CONSTITUTIONAL AMENDMENTS IN MALAYSIA PART I: A QUICK CONSPECTUS[1]

INTRODUCTION

The Constitution of Malaysia after sixteen years of application has been amended on no less than seventeen occasions.[2] The amendments so effected to the Constitution ranged from alterations of minor importance to amendments of far-reaching effect. In Part I of this article the writer undertakes a study of all the amendments that had been effected to the Malaysian Constitution from 1957 to 1973 and of the various circumstances which provided the impetus to the birth of the amendment Acts. In Part II the legal aspects and ramifications of the amendment Acts will be examined.

CONSTITUTIONAL HISTORY

The evolution of a national constitution generally reflects the history of the birth of a nation. As with most cases of territories which had managed to shake off the shackles of colonialism, the emergence from the colonial cocoon to adult statehood is usually proclaimed with the simultaneous promulgation of a written constitution. This written document symbolizes the beginning of a new era for a new-born nation. Malaysia is no exception. To the ringing chants of *"merdeka"*,[3] this nation came into being on 31 August, 1957. Though described as a "federal" constitution of an "orthodox" nature,[4] the chequered history of the birth of the Malaysian Constitution reflects not so much the negotiations on distribution of federal and state powers but rather the tortuous forging of acceptable terms and compromises among the various racial components of the Malaysian society, especially on matters of communal interests.

Malayan Union

Malaysian constitutional development received its first major impact with the outburst of Malay opposition to the setting up of the Malayan Union. This outburst recorded the sprouting of simmering

[1] This article is a revised version of an extract from a dissentation which was submitted in fulfilment of the requirements for the degree of Master of Laws in the University of Malaya.

[2] This article is concerned with amendments effected from 1957 to 1976. The amendments were effected by the following instruments: (1) Ordinance 42 of 1958; (2) Act of 1960; (3) Act 14 of 1962; (4) Act 25 of 1963; (5) Act 26 of 1963; (6) Act 19 of 1964; (7) Act 31 of 1965; (8) Act 53 of 1965; (9) Act 59 of 1966; (10) Act 68 of 1966; (11) Act 27 of 1968; (12) Act A1 of 1969; (13) Act A30 of 1971; (14) Act A31 of 1971; (15) Act A193 of 1973; (16) Act A206 of 1973; (17) Act A335 of 1976.

[3] This is a Malay word which denotes 'free' or 'independent'. Originally the Federation of Malaya, Malaysia came into being in 1963.

[4] Sheridan, L.A. (Ed.), *Malaya and Singapore, the Borneo Territories: the Development of their Laws and Constitutions,* (London, Stevens and Sons Ltd., 1961) at p. 47.

Malay nationalism which had existed in an unorganised form prior to the Japanese invasion in December 1941.

Before the Second World War, the political structure which had existed in peninsular Malaya comprised a varied groupings of States. There were nine Protected Malay States, of which, four were grouped together to form the Federated Malay States, namely; Perak, Selangor, Negri Sembilan and Pahang. The remaining States of Johore, Kedah, Kelantan, Perlis and Trengganu comprised the Unfederated Malay States. Penang, Malacca and Singapore at that time were part of the Colony of the Straits Settlements.[5] North Borneo and Sarawak existed as Protected States in Borneo whilst Brunei remains a Sultanate receiving British Protection.

The end of the Second World War saw the disbanding of the Straits Settlements. Following from this, Penang and Malacca were grouped together with the Malay States in 1946 under a new political set-up in the form of a Malayan Union. Singapore was however left to exist as a separate Crown Colony of its own.[6] The Malayan Union had a brief and incomplete existence until 1948 when it was replaced by the Federation of Malaya.

The failure of the Malayan Union could be attributed to two main factors — the position of the Malay Rulers and the question of citizenship. The opposition by the Malays on these grounds was the pointer to the sensitive areas of agreement which had to be forged out in the spirit of compromise for the rise of the "Merdeka" Constitution in 1957. Under the concept of a Malayan Union, the Malay Rulers were relegated to the status of mere figure-heads acting only on the approval of a new Governor. Their relegation in status was brought about through a series of treaties entered into between the Malay Rulers and Sir Harold MacMichael on behalf of the Crown whereby the Malay Rulers ceded full jurisdiction over their State territories to the British Crown, The sole legislative powers of the Malay Rulers were in matters concerning the Muslim religion. It was no wonder therefore that the Malay Rulers started to voice their dissent even before "the ink of the signatures endorsing the MacMichael Treaties was hardly dry".[7] The other major reason for the opposition by the Malays to the Malayan Union was the feeling of insecurity which had arisen from the proposed creation of a common citizenship. Any person could qualify as a citizen of the Malayan Union by the very fact of being born in Malaya and in other cases, by fulfilling a requirement of a ten year period of residence in Malaya out of the preceding fifteen years. With such intense opposition, the concept of a Malayan Union was scuttled before it was fully implemented. In 1948, a new constitution was effected and in consequence, the Federation of Malaya was established.

[5] The Colony of Straits Settlements also included the Cocos-Keeling Islands, Labuan Islands and Christmas Island.

[6] Great Britain, "Malayan Union and Singapore: Statement of Policy on Future Constitution", Cmd. 6724 (London, 1946), p. 3. The British Government felt that for the time being the distinct social and economic interests of Singapore warranted a separate government. Also see B. Simandjuntak, *Malayan Federalism 1945-1963* at p. 40.

[7] Simandjuntak, *op. cit.,* at p. 41.

