THE FIRST FIVE YEARS OF THE FEDERATION OF MALAYA CONSTITUTION*

It is exactly five years since the Constitution of the Federation of Malaya came into force, and now is perhaps as good a time as any to review the Constitution and the manner of its survival. And of course, five years is not long in the life of a Constitution — except in Asia.

In parenthesis, I must emphasise that what I say here represents an entirely personal view of affairs: the adjectival 'personal' invoking, of course, that provocative bundle of prejudices which burdens each of us.

What is immediately remarkable is that so much of the original Constitution remains. This, built by Lord Reid, Sir Ivor Jennings, Sir William McKell, Mr. B. Malik and Mr. Justice Abdul Hamid upon the model provided by the Indian Constitution, was published on February 21, 1957; hastily demolished and re-constructed by an energetic Working Party during the succeeding months; and promulgated in its final, revised form on Merdeka Day, August 31, 1957, as a schedule to the Federation of Malaya Agreement, 1957, concluded on August 5 of that year between Her Britannic Majesty and Their Highnesses the Rulers of the Malay States. Only one urgent amendment was found necessary, and this (designed to enable the Yang di-Pertuan Agong to amend the Constitution of the State of which he was substantively the Ruler, in order to bring that constitution into line with that prescribed by the Eighth Schedule of the Federal Constitution) was of a comparatively minor nature; effected by the Constitution (Temporary Amendment) Ordinance, 1958, and affording the only exercise of the power to make temporary amendments "to remove any difficulties in the transition from the constitutional arrangements in operation immediately before Merdeka Day to those provided for by [the] Constitution" conferred by Article 159(2) of the Constitution, the amendment it effected temporarily was finally embodied in the Constitution (Amendment) Act, 1960. Since the temporary Ordinance of 1958 there have been two amending Acts only, promulgated in 1960 and 1962: the Government having obtained at the general election of 1959 the two-thirds majority necessary to amend the constitution.

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The two Acts of 1960 and 1962 contain, therefore, the only amendments found necessary to the constitution during the first five years of its life: and not even all the amendments incorporated in these Acts have yet been brought into force. Basically, the two Acts may each be regarded as dealing with two particular subjects, the Act of 1960 with the national security and the public services, and that of 1962 with citizenship and the delimitation of parliamentary constituencies: but both Acts present other equally interesting and perhaps more subtle features.

THE EMERGENCY

Independence was achieved in 1957 against the background of a prolonged emergency for which express provision was made in the Constitution itself, for Article 163 thereof kept alive, under the authority of annual resolutions of the Federal Legislative Council, the Emergency Regulations Ordinance of 1948, and all subsidiary legislation thereunder: a necessary provision, since a number of regulations were inconsistent with the fundamental liberties set out in Part II of the Constitution. Independence, however, also brought with it, a sense of nationhood that reduced the emergency to local areas; and this demanded, for psychological reasons if no more, that the Ordinance of 1948 should be repealed. To accomplish this, however, it was necessary to amend the Constitution in order to enable Parliament to overrule the fundamental liberty conferred by a judicial check upon preventive detention, and to make a path for the Internal Security Act, 1960. Under the amending Act of 1960, therefore, the power of releasing a person subject to preventive detention, originally conferred upon the advisory board established under Article 151 of the Constitution, was abolished: the only power now left to that board being that of making recommendations to the Supreme Head of the Federation.

The amending Act of 1960 also abolished the one-year limit upon the life of any anti-subversion legislation cutting across any of the fundamental liberties set out in Articles 5, 9 and 10, and provided, in lieu thereof, for the annulment of any such legislation by a resolution of both Houses of Parliament.

The Internal Security Act, 1960 — the only law falling under Article 149 — contains a recital, modelled upon the new form of Article 149 imported into the Constitution by the Act of 1960, declaring that action had "been taken by a substantial body of persons to cause a substantial number of citizens to fear organised violence against persons and property", and also that action had "been taken and threatened by a substantial body of persons, which is prejudicial to the security of Malaya". The first recital is, presumably, related to particular border areas in which armed terrorism obtains, and the second to the more general provisions of the Act, including those relating to preventive

detention. Altogether, the Internal Security Act, 1960, as recently amended, deserves a commentary all to itself, and it is not the object of this brief skirmish with the Constitution to do more than note its dependence upon incantations set out in the amended Article 149: for upon such charms depends the liberty of those arrested under the Act.

As a lawyer I must hope that the practice of imprisonment without charge, trial or conviction admitted by the Act of 1960 will not be regarded as a permanent feature of the legal and political landscape of Malaya or, for that matter, of Asia generally; but I appreciate that as long as the threat of subversive Communism exists, so long will preventive detention be likely to persist. Indeed, it seems as vigorous as the belief in the merits of capital punishment, to which it has, I suspect, a certain affinity: for both have their origin in a public psychosis inspired by fear, rather than logic. As for the laws of preventive detention, one can only hope that they may be reviewed from time to time with reason and without fear, for their existence of necessity acts as an inhibitory factor in that vital element of criticism which we properly regard as part of a democratic way of life. The price we pay for these laws is, therefore, a heavy one in terms of a loss of liberty affecting immediately only a few individuals but, mediately and more insidiously, the whole community.

I should add, however, that the legacy of preventive detention used by the British and passed on to the newly-independent Government has certainly not been abused. For example, according to information given in Parliament, whereas there were about 200 persons in preventive detention in 1958, in 1961 there were only about 100. It seems, therefore, that the policy of the Government since independence has been to diminish, if not get rid of, this dubious weapon, replacing it where necessary by means falling short of detention — such as that notable and original measure, the Prevention of Crime Ordinance, 1959. And it may be proper to add here that I think that the Federation since independence has been, and is, an infinitely happier country than ever it was under a British administration. I say this not in criticism of my fellow-countrymen, but in tribute to the abilities of an independent Government.

