CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE POWER IN MALAYSIA

INTRODUCTION :

In 1895 the Sultan of Johore introduced for his subjects a written Constitution the preamble to which stated that it was a Constitution "That shall become and form the law of our State, country and people, and shall be an inheritance which cannot be altered, varied, changed, annulled or infringed or in any way or by any act whatsoever be repealed or destroyed." In 1939, the Johore Court of Appeal was invited by counsel to declare a certain Offences by Mohammedans Enactment *ultra vires* this Constitution and therefore void. The judges of the Court were unanimously of the opinion that this was not possible. In that case, *Anchom* v. *Public Prosecutor*,[1] McElwaine, Chief Justice of the Straits Settlements, said:[2]

> The position is that the legislature is the sole authority which can decide whether what it does is *intra vires* or not. It is constituted by enactment and the sole judge in its own cause. In legislating it must be presumed to have interpreted the Constitution as permitting that legislation.

Since then, however, one has witnessed the introduction of new constitutional concepts, especially after Merdeka Day, August 31, 1957. Arising from the discussions in 1956 for an independent Federation of Malaya, the Reid Constitutional Commission was appointed to recommend constitutional arrangements for the proposed federation. In due course, the Constitutional Commission presented its report together with its draft Constitution which, after further examination and some amendments, was finally promulgated as the Constitution of Malaya on Merdeka Day. This Constitution made provisions for a "federal form of government for the whole country as a single independent unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature," in accordance with the terms of reference.

Although the terms of reference for the Commission had not indicated whether the doctrine of legislative supremacy or constitutional supremacy should prevail, the written Constitution which the Reid Commission presented made it abundantly clear, however, that the entire philosophy of the constitutional arrangements was the doctrine of constitutional supremacy. Article 4 of the Constitution provided: "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void." With the attainment of independence and the simultaneous promulgation of the Constitution which came along

1. (1940), 9 M.L.J. 22.

2. *Ibid*., at p. 26.

with it, therefore, Malaya began, in this respect, a new era in constitutionalism similar to that of India and the United States, but different from that of United Kingdom.

Written constitutions may be espoused by legal systems for various motives: some seek to grant a high degree of protection to fundamental liberties, and others might wish to safeguard the interests of minorities. And in federal systems, written constitutions are often felt to be a good means of maintaining an amicable state of affairs between the States and the centre and to protect the former from excessive dominance by the latter. But whatever special objectives there may be for a written constitution, in the ultimate analysis, these objectives are achieved, or at least sought to be achieved, through the imposition by the Constitution, of various limitations and restrictions upon governmental powers, which limitations are intended to curb the arbitrariness of government in any specified matter. The "supremacy" of the Constitution is effected by giving the Courts the power to review governmental actions which violate these limits.

The purpose of this paper is to observe the nature of the limitations which the Constitution of Malaysia[3] seeks to impose upon governmental powers, particularly in the legislative field. (The inquiry focusses largely on legislative powers primarily to limit the discussion to modest proportions and not because other constitutional provisions and governmental functions are less important. Constitutional limitations on executive powers, for instance, do raise issues as crucial as those discussed here and this was well illustrated in the recent case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli*[4]).

Justification for undertaking this inquiry lies in the writer's belief in the relatively simple premise that if a written constitution such as that of Malaysia, which declares itself to be supreme, is to be meaningful and a useful instrument, then not only should the Constitution seek to subject the various organs of the Government to the prohibitions and limitations contained therein, but these limitations and restrictions must themselves, of necessity, be *effective*. Otherwise, written constitutions would, in the words of Chief Justice Marshall of the United States,

3. The Constitution of Malaysia is, in fact, the Constitution of the Federation of Malaya as amended by the Malaysia Act, Act No. 26 of 1963 and subsequent amendments.

4. [1966] 2 M.L.J. 187. In this case, the Governor of Sarawak "dismissed" the Chief Minister purportedly pursuant to provisions of the Sarawak State Constitution, relying upon a letter written to him by 21 members of the State Legislature stating that they had no longer any confidence in the Chief Minister (there being 42 members and a Speaker in the Legislature). In proceedings commenced by the plaintiff Chief Minister, Harley Acting C.J. (Borneo) held that the purported dismissal was void and of no effect and that, under the Sarawak Constitution, lack of confidence could be demonstrated only by a vote taken in the Legislature. The learned judge also doubted whether the Governor could in any case "dismiss" a Chief Minister who fails to resign but added that if such power did exist, the plaintiff in this case nevertheless had been denied a reasonable opportunity to tender his resignation or to request a dissolution of the Legislature. For the sequel to the case see, *post,* at p. 110.

become "absurd attempts to limit a power ... in its own nature illimitable."[5]

The inquiry in this article will be confined to certain selected areas of the Constitution of Malaysia. We shall first consider Article 5(1), Article 9(2), and Article 10 all of which are parts of the "fundamental liberties" provisions. We shall then examine: the provisions relating to the federal system with reference to the limitations upon federal legislative powers; the limitations placed upon the power of amending the Constitution; and, finally, discussion will turn to Article 150 (emergency powers) with particular reference to the decision of the Federal Court in *Eng Keock Cheng* v. *P.P.*[6]

FUNDAMENTAL LIBERTIES:

(a) *Article 5(1) and the due process question:*

First for consideration I have selected Clause 1 of Article 5 which reads:

> No person shall be deprived of his life or personal liberty save in accordance with law.

The immediate question that arises is as to the content of this guarantee of fundamental right. Professor Sheridan[7] maintains that "save in accordance with law" must mean "save lawfully" and that this provision does not limit legislative powers at all, and he feels that the phrase does not mean "without due process of law" as used in the American Constitution. He contends, further, that it is similar in meaning to Article 21 of the Indian Constitution which reads:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Burmese Constitution, 1947, had a provision[8] which read:

> No citizen shall be deprived of his personal liberty . . . save in accordance with law.

In the United States Constitution, the term "due process of law" appears in two different provisions — first in the 5th Amendment:

> No person shall be deprived ... of, life, liberty or property without due process of law.

and again, in the 14th Amendment:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

5. *Marbury* v. *Madison* 1 Cranch 137 at p. 177; 2 L.Ed. 60 (1803).

6. [1966] 1 M.L.J. 18.

7. L. A. Sheridan, *Commentaries on the Constitution of Malaya* (1961), at p. 9. At the time of writing, a new edition of the book (in collaboration with Professor H. E. Groves) is in the process of being published.