The Federation of Malaya

The Federation of Malaya Agreement of 1948 signalled the constitutional progress towards eventual self-government. The aborted Malayan Union experiment had resulted in the setting up of a Working Committee under the chairmanship of Malcolm MacDonald, the first Governor-General of the Malayan Union, Singapore and the British Territories in North Borneo. Representatives of the Malay Rulers and the United Malays National Organisation (UNMO)[8] participated in the discussions, and it was only in the closing stages of the negotiations that the views of the other communities were canvassed.[9] The Working Committee published its report on 24 December, 1946[10] and the final product of all the negotiations was the Federation of Malaya Agreement which came into being on 1 February, 1948.

The Federation of Malaya comprised the nine Malay States and Penang and Malacca. Singapore remained as a separate Colony "in deference to the fears of the Malays that they would be dominated by the Malayan Chinese if Singapore's one million Chinese acceded to Malaya".[11] A Federal Government was set up in Kuala Lumpur under a British High Commissioner. Other features of the Federation of Malaya Agreement was the establishment of a Federal Legislative Council in which the Malays were to be strongly represented. The Council also contained representatives from the other races.

On matters of immigration, the High Commissioner had to consult a council of Malay Rulers called the "Majlis Raja-Raja Negri Melayu". In matters of citizenship, there was a retreat from the liberal provisions of the Malayan Union. The addition of stiffer qualifications rendered it more difficult for the other races to acquire citizenship. For instance, all persons other than Malays could only become Federal citizens if they were born as British subjects *and* if their fathers were either State citizens or Federal citizens. For the former Straits Settlements of Penang and Malacca, it was sufficient if they were born as British subjects. The Federation of Malaya Agreement did not attract very warm support from the other racial communities. In 1952 a liberalization of the citizenship requirements was initiated as one of the means of countering the communist insurrection of 1948 which had resulted in a state of emergency being declared. It was only in 1960 that the emergency was lifted.[12] During the years when efforts were marshalled to battle the communist terrorism, the trek towards independence continued unabated.

[8] UMNO or United Malays National Organisation was formed by Dato Onn bin Jaaffar in 1946 to present a united front of all the Malays against the implementation of the Malayan Union.

[9] See Simandjuntak, *op. cit*., at p. 45.

[10] "Constitutional Proposals for Malaya: Report of the Working Committee Appointed by a Conference of His Excellency the Governor of the Malayan Union, their Highnesses the Rulers of the Malay States and the Representatives of the United Malays National Organisation" (Kuala Lumpur, 1946).

[11] Simandjuntak, *op. cit.,* at p. 53. See also Sopiee, *From Malayan Union to Singapore Separation* (Penerbit Universiti Malaya, Kuala Lumpur: 1974) at p. 106.

[12] In 1955 in an attempt to end the Emergency, an amnesty was offered to the terrorists. The failure of the Baling Talks between Tunku Abdul Rahman (who was accompanied by Tun Tan Cheng Lock and Mr. David Marshall) and the leader of the Communists, Ong Chin Peng, resulted in the amnesty being withdrawn.

In July, 1955, the first Federal elections were held for seats on the new Federal Legislative Council. Out of the fifty-two unofficial seats, the Alliance captured fifty-one.[13] Tunku Abdul Rahman who had succeeded Dato Onn as President of UNMO, as head of the Alliance assumed the office of Chief Minister in 1955.

Notwithstanding the prevailing emergency conditions, Tunku Abdul Rahman headed a Merdeka Mission to London to negotiate for independence. From 18 January to 6 February, 1956, talks were held in London between a Malayan delegation comprising four representatives of the Malay Rulers and four representatives of the Alliance Government, the Colonial Secretary,[14] the High Commissioner[15] and the British Minister of State. The result of the talks was the appointment of an Independent Constitutional Commission to draw up a constitution providing for full self-government and independence for the Federation of Malaya.[16]

Reid Commission

The Independent Constitutional Commission which was subsequently set up under the chairmanship of the Rt. Hon. Lord Reid,[17] also comprised Sir Ivor Jennings,[18] the Rt. Hon. Sir William McKell,[19] Mr. B. Malik[20] and Mr. Justice Abdul Hamid.[21] The Canadian Government was unable to make a nomination.[22] The Commission was instructed to examine the existing constitutional arrangements throughout the Federation of Malaya and "to make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature." The new constitution was to include provisions for (i) the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy, (ii) the safeguarding of the position and prestige of the Malay rulers, (iii) a constitutional Head of State for the Federation to be chosen from among the Malay Rulers, (iv) a common nationality for the whole of the Federation, and (v) the safeguarding of the special position of the Malays and the legitimate interests of other communities.

The Reid Commission went about its task of collecting data and memoranda [23] from June to October, 1956, holding all in all a total

[13] The sole remaining seat was won by the Pan-Malayan Islamic Party (PMIP) in the Krian constituency.
[14] Lennox Boyd.
[15] Sir Donald MacGillivray.
[16] "Report of the Federation of Malaya Constitutional Conference Held in London in January and February, 1956", Cmd. 9714 (London, 1956).
[17] Nominated by the United Kingdom.
[18] *Ibid.*
[19] Nominated by Australia.
[20] Nominated by the Government of India.
[21] Nominated by the Government of Pakistan.
[22] The Canadian Government nominated a member who withdrew at the last moment on medical grounds. The Canadian Government offered to make a further nomination. In view of the fact that time was running out before the proclamation of independence in August, 1957, this offer was not taken up as it would have taken some time for this further nomination and for the new member's arrival in Malaya.
[23] 131 memoranda were received by the Reid Commission. For a list of the names of those who submitted memoranda, see Appendix I of the "Report of the Federation of Malaya Constitutional Commission, 1957" (hereinafter called the Reid Commission Report) at p. 107.

