PART II: AN ANALYSIS OF THE LEGAL EFFECTS OF CONSTITUTIONAL AMENDMENTS IN MALAYSIA

INTRODUCTION

In Part I, a quick account was given of the various circumstances which provided the impetus to the birth of seventeen legislative instruments responsible for effecting amendments to the Malaysian Constitution from 1957 to 1973. In this part, the writer will deal with each of the amendment Acts. The provisions of the Acts will be examined and their legal effects and ramifications analysed.

(1) *THE CONSTITUTION (TEMPORARY AMENDMENT) ORDINANCE, 1958*

The Ordinance[2] inserted a new clause, Clause (8), into Article 34 of the Constitution and was aimed at removing difficulties relating to the exercise by the Yang di-Pertuan Agong of certain of his functions as Ruler of his State.[3] Article 34(1) provides that the Yang di-Pertuan Agong shall not exercise his functions as Ruler of his State except those of Head of the Muslim religion. The amendment was designed to empower the Yang di-Pertuan Agong to amend the Constitution of the State of which he was the Ruler and to appoint in respect of the State of which he was the Ruler, a Regent or member of a Council of Regency to replace any Regent or member who has died or has become incapable of performing their respective duties.[4]

(2) *THE CONSTITUTION (AMENDMENT) ACT, 1960*

"Anti-Subversion" Laws

Article 149 empowers Parliament to pass laws which may be inconsistent with the Constitution provided that such laws are enacted to counter subversion. This Article was amended whereby the grounds upon which "anti-subversion" laws can be based were expanded.[5] An Act of Parliament which is inconsistent with the Constitution can still be upheld provided it is recited that such a law is designed to counteract "subversive" action which has been taken or threatened to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or to promote feelings of ill-will and

[2] Ordinance 42 of 1958.

[3] The first Yang di-Pertuan Agong was the Ruler of Negri Sembilan.

[4] The amendment effected by this Ordinance was intended to have temporary effect only. It was to cease having effect at the expiration of twelve months beginning with the day on which Parliament as constituted in accordance with Part IV of the Federal Constitution first met. (See Section 3, Ordinance 42 of 1958). The amendment was subsequently replaced by a permanent provision (see Act 10 of 1960) and in consequence, Ordinance 42 of 1958 was repealed by Act 68 of 1965.

[5] Act 10 of 1960, Section 28(a).

hostility between different races or other classes of the population likely to cause violence; or to procure the alteration, otherwise than by lawful means, of anything by law established; or which is prejudicial to the security of the Federation or any part thereof. Prior to 1960, Article 149 provided for the enactment of "anti-subversion" laws designed to prevent or stop action which were aimed at causing organised violence against persons or property only.[6]

It must have been contemplated in the Constitution that the specific powers provided under Article 149 would if unfettered result in abuse. To safeguard against the possibility of wanton wielding of such powers, it was provided by the original Clause (2) of Article 149 that a law containing such recitals would automatically lapse on the expiration of one year from the date on which the law came into operation. However this restraint was removed and replaced by a new provision which permits such a law unlimited continuity of life unless and until both Houses of Parliament have passed resolutions annulling such a law.[7] It can be argued that the original Clause (2) of Article 149 was not much different from the amended version for there is nothing to prevent the Legislature prolonging such a law for the original Clause (2) merely required it to go through the motion of approving such a law. It is submitted that such an argument is misleading in the sense that it fails to appreciate the relevance of public debate in the legislative process. The merit of public debate on the issue of "renewing" the life of an anti-subversion law is that it will generate a greater awareness among the public. Under such circumstances an onus is placed upon a Government to make out a convincing case for prolonging the life of a law which is inconsistent with the Constitution.

Emergency Powers

Occasions may arise when a nation's fabric of peace and order may be threatened by internal dissension and external threats. Under such circumstances any effective action to restore normalcy can be obstructed or even negated if there is no recourse to "extraordinary" powers. By "extraordinary" powers is meant the powers to act even in infringement of various constitutional provisions, such as fundamental liberties. These extraordinary powers are resorted to when a state of emergency is said to be proclaimed. "Exceptional times may best be governed by exceptional means and exceptional powers to make laws may be necessary in these times".[8]

Constitutional provisions embodying emergency powers are by no means peculiar to the Constitution of Malaysia only. In many other countries there are similar provisions.[9] In regard to Malaysia, the

[6] *Ibid.* See Groves, H.E., "The Constitution of the Federation of Malaya" (1962) *Indian Yearbook of International Affairs* 103 at pp. 136-137.

[7] Act 10 of 1960, Section 28(b). Tun Abdul Razak said: "The Constitution at present provides for such a law to lapse after one year and this country is likely to have to deal with the remnants of the communist terrorist organisation operating on the border for some time to come and we consider it a sufficient safeguard that Parliament should be able to annul the special legislation by resolution at anytime." — "Parliamentary Debates" (Dewan Ra'ayat), 22 April, 1960, col. 306.

[8] Editorial, INSAF (The Newsletter of the Bar Council, States of Malaya), Vol. III, No. 3, July, 1969.

[9] For example, see Article 352 of the Indian Constitution.

legal aspects of a Proclamation of Emergency are dealt with in Article 150 of the Constitution. Article 150 reads as follows:

> "(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency. (2) If a Proclamation of Emergency is issued when Parliament is not 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.
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> (3) A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2).
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> (4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any Officer or authority thereof.
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> (5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the Emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts, the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.
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> (6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.
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> (6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship or language.
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> (7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period."

The powers to act contrary to the Constitution as provided under Article 150 are extensive in scope. As such, certain safeguards are needed which seek to ensure that there shall be no abuse of such powers. Except for certain restrictions in Clause (6A) of Article 150, laws passed by Parliament or ordinances promulgated by the Yang di-Pertuan Agong may contravene any provision of the Constitution. In the face of such wide powers, the Constitution as it originally stood provided that a Proclamation of Emergency shall cease to be in force at the expiration of *two months* from the date on which it was issued, and similarly, any ordinance promulgated by the Yang di-Pertuan

Agong automatically lapses and ceases to have effect at the expiration of fifteen days from the date on which both Houses of Parliament are first sitting. They will only continue to have force if they have been approved by a resolution of each House of Parliament before the expiration of each of their respective period of two months and fifteen days. However, the original Clause (3) of Article 150 was replaced by a new clause under the Constitution (Amendment) Act, 1960.[10] By virtue of the amendment, neither the Proclamation of Emergency nor ordinance automatically lapses. They have a continuity of life until such time as resolutions are passed by both Houses annulling such Proclamation or ordinance.