8. Constitution of Burma, 1947, section 16.

In the United States, these provisions have been transformed, through a process of bold and creative interpretation by the Courts, especially their Supreme Court, into important devices for judicial review of unconstitutional governmental actions. Under the doctrine of due process, the Courts in the United States will strike down any arbitrary, unreasonable or capricious legislative or executive act as being violative of the Constitution. The Courts, in addition to this "substantive" due process, have also evolved the doctrine of "procedural" due process, that is to say, any governmental action, affecting the liberty of subjects, which violates the rules of natural justice will be declared illegal and of no effect.

The question has arisen in the Burmese and Indian Courts whether, in respect of their constitutional guarantees of personal liberty, there can be any similarity to the due process concept of the United States. Both the Indian and the Burmese Courts have, not for dissimilar reasons, decided in the negative. It seems to me that writers who urge that the Malaysian Aricle 5(1) should be interpreted in the same way place importance on cases such as *Gopalan* v. *State of Madras*[9] and *Tinsa Maw Naing* v. *Commissioner of Police, Rangoon.*[10] If "in accordance with law" indeed means merely any enacted law of Parliament, then Article 5(1) is a fundamental liberty of little, if any, content, and imposes no limits whatever on legislative power. Before the provision is to be interpreted in such a manner, it is suggested that some examination be given to the grounds for the decisions in the *Gopalan* and *Tinsa* cases in order to appreciate the extent to which those cases can commend themselves as persuasive authorities.

(i) An important factor[11] leading to the Indian Supreme Court's rejection of any concept akin to due process was that the Indian Constituent Assembly had expressly considered this point and rejected it. It was pointed out that the original draft of the Constitution contained the phrase "due process of law" but had been finally omitted. As Chief Justice Kania said, "this clearly shows that the Constituent Assembly had before it the American Article and the expression 'due process' but they deliberately dropped the use of that expression from the Constitution" [12] and Justice Mukherjea said, "I have no doubt in my mind that if the due process clause which appeared . . . was finally retained by the Constituent Assembly, it could be safely presumed that the framers of the Indian Constitution wanted the expression to bear the same sense as it does in the United States. But when that form was deliberately abandoned and another was deliberately substituted in its place ... it is not possible to say that they mean the same thing. . . ." [13]

To the extent that the attitude of the judges in the *Gopalan* case

9. A.I.R. (1950), S.C. 27.

10. 1950 Burma Law Rep. 17.

11. It is to be noted that the judges took pains to explain that this was not a 'ground' of their decisions, but a careful reading of the case shows that they were much influenced by this point.

12. A.I.R. (1950), S.C. 27 at p. 39.

13. *Ibid.*, at p. 101.

seems to have been influenced by the Constituent Assembly debates, the persuasive authority of the case is considerably minimized in respect to Article 5(1) of the Malaysian Constitution. Where the Malaysian provision is concerned, the report of the Reid Commission does not indicate any discussion at all on this specific question. In such circumstances, the proper interpretation of Article 5(1) is, in the writer's opinion, far from being a closed matter.

(ii) An important ground for the decisions in both the *Gopalan* and *Tinsa* cases appears to be so-called 'vagueness" of the rules of natural justice. In *Tinsa*, the Court said (Chief Justice Sir Ba U) : [14]

> On principle also it seems to us difficult to accept the suggested contrary concept of "law" equating it with the principles of absolute justice or the rules of natural justice as they sometimes have been called. With the changing social and political conditions, notions regarding natural law change: all that remains is the appeal to something higher than positive law. Rules of natural law are as the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which positive law should strive to conform. But to accept natural law as higher law would lead to chaos.

And similarly, Kania C.J. in the *Gopalan* case echoed the sentiments of his brother judges Mukherjea, Das and Patanjali Sastri when he said: "To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down vague standards." [15]

It is submitted with respect, that the validity of these statements may definitely be challenged today. Both these cases were decided in 1950 and in the fifteen or so years since, numerous decisions in constitutional law and administrative law have reduced the area for doubts as to the requirements of the rules of natural justice. For instance, the requirements that the judge must be impartial and unbiased, that the accused has a right to know the case against him and that the accused must be given a reasonable opportunity to be heard and to defend himself against the charge, have been consistently stated to be some of the ingredients of rules of natural justice. The writer suggests that the "vagueness" of the rules of natural justice cannot be pleaded today with the same earnestness as a decade ago. It is also submitted that we should not hesitate to jettison the notion that a legal system would be chaotic if rules of natural justice were used as crititeria for adjudging the legality of governmental action. For many years now the courts have been using the rules of natural justice in reviewing the actions of administrative tribunals (quasi-judicial bodies). Surely one will not suggest that, as a result, the present system of administrative law is chaotic? On the contrary, the courts have been able, in this manner, to supervise quasi-judicial bodies effectively and to protect those who may appear before these bodies from unfair hearings.[16] In the circumstances it would

14. 1950 Burma Law Rep. at p. 25.

15. A.I.R. (1950), S.C. 27 at p. 39.

16. Admittedly, to adjudge the validity of a claim to a rule of natural justice in a particular set of circumstances may not be an easy matter, and the decided cases may lack uniformity or unanimity. But, then, surely this is a feature which plagues the lawyer, teacher and student in almost any field of law.

seem that there is nothing intrinsically defective in the rules of natural justice which would disqualify them as workable standards for reviewing the legality of governmental action. Indeed, as it will be shown below, the Indian Supreme Court itself has resorted to the rules of natural justice in determining the constitutionality of laws under other provisions of the Constitution.

The judges in the *Gopalan* case seem to have realized that their interpretation had given little, if any, meaning to Article 21 of the Indian Constitution and therefore made an attempt to rationalise their decision by explaining that Article 21 was nevertheless an effective restriction upon the *executive* branch of government, and that the executive must act only within the law. This is, at best, plausible. But it is submitted that this is not a point of much consolation. First, the provision's efficacy as a guarantee against executive arbitrariness in respect of personal liberty loses much significance when we consider that in India, as in Malaysia, the executive branch of the government is controlled by that political party which also has the effective power in the legislature. Hence, it is almost always in a position to initiate and obtain the legislation which it deems necessary. Furthermore, it is a proposition only too well established that the executive must act within the law, and it does not require a constitutional provision to furnish this guarantee.