of 118 sessions.[24] When it had collected all the evidence it needed, the Commission retreated to Rome [25] to prepare its report. The new constitutional framework drawn up by the Commission was devised with two objectives in mind: (1) that there must be the fullest opportunity for the growth of a "united, free and democratic" nation, and (2) that there must be every facility for the development of the resources of the country and the maintenance and improvement of the standards of living of the people.[26] The Reid Commission stated that in making its recommendations it had borne in mind that "the new provisions must be both practicable in existing circumstances and fair to all sections of the community". After its publication the Report of the Reid Commission was submitted to a Working Committee.[27] The deliberations by the Working Committee and subsequent new negotiations to settle remaining unresolved issues culminated in an agreement on a draft constitution. On 31 August, 1957, the Federation of Malaya became an independent and sovereign country with an elaborately written constitution.[28]

Post-Merdeka Amendments

The Malayan Constitution was subsequently amended on a number of occasions. The Constitution (Temporary Amendment) Ordinance, 1958 [29] was the first instrument to effect an amendment to the Federal Constitution and the only amendment which was made under Article 159(2). Article 159(2)[30] empowered the Legislative Council to make amendments which were necessary to remove any difficulties in the transition from the constitutional arrangements in operation immediately before 31 August, 1957, to those provided for by the Constitution. The amendment was however of minor importance.

In 1960, the Constitution (Amendment) Act, 1960[31] was passed. This was the first Act of the Malayan Parliament which sought to effect amendments to the Constitution. The amendments made were extensive and many of them were of a substantial nature. The more substantial of these amendments directly or indirectly impinged upon certain fundamental concepts underlying the Constitution such as the

[24] In addition, numerous meetings of a less formal nature were held by one or more of the members of the Commission.

[25] For reasons as to why the Reid Commission picked on Rome, see paragraph 13 at p. 4 of the "Report of the Federation of Malaya Constitutional Commission, 1957" (to be subsequently referred to as the "Reid Commission Report").

[26] Paragraph 14, p. 4 of the Reid Commission Report.

[27] The Working Committee comprised four representatives of the Malay Rulers, four representatives of the Alliance Government, and the High Commissioner, the Chief Secretary and the Attorney-General representing the British Government. The Committee was appointed before the Reid Commission had completed its task.

[28] See, generally: Cowen Z., *"The Emergence of a New Federation in Malaya"* (1958) 1 Tasmanian University Law Review 46; Groves, H.E., *"The Constitution of the Federation of Malaya"* (1962) Indian Yearbook of International Affairs 103; Sheridan, L.A., *"Federation of Malaya's New Constitution"* [1957] M.L.J. 1 xiii.

[28] Ordinance 42 of 1958. The whole of this Ordinance was subsequently repealed by Act 68 of 1965.

[30] Article 159(2) was subsequently repealed by Act 25 of 1963, Section 8, in force from 29 August, 1963, as it was totally irrelevant once Parliament was constituted in accordance with Part IV of the Constitution

[31] Act 10 of 1960.

principle of demarcation of Federal and State powers, independence of the Judiciary and the formulated system of checks-and-balances. It was stated that the amendments were necessary "as a result of experience so far gained",[32] that is, an experience of barely two years since the birth of the Constitution.

In 1962, after less than four and a half years of application of the Constitution, another amendment Act was passed. This Act, cited as the Constitution (Amendment) Act, 1962[33] effected a number of amendments which can be broadly grouped into amendments in relation to three matters: (1) citizenship, (2) electoral matters, and (3) finance. The same reason as put forth for the Constitution (Amendment) Act, 1960 was advanced to rationalise the necessity of the second Act. Tun Haji Abdul Razak who moved the Second Reading of the Bill stated that as experience was gained in the working of the Constitution, certain amendments were necessary "to meet the changing needs of our people and our country."[34]

Just before the formation of Malaysia, the Constitution (Amendment) Act, 1963,[35] was passed which made a number of minor amendments to the Constitution. Certain provisions which were no longer necessary were repealed. The Act was passed without debate as it was intended mainly to "tidy up" the Constitution.

The Malaysia Act

Meanwhile, in as early as 1961, a concept of a closer association encompassing the Federation of Malaya, Singapore, North Borneo[36] and Sarawak slowly began to take shape. More details were disclosed by the Prime Minister of the Federation of Malaya, Tunku Abdul Rahman, when he requested Parliament to endorse the Government's initiative in taking action for the realisation of the concept of Malaysia. The underlying reason for the necessity of Singapore's participation in a closer association with Malaya was the fear that an independent Singapore would easily succumb to communism and thus "endanger the peace and security of the Federation".[37] Such a fear was expressed by the Prime Minister of Singapore, Mr. Lee Kuan Yew, in his talks with the Malayan Prime Minister.[38] As to the form of association between the two territories, Tunku Abdul Rahman said:

> …(It) must be such as to provide protection for the interests of the people in the Federation and at the same time it should provide Singapore with economic security which is the desire of the people of Singapore, and to prevent outside interference and intervention in the affairs of Singapore.[39]

[32] "Parliamentary Debates" (Dewan Ra'ayat), Friday, 22 April, 1960, col. 304.
[33] Act 14 of 1962.
[34] "Parliamentary Debates" (Dewan Ra'ayat), Monday, 29 January, 1962, col. 4164.
[35] Act 25 of 1963.
[36] North Borneo was renamed Sabah after 16 September, 1963, and hereinafter shall be so referred to.
[37] For an in-depth account on the formation of Malaysia, see Sopiee, *op. cit.,* at Chapters V and VI.
[38] Federation of Malaya, "Parliamentary Debates" (Dewan Ra'ayat) Monday, 16 October, 1961, col. 1590. The Tunku described some of the problems conveyed to him by the Prime Minister of Singapore as "rather frightening" (at col. 1595).
[39] *Ibid*., col. 1598.

