THE CONSTITUTION OF MALAYSIA: ITS DEVELOPMENT: 1957–1977

ed. Tun Mohammed Suffian, H.P. Lee, F.A. Trindade:
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The Constitution of Malaysia came into force in 1957. Originally, it was known as the Constitution of Malaya. Since 1963, it has come to be known as the Constitution of Malaysia. With some modifications and amendments, the Constitution has maintained its continuity since 1957 and, thus, it has completed 20 years of its existence in 1977. The book under review seeks to record the main developments in the Malaysian Constitution during this period in its various aspects. The idea of compiling a book of this nature originated, in the first instance, with Mr. Lee and Mr. Trindade, both law teachers at the Faculty of Law, Monash University, Australia.

During this period of 20 years, the Constitution of Malaysia has not stood still. There have been immense socio-economic and political changes in the country during this period. Two five year plans have been completed and the third plan has reached its mid-half. Accordingly, the Constitution has also undergone quite a few changes, some of which are quite fundamental in nature. Despite the many amendments, in the words of Tun Suffian in the foreword to the book, the Constitution "is still recognizable by its makers". It may be of interest to note at the outset that, unlike many other constitutions such as those of the U.S.A. and Australia, where constitutional changes occur imperceptibly through the process of judicial interpretation and the growth of conventions, the changes in the Malaysian Constitution have been brought about principally by the process of constitutional amendments. The amending process has been rather easy to invoke in Malaysia as against the great difficulty of consummating a constitutional amendment in the U.S.A. or Australia. More on this point later in this review.

The book under review is a collection of 15 essays written on various aspects of the Malaysian Constitution by various contributors who form a mixed bag – academics, practising lawyers and administratiors. This greatly enhances the value of the book as it represents various angles, approaches and points of view on various constitutional issues. This reviewer heartily welcomes this latest addition to the not so profuse literature on the Constitution. The book will fill a gap in the literature on the subject.

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The first essay covering pages 1 to 26 is contributed by Professor R.H. Hickling. It is entitled "An Overview of Constitutional Changes in Malaysia: 1957–1977." Professor Hickling has an intimate knowledge of the origins of the Malaysian Constitution as he has been the Law Revision Commissioner of Malaysia and Editor of the Malaysian Constitutional Documents. In this essay, the author describes his task to be "to stand upon a peak and to look back upon the past twenty years of the history of a nation."[1] The author first describes in this essay the original concepts underlying the Malaysian Constitution, "the ideas behind the constitution, the ideas upon which it is based."[2] He sets before himself the task of finding out an "outline answer" to the question: "What were the ideas, traditions and principles on which the original compact was founded: and how were these adapted to the needs of Malaya?"[3] Professor Hickling points out that the Malayan Constitution was not hammered out by any constituent assembly; "nor did any formal referendum set a popular seal upon its simple but lengthy text."[4] It was "evolutionary" in character. The Constitution "in a political sense" was "the product of the Federation Agreement of 1948." The Constitution was "consensual" in nature, "the creature of compromise,"[5] and "Consensus was its base." The concepts of common law and parliamentary supremacy had been imbibed by the Malayan lawyers before independence. Accordingly, the terms of reference of the Reid Constitutional Commission laid strong emphasis upon a federal form of Constitution "based on parliamentary democracy," and that 'key phrase' "invoked, again, the concept not only of parliamentary democracy, but also that of parliamentary supremacy."[6] The Reid Commission consisted of a few distinguished men from the United Kingdom, Australia, India and Pakistan so as to give advice on "the problems of federal government." Professor Hickling observes: "The doctrine of constitutional supremacy has taken a long time to take root in Malaysia: but we can, I think, affirm that the tree is now reasonably secure . . ."[7]

Professor Hickling states that at the time of constitution-making, "there was no fundamental disagreement among the majority of citizens [of Malaya] over the basic principles of the Constitution: and these have

[1] The *Constitution of Malaysia*, at p. 1. Hereinafter in the notes below, the book under review is referred to simply as the *Constitution*.

[2] *Ibid.*, p. 2.

[3] *Ibid.*, p. 3.

[4] *Ibid.*, p. 2.

[5] *Ibid.*, p. 4.

[6] *Ibid.*, p. 5.

[7] *Ibid.*, p. 5.

remained."[8] As regards the amendments to the Constitution over the 20-year period, which are quite large in number, Professor Hickling sees them as, "essentially, reactions to an existing reality," mostly to "political events" or weaknesses in the Constitution itself.[9] He has not analysed these various amendments in detail. He has left this task to Mr. Lee, another essay writer, who has contributed an essay on this topic. Professor Hickling does point out however that the end result of the amendments of 1960 (amendments undertaken after the Emergency was over) was that "the executive was equipped with wider emergency powers, subject to lesser parliamentary control than those contemplated in 1957: when, of course, a state of emergency was already in existence."[10]

Professor Hickling then takes note of the formation of the Malaysian Federation which he characterises as "a kind of hybrid federation", or perhaps a "confederation" because the concept of inter-state equality on which the Malayan Federation was based, was now breached.[11] In the opinion of this reviewer, however, it is difficult to accept the characterisation of the Malaysian Federation as a 'confederation'. For that expression is used for an extremely loose kind of an association which has no central legislature of its own having power to frame legislation operating directly on the people. This certainly is not the position in Malaysia where the parliament makes laws for all the people. It is true that some units in the Federation enjoy more powers and privileges than other units, but it is also true that the central government is a very powerful entity having vast powers of legislation and administration throughout Malaysia. In this context, Professor Hickling refers to the famous case of *State of Kelantan* v. *Federation of Malaya*[12] in which the formation of the Malaysia Federation was challenged. He offers a 'silent salute' to the Government of Kelantan "for its courage in asserting that a constitution is more than mere words, and that custom and convention can often supply the spirit which the latter may lack."[13]

Next, Professor Hickling refers to the violence which erupted in 1969 in Kuala Lumpur which led to the "breakdown of the Constitution," "for the whole of the legislative structure of the Constitution was virtually suspended, and the whole of the executive authority of the Yang di-

[8] *Ibid.*

[9] *Ibid.*, p. 6.

[10] *Ibid.*, p. 7.

[11] *Ibid.*, p. 9.

[12] [1963] M.L.J. 355.

[13] *Constitution*, at p. 10.

Pertuan Agong delegated to one man, the Director of Operations."[14] From this situation, Malaysia was nursed back to "constitutional, democratic government."[15] However, the steps taken to fulfil that objective, the legislative and non-legislative steps, are characterised by Professor Hickling as amounting to "the negative solution to the problems posed by Article 153"[16] and based on "political expediency."[17]

Professor Hickling briefly surveys the judicial attitudes as manifest since 1957. One of the judicial trends is the acceptance of the "supremacy of the Constitution," as depicted by the *Kanda*[18] and *Assa Singh*[19] cases and as contrasted to the judicial response in *Chia Khin Sze*.[20] In the area of public service, the movement of the judiciary has been towards "a recognition of the importance of contract." There has been a "curious lack of any judicial discussion or interpretation of what is perhaps the most critical article in the constitution, Article 153."

On the whole, Professor Hickling succeeds in his essay to give a bird's eye view of the main developments in the area of the constitutional law and his essay serves as the foundational piece for the later essays which study specific constitutional problems in some depth. However, the reviewer feels disappointed that Professor Hickling did not utilise the opportunity offered to him in this essay of delving somewhat deeper into the course of judicial interpretation of the Malaysian Constitution over the last 20 years and that he has felt satisfied with a rather cursory reference to the institution of judicial review — an aspect of great importance in a written Constitution.

The second essay is on the critical subject of Fundamental Liberties (pp. 27–40). This is the contribution of Professor Harry E. Groves, who is at present the Dean of Law, North Carolina Central University, U.S.A. and who was formerly the Dean, Faculty of Law, University of Singapore. Professor Groves, in the first place, gives a brief summary of the relevant constitutional provisions. He then briefly takes note of a few of the important judicial pronouncements in the area of fundamental liberties. He concludes his discussion with the following quotation:

> "There is the familiar story of two persons examining the contents of the same vessel. The pessimist laments that it is half-empty. The

[14] *Ibid.*, p. 11.

[15] *Ibid.*, p. 12.

[16] *Ibid.*

[17] *Ibid.*, p. 14.

[18] [1962] M.L.J. 169.

[19] [1968] 2 M.L.J. 30.