Upon that examination of the approaches adopted in the *Gopalan* and *Tinsa* cases, it would appear that reliance on these cases is unwise in interpreting our provision, since the grounds of decision are either not applicable or not compelling. It is possible that Article 5(1) may have a psychological effect and thereby may inhibit the legislature from acting in an arbitrary manner. Be that as it may, if the proper interpretation is that life and personal liberty can be deprived as long as the deprivation is authorised by an Act of the legislature, that is, it seems to me, a provision which is legally otiose. One can perhaps understand an opposition to the adoption of a controversial concept such as the substantive due process. But there appear to be no good reasons why Article 5(1) should be incapable of being interpreted to require any law (or executive act) depriving persons of life or personal liberty to comply with the rules of natural justice. It will be interesting to await the interpretation which the judges will give to this provision, and when such an occasion arises, it will be useful to recall the words of Justice Fazl Ali in the *Gopalan* case:[17]

> I am aware that some judges have expressed strong dislike for the expression natural justice on the ground that it is too vague and elastic. But where there are well known principles with no vagueness about them which all systems of law have respected and recognised, they cannot be discarded merely because they are in the ultimate analysis found to be based on natural justice ... it seems to me that there is nothing revolutionary in the doctrine that the words 'procedure established by law' should include the four principles outlined by Professor Willis [that is, notice, opportunity to be heard, an impartial tribunal and orderly form of procedure] and which have no vagueness or uncertainty about them.

It should also be pointed out that even in the United Nations, when it was formulating the Covenant on Civil and Political Rights, the view was expressed that permissible restrictions upon fundamental liberties must not only be "legal" or "lawful" (in the sense that they are not

17. A.I.R. (1950), S.C. 27 at p. 61.

contrary to national legislation) but the legislation itself must be "just".[18]

(b) *Freedom of movement, speech and expression, assembly etc.*

Next for consideration I have selected Article 9 Clause 2 and Article 10. Article 9(2) grants the citizen the right to move freely throughout the Federation and to reside in any part thereof. Article 10 grants the citizen the right to freedom of speech and expression, the right to assemble peaceably and without arms, and the right to form associations.

The first observation that we have to make in respect of these rights is that they are taken away almost as immediately as they are granted. One must, of course, concede that fundamental liberties can never be absolute, and that certain restrictions must be tolerated in the interests of the society as a whole. However, the effectiveness of these provisions as limitations upon legislative power has been disproportionately minimised by the extremely wide latitude granted to the legislature to curtail the rights.

On the right to move freely throughout the Federation, Parliament may impose restrictions by laws relating to the security of the Federation or any part thereof, public order, or the punishment of offenders.[19] This saving clause, in using such general terms as 'public order'[20] and 'security of the Federation' is sufficiently wide enough to lend legality to almost any conceivable legislation restricting the right.

Article 10, in a more detailed manner, provides:

(a) On the right to freedom of speech and expression, Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof; friendly relations with foreign countries; public order or morality, and restrictions designed to protect the privileges of Parliament or of any legislative assembly or to provide against contempt of court, defamation or incitment to any offence.

(b) On the right to assemble peaceably and without arms, Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

18. See generally, "Annotations on the text of the Draft International Covenants on Human Rights," prepared by the Secretary-General, *General Assembly Official Records, Tenth Session, Annexes,* agenda item 28 Part II (Document A/2929) paragraphs 27-32 and paragraphs 54-55.

19. Art. 9(2).

20. What is "public order"? It may be noted that in the United Nations Covenant on Civil and Political Rights (General Assembly Resolution 2200 (XXI) December 16 1966) the phrase "public order" is qualified in paranthesis by *"l'ordre public"*. See "Annotations on the Text of the Draft International Covenants on Human Rights" *supra* note 18, at p. 48: "It was observed that the English expression 'public order' was not equivalent to — and indeed substantially different from — the French expression *'l'ordre public'* ... In common law countries the expression 'public order' is ordinarily used to mean the absence of public disorder. The common law counterpart of *'l'ordre public'* is 'public policy' rather than 'public order' ".

(c) On the right of citizens to form associations, Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality, or by any law relating to labour or education.

Here again such liberal usage of vague undefined terms such as 'public order and morality' serves only to reduce the efficacy of these fundamental liberties as it almost amounts, in my view, to a conferment of power to Parliament to curtail these rights as and when it pleases.

In India, the equivalent provision in the Indian Constitution would be Article 19, which reads: "All citizens shall have the right — (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) to acquire, hold and dispose of property; and (g) to practise any profession, or to carry out any occupation, trade or business."

In connection with these fundamental liberties, it is true that the Constitution of India also contains saving clauses[21] which permit the legislature to impose restrictions on certain enumerated grounds which are phrased in such general anl wide terms as the provisions in the Malaysian Constitution just referred to, and indeed that Constitution may have very well followed the Indian Constitution in this matter.

While that might have been so, there is a singularly distinctive feature of the saving clauses in the Indian provision which the framers of the Malaysian Constitution have not chosen to follow. While the Indian provisions permit the legislature to impose restrictions on the enumerated grounds, they also require that these restrictions be *'reasonable restrictions'*. And each of the saving clauses to Article 19 [22] employs the term 'reasonable restrictions'. Furthermore this requirement of reasonableness is phrased in a manner which permits an objective inquiry by the Courts, and the Indian Supreme Court has reiterated that it would take upon itself the duty of inquiring into the reasonableness of any restrictions purportedly made pursuant to this provision. The judicial attitude in India has been thus summarised:[23]

> In other words, in order to be reasonable (a) the restriction must not be arbitrary, and (b) the procedure or manner of imposition of the restriction must also be fair and just.

And *Basu* calls this substantive reasonableness and procedural reasonableness, and it is submitted that in determining the validity of legislation in this way, the Indian Courts are doing precisely what they felt, in *Gopalan* case, ought not to be done. In determining substantive reasonableness, the Courts in India examine the content of the restriction imposed, and to quote the Supreme Court: "Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of

21. See Constitution of India, Art. 19(2), (3), (4), (5) and (6).

22. *Ibid.*

23. Basu, *Commentaries on the Constitution of India,* 3rd Ed. at p. 505.

reasonableness".[24] In determining procedural reasonableness, the Courts are concerned with the procedure or the manner in enforcing these restrictions, and a law which satisfies the test of substantive reasonableness may still be invalid if it seeks to empower an authority to restrict a fundamental right without complying with rules of natural justice.

That elaborate statement of the Indian position serves only to accentuate the Malaysian situation: is there any possibility of the judiciary in Malaysia questioning the reasonableness of restrictions imposed by the legislature pursuant to either Article 9(2) or Article 10(2)? The provisions, in vesting such a wide discretion in Parliament, seem to preclude the Courts from doing so. In Article 9(2) it is proviled that any restriction may be imposed by *any* law related to the various enumerated grounds. This leaves very little scope for an objective inquiry into reasonableness. Article 10 even more categorically excludes any inquiry into reasonableness: not only is there no requirement of reasonableness, but the provision reads that Parliament may by law impose on those rights —

> such restrictions as *it* [i.e. Parliament] *deems* necessary or expedient. . . .