To concretise the Malaysian concept, lengthy negotiations between the British Government and the Malayan Government and representatives of the territories of Singapore, Sarawak and Sabah were carried on. A merger referendum [40] was conducted in Singapore while a Commission of Enquiry headed by Lord Cobbold was set up to ascertain the views of the peoples of Sabah and Sarawak in relation to the Malaysian concept and to make recommendations accordingly. The affirmative results of the referendum in Singapore [41] and of the findings of the "Cobbold Commission" paved the way to the signing of the Malaysia Agreement.[42] Brunei however backed out at the closing stages of the negotiations.[43]

In September, 1963, the Malayan Parliament passed Act No. 26 of 1963. This Act, known as the Malaysia Act, effected so extensive changes in the Malayan Constitution that it has been described as being responsible for the birth of a new Constitution of a new enlarged nation.[44] Amendments were made to accommodate Singapore, Sabah and Sarawak within a substantially restructured constitutional framework along the lines of the negotiated terms. The major amendments were centred around matters concerning the judiciary, citizenship, financial arrangements, distribution of legislative powers, the public services and the protection of the 'special interests' of the Borneo States and Singapore.[45]

The teething problems leading up to the birth of Malaysia assumed international proportion with the growing hostility of the neighbouring countries of Indonesia and Philippines. The latter sought to assert a claim of legal sovereignty over Sabah.[46] Indonesia on the other hand voiced its opposition to the formation of Malaysia on the ground that it was a British plot to perpetuate British colonialistic designs in

[40] See Lee Kuan Yew, *The Battle for Merger* (Singapore: Government Printing Office, 1961). In the referendum, the people of Singapore were given the choice of one of three alternatives: (A) to agree to the Singapore Government's merger proposals, (B) to merge as one of the States in the Federation of Malaya, and (C) to merge on terms no less favourable than those for the Borneo States. In anticipation of a call by the Opposition parties to cast "blank" votes, the National Referendum Bill provided that such blank votes were to be considered as accepting the decision of the Singapore Legislature. — See Simandjuntak, *op.cit.,* at pp. 147-150.

[41] 71% voted for the Singapore Government's merger proposals whilst there were 25% blank votes.

[42] "Malaysia: Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore." Cmd. 2094, (London: Her Majesty's Stationery Office).

[43] The major reasons which have been speculated upon and attributed to the failure of the talks were either because of the unresolved questions of precedence of the Sultan of Borneo or because of the financial arrangements concerning Brunei's rich oil revenues. Prior to this, towards the end of 1962, an open rebellion had broken out which was led by Azahari, the leader of Party Ra'ayat. The revolt however collapsed.

[44] H.E. Groves, *The Constitution of Malaysia — The Malaysia Act,* Vol. 5, No. 2, Malaya L. Rev., December, 1963, at p. 245. Cf. Professor Ahmad Ibrahim, *"Professor Groves' Constitution of Malaysia",* 1964, 2 M.L.J. xcviii.

[45] See Groves, *"The Constitution of Malaysia — The Malaysia Act",* Vol. 5, No. 2, Malaya L. Rev., December 1963, p. 245.

[46] See S. Jayakumar, "The Philippine Claim to Sabah and International Law", Vol. 10, No. 2, Malaya L. Rev., December 1968, pp. 306-335; see also M.O. Ariff, *The Philippines Claim to Sabah: Its Historical, Legal and Political Implications* (Oxford University Press, 1970).

South-East Asia. A series of meetings[47] was held at various levels between Malaysia, Indonesia and Philippines and these meetings culminated in the signing of the Manila Accord by the Foreign Ministers of the three countries.[48] A further "summit" meeting of the three Head of States was held at the end of July, 1963 as a result of a renewed outburst of Indonesian hostility following the signing of the Malaysia Agreement in London. In deference to the accord that was reached at the various meetings, a United Nations mission[49] was permitted to enter Sabah and Sarawak to ascertain the views of the inhabitants of these two territories. As the task of the United Nations fact-finding mission took up three weeks, the birth of Malaysia was delayed from 31 August to 16 September.[50] Indonesia and Philippines maintained their hostile postures despite the announcement by the United Nations Secretary-General on 15 September, 1963, that the majority of the people in Sabah and Sarawak were in favour of joining Malaysia.[51]

To top it all, on 10 September, 1963, the State of Kelantan proceeded in an unexpected action for a declaration that the Malaysia Agreement and the subsequent Malaysia Act passed by the Federal Parliament were null and void.[52] The action was based on the grounds, *inter alia,* that Kelantan should have been consulted before the passing of the Malaysia Act and that the Ruler of Kelantan should have been a party to the Malaysian Agreement. Thomson C.J., on the eve of Malaysia Day, held that the action had no constitutional merits. With the removal of this last legal obstacle, but in the face of overt Indonesian hostilities, Malaysia came into being on 16 September, 1963.[53]

1963-1965

During the period of two years from the birth of Malaysia to the separation of Singapore from Malaysia in 1965, two Constitutional Amendment Acts were passed: The Constitution (Amendment) Act, 1964 (Act 19 of 1964) and the Constitution and Malaysia Act (Amendment) Act, 1965 (Act 31 of 1965). The amendments made by these

[47] A tripartite sub-Ministerial meeting was held in Manila from 9 to 17 April, 1963. A meeting was held in Tokyo (31 May -1 June, 1963) between President Sukarno of Indonesia and the Malayan Prime Minister, Tunku Abdul Rahman.

[48] The Conference of Foreign Ministers lasted from 7 to 11 June, 1963.

[49] Indonesia, Philippines and Malaysia were permitted to send observers to accompany the United Nations fact-finding team. Initially, there was some disagreement over the number of the observers each country was allowed to send and the matter was finally referred to the United Nations Secretary-General, U Thant.

[50] There was some opposition from Singapore, Sabah and Sarawak to the change of the planned date of 31 August, 1963. September 16 was declared Malaysia Day by the Yang di-Pertuan Agong in a signed proclamation on 30 August, 1963. The fixing of the new date before the United Nations Mission had completed its task was deplored by U Thant and was seized upon by Philippines and Indonesia as a ground for furthering their resentment against Malaya. In Singapore, however, the Prime Minister, Lee Kuan Yew ignored the change of date and proclaimed Singapore's independence on 31 August. The legal significance of such a move is highly controversial but academic in nature.

