MONARCHY AND THE PREROGATIVE IN MALAYSIA

This article examines and attempts to refute the proposition that prerogatives at common law exist in Malaysia by virtue of devolution from the Crown onto the Yang di-Pertuan Agong. It goes on to consider the possibility of prerogatives existing in Malaysia by virtue of the vesting of executive power under the Constitution, drawing a distinction in this regard between external and domestic prerogatives, and concludes with an analysis of the problem of the royal assent which was resolved by the constitutional crisis of 1983/4.

"They are hornbills, we are sparrows. How can we possibly fly in the same flock" (*Malay proverb*).

I. INTRODUCTION

"PREROGATIVE" is one of the most controversial and complex notions in the legal vocabulary. It is a notion of extreme vagueness, giving ample scope to multifarious opinions. It is also a notion which has placed the lawyer, with all his learning and logic-chopping, at the centre of great ideological struggles; the constitutional struggles in seventeenth century England concerned, precisely, the prerogative rights of the King, a matter of acutely difficult legal argument.[1] In modern times the prerogative has been considerably reduced by parliamentary intervention, but it still fulfils an important role; indeed in many ways the British constitution would be unworkable without it.[2] This article attempts to assess whether the prerogative exists in Malaysia, and if so in what form.[3] Although Malaysia is unique in that it has retained the concept of monarchy since independence, albeit a rather different concept of monarchy from that prevailing in Britain, the matters discussed in this article may be of some interest to those countries which have a Constitutional Head of State other than the Queen, even though such Head of State cannot be described as a monarch. The problem of the prerogative has been extensively discussed in relation to countries where the Queen is Head of State, notably Australia,[4] but has received little attention in other contexts.[5]

1 See Keir and Lawson, *Cases in Constitutional Law,* (6th ed., 1979), pp. 69-74; Heuston, *Essays in Constitutional Law,* (2nd ed., 1964), Ch. 3; Evans and Jack, *Sources of English Legal and Constitutional History,* (1984), Ch. 16. The problems do not go away; see *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615; *Laker Airways Ltd.* v. *Department of Trade* [1977] 2 W.L.R. 234.

2 See de Smith, *Constitutional and Administrative Law,* (5th ed., 1985), Ch. 6.

3 For literature on this question see below, nn. 6, 15, and Hickling, "The Prerogative in Malaysia" (1975) 17 Mal. L.R. 207; Jayakumar, "Emergency Powers in Malaysia: Can the Yang di-Pertuan Agong Act in his Personal Discretion and Capacity?" (1976) 18 Mal. L.R. 149; Sheridan & Groves, *The Constitution of Malaysia,* (3rd ed., 1979), pp. 131-2.

4 See Winterton, *Parliament, the Executive and the Governor-General,* (1983), Chs. 3, 6; Cooray, "Australian Constitutional Convulsions of 1975" (1979) 21 Mal. L.R. 325, (1980) 22 Mal. L.R. 107; and the now vast literature referred to especially in Winterton.

5 See however Ghai & McAuslan, *Public Law and Political Change in Kenya,* (1970), pp. 254-8. The theory discussed in this article that the prerogative

Before we embark on the discussion it is necessary to trace briefly the development of the monarchy in Malaysia.[6]

Originally, during the Malaccan period, there were nine sultanates in Malaya (Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu).[7] The Sultans each held absolute power, subject only to the traditional tenets of Malay custom and the Islamic religion.[8] During the period of the British intervention in Malaya the sultanates were retained as a means of ensuring the acceptance of *de facto* British rule.[9] The Sultans entered into treaties with Britain to accept the advice of the British resident except in matters of Malay custom and the Islamic religion.[10] In the course of time Negri Sembilan, Pahang, Perak and Selangor were federated as the "Federated Malay States". An attempted union of all the states in 1948 failed.[11] When independence was finally granted in 1957, a Constitution was drafted on the basis of the recommendations of a Commission under the chairmanship of Lord Reid.[12] This Constitution, "a masterpiece of compromise",[13] preserved, and indeed enhanced, the monarchy in Malaysia in a number of ways:

(i) Each Sultan remained Head of State, with roughly the same powers and functions in relation to his State as the Yang di-Pertuan Agong had in relation to the Federation.[14]

(ii) The office of Yang di-Pertuan Agong, or Supreme Head of the Federation, was created, the incumbent for five years being elected

devolved onto the Yang di-Pertuan Agong of Malaysia on independence has not been canvassed in relation to any other Head of State of a former British possession. In Uganda, Tanzania and Kenya it seems that the prerogative *was* continued in force, but by constitutional or statutory provision: see Kiapi, "Constitutional checks on Presidential Powers in East Africa" (1975) 9 J.C.P.S. 28.

6 For general discussion of the history of monarchy in Malaysia see Milner, *Kerajaan: Malay Political Culture on the Eye of Colonial Rule,* (1982), Muzaffar, *Protector),* Aliran, (1979), Gullick, *Indigenous Political Systems of Western Malaya,* (1965); Heine-Geldern, *Conceptions of State and Kingship in Southeast Asia* (Cornell University Southeast Asia Program, Data Paper No. 18), (1956). See also the discussion of Islamic law in South-East Asia in Hooker, *A Concise Legal History of South-East Asia,* (1978), Ch. 2, especially pp. 48-68; and Y.A.M. Raja Azlan Shah, "The Role of Constitutional Rulers: A Malaysian Perspective for the Laity" [1982] J.M.C.L. 1; the same essay appears as Ch. 5 of Trindade & Lee ed., *The Constitutional of Malaysia: Further Perspectives and Developments* (1986). I am grateful to Dr. H.P. Lee for an early sight of Sultan Azlan Shah's essay.

7 In Perlis the Ruler is called the Raja, and in Negri Sembilan the Yang di-Pertuan Besar, an office on which the modern office of Yang di-Pertuan Agong is modelled.

8 See Muzaffar, above, note 6, Chs. 1, 2; and Hooker, *ibid.,* pp. 50-5. The influence of Islam may have modified the absoluteness of the Malay concept of sovereignty.

9 See Sadka, *The Protected Malay States 1874-1895,* (1968); Hooker, above n. 6, pp. 138-41.

10 See generally Maxwell and Gibson, *Treaties and Engagements Affecting the Malay States and Borneo, J.* Truscott, London, (1924).

