the relevant Penal Code that is in force in that particular part of the Federation.[18]

In conclusion it may be appropriate to make reference to the Bahasa Malaysia text of the Act. By virtue of the provisions of the National Language Act[19] all Acts of Parliament must be in the National Language (Malay) and in English but the Malay text is authoritative unless the Yang DiPertuan Agung otherwise prescribes.[20] It would, therefore, appear to be desirable that a standard terminology be maintained in the Malay text of all laws. It is somewhat unfortunate in this connection that the Akta Biro Siasatan Negara, 1973 refers to the Criminal Procedure Code as "Kanun Acara Jenayah" while in the Malay version of the Penal Code,[21] the Kanun Keseksaan,[22] the Criminal Procedure Code is referred to as "Kanun Peraturan Jenayah"[23] [The writer has also seen "unofficial" versions of the Malay translation of the Criminal Procedure Code itself entitled "Undang-Undang Acara Jenayah"!

I.S.A.

Akta 206 – Akta Perlembagaan (Pindaan) (No. 2) 1973. Constitution (Amendment) (No. 2) Act, 1973.

While this Act appears to provide, *inter alia*, the machinery for the severance of [Greater] Kuala Lumpur from the State of Selangor and its establishment as "Wilayah Persekutuan", or the Federal Territory, it can be viewed, less prosaically, as another fascinating facet in the panorama of a much amended Constitution.[1]

The setting for this Act was laid by the earlier Constitution (Amendment) Act, 1973[2] which provided,[3] *inter alia*, for the amendment of

[18] i.e. the 'Penal code in force in the States of Malaya or the Penal Code in Sabah or Sarawak as the case may be [s.2].

[19] Act 32 (Revised 1971).

[20] Act 32, s. 6.

[21] F.M.S. Cap. 45.

[22] Translated in the Attorney-General's Chambers.

[23] Kanun Keseksaan (N.M.B. Bab 45) s. 86 (i).

[1] The Constitution of the independent Federation has been amended 17 times, at least, since its promulgation in 1957 and thus averages slightly more than one amendment for each year of independence.

[2] Akta A193.

[3] Akta A193 S. 6.

S.19(5) of the 8th Schedule to the Federal Constitution. The 8th Schedule contains provisions known as "essential provisions" which must be inserted in the Constitution of all the States of the Federation. On the event of the failure by any State to include such essential provisions in its Constitution, Parliament is empowered to make laws to give effect in that State to such essential provisions[4]. Subsection (4) of Section 19 of the 8th Schedule states that, generally, bills for amending the State Constitution shall not be passed unless supported by two-thirds of the total membership of the Assembly. Subsection (5) refers to matters where amendment to the State Constitution is permitted without the necessity of a two-thirds majority and the earlier Constitution (Amendment) Act, 1973 had amended Section 19 (5) of the 8th Schedule to the Federal Constitution by adding a new clause (aa) so that the definition of the territory of a State can be amended by a mere simple majority if the amendment is consequential upon the passing of a law altering the boundaries of the State with consent given by the Legislative Assembly and the Conference of Rulers under Article 2 of the Federal Constitution.

The Legislative Assembly of the State of Selangor consequently enacted the Selangor Constitution (Amendment) Enactment, 1973.[5] This Enactment first recites:

> "WHEREAS section 19 of the Eighth Schedule to the Federal Constitution has been amended to include a new provision which shall be incorporated in the State Constitution;
>
> "AND WHEREAS the amendment to incorporate the aforesaid new provision shall not* be required to be supported by the votes of not less than two-thirds of the total number of members of the Legislative Assembly" . . .

The Enactment goes on to provide, in effect, that Article XCVIII of the Selangor State Constitution is amended so that a simple majority is sufficient for an amendment to the definition of the territory of the State which is made in consequence of the passing of a law altering the boundaries of the State under Article 2 of the Federal Constitution.

The earlier Constitution (Amendment) Act, 1973 and the Selangor Constitutional (Amendment) Enactment, 1973 thus seem designed to ensure that even if a two-third majority was not forthcoming[6] in the

[4]Federal Constitution Article 72(4).

[5]Selangor Enactment No. 1 of 1973.

[6]The Selangor Legislature as constituted on 1st May 1973 was made up on the basis

*This may not be entirely correct. See the discussion that follows.

State Assembly, the State Constitution could be amended to facilitate the excision of the proposed Federal Territory from Selangor and its handing over to the Federal Government. (It may be noted in passing that at the Federal Parliamentary level a two-thirds majority is not required since, according to Article 2 of the Constitution, Parliament may by law alter the boundaries of any State.) According to the Federal Constitution, the Selangor Constitutional (Amendment) Enactment itself, being an enactment the effect of which is to bring the Constitution of Selangor into accord with the provisions of the 8th Schedule to the Federal Constitution, needed only a simple majority to be passed.[7] However, the Article in the Selangor State Constitution dealing with amendments thereto, i.e. Article XCVIII, does not appear to contain[7a] a provision similar to the one in the Federal Constitution. (This is in contrast with, for example, the position under the Laws of the Constitution of Perlis which states, in effect, that a two-thirds majority is not needed for "any amendment the effect of which is to bring this Constitution into accord with any of the provisions" of the Eighth Schedule to the Federal Constitution.[7b]) Therefore, there is the probability that, despite its recital, the Selangor Constitutional (Amendment) Enactment, 1973 still requires a two-thirds majority before it becomes law. On the other hand, Article I of the Laws of the Constitution of Selangor, 1959, provides, *inter alia,* that the State Constitution "shall be read subject to the Federal Constitution" and perhaps this provision could be used to argue in favour of the proposition that the essential provisions in the 8th Schedule of the Federal Constitution override the limitations of the State Constitution. Article 2 of the Federal Constitution also provides that no such law altering the boundaries of a State shall be passed without the consent of the Conference of Rulers and of the Legislature of that State. The consent of the Legislature must be expressed by a law made by that Legislature.[8] Accordingly, the Selangor State Legislature passed the Federal Territory Enactment, 1973[9] to "give