[51] *United Nations Malaysia Mission Report,* p. vii.

[52] *The Government of the State of Kelantan* v. *The Government of Malaya and Tunku Abdul Rahman Putra Al-haj* (1968) 1 M.L.J. 129.

[53] On 26 May, Tun Abdul Razak announced that unofficially Indonesian confrontation was over, and in August, 1967, normal diplomatic relations with Indonesia were restored.

Acts are not of a highly controversial nature, except for the increase of Senators appointed by the Yang di-Pertuan Agong so as to outnumber the State-elected Senators.[54] The major aspects of the amendments effected by the Constitution (Amendment) Act, 1964, relate to the appointment of Parliamentary Secretaries, Political Secretaries and the Speaker of the House of Representatives.

The Constitution and Malaysia Act (Amendment) Act, 1965,[55] provided for amendments relating to the power of the Yang di-Pertuan Agong to extend the legislative or executive powers of the States, casual vacancies in the Houses of Parliament, Muslim religious appointments in Penang and Malacca, and the increase in the number of judges of the Federal Court.

The amendment relating to "casual vacancies" in the Houses of Parliament effected by the Constitution and Malaysia Act (Amendment) Act, 1965, came in the wake of a controversy concerning the legality of the election of a Senator by the Kelantan State Legislature.[56] Article 54 of the Federal Constitution provides that an election must be held "within sixty days from the date on which it is established that there is a vacancy". The Senator concerned was Wan Mustapha bin Haji AH, who had been elected by the Kelantan Legislative Assembly to fill the vacant seat in the Senate caused by the death of Senator Haji Nik Mohamed Adeeb. Wan Mustapha's election by the Kelantan Legislative Assembly was debated in the Senate and the Senate decided that it was void on the ground that the vacancy was not filled within the stipulated period of sixty days.[57] After the death of Senator Haji Nik Mohamed Adeeb on 4 April, 1964, the Yang di-Pertuan Agong gave notice to the Sultan of Kelantan that the election of a new Senator was required. The Sultan accordingly informed the Kelantan Legislative Assembly, which only elected Wan Mustapha on 19 July, 1964. The amending Act sought to prevent a similar "Wan Mustapha" controversy by providing that the election of a Senator by a State shall not be invalidated on the ground that it is not made within sixty days from the time the vacancy is established.

At the same time, during the years between 1963-1965, a state of continual friction had developed between the Central Government and the State Government of Singapore. Rapid events on the political scene erupted in Singapore leaving Malaysia on 9 August, 1965. This separation was effected by the Constitution and Malaysia (Singapore Amendment) Act, 1965.[58] The main tenor of the Act was the making of provisions to allow Singapore to embark on its own course as "an

[54] See Section 6 of Act No. 19 of 1964.

[55] Act No. 31 of 1965.

[56] See F.A. Trindade, *The Senate and Wan Mustapha,* The *Straits Times,* November 21, 1964, at p. 10.

[57] The Senate accepted Senator T.H. Tan's contention that the date on which a vacancy was established was the date of death of the Senator. Such an interpretation has been questioned by F.A. Trindade, *ibid*., and the writer is inclined to Trindade's view that the better interpretation of Article 54 is that the period of sixty days begins to run from the day on which a State Legislative Assembly is informed that a casual vacancy has occurred. This interpretation is reinforced by the fact that the wordings "on which it is established that there is a vacancy" replaced the original wordings "on which it (vacancy) occurs" — Act 26 of 1963.

[58] Act 53 of 1965. For an account on the separation of Singapore, see Sopiee, *op.cit.,* Ch. VII.

independent and sovereign State" and to accommodate consequential adjustments. Specific modifications to the Malaysian Constitution arising from this Act were made by a subsequent instrument, Act No. 59 of 1966. After the separation of Singapore was completed, there remain in Malaysia thirteen States.

1966: The Sarawak Crisis

Malaysia had hardly adjusted itself after the severance of one of its member States when it was buffeted by another crisis. This time the political convulsions occurred in Sarawak, one of the two States in East Malaysia. The crisis was precipitated to a large extent as a result of Federal involvement in the Sarawak political arena in which an assortment of political parties were jostling each other to arrive at certain political alliances.[59]

At the time of the crisis, the Chief Minister of Sarawak was Stephen Kalong Ningkan, who had been so appointed on 22 July, 1963, and who had acted as leader of the majority party in the Council Negri or State Legislature of Sarawak. On 16 June, 1966, the Governor acting on representations said to have been made to him by the majority of members in the Council Negri that they had lost confidence in their Chief Minister, requested Stephen Kalong Ningkan to resign. Instead of complying with the request, Ningkan urged for a reconvening of the Council Negri so that he could be put to the test of no-confidence through a formal vote in the Council Negri. Upon this non-compliance, the Governor, on 17 June 1966 purported to dismiss Ningkan together with the other members of the Supreme Council (or State Cabinet), and appointed Penghulu Tawi Sli as the new Chief Minister.[60] Ningkan thereupon instituted legal proceedings in the High Court at Kuching to have his dismissal declared void and to restrain Penghulu Tawi Sli from acting as Chief Minister.[61] Harley Ag. C.J. decided in favour of Ningkan and accordingly declared the latter's dismissal void.[62]

The main issue on which the outcome of the case was pivoted was the mode of assessing the lack of confidence in the Chief Minister under the Sarawak Constitution. In this connection, the Governor purported to dismiss Ningkan on receipt of a letter signed by twenty-one members of the Council Negri, to the effect that the signatories had no longer any confidence in Ningkan.[63] Harley Ag. C.J. quoted extensively from the Nigerian case of *Adegbenro* v. *Akintola*[64] but did not follow the decision of the Privy Council in that case. There, the Privy Council had held that under the Constitution of Western

[59] See Gordon P. Means, *Malaysian Politics* pp. 381-387.

