *Ibid.*, section 2(8).

Officer.[223] These three civil servants may take part in the proceedings of the Council and of the State Legislative Assembly, and may be appointed as members of its Committees, but may not vote.

### *The State Legislature*

The legislature of the state consists of the ruler or governor and one House, the Legislative Assembly.[224] Under the Federal Constitution the assembly has the power to determine the number of its own elected members[225] but, until this decision is made, the number of members must be the number specified in Article 171 of the Federal Constitution. The ruler or governor may not attend meetings of the Legislature, except on special occasions such as the opening of the State Assembly. He may summon, prorogue and dissolve the Legislative Assembly.[226]

Every citizen over the age of twenty-one who is resident in the state is eligible to be a member of the Legislative Assembly unless disqualified by the Federal or State Constitution or any law such as is mentioned in the Eighth Schedule.[227] But the ruler or governor may suspend any regulation or judgement disqualifying a citizen from being a member of the Legislative Assembly. A person may not at the same time be a member of the Legislative Assembly for more than one constituency.[228]

A bill becomes law if it is passed by a simple majority of the total membership of the Legislative Assembly and assented to by the ruler.[229] No Bill or amendment involving expenditure from the Consolidated Fund of the state may be introduced or moved in the Legislative Assembly except by a member of the Executive Council.

Article 72 of the Federation Constitution enumerates the privileges of the Legislative Assembly, and states that the validity of any proceedings in the Assembly may not be questioned in any court.

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223 In Penang and Malacça, the Legal Adviser, who takes part in the proceedings of the Legislative Assembly, may be appointed to its committee, but may not vote.
224 *Ibid.*, section 3.
225 *Ibid.*, section 4.
226 *Ibid.*, section 9.
227 *Ibid.*, section 6.
228 *Ibid.*, section 7.
229 *Ibid.*, section 11(1).

## Relations Between the Federation and the State

The 1957 Constitution divides legislative and executive power between Federal and State Governments in such a way as to give a preponderence to the former. However the states are equal to each other and to a limited extent independent and autonomous.

### *Distribution of Legislative Powers*

Legislative power in the Federation is divided into three categories: those subjects exclusively the preserve of the states' legislatures and subjects on which both the states and the Federal Parliament can pass laws. There are three lists that correspond to the three categories. Any subject not listed is understood to be within the competence of the states.[230]

This provision however should not give the impression that power in the Federation was weighted on the side of the states, because The Federal List[231] is very extensive; it includes elaborately defined external affairs and defence powers, wide authority on internal security including the police, very general powers over the criminal and civil law and the administration of justice, citizenship and aliens, extensive financial powers excluding tax powers, broad control over loans and borrowing including borrowing by states, and general fiscal control of the economy including power over foreign exchange, banking, currency and capital issues. The Federal Legislature is also given legislative powers with respect to the production, supply and distribution of goods, price control, and food control; industries and factories; exports, industrial property and insurance; shipping and navigation; fisheries, communications and transport; education; medicine and health; labour and social security including trade unions, industrial and labour disputes; labour and welfare; newspapers and other publications; wireless, broadcasting and television, libraries, museums, ancient and historical monuments.

In contrast the legislative powers of the state legislature[232] are meagre; they embrace Muslim matters, Malay customs, land law, agriculture and forestry, local government, turtles and riverine fishing; and local services. This list, the only really significant subjects are land and local government.

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230 Article 73.
231 List I of Ninth Schedule.
232 List II, *op. cit.*

The Concurrent List,[233] that is those subjects on which both Federal and State Legislatures are competent to pass laws, is short, and includes social welfare; town and country planning, protection of wild birds and animals, public health, sanitation, disease prevention, drainage and irrigation, culture and sports, and housing.

The Federation Constitution stipulates that Parliament has the power to make laws with respect to any matters enumerated in the State List but only:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country or any decisions of an international organization of which the Federation is a member; or
(b) for the purpose of promoting uniformity of the laws of two or more states; or
(c) when so requested by the Legislature of the State concerned.[234]

No such law under (a), however, in respect to any matters of Muslim law or the custom of the Malays shall be made, and no Bill for a law under this paragraph shall be introduced in either House of Parliament, until the Government of the State concerned has been consulted.[235] A law made for the purpose of promoting uniformity or at the request of any state shall not come into operation in any state unless it has been passed into law by the Legislature of that state, in which case it becomes a state law, and may accordingly be amended or repeated by a law made by that Legislature.[236]

Where the Constitution of any state does not contain the "essential" provisions as set out in Part I of the Eighth Schedule to the Federation Constitution or provisions approximating to these, or contains provisions inconsistent with the "essential" provisions, Parliament may by law supply the "essential" provisions or remove the inconsistent provisions. Where it appears to the Federation Government that in any state any Article of the State or Federal Constitution is being habitually disregarded, Parliament may, not withstanding anything in the Federa-

233 List III *op. cit.*
234 Article 76(1).
235 *Ibid.*, Clause (2).
236 *Ibid.*, Clause (3) as amended by the Constitution (Amendment) Act 1960 (No. 10) section 11, in force from 31st May 1960 (*LN 116/60*).

tion Constitution, by law make provision for securing compliance with those Articles.[237]

The 1962 Amendment[238] provides that Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to various matters of land including land tenure, the relation between landlord and tenant; registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, rating and valuation of land, and local government.[239] This exercise of Federal legislative powers is not subject to state approval except insofar as such laws are made to confer executive authority on the Federation. A comparable Article 77 of the Indian Constitution, authorizes the Federal Legislature to legislate on any matter in the State List, but this can be done only if the Councils of States have voted by a two-thirds majority that such a course of action is necessary and expedient and in the national interest.[240]

The State Legislature as we have seen has the power to make laws in respect to any matter not enumerated in the State List as set out in the Ninth Schedule, if it is not a matter on which the Federal Parliament has power to make laws.[241] This gives the residue such as there is, of legislative power to the states. Nevertheless the legislative power of the state is restricted in that it has no power to legislate to create offences in respect of matters in the State List, and even in respect of Muslim law; the Muslim courts constituted under the State Enactments are not to have jurisdiction in respect of offences except as conferred by Federal law.[242]

### *Distribution of Executive Powers*

The division of the executive powers follows that of the legislative powers. The executive authority of the Federation extends to all matters on which the Federal Parliament may make laws and the executive author-

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237 Article 71.

238 The Constitution (Amendment) Act 1962 (No. 14), effective from 21st June 1962 (*LN 164/62*); Article 76(4).

239 Article 80(3), which requires the approval of the State Legislative Assembly before any Parliamentary legislation on state matters operates in that state, save that under Article 76(4).

240 S. Jayakumar, 1967. "Constitutional Limitations on Legislative Power in Malaysia", *Malay Law Review*. Vol. 9, No. 1, p. 107.

241 Article 77.

242 Section, 1, List II, Ninth Schedule.

ity of the State to all matters on which the legislature of that state may make laws.[243] The executive authority of the Federation does not extend to matters enumerated in the State List, except insofar as is set out in Articles 93 to 95,[244] nor to matters enumerated in the Concurrent List except insofar as laid down by Federal or State law. To the extent that Federal or State law confers executive authority on the Federation on any matter enumerated in the Concurrent List, it may do so to the exclusion of the executive authority of the State. Any law made under Article 76(4), conferring executive authority on the Federation does not operate in any state unless approved by resolution of the State Legislative Assembly.[245] Federal law may extend the executive authority of a state to the administration of any specified provisions of Federal law and may for that purpose confer powers and impose duties on any state authority. Subject to any Federal or state law, arrangement may be made between the Federation and the state for the performance or.any function by the authority of one on behalf of the authority of any function by the authority of one on behalf of the authority of the other and such an arrangement may set out the terms for the making of payment in respect of any costs incurred under the arrangement. Where any function is conferred by Federal law on any state authority, the Federation must pay the state, but if the amount is not agreed, it is to be determined by a tribunal appointed by the Chief Justice.[246]

It is laid down that the executive authority of a state shall comply with any Federal law applying to that state and not impede or obstruct the executive authority of the Federation.[247]

While a proclamation of emergency is in force, the Federal executive authority extends to all state matters, and it may give directions to State Governments, officers and authorities. This is discussed full below under the heading "Special Powers Against Subversion and Emergency Powers".

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243 Article 80(1).
244 Matters relating to Federal surveys, advice to states and inspection of states activities.
245 Article 80(3).
246 *Ibid.*, Clauses (5) and (6).
247 Article 81.

## The Judiciary

The 1957 Federal Constitution provides for a unified judiciary; and the judicial power of the Federation is vested in the Supreme Court and such inferior courts of the Federation as stipulated by Federal laws.[248] The Supreme Court consists of a High Court and Court of Appeal, and in fact is the continuation of the *pre-Merdeka* Supreme Court.[249] It is a court of "unlimited original civil and criminal jurisdiction". It is also a court of appellate and revisional jurisdictions. The Constitution also contains express directives, inserted with the aim of securing the independence of the judiciary from the control or interference of the executive or the legislature.

The Supreme Court consists of a Chief Justice and other judges, Parliament may vary the number of judges,[250] but they may not exceed twenty-seven. The Chief Justice of the Supreme Court is appointed by the *Yang di-Pertuan Agong* on the advice of the Prime Minister and after consultation with the Conference of Rulers.[251] Likewise the judges of the Supreme Court are appointed by the *Yang di-Pertuan Agong* acting on the advice of the Prime Minister after consultation with the Chief Justice of the Supreme Court and after consultation with Conference of Rulers.[252] To be eligible for the appointment of judgeship, a person must be a citizen and have been an advocate of the Supreme Court or a member of the Judicial and Legal Service of the Federation for an aggregate minimum of ten years.[253]

Before *Merdeka*, a Malayan judge held office at the pleasure of the Crown,[254] since independence his terms is secure until he attains the age of sixty-five years, but after that he remains in office only for a further

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248 Article 121. This is similar to the provisions of the United States Constitution, Article 3, section 1, the Australian Constitution, section 71; *see LA* Sheridan, *Federation of Malaya Constitution, op. cit.*, p. 201.

249 Article 172. In Court of Appeal has been renamed as the Supreme Court with effect 1st January 1985, Act A566.

250 Article 122(1).

251 Article 122(2) and (3).

252 *Ibid.*

253 Article 123. For the ten years preceding his appointment as a judge he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a state, or sometimes one and sometimes another.

254 *Ferrel* v *Secretary of State* [1953] 2QB 482.

period of six months if the *Yang di-Pertuan Agong so* approves.[255] He may, however, resign from office at any time. He may not be removed from office except on the grounds of misbehaviour or of inability, from infirmity of mind or body or any other cause, to discharge properly the function of his office. The power to remove a judge from office is placed outsided the competence of the executive and the legislature, and entrusted to a Tribunal[256] of five judges or ex-judges, appointed by the *Yang di-Pertuan Agong*. The *Yang di-Pertuan Agong* may remove a judge from office only on the recommendation of this Tribunal.[257]

A judge's renumeration and other terms of office (including pensions rights) may not be altered to his disadvantage after his appointment. His remuneration is charged on the Consolidated Fund[258] and must be incorporated in an Act of Parliament. Further the conduct of a judge may not be discussed in either House of Parliament except on a substantive motion on which notice has been given and passed by at least a quarter of the total membership of that House, and may not be discussed in a State Assembly at all.[259]

Unlike before *Merdeka*, judges have power to interpret the Constitution (in cases actually before them). This is implicit in the Constitution. Courts have power to interpret written law; and by virtue of section 2 of the Federal Constitution Ordinance 1957, the Constitution has the force of law; as it is written, it is therefore written law.[260] Courts have the power to declare that a law enacted by a legislature. The Federal Parliament or a State Assembly, is void, or that a Federal or State law, is inconsistent with the Federation Constitution,[261] or that it is outside the

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255 Article 125(1).

256 Article 125(3) and (4). A Tribunal was set up under this Article to inquire into the misconduct of the then Lord President of the Supreme Court and upon whose recommendation the Lord President was removed from office by the *Yang di-Pertuan Agong*. *See* [1988] 2 *MLJ* xxxiii; [1989] 1 *MLJ* cix; Tun Salleh Abbas, 1989. *May Day for Justice*. Kuala Lumpur: Magnus Books. P.A. Williams, 1990. *Judicial Misconduct*. Malaysia: Pelandok Publications.

257 *Ibid.*

258 Article 125(6). The Consolidated Fund is established under Article 89. Provision for remuneration is made by the Judges of the Supreme Court (Renumerations) Ordinance 1958 (No. 17).

259 Article 127.

260 M. Suffian, *The Judiciary, The Constitution of Malaysia: Its Development, 1957–1977*, *op. cit.*, p. 237.

261 Article 4.

power of Parliament or a State legislature to enact, or that a State law is inconsistent with a Federal law.

The validity of any law made by the Federal Parliament or a State Legislature may not be questioned on the grounds that it exceeds the constitutional competence of that legislature, except in the following circumstances:

(a) if the law was made by Parliament, as a result of an agreement between the Federation and one or more States; or
(b) if the law was made by a State legislature, as a result of a similar agreement between the Federation and that State.[262]

The Federal Constitution stipulates further that only the Court of Appeal has jurisdiction to determine a law made by Parliament or a State legislature is ultra vires.[263]

Appeals from the High Court lies to the Court of Appeal, and from the Supreme Court to the *Yang di-Pertuan Agong*.

The 1988 Amendment[264] provided the change in the judicial power of the Federation; all inferior courts, the High Courts and the Supreme Court were no longer under the Constitution, but subject to Federal laws.[265] The jurisdiction of these courts does not extend to any matter which is within the jurisdiction of the *Syariah* Courts.[266]

Under the 1994 Amendments, a reorganization and restructuring of the Judiciary took place, whereby another court, i.e. the Court of Appeal, was set up. There came into being a three-tiers system of courts, *viz*, the Federal Court, the Court of Appeal and the High Courts.

At the apex is the Federal Court (formerly known as the Supreme Court) which consists of the President of the Court to be styled as the

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262 *Ibid.*, Clause (3).

263 Article 129. Before 1957 under the Federation of Malaya Agreement 1948, Clause 66, the validity of Ordinances could not be questioned in any court. It was to be determined by an Interpretation Tribunal with the Chief Justice as Chairman, whose opinion was conclusive and binding.

264 The Constitution (Amendment) Act 1988, Act A 704, w.e.f. 9th June 1988.

265 Clause (1) of Article 121. This Article was further amended in 1994 with the establishment of the Court of Appeal; bringing into being a three-tiers system of superior courts – the Federal Court, the Court of Appeal and High Courts.

266 Clause (IA) *ibid.* See the Amendment to Article 121 of the Federal Constitution. Its effect on Administration of Muslim Law by Prof. Tan Sri Ahmad Ibrahim [1989] 2 *MLJ*, p. xvii.

Chief Justice of the Federal Court. A judge of the Court of Appeal other than the President of the Court of Appeal may sit as a judge of the Federal Court where the Chief Justice considers that the interests of justice so require and the judge will be nominated for the purpose (as the occasion requires) by the Court of Appeal.[267]

The jurisdiction of the Federal Court has been enlarged to include the determination of appeals from the Court of Appeal, a High Court or a judge thereof and as may be provided by Federal law.[268]

In the middle tier, there is established a court known as the *Mahkamah Rayuan* (Court of Appeal) with its principal registry in Kuala Lumpur and has jurisdiction to determine appeals from the decisions of a High Court or a judge thereof (except the decision of the High Court by a Registrar or other officer of the Court and appealable under Federal law to a judge of the Court) and such other jurisdiction as may be conferred under Federal law.[269]

The Court of Appeal consists of a chairman known as the President of the Court of Appeal and ten other judges. However the *Yang di-Pertuan Agong* may by order increase the number of judges.[270] A judge of a High Court may sit as a judge of the Court of Appeal where the President of the Court of Appeal considers necessary in the interest of justice, and a judge will be nominated for the purpose by the President of the Court of Appeal after consultation with the Chief Judge of that Court.[271]

A person qualified for appointment as a judge of a High Court may sit as judge of the Court of Appeal if designated for that purpose as the occasion arises in accordance with Article 122B.[272]

The third tier is the High Courts; there are two High Courts, one for Malaya and the other for Sabah and Sarawak. Each of the High Court consists of a Chief Judge and not less than four judges, and will not exceed in the High Court in Malaya 47 judges and in the High Court in Sabah and Sarawak 10. The *Yang di-Pertuan Agong* may by order enlarge the number of judges.[273]

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267 Article 122(2) of the Constitution.
268 Clause (3) of Article 128, *ibid.*
269 Clause (IB) of Article 121, *ibid.*
270 Clause (1) of Article 122A, *ibid.*
271 Clause (2) of Article 122A, *ibid.*
272 Clause (I) of Article 122AA, *ibid.*
273 Clause (2) of Article 122AA, *ibid.*

For the despatch of the business of the High Court in Malaya and the High Court in Sabah and Sarawak, the *Yang di-Pertuan Agong* acting on the advice of the Prime Minister after consultation with the Chief Judge of the Federal Court, may by order appoint a Judicial Commissioner for such period or purpose as may be specified in the order, any person qualified for an appointment of a judge of a High Court and the person so appointed will have power to perform such functions of a judge of High Court as appeared to him required to be performed; and anything done by him acting in accordance with his appointment will have the same validity and effect as if done by a judge of that Court, and in respect thereof he will have the same powers and enjoy the same immunities as if he has been a judge.[274]

Clauses (2) and (5) of Article 124 shall apply to a Judicial Commissioner as they apply to a judge.[275]

The Chief Judge of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and other judges of the Federal Court, the Court of Appeal and of the High Courts will be appointed by the *Yang di-Pertuan Agong* acting on the advice of the Prime Minister after consulting the Conference of Rulers.[276]

Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice, the President or a Chief Judge, the Prime Minister will consult if the appointment is to the Federal Court, the Chief Justice of Federal Court; if the appointment is to the Court of Appeal, the President of the Court of Appeal; and, if the appointment is one of the High Court, the Chief Judge of that Court.[277]

A judge of the Federal Court, the Court of Appeal or a High Court, other than the Chief Justice of the Federal Court, shall before exercising his function as a judge, take and prescribe the oath of office and allegiance in the sixth schedule in relation to his judicial duties in whatever office.[278]

The *Yang di-Pertuan Agong* on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the

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274 Clause (1) of Article 122AB, *ibid.*
275 Clause (2) of Article 122AB, *ibid.*
276 Clause (1) of Article 122B, *ibid.*
277 Clause (4) of Article 122B, *ibid.*
278 Clause (2) of Article 124, *ibid.* The sixth schedule to the Constitution has been amended accordingly to include a judge of the Court of Appeal and a Judicial Commissioner.

High Courts may, after consulting the Prime Minister, prescribes in writing a code of ethics which shall be observed by every judge of the Federal Court.[279]

The Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the *Yang di-Pertuan Agong* that a judge of the Federal Court ought to be removed on the ground of the breach of the provisions of the code of ethics prescribed under Clause (3A) of Article 125, or on the ground of inability from infirmity of body and mind or any other cause, properly discharge the functions of his office, the *Yang di-Pertuan Agong* shall appoint a tribunal in acordance with Clause (4) and refer the representation to it, and may on the recommendation of the tribunal removed the judge from office.[280]

This Article 125 (removal from office) apply to a judge of the Court of Appeal and a judge of the High Court as it applies to a judge of the Federal Court, except before suspending under Clause (5) a judge of the Court of Appeal or a judge of the High Court other than the President of the Court of Appeal or the Chief Judge of a High Court, shall consult the President of the Court of Appeal or the Chief Judge of that High Court instead of the Chief Justice of the Federal Court.[281]

The President of the Court of Appeal and a judge of the Federal Court may exercise all or any of the powers of a judge of the Court of Appeal and of a judge of a High Court.[282]

The Chief Justice of the Federal Court and a judge of the Federal Court may exercise all or any of the powers of a judge of the Court of Appeal and of a judge of a High Court.[283] The President of the Court of Appeal and a judge of the Court of Appeal may exercise all or any of the powers of a judge of a High Court.[284]

Upon coming into force of the Amendment Act all references in or under the Federal Constitution or any written law to:

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279 Clause (3A) of Article 125, *ibid.* The Code of Ethics was drafted and approved by the Judges Conference before submission to the *Yang di-Pertuan Agong*.

280 Clause (3) of Article 125, *ibid.* A tribunal was set up in 1988 to remove the then Lord President of the Supreme Court. Another tribunal was set up in the same year to remove five judges of the Supreme Court and the tribunal recommended the removal from office two of the five judges of the Supreme Court.

281 Clause (9), *ibid.*

282 Clause (10), *ibid.*

283 Clause (1)(*a*) of Article 125A, *ibid.*

284 Clause (1)(*aa*) of Article 125A, *ibid.*

(a) the Supreme Court shall be construed as references to the Federal Court;
(b) the Lord President of the Supreme Court shall be construed as references to the Chief Justice of the Federal Court;
(c) the Chief Justice of a High Court shall be construed as references to the Chief Judge of a High Court;
(d) the High Court of Borneo shall be construed as references to the High Court in Sabah and Sarawak.[285]

Before *Merdeka*, the rulers severally requested the British sovereign to receive appeals to the Privy Council from Malayan Court and each states conferred jurisdiction on it to do so,[286] which jurisdiction the British sovereign accepted. The powers and procedure of the Supreme Court and rules relating to appeals from there to the Privy Council are set out in Federal ordinances. Until 1984 the Constitution retained appeals to the Privy Council, but such appeals were addressed not direct to the Privy Council, but to the *Yang di-Pertuan Agong* who then referred from for advice to the Privy Council. Instead of the British sovereign, the Privy council, the *Yang di-Pertuan Agong*, who then gave effect to the advice.[287]

The subordinate courts established under the Constitution by Federal law are the Sessions, Magistrates and *Penghulus* courts. As the administration of justice including the Constitution and organization of all courts other than Muslim courts, and the power and jurisdiction of such courts, is wholly a Federal subject, so Parliament may legislate to secure the appointment of all magistrates and judges (of Sessions Courts) by a Federal authority. A judge of Sessions Court is appointed by the *Yang di-Pertuan Agong* on the recommendation of the Chief Justice, and the *Yang di-Pertuan Agong* may on the advice of the Chief Justice confer upon the judge special jurisdiction. A first class magistrate in a state is appointed by the ruler or governor on the recommendation of the Chief Justice,[288] while the second-class magistrate by the ruler or governor and

285 Section 40 of the Constitution (Amendment) Act 1985 w.e.f. 23th June 1994.
286 Clause 83, Federation of Malaya Agreement 1948.
287 Article 131(4). The *Yang di-Pertuan Agong* must act under this Article on ministerial advice; *See* Article 40(1). Article 131 was repealed by the Institution (Amendment), Act 1983, Act A566, with effect from 1st January 1985.
288 Subordinate Courts Act 1948; Wu Min Aun 1975. *An Introduction to the Malaysian Legal System*. 2nd Edition. Kuala Lumpur.

does not require the recommendation of the Chief Justice. The *Penghulu* is appointed for a *Mukim* (parish), and like a second-class magistrate, he is appointed by the ruler or the governor.[289]

The Constitution at first provided for the establishment of the Judicial and Legal Service Commission,[290] an independent body, which consisted of the Chief Justice as the Chairman, Attorney-General, the senior puisne judge, the Deputy Chairman of the Public Services Commission, and one or more members as the *Yang di-Pertuan Agong* after consultation with the Chief Justice might appoint from among the judges and former judges.[291] It had no jurisdiction over the Chief Justice, judges and the Attorney-General. Its function was to appoint, promote, confirm, or (if a change in rank was involved) transfer personnel and exercise disciplinary control over members of the Judicial and Legal Service. It had to be consulted by the *Yang di-Pertuan Agong* before he appointed the Attorney-General. It made recommendations on the appointments of judges other than the Chief Justice and these recommendations had to be acted upon by the *Yang di-Pertuan Agong* after consultation with the Conference of Rulers.[292] It also made recommendations to the *Yang di-Pertuan Agong* as to the membership of the Tribunal to inquire into the conduct of a judge;[293] and as to whether to suspend a judge from office pending reference to or report by the Tribunal. In 1960 the Judicial and Legal Service Commission was abolished.[294] Since that time appointments of the Attorney-General and members of the Tribunal to inquire into the conduct of judges can be made by the *Yang di-Pertuan* Agong simply on the advice of the Prime Minister.[295] As regards appointments of judges other than the Chief Justice they can be made on the advice of the Prime Minister and after consultation with the Conference of Rulers and consideration of the advice of the Chief Justice.

The *Penghulu's* Court possesses civil and criminal jurisdiction in the *Mukim*, but its terms of reference are very restricted. In criminal cases an accused may elect to be tried by a Magistrate Court. An appeal against the decision of the *Penghulu's* Court lies to a First-Class Magistrate.

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289 *Ibid.*
290 Article 138 (Repealed in 1960).
291 *Ibid.*
292 *Ibid.*
293 Article 138.
294 Constitutional (Amendment) Act 1960 (No. 10) Section 20.
295 Established under Article 139 of the 1957 Constitution *see* M. Suffian, *op. cit.*

The Magistrates Courts deal with minor civil and criminal cases. They have a larger jurisdiction than the *Penghulu's* Court. They try cases summarily, and hold preliminary investigations on capital offences such as murder. The Second-Class Magistrates perform minor functions, for example the granting of bail and setting down of cases or hearing.

Offenders below the age of eighteen years are tried in a Juvenile Court.[296] It is presided over by a Judge of the Sessions Court with the assistance of two lay assessors.

The Judge of the Sessions Court has a much larger jurisdiction, civil and criminal, than a Magistrate. More serious cases are tried in the Sessions Courts.

Appeals from the Magistrates and Sessions Courts lie to the High Court.

## Special Power Against Subversion and Emergency Powers

The 1957 Federal Constitution contains a Part XI, consisting of three Articles. They are Article 149 (Legislation against subversion) conferring special powers on Parliament to deal with subversion including a limited power to legislate contrary to the provisions of the Constitution; Article 150 (Proclamation of Emergency) which confers wide ranging special powers to act inconsistently with the Constitution; and Article 151 (Restrictions on Preventive Detention) which sets out certain requirements to be observed in respect or preventive detention. The inclusion of these provisions was based on the *Reid Constitutional Commission's* recommendation, which states that "We must take notice of the existing emergency. We hope that it may come to an end before the new Constitution comes into force but we must make our recommendation on the footing that it is still then in existence."[297]

### *Legislation Against Subversion*

Under the original Article 149, an Act of Parliament must be passed reciting that certain actions have been taken or threatened "to cause substantial number of citizens to fear organized violence against person or property". The scope of Article 149 was considerably broadened by

296 Juvenile Courts Act 1947.
297 Reid Commission Report, *op. cit.*, paragraph 330, p. 75.

the 1960 Amendment,[298] which provides four additional alternative descriptions of possible consequences of the action or threat of action.

The amended Article states that if an Act of Parliament recites that action has been taken or threatened by a substantial body of persons whether inside or outside the Federation:

(a) to cause a substantial number of citizens to fear that organized violence against person or property; is in imminent danger of taking place; or
(b) to incite disaffection against the *Yang di-Pertuan Agong* or any government of the Federation; or
(c) to promote feelings of ill-will and hostility between the races or other classes of the population to cause violence; or
(d) to procure the alteration by other than lawful means of anything established by law; or
(e) which is prejudicial to the security of the Federation or any part thereof; any part of that law designed to stop or prevent that action is valid, notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9 or 10[299] or would apart from this Article be outside the legislative competence of Parliament;[300] and Article 79 shall not apply to a bill for such an Act or any amendment to such a bill.

The specific constitutional provisions of this Article override the

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298 Constitutional (Amendment) Act 1960 (No. 10) effective on 31 May 1960 (*LN 116/60*) section 28(a); "Subversion is a threat to the security of the country and against its constituted authority. It should be therefore the responsibility of the Government to deal with this threat". Tun Razak, (*Parliamentay Debate, Dewan Rakyat*, 1960, Vol. II p. 306). The Solicitor-General expressed his views on the amendment; Soon after *Merdeka*, the Government realized that the communist terrorists who had withdrawn into the jungle could not be easily eliminated, and that they had changed their tactic by infiltrating a number of innocent from organizations including business in the urban areas. It was therefore necessary to amend Article 149 so as to enlarge the power of Parliament to pass preventive (detention legislation under a wide range of circumstances so that in 1960 the Internal Security Act was passed. Salleh Abbas, 1977. Amendment of the Malaysian Constitution, *Malayan Law Journal*, p. xxxix para 21.

299 These Clauses lay down fundamental liberties.

300 The Internal Security Act 1960 (No. 18) was passed under this Article. "This make Parliament sovereign, i.e. Parliament has unlimited legislative power when using the recital", observed L.A. Sheridan, *Federation of Malay Constitution*, p. 137.

liberty of persons, freedom from banishment and freedom of movement; freedom of speech, assembly and association, and the limitations imposed by the legislative lists.[301]

The original Clause (2) of Article 149 provides that a law containing such recitals would automatically lapse on the expiration of one year from the date on which the law came into operation. This restraint was removed and replaced by an amended Clause (2) which permits such a law unlimited continuity of life unless and until both Houses of Parliament have passed resolutions annuling such a law.[302] This provision gives Parliament a measure of control over the executive, since annulment can be achieved without the concurrence of the *Yang di-Pertuan Agong*. The annulment by resolution is without prejudice to the legality of anything done previously by virtue of the laws, and Parliament may make new laws under this Article.

The Internal Security Act 1960 (amended in 1962) made under this Article, contains two recitals; the preamble states in part, "Whereas action has been taken by a substantial body of persons to cause a substantial number of citizens to fear organized violence against persons and property; and whereas action has been taken or threatened by a substantial body of person which is prejudicial to the security of Malaya ...." The Act, among other things, provides for detention without trial, restricts freedom of speech, assembly and association, limits freedom of movement and permits the closing by ministerial order of schools and educational institutions.

### *Proclamation of Emergency*

Constitutional provisions embodying emergency powers, as in the Constitutions of many countries (for example Article 352 of the Indian Constitution), are contained in Article 150 of the Constitution. It stipu-

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301 *See* Jayakumar, 1978. "Emergency Powers in Malaysia, Development of the Law 1957–1977", *Malayan Law Journal* ix.

302 Amendment Act 10/1960, section 28(6): Tun Razak in presenting the Bill said, "The constitution at present provides that such a law lapse after one year, but this country is likely to be dealing with the remnants of the communist terrorists organization operating on the border for sometime to come and we consider it a sufficient safeguard that Parliament should be able to annul the special Legislation by resolution at any time". (*Parliamentary Debate, Dewan Rakyat*, 20th April 1960, Col. 306).

lates that the *Yang di-Pertuan Agong* must issue a Proclamation of Emergency, containing the prescribed recitals as the essential prerequisite before the special powers under these provisions can be exercised.[303] He may do so if he is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part thereof is threatened, whether by war, external aggression or internal disturbance. He acts on ministerial advice for the formal issuance of the Proclamation. When such a Proclamation is in effect, emergency legislation is valid even if it is inconsistent with any provision of the Constitution (except provisions relating to religion, citizenship or language).[304] Where Parliament is not sitting and pending the sitting of both Houses of Parliament, the executive is permitted to legislate through emergency ordinances. Such emergency legislation, like the emergency legislation by Parliament can be inconsistent with any provision of the Constitution (except provisions relating to religion, citizenship or language).[305] During an emergency the Federal executive authority extends to state matters and the Federal Government is empowered to give directions to State Governments, or officers and authorities thereof.[306] Parliament can legislate on any matter whether it is within Federal, State or Concurrent List, and the requirement of consultation with a State Government or consent or concurrence of any other body is inapplicable.[307]

The powers to act contrary to the Constitution as provided under Article 150 are extensive in scope. The safeguard against abuse of such powers, in the original Article 150, was that a Proclamation of Emergency should cease to be in force at the expiration of two months from the date of its issue; and similarly any ordinance promulgated by the *Yang di-Pertuan Agong* automatically lapsed and ceased to have effect at the expiration of fifteen days from the date on which both Houses of Parliament were first sitting. Any such ordinances would continue to have force only if they were approved by a resolution in each House of Parliament before the expiration of their respective periods of two months and fifteen days.

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303 Article 150(1).

304 Article 150(6). This provision is in line with the Reid Commission's recommendation, paragraph 175, at page 75, it said, "Parliament should have power to enact any provision not with standing that in infringes fundamental rights or state rights".

305 Article 150(2).

306 *Ibid.*, Clause (4).

307 *Ibid.*, Clause (5).

The 1960 Amendment[308] altered Clause (3) of Article 150. This was in line with constitutional commission's recommendation[309] that both the Proclamation and ordinance should cease to have effect only when revoked or annulled. This change means that both Proclamation and ordinances have indefinite life unless expressly revoked and annulled by Parliament.

### *Restrictions on Preventive Detention*

The Constitutional Commission felt that preventive detention should be illegal except insofar as it may be allowed by emergency regulations. Its recommendations[310] are incorporated into Article 151 of the Constitution, the main features of which are: firstly, that the detained person must be informed of the grounds of his detention; secondly, that he must be told of the allegation of facts upon which the detention order was imposed, except that those facts need not be disclosed where disclosure would be against national interest; thirdly, that he is to have an opportunity to make representations against the detention; fourthly, that representations from detained citizens be considered and responded to within three months of the date of receipt (though this period may be delayed). The Constitution establishes an Advisory Board for considering such representations. Article 151 laid down that the detention could only be extended if the Advisory Board reported that there "is in its opinion sufficient cause for the detention."[311] Thus, the Board was originally set up as a decision-making body. If it decided that there was insufficient cause for the further detention of a citizen then he had to be freed.

The 1960 Amendment[312] reduced the power of the Board to a mere

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308 Amendment Act 10/1960, effective on 31st May 1960.

309 Reid Commission Report, *op. cit.*, paragraph 175, p. 75.

310 *Ibid.*, paragraph 176, p. 76.

311 This is in accord with the Constitutional Commission's Report which stated that in no case should a citizen be detained for more than three months unless an Advisory Board appointed by the Chief Justice has reported that there is in its opinion "sufficient cause for such detention", *ibid.*, paragraph 176.

312 Tun Razak in introducing the Amendment 10/1960 stated, "Every person detained has a right to have his case considered by an Advisory Board under the chairmanship of a person who is, or has been or is qualified to be a judge. This is already in the Constitution. The amendment of this Article provides that the final decision on continued detention shall in future rest with the Government, which alone is responsible for security and alone has access to the fullest information". (*Parliamentary Debate, Dewan Rakyat*, 20th April 1960, col. 306).

advisory capacity as its name suggests. By this amendment the board was to consider the representation "and make recommendations to the *Yang di-Pertuan Agong*". Thus even if the Board recommends against further detention, the citizen can still be detained beyond the initial three months.

The Advisory Board[313] consists of a Chairman and two other members appointed by the *Yang di-Pertuan Agong* after consultation with the Chief Justice. The Chairman must be a person who is or has been a judge of the Supreme Court or is qualified to be a judge of the Supreme Court.

### Constitution as Supreme Law and Its Amendment

The Federation Constitution is declared to be the supreme law of the Federation; and any legislation which is inconsistent with the Federation Constitution is automatically void.[314] State and Federal Laws which are inconsistent with the Federation Constitution are also void.[315] In general laws existing before the Constitution came into force remain in effect unless repealed or modified.[316] The Constitution stipulates that within a period of two years form *Merdeka Day*, the *Yang di-Pertuan Agong* possessed the power to modify any existing law[317] other than that of a State Constitution by decree if that was necessary to bring that law into accord with the Federation Constitution.[318] Specific legislative powers were also given by the Constitution to any court or tribunal when applying any existing law which had not been so modified in order to bring it into accord with the Constitution.[319]

The status of the Constitution as supreme law is determined by the procedure prescribed for its amendment. Those Articles which are thought to be especially important wil be protected from alteration by legislation passed in the ordinary manner or form. For example, a Clause may be inserted making it obligatory for a referendum to be conducted

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313 Article 151(2).
314 Article 4.
315 Article 76.
316 Article 162(1).
317 "Existing law" means any law in operation in the Federation or any part thereof immediately before *Merdeka Day* Article 160(2).
318 Article 162(4).
319 *Ibid.*, Clause (6); *Surinder Singh Kanda* v *The Government of the Federation of Malaya*, [1962] *MLJ* 169 (PC).

before any alteration can become law. Alternatively, the second chamber, if it exists, may be given an absolute veto to reject changes. Other major safeguards, such as the requirement for a two-thirds majority of the total membership of a legislature may be written into the constitution.[320]

Any amendment to the United States Constitution must ultimately be ratified by three-fourths of the states.[321] The procedure for proposing an amendment is also different from that laid down for the ordinary legislation. Article 368 of the Indian Constitution stipulates that a Bill for the Amendment of the Constitution must be passed by each House of Parliament by a majority of the total membership of that House which must at the same time be a majority of at least two-thirds of the members present and voting. Furthermore the consent of at least half of the states is required if it is intended to amend certain major organic Articles such as Article 368 itself, or clauses relating to any of the three Legislative Lists, the proportionate representation of states in Parliament, the judiciary or the State High Court. The Australian Constitution[322] provides that an amendment to the Constitution must be approved by an absolute majority of both Houses (with two exceptions which need not be considered here). It must be submitted to an electorate in a referendum not less than two and not more than six months after it has been passed in both Houses. The Amendment can only be approved if the majority of the states have agreed to it, and it must also be passed by a majority of all the electors in Australia.

In the Malayan Federation Constitution the rules laid down for amendment are contained in Article 159. This Article states that an amendment to the Constitution can be effected by an Act of Parliament which has received the votes of at least two-thirds of the members of both Houses of Parliament. The Constitutional Commission in its report stated that "It is important that the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguard which the Constitution provides".[323] The commission considered that the safeguard of two-thirds approval in each of the two Houses and the assent of the Senate which

320 The New Commonwealth and its constitution, London, p. 110.
321 Article V.
322 Article 128.
323 Reid Constitutional Commission Report, *op. cit.*, p. 41.

cannot be overriden would be an adequate safeguard.[324] Theoretically, the twenty-two state senators could in their role as representatives of the states effectively block any amendment which they considered advise to the interests of the states.[325]

Amendments to certain Articles require the prior consent of the Conference of Rulers. These Articles are Article 153 (relating to the special privileges of the Malays); Article 38 (concerning the Conference of Rulers itself); Article 70 (concerning the precedence of Rulers and Governors) and Article 70(1) (dealing with right of succession to the throne by any ruler in accordance with the Constitution).

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324 "In this matter, the House of Representatives should not be allowed to overrule the Senate. We think this is a sufficient safeguard for the states because the majority of the members of the Senate will represent the state", Reid Constitutional Commission's Report, *op. cit.*, p. 31.

325 R.H. Hickling, 1962. "The First Five Years of the Federation of Malaya Constitution", 4 *Malaya Law Review* 183, p. 201.

# 5

# THE CONSTITUTION OF MALAYSIA

## The Formation of Malaysia

After the Federation of Malaya achieved its independence in 1957,[1] political developments in Singapore were also in the direction of independence.[2] By 1958 Singapore achieved self-government,[3] except for defence, external affairs and internal security. The first two were still controlled by Great Britain, but internal security was in the hands of an Internal Security Council consisting of equal representatives of the Singapore and the British Governments plus one representative from the Government of the Federation of Malaya.[4]

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1 31st August 1957, *Merdeka Day.*

2 Singapore was not included in the Federation of Malaya (or the Malayan Union earlier) because Singapore heavily Chinese population was seen by the Malays as likely to create racial difficulties if combined with the Chinese on the mainland Malaya. As a positive aspect of the same issue there was the development of Malay nationalism which for the first time translated Malay concern about Chinese economic domination into practical action. Other contributing reasons were the more advanced economic development of Singapore, with neither Singapore nor Malaya ready at that stage to discuss an economic *modus vivendi* which might overcome the problem of the union; and the strategic consideration of the British Government which wished to maintain a strong Far Eastern base. In this final respect the British concern was strengthened by the Malayan Emergency (1948) and the outbreak of the Korean War: I.A. Mills, 1958. *Malaya. A Political and Economic Appraisal.* Minneapolis, p. 117.

3 *Singapore (Constitutional) Order-in-Council 1958.*

4 The Internal Security Council was the principal British safeguard embodied in the Singapore Constitution 1958. The Council was composed of two Singapore representatives, two British representatives and a Malayan representative. This composition was to ensure that in the case of British-Singapore deadlock in internal security matters, the Malayan members should have a casting vote: M.E. Soberness, 1964. *Singapore and Malaysia,* New York, p. 2.

In 1961 the People's Action Party[5] of Singapore had retained control of the Singapore Government. From the outset it had proclaimed its aim of uniting Singapore with the Federation of Malaya.[6] But the Federation had not shown much enthusiasm[7] about merger between the Federation and Singapore because of fears that Singapore's predominantly Chinese population would upset the ratio of Chinese and non-Chinese in the Federation as a whole. The Malay leaders of the Federation Government were acutely aware of the danger of Chinese chauvinism and racialism,[8] and Chinese domination in the Federation was not acceptable to the Malays of the Federation. However, the Prime Minister of the Federation in a speech to the Foreign Correspondents Association in May 1961[9] declared that the Federation must have an understanding with Britain and the Governments of Singapore, North Borneo, Sarawak and Brunei to bring these five territories into closer economic and political co-operation. This view found a prompt and favourable response from the British Government. So a plan for a bigger federation with the Borneo States along with Singapore was tentatively agreed upon, as a more realistic proposition than the merger with Singapore alone,[10] because

5 The People's Action Party was founded in 1954 and was dominated by Lee Kuan Yew. Between 1955 to 1962 the People's Action Party retained a majority of seats in the Singapore Legislative Assembly.

6 "Merger between Singapore and the Federation is the prime consideration of our political thinking", declared Deputy Prime Minister Toh of Singapore: *The Straits Times*, 22nd September 1960, p. 14, col. 2. The view of the Government was that the island's proximity to the Malayan mainland combined with Singapore limited natural resources, made it impossible for the island to have any true viability independent of Malaya. Practically and economically merger seemed desirable and logical. There had been merger at physical level between Singapore and Malaya for many years through the Johor causewave and this had been reinforced by the increasing reliance placed on water supplies from Johor: M.E. Osborne, *Singapore and Malaya, op. cit.*, p. 1.

7 The Malayan Chief Minister in early 1957 had said that he did not think of "all possibility of merger", *The Straits Times*, 15th January 1957.

8 In early 1957 there were racial riots in Penang (Malaya), and the Singapore Middle Schools riots and trade union protests in the second half of 1956 which convinced the Malay leaders of Malaya that there was "no point in adding to their troubles by embarassing Singapore" M.E. Osborne, *Singapore and Malaya, op. cit.*, pp. 1 – 2.

9 The Malayan Chief Minister made the suggestion in an address to the Foreign Correspondents Association in Singapore on 27th May 1961: Simandjuntak, 1969. *Malayan Federalism 1945 – 1963*. Kuala Lumpur: Oxford University Press.

10 "I was not in favour of the idea of merger with Singapore as I was of the opinion that the integration of the two territories would spell trouble – trouble for all of us, trouble for our country and the security part of our life. The difference of outlook

the additional population of the Borneo States would tend to maintain the existing ratio of Chinese to non-Chinese.[11] Throughout the discussion that followed the Borneo States, including the State of Brunei, gave every indication that they would join the new nation.

At the Commonwealth Parliamentary Association Regional Conference held in Singapore in July 1961, a Committee known as Malaysian Solidarity Committee[12] was set up, whose four main objectives were:

(a) to collect and collate views and opinions concerning the formation of Malaysia in the territorites concerned;
(b) to disseminate the information of the question of Malaysia;
(c) to encourage and initiate discussions on Malaysia; and
(d) to foster activities that would promote and expedite the realization of Malaysia.

In 1962 the Committee published a Memorandum which supported Malaysia and made recommendations on various aspects of the constitutional arrangements.

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of the people of the Federation and Singapore was so pronounced that for me a merger at that time was out of the question. However, times have changed ... we gave it a second and serious thought, so the idea of Malaysia took shape.... While Singapore is under the British we feel that there is no threat of open action by the Communists which might endanger the peace and security of the Federation but with an independent Singapore anything could happer." Tunku Abdul Rahman, *Dewan Rakyat*, no. 16, cols. 1590 – 1613, see also Means, G.P., 1970. *Malaysian Politics*. London: Hodder and Houghton, and R.S., Milne, and K.T. Ratnam, 1974. *Malaysia, New States in A New Nation, Political Development of Sarawak and Sabah in Malaysia*. London: Frank Cess and Col. Paradoxically, comment Milne and Ratnam, the Federation Government attempted to contain this expansion of the communist threat by including Singapore in its territorial jurisdiction. In the final analysis it appears that Malaya accepted the idea (of Malaysia) for two main reasons: firstly, the communist expansion in Singapore had to be contained, and secondly, the Borneo States with a predominantly non-Chinese population would help to maintain the balance in a federation which with a Singapore Malaya merger would otherwise have been overwhelmingly Chinese.

11 According to the 1957 Census Figures, the racial composition in Malaya and Singapore was 43.0% Malays against 44.3% Chinese (others 12.7%): *Federation of Malaya Official Year Book 1962, Kuala Lumpur, 1962*, and *Singapore Annual Report 1960*, Singapore, *1962*. With the proposed merger of Singapore, Malaya and the Borneo territories (i.e. North Borneo, Sarawak and Brunei) the racial composition would have been 46.4% Malays and indigenous races against 42% Chinese (others 11.4%): *Colony of North Borneo Annual Report 1961*, p. 14; *Colony of Sarawak Annual Report 1960*, p. 11 and *State of Brunei Annual Report 1960*, p. 12.

12 The Committee consisted of twenty-three members from Malaya, North Borneo, Sarawak and Singapore. Brunei had five observers on the Committee.

Meanwhile as a result of a series of meetings between the Governments of Singapore and the Federation, an agreement in principle was reached in August 1961 on the question of merger of the two territories. The Heads of Agreement, as the Text was called, for merger between the Federation of Malaya and Singapore were published as a Singapore White Paper on 15th November 1961.[13] The merger plan provided that under the new arrangements the special position of the Malays in Singapore would be safeguarded in accordance with the Federation Constitution with religious provisions for the State to be on the same lines as those applying in Malacca and Penang. The Singapore Public Service was to be retained as a public service with facilities available for sending its members to serve within the Federation.[14] The two most important and controversial aspects of the agreement for Singapore politics were citizenship and representation for Singapore to the Federal Parliament. On citizenship, the agreement was that all Singapore citizens should retain their Singapore citizenship, while assuming. Federal citizenship,[15] and on representation to Federal Parliament, Singapore was to have fifteen members. On financial matters, the agreement was fairly general.[16]

The importance of the Borneo territories for the Malaysia concept was, however, dearly appreciated by the leaders of the Singapore Government, and Singapore pressed for the quickest possible decision on their entry immediately after the publication of the Tunku's initial Malaysia proposal.[17] Singapore's Prime Minister Lee played a vital role in convincing the leaders of the Borneo States to join Malaysia, expressing concern for the feelings and interests of the Borneo delegates at the Malaysia Solidarity Committee meeting in Singapore in mid-1961. At this meeting Singapore announced the award of ten scholarships to students from

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13 State of Singapore, Memorandum Setting Out Heads of Agreement for a Merger Between the Federation of Malaya and Singapore, Cmd. 33 of 1961 (Singapore 1901).