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of party membership as follows:-

Alliance (Ruling Party)	16
DAP	6
Pekemas	3
Gerakan	1
Independents	2
Total	28

Thus the ruling party would have had to get the support of 3 other members in order to get a two-third majority of 19 votes.

[7] Federal Constitution 8th Schedule Section 19(5)(b).

[7a] So far as the writer can ascertain!

[7b] Laws of the Constitution of Perlis, Article 4(5)(b).

[8] *vide* Federal Constitution Article 2.

[9] Selangor Enactment No. 4 of 1973.

consent under Article 2 of the Federal Constitution."

The Federal Territory Enactment, 1973 recites that it has been agreed between the State of Selangor and the Federation of Malaysia that the Federal Territory shall be established. It also recites that the Conference of Rulers has consented to the establishment of the Federal Territory and to the alteration of the boundaries of the State of Selangor as contained in Part I and the Schedule to the Constitution (Amendment) (No. 2) Bill, 1973,[10] and that the Conference of Rulers has consented to the passing of the said Part I and the Schedule.

The Enactment then provides[11] that the boundaries of the State of Selangor are altered by the exclusion of the Federal Territory which shall consist of the areas shown in the deposited plan. (Reference will be made to this plan *infra* in relation to the discussion of the substantive Federal Act, Akta A206.) It is further provided[12] that the definition of "State" under Article XLVI of the Laws of the Constitution of Selangor is amended so as to exclude the areas of the Federal Territory. This is necessary because by virtue of the Interpretation Article (Art. XLVI) of the Second Part of the Laws of the Constitution of Selangor, 1959 the word "State" included "all the dependencies, islands and places which on the first day of December, 1941, were administered as part" of the State of Selangor.

Section 3 of the Enactment clarifies the exclusion of the Federal Territory by expressly stating that it shall cease to form part of the State and that the State Ruler shall relinquish and cease to exercise any sovereignty over the Federal Territory. Furthermore, all power and jurisdiction of the Ruler and State Legislature in or in respect of the Federal Territory shall come to an end.

The requirement in Article 2 of the Federal Constitution, that the State Legislature shall express its consent to a (Federal) law altering the boundaries of that State, seems to be expressly borne in mind as Section 4 of the Enactment states that "consents are hereby given to:-

"(a) the alteration of the boundaries of the State . . . .
(b) the establishment of the Federal Territory . . .
(c) the transfer of jurisdiction, powers, rights and prerogatives (specified in the Bill) and
(d) the execution of an agreement" between the Paramount Ruler of the Federation (the Yang DiPertuan Agung) and the State Ruler (the Sultan) "setting out, *inter alia*, provisions relating to financial arrangement with regard to the Federal Territory."

[10] The present Akta A206.

[11] Section 2.

[12] S.2(3).

The Schedule to the Enactment recites the relevant provisions of the Constitution (Amendment) (No. 2) Bill, 1973.

In passing it may be noted that the Constitution of Selangor does not appear to contain any provision declaring it unlawful for the Ruler to enter into any negotiation relating to the cession or surrender of the State or any part thereof. A provision such as the one appearing in the Kelantan Constitution, however, may cause problems. The Laws of the Constitution of Kelantan, Second Part, Article XXXIV states, "It shall be unlawful for the Sovereign or any other persons or body of persons to surrender or cede the State and Territories of Kelantan and its Dependencies or any part thereof."[12a] Thus should there ever be a necessity to excise, say, Kota Bahru, the capital of Kelantan and convert it to Federal Territory, and should there be significant opposition in the Kelantan State Legislative Assembly then, presumably, section 19(5) of the 8th Schedule to the Federal Constitution would be amended to permit the Kelantan Legislative

[12a] A slightly different provision can be found in Part I of the Laws of the Constitution of Perak. Article XXII states:

"(1) It shall be unlawful for the sovereign without the knowledge, advice and consent of the Dewan Negara* and the concurrence of the Legislative Assembly—

"(a) To surrender or cede the State or any part thereof;

"(b) to make any treaty, enter into any negotiation, agreement or plan to surrender or cede the State or any part thereof;

"(c) to enter into any treaty or engagement to altering the position of the State.

"(2) Such surrender or cessation or the making of any treaty or the entering into any negotiation, agreement or plan to surrender or cede without the knowledge and advice of the Legislative Assembly shall be null and void and shall have no effect."

The legal historian may also be interested in the now wholly superceded 1911 Constitution of Trengganu — "The Constitution of the Way of Illustrious Sovereignty" — which provided in Chapter Twenty-Six:

"It is not lawful and right in any way for ministers and the Council of Regency to plan or execute any treaty with any race or Government for the purpose of surrendering the country and Government of Trengganu or derogatory to the authority and interests of the Trengganu Government. If this restriction and provision is disregarded they must be accounted as guilty of treason against the Raja and the Government and may be punished in accordance with their crime and if they act contrary to what is right then the blame rests upon them and not in any way upon the Raja."