[20] *Chia Khin Sze* v. *Mentri Besar, State of Selangor*, [1958] M.L.J. 105.

optimist rejoices that it is half full. Perhaps this story is not totally inapt as one contemplates Fundamental Liberties in the Constitution of Malaysia."[21]

This reviewer feels that Prof. Groves' discussion of the topic of Fundamental Liberties is rather brief, sketchy and peripheral. It does not do full justice to the critical importance of the subject in Malaysia. Prof. Groves gives no indication whether he belongs to the category of an optimist or a pessimist so far as the Fundamental Liberties provisions of the Malaysian Constitution are concerned.[22]

The third essay on "The Position of Islam in the Constitution of Malaysia" (pp. 41–68) has been written by Professor Ahmad Ibrahim, Dean, Faculty of Law, University of Malaya. Prof. Ahmad traces in brief the position of Islam in the various States of Peninsular Malaysia in the pre-1957 period. He expresses the view that "the early Malay State Constitutions – written or unwritten – show traces of the traditional Islamic polity."[23] The author then gives the background to the inclusion of Article 3 in the Federal Constitution. Article 3 enacts that Islam is the religion of the Federation. It however permits the practice of other religions as well in 'peace and harmony'. In order to assure the non-Muslims that their civil rights are not affected, Clause (4) of Article 3 provides that nothing in Article 3 derogates from any other provisions of that Constitution. These provisions are Articles 8(2), 11 and 12. On the recent amendment of Article 12 undertaken in 1976, the author makes the following important comment: "it is not clear what changes are designed to be effected by the amendments except to make it unnecessary to have a federal or State law to provide for financial aid for the maintenance and assistance of Islamic institutions and Islamic religious education. The amendment may however be interpreted to mean that religious groups cannot establish schools except for the education of children in their own religion, but then it is difficult to understand why there cannot be discrimination in such institutions on the ground only of religion. The words 'and provide therein instruction' have been omitted, but again it cannot be intended that no instruction in the religion can be given."[24] Prof. Ahmad mentions the provisions in the Constitutions of various Muslim countries having a bearing on the position of Islam and Islamic Law. He points out that in Malaysia it is the Constitution which is the

[21] *Constitution*, at p. 37.

[22] See, in this connection, Book Review of Tun Suffian, *An Introduction to the Constitution of Malaysia*, [1976] *JMCL* 170, 188–194.

[23] *Ibid.*, p. 47.

[24] *Ibid.*, p. 52.

supreme law and that the definition of "written law" does not include Islamic Law. A law made by a state cannot be declared void because it contravenes 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." Prof. Ahmad mentions a few examples of pre-Merdeka laws which contain provisions contrary to Islamic Law.

In the essay on "The Citizenship Laws of Malaysia" (pp. 69–100), Mr. Visu Sinnadurai, Associate Professor, Faculty of Law, reviews the main developments in the area of citizenship in the pre-Constitution era and also since the beginning of the present Constitution in 1957. He points out that the concept of citizenship laws was introduced in some component States long before Malaysia became independent. When the Federation of Malaya was set-up pursuant to the Agreement of 1948,[25] certain provisions regarding Federal citizenship were made. In 1957, when the Federation of Malaya achieved independence, the citizenship laws were changed again.[26] Some changes have been introduced in the constitutional provisions since then, particularly in 1963, when Malaysia was formed.[27] In fact, the provisions of the 1957 Constitution were re-enacted with the necessary amendments. Mr. Sinnadurai points out that the Federal Government has not spelt out any policies for the criteria to determine who would be granted citizenship by the Federal Government. According to him: "It would be more desirable to spell out those policies rather than to leave the fate of the applicant at the complete discretion of the Government."[28] He also comments on the Court cases regarding deprivation of citizenship. On *Mak Sik Kwong*,[29] where Justice Abdoolcader has held that the Minister is not obligated to give 'particulars' upon which the deprivation order is made if such disclosure "would be prejudicial to the public or national interests," Mr. Sinnadurai's comment is:

> "It is rather unfortunate that the learned judge did not consider in detail the views expressed by the Privy Council as to the granting of 'particulars' and information to the citizen when an inquiry under Article 27 has been set up . . . [i] if the citizen is to be deprived of such particulars and information on the ground that such matters relate to

[25] *Constitution*, at p. 70.

[26] *Ibid.*, p. 72.

[27] *Ibid.*, p. 80.

[28] *Ibid.*, p. 94.

[29] *Mak Sik Kwong v. Minister of Home Affairs*, [1975] 2 M.L.J. 168.

the affairs of State, then one may have doubts as to the effect of such an inquiry."[30]

Mr. Sinnadurai suggests that the court should be slow in upholding the Minister's plea of 'affairs of State' when the citizen wants information. Otherwise, the procedure contained in Article 27 would provide no meaningful safeguard to the citizen. At the point of deprivation of citizenship, the procedural safeguards are extremely weak indeed. There is much force in what Mr. Sinnadurai says in this connection. Deprivation of citizenship is an extremely drastic step and there should be all possible safeguards subject to which such an order can be made by the Government.

Mr. F.A. Trindade, one of the editors of the book under review, has contributed a paper on "The Constitutional Position of the Yang diPertuan Agong" (pp. 101—122). Thirteen years back, Mr. Trindade along with Professor Jayakumar had contributed to the Malayan Law Review,[31] an article entitled "The Supreme Head of the Malaysian Federation." By then the office of the Yang diPertuan Agong had been functioning only for seven years. Still the contributors were able to suggest then that there was "every indication that the creation of the office will, in time to come, be proved to be a wise one".[32] The institution has been in operation since then, and now it is 20 years old. It is, therefore, appropriate that the working of the office of the Yang diPertuan Agong be evaluated at this stage. Mr. Trindade draws heavily on his previous article for his present contribution. He now characterises the institution in the following words:[33]

> "I think it is fair to say that the Yang diPertuan Agong has become 'a visible symbol of unity in a remarkably diverse nation'. There is hardly any criticism of the institution that I have encountered and there has been no significant change to it during the last twenty years. The original institution created in 1957 continues to thrive in 1977 without any serious problems and though there have been some minor constitutional amendments and some discussion of the constitutional position of the Yang diPertuan Agong in a few decisions of the courts, they have been mainly elucidatory rather than innovative and much of what we wrote in 1964 about the office is still valid and relevant in 1977."

Mr. Trindade summaries the relevant constitutional provisions having a

[30] *Constitution*, at p. 89.

[31] [1966] 6 *Mal. L.R.* 280—302.

[32] *Constitution*, at p. 101.

[33] *Ibid.*

bearing on the office of the Yang diPertuan Agong.[34] One interesting point considered by him is as regards the scope of the immunity conferred on the Yang diPertuan Agong through Article 32(1) which says that the Yang diPertuan Agong "shall not be liable to any proceedings whatsoever in any court." Pike C.J. in the *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg* case ruled:[35]

> "Article 32(1) only protects the Yang diPertuan Agong personally from proceedings in a court but cannot be construed to protect the Federal Government from action in the courts in respect of its acts committed in the name of the Yang diPertuan Agong, and when the Yang diPertuan Agong acts on the advice of the Cabinet, his act must be deemed to be the act of the Federal Government."

Tun Suffian also appears to accept this view.[36] Mr. Trindade does not seem to agree with this approach. He asks: Why would it have been necessary to have Article 32(1) if it was merely intended to confer immunity from proceedings in a court in his personal capacity? The Yang diPertuan Agong being a ruler of a state, enjoys a personal immunity under Article 181(2) from proceedings in a court. From this he seeks to argue that the scope of Article 32(1) may possibly be wider than that suggested by Pike C.J. in *Stephen Kalong Ningkan.* This reviewer feels that the scope of Article 32(1) cannot be broader than what Pike C.J. has suggested in the *Stephen Kalong Ningkan.* To give a broader scope to Article 32(1) would mean that the actions of the Central Government taken in the name of the Yang diPertuan Agong would become immune from judicial review. Recently, the Privy Council has also given its support to the same view. It has suggested that while the proclamation of emergency cannot be challenged in an action against the Yang diPertuan Agong, an action can still be brought against the members of the Cabinet on whose advice he acts in this matter.[37] Article 32 may have been put in the Constitution as a matter of abundant caution for the framers may have thought that while a ruler of a state is functioning as the Yang diPertuan Agong, a question may be raised whether Article 181(2) will apply to him and give him immunity for under Article 34(1), the Yang diPertuan Agong no longer exercises his functions as the Ruler of his State. The question of immunity of the Yang diPertuan Agong beyond personal immunity is really of theoretical interest only, for he acts on ministerial advice and, therefore, any action has to lie against the government and not against the Yang diPertuan Agong as such

[34] *Ibid.*, at p. 102–6.

[35] [1967] M.L.J. 46, 47.

[36] *Introduction to the Constitution of Malaysia,* 2nd Edition, 1976, pp. 24–25.

[37] *Teh Cheng Poh* v. *Public Prosecutor,* [1979] 1 M.L.J. 50.

as he does not exercise personal discretion except in a few cases. As Mr. Trindade himself observes in relation to Article 40(1):

"The Yang diPertuan Agong is a constitutional monarch and in exercising his functions under the Malaysian Constitution or Federal Law, he must act with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet."[38]

There are, of course, some functions which he exercises in his discretion. The Constitution confers three discretionary functions on him of which reference may be made at this stage to two functions:

(1) Appointment of the Prime Minister: Here, of course, as the author says, the element of discretion is extremely limited so far as there is a majority party in Dewan Ra'ayat. The author says that this discretion may be important only "when the majority party has no established leader but even then the prudent course" for the Yang diPertuan Agong "would be to wait until the majority leader has been chosen in the party room."[39]

Mr. Trindade does not refer to any conventions which may have developed in this area. He does not mention one situation where the Yang diPertuan Agong's discretion in the matter of appointment of the Prime Minister may become crucial viz., when there is a proliferation of political parties and no single party has a majority in the House. Any person appointed as the Prime Minister may then succeed in attracting support for himself in the House, and establish himself as the Prime Minister.

