THE PREROGATIVE IN MALAYSIA

I

In a graphic and telling phrase Cardozo speaks of "[t]he tendency of a principle to expand itself to the limit `of its logic…" The discovery pleased him: he makes the point in another way, by noting that "[g]iven a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize."[1] The tendency, manifest in the behaviour of the individual, obvious in the development of the common law, and summarised with conciseness in Acton's famous observation on power, is a useful basis on which to examine the prerogative. In this paper I propose to consider, albeit briefly, the nature of the prerogative in England, and then to seek to ascertain whether and, if so to what extent, the prerogative exists in Malaysia.

The question is not so remotely academic as it may appear. As Mitchell notes, "Essentially prerogative powers are those which, of necessity, inhere in governments".[2] Mitchell goes on to observe that "[t]he use of the word 'prerogative' with us is confusing." Blackstone noted that:

> By the word prerogative we usually understand that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies, in its etymology, (from *prae* and *rogo)* something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others and not to those which he enjoys in common with any of his subjects....

Blackstone's definition is cited with apparent approval by Joseph Chitty,[3] in his great study of the subject: a study that analyses in detail the nature and extent of a monarch's rights and duties under the common law. The definition is, however, somewhat vague in extent, and justifies the criticism offered in Dartmouth's note to Burnet's *History of His Own Time,* where he notes that "[t]he word prerogative has been much used, though seldom understood". Dart-

[1] *Nature of the Judicial Process,* Lecture I, p. 31.

[2] J.D.B. Mitchell, *Constitutional Law* (Second ed., 1968) p. 172.

[3] *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London, 1820) : a work still very much alive, and cited by Lee Hun Hoe C.J. (Borneo) in *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 155 at p. 165, where the following significant extract from Chitty (p. 68) appears: "The King is the first person in the nation — being superior to both Houses in dignity and the only branch of the Legislature that has a separate existence, and is capable of performing any act at a time when Parliament is not in being."

mouth continues, in a definition made use of some hundred years later, to the effect that:

> The notion that the greatest men of our law have had of it, has been that it is a power lodged in the Crown for which there is no law, but not repugnant to any law. The meaning is, the execution of it being vested in the King, and it being impossible the legislature should foresee all cases that may happen, have left a power with the chief magistrate to use his discretion upon extraordinary occasions, and to exercise the supreme authority in all cases where the law of the land has not directed or limited the execution.

Of this description two modern writers[4] have noted that it "emphasizes the fact that the prerogative is a survival — the residue of the discretionary powers of the Executive which are not definitely regulated by law. The history of the prerogative is, therefore, a history of the legislation by which the executive functions of the Crown have been declared, regulated and restricted." Such a comment is, all too clearly, prompted by good parliamentarian sentiment, adopting Dicey's well-known comment on the prerogative, that it is:

> the name for the remaining portion of the Crown's original authority and is therefore . .the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or her Ministers. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done by virtue of this prerogative.

Heuston is critical of Dicey's definition[5] and cites (with the happiness to be expected of a Fellow of Pembroke) that of Blackstone. Mitchell, after commenting on Blackstone's and Dicey's definitions, as well as that of Lord Haldane (to whom "it meant the common law as distinct from the statutory powers of the Crown") prudently notes that "There is also the obvious distinction between the prerogative powers which remain personal to the sovereign and those which have been transferred to the government"[6] and then comments on the *De Keyser* case:

> . . . it has been declared by the House of Lords that a statute operating in the field of prerogative excludes the possibility of exercising the old prerogative powers. This rule, which in some areas is applied with strictness, could have surprising results, if applied with logical firmness to the departments of the central government. In relation to them, it is not uniformly applied so that the lines of division are blurred. There may be from the point of view of the government both practical and psychological advantages in using the word prerogative, but this imprecision, while it has to be accepted, must also be watched. This imprecision is perhaps attributable to the fact that disputes about prerogative have always been at the centre of constitutional law, but the disputes have been settled in detail... What is clear is that prerogative cannot mean a power above the law.[7]

The nature of the prerogative is further confused by the relationship between the King and his ministers. Ideally, as Evatt has

[4] Leslie Scott and Alfred Hildesley, *The Case of Requisition: In re a Petition of Right of De Keyser's Royal Hotel Limited, De Keyset's Royal Hotel Limited* v. *The King* (Oxford, 1920) p. 105.

[5] Heuston, *Essays in Constitutional Law* (Second ed.) p. 58.

[6] *Op. cit.,* p. 173.

[7] *Op. cit.,* p. 174.

commented,[8] "the correct relationship between the Crown and its Ministers should be determined by definite rules which will make it impossible to impute the slightest unfairness or favouritism to the exercise of any legal prerogative". The formulation of such rules is virtually impossible, for it is in this area that practice — on occasion developing into convention — rules: such practice evolving or decaying as the necessity of the situation demands. Bagehot, with a human interest in the status of the sovereign, noted[9] that:

> If any one will run over the pages of Comyn's *Digest,* or any other such book, title "Prerogative", he will find the Queen has a hundred such powers which waver between reality and desuetude, and would cause a protracted and very interesting legal argument if she tried to exercise them. Some good lawyer ought to write a careful book to say which of these powers are really usable, and which are obsolete. There is no authentic explicit information as to what the Queen can do, any more than of what she does.

One of the most lucid modern writers on constitutional law, de Smith, states[10] that the royal prerogative "can be roughly described as those inherent legal attributes which are unique to the Crown . But prerogatives are non-statutory attributes of the Crown, not statutory attributes of its servants. . The prerogative consists mainly of executive government powers. . . The exercise of these powers is controlled by constitutional convention." Later he observes[11] that:

> If one were to devote a whole book to examining the scope of the royal prerogative today, one would still leave a number of questions unanswered. Writing in 1888, Maitland observed that there was 'often great uncertainty as to the exact limits' of the prerogative; and he concluded his short but masterly survey with these words: ' Thus our course is set about with difficulties, with prerogatives disused, with prerogatives of doubtful existence, with prerogatives which exist by sufferance, merely because no one has thought it worth while to abolish them'. The problem of identification, then, is very real We can identify, as a matter of historical interest, some of the disputed and undisputed prerogatives of which the Crown has been explicitly deprived by statute. But the concept of the prerogative as a bundle of inherent and residuary attributes is intrinsically vague.

It is perhaps not a matter for surprise that residuary attributes should be vague. We enter in this matter into the very arcana of government, into that shadowy area in which rights are arrogated according to the personality of the sovereign. Style and personality, as well as timing, are important even under a written consitution, as Indira Gandhi has recently demonstrated in India. Given such imponderables operating over a shadowy and uncertain area of the constitution, many things are legally possible.

That the prerogative exists in England even today — whatever its true extent — must be conceded. Borrie[12] places emphasis on the fact that prerogative powers are largely exercised by the Queen's

[8] *The King and his Dominion Governors* (Oxford, 1936) p. 11. Evatt seems to have foreseen the recent dispute over the extent of the prerogative in Australia. The current controversy over the power of the Governor-General to dismiss a duly-elected Prime Minister is a good illustration of the confusion inherent in the subject, and may have deep and alarming consequences.

[9] *The English Constitution* (Second ed., 1872) pp. 58-9.

[10] *Constitutional and Administrative Law* (Second ed., 1973) pp. 114-5.

[11] *Ibid*., p. 120.

[12] *Public Law* (Second ed., 1970) p. 58.

Ministers, and then conservatively divides them into those exercised in the legislative, executive and judicial spheres of government. The division is attractive to the logical mind: but the attributes of the prerogative are so varied and so vague that even today it is difficult to classify them with the broad learning and sweep of a Chitty. Sometimes it is said that "the prerogative no longer has the importance which it possessed when Dicey first wrote".[13] Statute has eaten into the area it originally covered; the welfare state has eroded the concept of the *pater patriae,* the personal ruler; and constitutional conventions have resulted in a general transfer of all essential powers of the Crown to the Cabinet and its members. All this may well be true in England, although even there the position is not as clear as some modern writers would have us believe. Conventions evolve to meet normal situations: but the crisis of modern government is such that contemporary problems are abnormal and unprecedented, and cannot always be resolved by the application of, say, conventions worked out in a past century. New difficulties demand new remedies.