Preventive Detention

Article 151 provides that if a person is detained under a law promulgated in pursuance of Part XI of the Constitution ("Special Powers Against Subversion, and Emergency Powers") he shall be informed of the grounds for his detention and be given an opportunity of making representations against the order of detention as soon as possible. But if a person is a Malaysian citizen, he cannot be detained longer than three months "unless an advisory board ... has considered any representations made by him... and has reported, before the expiration of that period, that there is in its opinion sufficient cause for the detention." In this capacity, the board can be described as a *decision-making* body. Thus if the advisory board decides that there is no sufficient cause for the further detention of a citizen, he must be freed. By virtue of an amendment, the board which earlier existed as a decision-making body has now been relegated to a mere advisory body.[11] The new clause reads:

> "No citizen, shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong."[12]

A new chapter was added to Part VI of the Constitution, namely, Chapter 7.[13] Article 95A of the new chapter provides for the creation of a National Council for Local Government. This new Council is to consist of a Minister as Chairman, one representative from each of the States,[14] and not more than ten appointed representatives of the Federal Government. The Chairman can vote on any question before the National Council for Local Government, has a casting vote and can summon meetings of the Council as often as he considers necessary.[15] However, there must be at least one meeting a year. It is the function which is entrusted to the National Council for Local Government which has important effects on the federal principle. The amendment provides:[16]

> "It shall be the duty of the National Council for Local Government to formulate from time to time in consultation with the Federal Government

[10] Act 10 of 1960, Section 29.
[11] See Athulathmudali, "Preventive Detention in the Federation of Malaya" (1961) 3 *Journal of the International Commission of Jurists,* 100 at pp. 105-6.
[12] Section 30, Act 10 of 1960.
[13] Section 12, *ibid.*
[14] The State representative is appointed by the Ruler or Governor of the State — see Article 95A(1), Constitution of Malaysia.
[15] Article 95A(2) and (3), Constitution of Malaysia.
[16] Article 95A(5), *ibid.*

> and the State Governments a national policy for the promotion, development and control of local government throughout the Federation and for the administration of any laws relating thereto; and the Federal and State Governments *shall follow* the policy so formulated.[17]

The demarcation of legislative powers under the Malaysian Constitution is effected through an "orthodox" arrangement into three Lists, namely, the Federal, State and Concurrent Lists. An examination of these Lists would show that the only areas of significance for the States are in matters of land and local government. But the composition of the National Council shows that once a concurring vote of a State Representative is obtained, a policy of local government would be made binding on *all* the States. The States have no choice but to follow the policy so formulated by the National Council.[18]

At first blush, the establishment of the National Council for Local Government would appear to be an encroachment into the State legislative sphere. The Constitution requires that any law made by Parliament with respect to a matter enumerated in the State List must be adopted by a State enactment before it can be operative in a State.[19] This requirement is not necessary in the case of a law made by Parliament on matters of land and local government if the law is made for ensuring uniformity.[20] Once Parliament resorts to enacting legislation for this purpose of ensuring uniformity on matters in the State List, the carefully formulated demarcation between Federal and State powers disappears altogether.

The National Council for Local Government was established with the aim of achieving a fair degree of uniformity in local government affairs.[21] This Council was created after a considerable degree of co-ordination in Land Administration was attained by the National Land Council.[22] The National Land Council is an organ provided for by the Constitution[23] and it was on the same lines as this organ that the National Council for Local Government was formed. Though the distribution of legislative powers is based upon the federal principle, the desire to attain a uniform policy on matters of Land Administration and Local Government is a more desirable state of affairs. Such a desire is consistent to a certain extent with the recommendations of the Reid Commission when it said:

> "We think that a large degree of uniformity is desirable in local government legislation, but that conditions in a particular State may require special treatment, and, in view of the close relationship between State authorities and local government authorities we think that State views on questions of local government should prevail."[24]

[17] Emphasis added.

[18] See Jayakumar, S., "Constitutional Institutional Limitations on Legislative Powers in Malaysia" (1967) 9 Mal. L. Rev. 96 at pp. 104-7.

[19] Article 76(3), Constitution of Malaysia. This Article only applies if the law made by Parliament is made for the purpose of promoting uniformity of the laws of two or more States or if it is made at the request of the Legislative Assembly of any State.

[20] See Article 76(4), *ibid.* It is to be noted that this Article 76(4) does not apply to the Borneo States by virtue of Article 95D.

[21] "Parliamentary Debates" (Dewan Ra'ayat), 22 April, 1960, at col. 307

[22] *Ibid.*

[23] See Article 91, Constitution of Malaysia.

[24] Reid Commission Report, para. 118 at p. 49.

It is submitted that the creation of the National Council for Local Government could have been more consistent with the Reid Commission's recommendations if the State representatives were to be appointed by the State Legislative Assembly rather than by the Ruler or Governor.

The amending Act abolished the Judicial and Legal Service Commission and transferred most of its functions to the Public Services Commission. The choice of Chief Justice was transferred from the Yang di-Pertuan Agong to the Prime Minister.[25] The choice of judges was transferred from the Judicial and Legal Service Commission to the Prime Minister.[26] The power of appointing persons to sit on a tribunal to consider the removal of a judge was transferred from the Commission to the Yang di-Pertuan Agong.[27] Pending the outcome of the report by the tribunal, the Yang di-Pertuan Agong had, prior to the amending Act, the power to suspend the judge from the exercise of his functions. After the Act, this power was transferred to the Prime Minister.[28]

The Federal Government sought to rationalise the amendments by referring to the system practised in the United Kingdom and other countries which practise parliamentary democracy and gave an assurance that it was not the intention of the Government to bring "political influence" into the appointments of judges.[29] Despite this assurance, sober thought must be given to the fact that avenues have been provided whereby an unscrupulous party coming into power could deal a sad blow to the independence of the Judiciary.

In respect of the method of appointment of the Attorney-General, this was changed from that of "the Yang di-Pertuan Agong after consultation with the Judicial and Legal Service Commission" to "the Yang di-Pertuan Agong acting on the advice of the Prime Minister".[30] What is highly controversial is that a new provision has been inserted which envisaged the possibility of the appointment of the Attorney-General from a member of the Cabinet.[31] The possibility has turned to reality as the post of Attorney-General is now already a political

[25] See Section 15, Act 10 of 1960. Before the amendment, the Yang di-Pertuan Agong was vested with a discretion as to the appointment of the Chief Justice. Before acting in his discretion, he had to consult the Conference of Rulers and consider the advice of the Prime Minister. See *Malayan Constitutional Documents* (Kuala Lumpur, The Government Printer, 1958), at p. 48.

[26] See Section 15, Act 10 of 1960. As to the appointment of the judges of the Supreme Court other than the Chief Justice, the Yang di-Pertuan Agong had to act on the recommendation of the Judicial and Legal Service Commission. Before so acting on the recommendation, the Yang di-Pertuan Agong had to consult the Conference of Rulers and consider the advice of the Prime Minister. The Yang di-Pertuan Agong was further permitted to refer the recommendation once back to the Commission for reconsideration — See *Malayan Constitutional Documents, ibid*., pp. 84-85.

[27] The tribunal was to be appointed if the removal of the judge was sought on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, to discharge his functions properly.

[28] See Section 16(c), Act 10 of 1960.

[29] "Parliamentary Debates" (Dewan Ra'ayat), 22 April, 1960 at col. 309.

[30] See Section 26, Act 10 of 1960.

[31] The amended Article 145(5) provides that the Attorney-General shall receive such remuneration as the Yang di-Pertuan Agong may determine "unless he is a member of the Cabinet".

appointment.[32] The merits or demerits of such a change must be considered in the light of the fact that the Attorney-General is conferred the discretionary power "to institute, conduct or discontinue any proceedings for an offence".[33] Furthermore, Section 376(i) of the Criminal Procedure Code (F.M.S. Cap 6) provides that the Attorney-General shall be the Public Prosecutor and that he shall have the control and direction of all criminal prosecutions and proceedings under the Code. On the other hand, the amendment introduced no extraordinary practice for in England, the appointments of the Attorney-General and the Solicitor-General are political in nature. In fact it has been written that these posts in England are conferred "on successful barristers who are supporters of the party in power".[34] An advantage to be accrued by making the post of Attorney-General a political appointment is that, as chief legal adviser to the Government, he can sit in Parliament and explain and answer legal matters.[35] The formation of Malaysia saw the revival of the Judicial and Legal Service Commission but with much reduced powers.[36] The Malaysia Act further brought about the creation of a new Federal Court.[37]

The Constitution provides that a person who is a member of either House of Parliament will be disqualified as a member on certain enumerated grounds.[38] Among these grounds is one which states that a member can be so disqualified if he has been convicted of an offence by a court of law in the Federation.[39] Not every conviction will result in disqualification. The convicted member must have been sentenced to imprisonment for a term of not less than two years. However, this has been altered and disqualification can take place if he is sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand dollars.[40]

The functions of the Election Commission consist purely of conducting elections to the House of Representatives and the Legislative Assemblies of the States and preparing and revising electoral rolls for such elections.[41] If the confidence of the public in the democratic process is not to be shaken, the proper conduct of such elections is vital. The integrity of the members appointed to the Election Commission must be above question. The Constitution has provided certain safeguards to ensure this by providing for the removal of such an appointed member in the same way and on the like grounds as a

[32] The present Attorney-General is Tan Sri Abdul Kadir who is also the Minister of Law.

