Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches BY HIS ROYAL HIGHNESS SULTAN AZLAN SHAH, EDITED BY PROFESSOR DATO' SERI VISU SINNADURAI [Kuala Lumpur: Professional Law Books/Sweet & Maxwell Asia, 2004. xxxv + 428 pp. Hardcover: RM280/US$74]

There is perhaps no better introduction to the present collection of His Royal Highness Sultan Azlan Shah's extra-judicial writings, lectures and speeches over the years than the Postscript written for the book itself.

These final pages address the developments that have occurred since His Royal Highness had on previous occasions dealt with the issues of constitutional monarchy and the judicial function in a number of speeches, lectures and writings, all of which are here reproduced in the present book. There is a discussion of the 1983 and 1993 amendments to the Federal Constitution. By 1993, these had removed the immunity of the State Rulers, ultimately gave the *Yang di-Pertuan Agong* and the Rulers only thirty days to assent to a Bill at the Federal and State levels respectively (failing which such a Bill would be deemed to have become law), and required the *Yang di-Pertuan Agong* and the Rulers to accept and act in accordance with advice received. The first of these, at least, was a very serious incursion into the powers, rights and privileges of the *Yang di-Pertuan Agong* and the Rulers under the original *Merdeka* Constitution.

Perhaps the learned editor could also have mentioned Professor Andrew Harding's remarks subsequently in the 1986 issue of the Malaya Law Review. Some readers may recall Harding's view that the 1983 "compromise" amendment had "enlarged" the powers of the *Yang di-Pertuan Agong* existing before then in connection with

the prospect of withholding the Royal assent. As he had put it provocatively, that compromise snatched "defeat from the jaws of victory".

But by 1993, even the Rulers had been curtailed by the current thirty-day rule brought into being by the 1993 amendments, and in the words of His Royal Highness, this "achieved what was not fully accomplished by the 1983 amendments". In any case, Harding's view on the (insignificance of) Royal assent seems also to have been shared by His Royal Highness in an article in the 1982 issue of the Journal of Malaysian and Comparative Law/*Jurnal Undang-Undang* (reprinted in Chapter 10 of the present book). Needless to say, that article had attracted attention during the events of 1983. It was certainly Professor Trindade's view in an essay published in 1978, the relevant part of which, interestingly, was enclosed by the Attorney-General in his advice of 18 October 1993 to the Malaysian Prime Minister. The Attorney-General had expressed the view that: "I am…of the opinion that the *Yang di-Pertuan Agong* has no power to withhold assent to *any* bill passed by Parliament" (my emphasis). The English translation of that letter appears now in Professor H.P. Lee's famous "Postscript" to a collection of essays edited by Professors Trindade and Lee, published in 1986, to which readers know to turn to for an incisive analysis of the 1983 amendments. Notably, Professor Lee does not share the (then) Attorney-General's unequivocal view completely.

The result of all this, in any event, was that by the 80s and the 90s, it could no longer be said, as Professor Trindade had been able to say in 1978, that "there is hardly any criticism of the institution" of the *Yang di-Pertuan Agong* and that there had been "no significant change to it". This book deals therefore with a matter of great contemporary significance in Malaysia.

The Postscript discusses also the role of the Conference of Rulers (which itself possesses certain constitutional powers) when called upon to be consulted, or to offer its advice, or consider its consent in respect of proposed executive action under the Federal Constitution. According to His Royal Highness, the distinction drawn by Lamin P.C.A. in the Court of Appeal case of *In the Matter of an Oral Application by Dato' Seri Anwar bin Ibrahim to Disqualify a Judge of the Court of Appeal* [2000] 2 M.L.J. 481 is highly debatable. There, it was considered (albeit *obiter*) that a requirement to "consult" the Conference of Rulers was not a requirement to seek the "consent" of the Conference of Rulers. His Royal Highness says: "Whatever strict legal distinction may exist between the terms 'consult' and 'consent' (or even 'advise'), the role played by the Conference of Rulers cannot be diminished by drawing such slight distinction in terminology" (p. 395). The consultation process is not a mere formality therefore, and it cannot be said, as Lamin P.C.A. did say, that even if the "Conference of Rulers…withholds its views or delays the giving of its advice" certain appointments can be gone ahead with. The difficulty with such a suggestion is that, if true, it would also mean that even the analogous requirement to "consult" the Chief Justice on judicial appointments may be dispensed with by the Prime Minister (Article 122B(2), Federal Constitution). Surely, some greater weight must therefore be given to the word "consult". Simply put: "The Prime Minister is duty-bound to give serious consideration to such advice" (p. 397).