We can, in spite of the confusion, affirm with some degree of confidence that even in England there still exists a traditional division of the prerogative into prerogatives personal to the Crown, and those pertaining to government and its motive power of politics. For the purpose of this study, however, we are concerned with the situation obtaining in Malaysia on *merdeka,* and on developments since that time. The foregoing quotations, designed to illustrate changing concepts of the prerogative, indicate that the prerogative was alive, albeit as a kind of ghost in the machine of government, in England in 1957. It was certainly alive in 1965: and a study of authority can only serve to confirm the melancholy or (dependent on the attitude of the observer) hopeful observation of Viscount Radcliffe in his dissenting judgment in the *Burmah Oil* case,[14] that "we know only vaguely what this prerogative is and have even vaguer information as to when and on what occasions it has been asserted " He then noted that:

> The essence of a prerogative power, if one follows Locke's thought, is not merely to administer the existing law — there is no need for any prerogative to execute the law — but to act for the public good where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.[15]

That the Crown has a "right and duty to protect its realm and citizens in times of war and peril"[16] and can invoke a prerogative to that end seems an admitted fact, even in the twentieth century. In England the prerogative lives: and it probably lives on Lockean lines. Let us now consider the situation in Malaya immediately before and upon independence, to ascertain whether the prerogative survived the shock of constitutional change and, if so, what its extent may be.

II

The States now forming Malaysia included, immediately before independence, two categories of territory, one category consisting of

[13] See, for example, Jennings, *The Law and the Constitution* (Fifth ed.) p. 87.
[14] *Burmah Oil Co. Ltd.* v. *Lord Advocate* [1965] A.C. 75 at p. 113.
[15] *Ibid.*, p. 118.
[16] *per* Lord Pearce, *ibid.*, p. 143.

territories over which the Crown exercised direct rule, and the other of States under indigenous Rulers bound by treaty to accept the advice of representatives of the Crown on — to quote from Article III of the Johore Treaty of 1914 — "all matters affecting the general administration of the country and on all questions other than those touching the Malay Religion and Custom." A consideration of the prerogative of the Yang di-Pertuan Agong [17] — the Supreme Head of the new federation, whose office was constituted on independence by Article 32 of the Constitution — must therefore follow several converging lines of enquiry: for there is the issue of the prerogative in relation to the former Settlements of Penang and Malacca,[18] and that in relation to the former Malay States.

Dealing first with the matter of Penang and Malacca, we may note that in a foreword to Roberts-Wray's book on *Commonwealth and Colonial Law* [19] Lord Denning M.R. states that "the basic law.. of most countries of the Commonwealth is the general law of England. It includes the principles of common law and equity, statutes of general application, and the Crown prerogative". That the Master of the Rolls should add the prerogative as a source of basic law is indeed significant, especially when for most purposes it is accepted as part of the common law itself. On the general issue of whether the prerogative existed immediately prior to independence in what are now the States of Malaysia it is pertinent to note the views of Roberts-Wray, who writes[20] "The rule that, in general, the Prerogative is as extensive in overseas possessions as in Great Britain has been judicially confirmed generally and, specifically, in relation to debts due to the Crown and forfeiture." Of this basic proposition there seems no doubt: so that in those overseas territories, such as Penang, Malacca, Sarawak and what is now Sabah, over which the Crown had direct government, it may properly be affirmed that prerogative powers in those territories were at least as extensive as those in England. Indeed, Berriedale Keith has stated [21] with some emphasis that:

> The Governor, or other chief executive officer, possesses all the authority inherent in the head of the executive government of the territory, whether it rests on prerogative or is inferred from statutes, and a grant to him of all necessary prerogative powers is assumed, including even powers generally held to be obsolete, such as the power to incorporate companies ascribed in 1916 to the Lieutenant-Governors in Canada by the Judicial Committee.

In relation to the powers of the Crown both at large and as manifest through its representative in a territory, therefore, it can be asserted

[17] I have used the title "Yang di-Pertuan Agong", since that is the one used in the latest reprint of the Constitution. However, current practice suggests that the title now popularly used is "Yang Dipertuan Agung".

18 What is said of Penang and Malacca can, given the position in relation to the common law, be applied to Sarawak and Sabah, although by reason of their later incorporation in Malaysia some at least of the conventions relating to the prerogative of the Yang di-Pertuan Agong had then already developed. As for Singapore, the question of the prerogative powers of the President affords an interesting area for study. This paper does not consider the position of the Governors of Malaysia: another extremely interesting subject for study.

[19] *Commonwealth and Colonial Law* (London, 1966) p. v.

[20] *Ibid*., pp. 599, 561.

[21] *The Governments of the British Empire* (1936) p. 389.

that they existed, and they duly devolved on independence upon the appropriate successor authority.

Let us now turn to the former Malay States, through which the Crown exercised a secular control through the advisory treaties. In this context Roberts Wray again provides an authority, by relating the matter of the prerogative to the adoption of the common law. It can, I believe, properly be accepted "that prerogative, like parliamentary privilege, is part of the common law".[22] As Heuston reminds us in his essay on the subject, Coke affirmed that "the King has no prerogative but that which the law of the land allows him": and "it is for the courts to decide on its existence and true extent. But the courts will not enquire into the mode or manner of user of an admitted prerogative, at any rate assuming that the holder of it is not shown to be acting in bad faith."

On the question of whether the common law applied in Malaysia, a clear answer is accorded by what is now the Civil Law Act 1956, revised (in 1972) as Act 67. Section 3 of the Act states — with the usual reservations relating to written law, local circumstances and necessary qualifications — that courts in Malaysia shall apply:

> *a* in West Malaysia, the common law of England and the rules of equity as administered in England on 7 April, 1956
>
> *b* in Sabah, the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December, 1951
>
> *c* in Sarawak, the common law of England and the rules of equity, together with statutes of general application as administered or in force in England on 12 December, 1949 (and also certain other prescribed statutes adopted since that date).

On independence all existing laws of the Federation of Malaya established by the Federation of Malaya Agreement of 1948 continued in force with appropriate modifications, under Article 162 (2) of the Constitution: and the definition of "law" in Article 160 (2) of the Constitution:

> includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

Such a definition was, clearly, capable of embracing the prerogative as it existed in relation to the territories of the Federation. Article 162(6) provides that any reference in existing, unmodified law must[23] be applied with "such modifications as may be necessary to bring it into accord with the provisions of the Constitution": and while no express, general modification substituting "Yang di-Pertuan Agong" for "Crown" was made, a study of express modifications made in 1957 under Article 162 illustrates a clear tendency to adopt such a principle, as a perusal of the modifications made in Chapter VI of

[22] Heuston, *op. cit.*, p. 58.

[23] An excellent illustration of when "may" means "shall" is offered by the Privy Council decision in *B. Surinder Singh Kanda* v. *Government of the Federation of Malaya* ([1962] A.C. 322 at p. 334) when, construing Article 162(6), Lord Denning M.R. stated that "[t]he Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution".

the Penal Code ("Of Offences Against the State") illustrates; for example, waging war against the King became the offence of waging war against the Yang di-Pertuan Agong (section 121) of the Code. It may be accepted, I suggest, as a general proposition that the appropriate authority corresponding to the Crown/King/Queen was and is the Yang di-Pertuan Agong, just as he in general became the recipient of the powers exercised by the High Commissioner on behalf of the Crown.

Roberts-Wray adopts Chitty's distinction between the "major" prerogatives — "those fundamental rights and principles on which the King's authority vests, and which are necessary to maintain it" — and "minor" prerogatives — those which "are merely local to England" — and then expounds[24] four principles, viz.:

a the major prerogatives apply to every part of Her Majesty's dominions, whatever the general system of law

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

c minor prerogatives form part of the law of every country where the common law runs, except so far as they may be excluded or modified by local circumstances or by statute

d where the common law is not in force, they have no effect unless they are applied by statute.

It is, I think, difficult to dissent from these several propositions, at least in a Malaysian context. Given an inheritance of the common law of England, therefore, coupled with a transfer of power on independence, it is logical to assume that on 31 August, 1957 there was a transfer from the Crown of both major and minor prerogatives: and the transferee of such prerogatives must have been, at the federal level, the Yang di-Pertuan Agong and, to such extent, as they affected the Malay States, the Malay Rulers.

The law of the land admitted, therefore, a prerogative. Whether the complete doctrine of the English common law on the prerogative — as manifest in, say, the *Case of Prohibitions del Roy* of 1607 — was imported in its pristine state and fullest flower to the Settlements in Malaya (or to Sarawak or Sabah) is perhaps mildly questionable: but a sense of history suggests that Berriedale Keith is correct in implying that the prerogative powers of the Crown overseas were wider and less capable of successful challenge than in England, where a representative House of Commons exercised — and continues to exercise — a sensitive vigilance in relation to all activities of the Crown.