[33] Article 145(3), Constitution of Malaysia. This power does not cover proceedings before a Muslim Court, a native court or a court-martial.

[34] See E.C.S. Wades and G. Phillips, *Constitutional Law* at p. 333. (E.L.B.S., 8th ed. 1971).

[35] See "Parliamentary Debates" (Dewan Ra'ayat) Friday 22 April, 1960 at col. 309-310. See also col. 329 where D.R. Seenivasagam supported this amendment to the post of Attorney-General.

[36] See Act 26 of 1963.

[37] *Ibid.*

[38] Article 48, Constitution of Malaysia.

[39] Article 48(1)(e), *ibid.*

[40] Section 7, Act 10 of 1960. This amendment could be too severe as it was pointed out that a person can be fined $2,000 for a variety of comparatively minor offences which do not involve dishonesty, such as criminal libel, criminal slander or driving a car and killing somebody. — See "Parliamentary Debates" (Dewan Ra'ayat), Friday, 22 April, 1960, at col. 329.

[41] Article 113(1), Constitution of Malaysia.

judge of the Federal Court.[42] The amendment has the effect of empowering the Yang di-Pertuan Agong himself to remove a member of the Election Commission on the following grounds: (1) if such a member is an undischarged bankrupt, (2) or if he engages in a paid employment outside the duties of his office, (3) or if he is a member of either House of Parliament or of the Legislative Assembly of a State.

A Police Force Commission was created to replace the Police Service Commission. The new Commission was patented on the Armed Forces Council. The new provisions elaborate the composition of such a Commission, its power and functions.[43] One noticeable difference in composition is that the Police Force Commission is headed by a Minister whereas the previous Police Service Commission was headed by either the Chairman or Deputy Chairman of the Public Services Commission. The Yang di-Pertuan Agong is also empowered to designate certain posts as "special" posts. Once a post is so designated, only the Yang di-Pertuan Agong can make appointment to such a post on the recommendation of the Police Force Commission. The Yang di-Pertuan Agong in acting under these provisions must consider the advice of the Prime Minister.

The Act also contained a number of miscellaneous amendments.[44]

(3) *THE CONSTITUTION (AMENDMENT) ACT, 1962*

Some of the more important amendments of this Act[45] touched upon the financial arrangements between the States and the Federal Government. The amendments effected by Sections 17 and 19 of the amending Act indicate the ease with which the Central Government can legislate across State prerogatives. Before the amendments, the State Governments were entitled to impose royalty on minerals mined within their borders and the Federal Government was entitled to impose export duties thereon by virtue of Article 110. Article 110 was thus amended by the insertion of two new clauses, Clauses (3A) and (3B). Article 110 (3A) empowers Parliament to legislate on the proportion of export duty which is to be paid over by the Federal Government to the States in respect of each mineral and the conditions to which such assignment will be subject. Accordingly, Article 110(3B) empowers Parliament to impose limitations as it sees fit on the States' power to impose royalties or similar charges. Article 76(4) was also amended to enable Parliament to legislate on the terms of mining leases for the purpose of ensuring uniformity throughout the Federation.[46] The reasons given for these changes were: (1) that it was inequitable for any mine to pay both royalty and export duty on the

[42] The Yang di-Pertuan Agong must appoint a tribunal comprising of not less than five persons who are or have been judges and refer the representations of the Prime Minister or the Lord President (after consulting the Prime Minister) to it. Only then may the Yang di-Pertuan Agong on the recommendations of the tribunal remove the member from office.

[43] See Section 22, Act 10 of 1960.

[44] See Appendix, *infra.*

[45] Act 14 of 1962. See Groves, H.E., "The Constitution (Amendment) Act 1962" (1962) 4 Mal. L. Rev. 324, and "The Constitution of the Federation of Malaya" by the same author in (1962) *Indian Yearbook of International Affairs* 103 at pp. 136-137.

[46] Section 17, Act 14 of 1962.

same product, (2) that different States imposed different rates of royalty, and (3) that there should be uniformity in the treatment of mines throughout the Federation.[47]

Article 39[48] originally provided that the executive authority of the Federation shall be vested in the Yang di-Pertuan Agong, but Parliament may by law confer executive functions on other persons.[49] Article 39 was amended by the Act to read "the executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any Federal Law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet but Parliament may by law confer executive functions on other persons."[50] It is difficult to ascertain what objectives could be realised by such an amendment.[51] The reason given for such an alteration was that it would clarify the law as to the formal exercise of the executive functions of the Federal Government and that it would also relieve the Yang di-Pertuan Agong of a number of "trivial" administrative acts which could be done by the Cabinet or by a Minister acting under Cabinet authority.[52]

In addition to these amendments, some fundamental amendments relating to citizenship and electoral constituencies [53] were effected by the Act. There were also a number of miscellaneous amendments.[54]

Citizenship

The issue of citizenship was never a significant one until the eruption of the Second World War. The swelling force of nationalism brought the question to the fore as the various communities awoke to the "realities of power-politics."[55] Ever since then the issue has become so "sensitive" that it has been removed from the realm of public debate in the aftermath of the May 13 racial riots of 1969.

To pave the way for independence, a set of proposals for citizenship had to be formulated which had to be acceptable to all the communities. In this regard, the Reid Commission in making their

[47] As stated by Tun Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), Monday, 29 January 1972, col. 4180.

[48] This Article was derived from Article 53 of the Indian Constitution.

[49] The point has been raised whether there is any significant difference between the use of the phrase "executive authority" in the Malaysian Constitution and the phrase "executive power" in the Indian Constitution. Hickling suggested that perhaps the latter term might be somewhat wider in its scope. See R.H. Hickling, "The First Five Years of the Federation of Malaya Constitution" (1962) 4 Mal. L.R. 187.

[50] Section 13, Act 14 of 1962.

[51] The amendment was made retrospective to Merdeka Day.

[52] "Parliamentary Debates" (Dewan Ra'ayat), Monday, 29 January, 1962, col. 4182.

[53] See footnote (302), *infra,* and Groves, "The Constitution (Amendment) Act of 1962" (1962) Mal. L.R. 324 at pp. 327-329.

[54] See Appendix, *infra.*

[55] See Simandjuntak, *Malayan Federalism 1945-63,* at Ch. VII. The determined opposition by the Malays to the citizenship proposals by the British Government was one of the major factors which demolished the Malayan Union even when it was in its embryonic stage. The Malayan Union was succeeded by the Federation of Malaya Agreement 1948. This time there was widespread agitation from the non-Malay communities, especially on the ground that there was no full cognisance of the *jus soli* concept.

recommendations adopted in the main the proposals submitted by the Alliance Party. In their report, the Reid Commission said:

> "Many different proposals have been submitted to us in memoranda and in evidence with regard to qualification for citizenship of the Federation We have carefully considered them all and we have come to the conclusion that the best proposals for dealing fairly with the present situation are those put forward by the Alliance. The parties of the Alliance have given full consideration to this matter and apart from a few minor points they have reached agreement. We are satisfied that this agreement is a reasonable and proper compromise between the views of the parties each of which has the most widespread support from the race which it represents, and we are further satisfied that this agreement is a better way of doing justice between the races than any other that has been suggested or has occurred to us."[56]

The recommendations of the Commission were fully embodied in Part III of the Federal Constitution. The main aim here is not to trace the intricate negotiations and demands on the citizenship issue nor to examine the complexities of the various provisions,[57] but rather to consider to what extent the original provisions of the 1957 Constitution have been amended.