11 See Funston, *Malay Politics in Malaysia,* (1982), pp. 77-8; Malayan Union Order in Council, S.I. 463/1946.

12 See *Report of the Federation of Malaya Constitutional Commission 1957,* London H.M.S.O. Colonial No. 330.

13 Y.A.M. Raja Azlan Shah, above, note 6.

14 Sec Federal Constitution, Pts. V, VI, especially art. 71.

by the Conference of Rulers from among its members by a complex procedure set out in the Constitution.[15]

(iii) The Conference of Rulers was created with the function of choosing the Yang di-Pertuan Agong, and certain other important functions mentioned later,[16] notably the power to veto certain laws, including certain constitutional amendments.[17]

(iv) The Yang di-Pertuan Agong was seen as a constitutional ruler who would act on the advice of the Government and assent to bills passed by the Dewan Rakyat and the Dewan Negara (lower and upper Houses of Parliament).[18] He was a "visible symbol of unity in a remarkably diverse nation."[19]

As is explained later,[20] the Rulers in certain cases have exceeded their constitutional role and this has led to what is almost a new constitutional settlement in Malaysia after a prolonged crisis which lasted from July 1983 to February 1984.

It is also important to bear in mind that Malaysia comprises not just the Malay States, Federated and Unfederated, but also the former Straits Settlements territories of Penang and Malacca, and the territories formerly under British rule now known as Sabah and Sarawak.[21] These last four states have Yang di-Pertuan Negeri or Governors who perform functions similar to the Malay Rulers but are not members of the Conference of Rulers for certain purposes.[22]

II. THE DEVOLUTION THEORY

The view that the prerogative exists in Malaysia has been powerfully argued by Prof. R.H. Hickling.[23] The theory which he puts forward depends on two separate lines of argument.

He distinguishes the position prior to independence in the territories directly governed by the Crown from the position in the Malay states:

> … in those overseas territories, such as Penang, Malacca, Sarawak and what is now Sabah, over which the Crown had direct government, it may properly be affirmed that prerogative powers in those

15 Third Schedule: see also Trindade, "The Constitutional Position of the Yang di-Pertuan Agong" in *The Constitution of Malaysia, Its Development 1957-1977,* (Suffian, Lee and Trindade ed. 1978), pp. 103-6; Trindade and Jayakumar, "The Supreme Head of the Malaysian Federation" (1964) 6 Mal. L.R. 280, 282-6.

16 Below, Pt. VII.

17 *Ibid.;* and see the Federal Constitution, arts. 38, 159. Hereafter all references to constitutional provisions are references to the Federal Constitution.

18 Arts. 40, 66.

19 Groves, *The Constitution of Malaysia,* (1964), p. 42.

20 Below, Pt. VII.

21 These latter states, with Singapore joined the Federation to form Malaysia in 1963; see Sheridan and Groves, above n. 3, pp. 2-4; Malaysia Act, No. 26 of 1963 (F.M.). Singapore left the Federation in 1965.

22 See arts. 38, 70, and 71; Pt. XIIA; and Fifth Schedule, para. 7, which provides that the Governors shall not be members of the Conference for the purposes of proceedings relating to the election or removal of the Yang di-Pertuan Agong or the election of the Timbalan Yang di-Pertuan Agong (Deputy), or relating solely to the privileges, position, honours and dignities of the Rulers or religious acts, observancies or ceremonies.

23 Above note 3.

> territories were at least as extensive as those in England.... In relation to the powers of the Crown both at large and as manifest through its representative in a territory, therefore, it can be asserted that they existed, and they duly devolved on independence upon the appropriate successor authority.[24]

In relation to the Malay States Hickling argues that the prerogative, as part of the common law, applied by virtue of section 3 of the Civil Law Ordinance 1956, which received the common law into the Federation of Malaya,[25] and on independence was continued in force by virtue of article 162(1)[26] of the Constitution which continued existing laws in force. He concludes:

> Given an inheritance of the common law of England, therefore, coupled with a transfer of power on independence, it is logical to assume that on 31 August, 1957 there was a transfer from the Crown of both major and minor prerogatives: and the transferee of such prerogative must have been, at the federal level, the Yang di-Pertuan Agong and, to such extent, as they affected the Malay States, the Malay Rulers.[27]

Thus there vested in the Yang di-Pertuan Agong on independence, (a) in relation to the former settlements of Penang and Malacca, the prerogative powers of the Crown in right of the government of those Settlement in relation to federal matters, and (b) in relation to the Malay States, such prerogative powers of the Rulers of those States as related to federal matters.

Hickling goes on to point to factors which in his view confirm the existence of the prerogative in Malaysia, pointing in particular to:

(i) the general substitution of the Yang di-Pertuan Agong for the Crown in statute law;[28]

(ii) the promulgation by the Yang di-Pertuan Agong of statutes relating to various orders of chivalry;[29]

(iii) the devolution of treaty obligations on independence;[30]

(iv) article 41 of the Constitution, which makes the Yang di-Pertuan Agong Supreme Commander of the Armed Forces of the Federation;

(v) article 150 of the Constitution, which empowers the Yang di-Pertuan Agong to issue a proclamation of emergency;[31]

(vi) section 63 of the Interpretation Act,[32] which embodies the general presumption of statutory immunity of the Yang di-Pertuan Agong and the Government; and

(vii) article 32(1) of the Constitution, which protects the Yang di-Pertuan Agong from legal proceedings.[33]

24 *Ibid., pp.* 211-2.
25 Now revised as Act 67 of 1972.
26 For the text of this provision see below, Pt. IV.
27 Above, note 3, p. 213.
28 *Ibid.,* pp. 212-3.
29 See below, Pt. VI(e).
30 See above, note 3, p. 218; and art. 169.
31 See below, Pt. III.
32 Act 23 of 1967.
33 See however *Teh Cheng Poh* v. *Public Prosecutor* [1980] A.C. 458 (P.C.); Trindade, above, note 15, pp. 107-8; and below, note 80.

In relation to article 150 he goes on to argue in support of his thesis that judicial opinion supports a personal discretion remaining in the Yang di-Pertuan Agong in relation to the exercise of those constitutional powers requiring as a condition precedent to their exercise a subjective state of mind. He sums up on a controversial note:

> ... the contention here made is that the Yang di-Pertuan Agong possesses a battery of prerogative powers; that these exist under the cover of the Malaysian Constitution and the Acts and ordinances passed thereunder and are, to that extent, curtailed thereby; that such powers are not necessarily implicitly curtailed by the existence of a[n] unexercised power to legislate on "the whole ground of something which could be done" pursuant to that power; but that the extent to which such prerogative powers can be exercised by the Yang di-Pertuan Agong himself, or by any of his Ministers, remains a no man's land in which either party will trespass at his peril....[34]

The thesis under consideration is an extreme one and has ramifications which are alarming. In the first place the Rulers are invested with prerogatives which derive from the common law, and which, while consistent with the Constitution, are not referable to any constitutional provision and are in a real sense extra-constitutional. Secondly, these prerogatives consist of both major and minor prerogatives of the Crown and may even be more extensive than those enjoyed by the Crown in England. Thirdly, they are not ousted by the express grant of legislative power (for example, in article 150) which covers the whole ground of a prerogative. Fourthly, the clear distinction apparently drawn in the Constitution between powers exercisable in the discretion of the Yang di-Pertuan Agong and powers which are exercisable on advice does not govern the prerogatives in question. Fifthly, where the subjective satisfaction of the Yang di-Pertuan Agong is in question such satisfaction is indeed personal to him, and the pronouncements of the judges support this view.