A consideration of the situation obtaining on and after independence therefore suggests that to such extent as the prerogative formed part of the common law adopted under the several laws relating to its application in Malaysia, and subject to the saving of the Rulers' sovereignty, etc., as set out in Article 181 of the Constitution, a prerogative thereupon vested in the office of the Yang di-Pertuan Agong, as Supreme Head, as the authority then corresponding to the Crown; and it would appear that — endeavouring to construe the general tenor of the instruments relating to the transfer of power — the prerogative then consisted of:

a in relation to the former Settlements of Penang and Malacca, the

[24] *Op cit.*, p. 561.

prerogative powers of the Crown in right of the government of those Settlements in relation to federal matters;

b in relation to the Malay States, such prerogative powers of the Rulers of those States as related to federal matters.[25]

The State Rulers possess their prerogatives, jealously preserved at the federal level by Article 181 of the Constitution, and at the State level by similar provision in the State Constitutions: for example, Article VIII of the Third Part of the Constitution of Johor provides that "Except as expressed herein, this Constitution shall not affect the prerogatives, powers and jurisdiction of the Ruler". In relation to the office of a Supreme Ruler, elected by the Conference of Rulers, it seems unlikely that the concept of prerogative powers was far from the minds of those who conceived and created the office: so that the history, law and mystique of government in Malaysia might be said to conspire to further this concept. On the practical level of constitutional law, however, and without adducing in aid any question of sentiment, it is suggested that on independence the Yang di-Pertuan Agong became endowed with all the prerogative powers comprised under the headings outlined in the previous paragraph.

III

One of the difficulties facing a lawyer examining the question of the prerogative in Malaysia is that he must do so, initially, from an English standpoint. He finds that many of the prerogative powers of an English monarch, powers based on precedent hardening into convention, are in fact incorporated in the Constitution itself, either as discretionary or non-discretionary powers, such as, for example, those relating to the appointment of a Prime Minister, to the duty to act on advice, to assent to Acts of Parliament, and to the summoning, prorogation and dissolution of Parliament. The "non-legal rules" (to use Wheare's term) of usage and convention do not "operate solely, or at any rate mainly, in countries which have no Constitution". As Wheare observes, following Dicey, "in many countries which have Constitutions usage and convention play as important a part as they do in England. . . . What is usually done conies to be what is done".[26] The importation of conventions derived from English constitutional practice fortifies a general reliance on such practice as offering a useful working guide to an interpretation of the Malaysian Constitution: but the analogy should not be carried too far, for at the centre of the latter is an office that is unique to Malaysia. In the final analysis, Malaysian problems beget Malaysian solutions. The Constitution is, after all, simply a set of basic principles of Malaysian government, reinforced by the *rukunegara*[70] and, even more so, by conventional practices that have developed since *merdeka.*

[25] In this context it is to be noted that the treaties excluded matters of Muslim law and religion: but in relation to federation-wide acts, observances and ceremonies the Yang di-Pertuan Agong may, even here, enjoy certain rights flowing *inter alia* from Article 3 of the Constitution.

[26] *Modern Constitutions* (1951) p. 179. It should be, but apparently is not, a tiuism that "[c]onventions have been shown to be quite different from laws": and "the writer or teacher of constitutional law should take notice of political rules and practices in areas when they are relevant, simultaneously estimating their strength. As generalisations or predictions, they may be expressed with varying degrees of confidence or probability": Colin R. Munro, "Laws and Conventions Distinguished" (91 L.Q.R. 218, 235).

In England the prerogative has been limited by doughty parliamentarians, who have written into the law prohibitions on, for example, dispensation with a law for the benefit of an individual, or the raising of money under pretence of the prerogative. In Malaysia Parliament has not asserted — and perhaps it never will — that degree of combativeness with the head of State which has been manifest in England. All the same, the principle of opposition as a political fact good in itself is reflected, for example, in the statutory recognition of the status of "Leader of Opposition".[27] To this extent something more than lip service is paid to the cause of democracy in Malaysia: and there are not wanting political leaders who appreciate the truth of the observations of an eminent English psychiatrist,[28] words which are worth quoting:

> As a practical system for controlling and making use of the competitive aggression which is so evident in political controversy, democracy seems the best system yet devised. Although slow and uncertain in operation, democracy has the decided advantage over other political systems of providing an opposition which not only acts as a check on government, but also gives scope for passionate disagreement. Indeed, the House of Commons might stand as an exemplar of how men should deal with their aggressive drives: for it provides 'enemies' who are clearly serving a useful function; it encourages the expression of opposite opinion; yet, by bringing opponents face to face as human beings it makes it difficult for them to project paranoid images upon each other. . . . Although it is probable that Western states are premature in their attempts to foist democracy upon countries who are not ready for it, and which may well be temporarily better served by the communist system, it is hard to fault democracy as an ideal psychologically.

Yet the doctrine of parliamentary government reached Southeast Asia by a curious process of transplanting, in which the plant has adapted itself sometimes only with difficulty to its new environment: and indeed, whether the transplant will survive is doubtful. Those architects of the Malaysian Constitution, Lord Reid and the members of his Commission, borrowed freely from the Indian Constitution; those who framed the basic law of India in turn derived this from such Imperial statutes as the Government of India Act of 1935; and those in turn leaned heavily on ideas borrowed from a western civilisation struggling to create and maintain the sort of democracy Pericles described — according, at least, to Thucydides.

Assuming, therefore, that the transplant was a good one, and that the principles of the prerogative survived — in perhaps a stronger form, since parliamentary government in the Crown's territories in Asia was a recent, belated development — let us now see what has happened since *merdeka* to confirm or justify *ex post facto,* as it were, the theory that the Yang di-Pertuan Agong is invested with a prerogative.

In Malaysia "the position of the Yang di-Pertuan Agong has emerged as one of the strong cohesive forces in the federal structure"[29] Sheridan has modestly noted that the "position of the Yang di-Pertuan

[27] See e.g., the Members of the Administration and Members of Parliament (Pensions and Gratuities) Act 1971 (Act 23), s. 2.

[28] Anthony Storr, *Human Aggression* (Penguin) pp. 163-4. Storr is here writing of parliamentary democracy. *Demos,* the people, can manifest *kratos,* strength, in other ways.

[29] Groves, *The Constitution of Malaysia,* p. 42.

Agong is rather similar to that of the Queen of England":[30] a comment of which Trindade and Jayakumar observe[31] that "the fact that he must act as a constitutional monarch does not necessarily imply similarity to the Queen of England". Of course not, and the matter may be one of relief to both Her Majesty and the Dull Yang Maha Mulia Sri Paduka Baginda Yang di-Pertuan Agong: but in a general sense it cannot be denied that as heads of state of two parliamentary democracies in two common law countries there is a degree of similarity between the two offices. What must be remembered, as Trindade and Jayakumar remind us, is that the office of Yang di-Pertuan Agong is an indigenous institution peculiar to Malaysia, and that its attributes cannot be ascertained exclusively by reference to English constitutional practice: they have to be assessed in the light of a purely Malaysian environment. It is the political, social and economic realities of Malaysia which govern the evolution of the office, its nature and its powers.

The essence of the constitutional functions of the Yang di-Pertuan Agong is set out in Article 40 of the Constitution, which requires the Supreme Head to act in accordance with ministerial advice "in the exercise of his functions under this Constitution or federal law": the term "federal law" being defined in Article 160 as covering certain "existing laws", and Acts of Parliament. Accepting this as a general rule embodying a convention of another system of law, we may note that certain functions of the Yang di-Pertuan Agong are discretionary, and not subject to advice. Article 40 defines certain of these discretionary functions, relating to the appointment of a Prime Minister, withholding consent to a request for dissolution of Parliament, and convening a meeting of the Conference of Rulers — provided that such a meeting relates solely to the privileges, position, honours and dignities of Their Royal Highnesses; it also provides that such a discretion may be conferred by the Constitution itself; and it then states that federal law can require the Yang di-Pertuan Agong to act after consultation with or, indeed, on the recommendation of any person or body of persons other than the Cabinet — but only in relation to functions other than those exercisable in his discretion, or under the Constitution.

There is, therefore, a margin of latitude in the matter of whether, and if so to what extent, any powers that may exist outside but are not in conflict with the Constitution, must be exercised on the advice of the Cabinet or a duly authorised Minister acting under the general authority of the Cabinet. Here is a hazy area, into which it is neither necessary nor, indeed, possible, to plunge deeply: for the relationship between even a constitutional ruler and his ministers depends upon many factors beyond the law and the Constitution, and the outside observer cannot often ascertain even the most insignificant of these.