Since 1957, Part III of the Federal Constitution has been amended on three major occasions. Of the three amending instruments, the Constitution (Amendment) Act, 1962[58] was responsible for a substantial variation of the 1957 constitutional provisions on citizenship. The Malaysia Act, 1963[59] and the Constitution (Amendment) Act, 1966,[60] dealt with citizenship provisions which were necessitated by the creation of Malaysia and the subsequent separation of Singapore.

The alterations in respect of citizenship matters were many and varied. Under the original terms of Article 14(1) (b), a person could become a citizen by operation of law merely by virtue of his being born within the Federation on or after Merdeka Day (i.e. 31 August, 1957). The *jus soli* concept is no longer fully applicable as a result of a qualification being added to the automatic acquisition of citizenship by birth.[61] From the date of coming into force of the Act,[62] a person will not acquire citizenship by operation of law by reason of birth in the Federation if at the time of birth neither of his parents was a citizen nor a permanent resident in the Federation.[63]

[56] Reid Commission Report, para. 36 at p. 14.

[57] See, generally, Jayakumar, S. & Trindade, F.A., "Citizenship in Malaysia" (1964) M.L.J. xlviii; Suffian, "Malaysian Citizenship" (Jabatan Penerangan, Malaysia); Sheridan and Groves, *The Constitution of Malaysia,* pp. 47-75; Groves, H.E. *The Constitution of Malaysia,* pp. 159-189.

[58] Act 14 of 1962.

[59] Act 26 of 1963.

[60] Act 59 of 1966.

[61] In reply to heavy charges that the principle of *jus soli* was being thrown overboard by the amendment Act, the Government advanced the reply that children of persons who had no right to be in the country and who had no attachment to it should not have the right to citizenship by operation of law. See *Straits Times,* 13, 16 and 22 January, 1962.

[62] 31 August, 1957.

[63] To this modified *jus soli* principle there are two categories of persons who cannot acquire citizenship by operation of law although they may be born in the Federation:—

a) a child of a foreign diplomat born in the Federation, or

b) a child of an alien born in any place under enemy occupation.

Article 15 was amended whereby new conditions were added for the registration as a citizen by virtue of being the wife or child of a citizen. Such a woman must satisfy the Federal Government that she has resided continously in the Federation for a period of not less than two years immediately preceding the date of the application; that she intends to reside permanently therein; and that she is of good character.[64] A special power was created whereby the Federal Government can cause any person below twenty-one to be registered as a citizen on the application by his parent or guardian. A new Article 15A arms the Government with discretionary power to register any minor as a citizen if there exist "special circumstances."

Previously, by virtue of Article 17, a person who was above eighteen years and who was resident in the Federation on Merdeka Day could be registered as a citizen provided he satisfied the Federal Government that he had fulfilled certain requirements.[65] This Article has been repealed by the Act and in consequence these special facilities for registration have been abolished.[66] It was argued that Article 17 was intended to be temporary to enable persons who were permanently resident in the country at the time of Merdeka to obtain citizenship if they so wished and that the time lapse of four years was more than ample enough for these people to apply for citizenship if they had so wished.[67]

In regard to citizenship by registration, Article 18(4) had provided for a presumption of good character. The Act deleted this provision on the ground that a person who has not been convicted of any criminal offence may nevertheless be a person of bad character and that it is therefore highly undesirable that such a person should be registered as a citizen.[68]

In respect of citizenship by naturalisation, a further residential qualification is now required, i.e., the applicant must show that he has resided continuously in the Federation for at least one year immediately preceding the date of the application. This is to ensure that he "must have made this country his home."[69] Previously, a person could be granted a certificate of naturalisation if he applied and satisfied the Federal Government that he had served as a member of the Armed Forces for a period of not less than three years in full-time service, or not less than four years in part-time service. Naturalisation by virtue of membership of the Armed Forces has been abolished by the repeal of Article 20. This Article was considered

[64] Article 15 was subsequently repealed and replaced by a new article altogether — See Section 3 of Act 26 of 1963.

[65] The requirements were: (i) residence for an aggregate period of not less than eight years during the twelve years immediately preceding the date of application, (ii) an intention to reside permanently in the Federation, (iii) good character, (iv) an elementary knowledge of the Malay language. Requirement (iv) was excepted where the application was made one year after Merdeka Day and the applicant had attained the age of forty-five years at the date of application.

[66] See Section 5, Act 14 of 1962.

[67] A short period of grace was given before the effective deletion of Article 17 to enable those who had not done so to register as citizens under the Article.

[68] "Parliamentary Debates" (Dewan Ra'ayat), 29 January, 1962 at col. 4171. But there are no criteria provided for the determination of "bad character". Does it cover character from the political or immoral aspect?

[69] "Parliamentary Debates", *ibid.*

no longer necessary as citizenship is now a requirement for enlistment in the Armed Forces.[70]

Article 23 of the Federal Constitution deals with renunciation of citizenship. Prior to the Act, a citizen could not renounce his citizenship unless he was actually a citizen of another country. However, certain foreign laws debar an individual from becoming a citizen until any previous citizenship has been renounced. The amendment to Article 23 was aimed at facilitating that process.[71]

The Act added several new grounds for the deprivation of citizenship. In addition to the deprivation of a person's citizenship on the ground that he has voluntarily claimed and exercised in a foreign country rights accorded exclusively to that country's citizens,[72] a person can also be deprived of his citizenship if he applies to the authorities of a place outside the Federation for the issue or renewal of a passport or uses a passport issued by such authorities as a travel document.[73] A person who is a citizen by registration under the special facilities available under the repealed Article 17 or who is a citizen by naturalisation can be deprived of his citizenship on the additional ground that he has served without the Federal Government's approval under a foreign government or any political subdivision or agency of such a foreign government where an oath of allegiance is required. Again, such a citizen who resides in a foreign country for a continuous period of five years without registering annually at a consulate of the Federation of his intention to retain his citizenship or who was not in the service of the Federation during that period can also be deprived of his citizenship.[74] A new provision has been added to the Constitution whereby the citizenship of a child who is registered under the new Article 15(2) can be deprived through a change of status of his parents. This is so where the father or mother has renounced their citizenship, or has been deprived of citizenship as a result of acquiring the citizenship of another country, or whose registration or certificate of registration was obtained by means of fraud, false representation or the concealment of any material fact.

A 'saving' clause is provided by the Act in respect of persons where grounds exist for depriving such persons of their citizenship under Articles 25, 26 or 26A. Such persons shall not be deprived of their citizenship "unless the Federal Government is satisfied that it is not conducive to the public good that he should continue to be a citizen". The hand of the Federal Government is further stayed if as a result of the deprivation such person would not be a citizen of any country. The overall effect of these amendments is that the conditions for the acquisition of citizenship have been rendered stiffer

[70] See Section 7, Act 14 of 1962.

[71] See Section 8, *ibid.,* and "Parliamentary Debates" (Dewan Ra'ayat), 29 January 1962 at col. 4172.

[72] As a result of Act 14 of 1962, the exercise of a vote in any political election in a place outside the Federation shall be deemed to be a voluntary claim and exercise of a right available under the laws of that place.

[73] See Section 9(3), Act 14 of 1962.

[74] The Act actually shortened the original period of seven years to five years. See Section 10(3), Act 14 of 1962. It was said: "It is essential that citizens who obtained that status by registration or naturalisation should continue to maintain a close and genuine contact with this country." — See speech by Tun Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), 29 January 1962, at col. 4174.