14 *Ibid.*, p. 5. This provision did not, however, apply to the Singapore police force, which under the general responsibility assumed by the Federation for security matters came under Federal control.

15 Originally it was Federal nationality, but this was later changed to citizenship under an amendment which was announced by Lee Kuan Yew on 1st September 1962.

16 This lack of precision was used to the advantage by Singapore in its later negotiations. Singapore had raised the question of a future common market which they regarded as essential to a merger, but this matter was not mentioned in the Heads of Agreement: M.E. Soberness, *op. cit.*, p. 42.

17 *See* note 9.

North Borneo wishing to study at Singapore University and Technical College.[18] Singapore offered to train Sarawak radio operators and to provide training for civil servants from Borneo territories within the Singapore civil service.[19] At the Committee meeting in Kuching in December 1961, Lee took the role of a wise marriage broker, ready to reconcile differences and complimenting the politicians of the Borneo States on their political sophistication. He expressed the view that so long as we accept the necessity and the inevitability of Malaysia, the differences of view which we have as to the form and content of Malaysia can be resolved.[20]

Following the successful conclusion of the agreement on merger between Singapore and the Federation, the British Government invited the Federation Government for discussion on the question of merger in greater detail and to prepare the way for consultation with the Borneo territories. The main issues at the discussion were (a) the future of British bases in Singapore; and (b) the future of the British dependencies in Borneo; and a compromise Anglo-Malayan agreement was reached to establish a Federation of Malaysia "in the interests of the peoples of the territories concerned". In a Joint Statement[21] of both Governments, it was proposed to set up a Commission charged with the duties of ascertaining the views of the peoples of North Borneo and Sarawak and to make recommendations. It was also proposed to seek the view of the Sultan of Brunei.[22] As regards the British bases in Singapore it was agreed that Great Britain would continue to use Singapore military facilities "for the purpose of assisting in the defence of Malaysia, for Commonwealth defence and for the preservation of peace in South East Asia."[23]

In January 1962, a Commission of Enquiry (known as the *Cobbold Commission*), under the Chairmanship of Lord Cobbold, was appointed

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18 The Minister of Education, Singapore, made the award of ten Malaysia scholarships to North Borneo students who wish to study at Singapore University and Technical College. It was at this meeting that Donald Stephen (who later became the first Chief Minister of Sabah, or North Borneo), changed his mind and supported Malaysia. His comment on the offer of scholarships was that "This is something which I will take back to my country with pride and with happiness. My people will appreciate it very much". (*The Straits Times*, 27th July 1961).

19 *Ibid.*

20 *Sarawak by the Week*, No. 51 of 1961, p. 10.

21 *Great Britain. Federation of Malaya: Joint Statement by the Governments of the United Kingdom, and of the Federation of Malaya*, Cmd. 1563, London, 22nd November 1961.

22 *Ibid.*, at paragraph 5.

23 *Ibid.*, at paragraph 6 and Annex B.

consisting of four members – two British and two Malayans.[24] The terms of reference for the commission were:

(a) to ascertain the views of the peoples of North Borneo and Sarawak on the question of the inclusion of North Borneo and Sarawak (together with other territories) in the proposed Federation of Malaysia; and
(b) in the light of their assessment of those views, to make recommendation.[25]

The Cobbold Commission commenced work immediately, in Sarawak in January and North Borneo in February 1962, explaining to the people the purpose of the Commission and the principles of the Malaysian concept. Nearly 600 memos were received in North Borneo, and over 1600 in Sarawak; and over 50 hearings held at twenty centers in Sarawak and fifteen in North Borneo. Well over 4000 people appeared before the Commission. In its recommendations the Cobbold Commission was unanimous in stating that the Federation of Malaysia was in the best interest of the peoples of the Borneo States and urged an early decision in principle.[26] The Cobbold Commission Report was published in

24 The two British members were Sir Anthony Abell and Sir David Watherson, whilst the Malayans were Encik Mohd. Ghazali Shafie and Datuk Wong Pow Nee.

25 Nordin Sopiee, 1974. *From Malayan Union to Singapore Separation.* Kuala Lumpur: Penerbit Universiti Malaya.

26 "About one-third of the population of each territory strongly favours early realization of Malaysia without too much concern about terms and condition. Another third, many of them favourable to the Malaysia project, ask, with varying degrees of emphasis, for conditions and safeguards varying in nature and extent; the warmth of support among this category would be markedly influenced by a firm expression of opinion by Governments that the detailed arrangements agreed upon eventually are in the best interests of the territories. The remaining third is divided between those who insist on independences before Malaysia in considered and those who would strongly prefer to see British rule for some years to come. If the conditions and reservations which they have put forward could be substantially met, the second category referred to above would generally support the proposals" (paragraph 144). "The British and Malayan members have both concluded that, on the line of their respective approaches, a Federation of Malaysia is an attractive and workable project and is in the best interests of the Borneo territories" (paragraph 237). "I regard it as vital that Governments should reach an early decision in principle, subject of debate in, and approval by, the legislative chambers in North Borneo and Sarawak." (Paragraph 239) of the Report of the Commission of Enquiry North Borneo and Sarawak, 1962, Cmnd. 1794 (London 1962), (known as the Cobbold Commission Report).

August 1962.[27] At the London meetings that followed the Report was considered and it was agreed between the British and Malayan Governments that the proposed Federation of Malaysia should be brought into being by 31st August 1963.[28] As progress towards Malaysia became assured after these meetings, an Inter-Governmental Committee, under the chairmanship of Lord Landsdowne,[29] consisting of representatives of the British, Malayan, North Borneo and Sarawak Governments, was formt to work out the future constitutional arrangements for the proposed Federation.[30] The Inter-Governmental Committee Report (IGC Report)[31] was published in February 1963 and it formed the basis of the Constitutions of Sabah (as North Borneo was known later) and Sarawak.[32]

The IGC Report[33] was approved overwhelmingly by the legislatures of Sarawak and North Borneo and 27th and 13th September respectively. By this time the Borneo States were ready for a formal agreement and an order-in-council to enable Malaysia to come into

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27 *Ibid.*, Temenggong Oyang (one of the Chiefs in Sarawak) said of the Report that "a large number of people of Sarawak who favoured Malaysia were 'still groping in the dark' about the implications and benefits of the proposal". *The Malay Mail*, 16th August 1962.

28 Subjects to the necessary legislation, the Government intended to conclude within six months, a formal agreement which, *inter alia*, would provide for (a) the transfer of sovereignty in North Borneo, Sarawak and Singapore by 31st August 1963; (b) provisions governing the relationships between Singapore and the new Federation as agreed by the Governments of Malaya and Singapore; (c) defence arrangements as set out in the Joint Statement (*see* note 20 above) between the British and Malayan Government of 22nd November 1961; and (d) detailed constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak, to be drama up after consultation with the legislatures of both territories: Boyce, Peter 1968. *Malaysia and Singapore in International Diplomacy*. Sydney University Press, p. 7.

29 The British Secretary of State for Colonial Affairs; and the Deputy Chairman was Tun Abdul Razak, the Deputy Prime Minister of Federation of Malaya.

30 The Committee consisted of the Plenary Committee and five subcommittees. In the former, it consisted of the Chairman, six members from Britain, eight from Malaya, ten from Sarawak, eight from North Borneo, and the Chief Justice of North Borneo, Sarawak and Brunei, and two observers from Brunei. On the sub-Committee, Britain had two additional members, twelve from Malaya, nineteen from Sarawak and eleven from North Borneo. A number of the members of the Plenary and Subcommittee other than British members were in fact Britons then in the service of one or other of the Government concerned: Boyce, Peter, *op. cit.*

31 H.M.S.O., Malaysia, Report of the Inter-Government Committee, 1962 (known as the IGC Report) Cmnd. 1954 (London 1963).

32 As contained in the Agreement relating to Malaysia.

33 *See* note 30.

being by 31th August 1963. Subsequently in the first local government elections held in North Borneo the pro-Malaysia parties won a substantial majority of the contests.

While the Cobbold Commission and the Inter-Governmental Committee were busy preparing the entry of North Borneo and Sarawak to Malaysia, in Singapore reaction towards merger reached such a state that the Government there felt itself compelled to hold a referendum to test public opinion on this issue. A National Referendum Bill was passed by the Legislative Assembly, and a referendum was held in Singapore in September 1962.[34] This gave the Government a decisive victory with 71% of the votes in favour of the Government's White Paper,[35] i.e., a merger with reserved powers, autonomy over labour and education and other agreed matters, and automatic Malaysian citizenship for Singapore citizens.

In Brunei, opposition to Brunei joining Malaysia had increased. In the 1962 local elections in Brunei, the Party Rakyat won all fifty-five constituences and consequently occupied the sixteen unofficial seats in the Brunei State Legislative Council through the electoral college system. In September 1962 the Party Rakyat submitted an anti-merger motion to be debated in the Council but the motion was disallowed because the Council was "not competent" to discuss the anti-merger question.[36] This led to a revolt in Brunei on 8th December 1962,[37] which was put down by the Sultan of Brunei with the help of British troops. The Sultan reiterated that he was convinced about the soundness of Malaysia, proposals.[38]

Malaysia did not become an international 'problem' until the Philippines Republic lodged her formal claim to sovereignty of North Bor-

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34 The People's Action Party had suffered a number of defections from its ranks, eventually producing an even split with the opposition (*see* note above) in 1962. The Government (PAP) met this problem by seeking a public expression on merger in the form of a referendum.

35 Out of 560 000 votes cast, 397 626 voted were for the Government, 144 077 votes were blank votes. Alternative B received 9422 votes and C 1911 votes: *State of Singapore Government Gazette Extraordinary* No. 60, IV, Monday, 3rd September 1962.

36 The British Government advised the Sultan, after postponements of the motion twice, to disallow the motion. The Sultan was under treaty obligation to accept such advice: Simandjuntak, *op. cit.*, p. 151.

37 The revolt was led by Azahari, the leader of *Party Rakyat*, who proclaimed independence for Kalimantan Utara, comprising the three Borneo States, and set up a Government-in-exile under his premiership in Manila.

38 *The Straits Times*, 22nd January 1963.

neo in June 1962.[39] Opposition to the Malaysia plan had been voiced by the Communist Parties around the world but much of it soundetd like routine propaganda at the time, and loud hisses from the already powerful Indonesian Communist Party (PKI) were not then interpreted as a prelude to opposition from the Indonesian nation at large. The problem abruptly switched key after Indonesia first offered moral and (soon afterwards) physical support to rebel movements throughout Brunei and the Borneo territories.[40] From there it was a rapid and predutable step to Indonesia's declaration of hostility to Malaysia in January 1963 and Indonesian President Sukarno's announcement of 'confrontation' the following February.[41]

Many measures were taken in an effort to ease the increased tension in the area, which included a series of 'summit' meetings between the leaders of Indonesia, Philippines and Malaya, and meetings at ministerial level. The results of those meetings were incorporated into the Manila Accord[42] which stated, *inter alia*, that Indonesia and Philippines would welcome the formation of Malaysia provided the support of the peoples of the Borneo territories were ascertained by an independent and impartial authority, the Secretary-General of the United Nations or his representative.[43] The Secretary-General sent his personal representative, Lawrence Michaelmore and a team of eight United Nations Secretarial Officials to verify whether the peoples of the Borneo States wished to join Malaysia. The United Nations mission held seventeen meetings and conducted interviews in both the Borneo States. The Mission's Report

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39 S. Jayakumar, 1968. "The Philippines Claim to Sabah and International Law", *Malaya Law Review* 2, p. 10.

40 P. Boyce, *op. cit.*, Indonesian opposition to Malaysia was generated by the Brunei revolt when Indonesia chose to support *Party Rakyat* in its aspiration to set up an independent *Negara Kalimantan Utara* (see note above) while Britain and Malaya were bent on suppressing the uprising, which Malaya chose to call 'rebellion': Simandjuntak, *op. cit.*, p. 161.

41 Indonesia mounted over acts of violence including setting fire to boats in the Malayan waters and patrolling her 'border' with Singapore and Malaya.

42 Tripartite meetings between Malaya, Indonesia and the Philippines were held in Manila 9 – 17 April 1963: between President Sukarno of Indonesia and Tunku Abdul Rahman in Tokyo 31st May and 1st June 1963; and the Conference of Foreign Ministers of Indonesia, Malaya and the Philippines in Manila from 7th to 11th June 1963; *Federation of Malaya, Malaya/Indonesia Relation 31st August to 15th September 1963*: Appendix xiv; *The Indonesian Herald*, The Problem of Malaysia, Appendix 3.

43 The Joint Statement contained the proviso that U.N. Secretary-General or his representative should ascertain prior to the establishment of Malaysia the wishes of the people of North Borneo and Sarawak: Simandjuntak, *op. cit.*, p. 161.

was submitted to the Secretary-General, who on 15th September 1963 made the announcement that the majority of the people of these two Borneo States supported Malaysia. But Indonesia and Philippines did not want to accept this[44] and summoned home their ambassadors, severing diplomatic relations between Malaysia and Indonesia, and Malaysia and the Philippines.

Following the victory in the local government elections,[45] the Sarawak Alliance Party won a majority in the election to the State Legislative Council (or *Council Negeri*) and formed the first elected government in the State. Similarly Sabah Alliance Party having won all the seats in the State Legislative Council, formed the first elected government there. Both these newly elected Governments in the Borneo States supported Malaysia. Then began the hard and detailed bargaining of the terms of entry to Malaysia by the various states including Brunei. The North Borneo and Sarawak agreements presented no problem. With Singapore there were areas of disagreement, mainly on matters relating to finance. As to Brunei, the disagreement centred very much on the State oil revenue, which the State wished to retain in perpetuity and not just for ten years after merger as suggested by Malaya. This issue led to a stalemate between the two states.

In June 1963 the leaders of the various states, at the invitation of the British Government, met in London for the final round of talks, where the points at issues between Singapore and Malaya were finally resolved by mutual concession. An Agreement relating to Malaysia was signed by the Governments of Great Britain, North Borneo, Singapore, Sarawak and the Federation of Malaya on 9th July 1963.[46] The State of Brunei decided to stay out of Malaysia.[47]

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44 The signing of the Malaysia Agreement on 9th July and the declaration that Malaysia would be brought into being on 31th August 1963 well before the United Nations could act, infuriated both Indonesia and the Philippines (*see* note 45 below).

45 Representations to the Federal Parliament were agreed to: twenty four for Sarawak sixteen for North Borneo and fifteen for Singapore.

46 *Malaysia: Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore*, HMSO Cmnd. 2094 (London 1963).

47 It is believed that the talks with Brunei broke down on the question of precedence of the Sultan of Brunei among the Malay Rulers. He had previously been offered the position of the most junior candidate to the throne of Malaysia, but this was considered as too damaging to be acceptable. *The Malayan Times* 10th and 17th July 1963. A spokesman for the Sultan denied this and gave the reason that the Sultan was not satisfied with the status of the people of Brunei in the Federation.

While the United Nations mission was still in the Borneo territories and in spite of the assurance given by the Secretary-General that his decision would be available on the 14th September 1963, the *Yang di-Pertuan Agong* with the concurrence of the Governments of Great Britain, North Borneo, Sarawak and Singapore proclaimed the establishment of the Federation Malaysia, comprising fourteen states eleven states of the Federation of Malaya, North Borneo (renamed Sabah) Sarawak and Singapore, which was to come into operation on 16th September 1963.[48] The Malayan Parliament unanimously passed the Malaysia Act, which brought it in to being the Federation of Malaysia on the appointed date, and with it the Constitutions of Sabah, Sarawak and Singapore.[49]

Earlier 31st August 1963 was the proposed date for the establishment of Malaysia, it was changed to the 16th September 1963, and this change was not readily accepted by the States of Singapore, North Borneo and

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*The Straits Times*, 18th July 1963. Subsequently a public declaration by the Sultan of Brunei state that the real reason was the unsolved issue of the oil-revenue of the State, *The Malayan Times*, 18th July 1963.

48 In fact, the *Yang di-Pertuan Agong* signed on 30th August 1963, a proclamation declaring 16th September, Malaysia Day. The original date for the coming into being of Malaysia, 31st August, (*see* note 42 above), was deferred because the U.N. Mission was not yet complete and the Secretary-General had given his assurance that his findings and conclusion would be made known on 14th September. Malaya"s declaration on Malaysia Day on 16th September was resented by Indonesia, who alleged that the Malayan Act was in defiance of the Manila Accord (*see* note 40 above) and a brazen insult to the High Office on the U.N. Secretary-General. Malaya stated that the Manila Accord provided a formula for Indonesia and the Philippines to welcome Malaysia but at the same time oppose the formation of Malaysia. *Dewan Rakyat*, 12th August 1963, col. 677, 722–5. The Malayan proponent pointed out that the evidence of the Borneo elections was irrefutable that the Borneo people favoured Malaysia, and that the U.N. verdict was not and had never been a condition precedent to the formation of Malaysia. The U.N. Secretary-General U. Thant, deplored the haste with which the new Malaysia date was fixed, and said, "This had led to misunderstanding, confusion and even resentment among the other parties to the Manila Agreement, which could have been avoided if the date could have been fixed after my conclusion had been reached and made known," Federation *of Malaya, United Nations Malayan Mission Report 1963*, p. ii.

49 The Act received the Royal Assent on 26th August 1963 and was to come into operation on 16th September 1963. The Act (the bill form of which had been annexed to the Malaysia Agreement) was to amend Article 1 (1) and (2) of the 1957 Constitution to provide, *inter alia*, for the admission of the three new States and for renaming of the Federation as Malaysia. *See* S. Jayakumar 1964. Admission of New States – *The Government of the State of Kelantan* v *The Government of the Federation of Malaya and Tunku Abdul Rahman al-Haj*, 6 *Malaya Law Review*, 181.

Sarawak; and Singapore, due to political pressure at home, took a calculated risk in proclaiming in Singapore Malaysia Solidarity Day on 31st August 1963.[50] The Malayan Government considered this move to be neither legal nor constitutional, and protested to the Brittsh Government, whose only response was a belated statement saying that as yet there had been no order-in-council signed by the Queen to transfer power from the British Government to the Singapore Government. As to North Borneo and Sarawak, the constitutional powers accorded to the two territories were powers which would he exercisable under their new Constitutions after the establishment of Malaysia, but all future Federal power continued to be retained by the Governors until Malaysia Day.

On 10th September 1963 the State of Kelantan instituted an action[51]

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50 The Singapore Prime Minister on 31st August 1963, proclaimed that "From today until 16th September; *Malaysia Day*, all Federal powers over Defence and External Affairs will repose in the *Yang di-Pertuan Negara*. .. We look upon ourselves as trustees for the Federal Government in these fifteen days. We will exercise these powers in the interest of Malaysia". (*The Manchester Guardian*, 3rd September 1963; *The Sunday Mail*, 1st September 1963). The proclamation was tantamount to a declaration of independence for Singapore; and the Malayan Government protested and sought clarification from the British Government as to why it consider it necessary to grant internal self-government to the Borneo States contrary to the Malaysia Agreement. The Commonwealth Relations Office maintained a diplomatic silence about the Malayan protest.

In justifying his action, the Singapore Prime Minister looked upon the Manila Accord as not binding Singapore because it was signed by Tunku Abdul Rahman, the Malayan Prime Minister when he was under extreme pressure from President Sukarno of Indonesia. Besides, Singapore was not a party to it. *The Manchester Quardian*, 9th August 1963.

51 *The Government of the State of Kelantan* v *The Government of the Federation of Malaya and Tunku Abdul Rahman al-Haj* [1963] 29 *MLJ* 355. The Kelantan Government, argued that the Malaysia Act would abolish the Federation of Malaya, thereby violating the Federation of Malaya Agreement 1957; that the proposed changes needed the consent of each of the states of Malaya, including Kelantan, and this had not been obtained, that the Ruler of Kelantan should have been a party to the Malaysia Agreement, that constitutional convention called for consultation with the rulers of each state and that Federal Parliament had no power to legislate for Kelantan in respect of any matter when that state had its own legislature. On 14th September 1963, Thomson, CJ heard the application and dismissed it. On the merits he held:

(1) that Parliament had power under Article 159 of the 1957 Constitution to enact the Malaysia Act so as to amend Article1(1) and (2), and this amendment did not require a two-third majority. The Constitution which formed an integral part of the 1957 Agreement (to which Kelantan was a party) did not require consultation with any state as a condition to the fulfilled:

(2) that the Malaysia Agreement was signed for the Federation of Malaya by the

in the High Court against the Malayan Government seeking to have the Malaysia Agreement[52] and the Malaysia Acts[53] declared null and void or alternatively not binding on that State. This action failed. Malaysia was born on the 16th September 1963, *Malaysia Day*, Her Britannic Majesty having relinquished her jurisdiction in North Bomeo, Sarawak and Singapore.

Nearly two years later on 9th August 1965, Singapore separated[54] to become a fully independent republic within the Commonwealth, thus leaving thirteen states in Malaysia.

## The Religion of the Federation

Article 3 of the Constitution declares that Islam is the official religion of the Federation. Islam was made the official religion primarily for ceremonial purposes, to enable prayers to be-offered in the Islamic way on official occasions such as the installation of the *Yang di-Pertuan Agong* and the anniversary of *Merdeka Day*.[55] The declaration was inserted to enable the Conference of Rulers to give rulings on the rites and conduct of the religion of Islam which would, apply to the Federation as a whole;

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Prime Minister, Deputy Prime Minister and four members of Malayan Cabinet. This was in compliance with Articles 39 and 80(1) of the Constitution, and there was nothing whatsoever in the Constitution requiring consultation with any State Government or the ruler of any state.

52 *See* note 41.

53 *See* note 50.

54 Malaysia (Singapore Amendment) Act 1965, No. 53/65, which came into force on 9th August 1965. Section 5 of the Act provided that Singapore ceased to be a state of Malaysia and became an "independent sovereign state and nation separate from and independent of Malaysia, and recognized as such by the Government of Malaysia; and accordingly the Constitution of Malaysia and the Malaysia Act shall thereupon cease to have effect in Singapore except as hereafter provided". The consequent amendment of the text of the Constitution of Malaysia was passed as the Constitutional (Amendment) Act 1966, No. 59/66.

The split came about after a period of public dispute between the Singapore Government and the Federal Government of Malaysia. The ostensible differences were over the question of the right and privileges of the Malays in relation to other races and the position of Islam in the Malaysia constitution and society. The PAP wanted a "Malaysian Malaysia" in which every citizen would have equal rights irrespective of race or culture, and no religion or culture would enjoy preeminence. See Lee Kuan Yew, 1966. The *Battle for a Malaysian Malaysia*. Singapore: Ministry of Culture. These differences came to be regarded as irreconcilable.

55 M. Suffian, "The relationship between Islam and States of Malaya", *Intisari*. Vol. 1, No. 1, p. 8.

and to authorize the *Yang di-Pertuan Agong* to represent the rulers in such national religious maters.[56] also gives authority to the Federal police[57] and Federal courts[58] in certain instances to enforce state religious laws, and allows Federal law[59] or State law[60] to provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction of the Muslim religion for persons professing that religion.[61] Lastly it is consistent with the provision pelmitting State laws to control or restrict the propagation of the Muslim religion.[62]

The Article does not however go as far as declaring the Federation to be an Islamic state; it remains a secular state. Under the constitution every citizen is guaranteed the freedom to practice his own religion in peace and harmony.[63] Although Islam is the religion of the Federation there is no Head of the Muslim religion for the whole of the Federation. The *Yang di-Pertuan Agong* continues to be the Head of the Muslim religion in his own state, and it is stated that he shall be the Head of the Muslim religion in Malacca, Penang, Sabah dan Sarawak.[64] It appears that Article 3(1) applies to the Borneo States, so Islam is the religion of those parts of the Federation also, but there is no Head of the Muslim religion in either of the states.

The early Malay State constitutions, written or unwritten, show traces of the traditional Islamic polity. The sultanate was the result of the assimilation of the spiritual and religious traditions with temporal authority that was the sultan; the latter in addition to being a sovereign

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56 Article 3(2).

57 For instance, section 58 Negeri Sembilan Administration of Muslim Law Enactment 1960.

58 *Ibid.*, sections 59.

59 Sections 36 and 37 Education Act 1961 as amended by Education (Amendment) Act 1963.

60 The Negeri Sembilan Muslim Religious Scholarship Fund Enactment 1961.

61 Article 12(2).

62 Article 11(4): Any person, whether or not he professes the Muslim religion, who propagates any religious doctrine or belief, other than the religious doctrine or belief of the Muslim religion among persons professing the Muslim religion shall be guilty of an offence cognizable by a civil court and punishable with imprisonment for a term not exceeding one year or fine not exceeding $3000 sections 15(2). The Negeri Sembilan Enactment 1960, *op. cit.*

63 Article 3(1).

64 Provision were made conferring on the *Yang di-Pertuan Agong* the position of Head of the Muslim religion in the Constitution of Malacca, Article 5; the Constitution of Penang, Article 5; the Constitution of Sabah, Article 5A; and the Constitution of Sarawak, Article 5.

prince in a secular sense also came to maintain a close association with and responsibility for the Shari'ah (or Islamic) law.[65] When each of the Malay states preserved its legal sovereignty[66] the position of Head of the Muslim religion in each state was occupied by the rulers. This was expressly preserved by the Constitution:

> In every State other than States not having a Ruler the position of the Ruler as Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired....[67]

Islam is a state subject. This means only states have legislative and executive authority over it. The Federal Government has not.[68] The State List enumerates matters on which the legislature of a state has power to make law, and includes Muslim matters over which a state has jurisdiction.[69]

In every Malay state there is a Religious Council[70] to advise the ruler on Muslim matters. In Malacca, Penang and Singapore there is also a separate Religious Council to advise the *Yang di-Pertuan Agong* in Muslim matters in the respective states. Each of the Borneo States has an Islamic Religious Council to advise the State Governments in Muslim matters. All these Councils have been established by state law. In such matters the Council is the Chief authority in the state and is required to take notice of and to act in accordance with the Islamic law, Malay custom and the written law of the state.[71] In theory it is open to each state ruler to act separately in such religious matters, but it was felt that there should be some uniformity and that the *Yang di-Pertuan Agong* should be given authority to represent each ruler in certain acts and observances or ceremonies. A further step was taken to co-ordinate the adminis-

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65 Ahmad Ibrahim. "The Position of Islam in Constitution", *The Constitution of Malaysia 1957–1977*, p. 47.

66 Even under the British protection, British influence in the Malay state came through treaties that were made between the British and the Malay sultans.

67 Article 3(2).

68 Except the Federal Territory, which was established in 1973 by Constitutional (Amendment) no. 2) Act 1973, (No. 206).

69 Article 73 and 74; and Ninth Schedule, Part II, section 1.

70 Article 3(5).

71 Ahmad Ibrahim, *op. cit.*, p. 53.

tration of the National Council for Islamic Affairs[72] whose functions are:

(a) to advise and make recommendations on any matter referred to it by the Conference, any State Government or Religious Council, and

(b) to advise on matters concerning Islamic law, the administration of Islam and Islamic education with a view of improving, standardizing or encouraging uniformity in Islamic law and administration.

It is expressly provided that the Council may not touch on the position, rights, privileges, and sovereignty, and other powers of any ruler as head of Islam in his state.

The Federal Constitution permits State law to control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.[73] This includes the propagation of Muslim doctrine or belief so that it is competent for the State law to provide for the regulation of Muslim teachers. This has been done in many states. This provision does not apply to the Borneo States, but they may include in their constitutions such provisions requiring a special majority of no more than two-thirds of the total number of members of the State Assembly, for the extesion of such legislation.[74] In reality therefore the proclamation of Islam as the official religion only applies to part of the Federation; and "this gives the concept of religious pluralism, which was the integral part of the original constitution, more strength."[75]

The Federal Constitution empowers Federal law to be made providing financial aid for the establishment or maintenance of the Muslim institutions or for instructions in the Muslim religion, but before it can apply to a Borneo State, the consent of the Governor of the State must be obtained. If the Federal aid does not apply to the Borneo States, and should it represent a grant out of public funds, the Federal Government

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72 It consists of (a) a Chairman appointed by the Conference of Rulers (usually the Prime Minister was appointed); (b) a representative from each of the states in Malaya, appointed by the ruler, in Malacca, Penang and Singapore by the *Yang di-Pertuan Agong*; and (c) five persons appointed by the *Yang di-Pertuan Agong*, with the consent of the Conference of Rulers.

73 Article 11(4).

74 Article 161 D, sections 65 Malaysia Act 1963 (No. 26).

75 H.E. Groves, 1964. *The Constitution of Malaysia*. Singapore: Malaysia Publications Ltd., p. 149. Census figures point to some anomaly as to the status of Islam in the new states. Singapore accepts Islam as the state religion, has the smallest percentage of less than 15% Muslims in its population (*Singapore Annual Report 1960*) whereas Muslims make up about 20% of Sarawak population and over one-third of Sabah population (*Sarawak and Sabah Annual Reports 1962*).

is obliged to pay the Borneo State concerned, a sum for social welfare purposes proportionate to the revenue derived by the Federation from other states in that year.[76] But no person in any part of the Federation may be compelled to pay any tax, the proceeds of which are especially allocated for the purpose of a religion other than his own.[77]

State authorities may establish Muslim courts having jurisdiction only over Muslims and having no jurisdiction in respect of offences under Federal law. The Muslim Courts (Criminal Jurisdiction) Act 1965 was enacted to confer upon them jurisdiction over offences against precepts of Islam committed by Muslims. Where it is necessary to ascertain Muslim law for purpose of Federal law, the power to legislate for this ascertainment is expressly conferred on Parliament.[78]

The Federal Constitution declares itself to be the supreme law of the Federation,[79] but the definition of law which is contained in the Constitution does not mention Islamic law.[80] Islamic law is a state responsibility, the State legislature can make laws, but the laws cannot be held void because they contravene Islamic law. The Civil Law Act 1956 in effect makes the English Common Law and rules of equity the basic law to which recourse must be had if there is no written law in force in Malaysia. There are still laws made before Merdeka Day which contain provisions contrary to Islamic law. Before the war the court held that section 112 of the Evidence Ordinance (now the Evidence Act) overrode Islamic law on the question of the legitimacy of a child of the Muslim faith.[81] More recently the Federal Court upheld the decision of a High Court which held that a *wakaf* for the benefit of the family of the deceased was bad, despite that such a *wakaf* was valid under Islamic law.[82]

The Federal Parliament may make laws applicable to Muslims[83] but they must be accepted by the states before in order to become law. The Guardianship of Infants Act 1961, for example, may apply to Muslims in a state if it is accepted by the state with modifications that any

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76 Article 161C. For this purpose any contributions received by the Federation out of the proceeds of the Social and Welfare lotteries are disqualified: Article 161C(3).
77 Article 11(2).
78 Article 3(5).
79 Article 4(1).
80 Article 160 (2).
81 *Ainon v Syed Abu Bakar* [1939] *MLJ* 209.
82 *Tengku Mariam v Commissioner of Religious Affairs Trengganu* [1970] *MLJ* 222.
83 Article 76.

provision in the Act which conflicts with the provisions of the Islamic law, will not apply to Muslims. Despite this, the Court held that the Guardianship of Infants Act 1961 is applicable to give the custody of a child to the mother who has married a stranger, if the Court is satisfied that it is in the interest of the child's welfare to grant such custody.[84]

## Fundamental Liberties

The Malaysia Act preserves the pre-existing set of fundamental liberties. Five basic concepts are: ( l) Liberty of the Person, (2) Equality; (3) Freedom of Speech, Assembly and Association; (4) Freedom of Religion; and (5) Protection Property from Acquisition without adequate compensation. Liberty of Person is treated under (a) freedom from arbitrary arrest; (b) freedom from slavery and forced labour, (c) freedom from retrospective criminal laws; (d) freedom from repeated trails; (e) freedom of citizens from banishment, and (f) freedom of citizens from restrictions and movements.

Only five of the above headings and sub-headings appear in the language of absolute terms; they are (i) freedom from slavery and forced labour; (ii) freedom from retrospective criminal laws; (iii) freedom from repeated trials; (iv) freedom from banishment, and (v) protection of property from acquisition without adequate compensation. Three are substantially qualified by constitutional exceptions to their scope; they are (i) equality in general; (ii) equality with respect to education; and (iii) freedom of religion. All these liberties except those of religion are subject to being overriden by emergency legislation.[85] Freedom of citizens from banishment appears to have been entrenched but is overriden by the special legislation against subversion.[86] The rest of the liberties are so far from fundamental that they may be largely or entirely abrogated by ordinary Acts of Parliament.

Nevertheless several liberties or rights concerning citizenship, matters of Muslim law, the custom of the Malays, native law or customs in the Borneo States and language,[87] which are not subject to the emergency legislation, are not termed as fundamental.

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84 *Myriam* v *Ariff* [1971] 1 *MLJ* 265.

85 Article 150 of the Federal Constitution, and the exceptions in Clause (6A) of the article.

86 Article 149, *ibid.*

87 *Ibid.*, Article 150(6A).

### *Liberty of the Person*

*(a) Freedom from arbitrary arrest*

No person shall be deprived of his life or personal liberty save in accordance with the law.[88] Law includes written law, the Common Law, insofar 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.[89]

The phrase "in accordance with law", as it also appears in Article 13,[90] has not been subject to judicial interpretation in Malaysia. Professor Groves feels that it does not mean "due process of law in the United States" but it may be given the same interpretation that the term has in India.[91] This interpretation, more limited in scope, would mean that an individual is protected only against arbitrary executive action, since any law, provided it is constitutional, could still deprive him of life or liberty.[92] Clause (1) of the Article, does not limit legislative powers nor does it make anything illegal that was not so already. It merely makes certain illegal executive actions unconstitutional.[93]

A distinction is drawn between Clause (I) and the comparable Article 21 of the Indian Constitution which states, "No person shall be deprived of his life or personal liberty except according to procedure established by law".

The Court is drawing the distinction, said that the presence of the word "procedure" in the Indian Constitution, not used in Clause (I), is one of the probable reasons why the Indian courts insist on a stricter compliance with procedural requirements of the Common Law in cases of preventive detention than the Federal Court finds it is compelled to do by Clause (1).[94] (The other probable reason suggested was that the power detention was often carried out in India by civil servants not answerable politically to Parliament.)

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88 *Ibid.*, Article 5(1). *cf.* with Article 14 of the United States constitution, which states: "No state ... shall deny to any person within its jurisdiction the equal protection of the law".

89 *Ibid.*, Article 160(2).

90 *Ibid.*, Article 13 deals with rights to property.

91 H.E. Groves, 1962. "Due process of law – a comparative study". *University of Malaya Law Review, I; The Constitution of Malaysia*, Singapore, 196, p. 191.

92 *Ibid.*

93 *Chong Fook Kam* v *Sha'aban* [1968] 2 *MLJ* 50.

94 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 *MLJ* 129, *per* Suffian FJ (as he then was) at p. 148.

Where a complaint is made to a High Court or any judge thereof that a person is 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.[95]

This Clause (2) writes *habeas corpus* into the Constitution. Subject to Article 149(1), the power of Parliament and the legislatures of states to enact laws on *habeas corpus, is* limited by the requirement to be consistent with the constitution. In a case[96] the Federal Court held that "... the onus of proving legally of the detention is on the Minister in the first instance. This he can discharge by producing an order of detention which, if its authenticity and good faith are not impugned, is a sufficient answer. If the detainee alleges *mala fides* ... then the onus shifts to him and it is for him to prove *mala fides*".

When a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.[97] It contains three separated but related rights: (a) the right to be informed of the grounds of arrest; (b) the right to consult counsel; and (c) the right to be defended by a legal practitioner of his choice.

The court gave a restrictive interpretation to this provision. It held[98] that the right to counsel presupposed a right to be heard, and where the court found in the legislation which predated the Constitution, no right to be heard, it denied the right to counsel. This decision was not followed in any subsequent cases[99] in which it was held that Article 5 meant to apply "to arrests under any law whatsoever in force in the country".

Where a person is arrested and not released, he shall without reasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.[100]

With the exception that an enemy alien is not entitled to be informed of the grounds of his arrest, to be defended by counsel of his choice, or

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95 Article 5(2) of the Federal Constitution.

96 *See* note 95.

97 *Ibid.*, Clause (3).

98 *Chia Khin Sze* v *The Menteri Besar State of Selangor* [1958] 24 *MLJ* 105; Sheridan, L.A. Right to Counsel, [1958] *Malayan Law Journal*.

99 *Aminah* v *Superintendent of Prison Pengkalan Chepa* [1968] *MLJ* 92; *Assa Singh* v *Menteri Besar of Johor* [1969] 2 *MLJ* 30; Loke Kit Choy 1968. Fundamental Rights of Arrested Persons, 10 *Malaya Law Review*, 1, p. 133.

100 Article 5(4), of the Federal Constitution.

produced before the magistrate, the above protections apply to all person.[101]

*(b) Freedom from slavery and forced labour*[102]

There is no judicial interpretation under this Article.

*(c) Freedom from retrospective criminal laws*[103]

*(d) Freedom from repeated trials*[104]

There is no change in these provisions, and there is no judicial interpretation.

*(e) Freedom of citizen from banishment*[105]

No citizen shall be banished or excluded from the Federation. This provision was retained by Malaysia Act. In a case[106] under this Article the Court held that a banishment order automatically removed the banished person citizenship. But this decision has never been followed[107] as such an interpretation would remove the efficacy from Article 9(1).

*(f) Freedom of citizens from restrictions and movements*

Article 9(2) grants a citizen the right to move freely throughout the Federation and to reside in any part thereof. A restriction has, however, been placed on these rights of movement; Parliament may impose restrictions through legislation on the rights of movement or residence so long as a state is in a special position as comparable to the States of Malaya.[108] For example, while Singapore remained in the Federation because

101 *Ibid.*, Clause (5).
102 *Ibid.*, Article 6.
103 *Ibid.*, Article 7.
104 *Ibid.*
105 *Ibid.*, Article 9.
106 *Re Soon Chi Hiang* [1969] 1 *MLJ* 218.
107 *Kung Sik* v *P.P.* [1970] 2 *MLJ* 174; *Liew Shin Lai* v *Minister of Home Affairs* [1970] 2 *MLJ* 7. The court held that Article 9(1) was applied to protect citizens from banishment; in an application to set aside a banishment order, the burden of proof that he was a citizen lay upon the applicant.
108 Article 9(3).

of its special status, Parliament was granted the power to pass laws to prevent citizen of the Malay states from enjoying certain educational, employment or other rights in Singapore.[109]

The scope of this limitation on freedom of movement is extended by Article 4(2) (*a*) which prohibits citizens from challenging restriction on freedom of movement, for the reason that the Article does not limit or define the grounds on which that freedom may be restricted. In other words, the list of reasons for which Parliament may limit freedom of movement has little significance as Parliament need not specify any reasons whatsoever, and the restrictions will nevertheless be valid.

Besides, the Constitution permits the Borneo States, through Federal law, to control entry into those states of citizens from elsewhere in Malaysia. To the extent that they can only be changed with the concurrence of the states of Malaysia, such laws become constitutionally entrenched.

From the reciprocal terms expressed in Article 9(3), it appears that Parliament may under its power prevent a citizen of one the states of Malaya, from entering or residing in a Borneo State, in the same way as it can so restrict a citizen from the Borneo States wishing to depart from it to another state. This power applied also to Singapore while it remained in the Federation.

The Immigration Act 1963 gives to each Borneo State, wide powers to control entry into or residence in the state, and these Clauses cannot be ammended without the consent of the Borneo States concerned The Borneo States are, with certain exceptions, permitted to treat Federal citizens seeking entry to or residence in these states as if they were non-citizens. These exceptions are:

(i) a native of the Borneo State concerned;
(ii) a member of the Federal Government or the Executive Council or Legislative Assembly of the Borneo State (or of any Council having the same functions in the State);
(iii) a judge of the Federal Court or High Court in Bomeo or a person designated or nominated to act as such, or a member of any commission or council established under the Federal Constitution or the Constitution of the Borneo States;
(iv) a member of the public services of the Federation or Borneo States,

109 Article 161H; section 69 Malaysia Act 1963 No. 26, which was repealed by Act A 59 of 1966, effective from 9.8.1965.

or a joint public service serving the Borneo States or anyone seconded to any such service;

(v) the wife and children under eighteen years of age of a citizen of the first four categories if entering the Borneo States with, or to be with, the citizen;

(vi) one entering the Borneo States for the sole purpose of legitimate political activity: or

(vii) one whose entry into the Borneo States is temporarily required by the Federal Government in order to enable that Government to carry out its constitutional and administrative responsibilities.

In addition, a citizen arriving in the Federation in the Borneo State or in any other part of the Borneo State, and proceeding to a part of the Federation which he is entitled to enter shall be entitled to such Pass as is reasonably required to enable him to do so. The burden of proof that a person is entitled to enter Borneo under the above exception lies on him, except that a person in category (g) above is indicated to the Controller of Immigration by the Minister concerned.[110]

Freedom of movement of citizens throughout Malaysia is subject to limitation for one of six basic reasons; (a) security; (b) public order; (c) public health; (d) punishment of offenders; (e) the special position of some states; and (f) the right of the Borneo States to control entry into their territories. The term "special position" is not defined. The terms "public order" and "security" are sufficiently vague and embracing to lend legality to almost any conceivable legislation restricing this right. As for public health, this was on the State List for Singapore, but for Sabah it is on the Concurrent List. Thus the legislature of Singapore could and that of Sabah can enact laws such as one requiring any would be visitor to have a vaccination certificate.

Restrictions on inter-states movement of Singapore citizens were great. Any right which one could enjoy in Singapore could be a reason for not permitting a Singapore citizen to enter the States of Malaya lest he might enjoy the same right there. This seems to have included movement of citizens engaged in lawful political activity, business or employment. There seems to have been no limit to Parliament's right to restrict the movement of Singapore citizens in the same way that residence in the Borneo States is restricted, except that in the latter case the right of re-

110 Article 161E and Immigration Act 1963.

striction is partially possessed by the Borneo States themselves. The only limit to Parliament's right to restrict the movement of citizens of either Borneo State into other states, are those matters controlled by the Borneo States themselves.[111]

### *Equality*

The Constitution provides that all persons are equal before the law and entitled to the equal protection of the law.[112] There must be no discrimination in favour of any person on the grounds that he is a subject of the ruler of any state. Except as expressly authorized by the Constitution, there must be no discrimination against citizens on grounds of religion, race, descent or place of birth, in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession vocation or employment.[113] A public authority must not discriminate against any person on the grounds that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

The Constitution expressly authorized[114] discrimination in measures of the following kinds;

(a) any provision regulating personal law;
(b) any provision or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;
(c) any provision for the protection, wellbeing or advancement of the aboriginal people of the Malay Peninsular (including the reservation of land) or the reservation to the aborigines of a reasonable proportion of suitable positions in the public service;
(d) any provision prescribing residence in a state or part of a state as a qualification for election or appointment to any authority

111 H.E. Groves, *op. cit.*, p. 193.
112 Article 8(1). *See* Groves, H.E., 1963. "Equal protection of the laws in Malaysia and India", 12 *American Journal of Comparative Law* 385; S.M. Huang-Thio, 1963. "Equal protection and rational classification", *Public Law* 412.
113 *Ibid.*, Clause (2).
114 *Ibid.*, Clause (5).

having jurisdition only in that state or part, or for voting in such an election;

(e) any provision of a Constitution of a state, being or corresponding to a provision in force immediately before *Merdeka Day*; and

(f) any provision restricting enlistment in the Malay Regiment to Malays.

In the States of Malaya, the Malays are to continue to enjoy as before (under the 1957 Constitution) special privileges notably as to positions in the public service, scholarships and bursaries, and business permits and licences. In Singapore, the general right to advance the Malays, did not indude special rights as to positions in the public service which were filled by recruitment in Singapore, or permits or licences for the operation of trade or business.[115] However, nothing in the Constitution was to prohibit or invalidate any provision of State law in Singapore, for the advancement of the Malays.[116]

In the Borneo States, the natives position is given special attention. The *Yang di-Pertuan Agong* has the power to ensure the reservation of a reasonable proportion of positions in the public service for them,[117] but this does not extend to scholarships or licences or permits for business or trade. Special privileges (as given to the Malays under Article 153) apply with certain modifications and exceptions to the natives of these states. The *Yang di-Pertuan Agong* must, before advice is tendered as to the exercise of his powers under this provision, consult the Chief Minister of the State.[118] State law may provide for the reservation of land for the natives of the States or for alienation to them, or for preferential treatment as regards to the alienation of land by the State.[119]

### *Freedom of Speech, Assembly and Association*

Parliamentary control over these rights which under the 1957 Constitution was already very great indeed, has been increased by the addition of the words "or any part thereof" to the restrictive Clauses. This

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115 *Ibid.*, Article 153.

116 *Ibid.*, Article 161G; section 68 Malaysia Act 1963, *see* note 25 in relation to Singapore.

117 *Ibid.*, Article 161A(I), section 62, *ibid.*

118 *Ibid.*, Clauses (2) & (3).

119 *Ibid.*, Article 161A.

means special legislation may be passed covering particular areas of the Federation.

(a) On the right to freedom of speech and expression, Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, on any matter concerning friendly relations with foreign countries; public order or morality; protection of the privileges of Parliament or any legislative assemble; or in order to guard against contempt of court, defamation or incitement to crime.[120]

(b) On the right to assemble peaceably and without arms, Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of public order or the security of the Federation or any part thereof.[121]

(c) On the right of citizens to form associations, Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality, or controlling labour or education.[122]

The terms "security of the Federation", "public order or morality" are not defined, and thus Parliament's power to curtail these rights is almost limitless.

The right to form associations guaranteed by Article 10(1) (*c*) is also limited to restrictions that may be imposed by law relating to labour or education.[123] Restriction can also be imposed by any law which Parliament deems necessary in the interest of the security of any part of the Federation.[124] The comparable Article 19 or the Indian Constitution[125] states that:

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120 Article 10(1)(*a*) and(2)(*a*).