THE YANG DI-PERTUAN AGONG

During the first five years of the Constitution the Rulers of Negri Sembilan, Selangor and Perlis have each in turn filled the office of the Yang di-Pertuan Agong, or Supreme Head of the Federation: the first and second Supreme Heads having died in 1960. These two tragic deaths, the second following so closely upon the first, have tended to obscure the fact that the Yang di-Pertuan Agong is elected by his fellow Rulers for a period of only five years: while, owing largely to the selfless and dedicated example of the first Supreme Head, it is becoming clear

that the holder of that office can command a certain affection, of a nature even stronger than the legal bond of allegiance: this could prove of use in enlarging the concept of loyalty to the Federation, as well as of considerable value during any time of crisis. For, while constitutionally the Supreme Head is fettered by strict legal rules, and even when acting in his discretion is subject to the bitter realities of political life, it would mean that his influence could be as powerful and effective as, for example, was that of George V in Great Britain.

Such a subtle change in the functions and role of the office of Supreme Head poses the question of what is likely to happen in the future to the offices of Supreme Head and Ruler? On the first point, we might well aver that, while the present office of Supreme Head is little different from that of an elected President, if it is to become a focus for a Malayan loyalty, and if that mysterious bond and pretentious magic surrounding the office of a sovereign is to be created and used, then there is much to be said for enlarging the period of office of the Supreme Head, from the present period of five years to one for life. This, in turn, raises the second point, however: for if this change took place — and it could only take place with the concurrence of the Rulers — then how would such a change affect the status of the Rulers?

The existence of the Rulers tends at present to create a divided loyalty, one to the State and the other to the Federation: for the State Nationality Enactments of the former Malay States remain in force, side by side with the citizenship provisions of the Constitution; and the Rulers, as well as the Supreme Head, confer Datoships and other honours and awards. Further, while the existence of the Rulers serves as a personification of the existence and reality of the States, a constant reminder of the creation of the Constitution by an agreement or treaty, and a vital fact in the recognition of the Malays as the indigenous rulers of the country, it also serves to derogate from the undivided loyalty due to the Supreme Head. The growing recognition of this fact is, of course, to be observed in the increasing powers of the Federal Government, and the consequent diminution in the powers of the States; and this cannot in the long run fail to have its effect upon the position of the Rulers who — unless they are prepared to go the way of the princes of India — should now be asking their Chief Ministers when and in what spheres the encroachments of Federal authority should be tolerated, and where resisted. We have come a long way since Braddell considered the legal status of the Malay States, but we should nevertheless, not allow the Constitution itself to obliterate the Agreement that gave its birth.

EXECUTIVE AUTHORITY

Article 39 of the Constitution originally declared that "the executive Authority of the Federation shall be vested in the Yang di-Pertuan Agong, but Parliament may by law confer executive functions on other

persons". This admirable statement of principle was derived from Article 53 of the Constitution of India, which provides that " the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution."

It is worthwhile pausing for a moment at this stage, to consider the variations between the original form of Article 39 and the parallel Indian provision. Whether any difference exists between the term "executive authority" and "executive power" is perhaps doubtful; although the latter term might appear somewhat wider in its scope, the former runs through the State Constitutions. Altogether, it might be worthwhile for a student of constitutional law to consider the meaning of the phrase "executive authority", and to determine whether, and if so to what extent, it differs from such a phrase as "executive power", also used for constitutional purposes.

By the amending Act of 1962, however, Article 39 was amended to read (the amendment is italicised) "the Executive authority of the Federation shall be vested in the Yang di-Pertuan Agong *and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet,* but Parliament may by law confer executive functions on other persons." The sole reason given for this amendment, which was given retrospective effect to Merdeka Day, was that it "removes doubts as to the formalities for the exercise of the executive functions of the Federal Government."

Exactly what doubts had arisen "as to the formalities" was not disclosed, and the reader can only therefore wonder why it was necessary to embroider a clear declaration of a basic constitutional principle with details of the "formalities" by which it is exercised; and why a specific reference should be made to the Second Schedule — which deals with the minor administrative details of citizenship, can be amended by an ordinary law (i.e. without a two-third majority) and specifically provides that a Minister can exercise the functions of the Federal Government thereunder — is something of a mystery, especially as the Article contains no reference to the other provisions of the Constitution.

The reader is left, therefore, with a hydra-headed monster styled "the executive authority of the Federation": for while in India the President constitutes the sole central authority, acting either directly or through the agency of subordinates, in the Federation there exists not only the Yang di-Pertuan Agong, but the Cabinet collectively, and any Minister authorised (in what behalf ?) by the Cabinet: all possessing an equality of executive authority and all, presumably, capable of exercising it in different ways. This may be an ingenious form of federal government, but it is also a quaint and original constitutional theory.

Whether those who framed the amendment were haunted by the ghost of Charles Stuart or Oliver Cromwell is, alas, a matter only for speculation: for the amendment leaves unresolved the question of the nature and extent of any prerogative powers vested in the Yang di-Pertuan Agong himself. Whether such powers exist is a good subject for debate; but if they do not exist, then some curious things have certainly been going on.

PARLIAMENT

This period has also afforded an excellent opportunity to assess the relative merits of the Federal Legislative Council, from Merdeka until its disappearance in 1959, and the two Houses of Parliament, the fully-elected House of Representatives and the Senate, partly appointed by the Government, and partly by the State Legislative Assemblies.

Whatever other defects it might have possessed, the Federal Legislative Council in its final form was always a stimulating and entertaining body. Of its membership of ninety-nine, fifty-two members were elected, and thirty-five appointed by the Government: and of the latter twenty-two represented the famous "Scheduled Interests" of commerce, planting, mining, agriculture and husbandry, and trade unions, three the racial minorities of the aborigines, the Ceylonese and the Eurasians, and ten were (if the term is strictly applicable) nominated members pure and simple, including several lawyers, and officials, and notably the Attorney-General, whose presence in the Chamber was most useful to the Government.