(4) *THE CONSTITUTION (AMENDMENT) ACT, 1963*

This Act (Act 25 of 1963) made a few non-controversial amendments. Section 2 amended Article 12 of the Constitution to empower the State Legislatures, similarly as the Federal Legislature, to enact laws to enable the States to give financial assistance to Muslim religious institutions and for the purpose of instruction in the Muslim religion.[75]

Article 50(3) which provided that a person's nomination for election to Parliament was void if his election would or might have been void, has been repealed. The reasons stated for this repeal were that the words "might be void" were vague and that the retention of the provision could result in a situation whereby an unsuccessful candidate who obtained the next largest number of votes would be elected instead of there being a fresh election.[76]

Article 118, prior to the amending Act, provided for any dispute arising in relation to elections to the Senate to be decided by an election petition. At the same time, Section 5 of the Seventh Schedule of the Constitution provides that in respect of such dispute, a decision of the Senate is "final". It was asserted that there was therefore a conflict between these two provisions. The "conflict" was removed by amending Article 118, leaving the decision with the Senate itself.[77] There were a few other minor amendments.[78]

(5) *THE MALAYSIA ACT, 1963*

The Malaysia Act[79] was passed by the Federal Parliament to provide for the admission of Singapore, Sabah and Sarawak as new States to the Federation. The Act incorporated terms which were recommended by the Inter-Governmental Committee[80] with regard to Sabah and Sarawak and terms resulting from the negotiations between the Governments of Singapore and Malaysia. The Act consisted of seventy-two sections dealing with amendments to the Constitution and over twenty-four sections containing transitional and temporary pro-

[75] This power was made retrospective to 31 August, 1957, *vide* Section 2(3) of the amending Act.

[76] As stated by Tun Haji Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), 15 August, 1963, at col. 956.

[77] See Section 3(2), Act 25 of 1963. It is submitted that the asserted "conflict" was unreal. Prior to the amendment it could be said that the Senate's decision is final in so far as the question revolves round whether a member of the Senate has been duly elected in accordance with *the provisions of the Seventh Schedule* only. If the legality of election of a Senator is based on the ground that it has not complied with other provisions of the Constitution (e.g. that the election was performed outside the stipulated period of sixty days), the Court ought to have the "final" say. If there had been no such amendment, the outcome of the "Wan Mustapha" controversy might have been different. See "Constitutional Amendments in Malaysia (Part I) etc," *supra.*

[78] See Appendix, *infra.*

[79] Act 26 of 1963. See Groves, H.E., "The Constitution of Malaysia—The Malaysia Act" (1963) 5 Mal. L.R. 245 and L.A. Sheridan, "Constitutional Problems of Malaysia" (1964) 13 *International and Comparative Law Quarterly,* 1349. For a detailed account of the constitutional arrangements between Singapore and the new Federation, see Professor Ahmad Ibrahim, "The Position of Singapore in Malaysia" (1964) 30 M.L.J. cxi.

[80] The Inter-Governmental Committee which was commissioned to make constitutional proposals for the Borneo territories comprised representatives from the Borneo States, Malaya and Great Britain. The Committee was chaired by the British Minister of State for Colonial Affairs, Lord Lansdowne

visions. It is intended here to give a brief commentary on the main features of the new constitutional arrangements.[81]

(a) *Parliament, Legislative Assemblies and State Constitutions*

The Act raised the number of Senators appointed by the Yang di-Pertuan Agong from sixteen to twenty-two. As for the House of Representatives the number of elected members was increased from one hundred and four to one hundred and fifty-nine with the addition of sixteen new members from Sabah, twenty-four from Sarawak and fifteen from Singapore.[82] The total number of members of the House of Representatives was reduced to one hundred and forty-four after Singapore's separation from Malaysia.[83] The membership of the Election Commission was increased from two to three whilst provision was made for separate reviews of constituencies in respect of the States of Malaya, the Borneo States and Singapore.[84] Article 71 was amended to deal with the relationship of the State Constitutions of the Borneo States and Singapore *vis-a-vis* the Eighth Schedule to the Federal Constitution.[85]

(b) *The Judiciary*

With the formation of Malaysia, extensive changes were made to the court structure.[86] Prior to the Act, judicial power was vested in a Supreme Court and such inferior Courts as provided by federal law. Judicial power is now vested in a new "Federal Court" and in the High Courts. Three High Courts were established — one in the States of Malaya, one in the Borneo States of Sabah and Sarawak, and one in the State of Singapore.[87]

The Federal Court is vested with "original" and "consultative" jurisdictions as specified in Articles 128 and 130, and exclusive jurisdiction to determine appeals from decisions of the High Court. The Federal Court is also conferred with jurisdiction to determine constitutional questions.[88]

The Federal Court comprises the Lord President, the Chief Justices of the High Courts and two[89] other judges. The maximum number of judges is set at twelve in the High Court of Malaya and eight

[81] For a lucid and detailed analysis of the Act, see Groves, "The Constitution of Malaysia — The Malaysia Act" (1963) Mal. L.R. 245.
[82] As to the negotiations on the number of seats in the House of Representatives for Singapore, see Simandjuntak, *op.cit.,* at pp. 274-6.
[83] See Section 2, Act 59 of 1966. Also, see the Constitution (Amendment) (No. 2) Act, 1973 which has increased the number of seats in the House of Representatives by ten, *infra.*
[84] Act 26 of 1963, Section 10.
[85] *Ibid.,* Section 12.
[86] See generally Sections 13-22, Act 26 of 1963.
[87] The number of High Courts was reduced from three to two with Singapore's removal from the Federation. The Singapore Parliament subsequently passed the Supreme Court of Judicature Act, 1969, to provide for the creation of a Supreme Court in Singapore. See Singapore Supreme Court of Judicature Act, 1969 (Act 24 of 1969).
[88] See generally Courts of Judicature Act, 1964 (Act 91 of 1964) (Revised — 1972), Laws of Malaysia.
[89] Under Act No. 31 of 1965, Section 2(2), the words "two other judges" were replaced by "four other judges and such additional judges as may be appointed pursuant to Clause (2) (of Article 122)".

each in the Borneo and Singapore High Courts, but each High Court is not to have less than four judges.[90] The Lord President, the Chief Justices and the other judges of the Federal and High Courts are appointed by the Yang di-Pertuan Agong "on the advice of the Prime Minister". The Yang di-Pertuan Agong must also consult the Conference of Rulers. In all these appointments the Act provided for various consultations.[91]

In respect of the Borneo States, the Yang di-Pertuan Agong (on the advice of the Lord President) or the Governor of the State (on the advice of the Chief Justice) may by order appoint a "judicial commissioner" for an area in which a High Court Judge is not available for the time being.[92] Such a judicial commissioner shall have the power to perform the functions of a High Court Judge and shall have the same immunities and powers of a High Court judge during the tenure of his appointment.[93]

(c) *Legislative Powers and Administrative Arrangements*

As certain legislative and executive powers conferred on the Borneo States and Singapore are different from the States of Malaya, supplements were added to the State List[94] and Concurrent List[95] to the Federal Constitution.

Among the component States of the new Federation, Singapore had obtained the greatest measure of State autonomy in the fields of education, labour, medicine, health, and social security.[96] The Legislatures of the Borneo States possess the power to make laws for imposing sales tax. Any sales tax so imposed will be deemed to be a matter enumerated in the State List.[97] In comparison with Singapore, the Borneo States are conferred legislative powers over matters of little significance.[98]

[90] Section 16(1), Act 26 of 1963.