Bearing this in mind, the traditional division of the prerogative into personal prerogatives and political or governmental prerogatives is useful enough. After all, we have established — or so I hope — that the Yang di-Pertuan Agong sprang into existence fully-equipped,

[30] *Malaya, Singapore and the Borneo Territories,* p. 49.
[31] *"The Supreme Head of the Malaysian Federation"* (1964) 6 Mal. L.R. 280.

as it were, with such prerogatives as his predecessors had enjoyed, but subject to such constitutional restrictions as expressly regulated his office. Such a division offers a rough-and-ready yardstick whereby the activities of the Yang di-Pertuan Agong since *merdeka* can be reviewed.

One of the earliest overt manifestations of the prerogative in Malaysia lay in the promulgation of statutes relating to various orders of chivalry. These statutes, issued without statutory authority and indeed, without reference to Parliament, provided — as they still provide— the machinery for establishing the major orders of chivalry within a society that attaches especial regard to pomp, ceremony and precedence. To the favoured few, therefore, titles and orders were and are awarded: a practice followed by those societies in which a loyal establishment is required and fostered.

To create and identify hierarchies by means of coloured bands, medallions and regalia is to fortify and reinforce the position of the donor: and when the donor is the monarch, a significance amounting to a mystique is thereby created. The prerogative acquires a kind of special life thereby: a particular energy that can be used in other fields and applied in other and more practical ways to maintain and further the interests of those in authority. From the fountain of honour there flows, therefore, something more important than mere baubles; to the magic of colour and ceremony is added the skilful exploitation of human vanity; and the result can be useful, sometimes to the community in general, more often to a section of the community in particular.

Shortly after independence, therefore, the Supreme Head of the Federation assumed guardianship of the fountain of honour. From 1958, a number of orders of chivalry were created by a succession of personal statutes promulgated by the Supreme Head of the Federation. While the form of each set of statutes is, perhaps, peculiarly English, the source of authority is peculiarly Islamic: each set opening with an invocation ("In the name of God, the Compassionate, the Merciful") and concluding with a pious prayer ("May God to Whom be praise and Whose name be exalted, the King of Kings, vouchsafe His Grace and may the Prophet Muhammad (on whom be the benediction and peace of God) grant his blessing to these Statutes for ever and ever. Amen: O Lord of the Universe").

Some nine or ten sets of such statutes were, in the years immediately following independence, promulgated: Statutes of Darjah Utama Seri Makhota Negara; Darjah Yang Mulia Pangkuan Negara; Seri Pahlawan Gagah Perkasa; Panglima Gagah Berani; Jasa Perkasa Persekutuan; Kepujian Perutusan Keberanian; Pingat Khidmat Berbakti; Pingat Perkhidmatan Setia; and Pingat Kebaktian. It would seem, too, that these were but the prelude, for titles and orders have tended to proliferate. While, as Anthony Storr says,[32] "democracy tries to make its leaders as little authoritarian as possible, and by giving each man a vote, and therefore at least a nominal share in the election of the government, has attempted to diminish the gap between those who govern and those who are governed," the gap is also bridged to a

[32] *op. cit.*, p. 45.

select extent by an attempt to reinforce the stability of society by creating a particular pattern of dominance. The order of precedence and the creation of titles, decorations and orders of chivalry are more significant than they seem, and might be said to lie close to the heart of the prerogative.

The mystique of a personal prerogative is to be observed, too, in the designs of the flag of the Federation and its armorial ensigns. Of the former, we note that the Federal Legislative Council, by a resolution of 19 April, 1950, expressed its opinion on the design: the Council itself being regarded as incompetent to give its approval to a matter residing within the authority of His Britannic Majesty and Their Highnesses the Rulers of the Malay States. Similarly, the armorial ensigns of the then Federation of Malaya were, on 12 May, 1952, the subject of a proclamation issued by the High Commissioner, acting on behalf of Her Britannic Majesty and Their Highnesses the Rulers of the Malay States. The badges and emblems of the prerogative have been, it seems, jealously shielded from the assault or criticism of those outside the charmed circle of authority and, with appropriate modifications, they survive to the present time.

Turning to political or governmental prerogatives, we find that in the field of external affairs there came with independence a devolution of treaty obligations from the protecting power to the newly-independent Federation. The devolution of the prerogative rights and powers under which the Crown of the United Kingdom had, on behalf of the Federation of Malaya or any part thereof, entered into any treaty, agreement or convention before *merdeka* was covered in part by Article 169 of the Constitution, and in part by an Exchange of Notes of 12 September, 1957. Under the Exchange of Notes the Government of the Federation of Malaya, with effect from 31 August, 1957:

> *a* assumed all the obligations and responsibilities of the Government of the United Kingdom which arose from "any valid international instrument", in so far as such instrument might be held to have application to or in respect of the Federation of Malaya, and
>
> *b* "enjoyed" (sic) the rights and benefits theretofore enjoyed by the Government of the United Kingdom "in virtue of the application of any such international instrument to or in respect of the Federation of Malaya."

The term "Government of the Federation of Malaya" was not, and is not in the Constitution itself, defined: but as the executive authority of the Federation is vested in the Yang di-Pertuan Agong,[33] who is the Supreme Head of the Federation[34] and custodian of the Public Seal[35] it is reasonable to suppose that in this context the term at least comprehends, if it is not indeed synonymous with, the term Government of the Federation.[36]

[33] Constitution, article 39.
[34] *Ibid*., article 32(1).
[35] *Ibid*., article 36.
[36] It may be that the use of the term "Government" as embracing in a functional sense sometimes the Cabinet, sometimes a Minister, and sometimes the Yang di-Pertuan Agong, obscures the real nature of the latter's powers. Indeed, a very senior law officer of the Federation once assured me, shortly after *merdeka,* that the Yang di-Pertuan Agong had no prerogative powers. It was a serious viewpoint, possibly based upon the fact that the office was unknown to the common law, and the creature of an agreement and a written constitution.

In those more critical areas in which the prerogative functions, namely, in relation to emergencies and martial law, we note that the Yang di-Pertuan Agong is "the Supreme Commander of the armed forces of the Federation".[37] The authority is not, in the strict constitutional theory adopted at present, exercised directly by him in person, but through the agency of officers holding his commission. Yet there appears to be no reason why the authority should not be exercised directly, for the semblance can well be converted into reality. It may appear—and in the magic realm of constitutional law illusion is important — that the Yang di-Pertuan Agong is but a figurehead, a figure in the *wayang kulit* subject to the control of a hidden *To' Dalang*: but even on a narrow interpretation of the principles of the Constitution he is something more important than a figurehead. The right to be consulted, to encourage and to warn imports, in a Malaysian environment, something much more than a passive, quiet and occasionally diplomatic role: otherwise Article 40 of the Constitution would not have created an entitlement to such information as the Yang di-Pertuan Agong may require of the Cabinet concerning the government of the Federation. The bond of allegiance carries great emotional significance as well as, perhaps, an unfortunate content of ethnical prejudices; used in a positive sense, it is capable of great public good: in a negative sense, of equal ill.

Indeed, I suspect that it is in relation to the ultimate operation of Article 41 of the Constitution that the prerogative powers of the Yang di-Pertuan Agong may one day be most clearly manifest. The supreme command of the armed forces of the Federation is a remarkable gift. What flows from that general proposition is nowhere spelled out: but one can conceive without difficulty a situation in which, say, no effective ministerial government exists. Such a lack of effective federal power could occur at an unexpected moment: for example, on May 13, 1969, there seems to have been a temporary break-down in the government of the Federal capital.

Heuston observes[38] that "The disposition and armament of the armed forces was one of the oldest prerogatives of the Crown and its exclusive discretion in such matters could not be challenged in a court": and the case of *Chandler* v. *D.P.P.*[39] adds colour and authority to that proposition. If, then, that is the situation in England, we can, I believe, contend that the prerogative powers in relation to the armed forces of Malaysia are at least as wide, if not indeed wider, and may not be limited only to the disposition and armament of the armed forces, but extend to the employment generally of the armed forces.

For the office of Supreme Head is the essential one of the Malaysian constitution, without which all others become meaningless. True it is that by virtue of the practice enshrined in Article 40 of the Constitution

[37] Constitution, article 41. I am not aware of the nature of the oath of allegiance taken by members of the armed forces. It may be that this incorporates (or could properly incorporate) an oath of allegiance to the office of Yang di-Pertuan Agong: although the form of oath prescribed by the Constitution itself requires the deponent to "bear true faith and allegiance to Malaysia", and to "preserve, protect and defend its Constitution."