[From an unofficial translation, made by W.A.C. Goode, Esq., M.C.S., reprinted in Malayan Constitutional Documents, 2nd Edition, Vol. 2, p. 391].

*This is a body established under Article LVII of the Second Part of the Laws of the Constitution of Perak, to aid and advise the Perak Sultan in the exercise of certain of His functions, and should not be confused with the Senate or Upper House of the Federal Parliament.

Assembly to repeal Article XXXIV by an enactment requiring a simple majority. Against this background we can now consider the Constitution (Amendment) (No. 2) Act, 1973 (hereinafter referred to as "the Act"). The preamble to the Act states that it is "An Act to amend the Federal Constitution to make provisions for the establishment of the Federal Territory, for the allocation of members of the House of Representatives by States and for matters connected therewith." While the stress and publicity has been laid on the provisions for the establishment of a Federal Territory separate from the State of Selangor it is submitted that what is more vital and perhaps of more long-lasting significance to the nation are the other amendments which may, at first glance, seem merely consequential to the establishment of the Federal Territory. These latter amendments relate to the provisions regarding elections and electoral constituencies.

It is therefore proposed in this note to discuss these two sets of provisions separately. This task is facilitated by the fact that each set of provisions comes into force on a different day. While Part I and the Schedule, which both relate to the Federal Territory, come into force on 1st February 1974,[13] or Federal Territory Day, the other provisions of the Act come into force on the date of publication of the Act in the Gazette.[14]

PART A—AMENDMENTS DEALING WITH THE FEDERAL TERRITORY

Part 1 of the Act deals with the Federal Territory. It provides that the boundaries of the State of Selangor are altered by the exclusion of the Federal Territory.[15] It should be noted that the Federal Territory is not merely what was previously known as Kuala Lumpur but is a much larger area. Under Article 154 of the Federal Constitution it is provided that until Parliament otherwise decides, the municipality of Kuala Lumpur shall be the federal capital. (Kuala Lumpur attained City Status on 1st February 1972 *vide* City of Kuala Lumpur Act, 1971.*) Article 154 also provides that Parliament has the exclusive power to make laws with respect to the boundaries of the federal capital. In the Act the Federal Territory is identified by reference[16] to a plan "certified by the Chief Surveyor, Selangor, as a true and correct plan of the areas" incorporated in the Federal Territory and "dated and deposited in the office of the Chief Surveyor, Selangor."

[13] Act A 206, S. 1(3).

[14] Act A 206, S. 1(2). The date of publication in the Gazette was 23rd August 1973.

[15] S. 2(1).

[16] S. 2(2).

*Laws of Malaysia Act 59.

It is then provided that the Federal Territory shall cease to form part of the State of Selangor and sovereignty over the Federal Territory shall pass from the Selangor Ruler to the Federation and power and jurisdiction of the Ruler and State Legislative Assembly in or in respect of the Federal Territory shall pass to the Federation.[17] Under the 9th Schedule to the Federal Constitution, land (including mineral rights) and forests fall within the State List and therefore would belong to Selangor State. Thus Section 5 provides for the transfer of all property in and control of all land, minerals and rock material within the Federal Territory vested in Selangor to the Federation without the necessity of any other formal transfer or conveyance. Further, all estates and interests in lands, mining rights and forest rights within Federal Territory held from Selangor State by any person, will henceforth be held from the Federal Government on the same terms and conditions as they were held from the State.[18]

There is provision in section 6 of the Act for the preservation and continuation of the operation of existing State laws in force in the Federal Territory until such time as Parliament passes laws to repeal, amend or replace them. One important result of this to Muslims in the Federal Territory would be that the penal provisions of the Selangor Administration of Muslim Law Enactment, 1952 would continue to apply to them. Consequential provisions[19] transfer powers and functions in relation to the Federal Territory vested, by such State laws, in the State Ruler or any authority in the State to the Yang DiPertuan Agung or the Minister responsible for the Federal Territory or to such persons or authorities as the Yang DiPertuan Agung may by order direct. Moreover, the authority in the State which previously exercised such power or function may continue to do so should the Yang di-Pertuan Agung so direct with the approval of the State. However, this power or function is to be exercised or performed on behalf of the Federal Government and for this purpose such authority of the State is deemed to be an authority of the Federal Government.

There is a separate provision[20] which deals with bye-laws of local authorities, where such a local authority area, or part thereof, becomes part of the Federal Territory. These bye-laws are to continue in force.

The Federal Government is given extremely wide (perhaps unnecessarily wide) powers under sub-section (4) of section 6, which reads, "The Yang DiPertuan Agung may, whenever it appears to him necessary or expedient so to do whether for the purpose of removing difficulties or in consequence

[17] SS. 3 and 4.

[18] S. 5(4).

[19] S. 6(2).

[20] S. 6(3).

of the passing of this Act, by order make such modifications to *any* provisions in any" Federal or State laws or subsidiary legislation made thereunder "as he may think fit." (italics added).