(2) Another important dimension of the Yang diPertuan Agong's discretionary powers is the dissolution of Dewan Ra'ayat. Mr. Trindade feels that this may not be an "important function."[40] But in saying so he is only partially right. So long as there is a majority party, this may not be an important function of the Yang diPertuan Agong. But the moment there is a multi-party proliferation, one may realise that this function of the Yang diPertuan Agong may assume crucial importance. The recent Kelantan case underlines the significance of the dissolution of the House at the critical moment. The Sultan did not grant dissolution of the House when the Chief Minister sought it after a vote of no-confidence had been passed against him in the House. The dissolution was delayed; in the meantime, the Federal Government intervened, and so, the House was dissolved and fresh elections held after a few months. As a result of the elections, the then Chief Minister lost his office, and the then majority party lost its majority. This only illustrates that there may arise a Constitutional crisis when the power of

[38] *Constitution*, at p. 109.

[39] *Ibid.*, p. 110.

[40] *Ibid.*

dissolution may assume great significance. This reviewer has stated something on this point earlier at another place,[41] and, therefore, does not want to labour the point again at this stage.

It is the view of this reviewer that there is need for some conventions to grow in these discretionary areas. No conventions have emerged so far because there has so far been no need for them. Because of the presence of a solid national majority party, no constitutional difficulty has arisen, and so no convention has grown.

Mr. Trindade seems to feel that although the choice of the Senators is not specifically left to the discretion of the Yang diPertuan Agong by the Constitution, it is arguable whether this is what was intended because Article 45(2) of the Constitution indicates that the Senators shall be persons who in the opinion of the Yang diPertuan Agong, have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, etc.[42] His argument is dependent on the words: "in the opinion of the Yang diPertuan Agong," to be found in Article 45(2). This reviewer does not agree with this view. The words "in his opinion" in Article 45(2) would not confer any personal discretion on the Yang diPertuan Agong any more than the words "if the Yang diPertuan Agong is satisfied" in Article 150(1). Such words have to be interpreted relatively with reference to Article 40 which is the key provision in relation to the office of the Yang diPertuan Agong. As the Supreme Court in India has observed recently there is nothing like "personal satisfaction" of the President and 'satisfaction' is that of the Council of Ministers.[43] Nomination of the Senators therefore has to be made effectively by the Prime Minister though formally by the Yang diPertuan Agong.

Referring to the present debate between Professor Hickling and Professor Jayakumar on the question whether the Yang diPertuan Agong has a personal discretion in the matter of proclaiming an emergency, Mr. Trindade does not indicate which of these two views he prefers.[44] Professor Hickling takes the view that he has such a discretion. He has based his case mainly on some stray judicial dicta. Professor Jayakumar counters his arguments.[45] He propounds the view that the Yang diPertuan Agong has to act on the advice of the Cabinet in this matter. This reviewer however agrees with Professor Jayakumar, and doubts whether the stray

[41] Book Review of Tun Suffian, *An Introduction to the Constitution of Malaysia*, [1967] *JMCL* 170, 177, 178.

[42] *Constitution*, at p. 111.

[43] *State of Rajasthan* v. *Union of India*, (1978) 1 S.C.J. 78.

[44] The Prerogative in Malaysia, (1975) 17 *Mal. L.R.* 207–232.

[45] Emergency Powers in Malaysia, (1976) 18 *Mal. L.R.* 149. See *Constitution*, p. 115.

judicial dicta taken out of context can provide a satisfactory basis for arguing in favour of the discretionary power of the Yang diPertuan Agong in the matter of proclaiming the Emergency. Most of the time, the judicial observation in a case is meant to meet the immediate argument of a party which the court disapproves and every *dicta* does not lay down a principle for future guidance in all situations. That is why a distinction has to be drawn between *obiter dicta* and *ratio decidendi*. Anyway, it appears to the reviewer that this point cannot be decided by judicial *dicta* alone. If judicial *dicta* were to decide this point we have the following observation in *N. Madhavan Nair*:[46]

> "Emergency rule which passes the legislative power from Parliament to the Yang diPertuan Agong has not displaced his position as the Constitutional Monarch, bound by the Constitution to act at *all* times on the advice of the Cabinet."

We also have now an observation of the Privy Council to suggest that the power of the Yang diPertuan Agong is not personal but is to be exercised by him on the advice of the Cabinet.[47] This reviewer, on the whole, feels that this matter is more of a political nature. If the Yang diPertuan Agong were to do something in this matter over and above the head of the Cabinet, it will create a first class constitutional crisis in the country which the Yang diPertuan Agong may not be able to handle himself. Therefore, practical considerations warrant that the Yang diPertuan Agong acts on ministerial advice in this extremely delicate and sensitive matter.

Finally, this reviewer would like to raise one question as regards the structure of the essay on the Yang diPertuan Agong. Mr. Trindade has catalogued all the provisions of the Constitution which seem to confer any formal power on the Yang diPertuan Agong. This creates an impression that the Yang diPertuan Agong himself is the depository of these powers. The truth of the matter however is that these are not his personal powers as Mr. Trindade himself accepts. These powers are conferred on the Yang diPertuan Agong for the sake of formality. Therefore, should these powers have been mentioned in the essay on the Yang diPertuan Agong? An unwary reader may get the wrong impression when he reads these provisions that the Yang diPertuan Agong can personally do this or that. It would have been better to eliminate these various provisions from this essay as most of these provisions have been referred to again in the discussion on the various topics. For example, the powers of the Yang diPertuan Agong in relation to the judiciary are mentioned again (and rightly so) in the essay on the Malaysian Judicial System;[48] Emergency provisions have been mentioned in the essay on

[46] *N. Madhavan Nair* v. *Government of Malaysia*, [1975] 2 M.L.J. 286 at p. 289.

[47] *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50 at p. 55.

[48] Essay No. 11 by Tun Suffian, see *infra*.

Emergency[49] and so on. By somewhat restructuring the scheme of the essay, the author would have found more space to highlight the crucial points concerning the Yang diPertuan Agong's office more deeply than what he has found it possible to do within the constraints of space at present.

The sixth essay in the book entitled as "Ministerial Responsibility in Malaysia" (pp. 123–135) has been contributed by Mrs. M. Puthucheary who is an Associate Professor in the Faculty of Economics and Administration, University of Malaya. Malaysia has adopted the parliamentary form of government on similar lines as in many other Commonwealth countries like India, Canada, Australia and England. In Malaysia, the Cabinet is appointed from among the members of either House of Parliament. But the Prime Minister is to be from the Lower House. Article 43(3) of the Federal Constitution expressly provides that the Cabinet shall be collectively responsible to the Parliament. "Thus, formally at least, the convention of ministerial responsibility is applicable in the Malaysian situation."[50] Mrs. Puthucheary goes on to emphasise that "political realities in Malaysia dictate a kind of democracy and a style of politics that is very different from the British experience,"[51] and that "democratic values appear to be less important than other values such as political stability and socio-economic development."[52] Thus, the application of the concept of ministerial responsibility in Malaysia is to be understood in this light. The author points out that "[g]enerally the opposition is regarded at best as unnecessary and at worst as evil".[53] The time given to the opposition in Parliament is considerably reduced. The right of the members to ask questions is very much restricted, that "even when questions are answered orally they are seldom answered adequately and to the satisfaction of the questioner,"[54] that during the last five years there has not been a single private motion passed to debate a matter of public importance.[55] The public accounts committee which looks into the accounts of the federal ministries also is not "an effective tool for checking wasteful expenditure." One of the reasons given by Mrs. Puthucheary for this state of affairs is that the chairman of the committee is not a member of the opposition as is the usual practice in most of the

[49] Essay No. 14 by Jayakumar, see *infra*.

[50] *Constitution*, p. 126.

[51] *Ibid.*, p. 126. .

[52] *Ibid.*, p. 126.

[53] *Ibid.*, p. 127.

[54] *Ibid.*

[55] Note 17, *supra*.

Commonwealth countries having a parliamentary system.[56] The author then discusses the case of the Malacca Hospital in 1973. and again in 1975, and the manner in which these cases were dealt with. The reports of the enquiry committees were never made public. There were allegations of corruption and maladministration in the background but the public was not taken into confidence. The concerned Minister was thus able to evade his responsibility because of the apathy of the press, public and Parliament. The author then refers to the two cases of ministerial resignations from the Cabinet and comments that the political environment of Malaysia does not appear to have the characteristics that allow the convention of ministerial responsibility to operate[56a] fully and effectively. Government prefers to deal with problems of maladministration or mismanagement of government funds through more internal methods rather than to discuss these matters in open debate in Parliament. Towards the end of the paper, the author concludes:

> "The socio-political environment and the style of politics that has evolved in Malaysia since Independence, however, are inimical to the development of a system in which the convention of ministerial responsibility can operate fully. Thus, for the time being at least, the convention can be said to operate in Malaysia more in form than in reality."[57]

Mrs. Puthucheary, on the whole, gives a very penetrating insight into the working of the parliamentary form of government in Malaysia. She does not confine herself to the mere formal structure but delves into its substance – as it really works in practice. As it comes out, the control of Parliament over the Cabinet is extremely weak and the checks against maladministration are not very effective.