121 *Ibid.*, 10(1)(*b*) and (2)(*b*).

122 *Ibid.*, 10(1)(*c*) and(2)(*c*).

123 *Ibid.*, Clause (3); section 60(4) Malaysia Act 1963, *op. cit.* It was stated that the amendment was necessary because the State of Singapore reserved to itself legislative and executive power in relation to labour and education. (*Dewan Rakyat*, 15th August 1963, co. 980). The restrictions imposed upon the right to form associations have yet to be removed even though Singapore has been separated from Malaysia for more than twenty years.

124 *Ibid.*, Article 10(2).

125 Article 10 of the Federal Constitution is closely patterned on Article 19 or the Indian Constitution: Groves, *The Constitution of Malaysia*, *op. cit.*

> All citizens shall have the right – (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to reside and settle in any part of the territory of India; (d) to move freely throughout the territory of India; (e) to form associations and unions; (f) to acquire, hold and dispose of property; and (g) to practice any profession, or to carry out any occupation, trade or business.

The saving Clauses[126] to Article 19 which are phrased in general and wide terms as in the Malaysian Constitution, permitting the legislature to impose restrictions on certain enumerated grounds require that these restrictions be "reasonable restrictions". The requirement of reasonableness permits an objective inquiry by the courts, and Indian Supreme Court has reiterated that it would take upon itself the duty of inquiring into the reasonableness of any restrictions purportedly made under this article. The judicial attitude in India has been thus summarised, "In other words, in order to be reasonable (a) the restriction must not be arbitrary; and (b) the procedure or manner of imposition of the restriction must also be fair and just."[127]

In determining substantive reasonableness, the Indian Courts examine the content of the restriction imposed, and to quote the Supreme Court, "Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness".[128] In determining reasonableness, the courts are concerned with the procedure or the manner in which these instructions are enforced, and the law that satisfies the test of substantive reasonableness may still be invalid if it seeks to empower an authority to restrict fundamental rights without complying with the rules of natural justice.

In Malaysia the Clauses investing Parliament with wide discretionary power, seem to preclude the Court from questioning the reasonableness of restrictions imposed by legislature pursuant to Article 10(2) or 9(2). Article 9(2) provides that any restrictions may be imposed by any law related to the various enumerated grounds. Furthermore, the restrictions in Article 4(2) provide that,

> The validity of any law shall not be questioned on the grounds that –
> (a) it imposes restrictions on the right mentioned in Article 9(2) but does

126 Clauses (2), (3), (4), (5) and (6) of Article 19.
127 Summarised by Basu, *Commentary on the Constitution of India*, 3rd Edition, p. 305.
128 *Dwaka Prasad* v *UP AIR* [1954] SC 224, 227; *Chitanmanro* v *Mahya Pradesh AIR* (1951) SC 118 as cited in Basu's *Commentary, ibid.*

not relate to the matters mentioned therein; or

(b) that it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

In the final analysis. the entire usefulness of these Articles is questionable.[129]

### *Freedom of Religion*

The Constitution lays down that Islam is the religion of the Federation, but provtdes that other religions may be practised in peace and harmony in any part of the Federation.[130] It also guarantees that every person has the right to profess and practise his religion and, subject to Federal and State law, to propagate it.[131] (This has been dealt with under the topic Islam in the Constitution of Malaysia).

### *Protection of Property*

The property owner is protected by Article 13, which states:

(1) No person shall be deprived of property save in accordance with law;[132] and

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

There is no change from the 1957 Constitution, and there have been no judicial pronouncements as to the terms "in accordance with law", "deprived", "use" and "adequate compensation".

## Citizenship in the Constitution of Malaysia

With the formation of Malaysia the citizenship laws were subjected to significant changes. The provisions of the 1957 Constitution were re-

129 L.A. Sheridan, 1957. "Where has the right of freedom of speech and expression gone", The Constitution of the Federation of Malaya, 2 *Malayan Law Journal XV*: S. Jayakumar, 1969. "Constitutional limitations on legislatives powers in Malaysia", 9 *Malaya Law Review*, 96.

130 Article 3 (1).

131 Article 11 (1).

132 *Government of Malaysia. Anor* v *Selangor Pilot Association* [1977] 1 *MLJ*. 133; Sheridan, L.A., 1977. "The Mysterious Case of the Disappearing Business", Journal *of Malaysian and Comparative Law*. Vol. 4, Part I [1977].

enacted with the necessary amendments to take into account the incorporation of the three new states and special provisions were made in the Constitution which were applicable to the new states alone but not to others. The Amended laws are set down in part III of the Constitution of Malaysia. The concept of state citizenship[133] as distinct from Federal citizenship was retained for the new states.

The three categories of acquiring citizenship are also retained under the Malaysian Constitution: operation of law, registration and naturalization.

### *Acquisition in the States of Malaya*

Acquisition of Federal citizenship by persons of the States of Malaya who are not Singapore citizens.

(a) *By operation of law*

(i) Persons born before Malaysia Day[134]

All persons who were citizen of the forrner Federation of Malaya before *Merdeka Day* by virtue of the Federation of Malaya Agreement 1948 are entitled to be citizens by operation of law. No distinction is drawn between those citizens who acquired citizenship by registration of naturalization and those by operation of law.[135]

Persons born within the Federation of Malaya acquire citizenship by the principle of *jus soli* only if born between 31st August 1957 and Oc-

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133 Singapore was the only state in the original Malaysia with a state citizenship district from Federal citizenship. *See* notes (159), (160), and (187) below.

134 i.e. before 16th September 1963. A person born within the territories that on Malaysia Day constituted is eligible to become a citizen of Malaysia. For purposes of clarification, (a) a person on board of a registered ship or aircraft shall be deemed to be born in the place in which the ships or aircraft was registered, and a person born on board an unregistered ship or aircraft of the Government of any country shall be deemed to have been born in that country: Section 19A, Part III Second Schedule; (b) any new child found abandoned in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of finding shall be taken to be the date of birth: section 198.

135 Article 14 and section 1(1) (a), Part I, Second Schedule to the Federal Constitution, but for the purpose of termination of citizenship they are treated differently; Article 28.

tober 1962.[136] Persons who were born after September 1962 became citizens of the new Federation by operation of law if one of the parents[137] at the time of the birth was either a citizen or permanent resident of Federation of Malaya,[138] or who was not a citizen of any other country.[139] A person born outside Malaya before *Merdeka Day* acquires citizenship if his father was a citizen at the time of the birth and either was born in Malaya or was at the time in the service of the Federation of Malaya or a State Government.[140] If the father does not satisfy either requirement, such a person becomes a citizen by operation of law if such a birth is registered within one year of its occurence or within such longer period as in any particular case was allowed by the Federal Government, at a consulate of the Federation, or if the birth occurred in Singapore, Sabah, Sarawak or Brunei, and was registered with the Federal Government.[141]

(ii) Person born on or after Malaysia Day

The acquisition of citizenship by operation of law by a person born on or after *Malaysia Day*[142] depends upon the status of the parent.

(a) If he or she was born in the Federation outside Singapore, one of his or her parents[143] must at the time[144] have been a citizen, but not a

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136 *Ibid.*, section 1(1) (b).

137 References to a person's father or to his parents, or to one of his parents, also apply to a person who is illegitimate and are to be construed as references to his mother *ibid.*, section 17.

138 *Ibid.*, section 1(1)(c).

139 *Ibid.*

140 *Ibid.*, section 1(1)(d).

141 *Ibid.* section 1(1)(e); the period of registration may be extended by the Federal Government.

142 The provisions relating to persons born after *Malaysia Day* are similar to those relating to persons born before *Merdeka Day.*

143 *See* note 142.

144 Any reference to status or description of the father of a person born after the death of his father, be construed as a reference to the status or description of the father at the time of the father's death, and where that death occurred before and the birth occurs on or after *Merdeka Day*, the status or description which would have been applicable to the father had he died after *Merdeka Day*, shall be deemed to be the status or description applicable to him at the time of his death. This section shall have effect in relation to *Malaysia Day* as it has effect in relation to *Merdeka Day*; section 19, *ibid.*

citizen of Singapore, or a permanent resident[145] of the Federation.[146]

(b) If he or she was born outside the Federation, then the father[147] of such a person must at the time[148] have been a citizen but not a citizen of Singapore, and must satisfy one of the following three conditions:

(i) he was born in the Federation[149] but not Singapore;
(ii) he was in the service of the Federation or a State Government;
(iii) his birth was registered at a consulate of the Federation[150] or, if it occurs in Brunei or a territory prescribed for this purpose by order of the *Yang di-Pertuan Agong*, registered with the Federal Government.

However, any person born in the Federation, but outside Singapore, not being born a citizen[151] of any other country also becomes a citizen of the Federation by operation of law.[152]

A special Clause provided for any person born in Singapore he or she became a citizen of the Federation by operation of law if at the time[153]

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145 A person shall be treated as having been at any time permanently resident in the Federation if, and only if, he was then resident in the Federation and either (a) had permission, granted without limit of time under any Federal law, to reside there or (b) was certified by the Federal Government to be treated for those purposes as a permanent resident in the Federation: Article 19C.

146 A person is not a citizen by virtue of this provision, if at the time of his birth, his father was not a citizen or possessed such immunity from suit and legal process as usually accorded to an envoy of a sovereign power accredited to the *Yang di-Pertuan Agong*, or if his father was then an enemy alien and the birth occurred in a place under the occupation of the enemy. Section 2(1) Part II, *op. cit.*

147 *See* note 142.

148 *See* note 145.

149 For this purpose, "born in the Federation includes having been born before *Malaysia Day* in the territories comprising the Borneo States and Singapore": section 2(2); *ibid.*

150 "Consulate of the Federation" includes any office exercising consular function on behalf of the Federation, section 21, *ibid.*

151 *See* note 147.

152 For the purpose of this provision a person is treated as having at birth any citizenship which he acquires within one year afterwards: section 2(3), *ibid.*

153 "Married woman" refers to a woman whose marriage has been registered in accordance with any law in force in the Federation, including any such law in force before *Merdeka Day*, or under any written law in force before *Malaysia Day* in the territories comprising the Borneo States or originally, Singapore, provided that this clause shall only apply where a woman applies to be registered as a citizen before

of his or her birth one of the parents[154] was a citizen of the Federation[155] but not a citizen of Singapore.

*(b) By registration*

(i) Wives of citizens

Any married woman[156] whose husband is a citizen, but not a citizen of Singapore, is entitled upon making an application to the Federal Government, to be registered as a citizen if the marriage is subsisting and the husband a citizen at the beginning of October 1962, or if she satisfies the Federal Government that she is of good character and has resided[157] in the Federation, outside Singapore[158] throughout[159] the two

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the beginning of September 1965, or such later date as may be fixed by the *Yang di-Pertuan Agong*, and is at the date of the application ordinarily resident in the Borneo States or Singapore: Article 15A.

154 *See* note 138.

155 *See* note 147.

156 *See* note 154.

157 For this purpose residence before *Malaysia Day* in the territories comprising of the Borneo States shall be treated as residence in the Federation, outside Singapore: Article 15(4 ).

158 For this purpose "outside Singapore" shall not have effect in the case of a woman whose husband is a citizen by naturalization under Article 19(2): Article 15(6).

159 (i) In calculating residence in the Federation:

(a) a period of absence from the Federation or less than six months or for the purposes of education of such a kind, in any such country and for such a period as may from time to time be either generally or specially approved by the Minister, or for reasons of health, or on duty in the service of the Federation or of any State, or for any other cause prescribed generally or specifically by the Minister, shall be treated as residence in the Federaton,

(b) a period during which a person was not lawfully resident in the Federation or spent as an inmate of any prison or as a person detained lawfully in custody in any other place other than a mental hospital under the supervision of any written law, of the Federation, or during which a person is allowed to remain temporarily in the Federation under the authority of any pass issued or exemption order made under the provisions of any written law of the Federation relating to immigration, shall not, except in thc case of any period referred to above (i.e. pass or exemption) with the consent of the Minister, be treated as residence in the Federation.

(ii) A person shall be deemed to be resident in the Federation on a particular day if he had been resident in he Federation before that day and that day is included in any period of absence referred to in sub-section (1).

(iii) This section shall apply in relation to any part of the Federation and the territories included in that part before *Malaysia Day* as it applies in relation

years preceding the date of the application and that she intends to do so permanently.[160]

### (ii) Children

The Federal Government may cause any person under the age of twenty-one years of whose parents[161] at least one is (or was at the time of death) a citizen, but not a citizen of Singapore, to be registered as a citizen upon an application made by his parent or guardian.[162] Any person under the age of twenty-one years, who was born before the beginning of October 1962 and whose father is (or was at the time of death) a citizen but not a citizen of Singapore, or was also a citizen at the beginning of October 1962 (if then alive), is entitled upon application made to the Federal Government by his parents[163] or guardian, to be registered as a citizen. Such person must satisfy the Federal Government that he is ordinarily resident in the Federation, outside Singapore, and is of good behaviour. This is a most stringent qualification and restricted to those born before October 1962.

The Federal Govemment may, in such special circumstantees, as it thinks fit, allow any person under the age of twenty-one years to be registered as a citizen.[164]

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to the Federation as a whole, and the reference in sub-section 1(d) to the service of the State shall include, in relation to those territories, the service of any government having jurisdiction therein before *Malaysia Day* or any later day. Sub-section (2) shall here apply as if the territories comprised in the Borneo States or Singapore had at all times formed part of the Federation: section 28 Part II, Second Schedule.

160 (a) A person over eighteen years old must take an oath of allegiance.
(b) No person who has renounced or has been deprived of citizenship under the Constitution of Singapore, or who has renounced or has been deprived of Federal citizenship or citizenship of the Federation of Malaya before *Merdeka Day* under the Federation of Malaya Agreement 1984, shall be registered as citizen.
(c) A person registered as a citizen shall be a citizen Article 18.

161 *See* note 5.

162 *See* note 21.

163 In relation to an adopted child whose adoption has been registered under any written law in force in the Federation including any such law in force before *Merdeka Day*, this Clause shall have efect as if the reference to his father there was substituted a reference to the adopter, and reference to this parent shall he construed accordingly; section 18, Second Schedule.

164 Article 15A. There is no definition of "special circumstances".

(iii) Person born in the Federation before *Merdeka Day*

Any person of or the over age of eighteen years who was born in the Federation, is entitled to be registered as a citizen if such a person has resided in the Federation, outside Singapore, for an aggregate of not less than five years during the seven years immediately before the application,[165] intends to do so permanently, is of good behaviour and possesses an elementary knowledge of the Malay language.[166]

*(c) By naturalization*

The Federal Government may, upon application made by any person of or over twenty-one years of age who is not a citizen, grant a certificate of naturalization to that person if it is satisfied that he has resided in the Federation[167] outside Singapore, for an aggregate of not less that ten years[168] in the twelve years immediately preceding the date of the application for the certificate, and which must include the twelve months preceding that date, and intends if the certificate is granted, to do so permanently. He should also be of good character and possess an adequate knowledge of the Malay language.[169]

The Federal Government may, in such special circumstances as it thinks fit, upon application made by any person of, or over twenty-one years old, who is not a citizen, grant a certificate of naturalization to that person if it is satisfied that he has resided[170] in the Federation[171] for an aggregate of not less than ten years[172] of the twelve years immediately preceding the date of the application for the certificate, which must include the twelve months preceding that date, that he is of good character and has an adequate knowledge of the Malay language.[173]

The Federal Government may, upon application made by any person serving in the armed forces under the jurisdiction of the Armed

165 *See* note 160.
166 Article 16 and 18. Note 20 above.
167 Residence before *Malaysia Day* in the territories comprising the Borneo States shall he treated as residence in the Federation out side Singapore: Article 19(4).
168 *See* note 160.
169 An oath of allegiance is required: *Ibid.*, Article 19(9).
170 Residence before *Malaysia Day* in Singapore shall be treated as residence in the Federation.
171 *See* note 168.
172 *See* note 160.
173 *See* note 170.

Forces Council[174] grant a certificate of naturalization to that person if it is satisfied that he has satisfactorily served for a period of not less than three years in full-time service or for a period of not less than four years in part time service, and that he intends if, the certificate is granted, to reside permanently in the States of Malaya.[175]

### *Acquisition in the Borneo States*

The Borneo States do not have a separate State citizenship. Before the formation of Malaysia, citizenship in those territories was determined by the British Nationality Act 1948. The Constitutions of Sabah and Sarawak, define "citizen" as meaning a citizen of the Federation.[176]

Acquisition of federal citizenship by persons of the Borneo States who are not Singapore citizens.

*(a) By operation of law*

(i) Persons born before *Malaysia Day*

All persons who were ordinarily residents in Sabah, Sarawak or Brunei on *Malaysia Day* are citizens of the Federation by operation of law if immediately before that day they were citizens of the United Kingdom and colonies, and either were born[177] in the territories comprising of Borneo States, or became such citizens by registration in these territories or by or in consequence of naturalization there.[178]

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174 Established under Article 137.

175 The former Article 20 in the 1957 constitution has been repealed. The position is stated as being in effect only until 1964. It permitted an application either while the applicant was serving in the armed forces or within the period of five years, or such longer period as the Federation Government may in any particular case allow, after his discharge. Since the Malaysia Act (No. 26/63) was silent,on this, the presumption exists that 31st January 1964, was the last date of entry into the armed forces from which the right given could arise. Applications will therefore, presumably be entertained under the repealed Article for many years in future.

176 Article 46 (Constitution of Sabah) and Article 44 (Constitution of Sarawak). This status with age and "residence", a term not defined, are prerequisites for membership of the State Legislature (Article 16 in both Constitutions).

177 *See* note 135.

178 For the purpose of deprivation of citizenship, a person who on *Malaysia Day* became a citizen by operation of law because immediately before that day he had the status of a citizen of the United Kingdom and colonies shall be treated as a citizen:
(a) by registration, if he acquired that status by registration;

(ii) Persons born on or after *Malaysia Day*

All provisions applying to the States of Malaya are also applicable to the Borneo States.

*(b) By registration*

Any person of or over the age of eighteen years who was on *Malaysia Day* ordinarily resident in a Borneo State, is entitled upon application made to the Federal Government before September 1971, to be registered as a citizen if the Federal Government is satisfied:

(i) he had resided before *Malaysia Day* in the territories of those states, and after the *Malaysia Day* in the Federation,[179] outside Singapore, for periods which amount in aggregate to not less than seven years in the ten years immediately preceding the date of the application, and which include the twelve months preceding that date;
(ii) he intends to reside permanently in the Federation, outside Singapore;
(iii) he is of good behaviour; and
(iv) except where the application was made before September 1965, the applicant has attained the age of forty-five years at the date of the application, he has sufficient knowledge of the Malay language, or the English language, or any native language in current use in Sarawak.[180]

All other provisions for acquiring citizenship by registration applicable to persons in the States of Malaya, are applicable to those in the Borneo States.

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(b) by naturalization, if he acquired that status by or in consequence of naturalization.

Where a person born before *Malaysia Day* is to be treated as a citizen by registration by virtue of a connection with a Borneo State and he was born in the territories comprising the Borneo States, Article 25 shall apply to him as if he were a citizen by registration under Article 16A or 17. Notwithstanding that a person is, under Article 28A, to be deprived of his citizenship under Article 25 if he was born before *Malaysia Day* in the territories comprising the Borneo states and so is to be treated according to the status he acquired by or in consequence of naturalization in those territories: Article 28A (5).

179 *See* note 160.

180 Article 16A.

*(c) By naturalization*

All provisions for the States of Malaya are applicable to the Borneo States.

### *(c) Acquisition of Federal Citizenship by Persons Who Were Singapore Citizen*

The following provisions of the Malaysian constitution ceased to apply in 1965 when Singapore succeeded from the Federation. Henceforth Singapore has been a foreign country and its citizens designated aliens. Some citizens of Singapore had an option to choose to be Federal citizens who were also Singapore citizens, or Federal citizens who were not also Singapore citizens.

*(a) By operation of law*

All citizens of Singapore were to become citizens of the Federation.[181]

*(b) By enrolment*

(i) The Federal Government was empowered, upon application made by any citizen of Singapore of or over the age of twenty-one years to enrol[182] him as a citizen who was not a citizen of Singapore, if the Federal Government was satisfied that had his application been for the grant under Article 19 of a certificate of naturalization as a citizen (who was not a citizen of Singapore) the conditions of Article 19(1)[183] for the grant of certificate would have been fulfilled.[184]

(ii) Any married woman[185] who was a citizen of Singapore and whose husband was a citizen but not a citizen of Singapore, was entitled upon application made to the Federal Government, to be enrolled as a citizen who was not a citizen of Singapore, if the marriage was subsisting and the husband was a citizen at the beginning of October 1962, or if the Federal Government was satisfied that

181 Article 14(1)(*c*).

182 A citizen enrolled as not being a Singapore citizen, shall not be a Singapore citizen from the day on which he is so enrolled: Article 19A(3).

183 Requirements of residence in the Federation outside Singapore are good character and a knowledge of the Malay language.

184 Article 19A.

185 *See* note 154.

she was of good behaviour, and that she had resided[186] in the Federation, outside Singapore, throughout[187] the two years preceding the date of the application and intended to do so permanently and was of good behaviour; [188]

(iii) The Federal Government was empowered to enroll as a Malaysian citizen any citizen of Singapore under the age of twenty-one years of whose parents one at least was (or was at the time of death) a citizen but not a citizen of Singapore, upon application made to the Federal Government by his parent or guardian. He or she would at the same time cease to be a citizen of Singapore.

(iv) A citizen of Singapore under the age of twenty-one years who was born before October 1962, and whose father was (or was at the time of death) a citizen but not a citizen of Singapore, and also was a citizen at the beginning of that month (if then alive) was entitled upon application made to the Federal Government by his parent or guardian, to be enrolled as a citizen if the Federal Government was satisfied that he was ordinarily resident in the Federation, outside Singapore, and was of good character.

(v) The Federal Government was able, in such special circumstances, as it thought fit, to cause any citizen of Singapore, under the age of twenty-one years, to be enrolled as a citizen who was not henceforth forth a citizen of Singapore.[189]

### *State Citizenship of Singapore*

The Federal Constitution permitted the Singapore Constitution to make provisions with respect to citizenship of Singapore, and further permitted such provisions to be amended by laws passed by the Singapore legislature and approved by Acts of Parliament.[190] Citizenship of Singapore was not severable from citizenship of the Federation.

Any person who was immediately before *Malaysia Day* by virtue of the Singapore Citizenship Ordinance 1957, a citizen of Singapore,[191] was

186 *See* note 155.
187 *See* note 160.
188 *Ibid.*, Clause (2). An oath is not required.
189 *Ibid.*
190 Article 14(2).
191 Citizen of Singapore by birth, descent, registration or naturalization.

able as from *Malaysia Day* to continue, subject to the provisions of the Singapore Constitution to possess that status. Where a person would have been a citizen of Singapore by descent before the coming into operation of the Constitution if his birth has been registered under the 1957 Ordinance, he was able to become a citizen of Singapore by descent if his birth was registered at a consulate of the Federation or with the Government within one year of its occurence or with the permission of the Government later.[192]

There were four ways of acquiring State citizenship under the Singapore Constitution: (1) by birth;[193] (2) by descent; (3) by registration or enrolment; and (4) by naturalization under the provisions of the Federal Constitution.

*(a) By birth*

Every person born[194] in the State[195] after *Malaysia Day* was a citizen by birth unless,

(i) his father[196] not being a citizen of Malaysia, possessed such im-

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192 Article 69 of the Singapore Constitution.

193 A person is treated as having at birth any citizenship which he acquires within one year afterwards. *Ibid.*, Third Schedule, section 14.

194 Any new born child found abandoned in the State of unknown and uncertainable parentage shall, until his parentage is established, be deemed to be a citizen of Singapore by birth and the date of finding shall be taken to be the date of birth of such child: *ibid.*, Third Schedule, section 11.

195 A person born on board a registered aircraft or ship, or on board of an unregistered aircraft or ship of the Government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered, in the country owning the means of transport. *Ibid.*, Third Schedule, section 11.

196 Reference to the status or description of the father or a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the status or description of the father at the time of the death of the father. Where that death occurred before and the birth occurs on or after *Malaysia Day*, the status or description which would have been' applicable to the father had he died after that date shall be deemed to be the status or description applicable to him at the time of death. *Ibid.*, Third Schedule, section 12. References to a person's father or to his parent or to one of his parents shall in relation to a person who is illegitimate be construed as references to his mother and accordingly section 12 shall not apply to such a person. In relation to an adopted child who has been adopted by an order of a court in accordance with the provisions of any law in force in the State or in any other part of the Federation or

munity from suit and legal process as in accordance with an envoy of a sovereign power accredited to the *Yang di-Pertuan Agong*; or

(ii) his father was an enemy alien and the birth occurred in a place then under the occupation of the enemy; or

(iii) neither of his parents was a citizen of Singapore and neither was a permanent resident[197] of the Federation. Paragraph (c) however was not to apply to any person if as a result of its application, he would not have been a citizen of any country.[198]

*(ii) By descent*[199]

(i) A person born outside the Federation after Malaysia Day became a citizen of Singapore by descent if at the time of his birth his father[200] was a citizen of Singapore, provided that his birth was registered at a consulate of the Federation or with the Government within one year of its occurence or with the permission of the Government later.

(ii) A person born in the Federation outside Singapore on or after Malaysia Day became a citizen of Singapore by descent if one at least of his parents was at the time of the birth a citizen of Singapore and he was not born a citizen of Malaysia otherwise than by virtue of this Clause.

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whose adoption has been registered under any written law in force in the Federation, references to a person's father or to his parent or to one of his parents shall be construed as references to the adopter. *Ibid.*, section 15.

197 For this purpose a person shall be treated as having been at any time a permanent resident in the Federation if, but only if, he was then resident in the Federation and either

(a) he then had permission, granted without limit of time under any Federal law, to reside there; or

(b) it is certified, by the Government of the Federation that he is to be treated for the purposes as a permanent resident in the Federation: *ibid.*, section 16.

198 Certificate of the Government of the Federation that a person is or was excluded from the application of this proviso shall be conclusive evidence of the matter certified: *ibid.*, section 16(2).

199 *Ibid.*, Article 55.

200 *See* note 197.

*(c) By registration or enrolment*

A person of or over the age of twenty-one years, being a citizen of Singapore but not of Malaysia was able upon application[201] made to the Government in the prescribed form to be enrolled as a citizen of Singapore.[202] If a person other than a Malaysian was resident in the State on the coming into operation of this Constitution he was able may upon application made to the Government in the prescribed form to be registered as a citizen of Singapore with the consent of the Federal Government[203] if he satisfied the Government that he

(i) was of good character;
(ii) had resided[204] in the State throughout the twelve months immediately preceding the date of his application;
(iii) had during the twelve years immediately preceding the date of his application resided in the State for periods amounting in an aggregate to not less than ten years;
(iv) intended to reside permanently in the State; and
(v) had an elementary knowledge of the national language.[205]

Any woman, whether or not a citizen of Malaysia who was not a citizen of Singapore[206] but who was married to a citizen of Singapore was able upon application[207] made to the Government in the prescribed

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201 *Ibid.*, Third Schedule, section 19.
202 *Ibid.*, Article 56 (Article 19A(3) of Federal Constitution).
203 *Ibid.*, Article 57.
204 In calculating a period of residence in the State
(a) a period of absence from the State of less than six months in the aggregate; and
(b) a period of absence from the State exceeding six months in aggregate for any cause generally or specially approved by the Government; and
(c) a period of absence from the State while the person is in any part of the Federation, may be treated as residence in the State and a person shall be deemed to be resident in the State on a particular day if he had been resident in the State before that day and that day is included in any such period of absence as aforesaid. *Ibid.*, section 17 (*see* section 18).
205 Provided that the Government may exempt an applicant who has attained the age of forty-five years or who is deaf or dumb from compliance with the language requirement (Article 56).
206 *Ibid.*, Article 56(2).
207 *See* note 202.

form, to be registered (or enrolled, if a citizen of Malaysia) as a citizen of Singapore if she satisfied the Government that she had resided[208] continuously in the state for a period of not less than two years immediately preceding the date of the application, that she intended to reside permanently in the state; and that she was of good character.[209]

The Government, was empowered in such special circumstances as it thought fit[210] or upon application in the prescribed form made by his parent or guardian, if it was satisfied that a child under the age of twenty-one years who was not a citizen of Malaysia (or who was a citizen of Malaysia but not of Singapore), was the child of a citizen of Singapore and was residing in the state,[211] cause that child to be registered (or enrolled, if not a citizen of Malaysia) as a citizen of Singapore.

*(d) By naturalization*

The Federal Government, with the concurrence of the Singapore Government, had the power upon application made by any person of or over the age of twenty-one years who was not a citizen, grant a certificate of naturalization to that person if it was satisfied that he had resided in Singapore for an aggregate of not less than ten in the twelve years immediately preceding that date, and intended if the certificate was granted to do so permanently: that he was of good character; and that he had an adequate- knowledge of the Malay language.[212]

If a new territory is admitted to the Federation, after Malaysia Day, Parliament may by law determine what persons are to be citizens by reason of their connection with that territory and the date or dates from which such persons are to be citizens.[213]

### *State Citizenship of the Separate States of Malaya*

Out of the eleven States of Malaya,[214] only four, Johore, Kelantan, Perak and Terengganu, contain any reference in their constitution to a status

208 *See* note 205.
209 *See* note 206.
210 *Ibid.*, Article 58(2).
211 *Ibid.*, Article 58(1).
212 Article 19(1) (a) (ii), (6) and (7) of the Federal Constitution.
213 Article 22.
214 All the State Constitutions require that members of the State Legislative Assembly be Federal citizens and residents of the State, e.g. Constitution of Johor, Part II, Article XVI. No State constitution defines the term "resident".

known as "subject" of the ruler. In none of these constitutions is there any description of how such a status is acquired; but "nationality" laws[215] in all the states having rulers define the status of subject of the ruler and lay down conditions for its acquisition and loss. These laws are still in effect. Malays are subjects if born in the state. An aborigine of any tribe in Malaya is a subject of the ruler if present in the state. As Malacca and Penang did not have any state citizenship, those who came within the terms of the Federation of Malaya Agreement 1948 became citizens of the Federation of Malaya, together with the subjects of any of the ruler.[216] All subjects of the rulers became citizens of the Federation by operation of law, as did any citizens of the United Kingdom and Colonies who had certain designated contacts with Malacca or Penang or with the Federation of Malaya.

### *Termination of Citizenship*

There are two methods of termination of citizenship, renunciation and deprivation.

#### *(a) Renunciation of citizenship*

Any citizen of or over the age of twenty-one years (or for a woman under twenty-one who had married) and of sound mind who is or is about to become a citizen of another country may renounce his citizenship of the Federation by a declaration registered by the Federal Government and shall thereupon cease to be a citizen.[217] A declaration made during any war in which the Federation is engaged shall not be registered except with the approval of the Federal Government.[218]

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215 Others are subjects if born in the State and one parent was born in the Federation of Malaya. *See* note (82).

216 The Federation of Malaya Agreement 1948, recognized operation of law, registration and naturalization as methods of acquiring citizenship of the Federation of Malaya.

217 Article 24, *ibid.* A person who on *Merdeka Day* became a citizen by ration of law as having been a citizen of the Federation immediately before that day shall not be deprived of citizenship under this provision by reason of anything done on or before that day. Article 28(3).

218 Article 23(1) and (3) of the Federal Constitution.

*(b) Deprivation of citizenship on acquisition or exercise of foreign citizenship, etc.*

If the Federal Government is satisfied that any citizen has:

(i) acquired by registration, naturalization or other voluntary and formal act (other than marriage) the citizenship of any country outside the Federation;[219] or

(ii) voluntarily claimed and exercised in a foreign country[220] any rights available to him under the law of that country, being rights accorded exclusively to its citizens,[221]

the Federal government may by order deprive that person of his citizenship. The exercise of a vote in any political election in a place outside the Federation, the application for the issue or renewal of a passport, or the use of a passport issued by the sovereign authority in that place as a travel document, is deemed to voluntarily claim and exercise a right avail able under the law of that place, being a right accorded exclusively to the citizen of that place.[222]

If the Federal Government is satisfied that any woman who is a citizen by registration[223] under Article 15(1) – (i) has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen of the Federation,[224] or (ii) the marriage by virtue of which she was registered has been dissolved, otherwise than by death, within the period of two years beginning with the date of the marriage,[225] the Federal Government may by order deprive her of her citizenship.

The Federal Government may by order deprive of his or her citizenship any person who is a citizen by registration under Article 16A or 17, or by naturalization if satisfied that:

(i) he has shown himself by act or speech to be disloyal or treacher-

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219 Article 24(1) and 26A.

220 "Foreign country" does not include any part of the Commonwealth or the Republic of Ireland. Article 160(2). However, where a provision is in force under the law of any part of the Commonwealth for conferring on citizens of that part of the Commonwealth rights not available to other Commonwealth citizens, that part of the Commonwealth is a foreign country for these purposes. Article 24(3).

221 *Ibid.*, Article 24(2).

222 *Ibid.*, Clause (3A). The effective date of the application of these conditions was 8 October 1963 *(LN 268/63)*.

223 *Ibid.*, Article 28A(3)

224 *Ibid.*, Article 24(4).

225 *Ibid.*, Article 26(2).

ous to the Federation,[226]

(ii) he has during any war in which the Federation is or was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business which to his knowledge was carried on in such manner as to assist an enemy in war;[227]

(iii) he has, within the period of five years beginning from the date of the registration or the grant of the certificate, been sentenced in any country to imprisonment for a term of not less than twelve months or to a fine of not less than $5000 or the equivalent in the currency of the country, and has not received a free pardon in respect of the offence for which he was sentenced;[228]

(iv) he has without the Federal Government approval accepted, served in or performed the duties of any office, post or employment of any foreign country or any political subdivision thereof, or under an agency of such a Government, in any case where an oath, affirmation or declaration of allegiance is required in respect of that office, post or employment;[229]

(v) he has been ordinarily resident in foreign countries[230] for a continuous period of five years[231] and during that period he has neither –

(a) been at any time in the service of the Federation or an international organization of which the Federal Government was a member; nor

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226 *Lim Lian Geok* v *The Minister of Interior, Federation of Malaya*, [1964] 30 *MLJ* 158; Article 25(1)(a).

227 Article 25(1)(*b*) and 26B(2). (*See* note 231 below).

228 *Ibid.*, Clause (1)(*c*) and 26B(2). (*See* note 231 below).

229 *Ibid.*, Clause (1A) and 26B(2). *Ibid.*

230 *Ibid.*, Article 26(1) (a), 26A and 26B(2) (i).

No person shall be deprived of citizenship (Article 25, 26 or 26A) unless the Federal Government is satisfied that it is not conducive to public good that he should continue to be a citizen; and (under Article 25, 26(1) (*b*) or 26(A) that as a result of the deprivation he would not be a citizen of any country. Article 26(B) (2).

Where a person has renounced his citizenship or been deprived under Article 24(1) or 26(1)(*a*), the Federal Government may by order deprive of his citizenship any child of that person under the age of twenty-one years who has been registered as a citizen pursuant to this constitution, and was so registered as being the child of that person or of that person's wife or husband. Article 26A.

231 This Article applies equally in relation to a period of residence in foreign countries beginning before *Merdeka Day* and such period on or after that day. Article 28(3).

(b) registered annually at a consulate of the Federation his intention to retain his citizenship.[232]

(vi) the registration or certificate of naturalization was obtained by means of fraud, false representation or the concealment of by material fact,[233] or was affected or granted by mistake.[234]

Where a person has been enrolled under Article 19A as a citizen who is not a citizen of Singapore, and the Federal Government is satisfied that the enrolment –

(a) was obtained by fraud, false representation or the concealment of any material fact; or
(b) was effected by mistake,

the Federal Government may cancel[235] the enrolment.[236] If the enrolment is cancelled under (a) above, any child of that person who has been enrolled as such a citizen[237] may be liable to have his enrolment by the Federal Government, unless he has attained the age of twenty-one years.[238] A person whose enrolment is cancelled shall revert to his former nationality.[239]

***Termination of State Citizenship***

It is possible both to renounce or to lose involuntarily the status of subject of a ruler.[240] But termination of that status does not terminate that of Federal citizenship.

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232 Article 25(2).
233 *See* note 231.
234 Article 26(1)(*b*), 26B and 26(4): Except for an action of deprivation of citizenship, the registration of a person as a citizen or the grant of a certificate of naturalization to any person would not have been called in question on ground of mistake.
235 Article 27 was applicable to cancellation of enrolment, i.e. right of notice and referral to inquiry.
236 Article 19A(4) (repealed by Act No. 59/66 ref. 9.8.1963).
237 Pursuant to Article 15(2) as applied to by Article 19A (repealed *ibid.*).
238 Article 19A(5) (repealed *ibid.*).
239 Cancellation of his enrolment did not discharge him from liability in respect of anything done or omitted before the cancellation. *See* note (88) above.
240 Article 14(3). The Constitution required the Federation and Singapore Government to notify each other of changes in the status of Singapore citizens. Article 30B.

Down to 1965, if a citizen of Singapore lost the citizenship of Singapore, he lost the Federal citizenship as well. The citizenship of Singapore was not separable from that of Federal citizenship [241] The Singapore Government had the right to deprive of their citizenship only those naturalized (but not those naturalized as citizens of Singapore, under the Federal Constitution)[242] and would not do so unless satisfied that it was not condusive to public good that a person should continue as a citizen of Singapore.[243]

The Singapore Government also had the right to deprive any citizen by registration or naturalization of his citizenship if satisfied that:

(a) the registration or certificate of naturalization
  (i) was obtained by means of fraud, false representation or concealment of any material fact; or
  (ii) was effected or granted by mistake.[244] No person was liable to be deprived of citizenship by the reason stated in (ii) if the Government was satisfied that as a result of the deprivation he would not be a citizen of any country.[245]
(b) that the citizen had within the period of five years after registration or naturalization been sentenced in any country to imprisonment for a term not less than twelve months or to a fine of not less that $5000 or the equivalent in the currency of the country, and had not received a free pardon in respect of the offence for which he was sentenced.[246]

Where a person had been enrolled as a citizen of Singapore[247] and the Singapore Government was satisfied that the enrolment –

(a) was obtained by means of fraud, false representation or concealment of any material fact; or
(b) was effected by mistake, the Government was empowered by or-

241 Article 14(3). The Constitution required the Federation and Singapore Government to notify each other of changes in the status of Singapore citizens. Article 30B.
242 Article 61(5). Constitution of Singapore.
243 *Ibid.*, Article 61(4).
244 *Ibid.*, Article 61(2).
245 *Ibid.*, Article 61(4).
246 *Ibid.*, Article 61(3).
247 Under provisions of Article 56; *ibid.*

der to cancel the enrolment in such an instance reverted the person to his former status.[248]

Where a person had been deprived of his citizenship, or his enrolment as a citizen had been cancelled, the Singapore Government was able by order to deprive of his citizenship, or, as the case may be, cancel the enrolment of any child of that person under the age of twenty one years who had been registered or enrolled as a citizen, and was so registered or enrolled as being the child of that person or of that person's wife or husband. But no child was liable to be deprived of his citizenship unless the Government was satisfied that it was not conducive to the public good that he should continue to be a citizen of any country.[249]

Where a person who had become a citizen of Singapore was liable for things done before the coming into operation of this constitution to be deprived of that status under the Singapore Citizenship Ordinance 1957 then the Government had the right, in exercise of the power delegated by the Government of the Federation, to deprive him of his citizenship, if proceedings for that purpose were begun within a period of two years after Malaysia Day.[250]

## The Rulers

### *Yang di-Pertuan Agong*

The *Yang di-Pertuan Agong is* the Head of State of Malaysia.[251] He takes precedence over all persons in Malaysia, and immediately after him is his consort (The *Raja Permaisuri Agong*) and after them the rulers and governors.

The *Yang di-Pertuan Agong* is a constitutional monarch, and is elected by the Conference of Rulers[252] for a term of five years, but he may resign

248 *Ibid.*, Article 62 and note (240) above.

249 *Ibid.*, Article 65.

250 *Ibid.*, Article 69(4). Where a person was liable to be deprived of citizenship under this provision and proceedings had before the coming into operation of the Singapore Constitution been begun to deprive him of his citizenship of Singapore under the provisions of the Singapore Citizenship Ordinance 1957, those proceedings would have been treated as proceedings to deprive him of citizenship under that Clause and would have been continued as such in accordance with the provisions of the 1957 Ordinance in force immediately before the coming into operation of the Singapore Constitution. Article 69(5).

251 Article 32 (1). The *Yang di-Pertuan Agong is* the symbol of unity in the nation.

252 Article 38(1). For the purposes of any proceedings relating to the election or re-

his office or he may be removed from office by the Conference of Rulers. Should he cease to be a ruler of his own state, he automatically ceases to hold office of the *Yang di-Pertuan Agong*.[253]

The only qualification for the office of *Yang di-Pertuan Agong* is that he is a ruler of one of the states. However he may not attain to this office if he is a minor, or he does not desire to be elected, or he is found to be unsuitable by five members of the Conference of Rulers, for any reason whatsoever.[254] For the first election a list was constituted of states in order of the length of time the incumbent rulers had occupied their thrones.[255] This principle of 'seniority' determines who is entitled to be elected as the next *Yang di-Pertuan Agong* since the first election the procedure has been that after each election the list is reconstituted with those states which preceded on the earlier list the state whose ruler was elected being transferred, in order, to the end of the list, while the state whose ruler, was elected is for the time being omitted from the list.[256]

After his election by the Conference of Rulers, the *Yang di-Pertuan Agong* announces his election and assumption of office by a proclamation which is published in the *Federal Gazette*. He subscribes to the oath of office of the *Yang di-Pertuan Agong* before the Conference of Rulers and in the presence of the Lord President of the Federal Court.[257] His formal installation follows at some convenient time later, by an elaborate and colourful ceremony that accords with the Malay traditions of installation of state rulers.

### *Timbalan Yang di-Pertuan Agong*

The Deputy *Yang di-Pertuan Agong*, known as *Timbalan Yang di-Pertuan Agong*, is also elected by Conference of Rulers for a term of five years;

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moval of the *Yang di-Pertuan Agong* or the election of the *Timbalan Yang di-Pertuan Agong* or relating solely to the privileges, position, honours and dignities of Their Royal Highnesses or to religious acts, observances or ceremonies the Governors are excluded from the meetings of the Conference: Fifth Schedule, Section 7.

253 Article 32(3) and Third Schedule.

254 *Ibid.* Third Schedule, section I (1): If the Conference resolves that he is unsuitable by reason of infirmity of mind or body or for any other cause to exercise the functions of *Yang di-Pertuan Agong*.

255 *Ibid.* Section 4. In the first election of the *Yang di-Pertuan Agong* the first two rulers in the list, the Sultans of Johore and of Pahang, indicated their desire not to be elected, so the *Yang Dipertuan Besar*, the third in the list was elected *Yang di-Pertuan Agong*.

256 *Ibid.*, section 4(2) (*b*).

257 Article 37 and Fourth Schedule.

and must have the qualification to be elected *Yang di-Pertuan Agong*. A ruler may decline election as *Timbalan;* and this does not disqualify him from being considered for the office of *Yang di-Pertuan Agong* at the next election. The *Timbalan* is normally the next person in line for election to *Yang di-Pertuan Agong*, for the Conference of Rulers in the first instance, must offer the office of *Timbalan Yang di-Pertuan Agong* to the Ruler who, on the death of the *Yang di-Pertuan Agong* last elected, would be first entitled to be offered the office of *Yang di-Pertuan Agong*.[258] In the interim period before the vacant office of *Yang di-Pertuan Agong* is filled up or during any period when *Yang di-Pertuan Agong* is unable to carry out his functions owing to illness, absence from the Federation for more than fifteen days or for any other reason, the *Timbalan Yang di-Pertuan Agong* exercises the functions and has the privileges of the *Yang di-Pertuan Agong*.[259] Should the *Timbalan* fail to be elected *Yang di-Pertuan Agong*, his term of office ceases on the filling of the latter office; and a new election for *Timbalan Yang di-Pertuan Agong* ensues.[260]

The Constitution permits that legislation may be made to provide that on occasions when the *Timbalan Yang di-Pertuan Agong* should act for the *Yang di-Pertuan Agong* but is unable to do so because of illness or absence, or if the office of *Timbalan* is unfilled, then the ruler of the state next in order on list who is able and willing should exercise the sovereign function.[261] This automatic appointment exist until the time of the next meeting of the Conference of Rulers, which will appoint a ruler to exercise the sovereign functions. Should the new appointee be other than the one on whom the functions automatically fall, the new appointment does not prejudice the validity of any of the official acts of the interim incumbent. A ruler exercising the sovereign functions ceases to do so upon the resumption or assumption of office by either a *Yang di-Pertuan Agong* or *Timbalan Yang di-Pertuan Agong*.

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258 Third Schedule, Part 11, section 7.

259 Article 33(1).

260 *Ibid.*, Clause (3).

261 *Ibid.*, Clause (5) and the *Yang di-Pertuan Agong (Exercise of Function) Ordinance* 1957. The Constitution does not provide for the removal of *Timbalan Yang di-Pertuan Agong* as the Conference of Rulers has full control over whether or not he succeeds when there is a vacancy in the highest office; and his substitute service for the *Yang di-Pertuan Agong* is unlikely to be of long duration. Groves, H.E. 1964. *The Constitution of Malaysia.* Singapore, pp. 40 – 41.

### *Disabilities of the Yang di-Pertuan Agong*

When exercising the functions of the *Yang di-Pertuan Agong*, a ruler may not exercise the functions of ruler of his state except those as head of the Muslim religion of that state.[262] He may not hold office of profit or actively engage in any commercial enterprise.[263] He may not receive any emolument of any kind payable to him as ruler of his state, and may not be absent from the Federation for more than fifteen days, except on a state visit to another country, without the consent of the Conference of Rulers. His consort may not hold any office under either the Federation or any state. All the disabilities of the *Yang di-Pertuan Agong* apply to anyone acting for him, except the disabilities that apply to the consort.