Walter Bagehot had put the point memorably—constitutional monarchy means a King saying to his Minister that:

> The responsibility of these measures is upon you. Whatever you think best must be done. Whatever you think best shall have my full and effectual support. *But* you will observe that for this reason and that reason what you do not propose is better. I do not oppose, it is my duty not to oppose, but observe that I *warn*.

No-one after all need suggest that magnificent Churchillian view, instead: "A great battle is lost. Parliament turns out the Government. A great battle is won. Crowds cheer the Queen".
But His Royal Highness would emphasize another passage from Bagehot (p. 7):

> [T]he sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no other.

Even here, however, we may observe from the difficulty encountered by the view of Lamin P.C.A. above that one advantage which constitutional monarchy in Britain does seem to have is that both Bagehot and Churchill could say all that they did with the benefit of an unwritten constitution. One disadvantage in the Malaysian example appears to be that constitutional monarchy at times threatened to become reduced to constitutional semantics instead—that in the trees of words, the woods of good sense have sometimes threatened to disappear. Constitutional monarchy is a creature of convention, its practice an art not a science. For those who must apply these conventions and those judges who may be faced by a convention indirectly impleaded before them, settled monarchical and political practices, as well as judicial recognition of these are simply relied upon to fill in the logical gaps. For a written constitution, however, we can agree with His Royal Highness that there can be nothing worse than the tyranny of the written word taken only in the abstract. This is a slightly different proposition from Professor Harding saying that Professor Hickling was wrong to speak of the existence of prerogatives which seemingly lie outside Malaysia's written constitution (in the 1975 and 1986 issues of the Malaya Law Review). A prerogative, operating in England by convention, may have become codified in the Federal Constitution, and there may or may not be prerogatives in existence beyond the four corners of the Constitution, but an interpretation of what the Constitution says should nonetheless maintain, in His Royal Highness' words, the "grain and spirit" (p. 395) of the Constitution. This, ultimately, may be no different from saying that conventions are as necessary to written as they are to unwritten constitutions (pp. 22-23):

> …the executive itself cannot just act as it pleases…constitutional conventions…serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general.

The State Rulers have here an effective voice. It is however less usual, indeed extraordinary, that we should also have the benefit of these views being expressed by a previous occupant of Malaysia's highest judicial office, and who is bound therefore to speak for the importance of the Constitution and against taking the

several amendments that have been made to the *Merdeka* Constitution too lightly for the mockery that could make of the supremacy of law (the substance also of Chapters One, Two and Four). One important consequence of this is that the Malaysian judiciary have also had the unusual benefit of a Royal champion (for which see Chapters Five and Eleven especially). As His Royal Highness puts it (p. 105):

> Under a written constitution of a federation like Malaysia, the absolute independence of the judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the executive.

There is perhaps no-one more qualified to speak on these matters. And yet one may be forgiven for thinking that such a uniquely qualified person may also be governed by considerations which would not apply in the case of another. As Professor H.P. Lee has pointed out, the truth is today that the Rulers have had their "oral undertaking" of 1983 abrogated by the 1993 amendments and their personal immunities removed. Yet they chose, it seems, not to test their privileges, position, honour and dignities before the courts, when the *Yang di-Pertuan Agong* triggered the Tribunal inquiry into the Lord President's conduct in 1988 which had undermined the Malaysian judiciary. Professor Lee's point is that the *Merdeka* Constitution had anticipated two important stabilizing devices in Malaysian constitutional government—the steadying hand on government of the *Yang di-Pertuan Agong* and the Rulers on specified matters, and the crucial role which an independent judiciary should play. The present book is about all that, but it cannot, understandably perhaps, always say what needs most to be said, when it needs most to be said.