The next paper is on the "Malaysian Parliament" (pp. 136–162) and is written by Mr. Nik Abdul Rashid, Associate Professor in the Faculty of Law, University of Malaya. In this essay, the author describes the composition, structure and functions of the Malaysian Parliament. Malaysia has a "bi-cameral" legislature. According to the author, the justification for this arrangement is that Malaysia being a federation, like India or Australia, "the interests of the component States as opposed to the interest of the populace must be given higher priority."[58] It appears however that in the Federal Parliaments, as at present constituted in the Federal countries, higher priority is not given to the interests of the component states as the powers of the upper chambers are much less than those

[56] *Constitution*, p. 128.
[57] *Ibid.*, p. 133.
[58] *Ibid.*, p. 137.

of the lower chambers. In the U.S.A. and Australia, it may be said that a little less than equal importance is given to the interests of the States than the interests of the population because the American and the Australian Senates are the two most powerful upper chambers in the parliamentary systems in the world, but even they are not equally powerful with the popular chambers. The Malaysian Senate is, on the other hand, much less powerful and less influential than the Dewan Rakyat.[59]

Mr. Nik Abdul Rashid's comments on Dewan Negara are very interesting. According to him, the fact that there are no direct elections to the Senate, that members to this body are appointed in effect by the Cabinet, that the number of the Government nominees is larger than the number for members elected to the House by the Senate Legislatures, and that the party in power appoints its own supporters, ensures that the Government Bills will have a smooth passage in the Senate.[60] According to the author, appointments to the Senate are based on "some sort of patronage system."[61] He makes the following interesting observations on this aspect of the matter:

> "If we were to have a referendum today on the question of whether Senators should be elected or appointed, 99.9 percent of the electorate would vote for an election, because they want to see democracy at work. But since politicians decide for the masses on many important political issues, the masses virtually have no say at all. They have to follow what the politicians have said and what they have to say."[62]

The author mentions the purposes which the Dewan Negara was designed to fulfil. One of these purposes was to check hasty legislation. In other words, the Dewan Negara was to function as a revising chamber so as to improve upon the Bills as passed by Dewan Rakyat. But, unfortunately, the author does not evaluate whether the Dewan Negara constituted as it is at present effectively fulfils any of the functions which were envisaged of it by the constitution-makers. For example, does the Dewan Negara serve, at present, as a debating chamber to hold dignified debates on crucial national issues? Does it really act as a revising chamber in practice? How many times has this chamber amended the Bills enacted by the Dewan Rakyat? An insight into the actual working of the Dewan Negara by answering these and many other similar questions would have been most useful to a student of constitutional law and practice in Malaysia. Since the writing of this paper by the author, Article 45 has been amended to increase the number of the nominated members to 40 and to

[59] *Constitution*, p. 138.

[60] *Ibid.*, p. 140.

[61] *Ibid.*

[62] *Ibid.*

reduce the term of membership from six to three years.[62a] Do these amendments further make the House more pliable and less meaningful?

The subordinate position occupied by the Senate in the Malaysian Constitutional process becomes tellingly clear by the fact that the statutes which make provision for laying of regulations made thereunder provide for laying only before Dewan Rakyat and not before Dewan Negara. This is indicative of the Government attitude towards this House. Mr. Nik Abdul Rashid will feel happy that his one wish has now been fulfilled. He desired that there should be someone in the House to champion the interests of the City of Kuala Lumpur in the Dewan Negara.[63] Provision has now been made for two members to represent Kuala Lumpur.

Concerning the Dewan Rakyat, "a democratic chamber popularly elected directly by the people on the basis of adult suffrage," Mr. Nik Abdul Rashid mentions some interesting facts. Some constituencies for electing members to this House are very small having as few as 13,000 voters, while other constituencies are comparatively much larger having as many as 58,000 voters. Therefore, there is no principle of uniformity in the number of voters each constituency must have. The distribution of seats and the demarcation of the constituencies are done not by any autonomous body but by the House itself on the recommendation of the Election Commission.[64] There is thus a possibility that political considerations may creep in this exercise. The author points out that "the number of seats are not proportionate to the relative populations of the country" but other factors are also taken into account.[65] He does not throw much light however on these other factors. He then refers to the concept of the "office of profit", but again does not throw much light on its practical operation. The underlying purpose of the disqualification on the membership of the House arising from the concept of office of profit is to free parliamentarians from government influence and patronage so that they may oversee government actions objectively. It therefore becomes necessary to look into the question whether the concept of 'office of profit', as it operates at present, is fulfilling this underlying purpose or not. Another point which the author mentions is that "concurrent membership in either House of Parliament and a State Legislative Assembly is not forbidden, and is, in fact, common".[66] He rightly points out that the

[62a] The Constitution (Amendment) Act, 1978 (Act 442), S. 2.

[63] *Constitution*, p. 140.

[64] *Ibid.*, p. 142.

[65] *Ibid.*

[66] *Ibid.*, p. 146.

'demerits' of dual membership 'far outweigh its merits'[67] and he advances very sound reasons in support of his thesis that dual membership be abolished. He advocates the adoption of the provisions prevailing in India against dual membership.[68]

In Malaysia, the question of disqualification of members of the House of Parliament is decided by the House concerned. This provision is different from that prevailing in other countries where such a question is decided by the Election Commission which, like the Election Commission in Malaysia, is an autonomous body. In this way, the decision is objective and not subject to political pulls and pressures. The author catalogues the important functions which the Yang diPertuan Agong discharges in relation to Parliament. In discharging these functions, the Yang diPertuan Agong acts on ministerial advice and, thus, the formal powers of the Yang diPertuan Agong become the effective powers of the Cabinet. In one important area, however, the Yang diPertuan Agong exercises discretionary power viz; the dissolution of Dewan Rakyat. The author here describes the formal constitutional provisions without discussing their operation in practice and what conventions, if any, have emerged in this connection.

Mr. Nik Abdul Rashid's comments on the institution of delegation of legislative power by Parliament are very interesting. He appears to feel that Parliament cannot delegate its legialative power to any other subordinate agency as there is no provision in the Malaysian Constitution to serve as a source of power for doing so. In the past, Parliament has assumed the power to delegate without knowing that it has no such power because the Constitution confers upon Parliament, and no one else, the power to legislate. The author refers to the Privy Council decisions saying that the legislature of a dominion is not a delegate of the British Parliament and that it has plenary power of legislation within the limits of its Constitution and, therefore, the legislature can delegate further its legislative powers. He suggests that "we cannot be swayed" with such decisions. He distinguishes the Malaysian Parliament from the British Parliament in so far as the latter is under no constitutional restraints whereas the former functions under a written constitution. Ultimately, he proposes that the Constitution should be amended to include a clause authorising Parliament by law to delegate its legislative power to other bodies; and that such a clause must be made operative with effect from the Merdeka Day. The author is afraid that, in the absence of such a constitutional amendment, there is a danger of the whole subordinate legislation being declared unconstitutional by the courts for violating Article 44 on the ground that Parliament cannot delegate its legislative power as there is no express provision in the Con-

[67] *Ibid.*

[68] *Ibid.*, p. 147.

stitution for the purpose. This part of the author's paper forms interesting reading but this reviewer suggests that his apprehensions are without much foundation. In this connection, it is worthwhile to remember that no Constitution whether of India or Australia or Canada or the U.S.A. has such a provision. Delegation of legislative power is regarded as an incident of Parliament's legislative power itself[69] and, therefore it has come to be accepted in all countries that Parliament can delegate legislative power even in the absence of any express authorisation for the purpose provided there is no express constitutional prohibition on delegation. It is realised by everyone that modern government cannot be run without delegation of legislative power by the Parliament. Even in the U.S.A., delegation has come into vogue in spite of the separation of powers doctrine. Therefore, to the mind of the reviewer no such amendment as proposed by the author appears to be necessary or called for. The practice of delegation has become so well entrenched in the country that any challenge thereto has no chance of success in a court of law.[70] In any case, the author's proposed amendment will permit a blanket delegation of power by Parliament and this raises its own problems which he has not alluded to. In the opinion of the reviewer, the very important question which deserves deep consideration by constitutional lawyers in Malaysia is: whether there should be an unrestrained power of delegation or whether Parliament should be subject to some restrictions in this matter. In India and the U.S.A., the courts have propounded the theory that Parliament cannot delegate its essential legislative function, that the legislature cannot delegate an uncontrolled power of legislation on an authority and that delegation should take place subject to some safeguards in the form of a statement of policy in the delegating statute subject to which the delegate is to act and/or subject to some procedural safeguards.[71] This question appears to be relevant to Malaysia as well. There are no controls at present operating on Parliament in the matter of delegated legislation,[72] and it is a moot point whether the parliamentary control-mechanism of subordinate legislation needs to be improved or the present position is satisfactory.

Nik Rashid refers to the parliamentary procedure like asking of questions by the members, but he does not investigate how effective the

[69] *In re Delhi Laws Act*, 1912, A.I.R. 1951 S.C. 332.