III. EMERGENCY POWERS

The last of Hickling's contentions can be speedily dealt with. In an article in 1976 Prof. S. Jayakumar[35] took issue with Hickling's interpretation of article 150 and concluded, on the basis of the provisions of the Constitution and the relevant case law, that the Yang di-Pertuan Agong is bound to act on advice under article 150. Prof. F.A. Trindade, on the other hand, appears to consider the question open.[36] Whatever the views of professors, the Privy Council has now put the matter beyond doubt in the case of *Teh Cheng Poh* v. *Public Prosecutor:*

> ...when one finds in the Constitution itself or in a federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of the opinion or is satisfied that a particular state of affairs exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of a particular

[34] Above note 3, p. 232.
[35] Above note 3.
[36] Above, note 15, pp. 115-7. The passage cited might appear to support Hickling's view, but its author has assured me he did not intend it to be construed in this way.

> minister to whom the cabinet have delegated their authority to give advice upon the matter in question.[37]

This dictum, although only *obiter,* appears to lay down a general principle, and it seems now unlikely that the Privy Council, or indeed the Supreme Court of Malaysia, will be persuaded to take a contrary view.

Hickling's view on this question will not be discussed any further here, partly because it is probably now in any event untenable, but mainly because it is not crucial to his main thesis. If the Yang di-Pertuan Agong could act in his discretion under article 150 that would indeed be an important (not to say dangerous) proposition,[38] and might conceivably tend to confirm the existence of prerogative power exercisable in the Yang di-Pertuan Agong's discretion elsewhere in the Constitution and written law. but in itself it would neither confirm nor deny the existence of the prerogatives for which Hickling argues, which are not dealt with in the Constitution. In any event if the Yang di-Pertuan Agong can exercise what are in effect emergency powers *outside* article 150, a proposition which is a consequence of the "devolution" theory, it seems of little moment how he can act *within* article 150. I proceed then to discuss what is essential to the devolution theory, namely the argument that the prerogatives of the Crown devolved onto the Yang di-Pertuan Agong on independenec.

IV. DEVOLUTION OR LAPSE?

An interesting and immediately noticeable feature of the devolution theory is that it comprises two separate lines of argument leading to an identical, or least similar, conclusion. The premiss from which it starts is that the position with regard to the prerogative was different in those territories which were directly governed from those which were not, *i.e.,* the position in Penang and Malacca was different from that in the Malay States.

This distinction is indeed valid. In fact to deny it is to fly in the face of history.[39] However, its existence leads to a problem. Hickling says that a consideration of the prerogatives of the Yang di-Pertuan Agong "must therefore follow several converging lines of enquiry". However, given the different position of the Crown in, say, Penang, as compared with, say, Johore, and the fact of the existence, in the latter case, of an indigenous ruler whose position falls to be determined in accordance with many factors, including treaty obligations and relevant Malay law and customs,[40] it seems inevitable that the prerogatives of the Crown must have differed in the two categories of state. While the existence of the prerogative in the Crown colonies of Penang and Malacca cannot be doubted,[41] the position in the Malay States is rather unclear and merits some further consideration here.

37 Above, note 33, p. 466.

38 Hickling goes so far as to say (above note 3, p. 219) that, in relation to emergencies and martial law, the authority of the Yang di-Pertuan Agong could be exercised "directly". With respect this goes further than "something much more than a passive, quiet and occasionally diplomatic role" *(ibid.).*

39 See Sadka, above, note 9.

40 See above, note 6.

41 See Roberts-Wray, *Commonwealth and Colonial Law,* (1966), pp. 557-61. The issue depends on reception of the common law, which, in relation to Penang and Malacca, was achieved by the Second Charter of Justice, Laws of The Straits Settlements (1826).

Roberts-Wray in his authoritative work *Commonwealth and Colonial Law* distinguishes protectorates from protected states. A protected state

> may be defined as a territory under Her Majesty's protection which has its own Ruler, together with regularly constituted executive government, legislature and courts, and in which Her Majesty has either no jurisdiction or jurisdiction within expressly defined limits. This clearly included the Malay States before the Federation of Malaya obtained its independence, and the State of Sarawak and the State of North Borneo before they were ceded to the Crown.[42]

This view is supported by two cases in which the Sultan of Johore was treated as a sovereign of an independent state and therefore enjoying sovereign immunity,[43] and another in which the Government of Kelantan was held to enjoy immunity as a foreign state.[44]

It is unclear however what are the consequences of this constitutional fact. Roberts-Wray addresses the question of the prerogative in protected states in the following way. He first distinguishes the major and minor prerogatives in the manner of Chitty,[45] and, after considering authority, discerns four simple rules:

(1) The major prerogatives apply to every part of Her Majesty's dominions whatever the general system of law.

(2) They extend to other territories in which Her Majesty has jurisdiction, subject to the limits (if any) of that jurisdiction.

(3) Minor prerogatives form part of the law of every country where the common law runs, except so far as they may be excluded or modified by local circumstances or by statute.

(4) Where the common law is not in force, they have no effect unless they are applied by statute.[46]

On this view both major and minor prerogatives could well have applied in the Malay States on the enactment of the Civil Law Act 1956. The case of *Nyali Ltd.* v. *Attorney-General*[47] seems to support this view. In that case the plaintiff built a bridge in the Kenya protectorate under an agreement with the Government of Kenya. The Crown claimed exemption from the payment of tolls, and part of its argument depended on whether the prerogative of pontage applied in the protectorate. Adverting to Crown's limited jurisdiction in the protectorate, which was under the sovereignty of the Sultan of Zanzibar, Denning L.J. referred to an Order in Council which required the Crown's jurisdiction to be exercised in conformity with the substance of the common law so far as the circumstances of the protectorate and its inhabitants and the limits of that jurisdiction permitted. On this basis he held, with the support of the other two judges in the Court of Appeal, that the prerogative of pontage, shorn of its technicalities, did apply in the protectorate.

42 Above, note 34, p. 48.
43 *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149; *Sultan of Johore* v. *Abubakar Tunku Arts Bendahar* [1952] A.C. 318 (P.C.).
44 *Duff Development Co. Ltd.* v. *Government of Kelantan* [1924] All E.R. 1 (H.L.).
45 Above, note 41, pp. 557-61.
46 *Ibid*., p. 561.
47 [1956] 1 Q.B. 1 (C.A.).

Nonetheless it may be that the better view is that the prerogative did not apply in the Malay States. First, the *Nyali* case concerned a protectorate and not a protected state; although in Roberts-Wray's view the matter depends on the reception of the common law and not on the status of the territory, the *Nyali* case itself shows that the reception of the prerogative may be affected by local circumstances, which would include, necessarily, the status of the territory, and the fact that there is an indigenous ruler with his own prerogatives. Secondly, I attempt to demonstrate below[48] that the prerogative is amply covered by constitutional and statutory provision.