[60] Penghulu Tawi Sli was nominated by the Malaysian Alliance National Council and not the Sarawak Alliance Council. See Gordon P. Means, *ibid.*

[61] [1966] 2 M.L.J. 187.

[62] *Ibid.*

[63] The letter was addressed from Kuala Lumpur and was produced after an entourage of the dissident members had flown to Kuala Lumpur and held discussions — See Gordon P. Means, *op. cit.,* at p. 384.
Again it is interesting to note that the Sarawak Council Negri comprises altogether 42 members, including the Speaker. The question was left open as to whether 21 out of 42 members constituted a majority.

[64] [1963] 3 W.L.R. 63.

Nigeria, by the use of the words "it appears to him" in Section 33(10)[65] the judgment as to the measure of support enjoyed by the Premier was left to the Governor's own assessment, and that there was no limitation as to the materials on which he might resort for the purpose. The learned judge opined that the Privy Council's decision was not applicable in respect of the Sarawak Constitution, upon the basis of the following five distinctions:—

(1) In the Nigerian case, it was mathematically beyond question that more than half of the House no longer supported the Premier;

(2) The measurement in Nigeria was a measurement of "support", not of "confidence". The Sarawak Constitution is dated subsequent to the decision of *Adegbenro* v. *Akintola,* and that the "confidence" of a majority of members, being a term of art, may imply reference to a vote such as a vote of confidence or a vote on a major issue;

(3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support;

(4) In Nigeria the Governor had express power to assess the situation "as it appeared to him";

(5) In Nigeria all Ministers, including the Premier, held office "during the Governor's pleasure", although there was an important proviso to this.

Because of these distinguishing features, Harley Ag. C.J. came to the conclusion that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri.[66]

The events arising upon the reinstatement of Ningkan as Chief Minister led to the passing of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966.[67] Penghulu Tawi Sli as spokesman of the Alliance majority in Council Negri, and the Governor had requested Ningkan to convene Council Negri. This time, the Governor had received signed statutory declarations from twenty-five members stating their loss of confidence in Ningkan. Ningkan, instead of acceding to the request, called for the consent of the Governor to dissolve Council Negri and for the holding of direct elections.[68] Under

[65] Section 33(10) of the Constitution of Western Nigeria provides that: "...the Ministers of the Government of the Region shall hold office during the Governor's pleasure: Provided that—(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly;

[66] For a critical analysis of the judgment of Harley Ag. C.J., see Dr. S.M. Thio, *Dismissal of Chief Ministers* [1966] 8 Malaya L.R. 283. This case perhaps serves to underline the necessity for the incorporation of important conventions into a constitution. See also S.A. de Smith, *Constitutional and Administrative Law,* (Second ed.) p. 54.

[67] Act 68 of 1966.

[68] Article 7(1) of the Sarawak Constitution reads as follows:
"If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council."

the Sarawak Constitution, the Governor had the absolute discretion to withhold his consent.[69] A constitutional impasse was created when the Governor invoked this discretion to refuse consent to Ningkan's request. After much outcry and press publicity of a deteriorating situation, the Yang di-Pertuan Agong proclaimed a state of emergency[70] in Sarawak and in an emergency session of the Federal Parliament, the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 was passed.

The Amendment Act was aimed at solving the constitutional deadlock by empowering the Governor of Sarawak to convene Council Negri at his absolute discretion and to dismiss the Chief Minister should the latter fail to resign after a vote of no-confidence has been passed against him in the Council Negri.[71] By this time there had been a shifting and re-shifting of political allegiance and in consequence, Ningkan found himself out-voted. Ningkan once again sought recourse to the courts.[72] However, the Privy Council upheld the validity of the Amendment Act.[73]

1966-1972

From the time of the "Ningkan" controversy to the end of 1972, the Federal Parliament passed a series of amendment Acts. The Constitution (Amendment) Act, 1968[74] made a few miscellaneous amendments to Articles 135 and 139 of the Federal Constitution and Section 9(3) of the Eighth Schedule. The amendment in respect of the Eighth Schedule was hotly debated especially by the members from Sarawak.[75] The main effect of this amendment was to extend the life of the Council Negri in Sarawak until the dissolution of the Federal Parliament in order that elections to the Sarawak State Legislature and to the Federal Legislature could be conducted at the same time. The Council Negri was supposed to have come to the end of its five years' term on 4 October, 1968.[76] This would mean that elections would have to be called within sixty days and a new Council Negri convened within ninety days of the dissolution of the Sarawak State Legislature. The Minister of Justice[77] in moving the Bill stated that the elections could not be conducted within the stated times as the Election Commission needed more time to complete its work in Sarawak.[78] Allegations were raised that the Federal Government was

[69] Article 10(2) of the Sarawak Constitution reads as follows:
"The Governor may act in his discretion in the performance of the following functions — (a) the appointment of a Chief Minister; (b) the withholding of consent to a request for the dissolution of Council Negri."

[70] *Vide* P.U. 339A/1966. The Proclamation of Emergency was issued by the Yang di-Pertuan Agong on 14 September, 1966.

[71] Act No. 68 of 1966, sections 4 and 5.

[72] *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119 (F.C.); [1968] 2 M.L.J. 238 (P.C.).

[73] *Ibid*., [1968] 2 M.L.J. 238 (P.C.).

[74] Act 27 of 1968.

[75] "Parliamentary Debates" (Dewan Ra'ayat), Wednesday, 21 August, 1968, col. 1788-1810.