In its debates the Council maintained a reasonably high standard, and certainly a fair degree of dignity. The variety of the interests represented assured the Council of a wide range of technical information; and this was leavened with the wisdom of the lawyers and the presence of several senior civil servants.

The Council functioned until its final adjournment on June 25th, 1959, when members dispersed in an atmosphere of mutual congratulations and goodwill. An intelligent but necessarily subservient body, the Council had outlived its purpose, and observers wondered how the two new Houses of Parliament would fare.

The House of Representatives, first constituted in 1959, has 104 members — so making it slightly larger than the Legislative Council. It has been, I think, fortunate in its choice of its first Speaker, a shrewd, experienced and decisive member, whose influence has been powerful and beneficent. He and his attendant clerks are, however, garbed in the traditional British manner, and this exotic picture is completed by the mace, whose appearance above and below the table is, I suspect, a source of mystery to many observers and, perhaps, a few Parliamentarians; but

the sergeant-at-arms invariably appears in Malay dress, black, solemn and splendid. In a society in which emblems are of importance, this mixing of styles is in itself symbolic.

All the members of the House are elected, and in consequence no members except, perhaps the Ministers, are regarded as representing any particular sphere of activity. The Opposition, broken down into some thirty members, comprising twelve members of the Pan-Malayan Islamic Party, eight members of the Socialist Front, five members of the People's Progressive Party, and five independent members, has not so far developed any particular technique in dealing with Government business. No Opposition members appear, for example, to specialise in particular subjects: with the result that it is often difficult, and sometimes impossible, to determine the reasons for opposition. Some members of the Opposition appear, indeed, to consider it their duty to oppose all measures put before them: but the greater part show a willingness to support such Government measures as they consider proper.

The practice of the Federal Legislative Council was based on that of the Commons House of Parliament of the United Kingdom, which was applied in the absence of express provision to the contrary in the local practice. It is a small point, but perhaps significant, that the House of Representatives amended this principle in order to follow Commonwealth parliamentary practice generally: a provision enabling the Speaker to consider the parliamentary practice of the newly-independent Commonwealth territories, as well as that of the United Kingdom and to adopt such practice as he may consider appropriate to the circumstances of the Federation. This is an enlightened principle, in my view: but then, I believe in the merits of the study of comparative law.

Only one of the many important measures put before the House of Representatives since its inception in 1959 has been referred to a Select Committee: and the observer might ask what momentous Bill was singled out for this distinguished treatment. This was in fact the Minor Offences (Amendment) Bill of 1961, almost two pages in length, and the point in issue was whether, on the assumption that it is in the nature of dogs to bite postmen, compensation should be paid to persons injured by dog-bites, regardless of the doctrine of *scienter*.

That slightly more important matters have not gone to Select Committees is due, I should say, not to any distrust of such a procedure, but rather to an anxiety on the part of Government to stand by what it has drafted and to continue the task of government with as little delay as possible. Nevertheless, failure to use the procedure of the Select Committee has occasionally meant that the full House of Representatives has proved a somewhat unwieldy committee to review the details of a Bill.

As for the Senate, this august body consists of twenty-two members from the States, each of the eleven State Legislatures electing two Senators, and another sixteen members being appointed by the Government. Of this total of thirty-eight Senators, half of the original number, nineteen, were appointed for a term of three years only, and half for the standard term of six years. By this means, therefore, there will be a turn-over of half the Senate once in every three years, beginning this year, all new appointments and elections made being for a period of six years.

It is too early to consider whether the Senate has justified its existence. My own view — influenced, I suppose, by the naval theory of the fleet in being — is that the Senate is valuable not for what it does, but for what it could do. It has, of course, few powers in relation to financial affairs: but two-thirds of the Senate could block any amendment of the Constitution. Thus — if, for example, there were a close link between the twenty-two State Senators and their eleven States — the States could block an amendment to which the State Governments objected. But no such link exists, as far as I am aware: and so the State Senators act in isolation, in the rarified, but dignified atmosphere of the Senate.

For Senators do not, we may observe, indulge in the contumely of their plebeian counterparts in the Lower House. Indeed, the only harsh words I have heard in the Senate have been directed at kidnappers, gang-robbers, and members of the House of Representatives: all of them, it seemed, rather impossible fellows.

As an innovation, about a dozen Bills have recently been introduced into the Senate. These, of course, could not be money Bills: but the Senate has shown an interest in those matters in which it has an original jurisdiction, and indicated its support for law and order by occasional demands for such expedients as more deterrent penalties in the criminal law.

As recently as sixty years ago mutilation was accepted as a common form of punishment in some parts of this Peninsula: and the thought that one or two Senators might study our legal history therefore causes one, now and again, a slight shudder. But at least the Senate does worry about these matters. This interest of the Senate in matters of the criminal law may, incidentally, be due to the fact that the Leader of the Senate is the Minister of Justice, the only member of the Cabinet who is not a member of the Lower House.

In the United Kingdom it is probably true, as R. H. S. Crossman has recently observed, that "with the concentration of bureaucratic and economic power proceeding unchecked, Westminster has ceased to be the place where decisions are taken and the prestige of the Commons has

inevitably declined. Even sympathetic observers are beginning to ask whether our system of two-party government is much more than a facade to disguise the new despotism, managed by a non-party Establishment and scarcely affected by what happens at the polls." This is an interesting, if melancholy reflection: and the sympathetic observer, translated some eight thousand miles to Malaya, might ask himself whether the Federation or Singapore has fared any better. A powerful bureaucracy on one hand, and a benevolent commercial plutocracy on the other: in short, is an elected legislature anything more today than a convenient rubber-stamp for legislation and supply, and a forum for the disaffected to make an unheeded protest: and, a primrose on the brim of the river of independence, nothing more? These questions are not frivolous.