[70] M.P. Jain, Forms of Delegation of Legislative Power in Malaysia and Singapore, [1978] M.L.J. xxviii–xxxiv.

[71] M.P. Jain, Development of Administrative Law in Malaysia since Merdeka, [1977] 2 M.L.J. pp. ms. ii–ms. xvi; M.P. Jain & S.N. Jain, *Principles of Administrative Law*, 21–48.

[72] Only a few statutes provide for laying of subsidiary legislation before Dewan Rakyat, see, *supra*, note 70.

system really is in practice in Malaysia.[73] He mentions that the main function of Parliament is to control the executive. This is a formal provision but he does not stop to investigate how effective, in practice, Parliamentary control over the executive is at the present moment and whether there is a case for devising some ways and means to strengthen the same.

The most valuable part of Mr. Nik Abdul Rashid's paper is towards the end where he proposes some modifications in the constitutional provisions regarding the composition of Parliament[74] so as to reflect the "true aspirations of our people". He seems to disapprove the present system of elections to Dewan Rakyat based as it is on a simple majority rule. The result is that many candidates securing as few as 25% of the total votes polled are elected while the candidates in opposition have secured 75% votes. The present system is "to the advantage of the party in power". According to the author: "In countries which adhere to true democratic principles, such as Australia, a candidate must secure an absolute majority of votes before he can be declared a winner."[75] He advocates a careful study of the Australian system, "for the merits of absolute majority outweigh its demerits." One of the advantages he sees in the Australian model is the growth of a real two-party system. At present, the parliamentary opposition is too ineffective. He advocates reform of the Senate. "The present set-up does not reflect the value of the democratic system of government", because the number of nominated members is larger than those indirectly elected.[76] He makes a very valuable suggestion, viz., to give some representation in the upper house to the parties defeated at the polls for the lower house. This reviewer cannot help but quote his stirring words on this point:

> "The voices of thousands of voters who voted for minority parties but whose representatives have lost by a slim majority can now be heard if that party can command a significant percentage sufficient to be accorded some recognition. After all, we believe in democracy. We adhere to democratic principles, and therefore we must see that democracy is at work. We need dissenting opinions, we need constructive criticism, we need to hear what the small men in the small parties have to say, for they are also citizens of the country."[77]

[73] *Constitution*, p. 153. See comments of Mrs. Puthucheary on this point, *supra*, note 53.

[74] *Constitution*, pp. 156–159.

[75] *Ibid.*, p. 157.

[76] *Ibid.*

[77] *Ibid.*, p. 158.

The author criticises gerrymandering of constituencies by the party in power. He has thus made some fundamental suggestions in his essay. This reviewer however feels that the time is not yet ripe for undertaking these reforms. At present, the most promising line of reform with a view to improve parliamentary supervision of the executive and thus strengthen the parliamentary system of government lies in improving the procedural aspects so as to make reality of the parliamentary system. For example, a member of the opposition may be appointed as the chairman of the public accounts committee; a committee may be created to supervise nationalised undertakings; provisions for laying of the delegated legislation may be improved and may be made universal; wider use of the select committee technique will enhance public participation in the process of legislation; a committee on subsidiary legislation may be constituted to oversee exercise of such a power by the executive. To effect these improvements, changes in attitudes, not the constitution, will be necessary.

The eighth paper in the book is on "Federalism in Malaysia – Changes in the The First Twenty Years" (pp. 163–191). It has been contributed by Tan Sri Datuk Mohd. Salleh bin Abas, at that time Solicitor-General of Malaysia, and presently, a Judge of the Federal Court. After a brief historical survey of the developments before the Constitution of 1957, the author surveys the federal portion of the Malaysian Constitution and points out that "the federal-state relationship and allocation of powers reveal a federal constitution with a central *bias*."[78] Matters of local importance remain with the states but "matters of the first level of governmental importance like external affairs, defence, internal security, finance, civil law and procedure, and the administration of justice, citizenship, trade, commerce and industry, are within the Federal competence."[79] The author makes the significant point that "the important sources of revenue" have been allocated to the Federal Government.[80] "Except for revenue from lands and forests, there are no significant sources for the States."[81] The Federal Government is the main taxing authority and controls the borrowing powers. Thus, according to the author, "the idea remains that the states would chiefly remain financially dependent on the Federal Government."[82] On the position of the States in the Malaysian Federation, the author makes the following significant observation:[83]

[78] *Ibid.*, p. 169.
[79] *Ibid.*, p. 169–170.
[80] *Ibid.*, p. 170.
[81] *Ibid.*, p. 170.
[82] *Ibid.*
[83] *Ibid.*, p. 172.

"From the foregoing it may be fair to say that States do not have much real power to guarantee their independence. Further if it is remembered that the preponderance of financial powers is with the Federal Government, such power is further diminished. The Federal Government's financial power can be used as a lever to require States to fall in line with Federal policies; the possibility of the abuse of this power should not be totally discounted."

The process of amendment of the Constitution is such that the States play no role therein. The Senate has co-equal powers with Dewan Rakyat and the Reid Commission had sought to provide in the Senate a guarantee of State Constitutions. Originally, the Senate had 22 Senators appointed by the States and 16 nominated by the Yang diPertuan Agong. But it did not turn out as planned, As happens in all federations, the Senators soon forget that they represent the States as such.[84] In Malaysia, as a majority of the Senators are now centrally nominated, there is no reason why the Senators should owe any loyalty to the States concerned. In 1964, the nominated Senators outnumbered the State Senators and with this qualitative change "(w)hatever potential the Senate had originally under the 1957 Constitution and later under the Malaysian modification was lost by this modification."[85]

The amendments of the Constitution during 1957–1962 show a bias towards the Federal Government.[86] In 1960, for the sake of co-ordination, the National Council for Local Government was constituted. "Here, through the organization, the Federal power to co-ordinate is effected through a national body: it is a further inroad into State matters."[87] Another similar body is the National Land Council.[88]

In 1963, Malaysia was formed. The forces operative at the time leading to the formation of Malaysia have been briefly mentioned by the author.[89] Somewhat special position was conceded to the new units (Sabah, Sarawak and Singapore) as compared with the older members of the Federation. But Article 150, the emergency provision, applies to the new states with the same force as to the older ones.

The author then specifically discusses central-state relationship in two areas — industrialisation and housing. The author rightly feels that

[84] *Ibid.*

[85] *Ibid.*, p. 176.

[86] *Ibid.*, p. 173.

[87] *Ibid.*

[88] *Art. 91.*

[89] *Constitution*, p. 174.

"Malaysia cannot afford economic parochialism in the States."[90] In a Federation, the prime necessity is "some flexible means of prohibiting the tendency of member States to go their own economic ways, to the community detriment." Industrialisation in Malaysia is a federal function. However, States do enjoy powers to create bodies for the development of urban and rural areas and, thus, State Economic Development Corporations have been established. Since 1976, the Federal Government has assumed "some control and supervision" over these bodies.[91] The area of housing is a State function. But because of a number of factors (the chief of which is money for which the main source is the Federal Government), a certain degree of control has shifted from the State to the Federal sphere in this area as well. This control for the present has no legal basis and the author suggests that because of at least two reasons (finance and to streamline development to cope with national objectives), Federal control ought to be given a legal basis.

In conclusion, the author points out that all the developments in the Federal area up to date have not departed from the originally expressed constitutional principle, viz., the Federation is to have a strong central government. He has produced enough evidence in his essay to show that over the years the Central Government has become more and more powerful vis-a-vis the States. The author appears to regard this as a welcome development. In his view: "Nation building demands an assimilation of all into one national identity."[92] However, he also pleads for "observance of the idea of federalism not only in letter but in spirit by the States" as well as discharge of its responsibilities "with goodwill and a sense of fairness to all" by the Central Government towards the States and the Rakyat. The essay is extremely informative and shows vividly the trend of evolution of the Malaysian federalism. However, this reviewer feels that, perhaps, the author would have rendered a positive service to the country had he suggested some constitutional measures with a view to improve the working and the status of the State Governments so that they can play a more meaningful role in the economic development of the country. If maintenance of a federal structure in the country is a desideratum, then it is necessary to evolve some machinery provisions to enable the States to play their legitimate role effectively.

To change a little the order of these essays for the purpose of this review, this reviewer would like to refer at this stage to essay no: 13 entitled "Financial Provisions of the Malaysian Constitution and their Operation in Practice" (pp. 304–327) by Tan Sri Dato' Abdullah bin Ayub, formerly

[90] *Ibid.*, p. 180.
[91] *Ibid.*, p. 181.
[92] *Ibid.*, p. 188.