However, even if I am wrong here, it is another consequence of the *Nyali* case that, if the prerogative was indeed received in the Malay States, a picture of the prerogative in the federation on the eve of independence would resemble a patchwork quilt without any consistent design. Thus a prerogative existing in Penang might well not have existed in Johore. For minor local prerogatives this might be quaint rather than disastrous, but at the federal level it might mean that an exercise of prerogative power would be valid in Penang but not in Johore. On the devolution theory this untidy and unnecessary complication still applies today.

It requires of course another step altogether to show that the prerogative devolved on independence. The devolution theory ignores the fact that on 31 August 1957 sovereignty in respect of all states of the Federation vested in the Yang di-Pertuan Agong, whose position, a novel and unique one, is defined within the four corners of a written Constitution which creates a limited constitutional monarchy based on the concepts of parliamentary democracy and the separation of powers.

Hickling's assertion that the prerogatives for which he argues exist "under the cover of the Malaysian Constitution" is thus untrue: they exist, on his view, *in spite of* the Malaysian Constitution because they are a source of potential legislative, executive and possibly even judicial power which owes nothing to the Constitution but exists, as it were, alongside its provisions. This is untenable. The Constitution lays down the manner in which the legislative, executive and judicial power is conferred. It is true that, like the English sovereign, the Yang di-Pertuan Agong has a part to play in each branch, but his part is carefully written into the Constitution in order to maintain the separation of powers. To quote Chief Justice Marshall: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[49] Extra-constitutional prerogatives, must, contrary to what Hickling says, have been far from the minds of the framers of the Constitution, otherwise their labours would have been in vain. If Hickling's argument is accepted, the Constitution can at any time be in effect ignored by those in power, for they can rely on vast prerogative powers of uncertain extent, for the exercise of which they need answer to no one.

Hickling's reply to this is, in effect, "*salus populi suprema lex*".[50] However, surely article 150 of the Constitution is sufficiently wide (many

[48] See below, Pt. VI.
[49] *Marbury* v. *Madison* (1803) 5 U.S. 137.
[50] Above, note 3, pp. 230-2.

would say far too wide[51]) to give the executive ample scope to deal with any internal or external threat?

The Civil Law Act is no answer to these constitutional objections. While it is true that the prerogative was part of the common law, and the common law applied to the states of the Federation by virtue of the Civil Law Ordinance 1956, section 3 of the Act contains reservations relating to written law, local circumstances and necessary qualifications.[52] In view of the existence of a written Constitution, I suggest that all three of these reservations count against the devolution theory.

Perhaps even more important than the Civil Law Act is the assertion that the prerogative was continued in force by article 162(1) as "existing law". The relevant provisions are clauses (1) and (6) of article 162:

> 162(1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or state law....
>
> (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

The definitions of "existing law" and "law" in article 160 make it clear that "existing law" includes the common law insofar as it is in operation in the Federation or any part thereof. Clearly however in construing article 162 the courts must have regard to article 162(6), and as Lord Denning pointed out in *Surinder Singh Kanda* v. *Government of the Federation of Malaya*[53] the court in effect *must* apply existing law with such modifications as may be necessary to bring it into accord with the Constitution. This principle applies to the common law as much as to statute law, and in the case of the prerogative must be regarded as cutting a swathe through it in order to give effect to the Constitution. It is hard to think of a clearer case for the application of article 162(6).

The conclusion is thus that a better view of the effect of the Constitution is that upon its introduction on 31 August 1957 a legal

51 See *e.g.*, Jayakumar, "Emergency Powers in Malaysia", in Suffian, Lee and Trindade ed. above, note 15, p. 328, especially pp. 332-49.

52 Section 31(1) reads as follows: "Save in so far as other provision has been made or any hereafter be made by any written law,... the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance: Provided always that the said common law and rules of equity shall be applied as far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permits and subject to such qualifications as local circumstances render necessary." The Federated Malay States received the common law by virtue of the Civil Law Enactment 1937, which was extended to the unfederated Malay States by the Civil Law (Extension) Ordinance 1951. See also, for Sarawak, the Laws of Sarawak Ordinance 1928; and for North Borneo (now Sabah) the Civil Law Ordinance 1938.

53 [1962] M.L.J. 169, 171 (P.C.).

revolution occurred. No doubt the Constitution sought to secure continuity, but it also made important redispositions of legislative, executive and judicial power. Her Majesty's prerogatives ceased to apply, insofar as they had applied, and to the different extents to which they applied (if at all), to the states which joined the Federation. The Head of that Federation was the Yang di-Pertuan Agong; he occupied an office which had never previously existed, and the like of which exists nowhere in the world. Clearly, therefore, insofar as the prerogative is an exclusively constitutional concept, which confers executive power on the Head of State, the prerogatives of the Yang di-Pertuan Agong are derived from the Constitution from which he himself sprang. The prerogatives of the Crown at common law merely lapsed when the Malaysian flag was raised in Kuala Lumpur on 31 August 1957, and the Yang di-Pertuan Agong owes nothing to Her Majesty by way of succession.

V. EXECUTIVE AUTHORITY

Starting from the premiss that the Constitution is the only source of prerogative power, one might be forgiven for thinking that there is an end of the argument — one either accepts or does not accept that the Constitution and not the common law confers prerogatives and one refers either to Hickling's exposition or to the works of those writers who have elucidated the Constitution on the point of the powers of the Yang di-Pertuan Agong.[54] Unfortunately, at the very point where one might expect the Constitution to be perfectly clear, it is somewhat obscure. Under article 39 the executive authority of the Federation is vested in the Yang di-Pertuan Agong and is exercisable, subject to the provisions of any federal law, by him or by the Cabinet or any Minister authorised by the Cabinet, but Parliament may by law confer executive functions on other persons. Article 40 goes on to specify when the Yang di-Pertuan Agong acts in his discretion and when he acts on advice. The occasions when the Yang di-Pertuan Agong can act in his discretion must be taken to be exhaustively set out in article 40(2), in other words he may only act in his discretion in the three instances mentioned in article 40(2)[55] and any other instances where the Constitution expressly gives him discretionary power.[56] Thus what remains unclear is the extent of the executive authority mentioned in article 39. Sheridan and Groves' assertion that the executive authority refers to "powers of the Federation as opposed to the component states"[57] does not take us much further. What *are* the executive powers of the Federation? On this overwhelming question the Constitution is strangely silent, but perhaps we can take as a starting point the following traditional formulation:

> Broadly speaking the executive function involves the continuing maintenance of a State's government. It emphasises the whole

[54] See above, notes 3, 15.

[55] This provision enables the Yang di-Pertuan Agong to act in his discretion in relation to:
i) the appointment of a Prime Minister,
ii) the withholding of consent to a dissolution of Parliament, and
iii) the requisition of a meeting of the Conference of Rulers.
As to dismissal of the Prime Minister, see Thio, "Dismissal of Chief Ministers" (1966) 8 Mal. L.R. 283.