[91] In the appointment of the Chief Justice of a High Court, the Prime Minister must consult the Chief Justices of the other High Courts. In regard to the Borneo States the Prime Minister had to consult the Chief Minister. The Prime Minister must also consult the Chief Justices of all the High Courts before tendering his advice as to the appointment of a Federal judge, and consult the Chief Justice of the High Court in the case of the appointment of a judge to that Court. In all these appointments, the Prime Minister is required to consult the Lord President. See Section 17, *ibid.*

[92] Section 16(3), Act 26 of 1963.

[93] Section 16(4), *ibid.*

[94] I.e. List II, Ninth Schedule, Constitution of Malaysia.

[95] I.e. List III, *ibid.*

[96] Other items falling within the ambit of the legislative powers of the State of Singapore included pensions, gratuities and other like allowances, and compensation for loss of office, factories, electricity and itinerant hawkers. — See List IIB, Ninth Schedule. List IIB was subsequently repealed by Section 2, Act 59 of 1966 because of Singapore's separation from Malaysia.

[97] However it is provided that no sales tax must be discriminatory between goods of the same description according to the place in which they originate and the charge for any federal sales tax has priority over a State sale tax — Section 35, Act 26 of 1963.

[98] These matters are native law and custom, native courts, incorporation, regulation and winding-up of authorities and other bodies set up by State law, ports and harbours (other than those declared to be federal under federal law), cadastral land surveys, libraries, museums, ancient and historical monuments and records and archaeological sites and remains (other than those declared to be federal under federal law). Sabah possesses legislative competence over an extra item, namely the Sabah Railway.

Supplements have also been added to the Concurrent List in respect of Singapore and the Borneo States. It must be noted that in those areas where the Federal Parliament and the State Legislatures have power to legislate, the Federal law supersedes if there is any inconsistency between the Federal law and a State law.[99] The conspicuous feature of these supplements was that Singapore had more items than the Borneo States, especially in relation to industrial and commercial activities.

Unlike the other States of Malaya, the new States of Singapore, Sabah and Sarawak are not subject to the power of the Federal Parliament to enact laws on land and local government for the purpose of uniformity.[1] The obligation to follow any policy formulated by the National Land Council and the National Council for Local Government arises only when the concurrence of these States have been obtained. Once a State concerned becomes obliged to follow the policy so formulated, its representative will become entitled to vote and the number of Federal representatives in these Councils will be increased by one to preserve the existing balance.[2] Similarly, the concurrence of the State Government of a new State is required before any area in the State can be proclaimed a development area under Article 92.[3] The agricultural and forestry officers of the Borneo States are not required to accept professional advice provided by the Federal Government but are only required to consider such advice.[4]

A new article was inserted whereby the Federal Parliament is empowered to delegate legislative authority in relation to matters in the Federal List to a State Legislature.[5] In regard to the Borneo States, the Yang di-Pertuan Agong may by order delegate such legislative authority and also executive authority to the Borneo State concerned to administer specified provisions of any Federal law.[6]

Article 4 of the Constitution was amended to enable an individual for the first time to bring an action to question the validity of a law made by Parliament or the Legislature of a State on the ground that the matter was one which Parliament or the State Legislature has no power to legislate upon. Prior to the amending Act, this ground for challenging the validity of a piece of legislation was confined to proceedings between the Federation and the States. The individual however is required to proceed by way of a declaration and the commencement of such an action is conditioned upon the obtaining of the prior approval of a Federal judge.[7]

Amendments were made to the Emergency provision of the Constitution, i.e. Article 150. The words "whether by law or external

[99] Article 75, Constitution of Malaysia. This provision was not amended by the Malaysia Act.

[1] Section 42, Act 26 of 1963.

[2] Section 43(2), *ibid.*

[3] Once an area is proclaimed a development area, the Federal Parliament is conferred the power to give effect to the development plan notwithstanding that any of the matters of the plan fall within the State's prerogatives.

[4] Section 43(4), Act 26 of 1963.

[5] Section 37, *ibid.*

[6] Section 38, *ibid.* This delegation by order of the Yang di-Pertuan Agong was subsequently extended to cover all the States of Malaysia by virtue of Section 2(1) of Act 31 of 1965.

[7] See Sheridan and Groves, *op.cit.,* at pp. 30-31.

aggression or internal disturbances" which appeared after "is threatened" in Article 150(1) were deleted. In consequence, the amended Article 150(1) now reads, "If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency." Clauses (5) and (6) of Article 150 were replaced with new provisions whilst a new Clause (6A) was inserted into Article 150[8] Groves noted the changes as follows:

> "Under the previous Constitution those provisions which required the consent or concurrence for a law to become valid, such as the consent of the Conference of Rulers, or which required consultation with respect to the passing of a law, as with the Conference of Rulers, were not affected by a Proclamation of Emergency. These requirements are now suspended during the period of the Emergency. An amending provision seeks to make clear that legislation passed during an Emergency is not subject to challenges in the courts on the grounds of constitutionality, except as it relates to religion, citizenship or language. Two matters only on the State List were beyond the reach of Parliament during an Emergency. They were Muslim law and the custom of the Malays. To these inviolable subjects has been added any matter of native law or custom in a Borneo State."[9]

(d) *Public Services*

The Malaysia Act revived the Judicial and Legal Service Commission which had been abolished in 1960.[10] Many of the duties and powers which had been transferred to the Public Services Commission were vested again in the re-established Judicial and Legal Service Commission.[11] However the re-established Commission no longer has any say in the appointment of judges. Provisions were also made for the establishment of a branch for the Borneo States and for Singapore. The branch for the Borneo States was envisaged to exist until the end of August, 1968 and thereafter until the Federal Government determines to the contrary[12] but in regard to Singapore, the existence of the branch was to be determined only by an Act of Parliament passed with the concurrence of the Governor.[13]

Branches of the Public Services Commission were established with jurisdiction in respect of members of the General Public Service of the Federation employed in a federal department in a Borneo State or in Singapore.[14] The existence of these branches is to be determined in the same manner as in the case of the branches of the Judicial and Legal Service Commission.[15]

The jurisdiction of the Police Force Commission was extended, except in matters of disciplinary control, to members of the public

[8] Section 39, Act 26 of 1963.

[9] Groves, H.E., "The Constitution of Malaysia — The Malaysia Act" (1963) 5 Mal. L.R. 245 at p. 274.

[10] Act 10 of 1960.

[11] The Judicial and Legal Service Commission consists of the Chairman of the Public Services Commission, the Attorney-General and one or more other members. These members are to be appointed by the Yang di-Pertuan Agong, after consultation with the Lord President of the Federal Court, from among persons who are or have been a judge of the Federal Court or a High Court — See Section 52(2), Act 26 of 1963.

[12] See Section 54(6), Act 26 of 1963.

[13] *Ibid.*

[14] Section 55, *ibid.*

[15] Section 55(8), *ibid.*

service of a Borneo State seconded to the Police Force.[16] This exception does not apply unless there is established a board for exercising disciplinary control over these members.[17]

Article 132 of the Federal Constitution was amended to exclude from the public service a list of offices which are all of a political nature[18] or offices consisting of appointments to the Federal Court or a High Court. The number of members of the Public Services Commission was also increased from eight to ten.[19]

(e) *Protection of Special Interests*

Title VI of the Amending Act grouped together those rights which had been reserved for the States of Sabah, Sarawak and Singapore either for specified periods or indefinitely. These rights or "special interests" are not available to the States in Malaya.