The Constitution permits the *Yang di-Pertuan Agong* to retain two important powers conferred by the State Constitution; to amend his state Constitution and to appoint a Regent or a member of the Council of Regency in the case of a vacancy caused by death or incapacity in either of those office.[264]

Parliament provides a Givil List[265] for the *Yang di-Pertuan Agong*, which includes an annuity to be paid to the *Raja Permaisuri Agong*. The Civil List is charged on the Consolidated Fund and may not be diminished during the *Yang di-Pertuan Agong's* period of office. The *Timbalan Yang di-Pertuan Agong* or other ruler authorized to exercise the functions of *Yang di-Pertuan Agong*,[266] while performing these functions, receives a monthly payment, allowances and certain privileges, provided he is not receiving the emolument due to him as ruler of his state.[267]

The *Yang di-Pertuan Agong*, except when the Constitution expressly provides, acts in accordance with the advice of the Cabinet;[268] but there are some important functions which are discretionary. The most important of these are the appointment of a Prime Minister and the withold-

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262 Article 34(1). Some form of Regency in his state upon the election of a ruler as *Yang di-Pertuan Agong* is set up, and the Regent or Council of Regency carries out his functions in the ruler's absence.

263 *Ibid.*, Clauses (2) and (3). This does preclude him from being a member of a Board of Directors of a corporation, but not from holding shares in that corporation.

264 *Ibid.*, Clause (8).

265 Article 35.

266 *See* note 260.

267 *Ibid.*, Clause (2), and the *Timbalan Yang di-Pertuan Agong* (Remuneration) *Ordinance 1958*.

268 Article 40(1).

ing of consent to a request for a dissolution of Parliament.[269] The *Yang di-Pertuan Agong* also has the right to receive, at his request, any information concerning the Government of the Federation which is available to the Cabinet.[270]

The *Yang di-Pertuan Agong* is a constituent element of Parliament,[271] and bills become law upon being assented to by him.[272] His assent is signified by affixing to the bill the Public Seal, which is kept in his custody.[273] He summons and prorogues Parliament[274] and has the right to address both Houses of Parliament separately or jointly.[275] He may remove the disability of persons who have become disqualified for membership of Parliament.[276]

The *Yang di-Pertuan Agong* is charged with the responsibility of causing to be laid before the House of Representatives the Annual Financial Statement[277] and the reports of the Auditor General,[278] and the annual reports of the constitutionally created commissions before both Houses of Parliament.[279]

He appoints members of the Cabinet on the recommendation of the Prime Minister and also the appointed members of the Senate.[280]

### *Conference of Rulers*

A unique institution among the governments of the world is that of the Conference of Rulers *(Majlis Raja-Raja)*.[281] It was first constituted in 1948[282] and is the most august body in the country, providing a link bet-

269 *Ibid.*, Clause (2).
270 *See* note 269.
271 Article 44.
272 Article 68.
273 Article 36.
274 Article 55.
275 Article 60.
276 Article 48(1). For failure to lodge a return of election expenses or for having been convicted by a court for which the sentence exceeds one year imprisonment or $2000 fine, if a free pardon has not been receive.
277 Article 99. A Statement of estimated receipts and expenditure of the Federation in respect of each financial year.
278 Article 107.
279 Article 146.
280 Article 43 and 45.
281 *See* note 253.
282 It was first constituted by the Federation of Malaya Agreement 1948. M. Suftian, 1976. *An Introduction to the Constitution of Malaysia*. Kuala Lumpur: Government Printer, p. 45.

ween the Federal Government and the State Government at the highest level. It is a body consisting of the heads of states of the component states in the Federation, that is the nine Malay rulers and the five governors of Malacca, Penang, Sabah, Sarawak and Singapore.

The most important powers of the Conference of Rulers are those of electing and if it becomes necessary removing of the *Yang di-Pertuan Agong* and the *Timbalan Yang di-Pertuan Agong*. Other functions of the Conference include agreeing or disagreeing to the extension of any religious acts and observances of ceremonies to the Federation as a whole.[283] In these matters the rulers act on their discretion.[284] The rulers also possess an absolute and discretionary veto over any law directly affecting their privileges, position, honours and dignities.[285] Meetings on these matters are confined only to the rulers, to the exclusion of the five governors.

The functions in which all heads of state participate include consultation over the appointment of the Auditor-General, members of the Public Services Commission, members of the Election Commission, and members of the Railway Commission.

In considering these appointments the Conference acts on its discretion, but the advice of the Conference is not binding upon the appointing authority. The conference also must be consulted on the appointment of the Lord President of the Federal Court, the Chief Justices of the High Courts and judges of both Federal and High Courts. It makes one national appointment: a member of the Armed Forces Council representing Their Royal Highnesses.[286]

The Conference as a whole possesses the power of veto over certain types of legislation; no law can be enacted altering the boundaries of a state except with the consent of the state concerned and of the Conference of Rulers[287] and as to such consent the Conference acts on its discretion. It has also a veto over any law which provides for a ruler to substitute for the *Timbalan Yang di-Pertuan Agong* in instances where the *Timbalan* is unable to perform the duties of the *Yang di-Pertuan Agong*.[288] No amend-

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283 Article 33(7). This provision does not extend to Sabah and Sarawak (Article 161E).
284 *Ibid.*, Clause (2).
285 *Ibid.*, Clause (4).
286 Article 138 (3) (*b*).
287 Article 2.
288 *See* Note 262.

ment can be made to the constitutional provision granting special rights and privileges to the Malays and the legitimate interests of other communities except with the consent of the Conference of Rulers. Its consent is required to any law making amendment to Article 38 (relating to the Conference of Rulers itself); Article 70 (relating to precedence of Rulers and Governors); Article 71 (relating to the Federal guarantee of State constitutions); and Article 153 (relating Malay rights and privileges). These powers, however, are suspended during a period of emergency.[289]

The Conference may deliberate on questions of national policy or any other matter it thinks fit. When deliberating on matters of national policy, the *Yang di-Pertuan Agong* is accompanied by the Prime Minister and the other rulers and governors by their *Menteri Besar* or Chief Ministers. In these deliberations the *Yang di-Pertuan Agong* acts in accordance with the advice of the Cabinet and the rulers and governors in accordance with the advice of their respective State Executive Council.[290] It is apparent that the Constitution does not contemplate independence of action or expression by the Conference of Rulers. Moreover, the State Constitutions require the rulers and governors to act on the advice of the Executive Councils unless otherwise stipulated.[291]

The majority of the members of the Conference constitutes a quorum, and the Conference determines its own procedure unless otherwise prescribed by the Constitution.[292] Where the Conference is not unanimous, decisions are made by a majority of members voting, except that a resolution 'by secret ballot' passing over a member for the office of *Yang di-Pertuan Agong*, must be passed by at least five affirmative votes, as does a resolution for the removal of the *Yang di-Pertuan Agong*.[293]

The Keeper of the Rulers' Seal[294] convenes a meeting of the Conference at any time upon the direction of the *Yang di-Pertuan Agong* and no fewer than three rulers. The Keeper is also the secretary to the Conference and he attends meetings and keeps minutes of the meetings. He is required by the Constitution to convene a meeting not later than four

289 Article 150.
290 Article 38(3).
291 For instance, the Constitution of Johore, Article II.
292 Fifth Schedule, section 5.
293 Third Schedule, section 1(2).
294 He is either a senior civil servant or a retired officer, who holds office at the pleasure of the Conference: Fifth Schedule, sections 3 and 4.

weeks before the expiry of the term of the *Yang di-Pertuan Agong* or whenever a vacancy occurs in that office or the office of the *Timbalan Yang di-Pertuan Agong*.[295] He need not convene a meeting in respect of an appointment requiring the approval of the Conference where the majority of the members have indicated to him in writing that they favour the approval.

The relationship of the *Yang di-Pertuan Agong* and the Conference of Rulers in the Constitution is that the former is not superior to but is a part of, if not subordinate to, the latter as a whole; this is from the provision of the Constitution requiring the consent of the Conference should the *Yang di-Pertuan Agong* be absent from the Federation for longer than fifteen days otherwise on a State visit to another country.[296]

The functions of the Conference of Rulers have been enlarged to include the appointing of members of the Special Court under Article 183 and the granting of pardons, reprieves and respites, and the suspending or commuting of sentences under Article 42(2). The Conference of Rulers may exercise their discretionary power in these matters.[297]

## The Executive Authority of Federation

The constitution vests the executive authority of the Federation in the *Yang di-Pertuan Agong*. This power is exercised either by him personally, or by the Cabinet or any minister authorized by the Cabinet, although Parliament may from time to time confer executive functions on other persons.[298]

The *Yang di-Pertuan Agong* appoints or dismisses ministers and assistant ministers on the advice of the Prime Minister; the Attorney-General; the High Courts; and members of the following commissions: Railway Service, Public Services, Election, Police Force; and some members of the Judicial and Legal Service Commission and of the Armed Forces Council; but all, these appointments are made on ministerial advice. This list may include departmental heads or deputy departmental heads, the Commissioner of Police, Deputy Commissioner of Police and other of similar status. Again appointments to specially designated posts in one of the services listed in Part X of the Constitution; the armed forces, judicial and legal service, ge-

295 *Ibid.*, section 6.
296 Article 34(5).
297 Clause (6)(*e*) and (*f*) of Article 38.
298 Article 39.

neral public services, are made by him on the recommendation of the commission concerned, although he must also consider the advice of the Prime Minister and may refer once the recommendation back to the commission.[299] He appoints an advisory board[300] to consider representations made by individuals held under the laws of detention without trial and receives its recommendation. His decision in these cases is final and without appeal.[301]

He has the responsibility of safeguarding the special position of the Malays and the legitimate interests of other communities.[302] In pursuance of this he is authorized to ensure that the appropriate commission or authority reserves for Malays a proportion as he may deem reasonable of positions in the public service, scholarships and other similar educational or training privileges or special facilities given and accorded by the Federal Government.[303]

He is above the law and not liable to any proceedings whatsoever in any court in Malaysia, and the Court has held[304] that this mean that he is not liable in his personal capacity but he is liable in his official capacity.

Until 1984 cases from Federal Court going on appeal to the Judicial Committee of the Privy Council were made through him, and he made such orders as were necessary to effect the recommendations of the Privy Council.[305]

He is the Supreme Commander of the armed forces of the Federation[306] and grants pardons, reprieves and respites in respect of all offences tried by court-martial.[307] He may initiate a state of emergency by issuing a Proclamation of Emergency under Article 150 and if Parliament is not sitting, the Cabinet may legislate through ordinances promulgated by the *Yang di-Pertuan Agong*.[308]

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299 Article 140(4) and (5) and 144(3). These designated posts are made by *Federal Notification* LN 397/58.

300 Article 151.

301 (1977) 2 *MLJ* p. 109.

302 Article 153.

303 The provisions do not extend to the Borneo States (Article 161A) did not extend to Singapore (Article 161 G) during its membership of the Federation.

304 *Stephen Kalong Ningkan* v *Tun Abang Hj Openg and Tuan Sli (No. 2)* [1967] 1 *MLJ* 146.

305 Article 131 was repealed by the Constitutional (Amendment) Act 1983, Act A566, with effect from 1.1.1985 (PU(B) 589/84).

306 Article 41. He acts upon the advice of the Armed Forced Council established under Article 137.

307 Article 42.

308 Article 150(2).

He is the head of the Muslim religion in his own state[309] and of the States of Malacca, Penang, Sabah and Sarawak. He may act on behalf of other rulers in respect of acts, observances or ceremonies which they agree should extend to the country as a whole.[310]

## Parliament

Parliament in Malaysia is closely modelled on that of India; it is bicameral. The two Houses are: the Senate (or *Dewan Negara*) and the House of Representatives (or *Dewan Rakyat*).[311] Parliament is the supreme legislative authority in the Federation. Sovereignty is rested in the *Yang di-Pertuan Agong* and Parliament; that is a bill must be passed by an absolute majority of both Houses of Parliament and receive the assent of the *Yang di-Pertuan Agong* before it may become law.

The *Yang di-Pertuan Agong* may address either Houses of Parliament of both Houses jointly but in practice he only addresses both Houses at the opening of each Parliamentary session. He summons Parliament from time to time but he must not allow more than six months to elapse between the last sitting in one session and the date appointed for the first meeting in the next session. He may prorogue Parliament, unless sooner dissolved. Parliament continues for a period of five years from the date of its first meeting, and at the end of five years it stands automatically dissolved. In the exercise of these functions the *Yang di-Pertuan Agong* acts on the advice of the Cabinet save the withholding of consent to a request for the dissolution of Parliament in which he acts on his own discretion.[312]

## (Dewan Negara) The Senate

The Upper House consists of sixty-nine members: two elected from each State of the Federation and twenty-two appointed by the *Yang di-Pertuan Agong*. The elected members are chosen by indirect election. Irrespective of size or population, the legislative of each State elects two persons. This is in order to give equal representation to state interests in Parliament.[313] The remaining twenty-two members are appointed by the *Yang di-Pertuan*

309 *See* note 265.
310 Article 3.
311 Article 44.
312 *See* note 270.
313 Article 45.

*Agong* on the advice of the Cabinet, from among persons who have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social services, or are representatives of social minorities or capable of representing the interest of the aborigines. However, Parliament may by law vary the number of either the elected or appointed members.

The basic qualifications for all Senators are that they should be Malaysian citizens, reside in the State they represent and be over thirty years of age.[314] They are subject to the same disqualifications for membership of Parliament under Article 48 as member of the *Dewan Rakyat*. The Senate, however, determines exclusively question as to the disqualification of its own members.[315]

The Senate elects a President and a Deputy President from among its own members. The President or his Deputy presides over meetings of the Senate; when the Senate resolves itself into a committee of the whole House, he takes the chair as chairman. No term of office is prescribed for the President, and election being required whenever the office becomes vacant. Like a minister, the President cannot be a member of a State Legislative Assembly. He is obliged to resign from office of the latter before he may carry out the functions of his office.[316] The powers of the President as to rules of order or decorum are similar to those of the Speaker of the *Dewan Rakyat*. Like the Speaker, the President has only a casting vote.

### Dewan Rakyat *(House of Representatives)*

The Lower House consists of one hundred and ninety-two elected members who are elected in different ways. In Peninsula Malaysia the principle of universal adult suffrage applies, but constituency boundaries are drawn in such a way that votes of the "rural" electorate may carry twice the votes of the counterparts "urban".[317] In Singapore and the Borneo States indirect election by members of the State Legislative Assemblies was permitted for a short period during the early years of the Federation.[318]

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314 Article 47.
315 Article 53.
316 Article 56(4).
317 Thirteenth Schedule, section 2.
318 Section 94 and 95 of Malaysia Act 1963, No. 26.

The basic qualifications for all members of the *Dewan Rakyat* are similar to those of members of the Senate, except that the minimum age is twenty-one years.[319] Like the Senate, the *Dewan Rakyat* determines exclusively questions as to the disqualification of its members.

The Constitution permits election to the *Dewan Rakyat* to be called in question by means of an election petition presented to the judge of the High Court having jurisdiction where the election was held.[320] Thus the courts determine the right of Representative upon challenge, to take his seat. But the House itself determines his continued right to retain it. Elections within sixty days are required to fill casual vacancies of either House however caused.[321]

Of the total number of representatives elected, one hundred and four are from the States of Malaya, sixteen from Sabah, twenty-four from Sarawak and until 1965, fifteen from Singapore. These figures are not proportionate to the relative populations of these areas but have resulted from the hard political bargaining that preceded the formation of Malaysia and take into account *inter alia*, the large land area of the Borneo States. The greater legislative and governmental powers of the State of Singapore were at the time an important consideration in determining its allocation.[322]

The *Dewan Rakyat* elects a Speaker and a Deputy Speaker from among its own members at the first meeting after a general election. Should an encumbent Speaker or his Deputy cease to be a member of the House, he must vacate his office as Speaker or Deputy Speaker. Either of them presides at meeting of the House; but when it resolves itself into committee of the whole House, one or other takes the chair as chairman. This rule applies to the Supply Committee. Like the President of the Senate, the Speaker cannot be a member of a State Legislative Assembly, and he is obliged to resign from the latter before he may exercise the functions of his office.[323]

The powers of the Speaker are large. He may alter a member's question or disallow it and he determines whether a minister can refuse to answer a question.[324] He may permit a question to be asked without

319 *Ibid.*
320 Article 118.
321 Article 54.
322 Article 46. H.E. Groves, *The Constitution of Malaya op. cit.*, p. 66.
323 *Ibid.*, Clause (4).
324 Standing Orders of House of Representative, No. 23.

notice if urgent, allow supplementary questions, permit or forbid personal explanation, disallow repetitious speech making, and order the withdrawal for the remainder of the day's sitting of a grossly disorderly member.[325] The Speaker may also adjourn or suspend a sitting in the event of grave disorder.[326] In debate, decisions of the Speaker on points of order cannot be reviewed except on a substantive motion moved for that purpose. Like the President of the Senate, the Speaker has only a casting vote. An important power of the Speaker is that the refusing leave for an adjournment.

Each House regulates its own procedure and each has its own standing orders. Each House may act notwithstanding any vacancies in its membership. Members who are absent are not allowed to vote. Decisions of each House are taken either by a voice vote or by a division. A division is ordered when a member requests it and is supported by at least fifteen members in the *Dewan Rakyat* or eight members in the Senate. The Speaker or President may call for a division in cases where a specified majority of members is necessary, such as a bill amending the Constitution.

## Legislative Procedure

Bills become law by being passed by both Houses of Parliament and assented to by the *Yang di-Pertuan Agong*.[327] Any bill may originate from either House except a money bill[328] which can only be introduced or moved by a minister and only in the *Dewan Rakyat*. The decision as to whether or

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325 *Ibid.*, No. 22, 24 and 25.

326 *Ibid.*, No. 44. He may name a member guilty of misconduct of disregarding the authority of the Chair or persistently and will fully obstructing the business of the House by abusing its rules. Provided that the offence is committed in the House, a motion will be proposed and seconded by two ministers present that the person be suspended from the House until the end of the meeting. Should the member be removed by force, he shall be suspended for the remainder of the session.

327 Article 66(1).

328 A money bill is a bill which the Speaker certifies contains provisions dealing with all or any of the following:
(a) the matters mentioned in Article 67(1) or the regulation or any tax;
(b) the reduction of any such amount as is mentioned in Article 67(1)(*d*); and
(c) any matter incidental to those matter or any of them.
A bill concerned only with fines or other pecuniary penalties or with licence or service fees, or for the imposition of alteration or regulation of any tax or rate by local authority or body for local purposes, is not a money bill.

not a bill is a money bill is made by the Minister charged with the responsibility for finance, whose declaration on this matter is unchallengeable.[329]

In general the procedure of passing bills is the same in both Houses. A minister after notice of at least one day presents a bill. The title of the bill is then read by the Clerk of the House and this constitutes the First Reading.[330] It is ordered to be printed and will stand for the second reading at the next or subsequent sitting of the House. In both the *Dewan Rakyat* and the Senate the first and second readings can be taken at the same sitting, i.e. on the same day except in the case of a Supply bill. The minister must give an oral notice when he wishes to move the second reading.

The second reading is the most important stage. It is here that the general principles of the bill are debated. A bill cannot be read a second time until it has been printed and circulated to all members. When the debate on the second reading has been completed, the bill stands committed[331] to a committee of the whole House unless the House on a motion commits it to a Select Committee. In the committee of the whole House the details of the bill are discussed, in definite order, the Clauses being considered first in the order in which they appear in the bill; then the schedules and finally the preamble. When the discussion in the committee has been completed, on a motion it is reported to the House. The committee stage is then over and the House resumes normal sitting.[332]

When the House resumes, the minister reports to the House that the bill has been considered and agreed with or without amendment in committee, and moves that the bill be read for the third time and be passed. When the motion has been agreed to, the bill is accordingly put to the vote.

If passed, the bill is then submitted to the Senate which follows a similar procedure to that of the *Dewan Rakyat*. If the bill is passed by the

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329 Article 67(1). In the original provision in the 1957 Constitution, the desicion was made by the Speaker at his discretion, but now he is obliged to follow the judgement of the Minister.

330 This reading is merely a formality and may be done even if the bill has not been prepared. M. Suffian, *An Introduction to the Constitution of Malaysia, op. cit.*, p. 78.

331 There is no necessity for a motion: the House automatically resolves into a committee of the whole House.

332 To motion to commit to a Select Committee does not require notice, but it must be made immediately after the bill is read for a second time: *Standing Order of Dewan Rakyat*, No. 54.

Senate, it is then submitted to the *Yang di-Pertuan Agong* who assents whereupon it becomes law. The *Yang di-Pertuan Agong* assents by fixing the Public Seal to the bill and thereafter it is published as law in the *Government Gazette*. It normally comes into force when published, unless the date of its commencement is stated in the law itself.

A money Bill may become law on being passed only by the *Dewan Rakyat* and assented to by the *Yang di-Pertuan Agong*. When it is passed by the *Dewan Rakyat* it must be sent to the Senate at least one month before the end of the session. If it is not passed without amendment within one month, it may be presented to the *Yang di-Pertuan Aggong* for his assent unless the *Dewan Rakyat* otherwise directs.[333] When it is presented to the *Yang di-Pertuan Agong*, it must bear a certificate of the Speaker, which is a conclusive evidence that the procedure stipulated in Article 68 has been complied with.

If a Bill other than a money Bill, passed by the *Dewan Rakyat* and sent to the Senate at least one month before the end of the session, is not passed by the Senate or is passed with amendment not acceptable to the *Dewan Rakyat*, and in the following session (whether of the same Parliament or not) but not earlier than one year after it was originally passed by the Lower House, the same Bill is passed again by the *Dewan Rakyat* and sent to the Senate at least one month before the end of the session and is still not passed by the Senate or is passed with amendment not acceptable to the lower House, the Bill may by pass the Senate and be presented to the *Yang di-Pertuan Agong*, for his assent.[334]

However any Bill amending the Constitution and requiring the votes of not less than two-thirds of the total number of members of the *Dewan Rakyat* and of the Senate may not become law in the manner provided by Article 68.

The Senate has only delaying power, of one month for a money Bill and of one year for other Bills, but it has a full veto over some constitutional amendments.

The validity of any proceedings in either House of Parliament or any committee of it cannot be questioned in any court.[335] No person is liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in any proceedings of either House

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333 Article 68(2).

334 *Ibid.*

335 Article 63, *Abdul Rahman Talib* v *D.R. Seenivasagam and Anor.* [1966] 2 *MLJ*, 66; Parliament (Privileges and Powers) Ordinance 1952.

or any of its committees, nor is he liable for anything published by or under the authority of either House of Parliament.

Parliament may by law provide for the remuneration of the President and Deputy President of the Senate and the Speaker and Deputy Speaker of the *Dewan Rakyat*, which sum is charged on the Consolidated Fund, and for the remuneration of members of both Houses of Parliament.[336]

The 1994 Amendments have made inroads into the legislative powers of the *Yang di-Pertuan Agong* and provided further limitations thereto. Clause (4) to Article 66 provides that when a Bill is presented to the *Yang di-Pertuan Agong*, he must give his assent to the Bill by affixing the Public Seal thereto within thirty days after the Bill has been presented to him.[337] If a Bill is not assented to by the *Yang di-Pertuan Agong* within the time specified in Clause (4) it becomes law at the expiration of the time specified in that Clause in the like manner as if he has assented thereto.[338]

## Privileges of Parliament and the State Legislative Assembly

These privileges have been enlarged in that in any proceedings in either House of Parliament or any committee thereof, the member taking part in the proceedings in respect of anything said by him of the Yang *di-Pertuan Agong* or the Ruler of a State except where he advo-

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336 Article 64.

337 Clause (4) of Article 66 of the Constitution, vide the Constitution (Amendment) Act 1994, Act A885. In the original Clause (4), *Yang di-Pertuan Agong* has to within 30 days after a money Bill is presented to him, assent to the Bill by affixing the Public Seal thereto. In a case of a non-money Bill, the *Yang di-Pertuan Agong* may return the Bill to the House in which it originated with reasons for his objections to the Bill or any provisions of the Bill. *See* Constitutional (Amendment) Act 1984, Act A584, w.e.f. 20th January 1984.

338 Clause (4A), *ibid.*, replacing the original Clauses (4A) and (4B) which provide that if a Bill is returned to the House in which it originated, the House will as soon as possible proceed to reconsider it. If after such reconsideration the Bill is passed by votes of not less than two-third of the total number of the members of that House in respect of a Bill for making any amendment to the Constitution other than an amendment excepted pursuant to Article 159, and by a simple majority in respect of any other Bill, with or without amendment, then the Bill has to be sent to the other House where it is likewise reconsidered and if similarly approved by members of the House, the Bill must again be presented to the *Yang di-Pertuan Agong* for assent. The *Yang di-Pertuan Agong* has to give assent to the Bill within thirty days after the Bill is presented to him, *ibid.*

cates the abolition of the constitutional position of the *Yang di-Pertuan Agong* as the Supreme Head of the Federation or the Ruler of a State, as the case may be, he is not liable.[339] The same privileges apply mutatis mutandis to a member of a State Legislative Assembly taking part in proceedings in respect of anything said by him of the Ruler of the State except where he advocates the abolition of the constitutional position of the Ruler of the State, he is liable.[340]

## The Executive

The executive authority of the Federation is vested in the *Yang di-Pertuan Agong* and exercisable, subject to the provisions of any Federal law and of the Second Schedule of the Constitution, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons. The *Yang di-Pertuan Agong* normally acts on the advice of the Cabinet.

## The Cabinet

The Cabinet is appointed by the *Yang di-Pertuan Agong*, and its purpose is to advise His Majesty in the carrying out of his functions.[341] Like in England, in the Cabinet reside the major part of the real power of the nation. It assumes responsibility for the formulation, initiation and direction of legislation and exercises nearly all the executive power of the government as provided for in the Constitution. Cabinet members are the heads of the Ministries of the Government. The departments and subjects under the control of each Ministry are designated by law,[342] but the Minister charged with the responsibility of defence is made the chairman of the Armed Forces Council, and the Minister charged with the responsibility for Home Affairs is made the chairman of the Police Force Commission. Ministerial control over government departments is one of the

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339 Clause (5) of Article 63.

340 Clause (5) of Article 72, there is no provision made in the case of a member of a State Legislative Assembly, taking part in proceedings in respect of anything said by him of the *Yang di-Pertuan Agong*, presumably he is not liable except where he advocates the abolition of the constitutional position of the *Yang di-Pertuan Agong* as the Supreme Head of the Federation.

341 Article 43(1).

342 Government Proceedings Ordinance 1956; section 21.

means by which Parliament ultimately controls the departments. The listing of the statutory body under an order made by a Ministers of the Federal Government[343] does not imply that the Minister has full responsibility for the statutory body. The degree of his responsibility depends upon the terms of the legislation creating that body; questions directed to the minister in Parliament concerning such a body must normally be limited to those aspects of the functioning of the body over which he does exercise control.

Many of the functions of the ministers are performed through others to whom the law permits a delegation of power.[344] Delegation is effected by *gazette notification*. All contracts made in the Federation are signed by a minister or a public officer duly authorized in writing by the minister.[345] Normally suits against the Government or by the Government are in the name of the Government; but the Minister of Finance is a body corporate under the name of "Minister of Finance", and he may sue or be sued in his name.[346]

The Cabinet is collectively responsible to Parliament. Ministerial responsibility is an important convention of the parliamentary system of government. This convention has been accepted at least in form as part of the parliamentary system of the Government of Malaysia. Each member of the Cabinet is not only responsible for decisions made by his ministry but is also responsible for decisions involving other ministries.

The Constitution permits a member of Parliament to be simultaneously a member of a State Legislative Assembly. But one who is appointed a minister, or the deputy minister, must resign from that state Assembly before assuming office.[347]

Every minister or the deputy minister has a right to take part in the proceedings of the House other than that to which he belongs. This right does not include that of voting in the other House or in its committees, though he may be appointed as a non-voting member of a committee. The number of ministries or Cabinet members is not fixed by the Constitution.

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343 Federal Government (Transfer of Functions) Ordinance 1951.
344 Delegation of Powers Ordinance 1958, as amended by the Assistant Minister Act 1960, section 2.
345 Governments Contract ordinance 1949 as amended by the Government Contracts (Amendment) Ordinance 1953.
346 Minister of Finance (Incorporation) Ordinance 1957.
347 Article 43(8).

The Cabinet is formed by the *Yang di-Pertuan Agong* first appointing at his discretion a member of Parliament to be a Prime Minister, who in his judgement is likely to command the confidence of the majority members of that House.[348] The only qualification is that he must be a citizen, but not a citizen by naturalization or registration under Article 17.[349]

The Prime Minister then selects the other members of the Cabinet from among members of either House, and the *Yang di-Pertuan Agong* appoints them on the Prime Minister's advice. Members of the Cabinet may be appointed while Parliament is dissolved, but they must be members of the last *Dewan Rakyat* and their continuance in office is conditional upon their being members of the new *Dewan Rakyat*. However the Prime Minister may be able to retain the services of the Cabinet member who fails to be re-elected, since such a person can be appointed to the Senate if a vacancy exists.[350] The Constitution authorizes the remuneration of ministers and assistant ministers.[351]

The Constitution lays down that if the Prime Minister ceases to command the confidence of the majority of the *Dewan Rakyat*, he must either request the *Yang di-Pertuan Agong* to dissolve Parliament or tender the resignation of his Cabinet.[352] However the *Yang di-Pertuan Agong is* not obliged to accede to Prime Minister's request to dissolve Parliament. The Constitution is silent on how lack of confidence is to be expressed. A substantial majority vote of no confidence or the defeat of the Government on a bill of major importance is the accepted Parliamentary practice.[353]

The removal of a Prime Minister can only be brought about by a Parliamentary defeat of the Government, although he, like a minister or assistant minister may resign his office. Ministers and assistant ministers hold office at the pleasure of the *Yang di-Pertuan Agong*.

Besides being the legislative and executive leader of the Government, the Prime Minister has certain specific rights and duties under the Constitution. He attends the Conference of Rulers when the Conference debates matters of policy, and his advice in such deliberations is binding on the *Yang di-Pertuan Agong*. The Prime Minister's advice is

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348 Article 40(1).
349 Article 43(7).
350 Article 45. Assistant Ministers are appointed in the same way as a Minister and are subject to the same limitations: Article 43A.
351 Article 43(9) and 43A(4).
352 Article 43(4).
353 *Adegbenro* v. *Akintola* [1963] AC 614.

sought on the appointment of all judges of the Federal Court and of the High Court and that of the Auditor-General and the Attorney-General.

Formally at least the convention of ministerial responsibility is applicable in the Malaysian situation. But the political realities dictate a kind of democracy and a style of politics that is very different from the British experience. The democratic process has been accepted with modifications. In fact it is generally believed that the concepts and precepts of a Westminster-type democracy are irrelevant to Malaysia,[354] and accordingly democratic values as understood in the West appear to be less important than other values such as political stability and socio-economic development.[355]

## The States

The Federation has thirteen states; eleven states in the Malay Peninsula, plus the states of Sabah and Sarawak. These states have agreed to the formation of Malaysia with a strong central government and a common citizenship.

Each state of the Federation has a written constitution; and each State Constitution must have the "essential" provisions as set out in the Eighth Schedule to the Federation Constitution.[356] This imposes a considerable degree of uniformity on the states. If a State Constitution lacks these provisions or if it contains Articles or Clauses in violation of these requirements then Parliament may legislate to remove the inconsistencies

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354 Thus "to mimic the Westminster-type of democracy in the 1957 constitution without comparative economic and social foundation is to court self destruction" Minister of Home Affairs Malaysia, on the constitutional Amendment 1971, *Straits Times*, 7th March 1971.

355 M. Puthucheary, 1979. "Ministerial Responsibility in Malaysia", *The Constitution of Malaysia: Its Development 1957 – 1977*. Kuala Lumpur: Oxford University Press, p. 126.

356 Article 71, Part I Eighth Schedule to the Federal Constitution. The requirements of "essential" provisions did not apply to the Singapore constitution However the constitution stated that no enactment of the legislature of Singapore to make constitution amendments in that State relating to any matter dealt with by the "essential" provisions shall have effect unless

(a) the amendments do not materially affect the operation of the Constitution in relation to those matters; or

(b) the effect of the amendments is confined to inserting the "essential" provisions or provisions substantially to the same effect or for removing provisions inconsistent with the "essential" provisions; or

(c) the enactment is approved by Act of Parliament; Article 71(8).

or amend the constitution according to the correct model. Any Federal law made for a state in pursuance of Article 71 unless sooner repealed by Parliament, ceases to have effect on such day as a new legislative Assembly, constituted in that state after the passing of the Federal law, may resolve.

Each of the nine Malay states is headed by a hereditary ruler and each of the other four states by a governor[357] appointed by the *Yang di-Pertuan Agong*. In most important matters of government each ruler or governor is bound by the State Constitution to act on the advice of the State Executive Council. Each state has a wholly elected one chamber legislature, from among whose members are appointed the *Menteri Besar* or Chief Minister, and the other members of the State Executive Council, who are appointed by the ruler or governor on the advice of the *Menteri Besar* or Chief Minister. Most states have their own administrative services and all states appoint their own subordinate officers, and there is also an understanding that Federal officers will be accepted to fill some of the states posts.

## The Ruler or Governor

Each of the nine Malay states has a royal ruler who reigns for life. The right of succession to his throne is governed by custom which varies from state to state. These rules of custom, with or without modifications, are now embodied in the States Constitutions. The Federal Constitution guarantees the right of the ruler of a state to succeed and to hold, enjoy and exercise the constitutional rights and privileges in accordance with the Constitution of his state, and any dispute as the succession of a ruler of any state, shall be determined solely by such authorities and in such manner as may be provided by the Constitution of the State.[358] This Clause of the Federal Constitution cannot be amended except with the consent of the Conference of Rulers.[359] Thus the position and status of the rulers are permanent in the States of Malaya, subject only to change at State level and in accordance with State Constitutions. But States Govern-

357 Known by various names; *Yang Dipertua Negeri* for Sabah, *Yang Dipertua Negara* for Singapore and Governor for Sarawak, Malacca and Penang, which is later amended *Yang Dipertua Negeri*.

358 Article 71(1).

359 Article 159(4). During the period of Emergency, this provision was suspended, Article 150.

ments do not contemplate any change in the monarchial form of Government.[360]

The ruler in all the nine monarchial states, must be a male Malay, or royal blood, a descendant of the ruler of the state and a Muslim. The method of selection of the ruler varies considerably, and in some states an exception to some of the requirements is permitted, even to the extent that a commoner may be chosen if a person of the preferred characteristics is not available.

Six states permit the reigning ruler to nominate an heir; and in one, Negeri Sembilan the ruler is elected. In all states except two, the rulers bear the title of *Sultan*. In Perlis he is called a *Raja*, and in Negeri Sembilan he is styled *Yang Dipertuan Besar*.

Two states, Kedah and Perlis, observe a modified principle of primogeniture.[361] Succession must be confirmed by a Council of Succession in both states.[362] Grounds for the Council's refusal to confirm are infirmity, blindness, dumbness or some other defect on account of which he would not be permitted by a *Hukum Syara'* (or Islamic law) to become a sovereign ruler.[363]

In Pahang, the throne must descend to the eldest surviving lawfully begotten and acknowledged male issue of the body of the present ruler.[364] The ruler is permitted to nominate the heir-apparent[365] and to depose him,[366] but only after consultation with the supporters of state.[367]

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360 For example, the Constitution of Kelantan stipulates that amendments to the State Constitution affecting the royal status can only be made by "His Highness by Proclamation issued with the consent and concurrence of the Council of Advisers and may not be amended by other means. Part I Article I. A majority of the Council are the personal appointees of the ruler, *ibid.*, Article XXXVI.

361 Article 7 of the Constitution of Kedah and Perlis.

362 The Council consists of the *Menteri Besar*, the other members of the Executive Council who are appointed by the Ruler, four male members, of the Ruling House, five male members, not being members of the Ruling House, one of whom shall be the Chief *Kadi* (or in Perlis the *Mufti*) and not less than one other person learned in the Muslim Law. All these persons are appointed by the Ruler. Article 9, *ibid.*

363 Article 11, *op. cit.*

364 Part I, Article 4 Pahang Constitution.

365 Tunku Mahkota: Article 20, *op. cit.*

366 Article 21, *op. cit.*

367 They are the heir-apparent, the titled kerabats, the Chiefs (six in number), the *Menteri Besar*, the State Secretary, four *Penghulus* (or Headmen), and the *Mufti Kerajaan* or *Sheikhul Islam*, whoever is the senior, Article 36, *op. cit.*

The heir-apparent may subsequently be denied the right to succeed by a refusal of the supporters of state to acknowledge as Sovereign for similar reasons to those which are considered grounds by the Council of Succession in Kedah and Perlis.

In Terengganu, the sultan may appoint and depose the heir-apparent, called *waris ganti*. In both instances the sultan has to consult the supporters of state.[368] The new sultan is chosen by the supporters of state, who consider first the *waris ganti*. They may reject the *waris ganti* on the grounds of "some great and serious disability derogatory to the quality of a sultan such as insanity, blindness; dumbness or the possession of undesirable traits on account of which he would not be permitted by Islamic law to become a sultan or ruler.[369] Normally the sultan's heir is to be chosen from the lineage of Sultan Zainal Abidin, but if none survived or if those who survived are not eligible, another person may be elected by the State Council together with the supporters of state and the *Ahl-al-hall wal'l-'aqd* (Council of Regency).[370]

In Johor, Kelantan, Selangor and Perak, the ruler may also designate his successor.

In Johor, the designation and deposition of the heir-apparent must be with the concurrence of *Juma'ah Majlis Diraja* (Council of the Royal Court).[371] The heir-apparent does not automatically succeed to the throne; he must be confirmed as Sovereign by the *Juma'ah Pangkuan Negeri* (supporters of the country).[372] Grounds for refusal to confirm are "any infirmity such as insanity, blindness, dumbness or the possession of some base traits on account to which he would not be permitted by *Hukum Syara'* (Islamic law) to become a Sovereign.[373]

In the event of rejection by the supporters of the country, the Council of the Royal Court immediately terminates the appointment of

368 Second Part, Article XIX Constitution of Terengganu: The Supporters of State consist of twelve persons selected and appointed by the Sultan.

369 Article VI, *op. cit.*

370 Two persons of minister of chief rank, who are *Ahl-al-hall wal'l-'aqd*, which literally means "men who have franchise in setting up of the Raja and matters of importance"; Ahmad Ibrahim, "The Position of Islam in the Constitution", *The Constitution of Malaysia 1957 – 1988, op. cit.*

371 First Part, Article VII of the Constitution of Johor.

372 The *Ahl-al-hall wal'l-'aqd*, which literally means "those who have power to loosen and to bind". First Part, Article I, *op. cit.*

373 Article III, *op. cit.*, the heir-apparent, shortly before taking a second wife, was deposed.

the heir-apparent, and appoints another heir to be heir-apparent, who in turn will be subject to the same procedure of confirmation by the supporters of the country.[374] The State Constitution provides for the selection of a commoner in the exceedingly unlikely circumstances of there being no available heir of the royal blood.

The Sultan of Kelantan designates his heir[375] on the advice of the Council of Succession[376] which also confirms subsequently the Sovereign. The grounds for rejection of an heir are the same as for Kedah and Perlis. A rejection results in a consideration by the Council of Succession of other heirs, until one is confirmed. The Sultan has no power to depose an heir.

The Sultan of Selangor also designates his heir after consultation with *Dewan Diraja*.[377] The *Dewan* must confirm the heir as Sultan upon the death or abdication of the Sultan.[378] The grounds for rejection of an heir are the same as for Johore. A rejection results in a consideration by the *Dewan Diraja* of other heirs until one is confirmed. Like Kelantan, the Sultan has no power to depose an heir.

The Sultan of Perak designates heirs[379] on the advice of the *Dewan Negara*.[380] The succession rotates among the heads of three families:

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374 Article IV, *ibid.*

375 Second Part, Article XXVIII of the Constitution of Kelantan.

376 The Council of Succession consists of a President, Deputy President, the State Secretary, four members of *Kerabat Diraja* and not less than four and not more than eight other persons who must be of the Malay race and subjects of the Sultan. All these members are appointed by the Sultan. Article VII.

377 *Dewan Diraja* consists of the *Raja Muda*, the *Tengku Laksamana*, *Tengku Bendahara* the *Menteri Besar*, the President of the Religious Affairs and Courts Department and the *Mufti*. All of these figures are *ex-officio* members. In addition, there are three *kerabat diraja*, three *Orang-orang Besar* and eight Elders, not Members of the Legislative Assembly or the House of Representatives, of whom not less than three must be members of the Council of Religion and Malay Custom. All those who are not ex-oficio members are appointed by the Sultan.

378 Article XXX, *ibid.*

379 Second Part, Article XXX of the Constitution of Perak.

380 Article LXII, *ibid.* The *Dewan Negara* consists of

(a) the *Raja Muda*, *Raja Bendahara*, *Raja Dihilir*, the *Menteri Besar* of a Malay and the *Mufti* (*ex-officio members*);

(b) the *Menteri Besar* if non-Malay and the holders for the time being of the titles of *Orang Besar Empat* and *Orang Besar Delapan* (official members);

(c) eleven Elders and one non-Malay who are not holding an office of emolument under any government. These unofficial members are appointed by the Ruler.

thus when the sultan dies, the *Raja Muda* (head of another family and the second in succession) becomes sultan, the *Raja Dihilir* (head of the next family and the third in succession) becomes the *Raja Muda*, and the head of the deceased sultan's family becomes *Raja Dihilir*. The selection of a sultan is made by the *Dewan Negara*, after considering the heirs in the prescribed order. An heir may be disqualified for the same reasons as in Johore and Selangor. The State Constitution does not provide for, but contemplates the removal of heirs *(sic.)* on grounds similar to those for another states.

In Negeri Sembilan, the *Yang Dipertuan Besar* is elected from the surviving male issue of the preceding Sovereign, or, if none, from certain designated classes of relative of the deceased Sovereign.[381] He is elected by the *Undang* (ruling chiefs) of Sungei Ujong, Rembau, Johol and Jelebu. The *Undang* possess a unique power in that they can call on the *Yang Dipertuan Besar* to abdicate. This call is self-executing, as the Constitution specifies that "the ruler shall thereupon cease to be the *Yang Dipertuan Besar*."[382] The justification for such a call may be that the ruler "has developed any great or serious defeat derogatory to the qualities of a *Yang Dipertuan Besar*, such as insanity, blindness, dumbness or has become possessed of any base characteristic on account of which he would not be permitted by *Hukum Syara'* (or Islamic law) to the *Yang Dipertuan Besar* or that His Highness has done any overt act detrimental to the sanctity, honour and dignity of the *Yang Dipertuan Besar* or has deliberately disregarded the provisions of the Constitution". On the death of the *Yang Dipertuan Besar*, the four *Undangs*, choose a successor from among his male issue, but they may, if they think that there is no suitable or competent person, choose others, giving precedence first to the brothers of the deceased *Yang Dipertuan Besar*, than to his paternal uncles and then to others.[383] Under the State Constitution the *Yang Dipertuan Besar* acts on behalf of himself and the four *Undangs* in accordance with the Constitution.

The heads of state in the non-royal states, are appointed by the *Yang di-Pertuan Agong* acting on his discretion. They are known by various names; *Yang Dipertua Negeri* (Governors) in Malacca, Penang and Sarawak, and Sabah. The governor is appointed for four years but he may resign or be

381 Article VII of the Negeri Sembilan Constitution.

382 Article X, *ibid.*

383 When the late *Yang Dipertuan Besar* Munawir died, his brother (then the Malaysian High Commissioner in Nigeria) was elected to succeed him and not his eldest son who was then still a minor.

removed from office by the *Yang di-Pertuan Agong* on an address by the State Legislative Assembly supported by the votes of not less than two-third of the total number of its members.[384] If a governor is unable to exercise his function owing to illness, absence or other causes, the *Yang di-Pertuan Agong*, after consultation with the chief minister of the state, may appoint another person to carry out the governor's functions. A Governor may not hold any office of profit and may not actively be engaged in any commercial enterprise, which means that no serving public officer or businessman, however eminent, will be appointed governor or acting governor.[385]

The power of the *Yang di-Pertuan Agong* to appoint these heads of states is conferred upon him by the State Constitutions. In making the appointment he has first to consult the chief minister of the state concerned. The only qualification specifically required of the appointed heads of state is that of citizenship. During the time it was part of the Federation, Singapore required that its head of state, the *Yang Dipertuan Negara* be a citizen of Malaysia born in Malaya.[386] In Malacca and Penang, a governor must be a citizen otherwise than by naturalization or registration under Article 17 of the Federal Constitution,[387] whilst in Sabah and Sarawak the Head of State must be a citizen of Malaysia otherwise than by naturalization.[388]As this is a non-political post, none of the State Constitutions prescribe racial or religious requirements nor do they stipulate that the candidate must be a resident in the state. The post of governor is in fact largely ceremonial and formal.

The *Yang di-Pertuan Agong* and his consort are supreme in personal status throughout Malaysia. Below them the rulers and governors take precedence over all other persons. Each ruler or governor in his own state takes precedence over other rulers and governors.[389] Rulers take

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384 Section 19A(2), Part I, Eighth Schedule to the Federal Constitution.

385 The late Tun Syed Sheikh Barakbah, Lord President of the Federal Court, had to resign from the Bench when he was appointed Acting Governor of Penang during the illness of the Governor. When the Governor died shortly afterwards, Barakbah was appointed substantive Governor.

386 Article 2 of Singapore Constitution. By Article 91, "Malaya" means "Malay Peninsula and Singapore".

387 Article 2 of the Constitutions of Malacca and Penang. Article 17 of the Federal Constitution was repealed on 1st July 1963 (by Act No. 14 of 1962) but presumably the disqualification remains for those who became citizens under its term.