[56] See Sheridan & Groves, above, note 3, p. 130 (note 5) for a list of such instances.

[57] *Ibid.*, p. 129.

> corpus of authority to govern, other than that which is involved in the legislative functions of Parliament and the judicial functions of the courts. The general direction of policy includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, administration of public services, and the conduct of the external relations of the State. The executive function has therefore a residual character and is exercised by techniques ranging from the formation of broad policy to the detailed management of routine services.[58]

There might be two ways of approaching this. One could say that "executive authority" merely refers to such authority as is conferred by provisions of the Constitution, or by written law, on executive officers, or one could say that in effect it includes also the prerogative, insofar as it is not dealt with by the Constitution or written law. In other words, even on the theory advocated here concerning the lapse of the prerogative, the prerogative may still apply in Malaysia by virtue of article 39 even if not by virtue of the common law.

The prerogative is a term much misunderstood, and adequate definition is almost impossible. Even Blackstone's famous definition, "that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity"[59] is clearly inadequate if not misleading. It will be useful here, and crucial to the argument, to indicate the breadth of the concept in order to understand its variegated nature and understand what is involved in its application. Only in this way can sense be made of article 39. It is rightly said that there is no consensus as to what prerogatives exist.[60] Like conventions they blossom in their time, can fall into desuetude and can be overtaken by statute law. To list them would be a very lengthy and arduous task. However it is possible to say with some degree of certainty what *categories* of prerogative exist.

There are of course many modes of categorisation. It is hard however to improve on Chitty, who in his famous *Prerogatives of the Crown*[61] written more than one hundred and sixty years ago, discerned the following broad categories:

(i) prerogatives with respect to foreign states and foreign affairs;
(ii) ecclesiastical prerogatives;
(iii) prerogatives with regard to Parliament;
(iv) prerogatives with regard to the administration of justice;
(v) prerogative powers with regard to the distribution of honours, dignities, privileges and franchises;
(vi) prerogatives with regard to the superintendency and care of commerce;
(vii) certain prerogatives which are listed under franchises, but are in effect property rights, such as those concerning wrecks and treasure trove;

[58] Wade and Phillips, *Constitutional and Administrative Law,* (9th ed., 1977), pp. 43-4.
[59] i *Bl. Comm.* 239.
[60] de Smith, above, note 2, p. 120, quoting Maitland.
[61] *A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject,* (1820).

(viii) prerogatives of the Crown as *parens patriac* with regard to infants, idiots, lunatics and charities;

(ix) prerogatives as to Crown revenues; and

(x) numerous privileges and capacities with regard to litigation, such as the Crown's immunity from suit and its position as a preferred creditor.[62]

It will be noted that the ecclesiastical privileges relate to the Church of England and are therefore wholly inapplicable to Malaysia, where the Yang di-Pertuan Agong and the other Rulers do however have their own religious "prerogatives" under the Constitution.[63] The prerogatives with regard to revenue, commerce and as *parens patriae* have clearly been largely, if not entirely, overtaken by history and the statute book and those with regard to Parliament (the appointment of Prime Ministers and the summoning and dissolution of Parliament) are exclusively dealt with by the Constitution in Malaysia. The importance of the remaining categories will be discussed in due course, but I wish here to advert to an important distinction or mode of categorisation which is not drawn by Chitty, but which seems right and has considerable judicial and academic support.[64] Evatt adopted a tripartite categorisation which, as is noted in a recent book relating to the prerogatives of the Governor-General of Australia,[65] is very useful when considering the prerogative in federal systems in the Commonwealth. First come the "executive prerogatives", which are essentially powers to *do things* — these are often called acts of state,[66] and they can be listed broadly as follows:

(i) the conduct of foreign affairs generally;

(ii) declaration of war and making of peace (traditionally this includes what we would now call emergency powers);

(iii) entering into treaty obligations; and

(iv) control of the armed forces.

Secondly there are superior rights or privileges of the Crown, which include:

(i) priority with regard to payment of debts;

(ii) the presumption that the Crown is not bound by a statute except in the case of clear words to the countrary; and

(iii) immunity from legal proceedings, costs and discovery of documents.

Thirdly there are rights of a proprietary nature (to which one might add the rights to grant franchises of various kinds) which are mainly ancient and residual in nature.[67]

62 This list is drawn from Chitty's treatment of the subject matter.

63 See art. 3; Ibrahim, "The Position of Islam in the Constitution of Malaysia", in Suffian, Lee & Trindade ed. above, note 15, p. 41.

64 See *e.g. Federal Commissioner for Taxation* v. *Official Liquidator of E.O. Farley Ltd.* (1940) 63 C.L.R. 278, 320-1, *per* Evatt J. The categorisation is in n6 way inconsistent with Chitty's analysis.

65 See Winterton, *Parliament, the Executive and the Governor-General,* (1983), pp. 48-9.

66 See de Smith, above, note 2, pp. 135-40.

67 Examples are estrays, fisheries, treasure trove, wrecks, fairs, markets, ports and mines; see *Halsbury's Laws of England,* (4th ed.), vol. 8, para. 1072 *et seq.*

The point I wish to make here is that only the executive prerogatives actually involve power to perform positive acts as opposed to mere enjoyment of a privilege or condescension to allow a subject to enjoy a privilege or monopoly. It is common but incorrect to talk of "prerogative powers" as though all prerogatives involve powers analogous to statutory powers. This point is crucial to the argument because if one wishes to interpret a term such as "executive authority" or "executive power" in such a way as to include the prerogative one can only include those prerogatives which are in fact powers and not merely privileges, immunities or proprietary estates. I therefore intend now to show that the term "executive authority" in the Malaysian Constitution does in fact have this meaning — that it includes the executive prerogatives, but not the other (which I will call "domestic") prerogatives.

First, it is worth noting that the Constitution, at article 80(1) and the Ninth Schedule, can be said to have defined, or at least indicated part of the content of, the term "executive authority". Article 80(1) says:

> Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the legislature of that State may make laws.

The federal list under the Ninth Schedule commences with external affairs, which are listed in such a way as to cover the whole ground of the executive prerogatives mentioned above except for control of the armed forces, which is dealt with under article 41 and elsewhere in the Ninth Schedule.[68] It is suggested that with regard to external affairs, because of their very nature, the Constitution does not limit the executive to acting in pursuance of a law — in other words the term "executive authority" in article 39(1) includes, in the light of article 80(1), the executive prerogative powers. It would appear to follow from this that the concept of an "act of state" exists in Malaysia.[69]

Secondly, even without the assistance of article 80 and the Ninth Schedule, the external prerogatives must be included in the executive authority because all modern governments must have these powers in some form or other, *de jure* as well as *de facto,* otherwise it becomes impossible for the government effectively to defend or promote the best interests of the state, or protect the people and their liberties. In short the position put forward here is dictated by dire necessity as much as by legal reasoning. However, of course, this does not apply to the domestic prerogatives, even if they can be considered as forms of "authority", which is very doubtful, as indicated above.