A restriction is placed on the right to freedom of movement in Article 9. The amendment empowers Parliament to impose restrictions through legislation on the rights of movement and residence, so long as a State is in a special position as compared with the States of Malaya. In regard to Singapore, this power was subject to the limitation that any law passed by Parliament restricting the right of movement relate to labour, education or any matter in respect of which, because of the special position of Singapore, it appeared to Parliament to be desirable to prevent the enjoyment of rights in the State of Singapore and in the States of Malaya.[20]

The right to form associations as guaranteed by Article 10(1) (c) is also limited by any restrictions that may be imposed by any law relating to labour or education.[21] Restrictions can also be imposed by any law which Parliament deems necessary in the interest of the security of any part of the Federation.[22] It was stated that the amendment was necessary because the State of Singapore had reserved to itself legislative and executive power in relation and education.[23] It is interesting to note that the restrictions imposed upon the right to form associations have yet to be removed even though Singapore had already been separated from Malaysia.

16 Section 57(1), *ibid.*

17 Such a Board must consist of the Chairman of a State Public Service Commission in the State, the legal adviser of the State, the senior officer of police in the State, and a representative of the officer of police in general command of the police force.

18 These offices include Ministers or Assistant Ministers, Chief Ministers or any other members of the Executive Council of a State and any political officer "by whatever name he may be known".

19 Section 59(1), Act 26 of 1963.

20 The amendments relating specifically to Singapore was subsequently repealed by Act 59 of 1966, Section 2, in force from 19 September 1966. The restriction placed generally on Article 9 still remains in force and it applies to laws passed before Malaysia Day so as to impose restrictions with effect from Malaysia Day — Section 60(2), Act 26 of 1963. The main aim of this was to enable the Immigration Act (Act 27 of 1963), restricting immigration into the Borneo States, to be passed before Malaysia Day in accordance with the recommendations of the Inter-Governmental Committee.

21 Section 60(4), Act 26 of 1963.

22 Section 60(3), *ibid.*

23 "Parliamentary Debates" (Dewan Ra'ayat), 15 August, 1963 at col. 980.

The special interests of the Borneo States are dealt with specifically by Sections 61 to 69 of the amending Act. The use of the English language in the Borneo States is not to be terminated nor restricted by any Act of Parliament until ten years after Malaysia Day.[24] Even after this ten year period, the approval of the Legislatures of the Borneo States must be obtained before an Act of Parliament can come into force concerning the use of English in proceedings before the High Court in Borneo or before the Federal Court in respect of matters arising from the High Court in Borneo.[25] Provision is also made for the continued use of a native language in current use in a Borneo State in native courts or native law.[26]

The position of the natives in the Borneo States is given special attention with power being conferred upon the Yang di-Pertuan Agong to ensure the reservation of a reasonable proportion of positions in the public services for them.[27] Under the amending Act, the position of the natives was not placed on par with that of the Malays as no provision was made for the reservation of a fixed proportion of scholarships, exhibitions and other educational or training privileges and facilities for the natives.[28] This has now been altered by the Constitution (Amendment) Act, 1971.[29] The Legislatures of the Borneo States are authorised to legislate for the reservation of land for the natives and for the giving of preferential treatment to them in regard to the alienation of land.[30]

Article 3(1) of the Federal Constitution declares Islam as the religion of the Federation.[31] By virtue of Article 12(2), Federal or State law may provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion. However no such Federal law can be made applicable to a Borneo State without the consent of the Governor of the State concerned.[32] Again, Article 11(4) permits a State to enact laws to control or restrict the propagation of any

[24] This refers only to the use of the English language in any of the following cases:—
(a) the use of the English language in either House of Parliament by a member for or from Sabah or Sarawak;
(b) in proceedings in the High Court in Borneo or in a subordinate court in Sabah or Sarawak or in proceedings before the Federal Court on matters arising from the High Court in Borneo;
(c) the use of the English language in Sabah or Sarawak in the Legislative Assembly or for other official purposes (including the official purposes of the Federal Government).

[25] Section 61(3), Act 26 of 1963.

[26] Section 61(5), *ibid.*

[27] Section 62(1), *ibid.*

[28] Section 62(2), *ibid.*

[29] See Act A30 of 1971, *infra.*

[30] Section 62(5), Act 26 of 1963.

[31] However the practice of other religions is constitutionally protected.

[32] Section 64, Act 26 of 1963. If a Federal law provides aid for the establishment or maintenance of the Muslim institutions or instruction in the Muslim religion by way of grant out of public funds in States other than Sabah or Sarawak, the Federation must pay to the Government of Sabah or Sarawak amounts which bear to the revenue derived by the Federation from the State in the year the same proportions as the grant bears to the revenue derived by the Federation from other States in that year. These amounts must be applied for social welfare purposes in Sabah or Sarawak — See Section 64(2) Act 26 of 1963.

religious doctrine or belief among persons professing the Muslim religion. Notwithstanding Article 11(4), the Borneo States are allowed to insert into their State Constitutions a provision requiring such State laws to be approved by a specified majority not exceeding two-thirds of the total number of members of the State Legislative Assembly.[33]

For the Borneo States, a two-thirds majority is required for amendments to the Malaysian Constitution concerning the admission to the Federation of a Borneo State or any modification made as to the application of the Constitution to a Borneo State unless the modification is aimed at equating or assimilating the position of the Borneo States to the position of the States of Malaya.[34] Furthermore, the concurrence of the Governor of a Borneo State is essential before any amendment can be made to the Federal Constitution if the amendment relates to any of the following matters:- (i) citizenship; (ii) the constitution and jurisdiction of the High Court in Borneo; (iii) the division of Federal and State legislative and executive powers and financial arrangements between the Federation and the Borneo States; (iv) religion, language and the special position of the natives of the States; and (v) the allocation to the State, in any Parliament summoned to meet before the end of August, 1970, of a quota of members of the House of Representatives not less, in proportion to the total allocated to the other States which are members of the Federation on Malaysia Day, than the quota allocated to the State on that day.[35]

Sections 67 to 69 of the amending Act referred to the special interests of Singapore. The use of the English, Mandarin and Tamil languages was to continue until such time as the Singapore Legislative Assembly decides otherwise. Unlike the other States, in Singapore there was to be no reservation for Malays of positions in the Public service, or of permits or licences for the operation of any trade or business in Singapore.[36] The concurrence of the Governor was required for any amendment to the Malaysian Constitution regarding, in addition to the same matters as the Borneo States, the discharge of functions of the Public Services Commission or of the Judicial and Legal Service Commission by a branch established for Singapore, the use of any language in the State or in Parliament, and the special position of the Malays in Singapore.

(f) *Financial Arrangements*

The financial arrangements between the Federation and the Borneo States were set out in Sections 45 and 46 and the Fifth Schedule to the amending Act.[37] These arrangements are subject to review by

[33] Section 65, *ibid.*

[34] If the modifications seek to equate or assimilate the position of the Borneo States to the position of the States of Malaya, a simple majority vote is sufficient.

[35] This protection is further extended to any rights and powers conferred by Federal law on the Government of a Borneo State as regards immigration into the State — See Section 66(4), Act 26 of 1963.

[36] However nothing in the Constitution was to prohibit or invalidate any provision of State law in Singapore for the advancement of Malays: Section 68, Act 26 of 1963.

[37] The technical aspects of these arrangements are elaborated upon in Tan Sri Mohamed Suffian bin Hashim's book, *An Introduction to the Constitution of Malaysia,* at pp. 158-168.

agreement between the Federal Government and the State Governments at intervals of not less than five years.[38] If there is any disagreement arising on a review, the matter is to be referred to an independent assessor whose recommendations shall be final and binding.[39] The financial arrangements between the Federal Government and the Government of Singapore were embodied in Section 48 of the Act.