[38] *Op. cit.*, *p.* 34.

[39] [1962] 3 W.L.R. 694.

the Yang di-Pertuan Agong acts through Ministers, so that his power seems unreal. Yet suppose the illusion is that which we observe now? Like Chuang Tzu, we can never be sure which is the butterfly, which the man: and the field of constitutional law is, we know, littered with illusions. What seems possible is that in a situation demanding the imposition of martial law, the establishment of special courts replacing those functioning under Part IX of the Constitution, and the imposition of penalties going beyond, say, Part II or Article 151, prerogative power could be invoked on a wide scale — a scale probably never envisaged by those who framed, but possibly contemplated by those who adopted, the Constitution.

Some of the most important aspects of that inherent power residing in the sovereign and known as the prerogative arise out of State necessity. Indeed:

> The principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English law; there is a defence of necessity (albeit of uncertain scope) in criminal law; and in constitutional law the application of martial law is but an extended application of this concept. But the necessity must be proportionate to the evil to be averted, and the acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order; it is essentially a transient phenomenon.[40]

Whether any necessity is a "transient phenomenon" is, in this day and age, in political and constitutional terms a nice point. The history of the law of preventive detention suggests that once a state has taken extraordinary powers, extraordinary conditions are created, and that the powers will remain in force for so long that, in time, they acquire a kind of respectability that justifies their retention. So it may be with powers adopted from necessity, even from some cases of non-necessity, and any judicial review thereof may well be sympathetic: As Lord Upjohn said in the *Burmah Oil* case, "The right of the Crown cannot possibly be limited... to the cases of imminent danger and necessity in face of an enemy who has embarked on active operations."[41] That such a principle operates in Malaysia I have no doubt.

In relation to Article 150 — which is a neat example of State necessity in action — the Yang di-Pertuan Agong may issue a Proclamation of Emergency if he is "satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened". Of this power Trindade and Jayakumar observe[42] that "[i]t is reasonable. . .to assume the Yang di-Pertuan Agong will generally act on the advice of the Cabinet and the observation [of K.K. Koticha in an article on presidential intervention under Article 356 of the Constitution of India] that 'the Cabinet's right to expect the President to act on its advice goes with the principle of ministerial responsibility' is equally true of the Malaysian Constitution as it is of the Indian Constitution". As a general proposition this is no doubt sound enough: but the importation of a subjective state of mind in this context may well, given the unusual situation contemplated by the Article and the existence of a residue of prerogative powers, enable the Yang di-Pertuan Agong

[40] de Smith, *op. cit.,* p. 70.
[41] [1965] A.C. at p. 166.
[42] *Op. cit*., p. 298.

to legislate by Ordinance, at will: for the Article admits that such a method of legislation — which can overrule all provisions of the Constitution — can be adopted by the Yang di-Pertuan Agong, "if [he is] satisfied that immediate action is required". Here, then, is an unlimited power of legislation which could probably never be the subject of successful attack in any court. Such great powers have no doubt been entrusted to the Yang di-Pertuan Agong with the certain feeling that, to adopt Lord Finlay,[43] they "will be reasonably exercised".

It has, however, been clear ever since *De Keyser,* that — to quote Lord Dunedin in that case[44] — "if the whole ground of something which could be done by the Prerogative is covered by the statute, it is the statute that rules". To what extent the prerogative is eroded by powers conferred but not in fact invoked under a statute remains obscure. Such measures as a Defence of the Realm Act or an Emergency Regulations Ordinance usually embrace, on the basis of State necessity, such a plenitude of powers that they could, potentially, cover the whole area of government. Even subsidiary legislation requires, however, a period of gestation: it seldom springs to the pages of a government gazette without considered drafting. The existence, therefore, of a potential legislative power may well be said to offer a partial definition of prerogative power: although this proposition must be handled with care. After all, on the effect of statute on the prerogative we have the words of Swinfen-Eady, M.R.[45] cited with emphatic approval by Lord Atkinson in the *De Keyser* case: "Where Parliament has intervened and has provided by statute for powers previously within the Prerogative being exercised in a particular manner and subject to the limitations contained in the statute, they can only be so exercised. Otherwise," he adds, putting what Lord Atkinson called "a rather unanswerable question", "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back upon the Prerogative?" As Lord Atkinson then said, "It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to the exercise by the Crown of, the powers conferred by a statute if the Crown were free at its pleasure to disregard all these provisions, and by virtue of its Prerogative do the very things the statutes empowered it to do".

Yet this doctrine, founded in apparent logic, collides with the principle of statutory immunity embodied in section 63 of the Interpretation Act,[46] which provides that:

> No written law shall in any manner whatsoever affect the rights of the Yang di-Pertuan Agong or the Government unless it is expressly provided or it appears by necessary implication that the Yang di-Pertuan Agong or the Government, as the case may be, is to be bound thereby.

Chitty notes in his great study of the prerogative that the King is not bound by such statutes "as do not particularly and expressly

[43] *R.* v. *Halliday* [1917] A.C. at p. 268.
[44] *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508 at p. 526.
[45] [1919] 2 Ch. 216.
[46] 23 of 1967.

mention him":[47] but he adds a "most important exception, namely, that the King is impliedly bound by statutes passed for the public good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong". However, in spite of the uncertainty of such exceptions, Chitty affirms that "Acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to or bind the King, unless there be express words to that effect". Here we arrive by a direct route back at section 63 of the Interpretation Act. The principle of immunity is regarded as of paramount importance: for without it the essential hierarchy of sovereign authority would be lost, just as without, say, the doctrine of *stare decisis* the common law itself would fade to anarchy.

The immunity offered by statute is linked with that set out in Article 32(1), to the effect that the Yang di-Pertuan Agong "shall not be liable to any proceedings whatsoever in any court". Of this particular immunity, the feudal principle that a lord could not be sued in his own court is generally offered as origin. In a recent note[48] Paul Jackson emphasises the point made by Ehrlich, that the sovereign's rights were never merely the "intensified rights of a feudal lord. Whatever we mean by feudalism, kingship in England was not a product of the feudal system":[49] and in his note Jackson illustrates this principle by reference to the decision in *Lord Advocate* v. *Aberdeen University,*[50] a case in which the Crown asserted a general prerogative right to ownerless property, and a specific right to treasure trove. The past continues to haunt the doctrine of the prerogative.

It is possible to split a few sunflower-seeds in the matter of interpreting Article 150 and other provisions of the Constitution: so that when, say, an emergency is to be proclaimed when the Yang di-Pertuan Agong "is satisfied" of the existence of a particular state of affairs, or can appoint senators from those who "in his opinion" have given distinguished service or achieved distinction in certain areas, the zealot can argue that such a subjective state of mind cannot be induced by the persuasion of ministers, and must exist as a personal discretion. As Trindade and Jayakumar ask of the words "in his discretion", as used in the Constitution, "is this the only magic formula?"[51] What is essential in the context of these phrases is to establish the nature of the practice that has developed in the course of exercising the powers they refer to: for precedent and convention afford the safest guides in interpreting the grey areas of the Constitution.

In the *Ningkan*[52] case a discussion took place on the nature of the powers conferred by Article 150 of the Constitution, and reference

[47] *Op. cit.,* p. 382.
[48] 91 L.Q.R. 171.
[49] Ehrlich, *Proceedings against the Crown,* 6 Oxford Studies in Social and Legal History (ed. Vinogradoff) p. 11.
GO [1963] S.C. 533.
[51] *Op. cit.,* p. 298.
[52] *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119, at pp.122, 124, 125.

was made to several Privy Council cases involving the powers of the Governor-General to legislate in cases of emergency under the Government of India Act. The exact relevance of these cases is obscure, as Ong Hock Thye F.J. indicated: and it appears from his judgment that "it was on Cabinet advice that the Yang di-Pertuan Agong proclaimed the Emergency" then in question. Nevertheless, in the course of his judgement the Lord President stated that "(i)n my opinion the Yang di-Pertuan Agong is *the sole judge* (of whether a grave emergency exists) and once His Majesty is satisfied that a state of emergency exists it is not for the court to inquire as to whether or not he should have been satisfied". Further, the Chief Justice of Malaya stated that "the Yang di-Pertuan Agong in the exercise of his power under Clause (1) of article 150 must be regarded as *the sole judge* of that. He alone could decide whether a state (of) emergency whereby the security or economic life of the Federation was threatened, did exist". The two judgements (emphases added) clearly suggest that in the eyes of some Malaysian judges the Head of State has a personal discretion under Article 150, and that his subjective state of mind can seldom if ever successfully be called in question. Such an interpretation puts a useful brake on hasty or irresponsible Cabinet or ministerial action.