The Yang DiPertuan Agung is to act, of course, in accordance with the advice of the Cabinet or of a minister acting under the general authority of the Cabinet.[21] Therefore, we have a situation where the Federal Government by a simple executive decree, may apparently modify any law in the country and, since this sub-section is replete with expressions suggesting a subjective test of necessity or expediency, all that has to be done is to recite in the order that it appears expedient to the Yang DiPertuan Agung that in order to remove difficulties (a suitably vague phrase) the following modifications have to be made. And there is nothing in the Act to say that these modifications by executive decree will apply only to the Federal Territory. Indeed, they can apply to all parts of the country which are, otherwise, totally unaffected by the establishment of the Federal Territory. One is tempted to ask whether such wide powers are really necessary. It might be argued that one can rely on the Government to use these powers sparingly and solely with regard to legislation affecting the Federal Territory. Nevertheless, to borrow from a slightly different context the words of R.H. Hickling, a former Law Revision Commissioner (Malaya), this provision "opens the door to all manner of modifications, without the tedious necessity of obtaining the support" of Parliament.[22] And, to quote Hickling again, "[w]here a power exists, however, then sooner or later various pressures are liable to compel its exercise."[23] Since this Act excises the Federal Territory from Selangor State provision is also made to abrogate the State constituencies within the Federal Territory. However, the members of the State Assembly who represent these abrogated constituencies shall continue to be members of the Assembly until the next dissolution of the Assembly.[24] Somewhat surprisingly, it was felt necessary to provide that the present federal (or Parliamentary) constituencies "within the Federal Territory and the State of Selangor shall continue to exist" until the next dissolution of Parliament, and that the present members elected from these constituencies "shall continue to be members of Parliament."[25] Perhaps, this provision was designed for a

[21] Federal Constitution, Article 40(1).

[22] R.H. Hickling, "The First Five Years of the Federation of Malaya Constitution (1962) 4 *Mal. L.R.* 183, 203. This comment was made with regard to the 1962 amendments to Article 159 of the Federal Constitution.

[23] *Ibid*, p. 193. This comment was made with regard to the power to dismiss persons in the public service.

[24] Akta A206, S. 7(1).

[25] Act 35 of 1960.

case where a Parliamentary constituency, as presently delineated, straddles the Territory/State boundary.

The Federal Capital Act, 1960[26] which dealt with the administration of Kuala Lumpur will now apply to the whole of the Federal Territory.[27] The Act provides that the area of the municipality of Kuala Lumpur shall be extended as provided for in section 15(2) of the Federal Capital Act, 1960. It is made mandatory for the Yang DiPertuan Agung to appoint two persons nominated by the Ruler in Council of the State of Selangor to be members of the Advisory Board under section 6 of the Federal Capital Act, 1960, which Board shall advise the Government of the Federation upon matters connected with the administration of the Federal Territory.[28]

If on the commencement of the Act responsibility for a matter is transferred from the State Government to the Federal Government then all rights, liabilities and obligations relating to that matter shall devolve upon the Federation in the absence of any agreement to the contrary between the two Governments.[29] Insofar as financial liabilities and obligations were previously a charge on the State Consolidated Fund they shall now be a charge on the Federal Consolidated Fund but only to the extent of the transfer of such liabilities and obligations.[30] In any proceedings any interested party may apply to the Attorney General to certify whether by virtue of this section, a right, liability or obligation is that of the State or of the Federation. The Attorney General must give this certificate which will then be final and binding on all courts for the purpose of those preceedings.[31] Perhaps because the present Attorney General is a member of the Federal Cabinet, it is provided that the foregoing will not apply in the case of proceedings between the Federation and Selangor, nor shall the Attorney General's certificate operate to prejudice the rights and obligations, as between themselves, of Selangor and the Federation.[32]

[26]Act 35 of 1960.

[27]Akta A 206, S.8.

[28]The second Proviso to S. 8. It is interesting to note that at the Bill stage, the Federal Territory Enactment, 1973 (Selangor no. 4 of 1973) provided, in its schedule, that the Yang DiPertuan Agung shall "appoint *a* person nominated by the Ruler". The Act, too, in its Bill stage contained a provision for only *one* person to be nominated by the Ruler.

[29]S. 9(1).

[30]S. 9(2).

[31]S. 9(3).

[32]*Ibid.*

Furthermore, it is provided that in pending civil proceedings there shall be such substitution of parties as may be necessitated by any transfer of jurisdiction, executive authority, rights, liabilities or obligations.[33] Where a decision has been given before the commencement of this Act and no appeal is brought on or after the commencement of the Act then a similar substitution will be made. If, however, such an appeal or application for leave to appeal is brought, then the parties to the appeal or application can be similarly substituted.[34] Again, there is a provision that the Attorney General shall, on the application of a party to any proceedings[35], give a certificate (which shall be final and binding for the purposes of any such proceedings or appeal) stating what substitutions, if any, are to be made in such proceedings or appeal therefrom.[36]

Section 11 of the Act provides that the consequential amendments to the Federal Constitution which are set out in the Schedule to the Act shall have effect.

Since Clause (3) of Article 1 of the Federal Constitution provides that the territories of each of the States in the Federation are the territories comprised therein immediately before Malaysia Day a proviso had to be added making this Clause subject to a new Clause (4), which provides that the territory of the State of Selangor shall exclude the Federal Territory established under this Act. Somewhat surprisingly this is deemed to be sufficient consequential amendment to Article 1. The marginal note to Article 1 reads "The name, states and territories of the Federation". One would have thought that now that there is a Territory as well as States in the Federation it would have been appropriate to amend Clause (2) of that Article to read somewhat like Article 1 of the Indian Constitution, as follows:

"The States *and territories* of the Federation shall be –

"(a) the States of Malaya" etc.