Secretary-General, Ministry of Finance, Malaysia and now Chief Secretary to Government, Malaysia. This essay goes along with the essay on Malaysian Federalism as it throws some more light on the financial relationship between the Centre and the States – a matter touched upon by the author in the essay on Malaysian Federalism, but discussed somewhat more elaborately in the present essay. In the opinion of this reviewer, financial relationship is the main determinant of the character of a federation. What Tan Sri Salleh Abas has said in his essay about the financial weaknesses of the States comes out much more vividly in this essay on "Financial Provisions". After reviewing the financial provisions of the Malaysian Constitution, the author rightly states:

> "The Constitution's financial provisions have indeed made the Malaysian Federation one of the strongest central governments from the financial point of view. If comparisons were made between Malaysia's financial arrangements with those of other federal systems such as those of the United States, Canada and Australia, it will be noted that the Malaysian financial system is a very strongly centralised one."[93]

The Centre has power to collect all major revenues and taxes. All major areas of expenditure are to be borne by the Federal Government; such expensive subjects as health and education are paid for by the Centre. The Government has flexibility in the matter of raising revenue and defraying expenditure and, therefore, is "in a position to be able to build up surpluses if it wants to, while it is not so with State Governments."[94] "These points", states the author, "are mentioned only to indicate the potential that the Federal Government has in exerting its central authority which is liberally provided for under the Constitution."[95]

The sources of revenue open to the States are not many and they are "relatively insignificant." In 1976, the total state revenue from all state resources amounted to about $797 million as compared to $6,157 million raised by the Central Government. The biggest revenue source for the States is from "lands, mines and forests." Not all States, however, have ample land endowments or mines. Land is agricultural and under-developed. Revenue from this source is not large. Revenue from entertainments is sizeable to the more developed States but not in States where entertainments are controlled for religious reasons. There is imbalance among the States because of disparity of resources. Production of petroleum has boosted the revenues of some States where petroleum is produced.

The Central Government has sought to augment the State resources from time to time by providing additional financial resources by way of

[93] *Ibid.*, p. 306.

[94] *Ibid.*

[95] *Ibid.*

grants and allocation of development funds. This is because the Centre realises that the States need more funds to be able to undertake their own projects and programmes. Some portion of the revenue derived from taxation of minerals is allotted to the States through central legislation. The Centre has also revised grants to the States as provided for under Article 109, e.g., Capitation Grant and Road Grants. But figures show that the increase under these two heads has only been marginal, e.g., Capitation Grants have been increased from $61.2 million to $72 million per year. The grant is paid in such a way that the States with smaller populations get more relatively than those with larger populations. The Road Grants have increased from $4,600 per mile of state roads per year to $6,200. Another new grant introduced by the Centre in 1976 is the "Revenue Growth Grant". This grant is based on the premise that the State Governments should also benefit from the growth of Federal Government revenue. This grant is payable to the States if the Federal revenue increases by more than 10% in a year over the previous year. The maximum amount available is $50 million. The formula to distribute this sum amongst the States gives a weightage to smaller States with populations of less than 500,000.

Over the years, the State Budgets have been experiencing increasing financial strains. Most States have been facing deficits year after year. The author lists the reasons which are causing these strains. According to him, "It is likely that this strain will continue unless further additional grants are made to the States."[96] Of the numerous reasons responsible for this state of affairs, one is the inelasticity of state government revenues; other factors are inflation and increase in state expenditure due to federal policies. The limited financial resources of the State Governments and their inadequate capacity have led to a greater Federal Government involvement in the development process on behalf of the States. But, the Federal Government itself has become increasingly constrained by "the lack of effective implementation capacity."[97]

The author has given a very cursory treatment to the National Finance Council which is concerned with "the financial relationships and problems between the State Governments and the Central Government." According to him, it is evident that, in the last few years, the National Finance Council has become "more effective" in persuading the Federal Government to provide more funds to the States.

Although, over the years, the Central Government has devoted some attention to transferring more funds to the States, the picture that emerges from this very illuminating essay is that if the States are to play a more meaningful role as instruments of administration, if too much central-

[96] *Ibid.*, p. 311.

[97] *Ibid.*, p. 314.

isation of power is to be avoided, and if it is desired to maintain a proper federal balance, the financial resources of the States need to be improved and some of the transfer of revenue to the States has to be freed from central discretion. Today, apart from the small amounts given to the States in the form of grants under Article 109, the rest of the flow of the revenue from the Centre to the States lies in the Centre's discretion.

An interesting sidelight is furnished by the author on parliamentary control over finances.[98] The author points out that "the annual budget in many countries with a parliamentary system of government is subject to severe and critical debate." But this is not so in Malaysia where the budgetary documents "are subject to limited and rather casual scrutiny in Parliament." All around, there is a sense of complacency about the budget. The author makes the following interesting observation in this connection:[99]

> "Whereas the budget debates in other countries have often been the focal point for the discussion of economic policy, over which governments have fought and lost, or risen and fallen, it has been different in Malaysia. This is due to the strong Central Government and the continued political stability, which has also been buttressed by the continuation of basically the same political parties in power. The Malaysian budget has therefore never really provided the anxious moments and strains that have often been experienced by other Governments elsewhere."

The author however makes no suggestion as to what procedural changes, if any, may be effected in parliamentary procedures to achieve a more effective and meaningful debate on the budget. The Public Accounts Committee is also not able to play its proper role in making recommendations to improve parliamentary supervision and public accountability of funds.[99a] According to the author: "The role of the Auditor-General is becoming more and more important in view of the increasing size of the budget from year to year and the decision of Government to venture into the commercial and industrial sectors in order to achieve the objectives of the New Economic Policy. Hundreds of millions of dollars of public funds have been made available to the statutory corporations in order to achieve these objectives, but whether these funds are properly and economically utilized is a matter of concern to every one and it is, therefore, the duty of the Auditor-General to report on such matters with greater dispatch."[100]

[98] *Ibid.*, p. 320.

[99] *Ibid.*, p. 321–322.

[99a] Also note the similar views expressed by Mrs. M. Puthucheary, *supra*, pp. 54–55.

[100] *Constitution*, p. 323.

Accordingly, the author suggests some modifications in the system of auditing by the Auditor-General so that the general level of efficiency in financial management can be improved.

But after having pointed out the present-day defects in the system of parliamentary control of the budget and that of the Federal grants to the States, the author towards the end of his paper himself shows a kind of complecency when he observes that "Malaysia has a fine constitutional framework"[101] and that the original constitutional provisions "have served Malaysia well except that the finances of some of the States have not performed as well as might be expected." Perhaps, the time may appear to have come, after a lapse of 20 years of the working of the Constitution of Malaysia, to have a second look at the financial provisions to see what adjustments can be made therein so that the States may be enable to play a more meaningful role in the Malaysian Federation. If the objective is to maintain a federal structure in spirit, then it appears to be a desideratum that the States be strengthened financially, economically, politically, and administratively and that some financial autonomy be granted to them. This is possible only by giving to the States some additional powers of taxation which they can share with their local governments, and also to make the system of Federal grants to the States less dependent on the discretion of the Central Government. Perhaps there is need to have some autonomous machinery to objectively assess the needs of the States according to some national standards and through which transfer of funds may be made from the Centre to the States in an objective manner depending upon the relative needs of the States. Two models are available for this purpose one, the Commonwealth Grants Commission in Australia and, two, the Finance Commission in India. It is quite clear that, in its present form, the National Finance Council does not play the role which is played by the respective Commissions in India and Australia.[101a]

In his essay entitled "Problems of Harmonising the Laws in the Malaysian Federation", (pp. 192–207), Tan Sri D.V.W. Good, formerly Law Revision Commissioner of Malaysia, narrates the background to the enactment of the Revision of Laws Act in 1968. He points out how the laws of the various States were inaccessible and not available to the public. Law had become very complicated in the country because of several developments, as for example, transformation from the colonial to the Merdeka era, formation of the Federation of Malaya in 1957, formation of

[101] *Ibid.*, p. 324.

[101a] For a detailed discussion of the scheme of Centre-State Financial Relationship in India as well as Australia see, M.P. Jain, Central-State Fiscal Relationship in India (1950–1967): A study of an Aspect of Indian Federalism, 16 *Jarbuch Des Offentlichen Rechts Der Gegenwart*, 465–511 (1968).

the Malaysian Federation in 1963 and the separation of Singapore in 1967, etc. For 'harmonising' of laws (the term used by the author as distinguished from 'consolidation') the Revision of Laws Act established a Law Revision Committee to be appointed by the Lord President of the Federal Court. Its function is to 'vet' the amendments to the laws made by the Commissioner in the course of revision, and to certify that they are *intra vires* the powers conferred upon him by the Revision of Laws Act. Accompanying each revised law, the Commissioner sends to the Committee:

(i) a list of the amendments which have been made from time to time by law, with references to the amending laws and the dates on which they came into force; and

(ii) a list of the amendments made by himself under the Revision of Laws Act, quoting his authority for making each amendment.[102]

The Act envisages law revision as a 'continuing process' to keep pace with the tempo of legislative changes in a fast developing country. This machinery avoids cluttering up parliamentary business with a vast workload of statute law revision bills. On the whole, this essay forms fascinating reading for a student of Malaysian Legal History and Law Reform.