ELECTORAL CONSTITUENCIES

A basic change in electoral law was effected by the amending Act of 1962: for this Act affirmed the composition of the House of Representatives as 104 members, instead of 100; transferred from the Election Commission to that House the power to delimit Parliamentary constituencies; and abolished the formula for the delimitation of constituencies under a 'quota' system, written into the original constitution: substituting in place thereof certain principles set out in Part I of a new Thirteenth Schedule. Of these principles the most important one is that permitting a weightage of up to two to one in favour of rural constituencies: a provision presumably designed (since no explanation is afforded by the Explanatory Memorandum to the Bill) to ensure that the interests of the rural areas are adequately represented. It is possible that the majority of workers in rural areas are Malay. Certainly the argument was advanced in a criticism of the proposal: yet in view of the apparent drift of the rural population to the towns, it is suggested that any such criticism may be invalid.

However, the abolition of the powers of an independent Commission smacks a little of expediency: and expediency can be a dangerous policy. Indeed, these particular amendments, coupled with those affecting the Service Commissions, suggest that the Federation is intent upon destroying the relics of a paternal policy, embedded in the original Constitution, under which a number of independent bodies (in addition to the Supreme Court) shared, with the legislature, the authority of the Federation. The present policy is, no doubt, in line with orthodox constitutional doctrine in the United Kingdom: but there Parliament has lost much of its authority and most of its magic; and (ridden with the doctrines of Dicey as some of us are) it seems an unfortunate example to follow. Power is properly assumed by politicians, but the increasing complexity of life compels them to throw much to the civil service and, of this benighted body of men, those fare best who think least: for who

would move one step, if by doing so he put a foot wrong? That, surely, is not the way battles are lost, even on paper. The original architects of the Constitution may have been wiser than we know, in creating a complex division of powers designed to frustrate the politician and alarm the law student. To transfer all powers to the myth of a legislature and the reality of an executive is to make the way straight for authoritarian rule. This may not be a fear for today, but what of tomorrow, when these powers may be in other hands?

TAXING LEGISLATION

A further instance of a tightening-up of the provisions of the Constitution lies in the amendment of Article 67. This Article is designed to ensure that legislation involving taxation and public expenditure may only be introduced by a Minister and then only in the House of Representatives; it is derived from Articles 110 and 117 of the Constitution of India and expresses an orthodox principle of parliamentary government. In its original form Article 67 provided, to take a simplified example therefrom, that a Bill or amendment "making provision for imposing any tax shall not be introduced except by a Minister." This has now been amended to provide that a "Bill or amendment making provision *(whether directly or indirectly)* for imposing any tax, *being provision as respects which the Minister (of Finance) signifies that it goes beyond what is incidental only and not of a substantial nature having regard to the purposes of the Bill* shall not be introduced except by a Minister", etc. Exactly what the words now added (here in italics) may mean is far from clear, and no prize is offered for their translation into the national language or, indeed, into English: but their import at least is clear: to make the Minister, and not the Speaker, the arbiter of whether any amendment can properly be introduced by, say, (let us be optimistic here) a member of the Opposition. Applied with discretion, the power is of course as unobjectionable as that of preventive detention.

No doubt the ideas behind amendments of this nature can be traced back to the days before independence, when the relationship of the Federal Executive Council to a partly elected, partly nominated Legislative Council was such that the latter body exercised little more than a persuasive authority over the former. In this amendment, therefore, the influence of the colonial system of government might be said to persist in the form of certain autocratic attributes, as necessary now as they were in earlier days.

OFFICE AT PLEASURE

The Constitution set out with, it was hoped, an impartial and completely independent civil service, to be used as an advisory body to and as an instrument for implementing the policy of the Government. This independence, so recently reinforced by the decision of the Privy Council

in the case of *B. Surinder Singh Kanda* v. *Government of the Federation,* has, perhaps, and if the trend of constitutional amendments is any guide, been subject to a subtle erosion.

This erosion is indicated by the series of amendments to Part X of the Constitution (which deals with the public services) set out in the amending Act of 1960. This Act made several major changes, which may now be considered, possibly in their order of importance.

First, Article 132 was amended, in order "to make it clear that public officers hold office at the pleasure of His Majesty or, in the case of the State public services, of the Ruler or Governor of the State". This, at any rate, is the reason offered in the Explanatory Statement to the Bill; and it suggests that the amendment is of a purely declaratory nature, for the Statement adds that the amendment "in no way affects the provisions of the Constitution requiring that disciplinary functions in respect of members of the public services are to be exercised by, or subject to an appeal to, the appropriate Services Commission".

Now this amendment is worth careful consideration. Was it in fact declaratory, or did it import a new principle into the Constitution, and one different from that affirmed by the Privy Council in the *Singh Kanda* case? That it is derived, like so much of the Constitution, from the Constitution of India is clear. Article 310 of the Constitution of India provides, for example, that members of civil services hold office "during the pleasure of the President" : in India the Service Commissions act, in principle, as consultative bodies advising the Government on appointments to the public services. In the Federation the position may now be different: for the amendment (which implies the existence of prerogative powers not dissimilar in this context from those possessed by the Crown in the United Kingdom, and which were, no doubt, carefully considered and rejected by those who originally framed the Constitution) suggests that the Yang di-Pertuan Agong, acting through his Ministers, may dismiss a public servant at pleasure without recourse to the somewhat cumbersome machinery of the Service Commissions. Such a public servant must of course (Article 135) be given "a reasonable opportunity to be heard" (but to be heard on what?): and this seems the extreme limit of protection accorded a civil servant. If he is politically unacceptable, therefore, he runs a risk of dismissal without recourse to the Service Commissions: but he will have the satisfaction of knowing that his dismissal is not, after all, a "disciplinary function".

Such extreme action, is, of course, unlikely. No doubt the Service Commissions will continue to be used for disciplinary purposes, to the exclusion of any power of dismissal "at pleasure". Where a power exists, however, then sooner or later various pressures are liable to compel its exercise. *Caveat lector.*

The second major amendment lay in the abolition of the Judicial and Legal Service Commission, whose functions were assumed by the Public Services Commission — except in relation, generally, to the appointment of judges. Under the original Constitution judges could only be appointed by His Majesty on the recommendation of the Judicial and Legal Service Commission — a recommendation hedged about by consultations, but nevertheless specific and clear: so that, coupled with the independence of the Commissions themselves, an appointment was made by as impartial a body as it was possible to obtain.