"(b) the Borneo States" etc.

"(c) (Repealed)

"(d) *the Federal Territory established under the Constitution (Amendment) (No. 2) Act, 1973*", and, with an eye to future contingencies, another sub-clause could have been added,

"(e) and such other states and territories as may be created, acquired, or admitted into the Federation".

The next consequential amendment relates to Article 3 which concerns

[33] S. 10(1).

[34] S. 10(2), (3).

[35] One wonders why S.9 allows any party *interested* in any legal proceedings to apply for a certificate while S. 10 allows only a party to any proceedings to so apply.

[36] S. 10(4).

the Religion of the Federation. Despite the fact that Islam is the religion of the Federation,[37] there is no provision stating that the Yang DiPertuan Agung is the Head of the Muslim Religion in the Federation. Indeed, Clause (2) of Article 3 guarantees the position of the Malay Rulers as Head of the Muslim religion in their respective States. Thus in nine States[38] the State Ruler is the Head of the Muslim Religion. There is no provision for a State Head of the Muslim religion in the Borneo States of Sabah and Sarawak. Insofar as the two States[39] of Malaya that do not have Rulers are concerned Article 3(3) provides that their [State] Constitutions shall each make provisions for conferring on the Yang DiPertuan Agung the position of Head of the Muslim religion in that State.[40] With the establishment of the Federal Territory a new Clause (5) as follows is added:

> "notwithstanding anything in this Constitution the Yang Di-Pertuan Agong shall be the Head of the Muslim religion in the Federal Territory; and for this purpose Parliament may by law make provisions for regulating Muslim religious affairs and for constituting a Council to advise the Yang DiPertuan Agung in matters relating to the Muslim religion."

This would therefore mean that the Yang DiPertuan Agung is Head of the Muslim religion in four parts[41] of the Federation – the Federal Territory, Penang, Malacca and in his own State.[42]

The next consequential amendment deals with the right to propagate one's religion. Despite the fact that Islam is the official religion of the country, Article II guarantees every person the right to profess and practise his religion. However, in view of the fact that there is an official religion, the right of a person to propagate his religion is subject to the

[37] Federal Constitution, Article 3(1).

[38] i.e. Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu.

[39] Penang and Malacca.

[40] They have done so – Malacca Constitution Article 5(1); Penang Constitution, Article 5(1).

[41] This may soon have to be charged to 5 areas as recent events in Sabah seem to indicate – see the Sabah Constitution (Amendment) Enactment No. 8 of 1973, which now establishes Islam as the official religion of Sabah State.

[42] The writer is grateful to Professor Ahmad Ibrahim, Dean of the Law Faculty, University of Malaya, for drawing his attention to this factor in Article 34(1), Federal Constitution. One could also refer to, for example, Article VI(2) of the First Part of the Laws of the Constitution of Kelantan, "notwithstanding that there is a Regency in the State by reason of the fact that His Highness is elected to the office, or is exercising the functions of the Yang DiPertuan Agung, His Highness shall continue to exercise his functions as Head of the Religion of the State." See also Article LVIIA of the First Part of the Laws of the Constitution of Johore, 1895, which is to the same effect.

condition that State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.[43] This clause has been amended by this Act so as to provide that federal law may so control or restrict the right to propagate one's religion in the Federal Territory.

Five consequential amendments are made to Article 42 which deals with the power of pardon. The Yang DiPertuan Agung is Supreme Commander of the armed forces[44] and previously his power to grant pardons, reprieves and respites or to remit, suspend or commute sentences was restricted solely to offences tried by court martials[45] or by any Court in Penang or Malacca established under any law regulating Muslim religious affairs in those two states[46]. Now these powers can also be exercised in respect of offences tried by, or sentences imposed by, civil courts in the Federal Territory or by Courts established under any law regulating Muslim religious affairs in the Federal Territory. In respect of all other offences such powers are exercisable by the Ruler or Governor of the State where the offence is committed. Moreover, where an offence is either committed partly in Malaysia and partly outside or in more than one State or in circumstances rendering it difficult to decide where exactly an offence was committed, then it is deemed to have been committed in the State in which it is tried[47] and now, for the purposes of this clause, i.e. Clause (3), the Federal Territory is to be regarded as a State. The other clauses of the Article deal with the constitution of State Pardons Boards, their activities, duties and so on and the role of the Ruler/Governor and the Chief Minister of that State with regard to the Board. Provision is now made for a Federal Territory Pardons Board and the other clauses apply to this Board as well with the references to Ruler or Governor construed to refer to the Yang DiPertuan Agung, and the reference to Chief Minister construe to refer to the Minister responsible for the Federal Territory.

Article 97(3) deals with Muslim revenue raised in accordance with State law. It is provided that such revenue shall not be paid into the State Consolidated Fund but paid into a separate fund and shall not be paid out except under the authority of State law. Similar provision is now made for Muslim revenue raised, in the Federal Territory in accordance with federal law, not to be paid out except under the authority of federal law.

Five consequential amendments are made to the Ninth Schedule to the Constitution. This Schedule lists out the separate Legislative Lists which

[43] Federal Constitution, Article II (4).

[44] Federal Constitution, Article 41.

[45] Federal Constitution, Article 42(1) and (2).

[46] Federal Constitution, Article 42(10).