Even so, the drift of this book is unmistakable; that it does say some of what needs to be said is perhaps enough. In the landmark Supreme Court case of *Public Prosecutor v. Dato' Yap Peng* [1987] 2 M.L.J. 311, the Public Prosecutor had sought, under section 418A of the Malaysian Criminal Procedure Code (Act 593), to remove a case from the Sessions Court to the High Court. The late Eusoffe Abdoolcader S.C.J. had quite famously castigated this "legislative and executive intromission into the judicial power of the Federation" and dismissed the Public Prosecutor's appeal. He had spoken passionately of the Federal Constitution's vesting of "the judicial power of the Federation in the curial entities" being otherwise made "no more than a teasing illusion, like a munificent bequest in a pauper's will". Yet what resulted at the time was the Constitution (Amendment) Act 1988. The inherent jurisdiction of the High Courts today is now little more than a consequence of legislative permission. His Royal Highness has two things to say here—the situation may yet be saved by *Liyanage v. R.* [1966] 1 All E.R. 650 (P.C.), but that Parliament should in any case reconsider the 1988 amendment. That needed to be said.

Similarly, in discussing allegations often heard these days of an erosion of public confidence in the judiciary, His Royal Highness says, simply, that whatever the truth of this: "…a judiciary may only be said to be independent if it commands the confidence of the public—the very public it seeks to serve" and that "[a]t the end of the day, it is this public perception that ultimately matters" (p. 400). Putting aside the judges themselves, those who speak of the recent release of the former Malaysian Deputy Prime Minister as a "step forward" but who will, in the same breath, speculate about the existence of a "deal" between the executive and the judiciary could still profit from these remarks.

Likewise, in respect of "events in late 1983 when controversies raged throughout this land over the propriety of certain proposals made by the government" (i.e. the 1983 proposed amendments to the Constitution), His Royal Highness concludes that the outcome nonetheless "was one which met with the approval of all parties affected" and "reflect[ed] the wishes of the people" (p. 23).

There are fourteen chapters in addition to the Postscript described above. Some of these are well-known, such as the article originally published in the 1982 issue of the Journal of Malaysian and Comparative Law/*Jurnal Undang-Undang* (which was also reprinted in the 1986 collection of essays edited by Professors Trindade and Lee). But aside from that chapter and the Postscript, the remaining thirteen chapters consist of previously dispersed lectures and speeches touching on the three editorially interwoven themes of constitutional monarchy, the rule of law, and good governance. Some of these call for action, such as His Royal Highness' call for a review of the Constitution with widespread public consultation and for a Malaysian Freedom of Information Act.

That "breadth and depth of…learning in the law" which the late J.C. Smith, His Royal Highness' former tutor had once referred to is not only present, but delivered here in a pithy and engaging style. Here is what I mean (p. 251):

> The King is elected but he is a hereditary Ruler in his own State. He is elected not by universal suffrage as in the case of members of Parliament, but by the other hereditary Rulers. His term of office is five years. He can be removed.

The result should appeal to all who may be interested in the subject of constitutional monarchy or the Malaysian Constitution from the unique viewpoint of a progressive monarch and a former Lord President. Biographical sketches of His Royal Highness appear in between the various chapters, a table of cases appears at the beginning, and a useful index appears at the end. This is a handsome, well-written and informative book which makes His Royal Highness' extra-judicial views available for posterity, and hopefully to a wider audience. We owe a debt of gratitude to the editor and publishers. It should find a place in every decent private and institutional library.

C. L. **LIM**