388 Article 2 of the Constitutions of Sabah and Sarawak.

389 Article 70(1) of the Federal Constitution.

precedence over governors and among themselves, in accordance with the dates on which they acceded as rulers. Governors take precedence among themselves in accordance with the dates on which they were appointed as governors, and if the governors were appointed on the same day, the older takes precedence over the younger.[390]

A ruler, though sovereign, has no autocratic powers. He must act nearly always in accordance with the advice of the Executive Council. The same applies to governors. A ruler or governor may act on his discretion in the performance of certain functions as specified by the State Constitution, for instance the appointment of the *Menteri Besar*, in addition to those specified under the Federal Constitution. State law may make provisions requiring a governor or ruler to act after consultation with or on the recommendation of any person or body of persons other than the Executive Council in the exercise of any of his functions other than:

(a) functions exercisable on his discretion;
(b) functions with respect to which provision is made in the State of Federal Constitution.[391]

## Sovereignty and Legal Immunity

The Federal Constitution states that the sovereignty, prerogatives powers and jurisdiction which the rulers enjoyed in their respective territories before it came into effect are unchanged except insofar as they are subject to the provisions of the constitution. No proceedings whatsoever may be brought to any court against the ruler of a state in his personal capacity, which implies that he may be sued in his official capacity. In one case, the ruler of Pahang dismissed a *kadi*, who then alleged that his dismissal was wrongful, but he brought his action not against the ruler but against the State Government as defendant.[392]

## Position of the Rulers Before and After Independence

In a case, the Sultan of Johore was sued in his private capacity in England for breach of promise to marry, and a letter from the Colonial Office to the Court stated that he was a sovereign ruler of an independent state,

390 Section 1(1), Part I, Eighth Schedule, *ibid.*
391 Section i(2) and (3), *ibid.*
392 *Hj. Ariffin bin Hj. Chot* v *Government of the State of Pahang*, [1969] 1 *MLJ* 6.

his relation with the Queen being those of alliance, not sovereignty or dependence, regulated by a treaty which limited the exercise of some of his sovereign rights. The letter was held by the Court to be conclusive evidence of the fact that he was an independent sovereign and therefore immune from legal proceeding.[393]

In 1924 the status of the Sultan of Kelantan was considered in an English court, and again the Secretary of State for the Colonies certified that the Sultan of Kelantan was the sovereign ruler of an independent state and therefore immune from the jurisdiction of the English courts.[394]

The status of the Sultan of Pahang was considered by the courts in the Federal Malay States in 1931. The Privy Council accepted without argument that despite the entry of the state into the Federal Malay States in 1895, the Sultan of Pahang remained an absolute ruler in whom resided all legislative and executive powers, subject only to the limitations which had from time to time been imposed upon himself, and therefore immune from legal process.[395]

The status of the Sultan of Johore came up for consideration again after the end of the last war. This time in the courts in Singapore, in the case of the *Sultan of Johor* v *Tunku Abu Bakar & Others*,[396] where the Sultan was sued by his son and he argued that the Court had no jurisdiction over him as he was sovereign ruler. The Secretary for Colonies when asked to certify His Royal Highness status, merely set out the particulars of the then constitution and left it to the Court to decide whether or not His Highness was a sovereign ruler. By the time the matter came to the Privy Council, the Secretary of State, in response to complaint from all the Malay rulers, had written a letter to them categorically asserting that "His Britannic Majesty regards Your Highnesses as independent sovereigns insofar as your relations with His Majesty are concerned. The Privy Council, on the basis of this letter, held that the Sultan was an independent sovereign entitled to the immunities in respect of litigation against him.[397]

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393 *Mighell* v *Sultan of Johor*, [1894], 1QB 147.

394 *Duff Development Co. Ltd.* v *Government of Kelantan*, [1924] AC 797.

395 *The Pahang Consolidate Co. Ltd.* v *The State of Pahang* [1931-32]. FMSLR 390.

396 *The Sultan of Johor* v *Tunku Abu Bakar and Others* [1952] A.C. 318; *MLJ* 115.

397 *Ibid.* The view was taken that had the Malayan Union gone through it might very well have destroyed the sultan's sovereignty. According to this view the creation of the Federation did not have the effect of abrogating his sovereignty (p. 322).

From the above cases it is clear that in the courts in England and Singapore, the ruler was considered before Independence to be an independent sovereign, despite the surrender of some of his sovereign powers under treaties with the British Crown and the Federal Government, and therefore personally immune from civil or criminal action. This supra legal status was carried over into post-independence law and confirmed in the constitutions of the Federation of Malaya and Malaysia.

Article 181 of the Federal Constitution expressly preserves the sovereignty of the rulers after independence. This provision has effect only in Malaysia, but nevertheless it was thought that their sovereign status would still be recognized by the British Government should they be sued in England. What the attitude of other foreign governments would be should a ruler be sued in their country, is still an open question.

The consort of a ruler does not enjoy legal immunity in Malaysia, nor does a Regent or a member of the Council of Regency. Similarly there is no constitutional provision granting a governor or his wife legal immunity in any capacity.[398]

Under the 1993 Amendment[399] the *Yang di-Pertuan Agong* or the Ruler of a State is liable for his action in his personal capacity and if he is charged of any offence under any law, he will be brought before a specially constituted court.[400] For this purpose, a Special Court is established under Part XV of the Constitution. Under this provision,[401] if the *Yang di-Pertuan Agong* or the Ruler of a State is charged of any offence under any law in the Special Court, he ceases to exercise the functions of the *Yang di-Pertuan Agong* or the Ruler of a State, as the case may be.[402] In case of the *Yang di-Pertuan Agong*, the period during which he ceases to exercise the functions of the *Yang di-Pertuan Agong*, becomes a part of the term of office of the *Yang di-Pertuan Agong* under Article 32(3) of the Constitution.[403] In case of the Ruler, the period during which he ceases

398 In the casses of *Stephen Kalong Ningkan* v *Tun Abang Hj. Openg and Tawi Sli* [1966] 2 *MLJ* 187, the defendant Governor was sued; S.M. Thio, Dismissal of Chief Ministers, *Malaya Law Review* 283, 1966.

399 Constitution (Amendment) Act 1993, Act A848.

400 Clause (2) of Article 181 and Article 182 of the Constitution. Originally, no proceedings against the *Yang di-Pertuan Agong* or a Ruler of a State in his personal capacity may be brought. Now, if he is charged of any offence under any law, he may be brought before the Special Court.

401 Article 33A and the Eight Schedule.

402 Article 33A(1) and Clause 1A(1) of the Eighth Schedule.

403 Article 33A(2).

to exercise the functions of the Ruler of a State, a Regent or a Council of Regency, will be appointed in accordance with the State Constitution, to exercise the functions of the Ruler.[404]

If a Ruler is convicted of an offence in the Special Court and sentenced to imprisonment for more than one day, unless he receives a free pardon, he ceases to be the Ruler of the State.[405]

However, there is no provision made (in this amendment) in respect of the *Timbalan Yang di-Pertuan Agong* and by analogy it seems that the same disqualification would be applicable to the *Timbalan Yang di-Pertuan Agong* when he is charged of any offence under any law in the Special Court. When the *Yang di-Pertuan Agong* ceases to exercise the functions of the *Yang di-Pertuan Agong*, the *Timbalan Yang di-Pertuan Agong* will exercise the functions of the *Yang di-Pertuan Agong* and where owing to a vacancy at the office of the *Timbalan Yang di-Pertuan Agong* or to his illness or absence from the Federation or to any other cause, the *Timbalan Yang di-Pertuan Agong* ceases to exercise the functions of the *Timbalan Yang di-Pertuan Agong*, then Parliament may by law appoint a ruler to exercise the functions of the *Timbalan Yang di-Pertuan Agong*. The consent of the Conference of Rulers is required to pass this law.[406]

No action, civil or criminal, for anything done or omitted to be done by the *Yang di-Pertuan Agong* or the Ruler of a State, may be brought against him in his personal capacity without the consent of the Attorney General personally.[407] This provision has no retrospective effect.[408] However, there is no provision for the *Yang di-Pertuan Agong* or the Ruler of a State who wishes to bring any action, civil or criminal, in his personal capacity against any person in the Federation. To all intents and purposes, there is no constraint whatever placed on the *Yang di-Pertuan Agong* or the Ruler of a State to bring any action in his personal capacity in accordance with the law.

The rulers and governors have jurisdiction in respect of Muslim courts and in the Borneo States of native courts, which are subject to

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404 Clause 1A(2) of the Eighth Schedule.

405 Clause 1A(3), *ibid.*

406 Article 33(5), *ibid.*

407 Article 183, *ibid.*, which abolishes the legal immunity contained in the original Article 181(2) to the *Yang di-Pertuan Agong* or the Ruler of a State for any act or omission done in his personal capacity. This is a drastic departure from normal practice accorded to a monarch, traditional or constitutional, in this country.

408 Article 183, *ibid.*

those of the state. In the States of Malaya, magistrates are appointed by the ruler or governor and (in case of first class magistrates) on the recommendation of the Chief Justice of the High Court Malaya. In the Borneo States the magistrates are appointed by the governors.

A ruler or governor has the power to grant pardons, reprieves, and respites in respect of all offences committed in his state, except offences tried by court-martial and sentences imposed by Muslim courts in Malacca and Penang. Where it is doubtful as to where an offence is committed, it is treated as if it was committed in the state in which it was tried. The power of pardon of a ruler or governor is exercised on the advice of the Pardon Board constituted in each state.[409] The Board meets in the presence of the ruler or governor and he presides over it. The Federal Government has no say in the exercise of the power of pardon by a ruler or governor. Whatever influence it has may be brought to bear only indirectly through the good offices of the Attorney-General, who sits on State Pardon Boards.

The power of pardons, reprieves or respites in respect of all offences which have been tried by court-marshall and all offences committed in the Federal Territories of Kuala Lumpur and Labuan vests in the *Yang di-Pertuan Agong* and in the Ruler or *Yang Dipertua Negeri* in respect of all other offences committed within his State.[410] Notwithstanding this, where the powers are exercisable by the *Yang Dipertua Negeri* and are exercisable in respect of himself or his wife, son or daughter, such powers are exercisable by the *Yang di-Pertuan Agong* acting on the advice of the Pardon Board constituted for that State,[411] and in such proceedings it is presided by the *Yang di-Pertuan Agong*. Where the powers are exercisable in respect of the *Yang di-Pertuan Agong*, the Ruler of a State, or his consort, as the case may be, such powers are exercisable by the Conference of Rulers. In such proceedings, the *Yang di-Pertuan Agong* is not accompanied by the Prime Minister and the other

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409 The State Pardon Board consists of the Attorney-General of the Federation, the *Menteri Besar* or Chief Minister and not more than three other members appointed by the ruler or governor. Appointed members hold office for three years and no member of Parliament or of a Legislative Assembly may be appointed. If an appointed member is unable to attend, the ruler or governor may appoint a temporary member in his place.

410 Clause (1) of Article 42.

411 Clause (12)(*a*), *ibid.*

rulers are not accompanied by their *Menteri-Menteri Besar*, and the Conference of Rulers must consider any written opinion which the Attorney-General may have delivered thereon.[412]

Where the powers are exercisable by the *Yang di-Pertuan Agong* or the Ruler of a State in respect of his son or daughter, as the case may be, such powers are exercisable by the Ruler of a State nominated by the Conference of Rulers, who acts in accordance with the advice of the relevant Pardon Board constituted under this Article.[413]

For the purpose of the latter provisions under Article 41 Clause (12) (*b*) and (*c*), the *Yang di-Pertuan Agong* or the Ruler of the State concerned, as the case may be, the *Yang Dipertua Negeri* are not members of the Conference of Rulers.[414] No action, civil or criminal, lies against the *Yang di-Pertuan Agong* or the Ruler of a State in his personal capacity in respect of anything done or omitted to be done by him before the coming into force of this Act.[415]

A member of the public service of a state holds office at the pleasure of the ruler or governor, though appointments, promotions and discipline are entrusted to a public service commission, independent of government control. Although he holds office at the pleasure of the ruler or governor, like officers in the Federal service, he cannot be disciplined or dismissed except in accordance with the stringent rule specified in the Federal Constitution and regulations applicable in each state.

A ruler is head of Islam in his state but not a governor. In each state there is a Council of Religion to advice the ruler in the exercise of his functions as head of Islam. A ruler or governor is the fount of honours in his state and makes awards to persons who have rendered distinguished service in the state.

## The Executive Council

The ruler or governor must appoint an Executive Council which consists of elected and appointed members. The elected members are members of the State Legislative Assembly, and the appointed members are

412 Clause (12) (*b*), *ibid.*
413 Clause (12) (*c*), *ibid.*
414 Clause (13), *ibid.*
415 Section 8 of the Constitution (Amendment) Act 1993 w.e.f. 29th March 1993.

ex-officio members of the Council.[416]

The ruler or governor must first appoint a *Menteri Besar* or Chief Minister to preside over the Executive Council. This individual must be a member of the Legislative Assembly, who is in his judgement likely to command the confidence of the majority of the Assembly.[417] Following this, the ruler or governor must, on the advice of the *Menteri Besar,* appoint to the council not more than eight and not less than four persons, from among members of the Legislative Assembly. If the appointment is made while the Assembly is dissolved, a person who was a member of the last Assembly may be appointed, but he may not continue to hold office after the first sitting of the next Assembly unless he is a member of it. A person who is a citizen by naturalization or by registration under Article 17 of the Federal Constitution, may not be appointed *Menteri Besar.* A member of the Executive Council other than the *Menteri Besar* holds office at the pleasure of the ruler, but any member may resign his office at any time.

The last two provisions came in for consideration in the case of *Stephen Kalong Ningkan* v *Tun Abang Haji Openg and Tawi Sli*[418] where the Court held that the governor might dismiss ministers but not the chief minister unless the *Council Negeri* had shown lack of confidence in him and this might under the State Constitution be shown only by a vote on the floor of the House. In this case, the defendant governor had received on 16th June 1966 a letter signed by twenty-one members of the *Council Negeri* (which has forty-two members including the Speaker) saying that they no longer had any confidence in their chief minister, the plaintiff. On the same day the governor wrote inviting the plaintiff to resign. The plaintiff acting under the State Constitution refused to tender the resignation of his Supreme Council (Executive Council) members including his own. In accordance with the provisions of the Constitution the plaintiff and other members of the Supreme Council ceased to hold office and Penghulu Tawi Sli was appointed Chief Minister in his place. The plaintiff sued the governor and Tawi Sli, and as the court found the former's purported dismissal by the Governor to be *ultra vires,* null and void, he was reinstated as Chief Minister.

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416 Like the Federal cabinet, the Executive Council of a State is the Cabinet of State Government.

417 Section 2 Eighth Schedule.

418 *See* note 409.

A member of the Executive Council may not engage in any trade, business or profession connected with any subject for which he is responsible. He may not as long as he is engaged in trade, business or profession take part in any decision of the council relating to that trade, business or profession, as in any decision likely to affect his pecuniary interest therein.[419]

The ruler or governor is not a member of the Executive Council and the Executive Council is not responsible to the ruler or governor but to the Legislative Assembly.

## The State Legislature

The legislature of a state consists of the ruler or governor and one House, namely the Legislative Assembly.[420] The Assembly must consist of such a member of elected members as the Legislature may by law provide. This number must be either the same or a multiple of the Federal constituencies into which the state is divided under Article 116 of the Federal Constitution.

The ruler or governor, though a member of the Legislature, attends it only on special occasions such as the opening of the Assembly. His principal functions is to summon the Legislative Assembly to meetings, to prorogue and dissolve it. He must not allow six months to elapse between the last sitting in one session and the date appointed for the first meeting of the next session. His other principal function is to assent to State law passed by the Assembly.

The basic qualifications for all members of the Legislative Assembly are citizenship, residence in the state and the attainment of the age of twenty-one years, unless disqualified from being a member by the Federal or State Constitution or by any such law as mentioned in the Eighth Schedule to the Federal Constitution. These qualifications also apply to the Borneo States now that the period of indirect elections has expired. The Assembly however, determines conclusively questions as to disqualification of its own members.

The Legislative Assembly must elect one of its members to be the Speaker and may not transact any business other than his election while the office of Speaker is vacant. The Speaker vacates his office on ceasing

419 *Ibid.*, section 2(8).
420 *Ibid.*, section 2.

to be a member of the Legislative Assembly and may at any time resign his office. During the absence of the Speaker from a sitting of the Assembly, another such member as may be determined by standing rules and orders, may act as Speaker.[421]

In the Borneo States the Speaker is appointed by the Governor from among members or non-members, who qualify for election as elected members of the State Legislature. He holds office for the period set out in the letter of appointment and does not automatically cease to hold office on the dissolution of the Assembly.

### Legislative Procedure

Bills become law by being passed by the Assembly and assented to by the ruler or governor.[422] No Bill or amendment involving expenditure from the Consolidated Fund of the State may be introduced or moved in the Assembly except by a member of the Executive Council. A Bill becomes law on being assented to by the ruler or governor and thereafter it is published as law in the *State Government Gazette*. It normally comes into force when published, unless the date of its commencement is stated in the law itself.

The validity of any proceedings in the Assembly may not be questioned in any court and no person is liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in proceedings of the Legislative Assembly of any state, nor is he liable in respect of anything published by or under the authority of any State Legislative Assembly.

### Amendment of State Constitution

Amendments to the State Constitution can be accomplished by State law,[423] which has been supported on the second and third readings by votes of not less than two-thirds of the total number of the members of the Legislative Assembly.[424] There are, however exceptions to this principle:

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421 *Ibid.*, section 10(3).

422 Laws made by a State Legislative Assembly are called enactments except in the Borneo States where they are called ordinances. In general the procedure of enacting legislation in the Assembly is the same as that in a House of Parliament.

423 *Ibid.*

424 Section 19(4) Eighth Schedule; *op. cit.*

(a) Some amendments cannot be effective without the consent of certain bodies of persons; they are
   (i) the appointment of an heir or heirs to the Throne, of the ruler's consort or of the Regent or members of the Regency of the state;
   (ii) the withdrawal, removal, abdication of the ruler or his heir or heirs;
   (iii) the appointment of the ruling chiefs or similar Malay customary dignities and members of the religious or customary advisory council or similar bodies;
   (iv) the establishment, regulation, confirmation and deprivation of Malay customary ranks, titles, honours, dignities and awards and the regulation of the royal courts and palaces.[425]

(b) Some amendments can be effected by the procedure for the enactment of an ordinary bill as in the constitution of a state without a ruler;[426]

(c) Some amendments can be effected by a simple majority; any amendment consequential on a law providing for the number of elected members of the State Legislature and an amendment to bring the State Constitution into accord with any of the essential provisions as set out in the Eighth Schedule if it is made after the Legislative Assembly has been elected in accordance with section 4 of the Schedule.[427]

Parliament may legislate to secure compliance with the essential provision, notwithstanding anything in the Federal Constitution,[428] and it may also amend a State Constitution temporarily if it thinks that such a step is required for reasons of emergency.

## Relations Between the Federation and the States

### *Distribution of Legislative Powers*

Parliament may make laws for the whole or any part of the Federation and may make laws having effect outside and within the Federation. A State Legislature may make laws for the whole or part of the state.[429] The subjects of legislative competence are specified in three legislative lists; Fed-

425 *Ibid.*, section 19(6); 'amendment' includes addition and repeal: section 7.
426 *Ibid.*, section 19(3).
427 *Ibid.*, section 19(5).
428 *See* note 357.
429 Article 73.

eral, state and concurrent.[430] The residuum of legislative power is in the state, but as the lists are quite comprehensive, it is an insignificant element. A state law which is inconsistent with a valid Federal law is, to the extent of inconsistency void and Federal law on a subject in the Concurrent List, whether prior or subsequent to the State enactment, overrides the State law.[431]

The 1963 constitution containing new Clause permitting a challenge to the validity of any legislation on the grounds that the law is *ultra vires* – that it deals with a subject not on the list for the legislative that enacted it. A suit under this provision could be between the Federal Government and one or more State Governments, or it could involve private partia, provided that leave is secured by such a party from a judge of the Federal Court. In this case the Federal Government is entitled to be a party and any State Government which would have been a party had the action been inter-government.[432]

The Federal List includes, *inter alia*, external affairs, defence, internal security, newspapers, publications, publishers, printing and printing presses, censorship, civil and criminal law, and the administration of justice, Federal citizenship, aliens, finance, trade, commerce, industry (including corporations) shipping, navigation[433] and fisheries, communication, transport, education (including libraries, museums, ancient historical monuments and records and archaeological sites and remains), medicine, health, labour and social security, unincorporated societies and professional occupations. This list is applicable *vis-a-vis* the States of Malaya, and is generally applicable to the new states as well with modifications and expansions of their State Lists.

The State List, for the States of Malaya, includes, *inter alia*, Muslim

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430 *Ibid.*, Article 74 and the Ninth Schedule.

431 *Ibid.*, Article 75. In the case of *The City Council of Georgetown & Anor.* v *The Government of the State of Penang and Anor.* [1967] 1 *MLJ* 170, the Federal Court held that the Municipal (Amendment Penang Enactment) 1966 passed by the Penang Legislature was inconsistent with the Local Government Elections Act 9601, a Federal law, and therefore void to the extent of the inconsistency.

432 *Ibid.*, Articles 4(4) and (3).

433 *Ibid.*, Article, 78. Insofar as any law made by Parliament or any regulation made thereunder restricts the rights of a state or its residents to the use for navigation or irrigation or any river wholly within that State shall not have effect in that State unless it has been approved by a resolution of the Legislative Assembly of that State supported by a majority of the total number of its members.

law, land, agriculture and forestry, local government, State works and water, machinery of State Government, State holidays, turtles and riverine fishing.

The general State List is applicable to the Borneo States, but with the following additions; native law, incorporation of authorities and other bodies set up by State law, if incorporated directly by State law, ports and harbours (other than those declared to be Federal by or under Federal law), cadastral land surveys, libraries, museums, ancient and historical monuments and records, and archaeological sites and remains; and in Sabah, the Sabah Railway.[434]

The State List, as it applied originally to Singapore, was expanded to include the following; education, medicine and health, labour and social security, pensions, gratuities and like allowances, factories, electricity, gas and gas works and itinerant hawkers.[435]

The Concurrent List, that is those subjects on which both Federal and State legislatures are competent to legislate includes, *inter alia*, social welfare (where aspects of this subject are not present in other lists) scholarships, protection of wild animals and birds, animal husbandry, town and country planning, public health, vagrancy and itinerant hawkers.

In addition the Borneo States are empowered among other matters to legislate upon personal law, shipping under fifteen tons, water power, agricultural and forestry research, charities and charitable trusts, theatres, cinemas and places of public amusement, elections to the Legislative Assembly held during the period of indirect elections; and in Sabah, until the end of 1970, medicine and health.[436]

Originally added to Concurrent List for Singapore were among other things, personal law, borrowing by the State and its authorities, production, supply and distribution of goods (but not bounties on production), imports and exports, insurance, banking, industry, shipping and navigation, professional occupations, unincorporated societies, charities and charitable trusts, newspapers, publications, publishers, printing and printing presses, censorship, theatres, cinemas, places of public

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434 *Ibid.*, Article 95B(1)(a) and Ninth Schedule, List IIA.

435 *Ibid.*, List IIB.

436 *Ibid.*, Article 95B(1)(b) and Ninth Schedule, List IIIA. Where any item is included in the Concurrent List for a State for a period only, the expiration of the period does not effect the continued operation of any State law passed during that period except as laid down by Federal or State law: M. Suffian, 1976. *The Introduction to the Constitution of Malaysia.* Kuala Lumpur: Government Printer, p. 161.

amusement; and until the end of August 1968 and thereafter until Parliament with the concurrence of the State Government otherwise laid down, elections to the 'Legislative Assembly'.[437]

*Power of Parliament to Legislate for States in Certain Cases*

Parliament may make laws with respect to any matter enumerated in the State List for the purpose of:

(a) implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member,[438] except Muslim law or the custom of the Malays, or of the native law or custom in the Borneo States. However a Bill for such law cannot be introduced into either House of Parliament until the government of any state concerned has been consulted;[439]
(b) promoting the uniformity of the laws of two or more States; or
(c) if so requested by the Legislative Assembly of any State.

A law made under paragraph (b) and (c) does not come into operation in any state until an identical law has been passed by its own legislature. When it has been passed it is deemed to be a State law and may be amended or repealed by State law.

Parliament may, for the purpose only of ensuring uniformity of law or policy, make laws on land tenure, the relationship between landlord and tenant, registration of titles and deeds of land, transfer of land, mortgages, leases, and charges of land, easements and other rights and interests in land, rating and valuation of land and local government. This power of Parliament applies only to the States of Malaya and not to the Borneo States and originally not to Singapore.[440] These laws come into operation in a State without being passed by State law. However, insofar as they confer executive authority on the Federation, they do not

437 *Ibid.*, List IIIB. *See* H.E. Groves, 1964. *The Constitution of Malaysia.* Singapore: Malaysia Publication Ltd., p. 135.
438 *Ibid.*, Article 76.
439 *Ibid.*, Clause (1)(*a*) and (2).
440 *Ibid.*, Article 95D.

come into operation in any state unless approved by resolution of the Legislative Assembly of that state.[441]

### *Power of Parliament to Extent the Legislative Powers of States*

Article 76A declares that –

> ... the power of Parliament to make laws with respect to any matter enumerated in the Federal List includes power to authorize the legislatures of the states or any of them, subject to such conditions or restrictions (if any) as Parliament may impose, to make laws with respect to the whole or any part of that matter.

A State law made under this authority may, if and to the extent that the Act so allows, amend or repeal (as regards to the state in question) any Federal law passed before that Act. Further any matter on which the legislature of a state is for the time being authorized by Act of Parliament to make laws for the purposes of Articles 79, 80 and 82,[442] must be treated is if it were a matter enumerated in the Concurrent List. For instance, by the Incorporation (State Legislative Competency) Act 1962 Parliament has, with effect for *Merdeka Day* authorized any State legislature[443] to make law with respect to the incorporation of any person or body within the state, and to amend and repeal any laws so made and any pre-*Merdeka* State law dealing with such matters. Any person or body incorporated by such law is deemed to be a body corporate throughout the Federation as if the State law creating it had been enacted by Parliament.[444]

Article 95C lays down that, subject to any Act of Parliament passed after *Merdeka Day*, the *Yang di-Pertuan Agong* may by order authorize the

441 *Ibid.*, Article 80(3). The Petroleum Mining Act 1966 and the Padi Cultivators (Control of Rent and Security of Tenure) Act 1967 were made under this provision. So were the Land Conservation Act 1960. Land (Group Settlement Areas) Act 1960, Land Acquisition Act 1960, the National Land Code (Penang and Malacca Titles) Act 1963.

442 Those provision regarding Parliamentary procedure for enacting legistlation on the Concurrent List, the distribution of executive powers, and the financing of expenditure relating to matters on Concurrent List.

443 In relation to State scholarships, State education and endowments, charities and charitable trusts, incorporation of the State Secretary, of the *Menteri Besar* or Chief Minister, the development of urban and rural areas, assistance to padi planters, state parks, museums, public libraries, and Sultanate lands.

444 Suffian, *op. cit.*, at p. 163.

legislature of a state to make laws on any matter. But any such order may not authorize the legislature of a state to amend or repeal an Act of Parliament after Malaysia Day unless the Act so provides.[445] Where an order under this Article is revoked by a later order, the later order may provide for the continuing in force of any State law passed by virtue of the earlier order, since any subsidiary legislation made or thing being done under any such State law thereby continuing in force has effect as Federal law.[446] But no State law may be continued in force by virtue of this provision if it could not have been made by Act of Parliament. Any order of the *Yang di-Pertuan Agong* under this Article must be laid before each House of Parliament.[447]

The Federal Government by Legal Notification No. 17 of 1964 in effect extended the Concurrent List for the Borneo States as follows:

*(a) Both States*

(i) Carriage of passengers and goods by land, and mechanically propelled vehicles (including the licensing and registration fees in respect of mechanically propelled vehicles) until the end of 1973 only;

(ii) Electricity and distribution of gas.

*(b) Sabah*

(i) Rubber research and rubber replanting, and the provision and application of funds raised by means of a cess on exported rubber.[448] But the minimum and maximum rates at which a cess may be imposed for replanting shall not be altered otherwise than by a law passed with the concurrence of the Minister of the Federation Government responsible for the rubber industry;

(ii) The Labuk survey and matters relating thereto.

*(c) Sarawak*

(i) The planting of rubber plants and seeds, and the production, sale import and export of rubber, and the provision and application of funds raised by means of a cess on exported rubber for the purpose

445 Article 95C(2).
446 Article 76(4).
447 Article 95C(5).
448 So far as not otherwise within the powers of the legislature.

of regulating these matters, for rubber research and for other purposes connected with the rubber industry. But the rate of cess shall not be altered without the consent of the Minister of the Federation Government responsible for the rubber industry.

A State Legislature has power to make laws on any matter not enumerated in the Federal List, or State or Concurrent List, if it is a matter on which Parliament has no power to make law.

Any law made by Parliament or any regulation under such a law which restricts the rights of a state or its residents to the use for navigation or irrigation of any river wholly within the state, does not have effect in that state unless approved by resolution of the State Legislative Assembly supported by the majority of the total number of its members.[449]

Where it appears to the presiding officer of either House of Parliament or of the Legislative Assembly of any state that a Bill or an amendment to a Bill proposes a change in the law on any of the matters enumerated in the Concurrent List, or to any of the matters enumerated in the State List on which the Federation is exercising functions in accordance with Article 94 (relating to Federal powers in respect of state subjects), then he must certify the Bill or amendment for the purpose of Article 79.[450] This means that the Bill or amendment cannot be proceeded with until four weeks have elapsed since its publication, unless the presiding officer is satisfied that the Federal Government, or the State Government, as the case may be, has been consulted, and allows it to be proceeded with on the grounds of urgency.

During a period of Emergency, Parliament may make laws on matters in the State List except matters of Muslim law and the custom of the Malays, or native law or custom in a Borneo State.[451]

### *Distribution of Executive Powers*

The executive authority of the Federation extends to all matters on which Parliament may make laws, and the executive authority of a state to all matters on which the State legislature may make law.[452] The executive authority of the Federation does not extend to any matter enumer-

449 Article 78.
450 Article 79(1).
451 Article 150.
452 Article 80.

ated in the State List, except insofar as provided in Article 93, 94 and 95 (relating to Federal surveys, advice to state and inspection of state activities), nor to any matter enumerated in the Concurrent List, except insofar as laid down by Federal or State law. Insofar as Federal or State law confers executive authority on the Federation with respect to any matter enumerated in the Concurrent List, it may do so to the exclusion of the executive authority of the respective state. So far as any law made under Article 76(4) makes provision for conferring executive authority on the Federation, it does not operate in any state unless approved by resolution of the State Legislative Assembly. A Federal law, or an order of the *Yang di-Pertuan Agong*,[453] may extend the executive authority of a state to the administration of any provision of Federal law and may for that purpose confer powers and impose duties on any of the state authority.[454] However, the Federation must pay the state for such functions; and in the event of a failure to agree as to the amount of payment, the matter may be determined by a tribunal appointed by the Lord President of the Federal Court.[455] Subject to the provisions of Federal or State law, arrangements may be made between the Federation and the state for the performance of any functions by the authorities of the one on behalf of the other authorities and such arrangements may be provided for the making of payments for any costs incurred in the arrangement.[456]

The obligations of states towards the Federation are that the executive authority of every state shall be so exercised;

(a) as to ensure compliance with any Federal law applying to that state; and
(b) as not to impede or prejudice the exercise of the executive authority of the Federation.[457]

## Financing of expenditure relating to matters on Concurrent List

Where any law or executive action relating to any matters enumerated in the Concurrent List involves expenditure, such action shall be taken under this Constitution as will ensure that, unless otherwise agreed, the burden of that expenditure is borne –

453 Article 95C.
454 Article 80(4).
455 *Ibid.*, Clauses (4) and (6).
456 *Ibid.*, Clause (5).
457 Article 81.

(a) by the Federation, if the expenditure results either from Federal commitments or from state commitments undertaken in accordance with Federal policy and with the specific approval of the Federal Government;
(b) by the state or states concerned, if the expenditure results from State commitments undertaken by the state or states on its or their own authority.[458]

Land and local government are two of the most comprehensive subjects in the State List.

Land is a state subject and the states have both legislative and executive authority over it.[459] Consequently the state authority has all the powers of disposal of state land as well as the right in reversion and other similar rights over alienated land. In the circumstances set out in Article 76(4) Parliament may legislate on land matters but the Federal Government can never have executive authority over them without the state consent.

### *Acquisition of Land for Federal Purposes*

If the Federal Government is satisfied that land in a State, provided it is not alienated land, is needed for Federal purposes, it may, after consulting the state, require the State Government to make to the Federal Government, or to such public authority as the Federal Government may direct.[460] If it requires the State Government to grant the land in perpetuity, the State Government must do so without making restrictions as to the use of the land. However the Federal Government must pay to the state an appropriate quit rent and a premium equal to the market value of the land granted. If the Federal Government requires a grant or any other interest in the land, it must pay a just annual rent for it. If the land is required by a State Government, a just premium must also be paid.[461]

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458 Article 82.
459 Article 74. Section 40 of the National Land Code in the States of Malaya and the corresponding sections in the Borneo States and Singapore, lays down that all state lands in a state are under the control of the state authority, the state authority being the ruler or governor of the state concerned.
460 But the Federal Government cannot acquire any land reserved for a state purpose unless it is satisfied that it is in the national interest to do so: Article 83(1).
461 If the value of the land has been increased by means of an improvement made (otherwise than at the expense of the state) while the land law reserved for Federal purposes, the increase must be taken into consideration in determining the market value, rent or premium: Article 83(2).

If the Federal Government requires any land which was intended for a state purpose, then if;

(a) other land is acquired by the state for that purpose in substitution for the first-mentioned land; and
(b) the cost of the land so acquired exceeds the amount paid by the Federation (otherwise than as rent), then the Federation must pay to the state the excess.[462]

Where a further grant of land is made, to the Federation or any other public authority, any sums payable by way of premium for this further grant shall be reduced by an amount equal to the market value of any improvement made (otherwise than at the expense of the State Government) since the land was acquired.

If the Federal Government is satisfied that alternated land is needed for Federal purposes it may require the State Government to cause to be made to the Federal Government or such public authority as the Federal Government may direct, such a grant of the land as the Federal Government may direct.[463] Then it becomes the duty of the State Government to acquire by agreement or compulsorily such land as may be necessary for complying with this directive.[464] Any expenses incurred by the State Government would be reimbursed by the Federal Government except that if the acquisition is by agreement and the Federal Government is a party thereto, then the Federal Government need not pay more than it would have paid on a compulsory acquisition. If a grant of the land is in perpetuity or a grant of any other interest in the land, it must include the appropriate quit rent or the just annual rent, and the sum so paid by the Federal Government must be deducted from any premium to be paid for the grant.

The state may agree to the reservation of land in a state for Federal purposes on such agreed terms and conditions, or the appropriate authority in a state may acquire in accordance with any existing law any alienated land for Federal purposes without a requirement by the Federal Government under Article 83.

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462 Article 83(8).
463 In the Borneo States the Federal Government must consult the State Government: Article 88(b).
464 Article 83(5)(*a*) and (*b*).

### *Reversion to State of Land Held for Federal Purposes*

If any interest in land in a state vested in the Federal Government or a public authority ceases to be required for Federal purposes, it reverts to the state if the state agrees to reimburse the Federal Government an amount equal to the market value of the interest vested in the Federal Government or public authority,[465] or, at the option of the State Government, either an amount equal to the market value of the interest or an amount equal to the sum paid by the Federation in respect of the grant together with the market value of any improvements made by the Federation to the land after the grant.[466] If the interest does not revert to the State, the Federal Government of public authority may sell the interest as it thinks fit.

In the case of alienated land which has been purchased from its proprietor and registered in the name of the Federal Land Commissioner and if the Federal Government no longer requires it, the Government may dispose of it without reference or consultation with the State Government.[467]

Where any land in a state which is reserved for any Federal purpose ceases to be required for that purpose, the Federal Government must offer the land to the state, and if accepted by the state, the reservation ceases; if not, the Federal Government may require the State Government to make to the Federal Government a grant in perpetuity without restrictions as to the use of the land. If the grant is made, the Federal Government may dispose of it as it thinks fit.[468]

The Federal Government may dispose of an interest or any smaller interest in land vested in the Federation and may do so to a person only in accordance with Federal law or by an order of the *Yang di-Pertuan Agong* which must be laid before both Houses of Parliament and approved by a resolution of each House, and may not take effect until it is approved.[469]

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465 Where the land or interest therein was acquired by a State Government in pursuance of Article 83(5) or was acquired by the State Government at the expense of the Government of the Federation of Malaya before *Merdeka Day*, Clause (5)(*d*) shall apply to the sums paid as if they were sums paid by the Federation under Clause (5)(*c*), and Clause (3) shall not apply to such land: Article 83(6).

466 Article 84(1).

467 Under the Federal Land Commissioner Ordinance 1957.

468 Article 85(2).

469 Article 86(3).

Where any dispute arises between the Federal Government and a State Government as to the payment in respect of land under the above provision, it must be refered to a Land Tribunal, and appeal from the Tribunal lies to the Federal Court on a point of law.[470]

The system of land tenure in Malacca, Penang, and the Borneo states is different from that in the Malay States. The Constitution provides that Parliament may by law adapt Articles 83 to 87 so that they apply there as they do to the Malay States.[471]

### *Malay Reservation*

Any land which was a Malay reservation before *Merdeka Day* continues as a Malay reservation in accordance with the State law.[472] And land which has not been developed or cultivated, may be declared as a Malay reservation in accordance with the existing law, but an equal area of land in that state which has not been developed or cultivated must be made available for general alienation. The Government of any state may declare as a Malay reservation any land acquired by that Government for that purpose or on the application of the proprietor, (and with the consent of every person having a right or interest in it) any other land, and shall, declare as a Malay reservation, in a case where any land ceases to be a Malay reservation, any other land of similar character and of an area not exceeding the area of that land.[473]

The Constitution retains the existing laws relating to customary land in Negeri Sembilan and Malacca, and in Terengganu with respect to

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470 Article 87. The Tribunal consists of a chairman (a judge or ex-judge or person qualified to be a judge) appointed by the Lord President of the Supreme Court, a member appointed by the Federal Government and a member appointed by the State Government.

471 Article 88.

472 Article 89(1): The State law may be changed by a majority of the total number of members of the State legislature and by votes of not less than two-thirds of members present and voting; and approved by a resolution of each House of Parliament and passed by a majority of the total number of members of that House and by votes of not less than two-thirds of members voting. The *Menteri Besar* may no longer abrogate a Malay reservation order made under section 4(1) of the Federated Malay States Malay Reservation Enactment or the equivalent law in other Malay States.

473 But not land owned or occupied by non-Malay or over which a non-Malay has any interest or right: Article 89(3).

Malay holdings.[474] In the Borneo States any state law may provide for the reservation of land for natives of the states or alienation of land to them or for giving them preferential treatment as regards to the alienation of the land by the state.[475]

### *The National Land Council*

Article 91 establishes a National Land Council[476] whose duty is to formulate a national policy for the promotion and control of the utilization of land throughout the Federation for mining, agriculture, forestry or other purposes and for administration of laws relating thereto; and the Federal Government and the Governments of the States of Malaya are obliged to follow the policy formulated by the National Land Council.

If the *Yang di-Pertuan Agong* is satisfied, after a recommendation from an expert committee and after consultation with the National Finance Council,[477] the National Land Council and the Government of the State concerned, that it is conducive to the national interest that a plan for development, improvement or conservation of the natural resources in any area or areas in one or more states to be put into operation, the *Yang di-Pertuan Agong*, may, after publishing the plan, proclaim the area or areas as a development area, and thereupon Parliament has the power to give effect to the development plan or any part thereof, notwithstanding that any of the matters to which the plan relates are matters on which ordinarily only the State Government has the power to make laws.[478]

The Federal Government may from time to time reserve for the purposes of a development plan, to such extent as they may specify, any land in a development area which is not occupied by private persons; but any consequent diminution of the annual revenue received by a state must be made good to the state by the Federation. A state may continue,

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474 Article 90(1), (2) and (3).

475 Article 161A(5).

476 Article 91(1). The Council consisting of a Minister as chairman, one representative from each of the States, who shall be appointed by the Ruler or Governor, and not more than ten representatives appointed by the Federal Government.

477 Established under Article 108; the Council consisting of the Prime Minister, such other Ministers as the Prime Minister may designated, and one representative from each of the States, appointed by the Ruler or Governor.

478 Article 92. Article 71 requiring a delay in the passing of legislation concerning matters in the Concurrent List does not apply here: Article 92(3).

to impose taxes on property in a development area, except that it cannot impose a rate of the same kind as that imposed by Federal law, which but for the creation of the development area might have been imposed by State law.

These provisions apply to the States of Malaya but not to the Borneo States, unless and until they desire their application.[479]

### *The National Council for Local Government*

Article 95A establishes a National Council for Local Government[480] whose duty is to formulate a national policy for the promotion, development and control of local government throughout the Federation and for administration of any laws relating thereto; and the Federal Government and the Governments of the States of Malaya are obliged to follow the policy formulated by the National Council for Local Government.

Through these two organizations, the Federal Government has the power to co-ordinate national policy. They represent a further reduction of state autonomy.

### *Federal Surveys, Advice to States and Inspection of State Activities*

The Federal Government may conduct such inquiries, authorize such surveys and collect and publish such statistics as it thinks fit even though such inquiries, surveys, collection and publication of statistics relate to a matter on which the legislature or a state may make laws, it is the duty of the State Government and all of its officers and authorities, to assist the Federal Government in these activities, and to that and the Federal Government may give such directions as it may deem necessary.[481]

Any officer authorized by the Federal Government may inspect any department or work of a State Government with a view to making report thereon to the Federal Government.[482] The executive authority of the Federation extends to the conduct of research, the provision and main-

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479 Article 95E.

480 Article 95A. The Council consisting of a Minister as a chairman, one representative from each of the States, who shall be appointed by the Ruler or Governor, and not more than representatives appointed by the Federal Government.

481 Article 93.

482 This right does not, however extend to any department or work dealing on, with matters within the exclusive legislative authority of a State: Article 95.

tenance of experimental and demonstration stations, the giving of advice and technical assistance to the Government of any state, on any of the matters on which the legislature of a state may make law. The agricultural and forestry officers of all except the Borneo States[483] are required to accept the professional advice of the Federal Government in respect of their duties.[484]

### *Fiscal Control*

A state may not borrow except from the Federation, or for a period of not exceeding twelve months, from a bank or other financial source approved for that purpose by the Federal Government.[485] But this provision does not restrict the power of a Borneo State to borrow under the authority of the State law within the State if the borrowing has the approval of the Central Bank of the Federation. During the time that Singapore was within the Federation, it was forbidden to borrow outside the state without the approval of the Federal Government.[486]

No state may without the approval of the Federal Government, make any addition to its establishment or the establishment of its departments, or alter the rates of established salaries and emoluments, if the effect of doing so would be to increase the liability of the Federation in respect of pensions, gratuities or other like allowances.[487]

### *Secession of a State from the Federation*

Although special arrangements were made for Singapore to leave Malaysia in 1965, there is in fact no provision in the constitution for a secession of state from the Federation. However Article 161E requiring a two thirds majority of both Houses of Parliament for any amendment made "in connection with" the admission to the Federation of a Borneo State

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483 Article 95E(4). The Borneo Officers may consider such advice but are not obliged to accept it.

484 Article 94(1).

485 Article 111(2).

486 Article 112B.

487 Article 112(2). This provision does not apply to non-pensionable appointments with maximum salaries of which do not exceed four hundred ringgit per month or such other amount as may be fixed by order by the *Yang di-Pertuan Agong*, or pensionable appointments with maximum salaries of which do not exceed one hundred ringgit per month or such other amount as may be fixed by order by the *Yang di-Pertuan Agong*.

or to any modifications made as to the application of the Constitution to a Borneo State would be enough to include a repeal of the amendment effecting admission. The provision guaranteeing the constitutional rights and privileges of the state rulers clearly contemplates the permanence of the Federal form of government.[488] On the other hand the fact that constitutional amendments may be effected without reference to the States of Malaya does give Parliament considerable scope to limit the Federal concept so far those states are concerned. Futhermore, at the outset the Borneo States and Singapore, did manage to secure control over some amendments to the Constitution which would have affected their rights as constituent member states.

No boundary of any state may be altered without the consent of that state, expressed by a law made by the legislature of that state. Any such law also requires the consent of the Conference of Rulers.[489]

### Constitutional Amendment

The basic principle of amendment to the Constitution of Malaysia is that it can be accomplished by an Act of Parliament which has been passed on both the second and third readings by votes of not less than two thirds of the total number of members of each House.[490] There are three exceptions to this principle.

(a) Some amendments cannot be effective without the consent of the Conference of Rulers; they are amendments to Articles 38 (relating to the Conference itself), 70 (relating to the precedence of the Rulers and Governments), 71 (relating to the Federal guarantee of rights of the Rulers), and 153 (relating to the special privileges of the Malays).
(b) Some amendments can be effected by the procedure for the enactment of an ordinary parliamentary bill, i.e. requiring a simple majority; they are in reference to matters of citizenship (Second Schedule, Part III), the forms of oaths and affirmations (Sixth Schedule), the election and retirement of senators (Seventh Schedule), or any amendment consequential on an amendment of the preceding

488 It is however possible that the Borneo States could still secede from the Federation by means of an Act of Parliament repealing the constitutional provisions by which they were admitted; *see* Article 71.
489 Article 2(*b*).
490 Article 15.

subjects, or any amendment made for or in connection with the admission of any state to the Federation or its association with the state thereof or any modification made to the Constitution of a State previously so admitted. Also requiring only a simple majority are certain other amendments incidental or consequential on the exercise of any power to make law conferred on Parliament by any provision of the Constitution other than Articles 74 or 76.[491]

(c) Some amendments cannot be effective without the consent of the governor of the state concerned.[492] No amendment can be made to the Constitution without the concurrence[493] of the governor of Sabah or Sarawak or each of the Borneo States concerned if the amendment is such as to effect the operation of the Constitution in relation to the Borneo States as regards to citizenship, the constitution and jurisdiction of the High Court in Borneo and its judges, immigration, the State Legislative List, the Federal – state financial arrangements, religion, language and the special treatment of the natives of the States.[494]

Similarly during Singapore's membership of the Federation no amendment could be made to the Constitution without the concurrence[495] of the *Yang Dipertua Negara* of Singapore if the amendment was such as to effect the operation of the Constitution in relation to Singapore with regards to citizenship, the constitution and jurisdiction of the High Court in Singapore and its judges, the. State Legislative List, the Federal – state financial arrangements, religion, language, the special position of the Malays in Singapore, the state branch of the Public Services and Judicial and Legal Service Commission, and the allocation to the State of Representatives in the *Dewan Rakyat* before the end of 1970.[496]

From the foregoing it may be fair to say that states do not have

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491 Provisions for Parliament to make laws on subjects listed on the Federal and Concurrent Lists, and to legislate for states in certain cases: Article 159(4)(*b*).

492 Article 59 read together with 161E(2).

493 'Concurrence' here means the consent of the State Government since the Governor is obliged to act on the advice of the State Government: Article 161E(2); Article 10 of the Constitution of Sabah and Article 10 of the Constitution of Sarawak, and Article 5 of the Constitution of Singapore.

494 Article 161E in the Constitution of 1963 the allocation to the State of representatives in the *Dewan Rakyat* before the end of 1970 was also on this list.

495 *See* note 494.

496 Article 161H.

much real power to guarantee their independence. With the preponderance of financial power in the Federal Government, such power that a state has, is further diminished.