[47] Federal Constitution, Article 42(3).

enumerate the matters wherein the State Legislature or Parliament have exclusive jurisdiction or concurrent jurisdiction.

Item 6 of the 9th Schedule previously provided that the Federal List included the machinery of government, including "(e) Local government and town planning in, and water supply to the federal capital." A more comprehensive new sub-item now replaces the old sub-item (e), i.e., "(e) Government and administration of the Federal Territory including Muslim law therein to the same extent as provided in item 1 in the State List."[48]

Consequential amendments to the State List have also to be made as previously the states were given exclusive jurisdiction over matters in the State List. These consequential amendments, in effect, provide that, except with respect to the Federal Territory, the States have exclusive jurisdictions over matters set out in item 1 of the State List.[48] land,[49] agriculture and forestry,[50] local government,[51] and services of a local character.[52]

PART B — AMENDMENTS RELATING TO CONSTITUENCIES AND ELECTIONS

The other amendments contained in Part II and III of the Act are of far-reaching effect and further reduce the functions and powers of a once-independent Election Commission, which already had much of its stature reduced by the Constitution (Amendment) Act, 1962.

It might be useful to refer to the 1962 amendments and the views thereon of two distinguished commentators on the Malaysian Constitution, Hickling and Groves. Hickling said:

> "A basic change in electoral law was effected by the amending Act of 1962: for this Act affirmed the composition of the House of Representatives as 104 members, instead of 100; transferred from the Election Commission to that House the power to delimit Parliamentary Constituencies; and abolished the formula for the delimitation of constituencies under a 'quota' system, written into the original constitution: substituting in place thereof certain principles set out in Part I of a new Thirteenth Schedule. Of these

[48] In effect Item 1 in the State list empowers States to make laws regarding various aspects of Muslim law, the personal laws of Muslims, Muslim institutions, offences against Muslim law, and courts having jurisdiction with regard to these matters.

[49] Federal Constitution, 9th Schedule, List II, item 2.

[50] *Ibid*, item 3.

[51] *Ibid*, item 4.

[52] *Ibid*, item 5. These services are (a) fire brigades; (b) boarding houses and lodging houses; (c) burial and cremation grounds; (d) pounds and cattle trespass; (e) markets and fairs; and (f) licensing of theatres, cinemas and places of public amusement.

principles the most important one is that permitting a weightage of up to two to one in favour of rural constituencies . . . ."[53]

Professor Groves's view of the earlier amendments does not appear very favourable, as he states:

"It is apparent that the [1962] amendments as to elections have converted a formerly independent Election Commission, whose decisions became law and whose members enjoyed permanent tenure, into an advisory body of men of no certain tenure whose terms of office, except for remuneration, are subject to the whims of Parliament. The vital power of determining the size of constituencies as well as their boundaries is now taken from a Commission, which the Constitution-makers had apparently wished, by tenure and status, to make independent and disinterested, and has been made completely political by giving this power to a transient majority of Parliament, whose temptation to gerrymander districts and manipulate the varying numerical possibilities between 'rural' and 'urban' constituencies for political advantage is manifest. It is, perhaps, not unworthy of comment that the constitution does not offer any cirteria for the determination of what is 'rural' and what 'urban'."[54]

After examining the 1973 amendments one may be tempted to observe that the scope to gerrymander districts and manipulate constituencies for political advantage is vastly more manifest. Prior to this Act, Article 46 of the Federal Constitution read as follows:-

"(1) The House of Representatives shall consist of one hundred and forty-four elected members;

"(2) There shall be

"(a) one hundred and four members from the States of Malaya;

"(b) sixteen members from Sabah;

"(c) twenty-four members from Sarawak;

"(d) (Repealed)" [Provision relating to Singapore]

As Professor Groves says of clause (2) above, "These figures are not proportionate to the relative populations of these areas, but resulted from hard political bargaining preceding the formation of the Federation and take into account, *inter alia*, the large land area of the Borneo States . . ."[55] Further, this proportion was guaranteed. As is stated in the

[53] R.H. Hickling "The First Five Years of the Federation of Malaya Constitution' (1962) 4 *Mal. L.R.* 183, 191.

[54] H.E. Groves, "Constitution (Amendment) Act, 1962" (1962) 4 *Mal. L.R.* 324,329.

[55] H.E. Groves *The Constitution of Malaysia*, p. 66.

Malaysia Report of the Inter-Governmental Committee 1962 (set up to work out the terms of entry of the Borneo States into Malaysia),

> "The proportion that the number of seats allocated respectively to Sarawak and to North Borneo [Sabah] bears to the total number of seats in the House should not be reduced (except by reason of the granting of seats to any other new State) during a period of seven years after Malaysia Day without the concurrence of the Government of the State concerned[56], and thereafter (except as aforesaid) shall be subject to Article 159(3) of the existing Federal Constitution (which requires Bills making amendments to the Constitution to be supported in each House of Parliament by the votes of not less than two-thirds of the total number of members of that House".[57]

It can be seen that while there was no breakdown by States of the members from the States of Malaya there was the need to do so for the Borneo States since their special circumstances demanded that they have more members in the House of Representatives than they would otherwise be entitled to on the basis of a strict population ratio. The breakdown for the States of Malaya was achieved by the operation of Article 116, especially clause (2) thereof, and the provisions of the Thirteenth Schedule. This schedule contained various principles which as far as possible were to be taken into account in dividing the States of Malaya into constituencies. Of these principles the most important, perhaps, was the one contained in Section 2(c) and, in view of its importance, it is set out here in full:

> "The number of electors within each constituency ought to be approximately equal throughout the unit of review except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies, to the extent that in some cases a rural constituency may contain as little as one half of the electors of any urban constituency."