But judges are, alas, and whether they like it or not, potential instruments in furthering public policy: and this argument, attractive to a contemporary Roosevelt, no doubt justifies their present appointment on the advice of a politician. The impartiality of a member of the Bench therefore rests rather in a settled habit of professional integrity, developed by experience of the law and humanity; and since he may privately distinguish the politicians from the civil service they control, it is not unreasonable to suppose that he will publicly maintain an even balance between the interests of the State and those of the individual. Nevertheless, the risk of political influence over judicial action has, since 1960, arisen on the horizon, a cloud no bigger than a litigant's hand: no such influence has, happily, been apparent so far, and it seems safe to assert that with a Government whose most prominent members are lawyers it will never arise. But it exists, and with a further, more distinct cloud manifest in the introduction of a permanent Court of Appeal, it is clearly possible that, at some future date, the current appellate functions of the Judicial Committee of the Privy Council may be abolished.

THE ATTORNEY-GENERAL

One fact that has emerged is that since the disappearance from the political scene in 1959 of the Attorney-General, the Government has been handicapped by an absence of specialised legal talent on the Government benches. The possible cure, introduced by the amendment to the Constitution designed to provide for a political Attorney-General, has not yet been brought into force, and it seems likely (this is simply a guess) that its operation will await the next general election, due sometime in 1964.

The question is one of some consequence, for by Article 145 of the Constitution and section 376 of the Criminal Procedure Code the Attorney-General is also the Public Prosecutor, invested with the power to institute and discontinue criminal proceedings. Now the (still-suspended) amendment to Article 145 retains these powers in the hands of a political Attorney-General, appointed by His Majesty on the advice of the Prime Minister, who will probably (but need not necessarily) be a member of the Cabinet or a member of Parliament — or both. Such

an arrangement, derived from British practice, should put the powers of the Public Prosecutor in the hands of an experienced lawyer (for the Attorney-General must be qualified to be a judge); and the responsibility for the exercise of those powers will rest either with a Minister or, more probably, and assuming that the Public Prosecutor is a member of the House of Representatives, with the appointee himself.

At which point we may note, in passing, that Standing Order 36 of the House of Representatives provides, *inter alia,* that "the conduct or character . . . . of Judges and other persons engaged in the administration of justice . . . . shall not be referred to except upon a substantive motion moved for that purpose." Whether a Public Prosecutor falls within this provision is a nice point for, no doubt, the Speaker to resolve; it seems likely that he does so fall, in which event it will be interesting to see how a political law officer and prosecutor may be called to account. Possibly — the thought may be optimistic — the existence of the threat of a substantive motion of criticism simply being put upon the Order Paper may be, after all, an adequate safeguard against an abuse of power: on the other hand, there may be something to be said for a permanent Public Prosecutor existing, contemporaneously with a political Attorney-General, and holding office upon more or less the same conditions as a Judge. This is certainly an entertaining matter for the law student to debate: for what are the subtle checks, persuasions and pressures that operate here, as they do in the United Kingdom, to ensure that powers are exercised with responsibility?

It is, incidentally, worth noting, in view of current and sometimes critical interest in the administration of criminal justice in Malaya, that the law officers of the Federation seldom if ever appear in person to conduct prosecutions. Before 1957 the Attorney-General, certainly, was saddled with many of the burdens of political, as well as legal office. With independence, however, the Executive Council (of which the Attorney-General was a member) ceased to exist; and in 1959, with the dissolution of the last Legislative Council, he disappeared, for the time being at least, from the front line of politics. Perhaps we may hope for a revival of the practice whereby, from 1897, cases of "special difficulty or importance" were conducted by the Legal Adviser of the Federated Malay States: for the presence of a law officer in the courts is, one may reasonably hope, as much appreciated by the courts of the Federation as it is by the courts of the United Kingdom or, for that matter, Singapore.

THE CIVIL SERVICE

The Federal Civil Service was subject to intense stress during the first two years of the new Constitution. Already understaffed, it was with independence committed to the creation of a new department of external affairs, and many other additional burdens: yet at the same time expatriate officers were permitted to leave the service, and offered to

that end the additional inducement of sums of compensation of up to eleven thousand pounds. In consequence, and to make a severe and extremely unfair generalisation, the best of the expatriates left on or shortly after independence; their colleagues, permitted to draw up to three-quarters of their compensation and given varying options to remain in the public service up to 1960, 1962, etc. remained, spending some time, one suspects, in the management of their investments but remaining astute to collect any further crumbs that might fall from the table of independence; and yet the civil service continued to function with the same skill, honesty and efficiency for which, so its members had ever affirmed, it was justly renowned.

To what extent this curious phenomenon indicates the competence and dominant self-interest of the civil service is a matter for the historian, rather than the contemporary reviewer: although perhaps C. Northcote Parkinson has a simple explanation. The fact remains that the civil service, which ought to have collapsed under the strain of independence, did not do so. To the disappointment or pleasure of its senior members (the choice is difficult) it continued to function with, as ever, an anxious and proper care for its hours of work and its general rights. Gone are the days when the colonial conscience required civil servants to remain at their offices until five, six or later in the evening: yet today the life of the civil service and the government continues with, in some spheres, greater vivacity. Perhaps, after all, those apparently industrious expatriates were obstructing each other (as well as, on a secondary plane, the public) and that with their absence the machine manages to function as well as, or perhaps slightly better, than it did.

One reason for this may lie in the fact that some civil servants are subject to the strict and invigorating vigilance of Ministers who have been members of the civil service, and know its little ways. So it is that the Minister of Rural Development, for example, is aware and can dispose of the obstructions of bureaucracy within his own Ministry by such unorthodox methods as the tape recording of the oral progress reports of civil servants, made at meetings held to review the course of rural development. I have heard one of these played back on a subsequent occasion, with interesting results.