With regard to the Senate as a constitutional safeguard of States Rights, in the original arrangement for Malaysia[497] the proportion of State Senators to Federally appointed Senators was 28:22. But soon after 1964 the appointed Senators outnumbered the State Senators 32:28,[498] and with the separation of Singapore the latter group was reduced to 26.[499] Whatever potential the Senate had originally under the 1957 Constitution and later under the Malaysian Constitution to act as a bulwark of state autonomy has been to all intents and purposes lost by this modification.[500]

## The Judiciary

A new judicial structure was necessary with the creation of the new Federation. Article 121[501] was amended to provide that the judicial power of the Federation is vested in the three high courts and such inferior courts as may be provided by Federal law. Thus three high courts of coordinate jurisdiction and status were set up: one in the States of Malaya, one in the State of Singapore and one in Borneo State.[502] Above these three high court was created, a new court known as the Federal Court with its principal registry in Kuala Lumpur.[503] This court has since been renamed *Mahkamah Agung* (Supreme Court).

The Supreme Court, besides hearing appeals from the two High

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497 Malaysia Act 1963, (No. 26), section 8.

498 Constitution. (Amendment) Act 1964 (No. 19), with effect from 3rd July 1964 (section 6).

499 Constitution (Amendment) Act 1966 (No.59), with effect from 9 th August 1965.

500 Salleh Abbas, Amendment to the Malaysian Constitution (1977) 2 *Malayan Law Journal Sup.* xxxiv: H.P. Lee 1976. Constitutional Amendments in Malaysia, 18 *Malay Law Review*, 159.

501 Section 13(1). Malaysia Act 1963 (No. 26) effective from 16th September 1963; Groves 1964. The *Constitution of Malaysia*. Singapore: Malaysia Publication Ltd., p. 99.

502 *Ibid.*, section 13(2) abolished the Supreme Court of Malaya, the Supreme Court of North Borneo, Sarawak and Brunei, and the Supreme Court of Singapore; and established the Federal Court, the High Court of Malaya, the High Court of Borneo and the High Court in Singapore. By the Constitutional (Amendment) Act 1965, Act 59/66, Article 121(1)(6) was repealed with effect from 9th August 1965; leaving two High Court, one in Malaya and the other in the Borneo States.

503 Article 121(1) of the Federal Constitution; section 13(2) *op. cit.*

Courts[504] which form the bulk of its work, has three kinds of jurisdiction:

(i) Exclusive jurisdiction:[505]
  (a) to determine the validity of laws made by Parliament or any State legislature,[506] and
  (b) to resolve disputes or any other questions between states, and between the Federation and any State;

(ii) Referral jurisdiction
Where in any proceedings before any court a question arises as to the effect of any provision of the constitution, the Supreme Court has jurisdiction to resolve the question and remit its case to the other court to be disposed of in accordance with that judgement;[507]

(iii) Advisory jurisdiction (Article 130):
This gives power to the *Yang di-Pertuan* Agong to ask the Supreme Court for its opinion on any question as to the effect of any provision of the Constitution about which doubt has arisen or appears likely to arise.[508]

The High Courts possess all the judicial power of the Federation save those specifically granted to the Supreme Court. They possess an original jurisdiction, and through their appellate, revisionary and supervisionary jurisdiction exercise control over the subordinate courts. Since 1988 these High Courts have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts.[509] Excepts as Federal law may provide otherwise, any order, decree, judgement or process of the High Courts or of their judges have the full force and effect throughout the Federation, and Federal law may provide for courts in one part of the Federation or for their judges to act in aid of court in another part. The

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504 *Ibid.*, Article 121(2)(a); except decisions of a High Court given by a registrar of other officer of the court and appealable under Federal law to a judge of that court.

505 Article 128(1)(a) "To determine whether a law made by Parliament or by a State Legislature is invalid on the grounds that it makes provision with respect to a matter which Parliament or, as the case may be, the State Legislature has no power to make law. No other court has this jurisdiction". Suffian, "The Judiciary", *The Constitution of Malaysia 1957 – 1977, op. cit.*, p. 239.

506 Article 128(1)(*a*).

507 Article 128(1)(*b*) and (2).

508 Article 130.

509 The Constitutional (Amendment) 1988, Act A704; Article 121(IA), effective from 10th June 1988.

Malaysia Act had, in fact, left untouched the jurisdiction of the High Courts.

The Federal Court (Supreme Court) was established consisting of a president of the Court, (to be styled "the Lord President of the Supreme Court") together with three Chief Justices of the High Courts and two other judges. Parliament, however, may vary the number of the other judges.[510] The Lord President may, on such occasion if he feels justice so requires, appoint a judge of a High Court other than its Chief Justice to sit in the Supreme Court.

Each of the High Courts consists of a Chief Justice and no less than four other judges, to the maximum of twelve for Malaya, and eight for the Borneo States. Parliament, however, may vary by ordinary law, the number of judges of the High Courts.[511]

All judges of the Supreme Court and of all the two High Courts are appointed by the *Yang di-Pertuan Agong* acting on the advice of the Prime Minister, after consulting the Conference of Rulers. The Prime Minister is not obliged to consult any one in recommending a judge to fill the office of Lord President; but he has to consult the Lord President and all the Chief Justices as to the appointment of the other judges of the Supreme Court. He has to consult each of the High Court Chief Justices as to an appointment to that office, and if the appointment is in the Borneo States, the respective Chief Ministers. He has also to consult the Chief Justice of the High Court concerned as to the appointment of a judge of that court.[512]

A special provision for the Borneo States stipulates that in an area in which a judge of the High Court is not for the time being available to deal with the court business, a judicial commissioner may be appointed subject to such conditions and limitations as may be contained in his order of appointment. His jurisdiction is limited to the area of his appointment, but otherwise he has the same powers and privileges of a High Court judge. He is, however, expected to be appointed for a limited period only, and as such he acts on matters which on his judgement are urgent.[513]

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510 Article 122(1). The Federal Court was renamed as the Supreme Court by the Constitutional (Amendment) Act 1983, effective from 1st January 1985 (Act A566).

511 Article 1 22A(1).

512 Article 122B.

513 Article 122A(3).

Power to appoint a judicial commissioner in the territory of each of the Borneo States rests with the Governor of the Borneo State concerned, acting on the advice of the Chief Justice of the High Court in Borneo. The *Yang di-Pertuan Agong* may also appoint a judicial commissioner for any area in either of the Borneo States, and he acts on the advice of the Lord President. A judicial commissioner may not possess the qualification of a High Court judge but he must be an advocate or a person professionally qualified to be admitted as an advocate of the High Court.

The Constitution lays down that a judge may be appointed to the High Court, Malaya whenever one is needed, but the appointee must be qualified for the post, and the same machinery of consultation and appointment must be followed as for a regular appointment to the High Court.[514]

In 1965 a new amendment empowered the *Yang di-Pertuan Agong* on the advice of the Lord President, to appoint for such purposes or for such a period of time as he may specify any person who had held a high judicial office in Malaysia to be an additional judge of the Supreme Court,[515] or Federal Court as it then was.

The qualifications for a judge of the Supreme Court and of the High Court are the same. He must be a citizen, and an advocate for ten years of either the High Court or Federal Court or a member of the Judicial and Legal Service of the Federation or the legal service of a State. The citizenship requirement was, however, waived for any person who immediately before *Merdeka Day* was a member of the Judicial and Legal Service of the Federation or immediately before Malaysia Day, was a member of the Judicial and Legal Branch of the Public Service of Singapore, Sabah and Sarawak.[516] For a limited period, the requirement of ten years standing as an advocate or the equivalent was reduced to five years practise as an advocate of a court of any Commonwealth country having unlimited jurisdiction in civil or criminal matters. The reduced time applied to appointments made to the Federal Court or the High Court in Malaya within ten years of *Merdeka Day*, i.e. until 31st August 1977.

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514 Article 122A(2) and 122B(5).

515 Constitution and Malaysia (Amendment) Act 1965 (No. 31), First Schedule, Part 11, effective from 1st July 1965 (S. 2(2)). Tan Sri MacIntyre J. on his retirement from the High Court in Malaya (at 65 years old) was appointed a judge of the Federal Court for a specified period.

516 Section 90(1) Malaysia Act. This waiver was to accommodate largely British jurists serving for the most part in the Borneo territories.

As to appointments to Singapore and Borneo High Courts, it applied for ten years following Malaysia Day, i.e. 16th September 1973.

Judges are transferable from the High Court to another and such transfers are effected by the *Yang di-Pertuan Agong* on the recommendation of the Lord President, after consulting the Chief Justice of the two High Courts concerned. This transfer provision applies only to judges appointed after *Merdeka Day*. Judges who held office in their respective States before *Merdeka Day* might be transferred only with their consent[517]

The tenure of office and remuneration of judges was continued unchanged except that the provision governing the constitution of the Tribunal was amended to give precedence among the members. A new provision lays down that Article 125 applies "to a judge of a High Court as it applies to a judge of the Supreme Court, except that the *Yang di-Pertuan Agong* before suspending under Clause (5) a judge of a High Court other than the Chief Justice shall consult the Chief Justice of that court instead of the Lord President of the Supreme Court".[518]

Article 131 retains appeals to the Privy Council from decisions of the Supreme Court. The *Yang di-Pertuan Agong* may make arrangements with the British Sovereign for referral to the Privy Council of appeals from the Supreme Court, and on receiving from the British Sovereign the report or recommendation of the Privy Council in respect of an appeal under these provisions, the *Yang di-Pertuan Agong* may make such order as may be necessary to give effect to it. However, Article 131 was repealed on 1st January 1985.[519]

The Malaysia Act retained the existing structure, jurisdiction and personnel of inferior courts in the new States. It also recognized the separate system of religious, i.e. Muslim and customary or native, court.[520]

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517 Section 89(6) *op. cit.*

518 Article 125.

519 Such arrangements were made in an agreement between the *Yang di-Pertuan Agong* and the British Sovereign on 4th March 1958, *vide Federal Gazette* G.N. No. 1254. Article 131 was repealed by the Contitutional (Amendment) Act 1983. Act 566, with effect from 1st January 1985. *See* note 305.

520 Parliament has power to create inferior courts: and the Courts (Amendment) Ordinances 1958 and 1959 established such inferior courts not provided for under the Malaysia Act. The Muslim courts and customary or natives courts were established by State laws.

A sessions court has jurisdiction to try offences for which punishment by law not exceeding seven years or five only for certain grave offences under the Penal Code, but it can pass only a sentence not exceeding (a) three years imprisonment; (b) a fine of RM4000; (c) whipping of 12 strokes; or (d) any combination of the above sentences.

It can, however, impose the maximum sentence prescribed by law if it considers it just to do so by reason of previous conviction or the backgraund of the accused, in which case it must record its reasons for so doing. In civil matters, it has jurisdiction to try all civil suits where the subject-matter does not exceed RM2000.[521]

A first class magistrate has jurisdiction to try all offences for which the maximum punishment by law does not exceed three years or is a fine only for certain grave offences under the Penal Code, but it may pass only a sentence not exceeding (a) twelve months imprisonment; (b) a fine of RM2000; whipping of six strokes; or (d) any combination of the above sentences.

In exceptional cases it can impose the maximum sentence prescribed by law, on the same grounds or previous convictions or background of the accused, as in the sessions court. In this case it must record its reasons for so doing. In civil matters, it has jurisdiction to try all civil suits where the subject-matter does not exceed RM1000.[522]

A first class magistrate in the Borneo States can pass a sentence not exceeding twelve months imprisonment, or fine of RM2000 or both; but where a magistrate has in his state been declared a Stipendiary Magistrate then he can pass a sentence not exceeding three years imprisonment or a fine of RM5000.

In civil matters, a first class magistrate has jurisdiction to try all Civil Suits where the subject-matter does not exceed RM1000 and a Stipendiary Magistrate RM3000.[523]

In the case of subordinate judges such as presidents of Sessions Court and magistrates, they hold office at the pleasure of the *Yang di-Pertuan Agong*, but their appointments, promotion, transfer and discipline are conrolled by the Judicial and Legal Service Commission. The

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521 Sections 63(1), 64(1) and 65(1). Courts ordinance 1948 (No. 13), again this was not touched by the 1963 Act.

522 *Ibid.*, sections 85, 87 and 90.

523 A First Class Magistrate has the jurisdiction as his counterpart in the States of Malaya, *See* Wu Min Ann 1975. *An Introduction to the Malaysian Legal System Kuala Lumpur*, p. 79.

On 9th August 1965, Singapore ceased to be a State of Malaysia, and amendments were made to the Constitution whereby all references to Singapore wherever they appear were deleted. Thus the remaining Clauses provide for two High Courts and the Borneo branch of the Judicial and Legal Services Commission.[530]

## Special Power Against Subversion, Organized Violence, and Acts and Crimes Prejudicial to the Public, and Emergency Powers

### *Legislation Against Subversion*

The 1957 Constitution made provisions for special powers to deal with matters, both legislative and executive, relating to subversion or any emergency.[531] When the Govemment assumes these powers, anything it does is perfectly constitutional provided it is within these special powers since they are authorized by the Constitution itself. These special powers are contained in Articles 149 and 150 of the Constitution, and both these Articles, with slight amendments, are retained in the Constitution of Malaysia.

The special powers conferred by Articles 149 and 150 overlap but are quite distinct. Article 149 empowers Parliament to make laws against subversion irrespective of whether or not an emergency has been proclaimed. Whilst the special powers conferred under Article 150 may be made only after an emergency has been proclaimed. An ordinary law may be made only by Parliament whereas a law under Article 150 may be made either by the *Yang di-Pertuan Agong* or by Parliament itself.[532] An

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530 Section 4, Constitution (Singapore Amendment Act) 1965, (No. 53) and Constitution (Amendment) Act 1966 (No. 59), *op. cit.*, and Article 121(1) [Clause (1)(c) repealed] and Article 146A [Clause (4) repealed].

531 Constitution of Federation of Malaya, Articles 149 and 150. These provisions were based on the recommendations of the Reid Commission Report (Colonial 330, 1957). In giving great powers of government to Parliament, the Commission was of the opinion that "It must be for Parliament to determine whether the situation is such that special provisions are required, but Parliament should not be entitled to authorize infringements of such a character that they cannot properly be regarded as designed to deal with the particular situation. It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not be so regarded and submit the question for decision of the Court". (para 174).

532 Constitution of Malaysia. Article 150(2): When Parliament is not sitting, the *Yang di-Pertuan Agong* may promulgate ordinances having the force of law if he is satisfied that immediate action must be taken.

Ordinance or Act under Article 150 is valid even if inconsistent with any provision of the Constitution[533] except those dealing with the Muslim law or the Malay custom, or the native law or custom in the Borneo States, or any matter relating to religion, citizenship or language.[534] A law made under Article 149 is valid even if inconsistent with Article 5 (dealing with freedom of person), 9 (dealing with freedom or movement), or 10 (dealing with freedom of speech, assembly and association). A law made under Article 149 is valid even if outside Parliamentary competence[535] but it cannot extend the executive authority of the Federation to any matter within the legislative authority of a State. However during an emergency proclaimed under Article 150, the executive authority of the Federation extends to any matter within the executive authority of a State and to the giving of directions to a State Government or a State officer or authority.

The form of Article 149 is the same as in the 1957 Constitution and the Malaysian courts have made no judicial pronouncement under this Article.

Article 149 provided that if action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

(*a*) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
(*b*) to excite disaffection against the *Yang di-Pertuan Agong* or any government of the Federation; or
(*c*) to promote feeling of ill-will and hostility between different races or other classes of the population likely to cause violence; or
(*d*) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(*e*) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the federation or any part thereof; or
(*f*) which is prejudicial to public order in, or the security of the Federation or any part thereof.

Parliament may pass an Act reciting that such action has been taken or threatened. Any provision of law designed to stop or prevent that action is

533 *Ibid.*, Article 150(*b*). Emergency legislation would also have to comply with Article 151.
534 *Ibid.*, Clause (6A).
535 *Ibid.*, Clause 149(1).

valid; notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9 or 10, or would be outside the legislative competence of Parliament, and Article 179[536] shall not apply to a bill for such an Act or any amendment to such a bill.

Such an Act, if no sooner repealed, ceases to have effect only if resolutions are passed by both Houses of Parliament annulling it. If annulled, it does not prejudice anything previously done by virtue of the Act, and Parliament may make a new law under this Article.[537] This provision gives Parliament a measure of control over the executive, since annulment can be achieved without the concurrence of the *Yang di-Pertuan Agong*.

Article 149 gives great powers of government to the Federal Government Parliament and when Parliament chooses to exercise these powers, the Act of Parliament must recite that action described above has been taken or threatened. The action or threat of action need only be enough to cause fear, not actual harm, for such a recital to be valid. It would appear as if these great powers were meant to deal with temporary and specific exigencies and that the special situation having been met, the legislation would be repealed. The danger, of which the legislation of many countries offers examples, is that Parliaments are slow to repeal laws enacted to deal with specific situations. Both the people and their legislators can become habituated to restrictions on liberty until the exceptional appears to be the usual and regular.[538] New events are likely to arise to support the need for the continuance of the special legislation, originally enacted to meet a quite different and long since obsolete exigency.

The Internal Security Act 1960 contains two Article 149 recitals, which state that

> Whereas action has been taken by a substantial body of persons to cause a substantial number of citizens to fear organized violence against persons and property; And whereas action has been taken or threatened by a substantial body of persons which is prejudicial to the security of Malaya ...

This provides, *inter alia*, for detention without trial, restricts freedom

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536 Relating to the exercise of concurrent legislative powers. The State Government need not be consulted before a bill for such an act or any amendment to such a bill is proceeded with.

537 Article 149(2).

538 Groves, H.E. 1964. *The Constitution of Malaysia, op. cit.*, Singapore, p. 220.

of speech, assembly and associations, limits freedom of movement, and permits the closing by ministerial order of schools and educational institutions. This Act was extended to Singapore and the Borneo States,[539] and at the time of going to press is still in force in Malaysia. It seems likely to be accepted as a normal and regular law for many more years to come.

### *Proclamation of Emergency*

Article 150 was amended to further strengthen the Federal Parliament's overriding competence over State matters. Words in the Article which could have been construed as restrictive words[540] qualifying the type of emergency envisaged, were dropped. A new provision empowers Parliament to enact emergency laws inconsistent with any provision of the constitution. Further provisions were made covering religion, citizenship and language. These enumerated subjects thus became entrenched in the constitution.

A proclamation of emergency containing the prescribed recital, is essential before special powers under the provision of this Article can be exercised.[541] Where there is a proclamation in effect, emergency legislation will be valid even if inconsistent with the provisions of the constitution. The Federal Executive is permitted to legislate through emergency ordinances when Parliament is not sitting or pending the sitting of both Houses of Parliament. The Federal legislative authority extends to State matters, and it is empowered to give directions to State Governments or Officers, and authorities thereof. It would appear that while the Proclamation is in effect, Parliament may legislate on any matter regardless of whether it belongs to the Federal, State or Concurrent List, and the normal constitutional requirements of consultation with a State Government or obtaining the consent or concurrence of any other body are waived.[542] However, Parliament is not permitted to extend its normal powers with respect to Muslim law, Malay custom, or native law or custom in the Borneo States.

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539 *Legal Notices 231, 271* and *232* of 1968.

540 The words "whether by war or external aggression or internal disturbances" in Clause (5) of Article 150.

541 *Ibid.*, Article 150(1). S. Jayakumar, 1978. "Emergency Powers in Malaysia: Development of the Law 1957 – 1977", *Malayan Law Journal*, ix.

542 *Ibid.*, Article 150(5).

In 1966 Article 150 was again amended following the Proclamation of Emergency, but the amendment[543] was limited to the emergency legislation enacted to deal with the crisis over the dismissal of the Chief Minister of Sarawak. Clauses (5) and (6) of this Article were amended to provide that the emergency legislation would be valid even if it contained Clauses inconsistent with the Constitution of Sarawak.

The Emergency Act 1966 was passed by Parliament recited that it was "an Act to amend the Federal Constitution and to make provision with respect to certain constitutional matters in the State of Sarawak consequent upon a Proclamation of Emergency[544] having been issued and being in force in that State". It expanded the power of Parliament to make laws with respect to any matter, including anything in the Federal Constitution "or in the Constitution of the State of Sarawak".[545] It further enlarged the powers of the Governor of Sarawak with regard to the summoning of meetings of the *Council Negeri* (or Legislative Council) and the transaction of its business.[546] It enacted specifically that the governor may, on his discretion, dismiss the Chief Minister and members of the Supreme Council if at any meeting of the *Council Negeri*, a resolution of no confidence in the Government is passed by a majority of members present and voting, and the Chief Minister after passing of such a resolution fails to resign and to tender the resignation of the members of the Supreme Council.[547] This amendment ceased to have effect six months after the termination of the Emergency.[548]

In the case of *Stephen Kalong Ningkan* v *Government of Malaysia*[549] the plaintiff who was the Chief Minister of Sarawak was asked to resign his

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543 Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, No. 68, effective from 14th September 1966.

544 *PU (A) 339/66*, 14th September 1966.

545 Section 3(1)(*a*). Emergency Act 1966, *op. cit.*; S.M. Thio, 1966. Dismissal of Chief Ministers, 8 *Malaya Law Reviews* 2.

546 Section 4, *ibid.*

547 Section 5, *ibid.*, Act 1966, *op. cit.*, "The aim of these provisions was to make good the 'lack of powers' on the part of the Governor. Article 150 is not wide enough to enable Parliament to amend any State Constitution other than the State Legislature itself; although it has power to extend the duration of 'a State legislature, suspend any election and make provision consequential upon or incidental thereto'.

548 Section 3(2), *ibid.*

549 (1968) 1 *MLJ* 119; (1968) 2 *MLJ* 23 – (PC); V. Sinnadurai, 1968. Proclamation of Emergency – Reviewable, 10 *Malaya Law Review*, I. R.H. Hickling 1975. "The Prerogative in Malaysia", 17 *Malaya Law Review 207* 1976 and S. Jayakumar, "Emergency Powers in Malaysia: Can the *Yang di-Pertuan Agong* Act in His Personal Discretion and Capacity"; *18 Malaya Law Review*, 149.

post of Chief Minister by the Governor who acted not upon a vote of no confidence but upon representations made to him by the majority of the Council's members who claimed that the plaintiff had lost the confidence of the Council. As the Chief Minister, was acting under the State Constitution, refused to resign and also refused to advise the Governor to convene a meeting of the Council to deal with the question of the resolution of no confidence against him, the matter became a serious political impasse. Upon his refusal to resign the *Yang di-Pertuan Agong* proclaimed a State of Emergency in Sarawak and Parliament passed an Act empowering Parliament to ammend the Constitution of Sarawak and the Governor at his absolute discret on to summon a meeting of the *Council Negeri* and, if need be, to dismiss the Chief Minister, i.e. the plaintiff.

As to the question of whether the Proclamation of Emergency was justiciable, the Federal Court in this case was emphatic in their view that the Court could not review the decision of the *Yang di-Pertuan Agong*, which was in effect the decision of the Government. It said that

> ... it is incumbent on the court to assume that the Government is acting in the best interest of the State and to permit no evidence to be edduced othetwise. In short, the circumstances which bring about a Proclamation of Emergency are non-justiciable.[550]

The Privy Council further adroitly avoided deciding the question of justiciability and proceeded to a claim of *"in fraudem legi"* on the assumption that it was in law justiciable. Their Lordships observed that the question

> ... is a constitutional question of far reaching importance which, on the present State of authorities remains unsettled and debateable.[551]

In an earlier case[552] the Court relying on Indian and English cases[553] stated that

550 (1968) 1 *MLJ* 119, *op. cit.*, Barakbah LP at p. 122, Ong, H.T. FJ dissenting on this point, said that the "inbuilt safeguards" and "words of limitation" showed that the power of the Governments was limited and it was open to challenge (a Proclamation of Emergency on grounds of *ultra vires*: p. 128.

551 (1968) 2 *MLJ* 238 *op. cit.*, *per* Lord MacDermott, p. 242.

552 *Stephen Kalong Ningkan* v *Tun Abang Hj. Openg and Tawi Sli* (No. 2) [1967] 1 *MLJ* 146.

553 Pike. CJ (Borneo) relied on the cases of *Bhagat Singh and Ors.* v *The King Emperor* [1931] LR 581A 169; *The King Emperor* v *Benoari Lal Sharma* (1945), AC 14; *Regina* v *Governor of Brixton Prison* (1962) 2 QB 242; and *Liversidge* v *Anderson* [1942] AC 286.

> ... it is not open to a court to inquire into the sufficiency of the reasons for a declaration of Emergency provided it was made *bona fide*.[554]

The challenge that the Proclamation was made on the grounds of *mala fides* seem be unresolved as the courts are clearly in conflict over the issue: Pike CJ (Borneo) felt that the cases had established that there could be no judicial review provided the proclamation "was *bona fide*". He relied upon the judgement in the *King Emperor's* case[555] that

> the exclusion of the courts right to inquire into the exercise of such a power depends upon whether or not the act was done *bona fide* ...

But the Federal Court noted that in the judgement on the *King Emperor* case

> there is something ... that might suggest that it could still be open to the court to question the *bona fide* of the *Yang di-Pertuan Agong*.

but dismissed this by saying that the Governor General in India was the "sole judge" of whether an emergency existed "and that, therefore, no court may inquire into it".

The courts have furthermore evolved a doctrine. that the power to legislate contrary to the Constitution can indeed be delegated. The Federal Court has held[556] that Article 150 (6) in giving Parliament power to legislate on any subject and to any effect even if contrary to the constitution necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written constitution.

> The true effect of Article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with Articles of the constitution (including the provisions for fundamental liberties) are involved. This power necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written constitution.[557]

In the case above, the appellant had been convicted of offences

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554 Pike, CJ, *ibid.*, p. 47.
555 (1945) AC 14, *op. cit.*
556 *Eng Kesh Cheng* v *Public Prosecutor* [1966] 1 *MLJ* 18.
557 *Ibid.*, *per* Wylie CJ (Borneo) at p. 20.

under the Internal Security Act 1960 and sentenced to death. On appeal it was agreed that;

(i) the Trial Court had no jurisdiction to try offences of which the appellant was charged and convicted by reasons, *inter alia*, of
   (a) the absence of any preliminary enquiry as required by section 138 of the Criminal Procedure Code;
   (b) the absence of a jury as required section 200 of the Code;
(ii) the procedure adopted by the trial judge for the trial was a procedure appearing in the Emergency Regulations 1964,[558] which is *ultra vires*. The Court held that the provisions of the Emergency (Essential Powers) Act 1964 are not beyond the power of Parliament to enact and as Parliament has expressly enacted that regulations made under the Act are to be valid notwithstanding any inconsistency with the provisions of the Constitution, such regulations cannot be challenged on the ground of any such alleged inconsistency.

In another case,[559] the appellants who were Indonesians were convicted of the murder of three civilians by planting explosives in a building called MacDonald House in Orchard Road, Singapore during the time of the 'Confrontation' of Indonesia against Malaysia. On appeal to Privy Council, they argued that the Emergency Regulations 1964 conflicted with Article 8 of the Constitution and the Emergency (Essential Powers) Act 1964 did not authorize the making of regulations inconsistent with the Constitution. However the Court held that Emergency Regulations inconsistent with the Constitution were not void because the Emergency (Essential Powers) Act 1964, which was passed under Article 150, under which the regulations were made, had included the power to amend, suspend, or modify any written law and by the interpretation and General Clauses Ordinance 1948, "written law" meant all Acts of Parliament, Ordinances and Enactments in force in the Federa-

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558 As contained in the Schedule to the Emergency (Criminal Trials) Regulations. The procedure referred to in regulation 4 which purports to authorize any one of the many Deputy Public Prosecutors to deprive a man charged with a capital offence the protection of the preliminary enquiry and of a jury. Regulations 4 and 5 of the 1964 Regulations which were made under section 2 Emergency (Essential Powers) Act 1964, subsection 4 provide "An Essential Regulation, and any order, rule or by-law duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any written law other than this Act or any instrument having effect by virtue of any written law other than this Act".

559 *Osman and Anor* v *Public Prosecutor* [1968] 2 *MLJ* 137, JPC.

tion or any part thereof and all subsidiary legislation made thereunder, including the Federal Constitution.

*Preventive Detention*

Article 151 of the 1957 Constitution was re-enacted with slight amendments to the nomenclature in reference to judges and courts in Clause (2) in line with the changes to the judicial system that took place with the formation of Malaysia.

In interpreting the Article, the Malaysian courts have consistently stated that there can be no judicial review of the subjective "satisfaction" that governs a decision of the executive to detain a person. In one case[560] the Federal Court was unanimous that the executive action was beyond judicial review. "Preventive detention is legal only by virtue of Part XI of the Constitution which includes Article 151". The appellant in this case had been detained under an order made by the Minister of Home Affairs, which recited that "whereas the *Yang di-Pertuan Agong* is satisfied with respect to the undermentioned person (the appellant) that, with a view of preventing that person from acting in a manner prejudicial to the security of Malaysia/maintenance of public order therein/the maintenance of essential services therein, it is necessary to make the following order".

The order of detention served on the appellant stated that it was made on the grounds that the appellant had acted in a manner prejudicial to the security of Malaysia, and set out twelve allegations on which the order was based. The trial judge had held that the order of detention was made in the exercise of a valid power and that the detainee had not discharged the burden, which was on him, of showing that the order was made *mala fide* or improperly. The Federal Court taking the same view dismissed the appeal and held that the appellant's detention had been made in the exercise of a valid legal power and therefore the onus lay on the appellant to show that such power had been exercised *mala fide* or improperly. The Court held that decision as to whether or not the appellant should be detained was that of the *Yang di-Pertuan Agong* acting on Cabinet's advice. Whether or not the facts on which the order of detention was based were sufficient or relevant, was a matter to be decided by the executive. In making their decision they had complete discretion and it

560 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri* [1969] 2 *MLJ* 129.

was not for a court of law to question the sufficiency of relevance of these allegations of fact.[561]

The Court will, however, exercise review where the challenge is based on *mala fide*. In the same case the judges considered the merits of the arguments of *mala fides*, and stated that " ... if the detainee alleges *mala fides* ... then the onus shifts to him and it is for him to prove *mala fides*". They went on further to state that "... it is for the authority who has detained the detainee to show that the latter has been detained in exercise of a valid power. Once that is shown it is for the detainee to show that the power has been exercised *mala fide* or improperly, which means that it is made for a 'collateral' or 'ulterior' purpose, i.e. a purpose other than those set out in Article 151".[562]

Even when the particulars supplied to the detainee have been vague, insufficient or irrelevant, the Malaysian courts have refused to follow Indian cases which made detention unlawful. The court held that such allegations of fact did not relate back to the order of detention and could not render the detention, which was made under a valid order, unlawful. The sufficiency of the allegations of fact for the purpose of making representations was not justiciable.[563] The judge felt that where the subjective nature of preventive detention power excluded judicial inquiry into the sufficiency of the grounds to justify the detention ... it would be wholly inconsistent to hold that it would be open to the court to examine the sufficiency of the same grounds to enable the person detained to make representations. Indeed the logical result ... would be to invalidate 8 of the Internal Security Act 1960 insofar as it purports to make the satisfaction of the Government the sole pretext of a detention order.

### *Constitutional Amendments 1969 — 1981*

After the separation of Singapore in 1965, no further important event took place until 1969.

Parliament was dissolved on 20th March 1969 and a general election to the *Dewan Rakyat* and all State Legislative Assemblies was fixed for the following May. During the fifty-one days of campaigning many things were said by politicians determined to win seats in one legislature or

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561 *Per* Suffian FJ (as he then was) *ibid.*, p. 151.

562 *Ibid.*, *per* Azmi LP at p. 138.

563 *Ibid.*, *per* Suffian FJ (Azmi LP agreed on the point) following the reasoning of the dissenting judgement of Sastri J in *State of Bombay* v *Atma Ram* 1951 SC 157.

another and many things were said by their supporters and detractorc, with the result that feelings became inflamed culminating in inter-racial rioting beginning on Tuesday 13th May in Kuala Lumpur. There were many reasons for the rioting, political, social and economic.[564]

The Government took rapid action under the Constitution; two days after the outbreak of violence the *Yang di-Pertuan Agong* acting on Cabinet advice, issued a Proclamation of Emergency throughout Malaysia. As Parliament was not sitting, the *Yang di-Pertuan Agong* acting under Clause (2) of Article 150 promulgated an Emergency (Essential Powers) Ordinance, 1969[565] giving himself wide powers to make "any regulation whatsoever which he considers desirable or expedient for the life of the community". The emergency regulations, known as "Essential Regulations",[566] were revived.

The Federal and State elections, which were not yet completed, were suspended forthwith. This suspension affected only the elections to *Council Negeri* and the Federal Parliament in Sarawak, those to the Federal Parliament in Sabah and a by-election in Malacca Selatan.[567] At the same time the *Yang di-Pertuan Agong* directed "... that the Legislative Assemblies and the *Council Negeri* shall not be summoned to meet until such date as may be determined".[568]

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564 Tunku Abdul Rahman 1969. *May 13 Before and After.* Kuala Lumpur: Utusan Melayu Press Ltd.; 1969. *The May 13 Tragedy,* a report of the National Operations Council, Kuala Lumpur: Government Printer; Goh Cheng Tek 1971. *The May Thirteenth Incident and Democracy in Malaysia.* Oxford University Press.

565 Emergency (Essential Power) Ordinance No. 1, *PU (A) 146/69.*

566 Under the Emergency (Essential Powers) Act 1964. No. 30. One of these the Emergency (newspaper and Other Publications) Regulations 1969, *PU (A) 146/69* was revived section 2 of Ordinance No. 1, *op. cit.*

567 In justifying this action, the Attorney-General Malaysia, differentiated between the 1969 Emergency and the previous emergencies, he said, "During the anticommunist guerilla Emergency (in 1948) and the Indonesian Confrontation (in 1964) the people were united against an external enemy. In 1969 the divisions were internal. Therefore it was possible for parliamentary rule to continue in the first type of situation but not in the second". Abdul Kadir 1971. "The Road Back to Parliament". *Malaysian Digest.* 14th November 1971, p. 1.

568 *PU (A) 147/69.* On 20th February 1971 the *Yang di-Pertuan Agong directed* "that the Legislative Assembly and the *Council Negeri* may now be summoned", *PU (A)*42/72. During the period of recess the functions of the Cabinet were discharged by the National operations Council but as things improved the Federal Cabinet emerged in importance. Its membership was the same as before the dissolution of Parliament with the exception to those who had lost in the elections.

A second Emergency (Essential Powers) Ordinance 1969[569] was promulgated two days after the first Ordinance, delegating the executive authority of the Federation and all the powers and authorities conferred on the *Yang di-Pertuan Agong* by any written law to a Director of Operations, the Deputy Prime Minister, appointed by the *Yang di-Pertuan Agong*. The Director of Operations was given very wide executive and legislative powers, but he was to act on the advice of the Prime Minister and a National Operations Council[570] appointed by himself. In the states the same Ordinance established State Operations Committee and District Operations Committee, and the Director of Operations appointed their members and directed their activities.

The emergency lasted longer thtan expected. For twenty-one months there was no *Dewan Rakyat* and in the States no Legislative Assemblies; A third Emergency Ordinance[571] was promulgated on 27th July 1969, providing that expenditure of Federal money might be made simply with Treasury Approval and State money with the approval of the *Menteri Besar* or Chief Minister.

The *Yang di-Pertuan Agong* promulgated an Emergency (Essential powers) Ordinance No. 8 which provided that State law could be enacted by the ruler or Governor assenting to a bill passed by the State Operation Committee and approved by the Director of Operations.

Further, the Emergency (Public Order and Prevention of Crime) Ordinance 1969, was promulgated, making provisions or arrest without warrant, and the restriction of activity, freedom of movement, place of residence and employment. Other related matters and procedures were also dealt with by this ordinance.

When after about a year the Government felt that the security situation had improved sufficiently, the uncompleted elections to *Dewan Rakyat* and to State Legislative Assemblies were held and eventually on 20th February 1971 Parliament was reconvened, followed at intervals by the various State Assemblies.

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569 Ordinance No. 2, 1969 (*PU (A) 149/69*), as amended by the Emergency [Essential Powers Ordinance No. 77, 1971. [*PU (A) 62/71*].

570 The Council consists of the Ministers for Home Affairs, Information and Broadcasting, Finance and Labour the Director of Public Services Department, the Permanent Secretary of Ministry of Foreign Affairs, the Chief of Staff or the Armed Forces, the Inspector-General of Police and a Lieutenant-General as Chief Executive.

571 The emergency (Essential Powers) Ordinance No. 3, 1969 [*PU (A) 170/69*], effective from 15th May 1969.

### *The Constitution (Amendment) Act 1971*[572]

As a result of the May 13 violence, a very important amendment was made to Article 10 of the Constitution to empower Parliament to pass laws which restrict further the right to the freedom of speech. The restriction was aimed at crubing public discussion on four "sensitive" issues: citizenship, the National Language and languages of other communities, the special position and privileges of the Malays and the natives of Sabah and Sarawak and the legitimate interests of other communities, and the sovereignty of the Rulers. These restrictions extend to members of Parliament and State Legislative Assemblies as well, who can no longer seek the protection of Parliamentary privilege.[573]

In imposing restrictions under Article 10 in the interest of the security of the Federation or any part thereof or public order, Parliament was authorized to pass legislation prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Articles 152, 153, or 181 of the Constitution.

A law cannot be challenged under Clause (1) of Article 10 if it furthers the interests stated in Clause (2). With regard to Clause (2), a challenge to any law is further restricted by Article 4(2)(*b*). Thus the courts cannot inquire into any Parliamentary acts on these subjects.

Article 10 is concerned with sedition cases. The Court has held[574] that "Any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10(2), (3)

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572 The Constitution (Amendment) Act 1971, (No. 30 of 1971) effective from 10th March 1971. In introducing the Bill in Parliament, the Prime Minister said that "We cannot practice the democratic process as it is practised in such developed countries as Britain, Sweden or the United States ... we must understand the background of the democratic evolution in those countries ... National unity cannot be achieved in Malaysia unless the economic imbalance existing among the communities is rectified and unless the nation's prosperity is enjoyed much more equitably among the people". Parliamentary Debate on 18th February 1971, *The Straits Times*. James Scott observed that Malaysia's commitment to democratic values was more formalistic in the sense that it tends to weaken quickly when threatened with other values like security, stability and so forth, *Political Ideology in Malaysia*, Yale University Press, 1968, at p. 177.

573 Article 63(4) and 72(4); section 3 and 4 of the 1971 Act; Immunity from legal proceedings in respect of things said or votes given in Parliament, the Legislative Assembly of a State or a committee thereof of either, was withdraw from a person charged with an offence under such a law or under the *Sedition Ordinance 1948* as amended.

574 *Madhavan Nair & Anor.* v *Public Prosecutor* [1975] 2 *MLJ* 264.

and (4) of the Federal Constitution can still be valid". This judgement applied to a case where the accused person had contravened a condition attached to the grant of a licence to make a public speech. The condition was *intra vires* as the police have powers to grant licences as laid down by Act of Parliament, but the defence raised the question whether it was constitutional. The Court held that no act of government, statutory or otherwise, is legal if it contravenes any Article of the Constitution; and that the said condition did not contravene Article 10.

The Court in another case[575] held that "... Article 10 of the Federal Constitution guarantees the right of every citizen to freedom of speech, assembly and association. These rights are, however, subject to any laws passed by Parliament". By that the judge meant any valid law, but also he meant no law could be valid on the sole ground that it abridged rights set out in Article 10(1).

What language is seditious is a mixed question of law and fact to be decided by the courts. The courts have in two cases[576] held that after the Emergency (Essential Powers) Ordinance 1970 was passed, it was immaterial in sedition cases whether the words complained of were true or false. The 1970 Ordinance has been held by the courts to be valid by virtue of Article 150(*b*); and the judge said that "in my view, the right to free speech ceases at the point where it comes within the mischief of the Sedition Act"; and added, that "Our sedition law would not be apt for other people but we ought always to remember that it ... suits our temperament.[577] This sentiment was, however, not shared by another judge who said that the 1970 amendment was *"ad hoc* legislation passed to meet the special needs and circumstances of the times ... as and when the justification no longer exists for banning fair comment on matters of public interest, the 1970 amendments to the Sedition Act will be removed".[578]

The 1971 Act provided that a bill for making any amendment to a law passed under Clause (4) of Article 10 cannot be passed by either House of Parliament unless it has been supported on the second and third readings by the votes of not less than two-thirds of the total number of members of the House, and received the consent of the Conference of

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575 *Lau Dak Kee* v *Public Prosecutor* [1976] 2 *MLJ* 229, Azmi J adopting the opinion of Chang J in *Madhavan Nair's* case.

576 *Fan Yew Teng* v *Public Prosecutor* [1975] 2 *MLJ* 235; *and Melan bin Abdullah* v *Public Prosecutor* [1971] (*per* H.T. Ong).

577 CJ (Malaya), p. 284.

578 *Melan's* case, *op. cit.*, *per* H.T. Ong CJ (Malaya) at p. 284.

Rulers.[579] No law has been passed under the amended Article 10 but effective prohibition on the discussion of sensitive issues has been brought about by the Sedition Act 1948.

In relation to the National Language, Article 152 of the Constitution expressly declares that the Malay language is the National Language of the Federation but no one can be prevented or prohibited from using any other languages except for official purposes. The 1970 Act now defines "official purposes" as meaning "any purpose of the Government, whether Federation or State, and includes any purpose of the authority".[580] Official purposes can now be defined as including any act by the *Yang di-Pertuan Agong*, the ruler or governor of a state, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by Federal or Stare law, any court or tribunal other than the Federal Court and High Courts, or any of those persons, courts, tribunals or authorities.

The Sabah legislature has enacted the National Language (Application) Enactment 1973, approving the extension of the National Language Act 1967 to Sabah, so that the rights guaranteed by Clause (2) of Article 161 may be overriden. The Sabah legislature has also adopted *Bahasa Malaysia*[581] as the official language in proceedings in the State Cabinet and the Legislative Assembly, but in the latter English may also be used.

Sarawak has adopted the National Language Act 1967 but the *Council Negeri* in 1973 passed a resolution prescribing the use of *Bahasa Malaysia* for official purposes side by side with English for five years, at the end of which the position would be reviewed. The position in Sarawak today is like that in the States of Malaya from 1957 until the introduction of the National Languange Act.

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579 Article 159(5).

580 This Amendment does not affect Sabah and Sarawak as Article 161 provides the use of English in these two states for a period of ten years after Malaysia Day, *i.e.* 16th September 1973. As to the termination of the use of English in these states the consent of the legislatures of those states is still required, although the ten years period has now passed. Article 152(6); section 5 Act A30/1973.

581 *See* National Language – Malaysia Act (Revised 1971), No. 32. The National Language Act 1967 which came into force on 1st September 1967, *i.e.* ten years after *Merdeka Day*, does not apply to Sabah and Sarawak. It has since been revised (incorporating the National Language Act 1963) and is known as the National Language Act 1963/67. *Bahasa Malaysia* is in fact the Malay Language, which after *Merdeka Day* was referred to for a time as *Bahasa Kebangsaan* or National Language but later renamed *Bahasa Malaysia*.

## Special Position of the Malays and the Natives of Borneo

Besides the responsibility of safeguarding the special position of the Malays and the legitimate interests of the other communities, the *Yang di-Pertuan Agong* is empowered to ensure the reservation for Malays of such proportions "as he may deem necessary" of positions in the public service (other than that of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government. When any permit or licence for the operation of any trade or business is required by Federal law, then, subject to the provisions of that law and Article 153, the *Yang di-Pertuan Agong* has the power to ensure that a necessary proportion of such permits and licences is reserved for Malays. The *Yang di-Pertuan Agong* must, in carrying out his functions under Article 153, not deprive any person of any public office held by him of any scholarship, exhibition, or other educational or training privileges or special facilities enjoyed by him, or deprive any person of any right, privilege, permit or licence occuring to or enjoyed or held by him or authorize refusal to renew to any person any such permit or licence or refusal to grant to his heirs, successors or assigns of such a person of any such permit or licence when renewal or grant might reasonably be expected in the ordinary course of events.

Section 6 of the Act gives the same rights to the natives of the Borneo State that are enjoyed by the Malays of the States of Malaya.[582]

Another important power given to the *Yang di-Pertuan Agong* is his power to direct any university, college and educational institution providing education after the level of the Malaysian Certificate of Education or its equivalent, where the number of places offered to candidates for any course of study is less than the number of candidates qualified for such places, to reserve such proportion of such places for the Malays and natives of the Borneo States as he may deem necessary.

In relation to the provisions of Article 153, the Court has held that " ... these provisions cannot be questioned and are necessary to assist the less advanced and fortunate in the light of the conditions prevailing in the country at the time of Independence.... The *Yang di-Pertuan Agong* is

582 The expression "natives" in the Article, in relation to a Borneo State shall have the meaning assigned to it in Article 161A. Prior to this amendment, the natives were entitled to a certain number of positions in the public service. There was however no reserved portion of scholarships, exhibitions, or other educational or training privileges or facilities.

to safeguard the special positions of the Malays and the natives of Sabah and Sarawak and the legitimate interests of the other communities.[583]

Clauses (7) and (8) of Article 153 provide protection for a non Malay against being deprived of a licence or permit for the purpose of bestowing the said licence or permit on a Malay. It would, however, appear to be no protection against the termination of a property interest, in the absence of a controling contractual provision, when the property is owned by the Federal Government and the enjoyment of the property interest is attached to the licence or permit.[584]

The major impact of the 1971 Act has been the enhancement of the power and role of the Conference of Rulers in the amendment process. Originally the consent of the Conference was required for any law which sought to amend Articles 38 (dealing with the Conference of Rulers itself), 10 (dealing with precedence of the Rulers and Governors), 71 (dealing with guarantee of the Rulers to succeed, the rights and privileges of the Rulers) and 153 (dealing with the special rights and privileges of the Malays). The amendment has added to these the Articles dealing with the "sensitive" issues: Part III (dealing with citizenship), Articles 10(4), 63(4), 72(4), 152 and 159 itself. The amended Clause (5) to Article 159 now reads: "A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, 38, 63(4), 70, 71(1), 72(4), 152 or 153 and to this Clause shall not be passed without the consent of the Conference of Rulers".