Then we have the notorious Article 4, Clause 2 which provides:

> The validity of any law shall not be questioned on the ground that (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein, or (b) that it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient for the purposes mentioned in that Article.

Leaving aside the question of reasonableness, this provision even throws a monumental doubt on whether a law can be challenged on the ground that the restrictions it imposes are not authorised by the already broad provisos to Article 9 and Article 10. Whatever little was left seems to be extinguished. In the final analysis, the entire usefulness of the provisions is questionable and it is little wonder that one writer has asked, "Where has the right to freedom of speech and expression gone?"[25]

PROVISIONS RELATING TO THE FEDERAL SYSTEM AND RELATION BETWEEN FEDERAL AND STATE LEGISLATURES:

Federalism, in most systems, unhappily poses more problems than those it was intended to solve, and Malaysia is no exception. Usually, after having determined the respective areas of competence for States and the Federal organs, the most perplexing problem is one of providing effective safeguards against unwarranted and arbitrary encroachments by the central executive or legislature into matters more properly regarded as State matters. In most modern federations the federal government is so powerful, politically as well as in military might, that the necessity for such safeguards becomes all the more acute. In the Malaysian Constitution, the distribution of legislative power is effected through three lists[26] known as the *Federal List* (the matters enumerated

24. *Dwarka Prasad* v. *U.P.* A.I.R. (1954), S.C. 224, 227; *Chitanmanrao* v. *Madhya Pradesh* A.I.R. (1951), S.C. 118. Cited in Basu, *op. cit.*, 509.

25. Sheridan "The Constitution of the Federation of Malaya" (1957), 23 M.L.J. lxv.

26. Art. 74.

there being exclusively within the competence of the Federal Parliament), the *State List* (the matters enumerated there being exclusively within the competence of the State legislatures), and the *Concurrent List* (the matters enumerated there being within the competence of both the States and the Federation, although Federal legislation will prevail in event of conflict). After Malaysia Day, the Borneo States, which entered the Federation have (and Singapore had) additional Concurrent and States matters, but we are not concerned with these exceptions for the purposes of our inquiry.

An examination of the State List[27] applicable to all the States informs us that the States may legislate on the following matters: Muslim Law; land; agriculture and forestry; local government; services of a local character, state works and water; and, machinery of the State Government. Of these few items, the items which carry any real significance are *land* and *local government.*

Under the item "land" the Constitution provides that the State's competence includes these matters: [28]

> Land tenure; relation of landlord and tenants; registration of titles and deeds relating to land; colonisation, land improvement and soil conservation; rent restrictions; Malay reservations; permits and licences for prospecting for mines; mining leases and certificates; compulsory acquisition of land; transfer of land, mortgages, leases and charges in respect of land; easements; escheat and treasure trove including antiquities.

And under "local government" the State's legislative competence is said to extend to:[29]

> Local administration; municipal corporations; local, town and rural board and other authorities; local government services; local rates; obnoxious trades and public nuisances in local authority areas; housing and provisions for housing accommodation; improvement trusts.

Parliament's authority to legislate on the matters in the State List is primarily deal with by Article 76 and there are four main instances when Federal intrusion is authorised:

(i) First, for the purpose of implementing any treaty, agreement or convention between the Federation and any foreign country, or any decision of an international organisation of which the Federation is a member.[30] One finds little to quarrel with this provision for the conduct of foreign affairs is a federal matter and it would embarrass the Federal legislature and the nation as a whole *vis-a-vis* foreign countries and international organisations if the Malaysian Government had not the power of implementing by law the provisions of the treaties it had entered into, or decisions with which Malaysia has to comply.

27. See the State List, 9th Schedule of the Constitution.

28. Item 2 of the State List.

29. Item 4 of the State List.

30. Art. 76(1) (a).

(ii) Secondly, for the purpose of promoting uniformity of laws of two or more States.[31] This, too, does not present itself as being objectionable mainly because under Article 76(3) such a Federal law shall not come into operation in a State until it has been adopted by the legislature of that State (in which case it becomes a State law and can be repealed or amended by State law). So Federal legislative intrusion upon State matters in this area is by consent of the State.

(iii) Thirdly, where there is a request by the State legislature for Federal Parliament to legislate on a matter within the State's competence.[32] Here again, it is provided that in order that that law apply to any State, the consent of that State as expressed in an adopting State enactment is required.

(iv) It is with respect to the fourth situation under which the Federal legislature may encroach upon the State Legislative List that attention should be particularly drawn. I refer to Article 74(4) which provides that Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to the following matters:

> Local government; land tenure; the relations of landlord and tenant; registration of titles and deeds relating to land; mortgages, leases and charges in respect of land; easements and other rights and interests in land; compulsory acquisition of land; and, rating and valuation of land.

Here then, is a provision which authorises the Federal legislature to make laws with respect to matters — land and local government — which, as we have just observed, were the only ones of any significance allocated to the States and without which the legislative powers of the States are reduced to almost nothing. (The Borneo States are, and Singapore was, excluded from the operation of this provision.)[33]

But for all the other eleven States, Article 76(4) represents a serious threat should a Federal legislature wish to insist upon legislating on land and local government with the view to implementing its policies throughout the Federation. What makes this provision all the more a potent device of unchecked federal legislative interference is that the consent of the State or States is not required. In fact, Article 76(4) expressly stipulates that the provision requiring consent of States shall not apply.[34] Therefore, in a situation where the Federal Government wishes to exercise this power to the fullest, the States become powerless and the federal principle disintegrates.

In the Indian Constitution, the nearest comparable provision is Article 249 which authorises the Federal Legislature to legislate on any matters in the State List, but this can be done only if the Council of

31. Art. 76(1) (b).

32. Art. 76(1) (c).

33. Art. 95D.

34. But it is provided, however, that where a law provided the conferrment of executive authority upon the Federation, it shall not operate in any State unless approved by the legislature of the State.

States have voted by a two-thirds majority that such a course of action is necessary and expedient in the national interest.

Reference should also be made to Article 95A of the Malaysian Constitution which deals with the National Council for Local Government. The Constitution provides that:[35]

> It shall be the duty of the National Council for local government to formulate from time to time in consultation with the Federal Government and the State Governments a national policy for the promotion, development, and *control* of local government throughout the Federation and for the administration of any laws relating thereto, and the Federal and the State Governments *shall follow* the policy so indicated.