Independence has, in any case, tapped energies that were subdued or, it may be, non-existent when the British ruled Malaya. The departments of the civil service, headed almost entirely (except where there has been an absence of technicians or a failure of policy) by Malayan officers, have in most cases, it would seem, done as well as and in many cases perhaps much better than expatriates. The testing time is, no doubt, still to come: but they seem as capable of facing it as their predecessors.

THE NATIONAL LANGUAGE

Under Article 152 of the Constitution Malay is the national language. No law has yet been passed under that Article, however, defining the script of that language: so we are still in doubt whether Jawi or romanised Malay is to be chosen although, on the basis of Indonesian practice, it seems likely — again, this is a guess, but the road signs may guide us — that this will be romanised Malay. Such a choice would be welcomed, I suspect, by all non-Malays who must learn the national language, in spite of the fact that it lacks the fluency, beauty and, I believe, expressiveness of the cursive script of Jawi.

Under Article 152, however, English may be used in Parliament, and for all other official purposes, at least until 1967, and until such time thereafter as Parliament decrees otherwise. A similar provision relates to the use of that language in the High Court and the Court of Appeal; and Bills and Acts of Parliament appear only in English.

Whether Malay can become the sole official language by 1967 seems to me, speaking with some diffidence, doubtful. The translation of Bills from English to Malay, for example, presents many difficulties, for legal terms do not admit of loose translation: and indeed, an official translation of the Constitution into the national language has only just been completed — although I have seen copies of an unofficial, Indonesian translation on sale in the bookshops.

This problem of legal translation poses particular difficulties. I think a heavy burden is put upon a draftsman in present circumstances, for he must — or should — draft with one eye on a translator, seeking therefore to express the intention of the legislator in English as simple, lucid and clear as possible, while leaving that margin of flexibility so necessary in many cases: for at times the honesty of politicians requires a fine degree of imprecision.

Yet the Bills of the Federation are often tortuous and obscure, and presumably derived from the "fear, often unconscious, that clear thinking would lead to anarchy" — a fear considered in perhaps the greatest of modern political essays, Bertrand Russell's *Philosophy and Politics.* While I would deplore this at any time, when at least half the legislature does not habitually use English such a practice seems to me to be wrong. I know that it calls for an extraordinary effort to produce a comprehensible law, but if the national language is to become an effective force, it is essential that as far as possible laws now be drafted in simple English capable of adequate translation by laymen. Of course, there's a danger here for, as George Orwell says, 'To write in plain, vigorous language one has to think fearlessly, and if one thinks fearlessly one cannot be politically orthodox.'

On the wider issues of translation there are of course many more problems. At the official level there are twelve *Gazettes,* one Federal and eleven State *Gazettes,* in some of which appear translations of legislation, sometimes in Jawi, sometimes in romanised Malay: although I have not so far encountered such a translation in any Federal *Gazette.* These *Gazettes* run to formidable proportions, even in English: but put wholly into romanised Malay they will be even larger. There is much to be said, therefore, for a decent brevity in expression: and while the days when a Rajah of Sarawak could simply order that 'all wooden shop-houses shall be brick' have gone, we can nevertheless strive for an equally effective and readily comprehensible communication.

Incidentally, I am not one of those who object to the adoption in Malay of English terms. As long as a word is understood by those to whom it is addressed, its origin seems to me a matter only for the etymologist.

CASES ON THE CONSTITUTION

The last five years have seen only four cases directly concerned with the Constitution: and all these concerned the rights of the individual. First, in 1958, the provisions of the Restricted Residence Enactment was challenged in *Chia Khim Sze* v. *Mentri Besar, Selangor* (24 M.L.J. 105). Under this Enactment of the Federated Malay States, the Mentri Besar may, after such enquiry as he may think necessary, require a person to reside in or be prohibited from a particular area of the State. It was held that since the right to counsel conferred by Article 5(3) of the Constitution pre-supposed a right to be heard, and since such right did not exist under the Enactment because the Mentri Besar need not hold an enquiry, Article 5(3) did not extend to such an enquiry. This decision has been the subject of criticism; it might well have been upset on appeal; and it is not calculated to inspire confidence in the right to counsel supposedly conferred by Article 5 of the Constitution.

In the second case, that of *Munusamy* v. *The Public Services Commission* (1960) (26 M.L.J. 220) the High Court held that a public servant who was removed from a probationary appointment (for which he was not strictly qualified) to the substantive appointment he formerly held was not thereby "reduced in rank" within the meaning of Article 135 of the Constitution. No one can, I think, fairly cavil at this decision, and the judgment is chiefly remarkable by reason of the fact that the cases cited therein are all Indian cases: a fact underlining the extent to which the Federation is indebted to the great and labyrinthine legal system of India.

The third case *(B. Surinder Singh Kanda* v. *Government of the Federation of Malaya* (1961)) arose out of Article 144 of the Constitution, and may be properly regarded as a counterbalance to the 1958 case and a vindication of the rights of a public servant. Here two points arose, one of a constitutional nature, the other relating to administrative law and enabling us to view in all its beauty that delicate flower styled natural justice. The facts of the case are simple: hence the confusion with which they became surrounded. Under the Police Ordinance, 1952, the Commissioner of Police had the power to appoint police inspectors. After Merdeka Day the Police Service Commission, to which the Commissioner of Police was himself subordinate, undertook this task. Allegations concerning the conduct of an Inspector having come to the ears of the Commissioner, he ordered an inquiry into that conduct; satisfied by the inquiry of the substance of the allegations, he supplied a copy of the report of the inquiry to an adjudicating officer appointed to consider formal charges against the Inspector, who having heard the Inspector, recommended his dismissal: upon which the Commissioner, purporting to exercise powers vested in him under the Police Ordinance, 1952, dismissed him. The Inspector appealed to the High Court, where he succeeded; the Government appealed to the Court of Appeal, where on their home ground they scored a 2-1 victory; and the Inspector returned the engagement in London, where he finally succeeded.