Is this merely to achieve by constitutional interpretation what Hickling achieves by operation of law? I think not. This view admits under article 39 only what is strictly necessary, and in fact already done, to ensure the maintenance of effective government and the survival of Malaysia, and excises the obsolete and the dangerous. By contrast the devolution theory offers a package of powers and immunities of uncertain scope and dubious authority.

[68] *I.e.,* at Ninth Schedule, Pt. 1, para. 2 (defence of the federation).

[69] The Malaysian Government would, on this view, be able to raise the defence of "act of state", which has generated some case law in England, see above, note 66.

VI. DOMESTIC PREROGATIVES

The purpose of this part is to show that matters dealt with traditionally by the prerogative in English law have been dealt with exclusively by statutory or constitutional provision in Malaysia. Hickling too recognises this, and in fact, as mentioned previously, he regards this fact as confirmation of his view that the prerogative devolved onto the Yang di-Pertuan Agong on independence. I tend to draw the opposite conclusion, on the basis that where the whole ground of a matter previously dealt with under the prerogative is dealt with under statute law, the prerogative must be taken to be abolished by the statute. The authority for this proposition is the highest possible, the decision of the House of Lords in the *de Keyser's Royal Hotel*[70] case.

However, in order to ensure that the ghost of the domestic prerogatives is truly laid to rest, it must be shown that all the important prerogatives, apart from those discussed in Part V, have been provided for by statute or by the Constitution, so that there is no practical necessity for the devolution theory to be invoked in order to fill a *lacuna* in Malaysian law.

A. *The Armed Forces*

Use of the armed forces is an external matter, except insofar as the armed forces might be used to quell internal rebellion. With regard to this exception the executive can act only under emergency powers. The Armed Forces Council is responsible under article 137 to the Yang di-Pertuan Agong for the command, discipline and administration of, and all other matters relating to, the armed forces. This however does not include operational use of the armed forces, where the Yang di-Pertuan Agong, as Supreme Commander, acts on the advice of the Cabinet.[71]

B. *Religion*

The position of the Yang di-Pertuan Agong and the Rulers as Heads of Islam, the religion of the Federation, is dealt with by article 3 of the Constitution and by the state constitutions. It is worth nothing that under article 3, subject to the state constitutions, all rights, privileges, prerogatives and powers enjoyed by the Ruler as Head of Islam are unaffected and unimpaired (*i.e.* by the Constitution). Thus the Constitution deals with religious prerogatives and recognises the previous and continued existence of local (*i.e.* autochthonous Malaysian) religious prerogatives vested in the Rulers. This of course is consistent with the position of the Rulers in the Malay states, in which, as indicated above, the Ruler was generally obliged to act on advice except in matters relating to Islam and Malay custom Clearly however these powers are purely indigenous and are not matters which were, or could have been, dealt with by the common law.

C. *Parliament*

The traditional prerogatives of the Crown to summon, prorogue or dissolve Parliament, and to appoint and (possibly also) dismiss the Prime Minister, are exercised by the Yang di-Pertuan Agong under articles 43 and 55 of the Constitution and, in relation to the state

[70] *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508.
[71] By virtue of the general rule in art. 40; see above, note 55.

legislatures, similar powers are exercised by the Rulers under the provisions of the state constitutions. The Yang di-Pertuan Agong exercises similar prerogatives with regard to the appointment of the Cabinet, and certain members of the Dewan Negara (Senate), but here again he acts under constitutional provisions.[72]

D. *Justice*

Such prerogatives as are still vested in the Crown with regard to the administration of justice are either inappropriate in a written constitution with a formal separation of powers, or are dealt with by the Constitution itself. In particular article 42 governs in detail the prerogative power of pardon.[72] The prerogative power to refuse to prosecute or to discontinue a prosecution is dealt with under article 142; case law has in fact held that a decision of the Attorney-General acting under article 142 cannot be questioned, so that the position thus established is in effect equivalent to the English law of *nolle prosequi.*[73]

E. *Honours*

Hickling is impressed by the extra-statutory power of the Yang di-Pertuan Agong, exercised since 1958, to confer honours on his subjects.[74] To draw from this the conclusion that the Yang di-Pertuan Agong is exercising a prerogative derived from the Crown seems, however, somewhat odd. The honours conferred by the Yang di-Pertuan Agong are purely Malaysian in character and are similar to the powers of the Rulers to confer honours at the state level, powers expressly continued in force under article 181(1) of the Constitution which provides, interestingly, as follows:

> Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

This provision appears to speak with forked tongue; it is clear, however, that the ceremonial aspects of the function of the Ruler, unaffected by the status of the Ruler during the period of British administration, and, it may also be said, unaffected by the prerogatives of the Crown, continue to have the force of law. In sum these prerogatives can be regarded as an indigenous, conventional and ceremonial element in the Malaysian Constitution. They owe nothing to the Crown or to the common law. It is hard to think of any aspect of public life which is more peculiarly Malaysian than the elaborate system of public ceremony and protocol of which the award of honours is an important part.

F. *Franchises*

These prerogatives are many and varied, and also ancient and (*pace* Denning L.J. in *Nyali*) peculiar to England. They include, for example.

[72] Art. 45; for comment on this power see Lee, "The Process of Constitutional Change," in Suffian, Lee and Trindade ed. above, note 15, pp. 376 *et seq;* for dismissal of chief ministers, see Thio, above, note 55.

[72a] See *Superintendent of Pudu Prison* v. *Sim Kie Chon* [1986] 1 M.LJ. 494; *De Freitas* v. *Berry* [1976] A.C. 239.

[73] See Halsbury, above, note 67, para. 1278.

[74] For further information as to the exercise of this power, see Hickling, above, note 3, pp. 217-8.

an award of the right to hold a market or fair, or to collect tolls from bridges or ferries.[75] These are matters which are crucial to the economy of the country. I suggest that they are dealt with exclusively by statute law in Malaysia.[76] As suggested above, it is arguable that some at least of these prerogatives applied outside England prior to the independence of the states (if any) where they applied.[77] After independence, however, it is clear that Malaysian law at least might become intolerably complicated and vague on crucial questions relating to individual property and commercial rights if these prerogatives were still in force. For example it might become doubtful who has the right to grant certain mineral concessions, or take possession of certain discovered treasures, or charge certain tolls.[78]

G. *Litigation*

The privileges of the Crown with regard to litigation are dealt with, as regards the Federal Government, by article 69 of the Constitution and the Government Proceedings Ordinance 1956[79]. The Yang di-Pertuan Agong, under article 32, and the Rulers, under article 181, enjoy immunity from suit, though this does not derogate from the amenability of the Government as such to ordinary legal process.[80]

This conspectus of domestic prerogatives in Malaysia shows, it is submitted, that the prerogative at common law has no role to play in the Malaysian polity or the general law of Malaysia.