[76] The first sitting of the Sarawak Council Negri was on 3 October, 1963, after Malaysia Day. By 4 October, 1968, it would have reached a period of five years.

[77] Tuan Bahaman bin Samsudin.

[78] The Election Commission's Report on the demarcation of boundaries for electoral constituencies in Sarawak was passed by the Federal Parliament on 14 June, 1968. See "Parliamentary Debates" (Dewan Ra'ayat), 14 June, 1968, col. 1464-1477. The registration of voters commenced on 8 July, 1968, for a period of sixty days and closed on 5 September, 1968.

purposely delaying the General Elections in Sarawak as it was afraid that the Sarawak Alliance which took over the reins of power from Stephen Kalong Ningkan, had not sufficiently consolidated its position to face the electorate.[79] The Election Commission finalised their delimitation proposals on 3 May, 1967, and on 5 August, 1967, the Election Commission submitted the Report to the Prime Minister. The Federal Government took nearly a year to approve the Report. Such a time lapse provided 'ammunition' for these allegations.

In January of 1969 the Constitution (Amendment) Act, 1969[80] was passed by the Federal Parliament as a measure "to meet an unusual situation". This unusual situation was caused by the block resignations of Labour Party members from all their seats both in Parliament and in the State Legislative Assemblies.[81] Thus vacancies were created in these legislative bodies even though the five year term of the Federal Parliament was about to come to an end. Under the Constitution it is mandatory for these "casual vacancies"[82] to be filled within sixty days from the date of establishment of these casual vacancies.[83] This would mean that by-elections would have to be held even though the General Elections was just round the corner. It was asserted that the holding of these by-elections was a futile exercise which was of no value, a waste of time for the voters and a waste of money to the Government.[84] The amendment thus provided that a casual vacancy shall not be filled if it arises on a date within six months of the date of dissolution of Parliament or of the State Legislative Assemblies.

13 May 1969

On 13 May 1969, Malaysia was convulsed by racial violence of an unprecedented nature and scale. The racial riots were precipitated in the midst of the General Elections which was being held on 10 May. For the first time, the ruling Alliance Party failed to acquire a two-thirds majority in the House of Representatives, whilst the Opposition parties made heavy inroads into many Alliance strongholds.[85] The inflamatory speeches by political candidates from various parties during the election campaigns and the "victory" processions staged by some Opposition parties were some of the causes which have been attributed by the government for the outbreak of violence.[86] To contain the situation, a Proclamation of Emergency under Article 150 of the

79 In fact after his removal from office, Ningkan's party, SNAP (Sarawak Nationalist Party) won a number of by-elections.

80 Act Al of 1969.

81 The Labour Party claimed that democracy in Malaysia was dead.

82 "Casual vacancy" is defined in Article 160 to mean a vacancy arising in the House of Representatives or a Legislative Assembly otherwise than by a dissolution of Parliament or of the Assembly.

83 Article 54.

84 As stated by Tun Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), Tuesday, 14 January, 1969, at col. 3106.

85 See also R.K. Vasil, *The Malayan General Elections of 1969* (Oxford University Press, 1972).

86 No independent Commission of Inquiry was held to determine the causes of the racial riots and to trace the sequence of events. The Government's version of what took place is contained in *The May 13 Tragedy,* a Report of the National Operations Council (Government Printer, Kuala Lumpur, 1969). See also Tunku Abdul Rahman, *May 13, Before and After* (Utusan Melayu Press Ltd., Kuala Lumpur, 1969) and Goh Cheng Teik, *The May Thirteenth Incident and Democracy in Malaysia* (Oxford University Press, 1971).

Federal Constitution was issued by the Yang di-Pertuan Agong.[87] The Proclamation was issued at a time when the elections to all the seats in the Dewan Ra'ayat were not yet completed. Acting under Article 150(2),[88] the Yang di-Pertuan Agong promulgated a number of Ordinances having the force of law. All uncompleted elections to the Dewan Ra'ayat and to all State Legislative Assemblies were suspended.[89] By virtue of the Emergency (Essential Powers) No. 2 Ordinance, 1969,[90] the executive authority of Malaysia and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law were delegated to a Director of Operations. Tun Abdul Razak who was then Deputy Prime Minister was appointed by the Yang di-Pertuan Agong as the Director of Operations. A National Operations Council was set up to assist him.[91]

Malaysia however managed to weather the crisis and on 20 February 1971 Parliament was reconvened following the resumption of the uncompleted elections. The reconvened Parliament after much debate passed the Constitution (Amendment) Act, 1971.[92] The Act embodied many of the conclusions arrived at during the deliberations of the National Consultative Council.[93] With the declared twin objectives of curbing public discussion on certain "sensitive" issues and rectifying the racial imbalance in certain sectors of national life, the Act imposed restrictions on the right to freedom of speech, cut down on parliamentary privilege of members of the Federal Parliament and the State Legislative Assemblies, defined the scope of official usage of the national language, enhanced the status of the natives of the Borneo States and the Malays, and finally, entrenched various constitutional provisions. Undoubtedly, of all the amending Acts, the

[87] P.U. (A) 145/1969.

[88] Article 150(2) provides:—
"If a Proclamation of Emergency is issued when Parliament is sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required".

[89] Section 7, Ordinance 1, P.U. (A) 146/1969.
The question may be raised as to whether the Yang di-Pertuan Agong can summon Parliament when elections to all the seats of the Dewan Ra'ayat are not yet completed. The answer lies in Article 62(2) of the Federal Constitution which provides that "Each House may act notwithstanding any vacancy in its membership." — See *On the legality of Emergency Laws Proclaimed in Pursuance of Article 150 of the Federal Constitution* INSAF, Vol. III, No. 3, July, 1969, pp. 31-39.

[91] Emergency (Essential Powers) Ordinance No. 2, 1969, P.U. (A) 149/1969.