The aspect of natural justice is not, alas, pertinent to this sketch: but the effect of the Privy Council judgment upon the Constitution deserves some mention. The trial Judge had held that the Police Ordinance, 1952, was clearly an existing law; Article 144(1) of the Constitution vested the power to appoint police officers in a Police Service Commission, "subject to the provisions of any existing law and to the provisions of [the] Constitution"; clearly the Constitution must override existing law; therefore, in exercise of the powers conferred by Article 162, under which a Court may apply an existing law "with such modifications as may be necessary to bring it into accord with the provisions of [the] Constitution," the Police Ordinance, 1952, must be construed in the light of the Constitution: and by this light the trial Judge saw that the powers of the Commissioner had, with independence, been assumed by the Service Commission. The judgment was well-expressed, logical and clear, and now that the smoke of the powder and shot spent in attacking it has been blown away by the Privy Council, it can be appreciated as a notable victory for justice and commonsense, two commodities sometimes viewed with suspicion, even in the law courts.

The fourth case, that of *Lim Lian Geok* v. *The Minister of the Interior* (1962) 28 M.L.J. 159, deals with the powers of the Federal Government, under Article 25 of the Constitution, to deprive of his citizenship a person who is a citizen by registration, on the grounds of

disloyalty or disaffection. The case appears, so far, to turn upon a technical point, but as it is under appeal to the Privy Council it would be improper for me to comment further upon it.

TRIAL BY JURY

Although not in fact incorporated in the Constitution, the right to trial by jury may be regarded as almost a constitutional right. Until 1958 we had never been able to make up our minds about trials by jury, in the Federation. The practice was instituted in the Malay States in the last century, with British intervention, then hastily abolished in or about the year 1900, when a criminal procedure code was introduced, providing for trial with assessors on the Indian lines, but giving a judge no power to overrule his assessors. In this code the draftsman, a cautious fellow, also provided the machinery for introducing trial by jury. This was not brought into force, however, until independence, when one of the first acts of the government was to provide for the trial by jury of all capital cases, in all the former Malay States, with effect from January 1, 1958. Before 1958 trial by jury existed only in Penang and Malacca: now it exists in all States.

I suspect that in England trial by jury survives owing to the schizophrenia brought about by the national hypocrisy of the English, who have almost come to the belief that justice should deem to be done, regardless of whether in fact it is done. It is not surprising that such an ambivalent attitude, understood in perfidious Albion, should fill others with a sense of awe at the majestic incomprehensibility of English law. No wonder the unhappy Stephen, endeavouring in 1871 to consolidate a law of evidence in India, observed despairingly that "the English Law of Evidence appears to be totally destitute of arrangement". This lack of arrangement, still more a lack of logic, runs through much English law — a recent example is the Homicide Act of 1957 — and is a danger to those who seek to follow without question English law and practice. Nevertheless, we now have trial by jury throughout the Federation.

In a broadcast talk printed in *The Listener* of March 8, 1962, C. R. Hewitt observes: "I want to suggest that the time has come for a thorough re-examination of the system of trial by jury. I use the word 're-examination' with a conscious sense of courtesy to the past, because I do not believe that it has even been thoroughly examined at all." Thoroughly examined or not in the Federation, the time has also come to re-examine it here, it is suggested: for — apart from the fantastic difficulties occasioned by the problem of translation — how can it ever be assumed that any jury can understand the conscientious narrative and legal annotations of a judge summing up with one eye on the jury and the other on the Court of Appeal? *Ratanlal* takes some mass of pages to consider the law of culpable homicide: and yet an untutored juryman is expected to grasp the law in a day or two, and then to determine the

fate of a fellow-countryman. The system barely works in England, where it is one of the less fashionable relics retained as nostalgic reminders of a great past: but here there is, surely, much to be said for the assessor system, with a simple determination of precise questions of fact, posed by a judge who himself takes the responsibility of final decision and sentence. Some enterprising student might study this subject and produce a paper, with statistics: it might, who knows, suggest that we would be wise to return to the former system of assessors.

TO THE CENTRE

A general feature of this five-year period has been an assumption by the Federation of certain powers formerly vested in the States. Thus, Article 76(4), which enables Parliament to legislate "for the purpose only of ensuring uniformity of law and policy", has been amended in order to enable Parliament to legislate on the subject of mining leases, while Article 110 has been somewhat clumsily amended to enable Parliament to control the royalties levied in the States on minerals (other than tin), and to provide, presumably as a *quid pro quo,* for the assignment to the States of at least ten per cent, of the export duty on tin produced in the State, and of such proportion of the export duties imposed on other minerals, as Parliament may think appropriate.

These amendments stress the continuing centripetal forces that appear to operate upon modern federal governments. At the same time they underline the extremely slender protection accorded to the States under the existing Constitution: for the only strict constitutional safeguard of the States lies in Article 159.

This Article requires a two-third majority of the full membership of both Houses of Parliament for any major constitutional amendment. Thus — theoretically — the twenty-two State Senators could effectively block any amendment adverse to the States, if they considered themselves representatives of the States. As I have indicated earlier, practice so far suggests that there is little or no link between the two Senators elected by each of the State Legislative Assemblies, and their State Governments. There is, of course, no reason why there should be any such liaison: but its absence underlines a weakness in constitutional practice since (to consider only the matter of constitutional amendments) the State Senators will not in general be concerned, at the late stage at which they generally review such amendments, with a critical consideration of their effect on the States. After all, a Senator may reflect that there is already so much consultation in practice, through the Conference of Rulers, the National Finance Council, etc., that it is reasonable to assume that the State interests have already been adequately represented and reviewed: a possibly dangerous assumption, but one fairly to be deduced from the complexities of current practice.