Dr. Yaacob Hussain Merican, Advocate and Solicitor, has contributed the paper on "Developments in the Law concerning Elections in Malaysia" (pp. 208–230). He describes the main features of the election law prevailing in Malaysia.[103] In addition, he also gives in this essay a description of the five general elections held in 1955, 1959, 1964, 1969 and 1974 in the country since Merdeka.[104] According to the author, there are four main requisites for a free election in any country:– an independent judiciary; an impartial administration to run the elections; developed system of political parties, and general acceptance (both by the politicians and by the general public) of the 'rules of the game.'[105] All these various requisites can be located in varying degrees in Malaysia. The judiciary in Malaysia enjoys relative independence *vis-a-vis* the legislative and the executive branches of the government. Of course, there have been instances when the Executive has modified or negatived court decisions not in its favour by using its legislative majorities.[106] The author mentions two recent cases in this connection, namely, the *Government of Malaysia*

[102] *Constitution* p. 200.

[103] *Ibid.*, pp. 208–210.

[104] *Ibid.*, pp. 210–220.

[105] *Ibid.*, p. 221. The author has borrowed this from Mackenzie: see his book, *Free Elections* (1958).

[106] *Ibid.*, p. 222.

v. Zainal bin Hashim[107] and *Loh Kooi Choon* v. *Government of Malaysia*.[108] The author does not seem to approve this attitude of the government as "they do, however, incur the suspicion of the lay public that the judiciary is simply another organ of the Executive and has invariably to toe the government's line."[109]

In the Election Commission, an "honest, competent and non-partisan body has been established to run the elections but its independence is qualified by the powers available to the Executive."[110] In 1962, for example, the power to delimit parliamentary constituencies was transferred from the Commission to Parliament. The most important principle to delimit the constituencies written down into the 13th Schedule to the Constitution is that which permits a weightage of 2:1 in favour of the rural constituencies. The author criticises these amendments made to the Constitution in 1962.

As to political parties, the Constitution is silent on this matter. But political parties are essential for the proper functioning of a democratic government. There are approximately 27 political parties in the country. According to the Societies Act, 1966, each political party is to get itself registered and thus fulfil certain conditions laid down in the law. According to the author, at present, almost all the major political parties are formed along racial lines. He however advocates abolition of the racial parties.[111] He then states, referring to the fourth component of free elections, that the Malaysian politicians and the general public, on the whole, have, to a certain extent, adhered to the 'rules of the game' of elections. Though there have been no dirty tricks, there have been a few incursions against the rules which have had 'appalling' consequences. On this point, he makes the following pithy observation:

"The 13th May riots of 1969 resulted, in a way, from the reluctance of voters of defeated candidates to accept the adverse verdict of the election against them. The impression is given that the recent imposition of Federal rule in Kelantan is said to have been the result of the reluctance of the ruling national coalition party to accept the fact that it cannot hope to wrest power from the Party Islam through a fair and clean general election."[112]

[107] [1977] 2 M.L.J. 254.
[108] [1977] M.L.J. 187.
[109] *Ibid.*, p. 224.
[110] *Ibid.*, p. 224.
[111] *Ibid.*, p. 226.
[112] *Ibid.*, p. 227.

Like Nik Rashid,[113] Dr. Yaakob Merican also criticises the system of simple plurality. Despite its simplicity, the system has one serious disadvantage from the point of view of the purists, namely, that it is liable to produce an overall result which does not accurately reflect the voting strength of the various parties contesting the election. The one advantage of the system is that it usually produces a government with an adequate working majority in Parliament. He points out that the government in 1969 was elected on the votes of a minority of the total electorate.[114] The author comes to the conclusion, after weighing arguments for and against the system of functional representation, that on practical grounds such a system is as impracticable as it is undesirable in principle.[115]

Tun Mohd. Suffian, Lord President of the Federal Court, has contributed an essay on "The Judiciary During the First Twenty Years of Independence" (pp. 231–262). He very neatly traces the several developments in regard to the Judiciary during the first twenty years of Merdeka. First is the "formal securing of the independence of the Judiciary by the Merdeka Constitution." The second development is the abolition of the office of the Minister of Justice in 1970. Tun Suffian does not approve of this step and suggests the appointment of a Minister of Justice to look after the administrative needs of the courts so that the Lord President and the Chief Justices of the two High Courts are freed from the time consuming non-judicial functions. On this point, he observes as follows:–

> "The present arrangement whereby the Prime Minister is responsible in Cabinet and Parliament for the machinery of justice, while splendid in concept, does not work well in practice. He and his staff have a thousand and one problems, political and otherwise, all urgent, and while they have the power to implement suggestions emanating from the judiciary they do not have the time to give much thought to them."[116]

He also regards as 'undesirable' the prevailing practice of the Minister of Law being assigned by the Government the function of answering parliamentary questions on the courts.[117] The Attorney-General is also the Minister of Law and the Attorney-General discharges functions as the Chief Prosecutor under several laws. These functions are of a non-political nature. This raises the crucial question whether the two offices should be

[113] *Supra*, note 74.

[114] *Ibid.*, p. 227.

[115] *Ibid.*, at 228.

[116] *Ibid.*, pp. 236–237.

[117] *Ibid.*, p. 237.

held by one person who is also a member of the Cabinet or whether the two offices ought to be delinked. While Tun Suffian does not refer to this matter, the reviewer feels that it is an important matter deserving serious consideration in the interests of the maintenance of the rule of law.

The third development in regard to the judiciary is that today, unlike before Independence, the Judges have power (and indeed the duty) to interpret the Constitution. In this connection, he mentions that Article 128(2) causes confusion at present. The power to interpret the Constitution vests in all courts and not in the Federal Court alone.[118] The fourth important development is that unlike before Independence, now the courts have power to declare laws enacted by the legislature as void.[119] The fifth important development is the "complete localization" of the Judiciary as it is manned by Malaysians alone. The sixth development is that some increase has taken place in the number of direct appointments from practising members of the local Bar. Tun Suffian points out the difficulties in the way of finding a private practitioner who is willing to be elevated to the Bench. Two reasons appear to be responsible for this situation — financial and the constraints of a Judge's life.

The sixth feature of the Judiciary mentioned by Tun Suffian is that the Judiciary has remained completely unpoliticized.[120] The seventh development is the "increasing professionalism" of subordinate courts, and this has led to the increase in their jurisdiction. The workload of all courts at every level has increased over the past twenty years. There has also been an increase in the responsibility of the Federal Court. The tenth development in the area of the Judiciary is the curtailment of appeals to the Privy Council with effect from 1 January 1978. This has resulted in the imposition of greater responsibility on the Federal Court. The present-day Judiciary in Malaysia is "more federal and less state."[121] Another significant development is the establishment of an independent Judicial and Legal Service Commission to appoint, confirm, promote, transfer and discipline officers of the Judicial and Legal Service. Lastly, Tun Suffian raises the question of use of national language in the courts and expresses his view that "the use of the national language cannot be rushed in a court of law without risk of doing injustice. Courts are not a political forum."[122]

[118] *Constitution*, p. 237.
[119] *Ibid.*, p. 238.
[120] *Ibid.*, p. 241.
[121] *Ibid.*, pp. 249–251.
[122] *Ibid.*, p. 257.

In his essay on the "Public Service and Public Servants in Malaysia" (pp. 263–303), Mr. V.S. Winslow, Senior Lecturer, University of Singapore, seeks to cover exhaustively the major developments in law relating to the public services during 1957–1977. Malaysia has at present eight categories of 'public services' which fall within the jurisdiction of six service commissions. The author has taken note of the changes made over time in the scope of jurisdiction of the most important of these commissions, viz., the Public Services Commission, which has the lion's share of the services and of the public servants within its jurisdiction. The author however has said nothing about the actual working of any of these commissions. It needs to be evaluated, perhaps, whether the ideal set forth by the Reid Commission in the creation of these commissions has been put into practice, has it been achieved?

The public servant in Malaysia holds office 'at pleasure'. Originally, the Constitution did not expressly state this principle, but it was implied.[123] Anyway, in 1960, the Constitution was amended to make the position clear and to 'remove any doubt' on the point.[124] The author raises the question whether the 'pleasure' doctrine can be modified by a statute or contract? This question has not been finally resolved. The author seems to perfer the view expressed by MacIntyre F.J. in *Haji Ariffin* to the effect that the 'pleasure' doctrine cannot be curtailed either by law or by contract.[125] The right to dismiss a public servant at pleasure is based on public policy i.e., the state should not be hampered in dismissing a servant whose continuance in office is regarded as detrimental to the best interests of the state and its good government.

The author then surveys the relevant case-law to examine the legal position of the civil servant in Malaysia. This survey is fairly adequate. In Malaysia, the position appears to be that pension is regarded as a "privilege which a public servant only becomes 'eligible for' and not 'entitled to' ". This position appears to be quite different from that prevailing in India where 'pension' is regarded as a right accruing to a civil servant.[126]

The fourteenth essay in the book under review is entitled "Emergency Powers in Malaysia" (pp. 328–368) and is contributed by Professor S. Jayakumar, Dean, Faculty of Law, University of Singapore. Unfortunately, Malaysia has been under long spells of emergency since Merdeka. The three relevant Articles in the Constitution are 149, 150 and 151. There has been an 'impressive body of case-law' settling many issues of interpretation of these Articles. A body of legislation and subsidiary

[123] *Ibid.*, p. 276.