Article 97(2) stipulates that "All revenue and moneys received however raised or received by a State are to be paid into the State Consolidated Fund. And a State Government may not borrow except under the authority of State law and from the Federal Government or, for a period of not exceeding five years, from a bank or other financial source on such terms and conditions as may be approved by the Federal Government.[585] "Borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly. In the case of the *Government of Malaysia* v *Government of the State Kelantan*,[586] the Court held that the royalties on forest produce etcetera paid under certain conditions to the Kelantan Government did not constitute borrowing within the meaning

583 *Fan Yew Teng* v *Public Prosecutor* [1975] 2 *MLJ* at p. 238.
584 *Station Hotels Ltd.* v *Malayan Railway Administration* [1977] 1 *MLJ* 122.
585 Article 111(2).
586 (1968) *MLJ* 129.

of Article 160(2) of the Federal Constitution, and as such the State Government had not contravened Article 91(2) of the Federal Constitution nor Article LXVII of the Kelantan State Constitution. In this case, under an Agreement between the Kelantan State Government and the Timbermine Industrial Incorportion Ltd. dated 20th February 1974, the Government granted the company a permit to extract timber and forest produce and to prospect and operate mines in the district of Ulu Kelantan. The company agreed to make a pre-payment of its mining and forest concessions, and the Kelantan Government to refund the prepaid royalties by collecting only 50% of the amount of royalties due from the company to the Kelantan Government and by setting off the other 50% in favour of the company until the prepaid royalties were fully and completely refunded. The amount advanced could be forfeited to the Government under certain conditions.

To negate this decision of the Court, the Federal Parliament in the same year passed a second amendment[587] to Article 160(2) of the Federal Constitution, giving an extended meaning to the word "borrow". It includes "the raising of money by entering into any agreement requiring the payment before the due date of any taxes, rates, royalties, fees or any other payments or by entering into any agreement thereby the Government has to repay or refund any benefits that it has enjoyed under that agreement".[588]

The other amendments were of an inconsequential nature or were minor modifications to the various provisions the substitution of "Deputy Minister" for the designation of "Assistant Minister"; a new provision for the appointment of Parliamentary Secretaries; the special position of the Attorney-General Malaysia in the case where the Attorney General is a member of Parliament. The inconsequential amendments included amendments of Articles 135(1) and (2); 144(5A); 159(4)(*c*) and (6), 3rd, 5th and 8th Schedule of the Federal Constitution.

## The Constitution (Amendment) Act 1973

The constitutional amendments in 1973 brought about fundamental changes to the Federal Constitution.

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587 The Constitution (Amendment) (No. 2) Act 1971 (No. 31 of 1971) effective from 24th March 1971.

588 Article 160(2) after the 1971 Amendment.

Under Article 2 of the Federal Constitution, Parliament may by law to alter the boundaries of any State; but a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of the State and the Conference of Rulers. To obtain the consent of the State Legislature the State enactment must be in the form of an amendment to the State Constitution. In most State Constitutions the word "state" is defined and is read in conjunction with Article 1(3) of the Federal Constitution, which provides that the territories of each of the states are "territories comprised therein immediately before Malaysia Day".[589] In Parliament, the amendment for altering the definition of "state" under Article 2 may be made by a simple majority but under the Selangor State Constitution it requires the approval of not less than two-thirds of the total number of members of the State Legislature.[590]

The Federal Parliament passed a Constitutional (Amendment) Act 1973[591] which amended the Eighth Schedule to the Federal Constitution to read that "any amendment to the definition of territory of the state which is made in consequence of the passing of the law altering the boundaries of the state under Article 2 of the Federal Constitution, to which the State Legislative Assembly and the Conference of Rulers have consented under the said Article" was exempt from the two-thirds majority requirement. And the Act further laid down that "In accordance with Clause (4) of Article 71 of the Constitution it is hereby provided that the amendment specified in section 3 shall have effect in every state in Malaysia".[592]

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589 Article 1(3) as amended by Act No. 26 of 1963 *(LN 214/63)*.

590 Article XCVIII(5) of Selangor State Constitution.

591 Act A193/1973 effective from 5th May 1973 [*PU (B) 566/731*]. The Amendment was a device aimed at circumventing the two-thirds majority required in the Selangor State Assembly to pass a constitutional amendment, to enable the Federal parliament to enact legislation to establish the Federal Territory. "The justification for bringing the amendment was attributed to this "discrepancy" between the Federal Constitution and the Selangor State Constitution with regard to the implementation of Article 2 of the Federal Constitution"; Prime Minister Tun Razak, *Siaran Akhbar, Jabatan Penerangan Malaysia (PEN 4/73/327 Parl)*. It has been pointed out that the alteration of State boundaries effects state rights and is therefore a justification for the strict procedure, requiring a two-thirds majority in the state Legislative Assembly, H.P. Lee 1976. Constitutional Amendments in Malaysia, 18 *Malaya Law Review*, 110.

592 Article 71(4) provided that "Parliament may, nothwithstanding anything in the Constitution, by law make provision giving effect in that State to the essential provisions or for removing the inconsistent provisions".

Accordingly the Selangor State Legislative Assembly passed the Selangor Constitution (Amendment) Enactment 1973, which brought the State Constitution into accord with the provisions of the Eighth Schedule. Thereafter on 5th July 1973 the Federal Territory Enactment 1973 was passed by a simple majority by the State Legislative Assembly of Selangor.

Upon completion of these various acts including the consent of the Conference of Rulers, Parliament set out the details[593] for the establishment of a Federal Territory, and passed a second amendment Act which amended Article 1(3) and (4); the latter provides that "The territory of the State of Selangor shall exclude the Federal Territory established under the Constitution (Amendment) (No. 2) Act 1973". The amended Clause (3) of Article 1 is now read "subject to Clause (4)" of the Article. The amended act provided for the cessation of the sovereignty of the State Ruler, and all power and jurisdiction of the State Ruler and Legislative Assembly and the transfer of the sovereign power and jurisdiction to the Federal Government. It provided for the transfer of lands and rights to all minerals and rock materials within or upon lands vested in that part of the State of Selangor to the Federation. It also provided for the continuation of the State laws in the Federal Territory until such time as they might be repealed, amended or replaced by laws passed by Parliament. The administration of the Federal Territory as decreed by order of the *Yang di-Pertuan Agong* was to be in accordance with the Federal Capital Act 1960.[594]

The 1973 Amendment Act also established the Education Service Commission, whose jurisdiction extended to all persons who are members of the education service.

The second major amendment was the reconstitution of membership of the *Dewan Rakyat* "on the basis of allocation to the states in West Malaysia similar to the scheme which has been applied to the Borneo States after Malaysia Day". As a result there was an increase of ten seats in the *Dewan Rakyat*, i.e. an increase from 144 to 154 members. The

593 It was agreed by both the Federal and Selangor Governments that the City of Kuala Lumpur and its surrounding area of 94 square miles, should be separated from Selangor and be established as Federal Territory.

594 Act No. 35 of 1960. The Act provided for the establishment of an Advisory Board to advise in the administration of the Federal Capital. The members of the Board are appointed by the *Yang di-Pertuan Agong*; and since 1974 the Board includes two persons nominated by the Ruler in Council or the State of Selangor Section 8 Act 206/1973.

periods for review of the constituency boundaries of any unit of territory in the States of Malaya "shall be calculated from the first delimitation of constituencies for that unit immediately following the passing of that Act".

The legislative lists were also amended. Under the Federal List was added a new Clause, (*e*), which provided that "the Government and administration of the Federal Territory includes Islamic law therein to the extent as provided in item 1 of the State List". Following this change items 1, 2, 3 and 5 in the State List were amended by adding the phrase "Except with respect to the Federal Territory" in each item, and by substituting for the words "Federal Capital" in item 4 the words "Federal Territory". Thus Parliament is empowered to legislate on matters on the State List in relation to the Federal Territory.

A new Clause (5) to Article 3 of the Federal Constitution made provisions for a Head of Islam for the Federal Territory, and conferred this position upon the *Yang di-Pertuan Agong*. It also empowered Parliament to make laws for the regulation of Islamic religious affairs and to constitute a religious council to advise the *Yang di-Pertuan Agong* on matters relating to the religion of Islam.

A Pardon Board was established to cover the Federal Territory.

### The Constitution (Amendment) Act 1976

Up to 1976 the Constitution seemed to indicate a federation of the Federation of Malaya with the states of Sabah and Sarawak. The amending Act 1976 amended Article 1(2) of the Federal Constitution so that all the constituent states of Malaysia are now listed in alphabetical order.

The Act also affected the constitutional position of the *Yang di-Pertuan Agong* and the relationship between him and the states of Sabah and Sarawak. Initially as part of the special arrangements on religion the *Yang di-Pertuan Agong was* not made Head of Islam in those states. Under this new amendment the title of the Head of Islam in Sabah, Sarawak, Malacca and Penang was now conferred upon him. Accordingly consequential amendments were made to Articles 12(2) and 38(7), and Articles 161C and 161D were repealed.

By the same Act the Federal List was extended, taking away the prevention an extinguishing of fire including fire services and fire brigade, from the Concurrent List and adding it to the Federal List for all states except Sabah and Sarawak. This provision had now been amended

making it applicable to all states in Malaysia including Sabah and Sarawak.

Also under this amendment, Commonwealth Countries and the Republic of Ireland lost their special status and were henceforth to be treated as foreign countries with regard to matters of immigration and citizenship, residence, length of service, night and eligibility for membership of either House or Parliament.

Several changes were made in the powers and composition of commissions for public services. Parliament was empowered to arrange for the disciplinary control of the police force to be exercised by an authority other than the Police Force Commission. Provisions were made for members of the public services of Sabah and Sarawak seconded to the police force to come under the Police Force Commission.[595] The branch of the Judicial and Legal Services Commission in East Malaysia was abolished; and the composition of the branches in those states of the Public Services Commission were readjusted. These branches too were subsequently abolished.[596]

Many minor amendments were made incidental to or consequential on the various amendments made to the Constitution. The rules governing the power of the states to borrow money were changed. The authority to alter the number of judges of the Federal Court and High Courts was transfered from Parliament to the *Yang di-Pertuan Agong*. Judges were given permission to move between Federal Court and High Courts and from one High Court to another. Article 122(5) provided for the appointment of judicial commissioners for the States of Malaya, akin to those in East Malaysia,[597] to be appointed by the *Yang di-Pertuan Agong* on the advice of the Lord President of the Federal Court.

Many changes of terminology were made without change in the law. The word "Muslim" was replaced by the word "Islamic"; "Muslim religion" by "religion of Islam", "Deputy *Yang di-Pertuan Agong*" by *"Timbalan Yang di-Pertuan Agong"*; "the Borneo States" by "the States of Sabah and Sarawak"; "Governor" by *"Yang Dipertua Negeri"*.[598] The word

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595 Article 146D: Substitution for a new Clause (1), and Clauses (20) and (3) repealed.

596 Articles 146A and 146B(3) were repealed; and Clause (2), Article 146B substituted with a new Clause (2); Articles 146B and 146C (dealing with the Public Services Commission, Sabah and Sarawak Branches) were repealed.

577 Article 122A(5) The qualification for a judicial commissioner's post are that a person must be a citizen and qualified to he a High Court judge.

598 Article 160(2): The term "Governors" was substituted by *Yang Dipertua Negeri*, with effect form 27th August 1976.

"Governors" was replaced by *"Yang Dipertua Negeri"*.[599]

Extensive restrictions were placed on the right of a civil servant not to be dismissed or reduced in rank without being given a reasonable opportunity of being heard. Apart from Parliament and its staff, ministers, the higher ranks of the judiciary, the Attorney-General, the Auditor-General, employers of independent statutory corporations and royalty itself, public servants of the Federation are now governed by one general and five specialist commissions. They are the Armed Forces Council, the Judicial and Legal Services Commission, the Police Force Commission, the Railway Service Commission and the Education Service Commission. Public servants who are not subject to one of these five commissions, come under the Public Services Commission. These commissions oversee the appointment, promotion and discipline of members of their respective services. Only specialist posts designated by the *Yang di-Pertuan Agong*, a ruler or a governor are not included here, as they come within the confidential realm of his personal appointment. Commissions can either act themselves or delegate functions. In the case of the Public Services and the Education Service Commissions, the *Yang di-Pertuan Agong* has power to appoint a Board to take over any of the functions of the Commission other than that of making a first appointment to a permanent or pensionable establishment.[600]

The Railway Commission had delegated many of its disciplinary powers and the Police Force Commission had delegated many of its powers of appointment, promotion and discipline.[601] The *Yang di-Pertuan Agong* has now appointed a Public Service Promotion Board[602] and a Public Service Disciplinary Board, an Education Service Promotion Board and an Education Service Disciplinary Board.[603]

Some of the States have their own commissions for their State services which are under the Federal Public Services Commission.

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599 Amendment was effective from 27th August 1976.

600 Article 144(5B)..

601 For example, the Instrument of Delegation of Function of Exercise of Disciplinary Control, *PU (B) 519/77*, and the Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities *PU (B) 547/75*.

602 Article 144(5B): e.g. The Public Services Promotion Board Regulations 1972, as amended: and the Public Services Disciplinary Board Regulations 1972, as amended.

603 *Ibid.*, e.g. The Education Service Promotion Board Regulations, 1974 and the Education Service Disciplinary Board Regulations, 1974.

Public servants of the Federation hold office at the pleasure of the *Yang di-Pertuan Agong* except when expressly stipulated by the Constitution. Similarly public servants of a state hold office at the pleasure of the Ruler or Governor of the State unless the State Constitution indicates otherwise.[604] In the case of *Government of Malaysia* v *Mahan Singh*[605] the Federal Court held that "... a pensionable officer has no right to his post, unlike the position in India where there are many Supreme Court decisions to the contrary, saying that a pensionable officer has a right, a lien, even title to his post equivalent to property". And " ... in the light of our constitution, these days dismissal must comply with Article 135". The judge further remarked that "the cardinal principle being that a public servant holds office at the pleasure of the Crown, the Court should not fetter the undoubted discretion of the Crown to terminate the service of the public servant" (at p. 162). The Privy Council took the same view; Lord Diplock quoted Article 132(2A), and said "So *prima facie*, the *Yang di-Pertuan Agong*, and during the emergency the Director of Operations under his delegated powers, can terminate the employment of any public servant without notice and at any time he pleases; but his right is subject to the express provision of the Constitution contained in Article 135(2) that a public servant may not be 'dismissed' without being given a reasonable opportunity of being heard".

For dismissal to arise, the decision to terminate the employment must be connected with the conduct of the servant in relation to his office. If this is regarded by the Government as unsatisfactory or blameworthy, then the consequences of the termination must involve an element of punishment.[606] This punishment will be manifested in either dismissal or reduction in rank.[607]

In the *Mahan Singh* case the Court found on the facts that a termination of employment did not constitute a dismissal, and that the plaintiff was not entitled to a reasonable opportunity to be heard under Clause (2) of Article 135. The plaintiff had received a letter stating that the gov-

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604 Article 132(2A).

605 [1975] 2 *MLJ* 155, pp. 260 – 62; 1978 2 *MLJ* 133 (PC).

606 [1978] 2 *MLJ* 133, p. 135; for application of the principle to one in the public of a state, *see Hj. Ariffin bin Haji Chot* v *The Government of the State of Pahang*, [1969] 1 *MLJ* 6; *Jacob* v *Attorney-General* [1970] 2 *MLJ* 133; and *Rajion bin Haji Sulaiman* v *Government of Kelantan* [1976] 1 *MLJ* 118.

607 *Munusamy* v *Public Services Commission* [1967] 1 *MLJ* 199 (PC) and *Hj. Ariffin bin Haji Chot* v *Government of the State of Pahang*, *op. cit.*

ernment had decided to pension him off at the age of forty-nine in the public interest, although the normal retirement age was fifty-five. It was not clear without qualification whether or not this termination was based on the employee's conduct in relation to his office. The Privy Council held that the action taken by the Government of Malaysia against Mahan Singh purported to be dismissal within the meaning of Article 135(2) of the Constitution "without having given him a reasonable opportunity of being heard. This is prohibited by the Constitution and the purported termination of the appellant's service by the Government is void".

This decision resulted in the addition of the further proviso[608] to Clause (2) of Article 135 that when the termination of service is in the public interest in accordance with the added proviso, it is not dismissal even when it involves punishment and when done on grounds of misconduct or unsatisfactory performance at work. The amendment was given retrospective effect from 31st August 1957.[609]

The termination of service of a civil servant in accordance with a term of the contract does not involve an element of punishment. Thus a temporary employee is not entitled to a reasonable opportunity of being heard if he is not kept on at the end of his temporary employment, even if the reason for dispensing with his services is his misconduct or unsatisfactory work.[610] Compulsory retirement, before the age to which the government had led the civil service to expect to be allowed to serve, was held not to be dismissal when done in accordance with the terms of employment of Federal Law.[611]

According to Article 135 of the constitution, no member of any of the services mentioned in Article 132 may be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismis-

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608 The Constitution (Amendment) Act 1978, effective from 1st January 1979, A442.

609 This amendment did not effect *the Mahan Singh* case, *op. cit.*, as his case had been finally disposed of before the amendment was made. The Mahan Singh case would now be decided differently on its facts. The Prime Minister in moving the amendment in Parliament referred to the need to conceal the source of information against the employee and the consequent difficulty of proving the case: *The New Straits Times*, 8th December 1978. The amendment states that the termination of service in the public interest is not a form of disciplinary punishment and that civil servant concerned would be paid pensions as laid down by Statutory formula.

610 *Gnanasundram* v *Public Services Commission* [1966] 1 *MLJ* 157; *Government of Malaysia* v *Lionel* [1974] 1 *MLJ* 3 (PC).

611 *Thambipillai* v *Government of Malaysia* [1969] 2 *MLJ* 206.

sal or reduction, has power to appoint a member of that service of equal rank.[612]

In the *Government of Malaysia* v *Iznan b. Osman*[613] the Privy Council found that "the effect of Articles 140(1) and 144(1) is that after Malaysia Day on the only authority which had power to appoint police constables was the Police Service Commission, later the Police Force Commission, subject no doubt to its powers to delegate its functions. Clearly therefore the provisions of the Commissioner's Standing Orders ... which authorized the dismissal of a constable by a Commanding Officer were not in accord with the provisions of Article 135(2) of the Constitution prohibiting the dismissal of a member of the Police Force by an Authority subordinate to that which had power to appoint him. The Standing Order must therefore, in accordance with Article 162(6) be applied with such modifications as will bring it into accord with the Constitution. But no modification of it can confer him power to dismiss one. As the respondent was dismissed by the Commanding Officer his dismissal is therefore void...."

While Iznan's case was going on appeal to the *Yang di-Pertuan Agong* (and determined by the Privy Council in 1977), an amending Act was passed by Parliament, which added a second proviso to Article 135(1) with retrospective effect from 31st August 1957. The amendment stated that Clause (I) of Article 135 "shall not apply to a case where a member of any of the services mentioned in the Clause is dismissed or reduced in rank but an authority in pursuance of a power delegated to it by a Commission to which this Part applies". But their Lordships refused to entertain any argument based on the amendment because: "No proper notice has been given to the respondent and the respondent's counsel has had no opportunity to consider it.... This attempt to deprive a litigant of a right of property by retrospective legislation passed *pendente lite* is a step of a most unusual character...." In *Zainul b. Hashim* v *Mohd. Haniff bin Omar*[614] the Federal Court allowed the Government to rely on the new proviso because the counsel for Zainal had been given three months'

612 Article 135(1).

613 [1977] 2 *MLJ* 1 (PC). In *Sithambaram* v *Attorney-General* [1972] 2 *MLJ* 175, the Court held that the power of a Senior Assistant Commissioner under section 4(1) of (Singapore) Police Force Ordinance 1958, who was subject to orders and directions of the Commissioner, was held concurrently with him, not delegated from him.

614 [1977] 2 *MLJ* 254 (PC).

notice of the Government's desire to do so, and concluded that the Court had to apply the law as it stood at the hearing of the appeal and held that a person could be an "authority" for the purpose of the second proviso to Clause (1). Their Lordships therefore decided that the addition of that proviso in 1976 compelled in this case a result contrary to that reached in *Iznan's* case.

The phrase "a reasonable opportunity of being heard" has raised many questions. The first is whether or not the right embraces both rules of natural justice, *viz.* "the rule against bias" and "the right to be heard" (or *audi alteram partem)* . It has been suggested that right embraces both rules. But two writers differ,[615] being of the view that only the right to be heard is included. The courts seem to support the latter view.

In *Surinder Singh Kanda* v *Government of Federation of Malaya*[616] one of the grounds on which the appellant contested the validity of his dismissal was an infringement of Article 135(2) of the Constitution. He was in fact given a hearing but a departmental report on his conduct was not made available to him although it had been read by the adjudicating officer. Rigby J following a decision of the Privy Council in an earlier case[617] held that " ... Article 135(2) has been infringed in that the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted in my view to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal". The Privy Council restored the decision of Rigby J in favour of the plaintiff, quoting with approval the passage of the trial judge's judgement.

The second question arises in the context of the actual hearing. It is argued that a public servant may in fact be entitled to two opportun-

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615 S. Jayakumar. "1969 Protection for Civil Servant: The Scope of Article 135 (I) and (2) of the Malaysian Constitution as Developed Through Cases", 2 *Malayan Law Journal*, F.A. Trindade 1975. "The Security of Tenure of Public Servants in Malaysia and Singapore", *Malayan Law Essays*, In Memorium of Basir Ahmad Mallal, I *MLJ* Ltd., and V.S. Winslow, The Public Service and Public Servants, *The Constitution of Malaysia 1957 – 77 op. cit.*

616 *Surinder Singh Kanda* v *Government of Federation of Malaya*, (1960) 26 *MLJ* 121; (1962) 28 *MLJ* 169 (PC).

617 *High Commissioner for India* v *I.M. Lallal* AIR 1948 PC 121; and *see* V.S. Wilson, p. 289, *op. cit.*

ities to be heard; one on the charges, and one on the penalty to be imposed. The latter is conceived to be not merely an opportunity to make a plea in mitigation but also to convey information to the servant in advance of the proposed or likely punishment. But all the cases on the "two opportunities" doctrine derive from Singapore[618] not Malaysia. In Malaysia, an officer is informed of the proposed dismissal or reduction in rank when a charge is proferred against him, and when he exercises his right of making representations on the charge, this includes representations on the proposed penalty.[619]

A third question is whether the hearing needs to be an oral one. The Privy Council has held that the right to be heard does not import the right to be heard orally. "What is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed".[620]

No person is to be deprived of his life or personal liberty save in accordance with the law. The Malaysian court have interpreted "law" to mean "enacted law",[621] and so have taken the view that firstly Articles 5 and 13 impose restrictions only on the executive and not the legislature and, secondly, that there is no scope in these Articles for including the rules of natural justice.

The courts have reiterated that when deciding a question of the deprivation of liberty there must be the strict compliance with the law.[622] Any form of detention does violate Article 5(I) of the Constitution "... and hence power given by law to detain must be construed strictly and in cases of doubt or ambiguity the Court should lean in favour of the subject".

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618 *Phang Moh Sin* v *Commissioner of Police* (1967) 2 *MLJ* 137; *Attorney-General* v *Ling How Dong* [1969] 1 *MLJ* 154; *Jocob* v *Attorney-General* [1970] 2 *MLJ* 133 and *Sithambaran* v *Attorney-General op. cit.* For reconciliation of these cases, *see* V.S. Winslow, *op. cit.*, p. 290.

619 General Orders Chapter D, Regulation 30(2) and (6). The General Orders were made by the *Yang di-Pertuan Agong* under Article 132, which governs conduct and discipline of public servants.

620 *Per* Viscount Dilhorne (p. 205) in *Najar Singh* v *Government of Malaysia* [1976]. 1 *MLJ* 203.

621 Article 5(1); For interpretation of "laws" *see Controller General of Inland Revenue* v *N.P.* [1973] 1 *MLJ* 165; *Arumugam Pillai* v *Government of Malaysia* [1975] 2 *MLJ* 29; M. Suffian, The Influence of the American Constitution on the Malaysian Constitution, *Malayan Law Journal*, xiii, 1976.

622 *Re P.E. Long @ Jimmy & Ors.* [1976] 2 *MLJ* 133; *Datuk James Wong Kai Min* v *Minister of Home Affairs, Malaysia & Ors.* [1976] 2 *MLJ* 245; *Andrew s/o Thamboosamy* v *Superintendent of Pudu Prisons* (1976) 2 *MLJ* 156.

But Parliament may, by constitutional amendment, limit the protections of Article 5 and may make those limitations retrospective.[623] It did so, amending Article 5 by adding a proviso to Clause (4) which notes that the Clause "shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from *Merdeka Day*."

Clause (I) of Article 5 merely makes certain executive acts unconstitutional[624] if carried out unlawfully. It does not import the American concept of due process. That fundamental right implies that no person is punishable or can lawfully be made to suffer in body except for a distinct breach of law proved in a court of law.[625] The due process in the United States includes the principles of natural justice as well as natural law. In Malaysia, cases which raise questions of natural justice, are disposed of in common law, without reference to the Constitution.[626]

Statutes authorizing detention must be strictly complied with. Clause (1) does not make inadmissible evidence otherwise admissible under the Evidence Act 1950, which had been held to be a complete code on the subject.[627] The Federal Court in allowing and appeal in a case[628] where the respondent was refused a passport, held that it was not an infringement of Clause (1), and said that "in construing 'personal liberty' in Article 5(1) one must look at the other Clauses of the Article, and in so doing we are convinced that the Article guarantees a person, citizen or otherwise, except an enemy alien, freedom of being unlawfully detained and ... these are rights relating to the person or body of the individual, and do not ... include the right to travel overseas and a passport. Indeed freedom of movement is dealt specifically in Article 9".

The right of a detainee under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 to make a representation to an advisory board, does not preclude him from making an application for a

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623 *Loh Kooi Choon* v *Government of Malaysia* [1977] 2 *MLJ* 87.

624 *Chong Fook Kam* v *Sa'aban* [1968] 2 *MLJ* 50.

625 *Public Prosecutor* v *Tengku Mahmood Iskandar & Anor.* [1973] *MLJ* 128.

626 For treatment of issue of *audi alteram partem; Ketua Pengarah Kastam* v *Hoi Kwan Seng* [1977] 2 *MLJ* 152; *Malayawata Steel Bhd.* v *Union of Malayawata Steel Workers* [1978] 1 *MLJ* 37.

627 *Public Prosecutor* v *Hj. Kassim* [1971] 2 *MLJ* 115.

628 *Government of Malaysia* v *Loh Wai Kong*, Federal Civil Appeal No. 87, of 1978. *per* Suffian LP (p. 66).

writ of *habeas corpus*.[629] "Unlawfully detained" means "physically detained" and "released" means "released from physical detention".[630] Detentions under an existing law, for example, the Banishment Act 1959[631] or the Immigration Act 1959 were held to be excluded from the application of Article 135 (1).

The 1976 Amendment had the effect of re-instating so much of the opinion of the Court in the *Chia Khin Sze's* case[632] as to exclude the application of Clause 5(4) of Article 5 to the Restricted Residence Enactment. However it leaves undisturbed that part of the judgement applying to Clause (3) to make arrests under the Enactment. This amendment has been held by the Court to be valid.

At the same time Article 151 was amended[633] in a way that wrought a significant change to the hitherto cardinal principle that no citizen can be detained beyond three months unless his representations were considered and the advisory board had made its recommendations. The amendment no longer linked the period of three months with the detention but instead linked it with the time within which the representations must be considered. Furthermore the time period could be extended. The effect of the amendment has completely change the scope of Clause (1)(*b*); citizens can now be detained beyond three months so long as their representations, when made, are considered within the three months of receipt thereof.[634]

Article 151 (1) reads that "where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention –

(b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause

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629 *Yeap Hock Seng* v *Minister of Home Affairs, Malaysia* [1975] 2 *MLJ* 279.

630 *Re Onkar Shrian* [1970] 1 *MLJ* 28.

631 *Minister of Home Affairs* v *Chu Choon Yong* [1977] 2 *MLJ* 20.

632 [1958] *MLJ* 105.

632 *See* note 567.

634 "This is clearly by its nature and terms and amendment of an administrative nature made by the experience gabled over the years in the administration of this provision. Obviously it would be unrealistic to expect the Board to conduct meaningful inquiry and make suitable recommendations within three months of detention, if the detainee were to choose to make his representations say, only two weeks before the expiry of his detention. Hence the period was altered to one of three months after the receipt of the representations by the Advisory Board and this could, no doubt, encourage a detainee to make his representations as early as he could". Salleh Abas, Amendment of the Malaysian Constitution, 2 *Malayan Law Journal, Supp. M.S. XXXIV* (page xi ), 1977.

(2) has considered any representations made by him under paragraph (*a*) and made recommendations thereon to the *Yang di-Pertuan Agong* within three months or receiving such representations, or within such longer period as the *Yang di-Pertuan Agong* may allow".

The courts have consistently stated that there can be no judicial review of the subjective "satisfaction" or decision of the executive to detain a person. It is regarded as settled law that subjective determination of the executive is nonjusticiable; but the Court will exercise review where the challenge is based on *mala fides*. In the *Yeap Hock Seng's* case the Judge pointed out that what was required to prove *mala fides* was "proof of improper or bad motive and not mere suspicion, and what has been made out is not lack of *bona fides* on the part of the police but the want of *bona fides* of the detaining authority as well as non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police".

The courts however have indicated that there can be judicial review to examine whether the grounds disclosed by the Minister in the order of detention are within the scope of the enabling legislation. The court "can examine the grounds disclosed by the Minister to see if they are relevant to the object which the ordinance prescribed". " ... An order of detention based on irrelevant grounds is invalid if any of the grounds furnished to the detainee are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered. The satisfaction of the determining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed." Employing this test the judge came to the conclusion that trafficking in drugs as a member of any international syndicate "strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudical to public order".[635] The Federal Court upheld the decision. In the case the appellant applied for a writ of *habeas corpus* and challenged the validity of the order of detention that the grounds on which the order was made was outside the preview and ambit of the ordinance.[636] The grounds were that he was

635 *Per* Abdoo Cader J in *Re Application of Tan Boon Liat and Ors.* [1976] 2 *MLJ* 3; [1977] 2 *MLJ*.

636 The Emergency (Public Order and Prevention of Crime) Ordinance 1969, which *inter*

trafficking in drugs as a member of an international drug distribution syndicate, and the Minister of Home Affairs, being satisfied of the grounds ordered the detention of the appellant. The Court has also considered it permissible to review whether the grounds stated in the order of detention are within the scope of the statute.

The Court will also exercise review in preventive detention where fundamental conditions, especially those contained in Article 150, are not met. The appellants in one case[637] were detained under orders of detention made under the 1969 Ordinance. They made representations against the orders to the Advisory Board, but the Board did not make recommendations thereon within the three months of the detention orders. Nevertheless the *Yang di-Pertuan Agong* acting on advice confirmed the orders (on the Board's recommendations made after the three months period). The Federal Court (consisting of a full bench of five judges) reversing the judgements of the trial judges, held that the detention was unlawful. It declared that "Article 151 (1) (*b*) envisages two kinds of detention: (1) detention for a period of not exceeding there months; and (2) detention for a period of exceeding three months ... and it is also equally clear that a citizen may be detained for a period of not exceeding three months without any intervention of the Board, he may not be detained exceeding three months unless within that period the Board has considered his representations and made recommendations thereon to His Majesty.[638] This was Article 151 (1) *(b)* as it then was before the amendment. The Article did not expressly provide that the board must act within the three months period but the words "has considered" implied that the Board's intervention was "a prerequisite". It was not just procedural but a substantive fundamental condition and precedent, and its requirements are conditions and in failing perform the Advisory Board had not acted in accordance with the law,[639] regardless of whether the provisions laid down were procedure or the law, "in either case the provisions are clearly mandatory". The law as such was violated.[640]

In Singapore the Court held that "Article 151 does not prohibit an order of detention from specifying that the citizens therein named are to be detained for a period exceeding three months. Article 151 (1) (*b*)

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*alia*, provided for preventive detention where the Minister was satisfied such detention was necessary "to prevent any person acting in any manner prejudicial to public order ... for the suppression of violence or prevention of crimes involving violence".

637 *Re Tan Boon Liat @ Allen & Anor. et al.*, [1977] 2 *MLJ* 108.

638 *Per* Sufian LP [1977] 2 *MLJ* 18, *op. cit.*

639 *Per* Lee Hun Hoe, CJ (Borneo) *Ibid.*, (p. 114).

640 *Per* H.T. Ong, CJ (Malaya) with whom Gill FJ and Ali FJ concurred (p. 115).

makes the continued detention of the named citizen after three months unlawful unless its requirements have been complied with ... A detainee cannot be detained longer than three months unless an independent Advisory Board constituted in accordance with the constitution has considered any representations made by him and made recommendations thereon to the President".[641]

The 1969 Ordinance lays down that the decision of the *Yang di-Pertuan Agong* is "final and shall not be called into question in any court". Following the decision of the House of Lords in *Anisminic Ltd.* v *Foreign Compensation Commission*,[642] the Court considered this exclusionary provision applied only to "real decisions and not to *ultra-vires* decisions".

The fact that preventive detention was resorted to after criminal proceedings does not amount to a contravention of Article 7 of the Federal Constitution. In the *Musa's* case[643] the respondent had been detained under the Internal security Act 1960 since 1963. In 1968 he was served with a restriction order and it was in breach of this order that he was charged. The Court held that Article 7 envisaged a trial before a court and that preventive detention based on the subjective satisfaction of the Minister was not a conviction for an offence or crime and the detention order was not a punishment for the purposes of Article 7. Similarly in another case[644] the court held that the executive satisfaction was neither a prosecution nor a trial, and noted that, "Indeed the very essence of the preventive detention is incarcernation without benefit of a prosecution or trial and with no offence proved nor any charge formulated or preferred".

## The Capitation Grant Act 1977[645]

The Act raised the amount of capitation grant made by the Federation to the States.[646]

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641 *Per* Wee Chong Jin CJ (Singapore) in *Lee Mau Seng* v *Minister for Home Affairs Singapore* (as before amendment) of the Malaysian Constitution; *Subramaniam* v *Menteri Hal-Ehwal Dalam Negeri* [1977] 1 *MLJ* 82; and see R. Daw 1978. "Preventive Detention in Singapore – A Comment on the Case of Lee Mau Seng" 14 *Malayan Law Review*, 276.

642 [1969] AC 147.

643 *Public Prosecutor* v *Musa* [1970] 1 *MLJ* 101.

644 *See* note 608.

645 Act A392 of 1977, effective from January 1976.

646 Tenth Schedule, Part 1, section 1(1) as amended by the 1977 Act.

The Constitution (Amendment) Act 1981 further amended the Tenth Schedule to the Federal Constitution, which provided that the capitation grant "shall be based on an annual population projection of the State as determined by the Federal Government and calculated as on the last population census: Provided that if the last census was taken one year before the beginning of the financial year, the grant for that particular year shall be based on the population as determined by that population census".

The Act also amended the provisions for State road grant; giving definition of maintenance of State roads, which means the preservation, upkeep and restoration of State roads, roadside furniture, bridges, viaducts, culverts forming part thereof or connected therewith as nearly as possible in three original condition as constructed or as subsequently improved. Further minor amendments were made.

In 1977 the *Yang di-Pertuan Agong* issued a Proclamation of Emergency for the State of Kelantan, and Parliament passed the Emergency Powers (Kelantan) Act 1977,[647] which amended the Kelantan State Constitution. The Act transferred the legislative power from the State Legislative Assembly to the Ruler, acting on the advice of the Director of Government, State of Kelantan (appointed by the Federal Prime Minister). The Emergency Powers [Repeal of the Emergency Powers (Kelantan Act 1977] Order 1978[648] using the power granted by section 14(3) of the Act restored the power of the State Legislature, with the proviso that, "Notwithstanding the repeal of the Emergency Powers (Kelantan) Act 1977, by paragraph 2, the regulations made by the Ruler of the State of Kelantan under section 10 of the Act shall continue in force until repealed or replaced by the legislature of the State of Kelantan."

The question of the delegation of emergency powers and the validity of the regulations made under Emergency Ordinance (under delegated powers) which conflict with the Constitution, arose in the Court. The Court affirmed these regulations as valid. The power of the *Yang di-Pertuan Agong* to delegate all his powers to the Director of Operations was held to be valid;[649] and the Federal Court stated that "... until Parliament could be summoned the Director could exercise all legislative and executive powers in Malaysia and in exercising such powers he is subject to the control of Parliament (which was not sitting, having been dis-

647 Act A192 effective from 18th November 1977.
648 *PU (B)* 46/78 effective from 12th February 1978.
649 *Mahan Singh's* case *op. cit.*

solved). The only control was that he must act in accordance with the advice of the Prime Minister". Describing this power in another case, the Federal Court said that, "His Majesty has powers expressly limited by Article 150(2) which created it *(sic.)*, and he can, of course, do nothing beyond the limits which circumscribe those powers. But when acting within those limits, he has, and is intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself".[650] The Police Regulations made by the Director of Operations were upheld by the Privy Council.[651]

A further question is whether non-compliance with certain formalities in the process of promulgation would justify a judicial review as to whether the ordinance had been properly promulgated. The 1969 Ordinance No. 1 had been challenged as not having been promulgated by the *Yang di-Pertuan Agong* because as printed in the Government *Gazette* it lacked authentication.[652] The original ordinance having been lost, the Court admitted the affidavit of the Prime Minister that His Majesty had approved the promulgation and signed it accordingly, and upheld the ordinance (17). In the Court's judgement (*per* Chang Min Tat J), the "emergency rule which passes the legislative power from Parliament to the *Yang di-Pertuan Agong* had not displaced his position as the constitutional monarch, bound by the Constitution to act at all times on the advice of the Cabinet". In a later case, "The Court can take a judicial notice of the affidavits reproduced in Chang Min Tat's judgement and on relying on those affidavits the Court can and should conclude that the ordinance was properly and validly promulgated."[653] The same question of lack of authentication was raised in the Privy Council, with the same result.[654]

It seems clear from Clause (2) of Article 150 that the executive power to legislate by emergency ordinances is a power exercisable when both Houses of Parliament are sitting. The Court interpreted the words "when Parliament is not sitting" in Clause (2) of Article 150 as meaning "not only when Parliament which is in being, is not sitting but also when

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650 *Johnson Tan Han Seng* v *Public Prosecutor* [1977] 2. *MLJ* 66.

651 *See* note 60.

652 The Ordinance did not have the public seal nor did it contain the formula and legend usually appended at the end of an Ordinance.

653 *Public Prosecutor* v *Khong Teng Khen & Anor.* [1976] 2 *MLJ* 160.

654 *Teh Cheng Poh* v *Government of Malaysia* [1977] 2 *MLJ* 66; (1979) 1 *MLJ* 50 (PC) p. 54.

Parliament has been dissolved and the general election to the new Parliament is not completed".[655] Under Clause (2) of Article 150, after a proclamation of emergency has been issued when Parliament is not sitting, which was the case in 1969, the *Yang di-Pertuan Agong* must summon Parliament as soon as may be practicable; but His Majesty did not, however, summon Parliament as soon as it was practicable after issuing the proclamation of emergency. The judge went on to say, "I do not, however, think that this in any way affects the validity of the proclamation, because of section 7 of the Ordinance No. 1. His Majesty expressly ordered the suspension of the uncompleted election to Parliament until such date as he might determine and the Emergency (Essential Powers) Ordinance No. 3 1969 added subsection 3 to the above section 7 providing that after the 1969 dissolution Parliament shall meet not on the date prescribed by Clause (4) of Article 55 but on the date to be determined by His Majesty".

After a declaration of an emergency the executive has the power under Article 150(2) to legislate until Parliament resumes, and the 1969 Ordinance No. 1 was promulgated during such a time. The question that arose in the Court was whether the essential regulations under the ordinance could be made after Parliament resumed sitting while there was still a state of emergency. The Court answered this in the affirmative.[656] Later this decison was overruled[657] by the Privy Council, which took the opposite view: that such regulations were *"ultra vires* the Constitution and for that reason void". In the case the Board said (p. 53) "The maker of the law, the *Yang di-Pertuan Agong* is the same for both, the only difference being in the label which is attached to them. But in applying the constitutional law the Court must look behind the label to the substance. So far as his power to make written laws is derived from Article 150(2) of the Constitution itself, in which they are described as "ordinances", it comes to an end as soon as Parliament first sits after the Proclamation of Emergency; he cannot prolong it of his own volition, by proposing to empower itself to go on making written laws, whatever the description he may apply to them. This would amount to the Cabinet lifting itself by its own bootstraps. Their Lordships concluded "that once Parliament had sat on February 20th, 1971, the *Yang di-Pertuan Agong* no longer had power to make essential regulations having the force of the law".

655 *See* note 653.
656 *See* note 654.
657 *See* note 655.

Clause (3) of Article 150 envisages that a state of emergency will end by (1) *Yang di-Pertuan Agong* revoking his proclamation of emergency; or (2) the proclamation being annulled by a resolution of both Houses of Parliament. The state of emergency cannot end by effluxion of time or some supervering events other than those referred in Clause (3).

The Federal court in overruling an earlier decision[658] held that a proclamation of emergency or the ordinance and regulations under its authority could lapse or cease to be law by effluxion of time, or as a result of changed circumstances which included the succession of the then *Yang di-Pertuan Agong* by two other rulers in another general election. In expressing the Court's view, the Lord President said that "the words of Clause (3) and (7) meant: (1) that a proclamation of emergency ceases to have effect only – (a) if revoked or (b) if Parliament by resolution annuls; and (2) that the ordinance ceases to have effect if (a) it is revoked or (b) Parliament by resolution annuls it, or further (c) if the proclamation in pursuance of which it was promulgated has ceased to have effect and six months have elapsed. It is a matter for the executive to decide whether a proclamation of emergency should or should not be terminated, and not for the courts".[659]

In the *Teh Cheng Poh's* case the Board said that "after the Emergency Proclamation on May 15th, 1969 no reliance can any longer be put upon the Emergency (Essential Powers) Act 1964. From its long title and recitals it is manifest that powers conferred on the *Yang di-Pertuan Agong* under section 2 were intended to be exercised only for the duration of the previous emergency proclaimed on September 3rd, 1964. It does not appear that the proclamation of that emergency was ever expressly revoked nor was it annulled by resolutions passed by both Houses of Parliament under Article 150(3) of the Constitution. The power to revoke, however, like the power to issue a proclamation of emergency, vests in the *Yang di-Pertuan Agong*, and the constitution does not require it to be exercised by any formal instrument. In their Lordships' view, a proclamation of a new emer-

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658 *See* note 651.

659 *Johnson Tan Han Seng* case *op. cit.*, *per* Raja Azlan Shah FJ at p. 73. "It would be quite inappropriate to now say that a change of circumstances is a later enactments." The argument that the Ordinance had been repealed by effluxion of time was "tantamount to saying that the Ordinance and the Proclamation can lose their force without express repeal", added the judge. *See Public Prusecutor* v *Khong Teng Khen*, *op. cit.*, *Public Prosecutor* v *Ooi Kee Saik and S. Jayakumar*, "Emergency Powers in Malaysia", *The Constitution of Malaysia: Its Development 1957 – 1977*, *op. cit.*, p. 342.

gency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force".

Thus Parliament on 18 February 1979 passed the Emergency (Essential Powers) Act 1979[660] giving the *Yang di-Pertuan Agong* identical powers of making regulations to that of section 2 of the 1969 Ordinance No. 1, and applicable throughout Malaysia retrospectively from 20th February 1971, the date on which Parliament first sat after the promulgation of the 1969 emergency and on which, but for the 1979 Act, the power of making regulations would have lapsed. Section 9 or the Act validated every subsidiary legislation whatsoever made or purporting to have been made under the 1969 Ordinance.

## The Constitution (Amendment) Act 1978

Apart from a small change relating to the Education Service Commission, this Act amended Article 45(1) to create two members of the Senate for the Federal Territory to be appointed by the *Yang di-Pertuan Agong*,[661] so increasing the number of senators appointed by him to forty.[662] The term of office of future senators was reduced from six years to three years.[663]

The Act caused the transfer of responsibility for expatriate civil servants pensions to the United Kingdom Government, and section 6 of the Act stipulated that Articles 149 and 180 of the Constitution and the law relating to pensions ceased from the date of the Act to apply to certain former expatriate members of the public service and their dependants. These British civil servants had been granted pensions under an agreement between Malaysia and the United Kingdom.

Further restrictions were introduced on the right of civil servants not to be dismissed without being given a reasonable opportunity of being heard.[664]

The Act provided for the extension of the special legislative powers to combat subversion so as to make them available also against non-vio-

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660 Act A216 of 1979.
661 Article 45(1)(*aa*).
662 *Ibid.*, Clause (1)(*b*).
663 *Ibid.*, Clause (3).
664 *See* note 612.

lence and crime.[665] This provision gives great powers of government to Parliament and Parliament's power to legislate seems limitless. Prior to the 1978 amendment, Clause (1) of Article 149 related to subversion, i.e. acts of a political and seditious nature. The amendment allows the enactment of permanent special powers, previously found in emergency legislation, which could cover ordinary (non-political) crime, labour disputes and local hooliganism.[666] The new amended Clause reads, (I) if an act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof, or which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a bill.

The courts have recognized the enormous scope of this provision. In the *Teh Cheng Poh's* case the Court held that "The Article is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something has happened in the past, *viz.* that action of the kind described 'has been taken or threatened'. It is not even a requirement that such an action should be continuing at the time the Act of Parliament is passed." In this case, the appellant was found on January 13th, 1976 in Georgetown, Penang, in possession of a revolver and ammunition following a police search which had been instituted as a result of an emergency phone call complaining of an armed robbery. The appellant was subsequently charged with two offences under section 57(1) Internal Security Act, of having in his possession in a security area without lawful excuse, a firearm without lawful authority thereof. The other charge was a similar offence in respect of the ammunition. The

665 Prior to the insertion of the present paragraphs (*e*) and (*f*), Clause (1) related to subversion i.e. acts of a political or seditious nature.

666 The amendments were proposed in order to deal effectively with the increasing problem of narcotic trafficking and the activities of secret societies the Prime Minister of Malaysia, *The New Straits Times*, 8th and 28th November 1978.

mandatory penalty for those offences is death, and the appellant was tried, convicted and sentenced to death.