Now, the National Council for Local Government comprises one representative from each State and ten Federal representatives. (The representatives of the Borneo States do not have a vote as long as they choose not to be bound by the policy of the Council.[36] Should any of these States agree to be bound, it has a vote, but there shall simultaneously be an additional federal representative.)[37] That being the composition of the Council, it may be observed that all that the central Government needs is the concurring vote of one State representative in order to effect a policy of local government which would bind all State Governments.

AMENDMENTS TO THE CONSTITUTION:

Professor de Smith in one of his recent works, states:[38]

> The status of the Constitution as supreme law is determined by the procedure prescribed for its amendment. Those provisions which are thought to be especially important will be protected from alteration by legislation passed in the ordinary manner and form.

Different Constitutions employ different methods to implement this feature of constitutionalism. It is, for instance, normal to find not only the procedure for amendment generally made different from and more difficult than the procedure for passing ordinary legislation, but that certain provisions may be made more difficult to amend than others. These would be, as Professor de Smith indicates, those on which the framers of the Constitution place special importance whether they be provisions establishing the essentials of responsible and representative government, safeguarding regional or minority rights, or guaranteeing fundamental rights. The form which such entrenchment may take also varies — there might be a requirement for a referendum before the amendment is adopted, the second legislative chamber might be given an absolute veto, or some institutional obstruction may have to be overcome before an amendment is passed (such as the requirement of the consent

35. Emphasis added.

36. Art. 95E.

37. *Ibid.*

38. S. A. de Smith *The New Commonwealth and its Constitutions* (1964), at p. 110.

of the Conference of Rulers in Malaysia with regard to certain amendments.)[39]

In the United States, the amendment procedure makes it about the most rigid constitution. Any amendment to the United States Constitution must ultimately be ratified by three fourths of the States. The procedure for proposing amendments is also different from that prescribed for proposing ordinary legislation.[40]

In India, Article 368 of the Constitution requires a Bill for amendment of the Constitution to be passed in each House of Parliament by a majority of the total membership of that House which must at the same time be a majority of at least two-thirds of the members present and voting. Further, the consent of at least half of the States is needed if it is intended to amend certain important provisions such as Article 368 itself or provisions relating to any of the three legislative lists, representation of States in Parliament, the judiciary or the State High Courts.

In the Australian Constitution, section 128 provides that an amendment to the Constitution must be approved by an absolute majority of both Houses (with two exceptions which we need not consider). It must then be submitted to the electorate not less than two and not more than six months after being passed in both Houses. The amendment can be approved only if the majority of the electors of *a* majority of the States have agreed to it, and this must at the same time, be a majority of all electors in Australia.

It is to be seen that the Australian and United States Constitutions are extremely rigid. The Indian position is more flexible, but the elements of rigidity manifest themselves particularly in requiring consent of States on certain specified important provisions. In Malaysia, the provisions relating to the amendment of the Constitution are Articles 159, 161E and 161H. In formulating Article 159, the Reid Commission had this to say:[41]

> It is important that the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides.

The provisions for amendment, unfortunately, it will be seen, are exceedingly liberal. The main feature of Article 159 is that an amendment to the Constitution can be effected by an Act of Parliament which has received the votes of at least two thirds of the members in both Houses of Parliament. It was thought therefore, that the requirement of two thirds approval in each of the two Houses, and the requirement of the assent of Upper House (Senate) which cannot be overridden[42]

39. Art. 159(5).

40. Art. V. Constitution of the United States.

41. Report of the Constitutional Commission, p. 31.

42. In any law, other than an amendment to the Constitution where it has an absolute veto, the Senate has only delaying powers. See Art. 68.

would be an adequate safeguard. Indeed, the Reid Commission rejected the idea of a referendum as an "unsuitable method" in Malaya and said "In this matter, the House of Representatives should not be allowed to overrule the Senate. We think that this is a sufficient safeguard for the States because the majority of the members of the Senate will represent the States." [43]

Very much in the same vein, Hickling[44] has said:

> The only strict constitutional safeguard for the States lies in Article 159 . . . theoretically the twenty two States senators could block any amendment adverse to the States, if they considered themselves representatives of the States.

But it is submitted that Article 159 is a pathetically weak limitation on the legislative power of amendment. The vesting of an absolute veto in the Senate is not that meaningful today. In 1964, the Constitution was amended[45] to provide for the appointed Senators to be in the majority for the first time. The reasons given were that "it was considered necessary to have more persons of wide experience who have voluntarily dedicated themselves to public service and welfare to participate actively in Parliament". No explanation was given as to why it was thought necessary to place the elected Senators from the States in the *minority* all of a sudden. Today, therefore, the Senate can comprise 26 elected State Senators, and 32 appointed Senators. In these circumstances, it is extremely difficult for the State Senators to 'block' any amendment. Further, the appointed Senators need the support of only a handful of State Senators to successfully approve or disallow any amendment.

Then again, Article 159 provides that the two thirds requirement of both Houses can be waived for certain amendments. In particular, the two thirds majority in Parliament is not required:

— for the admission of any state;

— or in connection with the admission of any state;

— the association of a new state with the old states;

— or any modification of the application of the Constitution to a state previously admitted or associated.

This exception was specially introduced in 1962[46] and one cannot underestimate its importance. By this provision the Constitution can be amended by an ordinary law to provide for the admission of *any* state, and that very same law can amend the Constitution to provide for matters such as the newly admitted State's representation in Parliament, what

43. Report of the Constitutional Commission, p. 31.

44. Hickling, "The First Five Years of the Federation of Malaya Constitution" (1962), 4 *Malaya L.R.* 183, at p. 201.

45. By Act 19 of 1964, section 6. Until then, the Senate comprised 28 elected Senators — two of each State (Singapore was still in at that time) — and 22 appointed Senators. See Art. 45.

46. By Act 14 of 1962.

matters come within the State's legislative competence, and so forth. Indeed the Malaysia Act did not require a two-thirds majority.

The Constitution seeks to impose an institutional obstruction to certain amendments by requiring the consent of the Conference of Rulers.[47] The consent of the Conference of Rulers is needed for any amendment to Article 153 (which deals with the special privileges of the Malays), Article 38 (which deals with the Conference of Rulers), Article 70 (which deals with the precedence of the Rulers and Governors), and Clause 1 of Article 71 which (although termed "Federal Guarantee of State Constitution") deals with the right of succession to the throne by the Ruler in accordance with the Constitution.