Yet all the intermediate reviewing bodies tend to review matters in the light of particular, rather than general interests: thus, the Conference of Rulers is essentially concerned, one suspects, with the position of Rulers; the National Finance Council, with national finance; and so on. The body designed to afford a final, general review of proposed amendments must, inevitably, be Parliament: and it is here that the limited interests of the State may not be adequately considered, for members of both Houses tend to regard themselves (and this, no doubt, properly) as agents of that mysterious organ, the Federation, from whom they receive their remuneration as members.

Amendment of the Constitution is made pursuant to the provisions of Article 159, which contains, however, a specific restriction: for under Clause (5) thereof no law amending Articles 38, 70, 71(1) and 153 may be passed without the consent of the Conference of Rulers. This Conference, established by Article 38, is attended by His Majesty, the Rulers, the Governors, and their Chief Ministers: and the functions of the constitutional Heads of State must be exercised in accordance with the views of the Cabinet and the State Executive Councils. Here, clearly, is a body with much wider authority than the Conference of Rulers established by Clause 67 of the Federation of Malaya Agreement, 1948: yet its authority in the sphere of constitutional amendment is extremely limited. Apart from what appears to be a drafting error (for Article 159 could apparently itself be amended without reference to the Conference of Rulers) there are other and more vital State matters concealed in the Constitution than those referred to in Clause (5) of Article 159. Article 38 establishes the Conference of Rulers; Article 70 deals with the order of precedence of the Rulers and Governors; Article 71(1) guarantees the right of a Ruler to enjoy the rights and privileges accorded to him by the State Constitution (the principles of which are in fact determined by Article 71(3) and (4) and the Eighth Schedule); and Article 153 — that famous Article — provides for the reservation of posts in the public service, scholarships, licences and permits for Malays."

Yet there are other provisions of the Constitution which seem of even greater importance to the States than those mentioned in Article 159. Article 71(3) and (4), for example; the Eighth Schedule itself, which sets out "the essential provisions" to be incorporated in State Constitutions; Article 76(4), giving Parliament power to legislate on State matters; and Articles 74 and 80 and the Ninth Schedule, setting out the legislative and executive powers of the Federation and the States. All these provisions, I suggest, should be capable of amendment only with the approval of the States. Such approval could be expressed by the Conference of Rulers but, following Indian practice, it might be more appropriate to require the approval of a majority of the State Legislative Assemblies, signified by resolution.

Such an amendment would bring together the elected legislatures of the Federation and the States, and afford a valuable check upon the increasing powers of the Federation, whose appetite grows with eating. Whether a Federation constantly enlarging its powers at the expense of its component States is desirable or not is of course a political issue: but with merger and Malaysia in the air, the essential character of the Constitution as a treaty or agreement, rather than a lengthy Act of Parliament, becomes more obvious.

Article 159 has been amended, however, by the Act of 1962, to provide for merger with Singapore and, perhaps, other territories. Curiously enough, the amendment is so designed that, by a simple majority of numbers of the members present at any meeting of the House (and a quorum in the House of Representatives is a mere 26 members, in addition to the member presiding) the Constitution can be subjected to "any amendment made for or in connection with the admission of any State to the Federation or its (the State's or the Federation's?) association with the States thereof, *or any modification made* as *to the application of this Constitution to a State previously so admitted or associated."*

Again it is difficult to understand what was intended by the words in italics. Amendment in Article 159 includes "addition and repeal", but "modification" is obscure — Article 162 interprets it as including, in that Article, amendment, adaptation and repeal. Whatever it means, it implies, however, that a bare majority is sufficient to "modify" the Constitution in order to "apply" it to a State already within the Federation. And who could challenge the propriety of such a modification? No court can question the validity of the proceedings of either House of Parliament (see Article 63), and so it seems impossible to assert that subsequent "modifications" are not made under the authority of the Clause, if Parliament asserts that they are. This opens the door to all manner of modifications, without the tedious necessity of obtaining the support of two-thirds of the total numbers of each House.

Amendments such as that made to Article 159, and designed to assist in the admission of new States to the Federation on a bare majority of votes in the two Houses of Parliament, tend by their very expediency, therefore, to obscure the character of the Constitution as a product of treaty: but, as the MacMichael Agreements illustrated, it is dangerous to indulge in premature burial of the States. The States have, like the lawyers, their uses: and in a world in which economic power tends to be concentrated in the hands of non-Malays, they may act as a valuable, stabilising barrier against hasty, expedient or authoritarian tendencies at the centre.

THE RULE OF LAW

All these changes, however, illiberal as some of them may appear to an outsider, cannot be understood without an appreciation of the structure and history of contemporary Malayan society: and these are matters outside the scope of this brief and impertinent review. At least the present Federation Government has shown that it is not afraid to govern, and it has certainly shown no signs of weakness in the sphere of national security; it has shown itself committed to government by law and even at times (as in the Kidnapping Act, 1961) committed to an unduly optimistic belief in the efficacy of law; it has been prepared to justify its authority to the Houses of Parliament, even although it has not, say, used the machinery of Select Committees for its more important legislative measures; and it has shown itself anxious to create a national consciousness, while being tolerant of the communal difficulties antagonistic to such a consciousness and occasionally, alas, exploited by myopic politicians.

All in all, it is no doubt true to say that the present guardians of the Constitution have altered it only to what they consider the minimum extent necessary to enable them to preserve and enlarge the prosperity and happiness of the people. Such a utilitarian, moral policy requires philosophers, not politicians, for its implementation: and, let us admit it, the philosopher, whether seated in Trafalgar Square in London or observing a picket outside Federal House in Kuala Lumpur, is not always the most tolerant of men. The Federation may therefore be grateful for the fact that its Prime Minister is one of those rare phenomena, a tolerant philosopher, from whom its present government derives its character and personality, and under whose guidance it is reasonable to hope (to make a final quotation from the unrepentant Russell) that it will never find it "worth while to inflict a comparatively certain present evil for the sake of a comparatively doubtful future good."

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