Clause (2) of the Article provided expressly that the law "shall continue in force until repealed or annulled by resolutions of both Houses of Parliament". The purpose of the Article is to enable Parliament once subversion of any of the kinds described has occured, to make laws providing not only for suppressing it but also for preventing its occurrence. But the Court has found some limits to the power conferred by this Article. Its judgement was that "where such an Act of Parliament confers powers on the executive to act in a manner inconsistent with Articles 5, 9 or 10, the action must be taken *bona fide* for the purpose of stopping or preventing subversive action of the kinds referred to in the recitals to the Act, for in order to valid under Article 150(1) [*sic:* presumably Article 149 (1) is meant] the provision of the Act which confers the power must be designed to stop or to prevent that subversive action and not to achieve a different end. The power to proclaim an area a security area with the consequences that this will entail is a discretionary one. It is for the *Yang di-Pertuan Agong* (again, in effect, the Cabinet) to form an opinion whether public security in an area in Malaysia is seriously disturbed or threatened by the causes referred to in the action (section 47 of the Internal Security Act) and to consider whether in his opinion it is necessary for the purpose of suppressing organized violence of the kind described. But, as with any discretion conferred upon the Executive by Act of Parliament this does not exclude the jurisdiction of the court to inquire whether the purported exercise of discretion was nevertheless *ultra vires* either because it was done in bad faith or because as a result of misconstruing the provision of the Act by which the discretion was conferred upon him the *Yang di-Pertuan Agong* has purported to exercise the discretion when the conditions precedent to its exercise were not fulfilled or, in exercising it, he has taken into consideration some matter which the Act prohibits him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration".[667]

Further the Court stated that, "the revocation of a security area proclamation is like its issue, a matter that is left ... to the discretion of the *Yang di-Pertuan Agong* acting in accordance with the advice of the cabinet. In their Lordships view, however, the discretion whether or when

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667 *Teh Cheng Poh's* case, *op. cit.*, *per* Lord Diplock at pp. 54 – 55.

to revoke a security area proclamation is not entirely unfettered. The Proclamation is lawful because it is considered necessary to make an area a security area for the purpose, not of suppressing violence by individuals generally but of suppressing existing or threatened organized violence of the kind described in the section. Once he no longer considers it necessary for that particular purpose it would be an abuse of his discretion to fail to exercise his power of revocation and to maintain the Proclamation in force for some different purpose."

The Court has no power itself to revoke the Proclamation. Apart from annulment by resolution of both Houses of Parliament, it can be brought to an end only through a revocation by the *Yang di-Pertuan Agong*. If he fails to act, it "does not leave the Court powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32(1) of the constitution makes the *Yang di-Pertuan Agong* immune to proceedings whatsoever in the Court. So *mandamus* to require him to revoke the Proclamation would not be against him; *mandamus* could in their Lordship's view be sought against the members of the cabinet requiring them to advise the *Yang di-Pertuan Agong* to revoke the Proclamation."

Whether a law enacted under Article 149 is deemed inherently to override the constitutional provisions mentioned therein or whether Article 149 only allows for inconsistencies which are expressed is not clear. In interpretating Article 149 the Court has held that the inconsistency must be expressed.[668] Thus if provision of a law under Article 149 are not expressly inconsistent with the constitutional provision concerned, those constitutional provisions will be given effect to.

The Constitution (Amendment) Act 1981 amended Clause (1) of Article 149 which empowered Parliament by law to authorize the executive to act in a manner inconsistent with certain provisions of Part II of the Constitution, which include Article 13.[669]

## The Constitution (Amendment) Act 1981

This Act brought fundamental changes to the already wide emergency powers of the *Yang di-Pertuan Agong*. The Act amended Article 150(1),

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668 *See* note 642.

669 Section 14, Constitution (Amendment) Act 1981, *op. cit.*

which provided that if the *Yang di-Pertuan Agong* is satisfied there is imminent danger of a grave emergency in which the security or economic life or public order of the Federation or any part thereof is threatened, he may before the actual occurrence of such an event, issue a Proclamation of Emergency.[670]

The Act also provided that the *di-Pertuan Agong* may issue different Proclamation of Emergency on different grounds or in different circumstances irrespective of whether or not, there exists in force a previous Proclamation by the *Yang di-Pertuan Agong*, under Clause (1). Unless both Houses of Parliament are sitting concurrently at the time, the *Yang di-Pertuan Agong*, if satisfied that it is necessary to do so, may promulgate ordinances in relation to any matter on which Parliament has power to make laws, regardless of the legislative or other procedures that should be followed, or the proportion of the total votes necessary for the act to be passed in either House of Parliament. The ordinance is to have the "force and effect as an Act of Parliament until it is revoked or annulled by the resolutions of both Houses of Parliament annulling it or lapses after a period of six months, beginning with the date on which a Proclamation of Emergency ceases to have force".

This is to negate the decision of *Teh Cheng Poh's* case insofar as that judgement imposes a duty on the *Yang di-Pertuan Agong* to summon Parliament as soon as may be practicable; but leaves untouched the principle that the *Yang di-Pertuan Agong* may not continue to promulgate emergency ordinances once Parliament has first sat after the emergency has been proclaimed. The phrase "Houses of Parliament are sitting" means only "if members of each House are respectively assembled together and carrying out the business of the House".[671]

The subjective satisfaction of the executive as to the existence of an imminent danger or the necessity to promulgate emergency ordinances or their content, is nonjusticiable. The Act provides that the *Yang di-Pertuan Agong's* decision under Clause (1) and (2B) "shall be final and conclusive and shall not be challenged or called in question in any court or any ground" nor has the court the jurisdiction to entertain or determine any question regarding the validity of the Proclamation and its effect as stated in Clause (1) or of its continued operation, and of any

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670 Article 150(2) as amended by Act 1981, *op. cit.*

671 *Ibid.*, Clause (9): This restrictive meaning negated the interpretation of Clause (unamended) given by the Privy Council in *Teh Cheng Poh's* case *op. cit.*

ordinance promulgated under Clause (2B) or its continuation in force.[672]

The exclusionary Clause in the 1969 Ordinance has been interpreted as applying to "real decisions and not to *ultra vires* decisions" and by analogy, the exclusionary Clause in Clauses (1) and (2) of Article 150 may similarly be interpreted. But the second exclusionary Clause seems to be very wide, and there has as yet been no decision in the Malaysian Court to define it more exactly.

The Act made major changes to the Public Services Commission The Railway Service Commission and branches of the Public Services Commission in Sabah and Sarawak, were abolished. All members of the Railway Service Commission are now placed under the jurisdiction of the Public Services Commission.[673]

The Act enlarged the membership of the Public Services Commission to a maximum of thirty,[674] and its jurisdiction was extended to include members of the public service of the Federation employed in Federal developments in Sabah and Sarawak, members of the public service of the state of Sabah or Sarawak seconded to the general public service of the Federation, or serving in Federal posts or Federalised posts in the state and who had opted to be members of the general public service of the Federation.[675] "Notwithstanding anything in the Constitution or the Constitution of Sabah or Sarawak, any member of the public service of the State of Sabah or Sarawak serving in Federal posts or Federalised posts who had exercised, in whatever manner or form, an option offered by the Federal Government to be a member of the general public service of the Federation shall be deemed to have opted and accordingly transferred to or appointed as a member of the public service of the Federation".

Extensive restrictions were imposed on membership of any of the five commissions.[676] A member cannot be appointed member of any of the commissions if he is, or a member will be removed by order of the *Yang di-Pertuan Agong* if he becomes, "a member of any board of directors or board of management, or an officer or employee, or engages in the affairs of business, or any organization or body, whether corporate or

672 *Ibid.*, Clause (8).
673 Articles 141, 146C and 146D were repealed by Act 1981.
674 Article 139(4) as amended by section 9(1) (*c*) of Act 1981.
675 *Ibid.*, Clause (IA): A Federalised post is defined as a post which has become a Federal post in the state.
676 The five commissions are the Public Services, Judicial and Legal Service, Police Force, Education Service Commission, and the Armed Forces Council.

otherwise, or of any commercial, industrial or other undertaking, whether or not he receives any renumeration, reward, profit or benefit from it". But the disqualifications do not apply "if the organization or body which carries out any welfare or voluntary work or objective to the community or any part thereof, or any other work or objective of a charitable or social nature, and the member does not receive any renumeration, reward, profit or benefit from it."

The Act also provided that "During any period of disability or leave of absence from the Federation of a Chairman of the commission, the Deputy Chairman will perform the functions of the Chairman, and in the latter's absence or disability, the *Yang di-Pertuan Agong* may appoint a member of the commission to perform the functions of the Chairman."[677]

Minor amendments were made to Articles 139(1)(e) and (4), 142(2) and 143(1) to bring them into line with the various amendments and changes to the various commissions.

The Act imposed further restrictions on future senators; they may "not hold office for more than two terms either continously or other wise", except those Senator who, on 14th May 1981, had served two or more terms of office previously may continue to serve for the remainder of their term.[678]

Furthermore the Act laid down that "A member of either House of Parliament who has been granted leave of absence from the sittings of the House of which he is a member shall not, for the duration of such leave, participate in any manner in the affairs and business of the House".[679]

Clause (3) of Article 56 and Clause (3) of Article 57 were amended to read that "During any vacancy in the office of President (or Speaker) or during any absence of the President (or the Speaker) from any sitting, (otherwise than by reason of the House first meet after a general election) ... the Deputy President (or the Deputy Speaker) or if the Deputy President (or the Deputy Speaker) is also absent or if his office is also vacant, such other member as may be determined by the rules of procedure of the Senate (or of the House) shall act as President (or Speaker)".[680]

Two new Clauses (5) and (6) were added to Article 56 (in respect

677 Article 152(2)(b); (2A) and (2B).
678 Article 45(3A) as amended by Act 1981.
679 Article 52(2).
680 Sections 5(c) and 6(c) of Act 1981.

of the President or Deputy President of the Senate) and Article 57 (in respect of the Speaker or Deputy Speaker of *Dewan Rakyat*). These Clauses laid down that if a person "who is elected to be President or Deputy President (or Speaker or Deputy Speaker) shall be disqualified from holding such office if after three months of his election to such office or at anytime thereafter he is or becomes a member of any board of directors or board of management, or an officer or employee, or engages in the affairs or business, of any organization or body whether corporate or otherwise, or any commercial, industrial or other undertaking, whether or not be receives any renumeration, reward, profit or benefit from it". These disqualifications do not apply where he is a member of an organization or body of a charitable or social nature as in the case of members of the commissions of public service. Any question as to the disqualification of President or Deputy President (or Speaker or Deputy Speaker) under the respective Article, Article 56(5) or 57(5), will be finally decided by the Senate (or *Dewan Rakyat*).[681] These provision are also applicable to the Speaker of a Legislative Assembly of a State.[682]

Minor amendments were accordingly made to Article 156(1) and (2) and section 10(2) of the Eighth Schedule to the Constitution to bring them in line with the various changes made.

Clause (2) of Article 42 was amended. This Clause states that any power conferred by Federal laws or state laws to remit, suspend or commute sentences for any offences may be carried out by the *Yang di-Pertuan Agong* if the sentence is passed by a court-martial or a civil court exercising jurisdiction in the Federal Territory and, in any other case, may be carried out by the Ruler or the *Yang Dipertua Negeri* of the state in which the offence is committed. This power, however, is subject to Clause 10 of the Article (dealing with Islamic Law) and exercisable "without prejudice to any provision of the Federal law relating to remission of sentences for good behaviour or special services".[683]

A new Clause (1A) was added to Article 89, which stated that "Any law made under Clause (1) providing for forfeiture or reversal to the State Authority, or for the deprivation, of the membership of any Malay reservation, or of any right or interest therein, on account of any person, or any corporation, company or other body (whether corporate or incorp-

681 Articles 56(5) and (6) and 57(5) and (6).
682 Sections 10(4) and (5) of Act 1981.
683 Article 52(2) as amended by Act 1981.

orate) holding the same ceasing to be qualified or competent under the relevant law relating to Malaya reservations to hold the same, shall not be invalid on the ground of inconsistency with Article 13." (dealing with rights to property).[684]

Consequential amendments were made to Article 89(3)(*b*) and (*c*) as a result of these changes.[685]

## The Special Court

There is the established Special Court,[686] consisting of a panel of five judges; the Chief Justice of the Federal Court as the Chairman, the two Chief Judges of the High Courts and two other persons who hold or have held office as judge of the Federal Court[687] or a High Court, appointed by the Conference of Rulers.

The Special Court has the exclusive jurisdiction to try all offences committed in the Federation by the *Yang di-Pertuan Agong* or the Ruler of a State, and all civil cases brought by or against the *Yang di-Pertuan Agong* or the Ruler of a State wherever the cause of action arose.[688] The Special Court is vested with the same jurisdiction and powers which are vested in the inferior courts, the High Court and the Federal Court by the constitution and any Federal law, and has its registry in Kuala Lumpur.[689]

The procedure (including the hearing of proceedings *in camera* in civil and criminal cases and the law relating to evidence and proof in civil and criminal proceedings, the practice and procedure in any inferior courts, any High Court and the Federal Court are applicable in any proceedings in the Special Court.[690]

The decision of the Special Court is based on the opinion of the majority of the members and its decision is final and conclusive and it

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684 Section 7(a) of Act 1981.

685 Article 89(3)(C) deleted by Act 1981.

686 Clause (1) of Article 182. The five members of the Special Court are three ex-officio members and two members to be appointed by the Conference of Rulers. It is not clear whether or not, the appointment of members are to be made on the recommendation of, e.g. the Prime Minister.

687 Presumably, it includes a judge of the former Supreme Court as well. There is no mention of persons who hold or have held office as judge of the Court of Appeal.

688 Clause (2), *ibid.*

689 Clause (4), *ibid.* Again the Court of Appeal has been omitted.

690 Clause (5), *ibid.* Again the Court of Appeal has been omitted.

cannot be challenged or questioned in any court on whatever ground.[691]

The *Yang di-Pertuan Agong* may, on the advice of the Chief Justice, make such rules as he may deem necessary or expedient to provide for the removal of any difficulty or anomaly whatsoever in any written law or in the carrying out of any function, the exercise of any power, the discharge of any duty or the doing of any act, under any written law that may be occasioned by the provision of this Article. For that purpose such rules may make the necessary modification, adaptation, alteration, change or amendment to any written law."[692]

691 Clause (6), *ibid.*
692 Clause (7), *ibid.*

# 6

# CONCLUSION: FROM PERSONAL TO CONSTITUTIONAL RULE

The Federal Constitution defines a ruler as "any person who in accordance with the Constitution of that state exercises the function of a ruler". In each of the State Constitutions the ruler is the sovereign of the state. In the Constitution of Perak, for instance, "sovereign" is defined as "Sultan, *Yang Dipertuan* and the Ruler of the State and Territory of Perak and all its dependencies and includes His successors". In Negeri Sembilan, the ruler is a composite concept; here it is essential to distinguish between the "composite" and the "unitary" concept of rulership. In the Federal Constitution the definition of "ruler" in respect of Negeri Sembilan, is the *Yang Dipertuan Besar* and the ruling chiefs (i.e. the four *Undangs, Undang* Luak Sungai Ujong, Luak Jelebu, Luak Johol and Luak Rembau, and the *Tunku Besar* Tampin). In its "unitary" concept, the ruler of Negeri Sembilan is the *Yang Dipertuan Besar,* acting on behalf of himself and ruling chiefs.[1] An *Undang* has everything that a ruler has except sovereignty and as such he is not immune to legal processes.[2] In the Negeri Sembilan Constitution, the definition of "ruler" includes constitutional obligations such as those relating to state legislation, to *adat* and to the religion of Islam. Yet an *Undang* is chosen on *adat* principles and in respect to that, *adat* is part of the State Constitution.[3]

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1 Article 160. Constitution of Malaysia; *Dato' Menteri Othman bin Baginda & Anor.* v *Dato Syed Ombi Syed Alun bin Syed Idrus* [1981] 1 *MLJ* 29; *see* comments by M.B. Hooker 1981. "Negeri Sembilan: *Adat*, the Constitution, and the Federal Court. *MLJ* lxc; H. Ramachandrans Reply [1981] 1 *MLJ* xlv; and Gullick, J.M. "Law and *Adat Perpateh:* A Problem from Jelebu", *JMBRAS* Vol. 54.

2 Article 18(1) *ibid.*

3 Hooker, M.B. "Law, Religion and Bureaucracy in a Malay State: A Study in conflicting Power Centres" in *American Journal of Comparative Law,* 19, 1971.

The qualifications of a ruler are that he must be a Malay, male, of royal descent and a Muslim. In the Perak Constitution, the ruler must be a Malay, male, of royal blood through male lineal descent, able to read and write (presumably in his own language) and professing the Muslim religion of the Shafie school. The only disqualification to rulership is "any great and serious defect derogatory to the quality of a sovereign, that is to say, any infirmity such as insanity, blindness, dumbness or possessing of some base quality on account of which he would not be permitted by *hukum syarak* to become a sovereign". The ruler succeeds to the throne by the traditional Malay custom which varies from state to state, and these rules of succession are now embodied in the Constitution of each state.

Two states, Kedah and Perlis, observe a modified principle of primogeniture; six states permit the reigning ruler to designate the heir, and in one, Negeri Sembilan the ruler is chosen by election. A ruler, except in Negeri Sembilan, is appointed to the rulership by the Council of Succession, known by various names, and the Council consists of the major chiefs in the state. A ruler may at any time resign, or he may be removed from office by the Council on grounds of insanity or any other cause as set out in the State Constitution.

In all states the ruler is known as Sultan except Perlis where he is known as the Raja. In Negeri Sembilan he is known as the *Yang Dipertuan Besar.* Here he is elected by the *Undangs* in accordance with the State Constitution. On his death the *Undangs* choose a successor from the direct male line but they may, if they think that there is no suitable or competent person among his male issue, give preference first to the brothers of the *Yang Dipertuan Besar,* second to his paternal uncles, and finally to others.[4]

In Perak, succession rotates among the heads of three families. Thus when the sultan dies, the *Raja Muda* (head of the next family and the second in succession) becomes sultan, *Raja Dihilir* (head of the next family and the third in succession) becomes *Raja Muda,* and the head of the deceased sultan's family becomes *Raja Dihilir.*

Insofar as the state Constitution provides for a ruler, the Federal Constitution guarantees the right of the ruler of the state to succeed and to hold, enjoy and exercise the constitutional rights and privileges of the

4 When the previous *Yang Dipertuan Besar* died, his brother was elected *Yang Dipertuan Besar* (as the son of the late *Yang Dipertuan Besar* was then a minor).

ruler in his state. This provision of the Constitution cannot be amended except with the consent of the Conference of Rulers. It is thus clear that to the extent law can accomplish the fact, the position and status of the rulers are permanent in the States of Malaya, subject only either to constitutional change at Federal level or to change at the State level and in accordance with that State Constitution. But State Constitutions do not contemplate change in the monarchial form of government. For example, the provision of Article 71 of the Constitution of Kelantan states that amendment to the Constitution affecting the royal status can only be made by "His Highness by Proclamation issued with the consent and concurrence of the Council of Advisers but may not be amended by any other means". The majority of the Council of Advisers are the personal appointees of the ruler.

The state rulers possess their sovereignty, jealously preserved at the Federal level by Article 181 of the Federal Constitution, and at the State level by similar provisions in all the State Constitutions. Article XI of the Constitution of Perak states that:

> "In the concept of sovereignty the following are inherent:
>
> (a) the Sovereign can do no wrong; and
> (b) the Sovereign never dies".

Article VIII of the Third Part of the Constitution of Johor provides that:

> Except as expressed herein, this Constitution shall not affect the prerogatives, powers and jurisdiction of the ruler.

The Federal Constitution expressly preserves the sovereignty of the rulers before *Merdeka* by providing that their sovereignty within their respective territories "as hitherto had and enjoyed shall remain unaffected and that no proceeding whatsoever shall be brought in any court against the ruler in his personal capacity". This provision has effect only in Malaysia, but nonetheless it may be assumed that their sovereign status would still be recognized by the British Government should they be sued in England. What the attitude of other foreign governments would be, should a ruler be sued in their country, is an open question, since such a case has to date never been brought.

A ruler, though sovereign, does not possess autocratic powers. He is bound by the State Constitution. Constitutionally, therefore, a ruler is fettered by strict legal rules, and even when acting on his discretion he is subject to the realities of political life. However in actuality this means

his influence is still as powerful and effective as it was before *Merdeka.*

The State Constitution requires that a ruler is to act in accordance with the advice of the Executive Council or a member of the Executive Council, except as otherwise provided for by the Federal or the State Constitution. He is entitled, at his request, to any information concerning the government of the state which is available to the Executive Council. Members of the Executive Council meet among themselves, and thereafter, the *Menteri Besar* submits the Council's advice to the ruler. Before *Merdeka*, a ruler presided at the Executive's Council meetings and could not act in opposition to its advice.

The ruler is a constituent part of the State Assembly. However, he does not attend its meetings except when addressing the Assembly on formal occasions such as the state opening of the Assembly. He gives assent to bills passed by the State Assembly, and in carrying out this function he acts on the advice of the Executive Council.

The State Constitution also provides that certain functions of the ruler are discretionary, and these discretionary functions include the appointment of a *Menteri Besar,* the withholding of consent to a request for the dissolution of the State Assembly, the making of a request for a meeting of the Conference of Rulers – provided that such a meeting solely relates to the privileges, position, honours and dignities of their Royal Highnesses; decisions relating to religious acts, observances or ceremonies; the appointment of an heir or consort, Regent or Council of Regency; the appointment of persons to Malay customary ranks, the bestowing of titles and honours; and the regulation of the royal courts and palaces.

State law may make provisions requiring a ruler to act after consultation with or on the recommendation of any person or body of persons other than the Executive Council, in the exercise of his functions other than those functions which he may exercise on his discretion, and those for which the State and the Federal Constitution provide.

### The *Yang di-Pertuan Agong*

The Federal Constitution sets out a federal form of government for the thirteen states of Malaysia. The linchpin of the whole Constitution is a unique indigenous institution, the *Yang di-Pertuan Agong,* who is the Supreme Head of State of the Federation, and takes precedence over all persons in the Federation. As a constitutional monarch, the *Yang di-Per-*

*tuan Agong* is to some extent similar to the monarch of the United Kingdom. He is the symbol of unity in the country. However the *Yang di-Pertuan Agong* is not hereditary monarch, but is selected from among his fellow rulers, and reigns for a fixed period of five years. This is an important facet of the Malaysian Constitution, allowing each of the nine rulers the opportunity of assuming the office of the *Yang di-Pertuan Agong*. In this way the Constitution tries to ensure that the people of the several states of the Federation identify themselves more closely with the Federation.

The existence of the rulers tends at present to create a divided loyalty, one to the state and the other to the Federation. The State Nationality Enactments of the former Malay states remain in force, to this day side by side with the citizenship provisions of the Constitution; and the rulers, as well as the *Yang di-Pertuan Agong*, confer Datoships and other honours and awards. Furthermore, the existence of the rulers serves as a personification of the existance and reality of the state, and is a vital factor in the establishment of the Malays as the rightful rulers of the country. But their existence also serves to detract from the undivided loyalty due to the *Yang di-Pertuan Agong* and Malaysia as a whole. In response to this danger, there has been a tendency to increase the powers of the Federal Government at the expense of those of the state.

A ruler is eligible to be elected to the office of *Yang di-Pertuan Agong* if he is an adult, he consents to be elected and is free from any physical and mental defect or "any other cause", which in the opinion of the Conference of Rulers, renders him unsuitable for the office. However, the Constitution does not define "the physical and mental defect or any other cause", and it is not unreasonable to presume that it may mean the same grounds upon which a person is disqualified to rulership as in the State Constitutions. The Conference of Rulers may, for "any other cause" disqualify a ruler from the office of the *Yang di-Pertuan Agong*, and in such a case there is no redress for the ruler who is thus excluded. As the Conference of Rulers may exclude a ruler by a resolution made by secret ballot and the ballot papers are destroyed immediately after each election, there is no way of knowing what that "other cause" may be.

The Conference of Rulers may elect a ruler qualified to be elected as *Yang di-Pertuan Agong* providing he initally receives the support of at least four rulers. The Conference may, at any time, by a resolution supported by at least five rulers, remove from office the *Yang di-Pertuan Agong* on the same grounds of physical and mental defect or any other cause, which in its opinion, renders the *Yang di-Pertuan Agong* no longer suitable

for the office. There is nothing in the Constitution restricting the exercise of the discretionary power of members of the Conference of Rulers in affecting the removal of the *Yang di-Pertuan Agong*.

The *Yang di-Pertuan Agong* may at any time resign his office. He need only to make known in writing his intention to do so to the Conference of Rulers. He need not inform Parliament of his intention. If he ceases to be a ruler of his state the *Yang di-Pertuan Agong* must at once resign his office.

The *Yang di-Pertuan Agong* and his deputy, the *Timbalan Yang di-Pertuan Agong* are elected by the nine ruler members of Conference of Rulers. The important feature of the election is the election list. The list consists of the states of all the rulers in the order in which the rulers recognize precedence among themselves, that is, the dates on which they acceded as rulers. The state of the longest reigning monarch appears first on the list. Having compiled the list the Conference of Rulers offers the office of the *Yang di-Pertuan Agong* to the ruler whose state is first on the list provided that he qualifies in other aspects for election. If he does not accept the office it will be offered to the ruler who is next on the list. This procedure will be repeated until a ruler accepts the office.

For subsequent elections the list is amended so that the state whose ruler was elected is ommitted from the list and any state preceding the state whose ruler was elected is transferred to the end of the list. Whenever a new ruler takes over as ruler of a state, that state is transferred to the end of the list. When no state remains on the list because all the rulers have at sometime been the *Yang di-Pertuan Agong* or when no ruler on the list is qualified for election or accepts an offer, the list is then reconstituted.

Once a ruler is elected as *Yang di-Pertuan Agong*, he must, prior to assuming his duties, take before the Conference of Rulers and in the presence of the Lord President of the Federal Court an oath of office as set out in the Fourth Schedule to the Constitution.

During any period a ruler holds office as *Yang di-Pertuan Agong*, he is not permitted to exercise the functions of ruler of his state except in his capacity as head of the Muslim religion. He may, however, amend the constitution of his state and appoint a new Regent if a new member of the Council of Regency dies or becomes incapable of performing his duties.

Further constitutional restraints imposed upon the *Yang di-Pertuan Agong* while in office are that he cannot receive any emolument of any

kind from the state of which he is the ruler nor hold any "office of profit" or actively engage in any commercial enterprise. He cannot leave the Federation without the consent of the rulers for more than fifteen days unless he is on a state visit to another country.

The constitutional functions of the *Yang di-Pertuan Agong* are set out in the Federal Constitution, which requires him to act in accordance with ministerial advice in the "exercise of his functions under the Constitution or Federal law": the term "Federal law" is defined as covering certain "existing laws" and Acts of Parliament. It is noted that certain functions of the *Yang di-Pertuan Agong* are discretionary; and these discretionary functions are the appointment of a Prime Minister, withholding of consent to a request for dissolution of Parliament, and convening of a meeting of the Conference of Rulers – provided that such meeting relates solely to the privileges, position, honours and dignities of Their Royal Highnesses. The Constitution also provides that such a discretionary power may be conferred by the Constitution itself, and the Federal law may require the *Yang di-Pertuan Agong* to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet, but only for functions other than those exercisable on his discretion or under the Constitution.

Some of the most important powers of the sovereign, known as prerogatives, arise out of state necessity. For example, in the Federal Constitution the *Yang di-Pertuan Agong* is empowered to legislate by ordinances: for the Constitution admits such a method of legislation – which can overrule all the provisions of both the Federal and the State constitutions. The *Yang di-Pertuan Agong* may issue a proclamation of emergency over the whole of the Federation or any part thereof if he is satisfied of the existence of a threat to the security and the economic life of the Federation or any part thereof. If Parliament is not sitting while an emergency has been proclaimed, the *Yang di-Pertuan Agong* may promulgate ordinances, having the force of law. These ordinances are valid even if inconsistent with the provisions for the Constitution or Federal law, and remain valid until repealed or annulled by Parliament.

Of this power to declare a state of emergency it has been suggested that the importation of subjective state of mind in this context may well enable the *Yang di-Pertuan Agong* to act on his discretion. Further it is contended that the *Yang di-Pertuan Agong* posseses "a battery of prerogative powers: that these exist under the cover of the Malaysian Constitution and the Acts and Ordinances passed there under, and are to

that extent, curtailed thereby; that such powers are not necessarily implicity curtailed by the existence of an unexercised power to legislate on the "whole ground of something which could be done pursuant to the power; but that the extent to which such prerogative powers can be exercised by the *Yang di-Pertuan Agong* himself; or by any of his ministers remain in no man's land on which either party will trespass at his peril, bearing in mind the challenges possible on legal or political grounds".[5]

On the issue of justiciability of a Proclamation of Emergency or an emergency ordinance promulgated by the *Yang di-Pertuan Agong*, the court, in *Stephen Kalong Ningkan* v *The Government of Malaysia*,[6] had referred to the *Yang di-Pertuan Agong* as being the "sole judge" to decide as to whether an emergency exists; in two judgements, that of the Lord President Barakbah and by Azmi CJ (Malaya), the words "sole judge" have been used. This seems to support the view just expressed: that "in the eyes of some of the Malaysian judges the head of state has a personal discretion under Article 150 and that his subjective state of mind can seldom, if ever successfully be called in question".[7]

In analyzing the Lord President's judgement in the case it shows that the Lord President in fact equated the *Yang di-Pertuan Agong's* action under Article 150 with the action of the Government; he said:

> In an act of the nature of a proclamation of emergency, issued in accordance with the Constitution, in my opinion, it is incumbent upon the court to assume that the Government is acting in the best interest of the state and permit no evidence to be adduced otherwise.

The fact that the Lord President used the word "Government" seems to suggest that he was fully aware of the fact that it was on the Cabinet's advice that His Majesty was so acting, observed one writer.[8]

In the Privy Council phase of this case, their Lordships understood the action of the *Yang di-Pertuan Agong* in emergencies to be synonymous with actions of the Government; Lord MacDermott said, "On the

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5 Hickling, R.H. "The Prerogative in Malaysia", 17 *Malaya Law Review*, 207, p. 232, 1975.

6 [1968] 1 *MLJ* 119; *Public Prosecutor* v *Ooi Kee Siak* [1971] 2 *MLJ* 108, p. 118.

7 Hickling, R.H. *op. cit.*, p. 223.

8 V. Sinnadurai, 1968. "Proclamation of Emergency – Reviewable?" 10 *Malaya Law Review* 130, p. 131; S. Jayakumar 1976. "Can the *Yang di-Pertuan Agong* Act in His Personal Discretion and Capacity", 18 *Malaya Law Review*, 149, p. 176; and S.M. Thio 1966. "Dismissal of Chief Ministers", 8 *Malaya Law Review*, 2.

14th September 1966, a week after the judgement of Harley J, the *Yang di-Pertuan Agong*, acting, as it may be presumed, on the advice of the Federal Cabinet as required by Article 40(1) of the Federal Constitution, proclaimed a state of emergency throughout the State of Sarawak under Article 150 of that Constitution".[9]

In another case later the court held that, "Emergency rule which passes the legislative power from Parliament to the *Yang di-Pertuan Agong* has not displaced his position as a constitutional monarch, bound by the Constitution to act at all times on the advice of the Cabinet".[10]

These judicial pronouncements seem to suggest that the *Yang di-Pertuan Agong* is not exercising his personal discretion, but is acting on advice, when proclaiming an emergency under Article 150 of the Constitution. One judge, Pike CJ (Borneo) went so far as to say that:

> ... since under Article 40 of the Constitution the *Yang di-Pertuan Agong* is required to act upon advice of the Cabinet in making a proclamation under Article 150 [and indeed in all other matters except those mentioned in classes (2) and (93) of Article 40], it cannot, I think, be argued that the power conferred by Article 150 is prerogative power analogous to certain powers of the British Sovereign.[11]

The *Yang di-Pertuan Agong* is further empowered to detain any citizen of the Federation for a period of more than three months under preventive detention laws, but in such a case he acts on the advice of a constitutionally set up Advisory Board.

The Constitution follows the ordinary methods of dividing powers between the Federal and State Governments: that the Federal and State Governments are each within their own spheres, co-ordinate and independent. The division of the legislative powers between the Federation and the states is set out in three lists: the Federal, the State and the Concurrent List, and all the residuary powers not listed are placed within the competence of the states. The distribution of powers in the Federation reflects a very strong centralist bias. The exclusive powers given to the Federal Parliament are very extensive; they include external affairs, defence, internal security and financial powers. In contrast, the legislative

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9 [1968] 2 *MLJ* 238 (PC), p. 240.

10 *N. Madhavan Nair* v *The Government of Malaysia* [1975] 2 *MLJ* 286, *per* Chang Min Tat J, p. 289.

11 *Stephen Kalong Ningkan* v *Tun Abang Hj. Openg and Tawa Sli* (No. 2) [1967] 1 *MLJ* 46, p. 67.

powers of the state are meagre; they include powers over matters concerning the Muslim religion, and the personal and family law of Muslims; various matters touching land tenure, local government, and various works and services of a local character. The Concurrent List is short and includes social welfare, town and country planning, public health, sanitation, drainage and irrigation. The Constitution also stipulates that if any State law is inconsistent with a Federal law the latter shall prevail, and the State law shall, to the extent of the inconsistency, be void.

Not only are the powers of the state circumscribed but the Federal Parliament has power to legislate on state matters. Parliament has power to make laws on any matter enumerated in the State List for the purpose of implementing any treaty, agreement of convention between the Federation and any other country or any decision of an international organization of which the Federation is a member, or for the purpose of promoting uniformity of the laws, or if so requested by the legislature of the state. Such law with respect to any matters of the Muslim religion or the custom of the Malays shall not be made unless the State Government concerned has been consulted, and no such law made for the promoting of uniformity or at the request of any states unless adopted by the legislature of that state, in which case it will be a State law. Parliament may also make laws to ensure a uniformity of law or policy with respect to various matters of land law. This exercise of the federal legislative authority is not subject to state approval except insofar as such law makes provision for conferring executive authority on the Federation, in which case it must be approved by the State Assembly if it is to operate there. Land utilization policy is formulated by a National Land Council controlled by the Federal authorities. They are entitled to prepare and to give legislative effect to national development plans, to conduct inquiries and research in any field, to inspect state activities and to give advice to State Government and officers, in times of emergency, after a proclamation of emergency has been issued by the *Yang di-Pertuan Agong*. Parliament may make laws with respect to any matter which appear to Parliament expedient, but this power does not extent Parliament's powers to matters concerning the Muslim Law or the Malays, nor could it validate any provision inconsistent with the provisions of the Constitution relating to any such matter or relating to religion, citizenship or language.

The division of the executive powers follow that of the legislative powers. The executive authority of the Federation extends to all matters with respect to which the Federal Parliament may make laws and the

executive authority of a state to all matters with respect to which the legislature of that state may make laws. It is provided that the executive authority in a state shall be so exercised as to ensure compliance with any Federal law applying to that state. In an emergency, the executive authority of the Federation extends to any matter within the legislative authority of a state and to the giving of directions to the government of a state or to any officer or authority thereof.

Where the Constitution of any state does not contain the essential provisions set out in Part I of the Eighth Schedule to the Constitution or provisions substantially to the same effect or contains provisions inconsistent with the essential provisions, the Federal Parliament is empowered to pass legislation for giving effect in that state to the essential provisions – or removing the inconsistent provisions. Where it appears to the Federal Parliament that in a state any provision of the Federal Constitution the State Constitution is being habitually disregarded, notwithstanding anything in the Federal Constitution, Parliament may by law make provision for securing compliance with those provisions.

The legislative power of the state is further restricted by the fact that it has no power to legislate to create offences in respect of matters included in the State List and even in respect of the Muslim law; the Muslim courts constituted by State Enactments are not to have jurisdiction in respect of offences except as conferred by Federal law.

The division of powers between the Federation and the states in Malaya differs from that between the Federation and the States of Sabah and Sarawak, where the state and concurrent powers of Sabah and Sarawak are much wider.

The Constitution provides that the judicial power of the Federation is vested in a Supreme Court, in two High Courts of the States of Malaya and the Borneo States and in such courts as may be provided by Federal law. All the courts other than the *Syariah* Courts which deal with Muslim law and Native Customary Courts, are Federal Courts. The High Courts have unlimited original jurisdiction in civil and criminal cases. Appeals go to the Federal Court now known as the Supreme Court which also has original jurisdiction on constitutional matters referred to it by Heads of State. There is an appeal from the Supreme Court to the *Yang di-Pertuan Agong* who until 1985 referred such appeals on civil matters to the Judicial Committee of the Privy Council. The judges of the Supreme and High Courts are appointed by the *Yang di-Pertuan Agong* on the recommendation of the Prime Minister who is required to consult the Lord

President of the Supreme Court. The removal of a judge of the Supreme or High Court is entrusted to a tribunal of judges and ex-judges, appointed by the *Yang di-Pertuan Agong*.

Under the Constitution, the Federation is in effect the main taxing authority. The state's sources of revenue are derived from revenues of a local nature, and the state also receives an annual capitation grant from the Federal Government. The state is guaranteed of a minimum of 10% of the export duty on tin and other minerals produced in the state.

The appointment and disciplinary control of public servants in the Federation are the responsibility of the Public Services Commission and a number of specialist Public Commissions. Some of the states have their own Public Services Commission, but in those which have not, the State Public Services come under the Federal Public Services Commission.

The Constitution provides for a number of organizations which provide consultation and co-operation between the State Governments. At the highest level is the Conference of Rulers. This body is quite independent of the Federal and State Legislative and executive organs and has a variety of functions. It is composed of the nine Malay rulers and four governors, but in certain of its functions, for example, the election of the *Yang di-Pertuan Agong*, only the rulers participate. The Conference of Rulers can block certain bills, has to be consulted on certain appointments, can make decisions on religious acts and observances, and can deliberate on matters of national policy.

Other bodies are the National Financial Council which is a consultative body on matters of finance especially in relation to the making of grants and loans to the states; the National Land Council which has concerned with the utilization of land in the Federation, and while the National Council for Local Governments has the duty of formulating a national policy for the promotion, development and control of local governments throughout the Federation.

The fundamental principle of federalism according to Wheare is that general and regional governments are co-ordinate. A critical observation of Wheare's "federal principle" suggests that in assessing whether a State has a centralist bias or not, we must examine the nature of those areas where the respective governments are "independent and co-ordinate".[12] Wheare's definition was based on an earlier experience of fed-

12 Mackenzie and Chapman. "Federalism and Regionalism", 14 *Modern Law Review*, p. 187, 1951.

eration in the United States of America and Australia, but the newer federations do not easily fall within this definition. In the light of the experience of these new federations the definition needs to be reconsidered.

It can therefore be said that while the Constitution of Malaysia is a modern instrument, drafted in the first instance out of the constitutional experiences of Western democracy, it is nevertheless in many of its fundamental concepts, consistent with Malay institutions, customs and practices reaching back at least to the sixteenth century; for example, each sultan is sovereign in his respective state, the fount of honours and titles, head of Islam, and the central of focus of state ceremonies.

## Islam

In the present system of religious pluralism, the Muslim religion takes a special place in the Federation. The Federal Constitution lays down that Islam is the religion of the Federation, but permits the practice of other religions in peace and harmony.

Although Islam is the religion of the Federation, there is no head of the Muslim religion in the Federation. In a state that has a ruler, the ruler is the head of the Muslim religion in that state. The *Yang di-Pertuan Agong* who is elected from among the rulers, is the head of the Muslim religion of his own state, in the Federal Territory, federal, in those state which do not have a ruler. Provision has been made in the Constitutions of each of those states that do not have a ruler, conferring upon the *Yang di-Pertuan Agong* the position of head of the Muslim religion in the state.

The Federal Constitution guarantees the position of the ruler as head of the Muslim religion in his own state "in the manner and to the extent acknowledged and declared by the Constitution of the state and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as head of that religion, are unaffected and unimpaired...." Similar Clauses are to be found in all of the state constitutions which give the ruler power, as head of the Muslim religion in his own state, to act on his own discretion in the performance of any of his functions as head of the Muslim religion.

In theory, therefore, it is open to each ruler to act separately in such religious matters. However it was felt that there should be some uniformity in the laws governing religious acts, observances or ceremonies in the Federation. Clause (2) of Article 3 of the Federal Constitution states that,

> In any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other rulers shall in his capacity of head of the Muslim religion authorize the *Yang di-Pertuan Agong* to represent him.

The various State Constitutions have correspondingly reproduced this provision.

In a society practising religious pluralism every person has the right to profess or practise his own religion, and in the Federation he may do so. He may also subject to State law, propagate it. Further, no person may be compelled to pay any tax, the proceeds of which are especially allocated in whole or in part for the purposes of a religion other than his own, and every religious group has the right to manage its own affairs, to establish and maintain institutions for religious and charitable purposes, to acquire and own property and to hold and administer it in accordance with the law. In conformity with the Federal Constitution, each State Constitution has a similar provision providing freedom to practise other religions in peace and harmony by persons professing them in any part of the state.

State law may control and restrict the propagation of any religious doctrine or belief among people professing the Muslim religion. The State laws of Kedah, Perlis, Perak, Negeri Sembilan, Kelantan, Sabah, Malacca and Penang make it an offence to propagate any religious doctrine or belief other than Islam to any person professing the Muslim religion. It may be noted that these offences are cognizable by a Civil Court but not by the Shariah Court. State laws prohibit the teaching (except in one's own residence and in the presence only of members of one's own family or household) of any doctrine of Muslim religion without written permission (or *tauliah*), and the teaching and expanding of any doctrine or the performance of any ceremony or any act relating to the Muslim religion in any manner contrary to Muslim law.

Although the State Constitution lays down that a ruler may act on his own discretion in the performance of any function as head of the Muslim religion, in reality he is guided by a Council of Muslim Religion, called by various names in each state, whose principal function is to "aid and advise the ruler on all matters relating to the religion of the state and Malay custom". In such matters it is the chief authority in the state but is required to take notice of and to act in accordance with Muslim law, Malay custom and the written law of the state. The power of the Council

varies, from state to state but generally it may issue *fatwas* (rulings) or any matters referred to it; it has power to administer *wakafs* (Muslim Charitable Institutions), to act as an executor of a will or administer the estate of a deceased Muslim, and to hear appeals from Shariah Courts.

For the day to day administration of matters relating to the Muslim religion there exists in each state a Department of Religious Affairs, headed in each case by a lay administrator. Some of the members of the Department are also members of the Council, and there is a close relationship between the two. There are laws in each state for the administration of Muslim law and these provide for the setting up of *Kadis* 'Courts for the adjudication of disputes relating to Muslim family law and the trial of Muslim offences. They also provide for the registration of Muslim marriages, divorce and revocation of marriages.

In most states apart from the lay head of the Department of Religious Affairs, the highest official is the *Mufti*, whose principal function is to issue *fatwas* and to assist the Council of Religious Affairs to do so. In some states the prerogative of appointing a *Mufti* is exercised by the ruler although in other states he is appointed by the ruler on the advice of the ruler in Council or of the Council of Religious Affairs.

The rulers of the Malay States, including of course the *Yang di-Pertuan Agong* who is chosen by the rulers from among themselves must necessarily be Malays professing the religion of Islam, but there is nothing in the Federal Constitution which stipulates that the Prime Minister or any other Minister or Federal high official must be a Muslim. The State Constitution contain provisions allowing the ruler to appoint a non-Muslim as *Menteri Besar* provided that in the ruler's judgement he is likely to command the confidence of the majority of the members of the State Legislative Assembly. The Constitutions of the Malay States, however, still provide that the State Secretary shall be of the Malay race and profess the Muslim religion. This provision remains unaltered and preserved by Article 8 (5) (*e*) of the Federal Constitution.

The early Malay States Constitutions, written or unwritten, show traces of the traditional Islamic policy. The Sultanate was the result of the assimilation of the spiritual and religious traditions originally associated with the institution of the caliphate with the purely temporal authority that was the Sultan thus the latter in addition to being a sovereign ruler in the secular sense also came to maintain a close association with and responsibility for the Shariah. Indeed the sultan was not entitled to special exemption from the provisions of the Shariah law, being himself

no more than a servant. In theory neither the ruler or any government body has legislative powers in those matters that form the exclusive substance of the Shariah law. The interpretation of Shariah in relation to new situations was the prerogative of the learned jurists, including the *Mufti*. The competence of the ruler has always been confined to the making of administrative regulations in areas, beyond the immediate concern of the substantive law of Islam, provided that such regulations do not themselves lead to a breach of that law. In practice, this theory of non-interference in the Islamic law has been broken by the rulers in the past and in more modern times has been seriously affected by legislative measures taken in the modern Malay State.

Under the present constitutional structure the sultan in theory may act on his discretion in the performance of his functions as head of Islam. For example the states of Kedah and Pahang have not participated in the National Council of Islamic Affairs because their respective sultans have not wished it. The sultan also has a great deal of influence in the appointment of religious officials, especially the *Mufti*. Since state laws must be passed by the Legislative Assembly and assented to by the sultan, the elected ministers and members of the Legislative Assembly have considerable influence over the Administration of Muslim law in their states.

The *Yang di-Pertuan Agong* as head of Islam in Penang, Malacca, Sabah and Sarawak is bound to act on advice and here the influence of the respective Prime Ministers is more significant. The sultan continues to play an important part in the issue of *fatwas* (rulings) on the Muslim religion and law. Under the various state enactments relating to the administration of Muslim law the power to issue *fatwas* is given to the *Mufti*, *Fatwa Committee* or the *Majlis Ugama Islam*. In issuing such *fatwas* the person or body issuing the *fatwa* is required to follow the orthodox tenets *of* the Shafie school but where the public interest so requires the *fatwa* may be given according to the tenets of the other schools. *Fatwa*, which are not based on the orthodox doctrine of the Shafie school require the special sanction of the sultan.[13]

13 Perak Administration of Muslim Law Enactment 1966, section 45.

**Summary**

The Malay ruler is now a constitutional monarch and acts in accordance with the State Constitution. The ruler as well as the *Yang di-Pertuan Agong*, who is chosen from among the rulers, acts on advice on nearly all matters of government. As executive ruler, he acts on the advice of an Executive Council, while in his capacity as legislator, he gives his assent to Bills passed by the Legislative Assembly of which he is constituent part. However theoretically at least he is endowed with certain discretionary powers which include his prerogative as head of Islam in the state. But even in this sphere of discretionary power he is not unfettered, for example, in the administration of Muslim law, he is advised by the Council of Religious Affairs, and in the substance of the Muslim religion and law he has to act according to *fatwas* (rulings) issued by the *Mufti* or the Council. Nevertheless he plays an important role in the administration of Muslim religion and law, mainly because it is he who appoints the religious officials. This combination of personal discretion with constitutional duty now defines the ruler's position. Though the form of rule has changed, his actual role is not very different from what it was understand pre-colonial system. Two most characteristic features of that system, the principle of limited discretion or prerogative, and the divine aspect of sovereignty have endured to the present day and are enshrined in the Constitution. Thus the system of government in Malaysia, although heavily influenced by western models, still contains its traditional Malay character.

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