VII. The Royal Assent and a Constitutional Crisis

The aspect of the prerogative which has given rise to most discussion is the royal assent, which precipitated the constitutional crisis mentioned earlier, a prerogative which was conferred on the Yang di-Pertuan Agong by the Constitution.[81] Unfortunately it was not clear until resolved with the utmost trauma by constitutional amendment[82] whether this right involved also a right to refuse to assent to bills duly passed by Parliament. Some Rulers apparently took (or preferred to take) the Constitution literally on this point and were guilty of delaying

75 See Halsbury, above, note 67.

76 See *e.g.,* Port Authorities Act, No. 21 of 1963. Matters which are governed by franchise at common law in England are dealt with by a host of federal and state enactments and local authority by-laws. The writer has discovered no evidence of the existence of any non-statutory franchises in Malaysia. The same applies to Other minor prerogatives: treasure trove, for example, is dealt with by the Antiquities Act, No. 168 of 1976, and previously by (F.M.) Ord. 14/1957.

77 See above, Part IV, and *Nyali,* above, note 47.

78 Should any doubts be encountered with regard to residual property rights of the Federation, *e.g.,* under treasure trove (see *Lord Advocate* v. *Aberdeen University* [1963] S.C. 533), I suggest they would be better resolved under those provisions of the Constitution dealing with transitional matters, *i.e.,* art. 166(1) (now repealed: see Sheridan and Groves, above, note 3, pp. 418-9) than under the prerogative at common law.

79 No. 58 of 1956; see Sheridan & Groves, above, note 3, p. 173.

80 See *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli* (*No. 2*) [1967] 1 M.L.J. 46, 47 *per* Pike C.J. (Borneo); *Teh Cheng Poh* v. *Public Prosecutor,* above, note 33. The applicability of statute law to the Government is dealt with by the Interpretation Act, No. 27 of 1967, s. 63.

81 See art. 66; the Rulers and Governors of the States have a similar prerogative under the State Constitutions.

82 See Constitution (Amendments) Acts A566 of 1983 and A584 of 1984.

assent to state legislation.[83] The Government, apparently fearing that a future Yang di-Pertuan Agong might behave similarly in relation to federal legislation, even to the extent of outright refusal to assent, moved in July 1983 a constitutional amendment bill designed:

(a) to ensure that under article 66 any bill duly passed by Parliament would become law within fifteen days of being presented to the Yang di-Pertuan Agong if for any reason whatsoever the bill was not assented to within that time;

(b) to ensure the operation of a similar rule at the state level;[84] and

(c) to amend article 150 in such a way as to make the satisfaction of the *Prime Minister* a prerequisite to a proclamation of emergency by the Yang di-Pertuan Agong.[85]

The bill was carried by the necessary two-thirds majorities. These amendments could be regarded as merely clarifying and rationalising the position which probably obtained in any case (this was the view put forward by the Government in moving the bill), or as a serious attack on the position of the Rulers (this was apparently the view taken by the Rulers themselves).[86] In the event the Yang di-Pertuan Agong withheld his assent and the Conference of Rulers resolved that the amendments should not be accepted. After a tense period of political manoeuvring the Government offered the Rulers a compromise solution, which was ultimately embodied in another constitutional amendment bill, the first having been assented to by the Timbalan (Deputy) Yang di-Pertuan Agong.[87] This second amendment, repealing the provisions mentioned above, provided in effect as follows, and was passed in February 1984:

(a) The Yang di-Pertuan Agong must assent to a bill presented to him within thirty days of presentation, but he may within that period return a bill other than a money bill to the House in which it originated, with a statement of the reasons for his objection, whereupon the House must reconsider the bill as soon as possible. If the House after such

[83] See Far Eastern Economic Review, June 30, 1983, pp. 26-34, especially p. 27, where it is reported that in one state dozens of bills remained unsigned for about two years. For other instances of royal intervention in politics, see also Y.A.M. Raja Azlan Shah, above, note 6. In one instance a ruler grew a beard and vowed not to shave it off until the Chief Minister left office; in another a ruler refused assent to a state bill duly passed — his action is criticised by the author as "clearly unconstitutional". See also *Far Eastern Economic Review,* July-December 1983, *passim,* for some excellent coverage of the crisis.

[84] *I.e.,* by amendment of the Eighth Schedule, which provides for certain provisions to be included in State Constitutions; see especially para. 11.

[85] Very arguably, as indicated above in Pt. III the Yang di-Pertuan Agong had no discretion in this matter, but the bill sought to vest the power to proclaim an emergency in the Prime Minister as opposed to the Cabinet.

[86] These assertions are based on the numerous articles which appeared in the Far Eastern Economic Review during the crisis: see above, note 83 See also Lee Hoong Phun, "The Malaysian Constitutional Crisis: King, Rulers and Royal Assent" Lawasia (1984) N.S. 22, 26; the same article also appears as a Postscript to Trindade & Lee ed., *The Constitution of Malaysia: Further Perspectives and Developments* (1986), p. 237. I am indebted to this valuable account and analysis, which contains in its Appendices some translations of letters between the actors in the crisis which are of considerable historical and constitutional importance. I am grateful to Dr. Lee for an early sight of his article in draft. See also H.F. Rawlings, "The Malaysian Constitutional Crisis of 1983" (1986) 35 I.C.L.Q. 237.

[87] See Lee, above, note 86, p. 31.

reconsideration passes the bill (in the case of most constitutional amendment bills a two-thirds majority is required),[88] then it must be sent, together with the objections, to the other House, which must reconsider it likewise. In the event of failure of royal assent (in the case of money bills), in the first instance, or the passing of the bill after royal objection, in the manner described, followed by failure to assent within thirty days of the second presentation for assent, the bill becomes law as if assented to within that period.

(b) The provisions with regard to assent to state legislation made by the first amendment were withdrawn on the basis of an oral undertaking which is not published, but which is presumably to the effect that assent to such legislation will be promptly given. This agreement is presumably legally unenforceable.[89]

(c) The amendment of article 150 was repealed but no further amendment was made.

These events clearly shed some light on, and make some substantial changes to, the prerogative in Malaysia.

The position first of all with regard to article 150 remains as mentioned above in Part III. The fact that the Government sought to amend article 150 should not be taken as a recognition of a personal discretion in the Yang di-Pertuan Agong, but should rather be seen as an attempt to ensure that the Yang di-Pertuan Agong would not act other than on the advice of the Government with regard to emergencies.