Under this principle should there be a massive movement of population from, say, Penang to Pahang then it would have been possible for the Election Commission, after carrying out a review of the division of the Federation and States into constituencies[58], to recommend to the Prime Minister that the number of constituencies be reduced in Penang and increased in Pahang. The Prime Minister may then embody these recommendations[58a] in a draft order for the approval of the House of

[56] Federal Constitution, Article 161E(2)(e) and (3).

[57] *Malaysia Report of the Inter-Governmental Committee* 962, p. 10 para 19(2).

[58] Federal Constitution Article 113(2).

[58a] The Prime Minister can modify these recommendations – Federal Constitution 13th Schedule, s. 9.

Representatives (i.e. the approval of not less than one-half of the total membership of that House) and the order would then be made by the Yang DiPertuan Agung.[59] However, with the 1973 amendment this is no longer possible. Article 46 has been amended in two respects.[60] The first is that the total membership of the House of Representatives has been increased from 144 to 154 and all the new members are from the States of Malaya.[61] The second point is that, for the first time, the Constitution stipulates the number of representations from each State of Malaya and provides that there shall be 5 members from the Federal Territory. (A student of political science may come to some interesting conclusions should he study the amendment in the light of the increased membership for less-developed States as against that of the more developed States.)[62] It is now not possible despite any substantial shift or growth of population for the number of constituencies in a State or the Federal territory to be altered unless two-thirds of the total membership of *each* House of Parliament agrees to a constitutional amendment.

The next amendment[63] is to Article 113. Clause (2) of the Article provides that the Election Commission shall at intervals, of not more than ten nor less than 8 years, review the division of the country into constituencies. A new clause (8) has been added to provide that the period of review for the States of Malaya shall be calculated from the first delimitation of constituencies immediately following the passing of the Act.

An amendment[64] has also been made to Article 116 clause (2), which previously read:

> "The total member of constituencies shall be equal to the number of members, so that one member shall be elected for each constituency, and of that total in the States of Malaya a number determined in accordance with the provisions contained in the Thirteenth Schedule shall be allocated to each State."

[59] Federal Constitution, 13th Schedule, ss. 4, 9, 10 and 12.

[60] Akta A 206, s. 12.

[61] It is to be noted that, therefore, the proportion of the Borneo members to the total membership of the House has been decreased. Prior to August 1970 such a decrease would not be constitutional without the concurrence of the Governors of the Borneo-States, *vide* Federal Constitution, Article 161E(2)(e).

[62] The break-down of constituencies per State is as follows, with the number of constituencies existing in 1969 given in brackets: Johore, 16(16); Kedah, 13(12); Kelantan, 12(10); Malacca, 4(4); Negri Sembilan, 6(6); Pahang, 8(6); Penang, 9(8); Perak, 21(20; Perlis, 2(2); Trengganu, 7(6); Selangor, 11, and Federal Territory, 5 (whole of Selangor, formerly, 14).

[63] Akta A206, s. 13.

[64] Akta A 206, s. 14.

The amendment replaces the words "Thirteenth Schedule" with the words "Article 46 and the Thirteenth Schedule." One would have thought that since Article 116 relates to Federal constituencies and since Article 46 now expressly states the number of members allocated to each State, the provisions contained in the Thirteenth Schedule can play no part in determining the number of constituencies allocated to each State. It is submitted, therefore, that it would have been more logical to amend Article 116(2) by deleting all the words immediately following the words "so that one member shall be elected for each constituency." (It is also rather strange that there is no reference to the Federal Territory in Article 116(2) as amended.).

It has already been pointed out that section 2(c) of the Thirteenth Schedule to the Federal Constitution contains the most important of the principles relating to the delimitation of constituencies. Two amendments[65] are made to this paragraph. Unless the proportion of electors remains the same in all States it would be impossible to follow, in view of the provisions of the new Article 46, the principle that the number of electors within each constituency ought to be approximately equal throughout the unit of review (i.e. States of Malaya). The principle is therefore now changed to provide that "the number of electors within each constituency *in a State* ought to be approximately equal."

Thus, whatever little powers the Election Commission had in recommending the allocation of constituencies to each State is further reduced and all the Election Commission apparently has left is recommending how the constituencies already allocated to each State (or the Federal Territory) ought to be delineated. It might be wise to bear in mind the warning note sounded by Hickling in relation to the 1962 amendments which severely curtailed the powers of the Election Commission:

> "[T]he abolition of the powers of an independent Commission smacks a little of expediency: and expediency can be a dangerous policy. Indeed, these particular amendments, coupled with those affecting the Service Commissions, suggest that the Federation is intent upon destroying the relics of a paternal policy, embedded in the original constitution, under which a number of independent bodies (in addition to the Supreme Court) shared, with the legislature, the authority of the Federation. . . The present policy is, no doubt, in line with orthodox constitutional doctrine in the United Kingdom: but there Parliament has lost much of its authority and most of its magic; and (ridden with the doctrines of Dicey as some of us are) it seems an unfortunate example to follow. Power is properly assumed by politicans, but the increasing complexity of