[91] There was some confusion as to the respective roles and standing of the Director of Operations, the National Operations Council and the Cabinet. Tun Abdul Razak claimed that he had "supreme powers" being responsible to Tunku Abdul Rahman *(Straits Times,* 15 May, 1969). Tunku Abdul Rahman declared that the Cabinet was "all powerful" and that it was wrong to say that the National Operations Council was stronger than the Cabinet *(Straits Times,* 4 July, 1969).
See Jayakumar, *Legal Aspects of Emergency Powers in Malaysia,* (1969) Vol. 2, No. 2, Commentary 17, and Vol. 4, No. 3 of The Law Times (University of Singapore Law Society), p. 27. The learned writer opined that the Director of Operations (assisted by the National Operations Council) had for all practical purposes taken over the functions of the Cabinet.

[92] Act A30 of 1971.

[93] The National Consultative Council was established during the emergency to provide a forum for the frank discussion of various matters relating to the racial riots. It comprised members of all races and political parties (except for the Democratic Action Party which turned down the invitation to sit on the Council).

Constitution (Amendment) Act 1971 (i.e. Act No. A30 of 1971) is the most important and controversial to date. The controversy centres over whether this Act represents the best highway to national unity and the best formula to prevent a recurrence of racial riots in Malaysia.

Hardly a month after the Constitution (Amendment) Act 1971 came into force, Parliament passed the Constitution (Amendment) (No. 2) Act, 1971.[94] The main feature of this amending Act is that it sought to negate the effect of the judicial decision in *Government of Malaysia* v. *Government of the State of Kelantan*.[95] This case arose from the following facts: An agreement was entered into between the Kelantan State Government and the Timbermine Industrial Corporation Limited on 20 February, 1964. Under the agreement, the company was granted a permit to extract timber and forest products and to prospect and operate mines in the District of Ulu Kelantan. The agreement further provided that the company should make pre-payments of royalty for its mining and forest concessions. The Kelantan State Government was to refund the pre-payment of royalties by collecting only 50% of the amount of royalties due from the company to the Kelantan State Government, and by setting off the other 50% in favour of the company until the pre-payment of royalties was fully and completely refunded. The amount advanced could be forfeited under certain circumstances.

It was asserted by the Federal Government that Article 111(2) of the Federal Constitution had been contravened as the pre-payment of royalties constituted "borrowing", and that the refunding amounted to a violation of Article 97(2) of the Federal Constitution and Article LVII of the Kelantan State Constitution.[96]

Article 111(2) of the Federal Constitution provides that a State shall not borrow except under the authority of State law, and State law shall not authorise a State to borrow except from the Federation or, for a period not exceeding twelve months, from a bank approved for that purpose by the Federal Government.

Article 97(2) of the Federal Constitution provides that all monies and revenues howsoever raised or received by a State shall, subject to clause (3) and to any law, be paid into and form one fund, to be known as the Consolidated Fund of that State.

Article LVII of the Kelantan State Constitution provides that no monies shall be withdrawn from the State Consolidated Fund unless they are (a) charged on such fund or (b) authorised by a State Supply Enactment.

The Federal Court comprising Barakbah L.P., Azmi C.J., Ong Hock Thye F.J., Ismail Khan J. and MacIntyre J. was of the unanimous opinion that there had been no violation of the Federal Constitution. The Court followed the cardinal principle of considering the agreement as a whole rather than the impugned clauses in isolation. It held that there was no legal relationship of lender and borrower

[94] Act A31 of 1971.
[95] [1969] 1 M.L.J. 129.
[96] A reference was made to the Federal Court for its opinion under Article 130 of the Federal Constitution by the Yang di-Pertuan Agong.

as between the company and the State Government, since "borrowing necessarily implies repayment at some time under some circumstance" and that there was no liability to repay in the instant case upon forfeiture for breach of conditions imposed on the company. The Federal Court also unanimously held that there had been no violation of Article 97(2) of the Federal Constitution and Article LVII of the Kelantan State Constitution as the monies had been paid into the Consolidated Fund and there had been no refund by the Kelantan State Government.[97]

The Constitution (Amendment) (No. 2) Act, 1971, negated the effect of the Federal Court's decision by expanding the definition of the word "borrow" in Article 160(2).[98] Thus the word "borrows" now covers the arrangement for advanced payment of royalties such as that entered into between the Kelantan State Government and the Timbermine Industrial Corporation Limited. This legislative measure can only indicate the extent to which the federal principle is weighted in favour of the Federal Government.

1973

On Tuesday, 17 April, 1973, the Yang di-Pertuan Agong ceremoniously opened the third session of the Federal Parliament. Among the twelve Bills presented by the Government during this session was the Constitution (Amendment) Bill, 1973.[99] The Bill has been passed, and now it represents the fifteenth legislative instrument effecting amendments to the Federal Constitution. The Act paved the way for Kuala Lumpur to be made a Federal territory, and also made provisions for the setting up of an Education Service Commission.[1] The Constitution (Amendment) (No. 2) Act, 1973 came closely on the tail of the Constitution (Amendment) Act, 1973. The Act declared Kuala Lumpur as Federal Territory and contained provisions to provide for this. The more important aspects of the No. 2 Act are in relation to the amendments concerning delineation of constituencies and the increase of seats in the House of Representatives by another ten members.

In taking stock of the situation to date, it can be concluded that the Malaysian Constitution has been extensively amended, both in minor and major aspects.

[97] In fact, Azmi C.J. (Malaya) considered the second question as being "premature" whilst Ong Hock Thye F.J. added that when the time for refund came around there was no presumption that the Kelantan State Government would not act in accordance with the manner as prescribed by law.

[98] See Section 8, Act 31 of 1971.

[99] *Straits Times,* Wednesday, 18 April, 1973.

[1] *Ibid*., at p. 28.