Secondly, the position with regard to the royal assent has been clarified, probably at the expense of conferring a share of the legislative power on the Yang di-Pertuan Agong. This was no doubt suggested by a Government confident of being able to secure a two-thirds majority, if necessary, in both Houses. As a provision to operate in a situation where the Government cannot command such majorities, however, article 66 as amended is not impressive. One cannot help wondering whether the Government did not snatch defeat from the jaws of victory. Such an enlargement of the prerogative is most unusual, and, while it perhaps solves one crisis, it might help to create the next.

Thirdly, we must consider the role of the Conference of Rulers. The basis on which the Conference represented the Rulers in the crisis is not completely clear, and it will be opportune to consider here the relationship between the Conference and the prerogative. The Conference of Rulers has been concisely described by Sheridan and Groves:

> [It] is a body whose constitutional position is hard to pin down. Its functions are miscellaneous and its composition and character protean. It stands outside Parliament, yet can veto certain bills and has legislative powers of its own in relation to certain religious observances in the States of Malaya; it stands outside the federal cabinet system, yet can pass judgment on certain executive appointments; it can make or break a Yang di-Pertuan Agong; and it can discuss anything.[90]

[88] See art. 159.
[89] See Lee, above, note 86, pp. 33-4.
[90] Above, note 3, p. 128.

Perhaps its most important constitutional function is that its consent is required for the passing of certain constitutional amendments, notably those concerning the power to abridge freedom of speech in relation to certain politically crucial matters (*e.g.,* national language, citizenship, reservation of quotas in education, the public service and trade licences), and those affecting the Rulers themselves.[91] In short it is a means whereby some of the main policies of the Government are entrenched and made unquestionable.

Under article 38(4) "[n]o law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers", and under article 38(5) it is clear that the Conference has a discretion in the matter of consent. Accordingly the consent of the Conference should have been sought by the Government before the bill was passed by Parliament, since it seems that the first constitutional amendment bill certainly affected the "privileges, position, honours or dignities" of the Rulers. Even the second amendment bill could be said to have so affected the Rulers.[92] As it was the Conference acted entirely on its own volition, the Government being clearly of the view that the Rulers' prerogatives were not affected.

H.P. Lee observes:

> The King [Yang di-Pertuan Agong] was placed in a most invidious position. If he went against the wishes of the Conference of Rulers he could have been removed from office by a resolution of the Conference if such a resolution was supported by five members of the Conference.[93] By complying with the wishes of the Conference of Rulers, he had to ignore the advice of the government of the day. It was a dilemma which would not have been posed to the King had the Government consulted the Conference of Rulers prior to the passing of the 1983 Bill.[94]

Who then, after the 1983-4 crisis, exercises the prerogative of refusing assent to a bill?

It might be thought to be convenient that the Conference of Rulers should in effect exercise this prerogative, since as a matter of political reality (and, one might argue, incipient constitutional convention) the Yang di-Pertuan Agong cannot go against their wishes. The position in law however appears to be otherwise. Ordinary bills considered by him under article 66 will never be scrutinised by the Conference of Rulers, for it is only concerned with bills caught by article 38. Thus the proposition, that the assent of the Yang di-Pertuan Agong is the assent of the Conference of Rulers, could only be true in relation to this latter kind of bill. However there is nothing to prevent the Yang di-Pertuan Agong seeking formal or informal advice from the Rulers, and even in the Conference they are able to discuss issues of national

91 See arts. 2, 33(5), 38(4) and 159(5). The last provides for the consent of the Conference to amendments to art. 10(4); (freedom of speech); Pt. III (Citizenship); art. 38 (Conference of Rulers); arts. 70, 71(1), 72(4) (parliamentary privilege); arts. 152, 153 (national language and reservation of quotas); and art. 159 (constitutional amendments).

92 "Affect" need not necessarily mean "adversely affect".

93 Third schedule, para. 8.

94 Above, note 86, p. 36.

policy by the express terms of article 38. While one might expect the Yang di-Pertuan Agong to withhold assent to bills which he considers should have been referred to the Conference of Rulers, and even bills which need not be so referred might in fact be discussed by the Rulers, one would not expect the Conference of Rulers to play a decisive role in the legislative process, though its role is clearly becoming more important, as evidenced by the events of 1983/4.

In connection with the problem of which bills are caught by article 38 the Yang di-Pertuan Agong will no doubt seek advice, and in difficult cases he can refer the question to the Federal Court under article 130.[95]

To sum up the principles with regard to the royal assent, it would appear that:

(a) the Yang di-Pertuan Agong may refuse assent to any bill on any ground, but his refusal may be overridden by affirmative votes in Parliament under article 66;

(b) a convention that "doubtful" bills should be considered by the Rulers will, in all probability, develop;

(c) article 38 bills must be referred to the Conference of Rulers for their consent, and if this is not given the bill may not be passed by Parliament, not even by affirmative votes in Parliament;

(d) if a bill to which the Yang di-Pertuan Agong considers article 38 applies is not so referred, he may withhold his assent and refer the bill to the Conference of Rulers for their consideration, or he may refer the question of whether article 38 applies to the Federal Court under article 130, in either of which cases the thirty-day period under article 66 does not apply.

VIII. CONCLUSIONS

It is now possible to give a brief account of the prerogative in Malaysia.

The Malay Rulers had prerogatives under Malay custom and Islamic law. In the Crown territories the prerogative at common law was received; but in the Malay States, the prerogative was either never received or, if it was, took a substantially different form. On independence in 1957 the prerogatives of the Rulers and the Yang di-Pertuan Agong were governed by the Constitution, but the prerogative at common law, insofar as it had been received, ceased to exist. On the other hand the traditional prerogatives of the Rulers continued, subject to the Constitution. On a proper construction of the Constitution, the executive prerogative powers of the Crown at common law are *in effect* continued (or are now in fact enjoyed) by the Yang di-Pertuan Agong acting on the advice of the Government, but the domestic prerogatives ceased entirely, being provided for by statute and otherwise.

[95], Art. 130: "The Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or is likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it". Presumably this power could only be exercised on the advice of the Cabinet, or the Attorney-General as authorised by the Cabinet, but no doubt a Cabinet faced with a revolt by the Conference would be impelled to advise such a reference rather than risk an open split with the Rulers.

Malaysian law covers all aspects of the prerogative at common law, but the concepts are modified in certain respects. In particular the prerogative of the royal assent has been expanded; the Yang di-Pertuan Agong enjoys the prerogatives of appointing the Prime Minister and refusing consent to a dissolution; the Rulers enjoy similar prerogatives at the state level; and certain constitutional prerogatives are enjoyed by the Conference of Rulers, which is empowered in particular to safeguard its own prerogatives and those of each Ruler, including the Yang di-Pertuan Agong.

The writer expresses the hope that this account is accurate in a matter where accuracy is crucial; that it does justice to the Rulers and the people of Malaysia and their history; and that the constitutional struggles of seventeenth century England, vividly brought to mind by the crisis of 1983/84, will never need to be re-enacted in the streets of Kuala Lumpur, or that if they ever do, it will not be due to the inadequacies of constitutional lawyers.

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