The consent of the Rulers may be significant if one considers that the Rulers have to act on the advice of their executive Councils in which case consent of the Conference of Rulers would mean, in reality, consent of the States. In my view, however, the articles enumerated, with the possible exception of the special position of the Malays, are all concerned with the privileges, position, honours and dignities of the Rulers and by virtue of Article 38(6) (3) they can act in their complete discretion in granting consent to amendments on these matters. In any case, all these provisions, excepting special privileges for the Malays, to my mind, are not of first importance.

The only real limitations or restrictions upon the amending power of Parliament were introduced by the Malaysia Act in respect of the Borneo States. Article 161E of the Constitution requires the consent of these States before amending the Constitution affecting any one of them in certain specified matters. These States, then, have secured for themselves some effective safeguards against amendments adverse to their special interests or incompatible with the basic objectives for which they entered the Federation. But in respect of the other eleven States, and in respect of the Borneo States in matters outside Article 161E, Parliament has tremendous amending powers in the exercise of which the States do not have the slightest say. Indeed, the case of *Kelantan* v. *Federation of Malaya*[48] is outstanding for dramatically high-lighting this immense and practically unlimited power of amendment which the Federal legislature has been granted.

SPECIAL EMERGENCY LEGISLATIVE POWERS:

The Constitution of Malaysia has provisions[49] relating to the powers

47. Art. 159(5) Malaysian Constitution.

48. *The Government of the State of Kelantan* v. *The Government of the Federation of Malaya and Tunku Abdul Rahman Putra al-Haj* (1963) 29 M.L.J. 355. In this case, the plaintiff State brought proceedings challenging the validity of the Malaysia Act and the Malaysia Agreement and to prevent them from being brought into operation (thereby hoping to forestall the establishment of the new Federation through the union of the Federation of Malaya with Singapore, Sarawak and Sabah). Kelantan contended, *inter alia,* that the consent of the States of Malaya — including Kelantan — had not been obtained and that they had not been consulted. Thomson C.J., in dismissing their claims, held *inter alia,* that the Constitution did not require the Federal Government to obtain the consent of, or to consult with, the individual States in these matters. See the writer's *note* on this case: (1946) 6 *Malaya L.R.* 181.

49. Articles 149, 150, 151.

of the legislature and the executive in times of emergencies. One of these provisions is Article 150 which authorises the Yang di-Pertuan Agong to issue a Proclamation of Emergency if he is satisfied that "a grave emergency exists whereby the security or economic life of the Federation or any part thereof is threatened." [50] From the moment such a Proclamation is issued and for the period of its duration certain special legislative powers are granted to Parliament.[51] Clauses (5), (6) and (6A) of Article 150 provide:

> (5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter, if it appears that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.
>
> (6) Subject to Clause (6A) *no provision* of any ordinance promulgated 52 under this Article, and no provision of any Act of Parliament which is passed while a Proclamation is in force and which declares that the law appears to Parliament to be required by reason of the emergency, *shall be invalid on the ground of inconsistency with any provision of this Constitution.*
>
> (6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim Law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship or language.

It can be observed that, except for the matters enumerated in Clause 6(A), Parliament is authorised to make laws which are contrary to the Constitution and which, if not for Article 150, would certainly be declared by a court to be invalid. Parliament's power to legislate in this situation reaches an unprecedented zenith. Just witness the manner in which emergency powers were invoked and manipulated to meet the 1966 Sarawak crisis. When the Court had held that the original "dismissal" of the Chief Minister of Sarawak was unconsitutional,[52a] the Federal Government, which clearly wanted him removed, advised the Yang di-Pertuan Agong to issue a Proclamation of Emergency. Thereupon Parliament proceeded to enact the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966.[53] This statute amended the Malaysian Constitution to authorise (notwithstanding the provisions of the Sarawak Constitution) the "dismissal" of the Chief Minister and, consequently, the Chief Minister found himself dismissed for a second time.

50. Article 150(1).

51. Extraordinary power is granted to the Yang di-Pertuan Agong by Art. 150(2), and to the executive authority of the Federation by Art. 150(4).

52. That is, an ordinance promulgated by the Yang di-Pertuan Agong pursuant to Art. 150(2).

52a. See footnote 4.

53. Act. No. 68 of 1966. The Chief Minister has instituted proceedings challenging the validity of the Proclamation and the legislation. The case was still pending at the time of writing this article. In this connection, see S. M. Thio "Dismissal of Chief Ministers", (1966), *Malaya L.R.* 283 at p. 288 *et seq.*

Although the sweeping terms of Article 150 may be questioned, the writer does not wish, here, to contest the desirability of such a provision and, indeed, it is conceivable that there may arise genuinely grave emergencies when the legislature may have to be granted some special powers. Among the many questions which seems to be relevant, I wish to confine myself to one relating to the scope of this unique legislative power to override the constitutional provisions. To be more specific, can Parliament *delegate* this special power to the executive or is it a power which must be exercised by Parliament only?

The Federal Court of Malaysia has decided in *Eng Keock Cheng* v. *P. P.*[54] that such powers may be delegated. Hence, the legislature can authorize the executive, in times of emergency, to make rules and regulations which may conflict with constitutional provisions. Because of the importance of the case in interpreting Article 150 and because of the writer's disagreement with the decision on this point, some comment is called for.

On September 4, 1964, the Yang di-Pertuan Agong issued a Proclamation of Emergency.[55] Following this, Parliament enacted the Emergency (Essential Provisions) Act, 1964.[56] This Act declaring itself to be passed by reason of the Emergency, authorised the Yang di-Pertuan Agong to make regulations which he considered "desirable or expedient for securing the public safety of the Federation, the maintenance of public order and services essential to the life of the community."[57] The Act provided that the regulations may make, *inter alia,* "special provisions in respect of procedure ... in civil and criminal cases."[58] The Act also provided that such regulations (and any order, rule made thereunder) will "have effect notwithstanding anything inconsistent therewith contained in any written law other than this Act or in any instrument having effect by virtue of any law other than this Act."[59]

Pursuant to this Act, certain regulations known as the Emergency (Criminal Trials) Regulations, 1964,[60] were promulgated. These Regulations authorised the Public Prosecutor and Deputy Public Prosecutors to decide that any particular case should be tried as an "emergency procedure case". The chief features of this special procedure were that the necessity for a preliminary inquiry or for a jury were dispensed with. Appellant in this case (charged with offences under the Internal Security

54. [1966] 1 M.L.J. 18.

55. Malaysia, *Gazette,* L.N. 271/64.

56. Act. No. 30 of 1964.

57. *Ibid.*, section 2(1).

58. *Ibid.*, section 2(2).