[124] *Ibid.*

[125] *Haji Ariffin* v. *Government of Pahang*, [1969] 1 M.L.J. 6, 18.

[126] *State of Punjab* v. *Iqbal Singh*, A.I.R. 1976 S.C. 667.

legislation has been enacted pursuant to these Articles representing Government's interpretation of these provisions. A number of amendments have also taken place in these three Articles since 1957. The discussion by the author of the case-law on the emergency provisions is very exhaustive and methodical. There has been so much discussion on the emergency in the country that not much need be said here in this regard. As is well known, the latest judicial pronouncement by the Privy Council, viz., in *Teh Cheng Poh* v. *Public Prosecutor*[126a] has changed the concept of the executive power as regards the making of regulations under an Ordinance. The Privy Council decision has slightly shifted the centre of power during an emergency in favour of Parliament. The author could not have anticipated this development in judicial thinking which came nearly a year after the completion by him of his paper.

The last essay in the book is on "The Process of Constitutional Change in Malaysia" (pp. 369–412) by Mr. H.P. Lee, Lecturer in Constitutional Law in Monash University and one of editors of the book. Here the author discusses the process of Constitutional Amendment in Malaysia. Mr. Lee is not new to the subject as he has written on this topic extensively since he submitted his dissertation on the same topic for the LL.M. degree of the University of Malaya in 1975. Mr. Lee's paper is very thoughtful and raises several pertinent questions.

The author points out that the Constitution of Malaysia "is still comparatively 'young' but since 1957 it has been amended on no less than twenty-three occasions." In the process, the Constitution has been altered extensively in both "major and minor aspects". The Reid Commission had sought to devise a formula for amending the Constitution so that it would be neither "too difficult as to produce frustration nor too easy as to weaken seriously the safeguards of the Constitution."[127] The *Kelantan case* lucidly reveals the powers of the States (or rather their lack of powers). "In the light of *Kelantan* case",[128] the author concludes that "the States, with the exception of Sabah and Sarawak, have no significant role to play in the amendment process."[129] This negatives the Federal principle to some extent. The Reid Commission had thought that the Senate would provide "a sufficient safeguard for the States *because the majority of members* of the Senate will represent the States . . ." But with the structural changes in the House, the government nominated members

[126a] [1979] 1 M.L.J. 50.

[127] *Ibid.*, p. 370.

[128] *The Government of the State of Kelantan* v. *The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*, [1963] M.L.J. 355.

[129] Constitution, p. 376.

have come to over-shadow the state representatives.[130] The author feels that "the time has come to consider the relevance of the Senate in the legislative process." The Upper House has come to be looked upon as a 'rubber stamping institution."[130a]

The ruling party has a solid majority in the House and, therefore, the Senate provides no effective safeguard in the process of constitutional amendment. It is inconceivable that any amendment sponsored by the government would be defeated in the Senate. Mr. Lee points out that the 'major impact' of the Constitution (Amendment) Act, 1971 is "the enhancement of the power and role of the Conference of Rulers in the amendment process" as the consent of the Conference is required for the amendment of various constitutional provisions. The Act of 1971 can justifiably be described "as an attempt at entrenchment".[131] The author reaches the conclusion that the amending process "has metamorphosed through various constitutional amendments to a form which is tangential to the aims of the Reid Commission."[132] Constitutional amendments have been pushed through Parliament hastily and without much public discussion.[133] A number of amendments have been made with retrospective effect. In *Iznan bin Osman* v. *Government of Malaysia*,[134] the Privy Council characterised such an amendment as "a step of a most unusual character" as it purported to deprive a person of "a vested right" affirmed by the courts and depriving a litigant of "a right of property by retrospective legislation passed *pendente lite.*" The author detects "some undertones of disquiet" in the Privy Council's observations in *Iznan* but in *Loh Kooi Choon* v. *Government of Malaysia*,[135] the Federal Court has given "its stamp of approval to retrospective constitutional amendments". The Federal Court has also rejected an argument based on the Indian cases on constitutional amending process that there was an implied limitation in Malaysia on the power to amend the Constitution.[136] Thus, the courts have refused to assert any control over the amending power.

[130] *Ibid.*, p. 377.

[130a] Also see *supra*, notes 59, 60 and 61 for Nik Abdul Rashid's comments on the Senate.

[131] *Ibid.*, p. 382.

[132] *Ibid.*, p. 385.

[133] *Ibid.*, pp. 385–386.

[134] [1977] 2 M.L.J. 1.

[135] [1977] 2 M.L.J. 187.

[136] Jain, *Indian Constitutional Law*, 704–715 (1978).

On the whole, the amending process in Malaysia is such that there is virtually no control over it except the good sense of the government itself. Whether such a situation is good or bad can be a matter of intense and prolonged debate. Herman Finer regarded the amending clause as so fundamental to a constitution that he was tempted to call it the constitution itself for the power to amend is the power to "deconstitute and reconstitute."[137] It remains a question mark how Finer would have viewed the amending process in Malaysia.

This reviewer would once again commend the thoughtful initiative of the editors in bringing out this collection of essays to commemorate the completion of twenty years of the Malaysian Constitution. The Constitution of the country is the fundamental law and conditions the entire legislative and administrative process. It is therefore very important that expository books on constitutional law do appear from time to time assessing the growing trends therein. This is a notable addition to the literature on Malaysian Constitution. Besides, a student of comparative constitutional law will find a lot of food for thought in this book. The essays in the book under review do sum up the significant developments in the area of the Malaysian Constitutional Law over the last twenty years. This period has been one of difficulty for the country and this has vitally affected the growth of the Constitution and as a result thereof inherent checks and balances within the Constitution have been diluted to some extent. Under more propitious circumstances, the Constitution might have developed differently. There is enough in these essays to ponder over by a student of constitutional law. Without in any way detracting from the great merit and value of the present book, this reviewer would have however preferred a somewhat more evaluative approach on the part of some of the essay writers. As it is, most of the essays adopt a descriptive approach. Secondly, the book ignores some significant aspects of the constitutional process in the country. For example, nothing has been said on the constitutional process in the States. Malaysia being a federation, the State Governments constitute an integral part of the country's constitutional process. An essay on the local governments would have been very welcome as they constitute the 'grass root democracy'. This reviewer keenly feels the absence of an evaluative essay on Judicial Review which plays such a key role in the evolution of a written Constitution. Last, but not least, a separate essay on the Genesis of the making of the Constitution – the forces operating at the time, the attitudes of the leading constitution-makers would have been very welcome because, in the opinion of this reviewer, this area remains unexplored so far.

[137] *The Theory and Practice of Modern Government*, 127 (1962).

Soon, it will be time to celebrate the Silver Jubilee of the Constitution and maybe another collection of essays is envisaged to commemorate that auspicious occasion, and this reviewer hopes that the editors undertaking that task will consider these suggestions of his for whatever they are worth.

This reviewer once again congratulates the essay writers, the editors and the publishers of the book for placing this valuable and informative collection of essays on the Malaysian Constitution in the hands of the students of constitutional law.

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AN INTRODUCTION TO THE MALAYSIAN LEGAL SYSTEM
Second Edition
By Wu Min Aun

[Kuala Lumpur: Heinemann Educational Books (Asia) Ltd., 1978; 138pp. Paperback $5.50]

This is the second edition of the book first issued in 1975 and reviewed in 1975 JMCL 378. The author states that he has made minor corrections to the book and also made a number of additions to take note of recent legislation and to deal with several new topics. Unfortunately there have been significant changes to the law since 1st February 1977 and the book is to that extent already dated.

The author has repeated the statement in the first edition that Islam was brought to Malaysia from India rather than from Arab countries. No authority is given for this statement, which cannot stand in the light of modern research. At page 3 of the book he refers to a number of materials on Malay law but omits to mention Liaw Yock Fang's edition of the Undang-Undang Melaka, 1976. He quotes Hugh Clifford at p. 9 but does not give the source of the quotation.

The author still does not appreciate that the Civil Law Act, 1956 (Act 67) did not repeal the Civil Law Ordinance 1956 – it merely superseded it. On the extent of the reception of the English law in Peninsular Malaysia the author seems to favour the views of Professor Sheridan and Professor Bartholomew but these views were expressed before the revision of the Civil Law Act, 1956 and needs to be reconsidered in the light of such revision. The author does not explain why what was said by Smith J. in *Mokhtar* v. *Arumugam* (1959) M.L.J. 232 was a *dictum*.

At page 25 the author seems to be too much influenced by Indian decisions when he states that "if the case before him is without precedent, then he (the judge) decides according to justice, equity and good conscience, thereby laying down an original precedent.".

The important case of *Lee Kee Chong* v. *Empat Nombor Ekor (N.S.) Sdn. & others* (1976) 2 M.L.J. 93 is ignored by the author. It would be interesting to know the author's views on this case.

The author relies on the Singapore case of Re *Lee Gee Chong deceased* (1965) 1 M.L.J. 102 to state that the decision in *Young* v. *British Aeroplane Co. Ltd* has been reaffirmed in Malaysia. Perhaps he feels that *Henry* v. *De Cruz* (1949) M.L.J. Supp. 25, a Kuala Lumpur decision, is not a Malaysian case.