The views of the Lord President and the Chief Justice of Malaya were not adopted by the Chief Justice of Singapore, in the *Lee Mau Seng*[53] case: but the basic difference between the two cases lies in the fact that in the Malaysian court was a problem of interpreting a provision of the Constitution itself, while the Singapore court was concerned with a provision of the Internal Security Act. Whether, therefore, the Yang di-Pertuan Agong must in exercising his powers under Article 150 act on the advice of the Cabinet or a Minister acting under Cabinet authority remains obscure: but the authoritative dicta cited strongly support a personal discretion remaining in him, in relation to the exercise of those constitutional powers requiring as a condition precedent to their exercise a subjective state of mind. One can argue the matter heatedly without gaining much light; a shrewd Head of State can read and interpret a constitution as well as, and sometimes better than his legal advisers; and in the end the brutal facts of political reality will prevail.

Yet there seems a virtually no end to the prerogative, to the residue of inherent power in the sovereign. Bracton said that "There is no greater crime than Contempt and Disobedience, for all persons within the realm ought to be obedient to the King and within his Peace". While the judicial power of Malaysia is vested in its two High Courts and the Federal Court, all of which have a constitutional power to punish contempt,[54] the Yang di-Pertuan Agong has an indirect control over the Courts, in relation to the appointment of judges and in relation — together with, as Article 42 states, the Rulers and Governors —to a power of pardon. While, therefore, the prerogative of mercy is divided in a manner consistent with the existence of the prerogative, this aspect of the prerogative is, except in relation to an emergency or a state of martial law, now probably of comparatively

[53] *Lee Mau Seng* v. *Minister for Home Affairs, Singapore, and Anor.* [1971] 2 M.L.J. 137.
[54] Articles 121, 126.

little significance. Whether it will emerge as of consequence remains to be seen. A recent manifestation of an increasing power of the Yang di-Pertuan Agong appears in regulation 32 of the Essential (Security Cases) Regulations 1975,[55] under which "the power of the Yang di-Pertuan Agong to grant pardons, reprieves and respites, or to remit, suspend or commute sentences under Clauses (1) and (2) of Article 42 of the Constitution" is extended to all convictions for offences under the Internal Security Act 1960, the Firearms (Increased Penalties) Act 1971, and any other offence in respect of which the Public Prosecutor has certified that the case "is a proper one to be dealt with and tried in accordance with" the Regulations, "notwithstanding any written law to the contrary". The powers of the central government have increased, are increasing, and seem.likely to increase.

A further aspect of the prerogative lies in the matter of proceedings against government. Section 15(1) of the Government Proceedings Ordinance 1956[56] provides, for example, that:

> Nothing in this Part of this Ordinance shall extinguish or abridge any powers or authorities which, if this Ordinance had not been passed, would have been exercisable by virtue of the prerogative of the Yang di-Pertuan Agong or a Ruler or Governor or the Government, or any powers or authorities conferred on the Yang di-Pertuan Agong or a Ruler or Governor or the Government by any written law, and, in particular, nothing in this Part shall extinguish or abridge any such powers or authorities, whether in time of peace or of war, for the purpose of the defence of the realm or of training, or maintaining the efficiency of, the armed forces.

Further, under that section a certificate of the Yang di-Pertuan Agong on the matter of whether anything was properly done or omitted to be done in the exercise of the prerogative of the Yang di-Pertuan Agong or a Ruler or Governor or the Government is conclusive of the matter so certified. This provision is of course based upon section 11 of the Crown Proceedings Act 1947 of the United Kingdom, but its retention since independence, in this form, offers a further confirmation of the recognition of a prerogative power, albeit of a diffuse and perhaps uncertain extent: for the distinction between the Yang di-Pertuan Agong and the Government must in this particular context be obscure.

[55] *Gazette* Notification P.U.(A) 320/75. The Regulations have been the subject of considerable criticism from the legal profession of Malaysia and have since been amended (with retrospective effect) by amendments limiting their scope to cases under the Internal Security Act and those which in the opinion of the Attorney General affect the security of the country: see the Essential (Security Cases) (Amendment) Regulations 1975 (P.U.(A) 362/75), reg. 29. They raise one point of especial constitutional interest, in that they are promulgated under an Ordinance of 15 May 1969, itself made under a Proclamation of the same day. It is arguable that Article 150 does not contemplate an emergency extending beyond the dissolution of an old and the first session of a new Parliament: and the matter is further complicated by reason of a change in the holder of the office of Yang di-Pertuan Agong. In the *Ningkan* case Lord MacDermott's observations in the Privy Council suggest that action under Article 150 is justified only on a temporary basis. It would be prudent to revoke and if need be renew a proclamation under Article 150 immediately after a general election, or a change of office of the Yang di-Pertuan Agong: or at the very best afford the incoming Parliament an opportunity to review the matter at such a time. These points do not appear to have been raised in a recent case in the High Court at Kuala Lumpur *(Straits Times,* 19 November 1975), when the Emergency (Essential Powers) Ordinance was held not unconstitutional and not invalid.

[56] Ordinance 58 of 1956.

The foregoing observations prompt the pertinent question of whether an exercise of the prerogative may constitute a "law" for the purposes of Article 4 ("any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsisting, be void") and of the provisions of Part II of the Constitution, dealing with fundamental liberties. Whether, say, an act of the Yang di-Pertuan Agong purporting to be promulgated by reason of the prerogative, and having legislative effect, could be regarded as a law "passed after Merdeka Day" for the purposes of Article 4, is a question that admits of no easy answer: although at first sight the phrase used, together with its context, suggest that it refers solely to laws passed by Parliament and the State legislatures.

In relation to Part II of the Constitution, however, the definition of "law" in Article 160(2), earlier noted, includes the common law, custom and usage having the force of law: and since we have sought to establish that the prerogative is indeed a part of the common law of Malaysia, it would seem that no particular difficulties would arise in relation, for example, to the exercise of prerogative powers affecting life, liberty or property. Some difficulties of construction must be admitted, however, in relation to those erosions of rights permitted to Parliament under Article 10(2) and (4). Even here, however, one suspects that the machinery of an indemnity Act would be invoked, if necessity so dictated.

IV

There has been and, I suspect, still may exist some confusion as to the existence of a prerogative in a Supreme Head of State who is elected for a term of five years. To some extent this confusion arises from such views as those of Bagehot,[57] who said:

> if the King is a useful public functionary who may be changed, and in whose place you may make another, you cannot regard him with mystic awe and wonder... The characteristic advantage of a constitutional King is the permanence of his place. This gives him the opportunity of acquiring a consecutive knowledge of complex transactions, but it only gives an opportunity. The King must use it. . . . An ordinary idle King on a constitutional throne will leave no mark on his time: he will do little good and as little harm: the royal form of cabinet government will work in his time pretty much as the unroyal.

A certain truth lies in these observations: but they can scarcely be applied to a Supreme Head who is, while admittedly limited in his tenure of office, already a Ruler and, as such, endowed with a popular "mystic awe and wonder" — however unpalatable the thought may be to the dedicated democratic parliamentarian. The Yang di-Pertuan Agong enjoys a certain pomp and indulges in (to use Bagehot's phrase) "interesting actions"; in fact he is endowed with most of the attributes evoking Bagehot's admiration.

Yet, given the provenance of the text of the Malaysian Constitution, it is an odd circumstance that in the matter of prerogative power or its equivalent one can find little or no guidance in relation to the office of President in the United States or India. That diligent observer, Basu, notes[58] of the President of the United States that he

[57] *Op. cit.*, pp.42, 85, 86.
[58] *Commentary on the Constitution of India* (Fourth ed.) Vol. 2, p. 339.

"combines in himself the two English offices of the Crown and the Prime Minister, — in the words of Bagehot, the 'dignified' as well as the 'efficient' functions". Many aspects of the office of President appear, even today, to be obscure. Lincoln as president sought to assert a power to suspend the writ of *habeas corpus* — a suspension permitted by the Constitution "when in cases of rebellion or invasion the public safety may require it",[59] although it seems that the better opinion is that the power lies with Congress; no specific provision exists for the exercise by the President of any exceptional powers required by reason of a state of war; and whether the President is subject to compulsory judicial process in relation to the performance of a purely ministerial act is a nice question. Schwarz notes[60] that "there is a paucity of meaningful judicial authority on the inherent powers of the President — i.e., on his power to act even though the particular act is not comprehended in a specific delegation to him. What authority there is has tended to support the view that the President does possess some inherent powers". It seems that the United States needs a prerogative, after all. Beyond the sunshine accorded by the Constitution the President's powers merge into shadow and the dark: although the area of light may now, it seems, be said to be spreading.