59. *Ibid.*, section 2(4). The point was made, but rejected by the Court, that the Act did not in fact authorise the making of any regulations inconsistent with the Constitution.

60. Malaysia, *Gazette,* L.N. 286/64.

Act, 1960)[61] was convicted and sentenced to death after a trial — without jury or preliminary inquiry — conducted according to the special procedure authorised by the regulations.

On appeal to the Federal Court, it was argued, *inter alid*, that these regulations were contrary to the Constitution as they violated Article 8(1) of the Constitution — the equal protection clause.[62] It was argued that the Emergency (Essential Powers) Act, 1964, inasmuch as it did delegate the power of Parliament to make provisions inconsistent with the Constitution, was invalid. The Court was invited to hold that the power of Parliament to act contrary to the Constitution was one which Parliament alone may exercise.[63]

The Federal Court, in dismissing the appeal, rejected this argument In the judgment written by Wylie C.J. (Borneo) the Court said:[64]

> The true effect of article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This *necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution.*[64a]

The writer respectfully disagrees with this remarkable conclusion. It is submitted that in a system with a written "supreme" Constitution and the doctrine of judicial review where the organs of the government are subject to various restrictions and limitations, the question whether a legislative power has been properly exercised must be decided by careful examination of the scope of the constitutional provisions. It is further submitted that, considering the entire tenor of Article 150, noting the special nature of the powers granted to Parliament and realising the grave consequences that will arise from the exercise of these powers, the proper interpretation of Article 150 must be that if any rule needs to be promulgated which overrides constitutional provisions, it is Parliament alone which may undertake this task.

61. Act. No. 18 of 1960.

62. Several Indian and Pakistan decisions have enunciated the scope of equal protection clauses similar to Article 8(1). See, for instance, *Chiranjit Lal* v. *Union of India* A.I.R. (1951), S.C. 41, *Chowdhury* v. *East Pakistan* P.L.D. (1957), S.C. (Pak.) 9. See also the special court procedure cases: *State of West Bengal* v. *Anwar Ali* A.I.R. (1952), S.C. 75; *Kathi Raning Rawat* v. *State of Saurashtra* A.I.R. (1952), S.C. 123; *Kedar Nath Bajoria* v. *West Bengal* A.I.R. (1953), S.C. 404; *Waris Meah* v. *State* P.L.D. (1957). Pak. 157 which make it clear that a grant of power to arbitrarily select cases for special procedure is to confer an absolute and unfetterel power contrary to the equal protection principle.

63. To the further suggestion that the Act was so wide in its terms as to amount to an abrogation by Parliament of its powers to legislate, the Court responded by saying that the Act . . . "is not all embracing and the Act does set out the policy and scope within which the power is to be exercised. It cannot be said to be an abrogation ... of all its power to legislate." [1966] 1 M.L.J. 18 at p. 21. The writer fails to see where in the Act there is any articulation of "policy and scope". The Act is an complete handing of discretionary power to the Yang di-Pertuan Agong to make regulations "which *he considers* necessary or expedient" for the enumerated purposes.

64. [1966] 1 M.L.J. 18, at p. 20.

64a. Emphasis added.

It cannot be over emphasised that this power granted to Parliament to legislate contrary to the Constitution is undoubtedly a tremendous, almost awecome, one. A list of a few "horribles" best illustrate this: Parliament, pursuant to Article 150, can banish citizens from the country [contrary to Article 9(1)], make retrospective criminal laws [contrary to Article 7(1)], prohibit the practice of a particular religion [contrary to Article 11(1)], deprive anyone of his citizenship for no reason at all [contrary to Article 27 and other citizenship provisions].

Such being the extraordinary power vested in the legislature, does it axiomatically follow that the legislature can then let someone else wield these powers originally entrusted to it? The Federal Court thought that this must be "necessarily" so but, regretably, did not attempt to give us a reasonably convincing explanation why this should be so. The Court readily made the *a priori* assumption that, because Parliament is empowered (subject to Article 150(6A)) to override constitutional provisions, there is nothing to prevent it from delegating such power. Does this, in turn, mean that the power to delegate absolutely and without limits any of its legislative functions is inherent in Parliament's powers?[65] This seems to be the rationale of the Court's surprising decision. There is no provision in the Constitution specifically dealing with the question of the power of the legislature to delegate its legislative functions. But it seems to the writer that some limits to delegation must be considered inherent in a system where governmental powers are sought to be limited by a "supreme" written constitution and where judicial review of unconstitutional governmental actions forms an integral basis for the maintenance of the rule of law. It is submitted that even in non-emergency periods certain legislative functions — such as that of amending the Constitution — cannot be delegated by the legislature unless the Constitution expressly provides to the contrary.

The British system of unlimited power of the Parliament to delegate stems, of course, from the absolute supremacy of the British Parliament. But the legislature in Malaysia is, as is the case in India, *not supreme*. It and the other organs of government are duty bound to operate within the framework of the Constitution. Where, therefore, the doctrine is one of constitutional supremacy and not legislative supremacy, it would appear to be a fallacy[66] to believe that the legislature can at any time freely delegate any or all its rights, responsibilities, powers and functions vested in it by the terms of the Constitution.

65. That the unlimited right to delegate legislative functions is inherent seems to be strongly rebutted by the existence of Article 76A which specifically authorises Parliament to delegate legislative functions on federal matters to State legislatures. If the right to delegate is indeed inherent then such a provision seems to be redundant since Parliament, according to that argument, would be free to delegate whenever and to whomsoever it likes.

66. "There is no constitutional limitation to restrain the British Parliament from assigning its powers where it will, but the Indian Parliament qua legislative body is fettered by a written Constitution and it does not possess the sovereign powers of the British Parliament. The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself . . ." *per* Mukherjea J., *Delhi Laws Act* case A.I.R. (1951), S.C. 332 at p. 400. See also Schwartz "Delegation of Legislative Power" (1952) 6 *Indian Law Review,* 19.

Whether a challenged delegation is permissible or not would depend on the facts of the case and it behooves the judiciary to consider each case in its proper context, to examine the nature of the legislative function which has been delegated, to weigh the consequences that may arise from the function being executed by persons other than the legislature and to inquire whether such consequences could have been intended or authorised by the Constitution — *a fortiori* where the functions and power vested in the legislature are such emergency extraordinary powers as in the case of Article 150(6).