[65] Akta A 206, s. 15(1)(a) and (b).

life compels them to throw much to the civil service and, of this benighted body of men, those fare best who think least: for who would move one step, if by doing so he put a foot wrong? That, surely, is not the way battles are lost, even on paper. The original architects of the Constitution may have been wiser than we know, in creating a complex division of powers designed to frustrate the politician and alarm the law student. To transfer all powers to the myth of a legislature and the reality of an executive is to make the way straight for authoritarian rule. This may not be a fear for today, but what of tomorrow, when these powers may be in other hands?"[66]

The other amendment to Section 2(c) of the Thirteenth Schedule to the Constitution is potentially quite far-reaching, though it is phrased quite innocuously:

"Paragraph (c) of section 2 of the Thirteenth Schedule to the Constitution is hereby amended by

"(a) . . .

"(b) deleting all the words immediately following the words 'a measure of weightage for area ought to be given to such constituencies'."[67]

What are these words that are deleted? They read:

"to the extent that in some cases a rural constituency may contain as little as one half of the elections of any urban constitutency."

In other words, there is now no limit to the weightage that can be given to a rural constituency and it now need not contain even as little as one half of the electors of any urban constituency. This is a far cry from the pre-1962 Amendment days when the permissible variation was only fifteen per cent above, or below, the electoral quota[68]. Just as there was no explanation in the Bill in 1962 regarding the amendment of the weightage provision no explanation is afforded in the Explanatory Statement to the Bill in 1973 except a bland treatment that this amendment is "consequential".

Part III of this Act contains two sections. It has already been noted that Article 113(2) provides that the Election Commission shall review the division of the Federation and the States into constituencies at intervals of between 8 to 10 years. Section 16(1) of the Act, according to the Explanatory Statement to the Bill provides that notwithstanding this

[66] R.H. Hickling, "The First Five Years of the Federation of Malaya Constitution" (1962) 4 *Mal. L.R.* 183, 191.

[67] Akta A206, s. 15(1)(b).

[68] Federal Constitution, Article 116, Clause (4) repealed by Act 14/1962, s. 22(c), w.e.f. 21-6-1962.

Article, the Election Commission is required immediately after the passing of this Act to undertake the review of the division of the States of Malaya into constituencies and to recommend the necessary changes so as to comply with the amendments made to the Constitution. This section may appear superfluous since there already exists sufficient provision in clause (3) of Article 113 for such a situation. The clause requires the Election Commission, if it is of opinion that in consequence of a law made under Article 2 (relating to the lateration of the boundaries of a State and to the admission of new States into the Federation) it is necessary to undertake the review of the division of the Federation and the States into constituencies, to do so notwithstanding that eight years may not have elapsed since the last review. As this Act is indubitably a law made under Article 2 of the Federal Constitution one wonders why section 16(1) of this Act was considered necessary – unless it is included *ex abundanti cautela* in case the Election Commission should *not* be of opinion that such a review is necessary. Sub-section (2) of Section 16 renders ineffective any report or recommendation already prepared or submitted by the Election Commission to the Prime Minister and provides that no further action required under the provisions of the Thirteenth Schedule to the Constitution need be taken with regard to such report or recommendations. (One sympathises with the Election Commission when, on top of everything else, even its labours, if any, are to come to naught.).

Section 17 of the Act reiterates the provisions of section 12 of the Thirteenth Schedule to the Constitution that the recommendations of the Election Commission (presumably as embodied in the Order made by the Yang DiPertuan Agung pursuant to s. 12, Thirteenth Schedule of the Constitution) following the review undertaken pursuant to s. 16(1) of this Act will not apply to any election to either the House of Representatives or a State Legislature until the next dissolution of Parliament or the Assembly, as the case may be, occurring on or after the date of coming into force of the Order.

I.S.A.

LEGISLATION

The following is a list of Acts and Enactments passed and revised in Malaysia in 1973:—

FEDERAL ACTS PASSED

Act No.	*Short title*
101	Tabong Angkatan Tentera Act, 1973. Akta Tabong Angkatan Tentera, 1973.
102	Banking Act, 1973. Akta Bank, 1973.
104	Lembaga Kemajuan Trengganu Tengah Act, 1973. Akta Lembaga Kemajuan Trengganu Tengah, 1973.
105	Malaysian Timber Industry Board (Incorporation) Act, 1973. Akta Lembaga Perindustrian Kayu Malaysia (Perbadanan) 1973.
106	Women and Girls Protection Act, 1973. Akta Perlindungan Wanita dan Gadis, 1973.
107	City of Kuala Lumpur (Planning) Act, 1973. Akta (Perancangan) Bandaraya Kuala Lumpur, 1973.
108	Good Shepherd Nuns (Incorporation) Act, 1973. Akta (Perbadanan) *Good Shepherd Nuns*, 1973.
109	Farmers' Organization Act, 1973. Akta Pertubuhan Peladang, 1973.
110	Farmers' Organization Authority Act, 1973. Akta Lembaga Pertubuhan Peladang, 1973.
111	National Tobacco Board (Incorporation) Act, 1973. Akta Lembaga Tembakau Negara (Perbadanan), 1973.
112	Securities Industry Act, 1973. Akta Perusahan Sekuriti, 1973.
123	Biro Siasatan Negara Act, 1973. Akta Biro Siasatan Negara, 1973.
124	Local Government (Temporary Provision) Act, 1973.