As for the President of India, the President of the Constituent Assembly, Dr. Rajendra Prasad, stated[61] that "We have had to reconcile the position of an elected President with an elected Legislature, and in doing so, we have adopted more or less the position of the British monarch for the President". Even so, it is difficult to trace any source of illumination on the obscure question of what prerogative powers, if any, may have vested in the President: although given the pressure of events in contemporary India that question may well before long be studied with the indefatigable zeal and industry characteristic of Indian scholarship.

The subject of the prerogative has naturally enough been explored more fully in Australia. Dixon J. in 1940[62] explained that "[t]he United States Government did not succeed to the sovereignty of the British Crown, and therefore inherited none of its common-law powers and privileges", and added that "[t]he Commonwealth Constitution (of Australia), an enactment of the Imperial Parliament, took effect in a common-law system, and the nature and incidents of the authority of the Crown in right of the Commonwealth are in many respects defined by the common law". In Australia, however, the Commonwealth and the several States are "in strict legal theory, non-existent, being, in law, the Crown in one aspect or another, their Governments being the Queen's several governments":[63] and this theory makes it difficult to import any useful analogies, even of, say, federal and State prerogatives, from that jurisdiction, although there is much in Australian constitutional law that from a Malaysian standpoint can profitably be studied. Similarly, Canadian constitutional law is com-

[59] Article I, Sec. 9, Cl. 2.
[60] *Constitutional Law* (1972), p. 146.
[61] Quoted in Basu, *op. cit.*, p. 343.
[62] *Federal Commissioner of Taxation v. Official Liquidator of E.0. Farley Ltd.* (1940) 63 C.L.R. at p. 304.
[63] *Legislative, Executive and Judicial Powers in Australia,* by W. Anstey Wynes (Fourth ed.) p. 369.

pelled to create a federal Crown: so manufacturing a distinction that offers a parallel of sorts with Malaysia. Malaysia's status is, however, unique, as a monarchy within the Commonwealth.[64]

In some areas the prerogative is, it seems, already subject to change, and it may be that the prerogative in Malaysia will never have an opportunity to develop to the limits of its capacity, or else will develop in a manner in which the origin of the power inherent in it is changed. On 10 September, 1975, for example, Tun Abdul Razak, the Prime Minister announced[65] that the Malaysian Government would not commute death sentences on those found guilty under the Internal Security Act of illegal possession of firearms or explosives. To what extent the Yang di-Pertuan Agong and the Rulers and Governors were or are identified with that pronouncement is not clear, although from what we know of the contemporary Malaysian Cabinet it is reasonable to assume that it seeks to act with a scrupulous constitutional propriety. Whether the pronouncement was or is binding upon, for example, the sixth holder of the office of Yang di-Pertuan Agong, who was sworn in on 21 September 1975, is perhaps best left as an obscure constitutional issue; every government, after all, likes a little area in which, for purposes of public policy, it is free to manoeuvre, and as a matter of practice the power of pardon devolves, in most significant instances, only upon the Rulers and Governors.

It is, after all, difficult to view the law and the Constitution of Malaysia in isolation from the society from which they have been born: and in that society one senses at times a certain resentment of the expense, privilege and panoply attaching to the Supreme Head of State and his fellow Rulers. On occasion one hears reports of actions of members of royal Houses which — if true — suggest a certain element of irresponsible autocracy, of the indulgence of personal prejudice in a manner antagonistic to the public good. This paper is not intended to support any enlargement of the element of caprice, either at the federal or State level, but constitutes simply an attempt to define the necessarily nebulous boundaries of authority of the Yang di-Pertuan Agong himself, and to assert that these should not in themselves cut across or erode the commonly accepted rights of the individual. To admit that there is a divinity hedging a king leads to the maintenance of the mystique of monarchy: but there seems to be an increasing number of observers who — seeing the Emperor's new clothes — consider that this mystique is skilfully exploited by the small, upper echelons of society in order to satisfy their own vanity and line their own pockets.

In this situation, to argue the legitimacy of a wide prerogative could — if the argument be misunderstood — lead to dictatorship and abuse of power. Such a power can in the end only be effectively controlled by the courts: but the courts themselves are but voices, powerless to implement their decisions unless backed by the force of the state. Government is, after all, about force; Mao Tsetung was correct in his argument of the source of political power; and the judicial process itself — expensive, protracted and uncertain — is a relic of an earlier age, when life could move at the pace of a stately minuet.

[64] Roberts-Wray, *op. cit.*, p. 87.
[65] *Straits Times,* 11 September, 1975.

To litigate is to embark upon a sea of uncertainty; one judge, persuaded by the facile argument of an eloquent counsel, may decide one way; a battery of judges, similarly persuaded, in another. No certainty exists in the realm of law, any more than in life itself.

A possible factor, too, that may affect the development of the prerogative at the federal level lies in the status of the Malay Rulers themselves. Since the tragic events of May 1969 there has been an increase in their power: at least, in relation to the Rulers when sitting in the Conference of Rulers. This increase in power which, paradoxically, may itself signal a form of decay — as Chesterton said, "a dying monarchy is always one that has too much power, not too little" — is nowhere more manifest than in the amendments to Article 159(5) of the Constitution. These reflect something of the policy commented upon in the judgement of Thomson C.J. in the *Kelantan* case of 1963 where, in reciting the grounds on which the Government of Kelantan objected to the content of the Malaysia Agreement, he observed (although without himself accepting the proposition) that "apart from anything else there is a constitutional convention that the Rulers of the individual States should be consulted regarding any substantial changes in the Constitution".[66]

This argument was rejected on the ground that "the Constitution is primarily to be interpreted within its own four walls": a proposition stemming from Lord Radcliffe's distinction, in the *Adegbenro*[67] case, between the British Constitution — that admirable institution which, quoting Bryce as quoted by Lord Radcliffe, "works by a body of understandings which no writer can formulate" — and a "written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in the balance. That instrument now stands in its own right. .. ."

The *Kelantan* case left me with an uneasy feeling: and I suspect that others share that uneasiness. The "constitutional convention" of consultation pleaded so unsuccessfully by counsel for the Government of Kelantan had seemed to me real enough. As a current sample of a convention, the States do not, according to the Lord President of the Federal Court, receive a resident judge without considering whether he is acceptable to the State;[68] even under the Constitution regard must be had to the position of the States and their Rulers; and indeed, the very last Article of the Constitution itself (saving, subject to the Constitution, the "sovereignty, prerogatives, powers and jurisdiction of the Rulers") is no mere afterthought, but as important as, say, the Crown's usual reservations on the grant of a colonial constitution.

I appreciate that this argument, of course, can serve to enhance the prerogative of the Ruler of a State. It is advanced, here, however, because I believe that constitutional conventions do exist: and when, as in the *Kesavananda*[69] case, the directive principles of policy on

[66] (1963) 29 M.L.J. 355 at p. 357.
[67] *Adegbenro* v. *Akintola* [1963] 3 W.L.R. 63.
[68] "Administrative Problems in the Working of Superior Courts of Justice in Malaysia" [1975] 1 M.L.J. xl.
[69] *Kesavananda* v. *State of Kerala* [1973] A.I.R. (S.C.) 1461.

which the Constitution is based are accepted as fundamental to constitutional interpretation, we can ponder upon the possible effect of the *Rukunegara* of August 31, 1970[70] in the interpretation of the Malaysian Constitution; begin to appreciate that we may be crossing a major watershed in constitutional law; and understand that before long the Malaysian bench may — having already manifested a vigorous independence and a constructive and original approach to new problems— embark upon a series of novel and significant constitutional interpretations that could authoritatively shape the future development of Malaysia. In other words, the destiny of the country will, as long as the Constitution lasts, depend as much (and perhaps more) upon the quality of judicial logic as upon that of political skill.