There is considerable persuasive authority in Indian cases to the effect that the legislature cannot delegate its essential legislative functions. In other words the essential legislative function of declaring policy and making it a binding rule of conduct must be done by the legislature. The question was discussed thoroughly in the *Delhi Laws Act* case[67] where Mukherjea J., said:[68]

> . . . The legislature can on no account throw the responsibility which the Constitution imposes on it on the shoulders of an agent or delegate and thereby practically abdicate its own powers.

and Bose J., said in his opinion:[69]

> . . . where Parliament has been left free to legislate in a general way on a particular topic, I consider it can legislate in the manner which has been commonplace in this land over the years, I do not think it is desirable to lay down general rules . . . But *when Parliament has been directed to do a particular and specific thing*, and particularly under the Chapter of Fundamental Rights, as, for example, to fix a maximum period of detention under Art. 22(7) *that sort of a duty cannot . . . be delegated.*[70]

Although in subsequent cases, the Indian Supreme Court has attempted to read the opinions of the judges who constituted the majority in the *Delhi Laws Act* case narrowly, these cases[71] have not disapproved the basic proposition that the essential powers of legislation cannot be delegated.

The Federal Court in the *Eng Keock Cheng* case, however, did not consider these Indian decisions relevant because:[72]

> It does not appear that, in any of the cases cited, the legislation that was challenged, was enacted pursuant to a power such as that conferred by Clause 6 of Article 150. If the legislation is enacted under a power which gives it

67. In re *Art. 143 Constitution of India and Delhi Laws Act, 1912* A.I.R. (1951) S.C. 332.

68. *Ibid.*, at 377.

69. *Ibid.*, at 437-438.

70. Emphasis added.

71. *Harishankar Bagla* v. State *of Madhya Pradesh,* A.I.R. (1954) S.C. 465; *Raj Nairan* v. *Chairman*, *Patna Administration Committee,* A.I.R. (1954) S.C. 569; *Edward Mills Co.* v. *State of Ajmer*, A.I.R. (1955) S.C. 25; *Banrsi Das* v. State *of Madhya Pradesh*, A.I.R. (1958) S.C. 909; *Vasanlal Maganbhai Sanjawala* v. *Bombay* A.I.R. (1961) S.C. 4. See also *Makhan Singh* v. *State of Punjab* A.I.R. (1964) S.C. 381 at p. 401 *(per* Gajendragadkar J.).

72. [1966] 1 M.L.J. 18 at p. 20.

validity notwithstanding any inconsistency with the Constitution, it becomes unnecessary to consider whether the legislation would, apart from the exercise of that power, be inconsistent with any part of that Constitution.

It certainly is to beg the question somewhat to state ". . . . under a *power* which gives it validity . . ." when the crucial issue is the very *scope* of this power to act contrary to the Constitution — and when the determinative question is whether the power granted in Article 150(6) to *Parliament* may be granted to some *other* bodies and persons. While the facts and the constitutional provisions in the Indian cases were different, the reasoning of the judges in those cases, it is submitted, were no less relevant in solving the problem at hand.

An examination of Article 150, it seems to the writer, discloses the following features:

(a) In times of emergencies, extraordinary powers are conferred on both the executive and the legislature.

(b) The executive shall have the extraordinary *executive* powers as are specified in Article 150(4).

(c) The legislature shall have such *legislative* powers as are specified in Article 150(6), which includes the power to enact a law which is inconsistent with other provisions of the Constitution.

(d) The only instance when the executive (the Yang di-Pertuan Agong acts on advice here) is given *legislative* powers in the emergency is provided in Article 150(2). But this is limited. The Yang di-Pertuan Agong's power to promulgate the ordinances "having the force of law" (and which may conflict with the Constitution — see Article 150(6)) is *limited* to the period before Parliament meets. Once Parliament meets, the Yang di-Pertuan Agong ceases to have lawmaking powers.

Hence we can see that Article 150 has carefully spelled out (i) the special executive and legislative powers of the executive, and (ii) the special legislative powers of the legislature, when a Proclamation of Emergency is in force. In the light of this, to decide, as the Federal Court did, that Parliament can then delegate its immense powers under Article 150(6) to the executive seems to overlook the nature of the special responsibility and role which the Constitution has conferred on Parliament in an emergency.

CONCLUSION :

It is true that I have selected only specific provisions or groups of provisions for the purpose of my inquiry. I do admit that there are several provisions which can be said to impose effective and sometimes absolute limitations on the legislature.[73] The matters which have been examined in this article, however, were so selected for their importance to any federal state operating within a scheme of a written constitution

73. For instance, see Article 6(1): no person shall be held in slavery; or Article 9(1): no citizen shall be banished or excluded from the Federation.

with the theory of judicial review of unconstitutional acts, and to a society which favours the rule of law at all times.

The conclusion which one is reluctantly forced to arrive at is that, in respect of the matters examined in this article, the Constitution fails to place effective limitations upon legislative power. With regard to the Federal Court decision in *Eng Keock Cheng* v. *P. P.* one must express dismay at the attitude of the Court when, in a voluntaristic manner, it extended almost limitlessly what was a special conferment of emergency legislative power. From the survey in this article, we can see that the constitutional provisions are such that they call for a high degree of judicial creativity and initiative in order to inject meaningful content into the constitutional provisions.

It is insufficient for a Constitution to claim that it is the supreme law and that the Courts can declare any legislation contrary to the Constitution void and of no effect. It seems only evident that the doctrine of constitutional supremacy does neither begin nor end with the mere establishment of a written constitution. The doctrine achieves true meaning when the restrictions which the Constitution seeks to impose are real and effective limitations.

Some of the provisions which have been subject to our inquiry seem to be more consistent with the doctrine of Parliamentary sovereignty than with constitutional supremacy in the vast, generous and almost unchecked power granted to the legislature. In areas where a constitutional lawyer would expect to find the provisions to contain strict and rigid limitations, either limits are non-existent or if they exist they are far from being effective limitations. In areas, such as fundamental rights, where one would expect the Constitution to place utmost emphasis upon judicial review of the transgression of these constitutional rights, the Constitution itself specifically seems to oust the jurisdiction of the Courts.

It is my view that all these are factors which reduce the value of a Constitution which one might otherwise be proud of. The argument can, of course, be made by an optimist that governments are unlikely to abuse these vast powers granted, and that the system of representative government itself ensures that the government would not abuse these powers due to fear of castigation by the electorate at the next elections. I disagree: if indeed we were to make this assumption, then there would be no need for a written Constitution. I am not prepared to assume that there will never come into power an authoritarian, arbitrary government. In such a situation it would be paradoxical if such a government could justify any of its oppressive measures by reference to the Constitution itself. It is precisely in order to *avoid* contingencies such as that that written constitutions are first sought.

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