Given this background, therefore: a situation in which a constitution exists, must be applied and therefore must be interpreted: an uneasy evolution of political privilege and economic inequality: a situation of internal and external stress, in which the exercise of prompt and exceptional power may in the public safety be required: it is, I submit, in these circumstances, essential to determine the nature and extent of the prerogative vested in the Yang di-Pertuan Agong. Such is the object of this brief survey, made at a time when — in the writer's view — a quiet revolution is about to take place in the common law. The confusion of the judges on the matter of 'filling in gaps' in statutes has already exposed the judicial process

[70] The *Rukunegara* was proclaimed by the Yang di-Pertuan Agong on August 31, 1970. According to Professor Ahmad Ibrahim *(Parliamentary Debates on the Constitution Amendment Bill 1971,* p. x), "It might perhaps be regarded as the expression of certain accepted Constitutional conventions." The *Rukunegara* consists of an introduction, a declaration of objectives and principles, and a commentary. The statement of objectives is as follows:

> "Our Nation Malaysia, being dedicated
> to achieving a greater unity of all her people;
> to maintaining a democratic way of life;
> to creating a just society in which the wealth of the nation shall be equitably shared;
> to ensuring a liberal approach to her rich and diverse cultural traditions;
> to building a progressive society which shall be oriented to modern science and technology."

Then comes the statement of principles:

> "We, her peoples, pledge our united efforts to attain these ends guided by these principles —
> Belief in God
> Loyalty to King and Country
> Upholding the Constitution
> Rule of Law
> Good Behaviour and Morality."

In the commentary on principles, the *Rukunegara* emphasises that "(t)he Yang di-Pertuan Agong, the Rulers and the Governors are symbols of unity and therefore stand above politics. The loyalty that is expected of every citizen is that he must be faithful and bear true allegiance to His Majesty the Yang di-Pertuan Agong and be a true, loyal and faithful citizen of the Federation. . . . Loyalty constitutes the soul of our nationalism."

The term *Rukunegara* is derived from the Arabic word *rukun,* article of faith, principle, basis, and the Sanskit word *negara,* State, country. For an article on the *Rukunegara* see "The Rukunegara and the Return to Democracy in Malaysia" by Syed Hussein Alatas, *Pacific Community, 2* (July 1971), 4:800-808. Syed Hussein Alatas observes (p. 808) that "(t)here is an increasing number of people who prefer to see the monarchy reformed to keep it in tune with the times. Feudal survivals should be replaced with democratic and modern elements. Certain forms of royal ceremonies may be subjected to reform. . . . The channel for such reform is the Conference of Rulers."

as a piece of camouflage for the legislative process: and the efforts of Lord Denning **M.R.** to break away from the doctrine of precedent confirm the strength of the pressures operating to destroy the existing system of common law and precedent, with its peculiar doctrine of the *ratio decidendi.*

An Asian country under severe pressure both politically and economically is unlikely to be able to maintain such an expensive anachronism as the common law system. Recent events in India illustrate the inadequacy of the system of parliamentary government and the confused structure of precedent and constitutional law within which it operates: and it requires no great gift of prophecy to forecast that an expensive system of dubious precedent is in the long run too great a burden for an under-developed country to afford. Out of the common law great principles have emerged, and it has afforded a useful, theoretical origin or refuge for the doctrine of the prerogative. It may be that this last gift will be of greatest practical use.

V

Some may argue that the foregoing observations relate to the realm of high theory. "Look at Article 150 of the Constitution", a critic may say, "under that Article ample powers exist, within the framework of parliamentary government, for the Supreme Head, as advised by his Ministers, to take any urgent action necessary to protect the State". This is true, if it is accepted that at all times a minimal form of government and administration exists. Indeed, such a minimal form, a skeletal administration at least, was perhaps assumed always to exist, by those who framed the Constitution itself.

Such an assumption — if made — is, I suggest unreal. The whole of our legal system is based upon the concept of the reasonable man; we assume that even the most awkward of individuals will have the fundamental decency to play the game according to the rules invented by those in authority; and when that assumption is successfully challenged we become confused, feel aggrieved. Our rules of behaviour are constantly designed with the myth of the reasonable citizen in mind: seldom, indeed, do we admit the existence of the eccentric or, worse still, the anarchist. For any system — be it the legal system in general, or the system of government in particular — must carry within itself, or at least be able to devise in an emergency, the means to maintain itself in existence. To admit the right of an accused to refuse to accept the authority of a duly constituted court or the rules of evidence, practice and procedure binding that Court, would be to accept the destruction of the system itself: a system that is much more fragile than, perhaps, it appears.

To assert the life of the prerogative is, therefore, to maintain that the Malaysian constitution is not comprehended in a single document, but is a living set of rules, principles and conventions that can be invoked, shaped and adapted to the needs of a society in urgent quest of a national identity, of justice and equality, of security and peaceful progress.

Yet the principles of the Constitution are in themselves virtually neutral: apart from the token nod to Islam in Article 3, such philosophy

and doctrine as can be extracted from the written record itself are difficult to assess, and the document might be compared to a piece of litmus paper, originally perhaps blue, that now may be turning pink and may, perhaps, one day turn red. The political colouring comes from the operation of the institutions created by the Constitution which, like a vessel, can be set in motion and directed in such direction as those in charge may desire.

We move, therefore, upon deep waters, and the nature of the currents below cannot be determined. That they exist is clear from the occasional flurries of foam that indicate a tide race, from the whirlpools that disclose a meeting of conflicting elements: but on the surface the sun glitters, the waters appear calm. With the powerful forces that are in the making in mainland Malaysia this paper is not concerned: what it is concerned with is the study and maintenance of law — any law, it may be, rather than no law — in circumstances in which there is be a real risk that the rule of law may break down.

In such a crisis a powerful personality can maintain order. His power stems, however, not only from human character, but from the concept of legality itself. To assert and exercise power requires — if that power is to be clothed with legitimacy — the support of the courts as well as that of the people. Often, if justice exists with necessity, the colour of legality is enough. For this purpose the doctrine of prerogative is of value; but as to who is to exercise it, whether it be arrogated as a personal attribute of the Supreme Head of State, or whether it be exercised by another in his name: these are questions that fall for determination in accordance with the personalities and pressures of the time. In this context it is timely to call to mind the words of Lord Shaw of Dunfermline:

> If once again, and ever so slightly, [the Royal] prerogative gets into association with executive acts done apart from clear parliamentary authority, it will be an evil day: that way lies revolution.[71]

The trouble is, the evil days often come upon us without any such association, and the fire of the prerogative may then be necessary to fight the fire of civil war or revolution. Law, like life itself, often consists of a process of choosing the lesser of two evils.

For what, after all, is the essence of the prerogative? As Anson affirms,[72] it includes "attributes with which the Crown has been invested by legal theory. These attributes, which take their origin in notions of practical convenience, in their turn harden into legal rules which give rise to deductions sometimes of an unexpected and inconvenient character". In the unexpected lies an area of hazard and charm. It may be that the prerogative is a matter of political magic rather than law, for its very existence is in that shadowy land beyond the boundaries of the common law and statute law. In the institution of monarchy lies a certain mystery, quite beyond that of, say, a presidency: the pageantry and special language employed in communication with the monarch, the hierarchies of ministers, officers, servants and agents, the curious privileges that surround the monarch,

[71] *R.* v. *Halliday* [1917] A.C. at p. 286.

[72] *Law and Custom of the Constitution* (Fourth ed., 1935) Vol. II, Part I, p. 19.

his consort and subordinates: all these factors, intangible, creatures of no law, exert a force well known to the judiciary, itself a body not unacquainted with magic, panoply and privilege.

This paper is thus in the nature of a trial foray into those uncertain areas lying beyond the boundaries of the letters of the Constitution; it raises issues that are likely to cause controversy; it is not intended to put, say, a weapon in the armoury of a potential dictator, or to invest him with any especial degree of legality; but it is intended to stimulate thought upon the matter of the prerogative and its legitimate extent.

For the contention here made is that the Yang di-Pertuan Agong possesses a battery of prerogative powers; that these exist under the cover of the Malaysian Constitution and the Acts and Ordinances passed thereunder and are, to that extent, curtailed thereby; that such powers are not necessarily impliedly curtailed by the existence of a unexercised power to legislate on "the whole ground of something which could be done" pursuant to that power; but that the extent to which such prerogative powers can be exercised by the Yang di-Pertuan Agong himself, or by any of his ministers, remains a no-man's land in which either party will trespass at his peril, bearing in mind the challenges possible on legal or political grounds.

To such extent as these prerogative powers are to be exercised in the public interest and for the public welfare, I believe that the Courts would accept them, albeit critically; but should they be exercised in a manner inconsistent with the spirit of the Constitution, the *rukunegara* and the living principles of the Malaysian common law: to that extent they would, I suspect, be held unconstitutional. They exist, and take their life and purpose, therefore, from the Courts, as the guardians of the Constitution, and from the spirit, conscience, and charity of the people of Malaysia.

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