(g) *Citizenship*

Sections 23-34 of the Malaysia Act dealt mainly with the subject of citizenship in relation to the States of Singapore, Sabah and Sarawak. The original States of the former Federation of Malaya were not affected by these amendments, except that the format of the Constitution was slightly altered. The rules relating to citizenship by operation of law were inserted into the Second Schedule as Parts I and II of that Schedule.[40]

There was much controversy over the difference in treatment of Singapore as compared with that of Sabah and Sarawak. Whilst these Borneo States were "assimilated" into the Federation,[41] the citizenship provisions in relation to Singapore made Singapore look "like a foreign country in her relationship with the Federation." Tun Abdul Razak in moving the Bill said:

> "The effect of the citizenship provisions of the Bill in relation to citizens of Singapore may be summarised as follows —
>
> (a) a citizen of Singapore will, by virtue of such citizenship, be a citizen of Malaysia;
>
> (b) birth or residence in Singapore will only count for the purpose of acquiring citizenship of Malaysia through citizenship of Singapore, but the Federal Government may treat such residence as residence in the Federation outside Singapore for the purpose of naturalisation as a citizen other than a citizen of Singapore;
>
> (c) the Federal Government will have authority to register a citizen of Singapore as a citizen of Malaysia (other than by virtue of citizenship of Singapore) if he satisfied all the requirements of Article 15 or 15A for citizenship by registration of wives or minor children of citizens or of Article 19 for citizenship by naturalisation;
>
> (d) the Federal Government will have authority to deprive persons of Malaysian citizenship on all grounds;
>
> (e) after Malaysia Day a person who was a citizen of Singapore prior to Malaysia Day will be liable to be deprived of the citizenship on any ground arising before Malaysia Day which he could have been deprived under the law in force prior to Malaysia Day provided proceedings are commenced before or within two years after Malaysia Day;

[38] Initially, the reviews had to be carried out at the end of five years or ten years — Section 47(4), Act 26 of 1963.

[39] Section 47(6), *ibid.*

[40] See Section 23(1) (a) and (b), Act 26 of 1963. These rules are still protected by the two-thirds majority vote requirement for their amendment. See Article 159, Federal Constitution. The original Second Schedule of the Federal Constitution was amended by the inclusion of various provisions as set out in Part III of the Third Schedule to the Malaysia Bill and by the miscellaneous amendments as set out in Part IV of that Schedule. The so amended Second Schedule became the existing Part III of the Second Schedule to the Federal Constitution: see Malaysia Act, Section 24.

[41] Simandjuntak, *op.cit.,* pp. 186-191. See also Groves, H.E., "The Constitution of Malaysia —The Malaysia Act" (1963) 5 Mal. L.R. 245.

(f) in respect of deprivations pending on Malaysia Day the Federal Minister will delegate his functions to a State authority and, in respect of proceedings commenced on or after Malaysia Day he will be empowered to do so;

(g) deprivation or renunciation of Malaysian citizenship of a citizen of Singapore would involve loss of Singapore citizenship;

(h) a citizen of Singapore who is deprived of, or renounces, his citizenship of Singapore (except on acquiring Malaysian citizenship by registration), will cease to be a citizen of Malaysia and shall not, except with the approval of the Federal Government, be eligible for registration as a citizen of Malaysia or of Singapore; and

(i) a person who has renounced or been deprived of his Malaysian citizenship would not be eligible to be registered as a citizen of Singapore except with the approval of the Federal Government."[42]

The fundamental difference in the complexities of these citizenship provisions boiled down to the rights that were available to the citizens of Singapore and this difference was embodied in Section 31 of the Malaysia Act. Section 31 provided that only citizens of Singapore were allowed the right to stand or vote at elections to Parliament or to a State Legislative Assembly in Singapore constituencies. In like manner, Malaysian citizens who were not citizens of Singapore were allowed to vote or stand as candidates in State and Federal elections in Malaysia outside Singapore.[43] However, citizenship of Singapore was tied to citizenship of the Federation to the extent that a Singapore citizen who lost his Singapore or Malaysian citizenship would lose the other also.[44]

(h) *Transitional and Temporary Provisions*

Sections 73 to 96 contained the "transitional and temporary" provisions. These provisions had constitutional force although they were not incorporated into the Malaysian Constitution. Some of these provisions dealt mainly with the continuation and modification of present laws,[45] succession to property,[46] rights, liabilities and obligations,[47] the continuation of criminal and civil proceedings[48] and succession on future transfers of responsibilities.[49] Section 79 concerned the vesting of defence lands in Singapore whilst Section 80 made temporary provisions on financial arrangements for the Borneo States in respect of the periods up to 31st December, 1963.

Other transitional and temporary provisions related to the preservation of pensions of serving officers in State service in the Borneo States and Singapore,[50] the transfer of members of the police force in Singapore to the Federal police force,[51] and the courts and judges.[52]

[42] See speech by Tun Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), 15 August, 1963, col. 971-974.

[43] Simandjuntak, *op.cit.,* at p. 190, described the difference as follows: "In other words, Singapore citizens would not be able to have a common political life with the citizens of the rest of Malaysia".

[44] Malaysia Act, Section 23(3).

[45] Sections 73, 74, *ibid.*

[46] Section 75, *ibid.*

[47] Section 76, *ibid.*

[48] Section 77, *ibid.*

[49] Section 78, *ibid.*

[50] Sections 81-83, *ibid.*

[51] Section 85, *ibid.*

[52] Sections 87-92, *ibid.*

Section 93 provided for the first elections and appointments of Senators from the Borneo States and Singapore. Sections 94 and 95 provided for the election of the members of the Federal House of Representatives and the State Legislative Assemblies in the Borneo States and Singapore, whilst Section 96 provided for the delimitation of constituencies for the first direct elections in the Borneo States and for the first elections in Singapore to the House of Representatives.

(6) *THE CONSTITUTION (AMENDMENT) ACT, 1964*

For the first time the posts of Parliamentary Secretaries and Political Secretaries were created with the aim of enabling the Government "to strengthen the administration".[53] The power of appointment was vested in the Prime Minister.[54] Unlike Political Secretaries, Parliamentary Secretaries must be appointed from among members of either House of Parliament.[55] Parliamentary Secretaries assist Ministers and Assistant Ministers in the discharge of their duties and functions[56] whilst the duties and functions of the Political Secretaries are left to be determined by the Cabinet.[57]

Prior to this amending Act, the Speaker[58] and the Deputy Speaker of the House of Representatives must be elected from among the members of the House. This is no longer a mandatory requirement in the case of the Speaker,[59] but a Speaker who is elected from outside the House does not obtain for himself the same benefits and rights as available to a member of the House.[60] Furthermore, he is not entitled to vote on any matter before the House. Neither has he got the power to cast a vote to break a voting tie unless he is also a member of the House. He is to hold office until the first meeting of the House of Representatives after a general election.[61] The amendments also provided for the removal of the Speaker and Deputy Speaker if the House so resolved.[62] The reason given for appointing a Speaker from outside the House of Representatives is that the amendment contemplates the possibility where no member

[53] See "Parliamentary Debates" (Dewan Ra'ayat), 9 July, 1964, col. 1109.
[54] Section 5(1), Act 19 of 1964.
[55] *Ibid.* Since a Parliamentary Secretary is not included as a member of the Cabinet, he can only speak on behalf of a Minister or Assistant Minister in the House in which he belongs. As for a Political Secretary, he cannot speak in either House unless he is elected from among the members of Parliament. The appointment of these Parliamentary and Political Secretaries and their dismissals are at the discretion of the Prime Minister.
[56] It was stated that the duties and functions of the Ministers and Assistant Ministers have been greatly increased as a result of the formation of Malaysia, and that they now have to cover a wider area.
[57] The words "member of the administration" in Article 160 have been expanded to include these new posts. Thus Parliamentary and Political Secretaries are not members of the Public Service.
[58] Or, "Yang di-Pertua Dewan Ra'ayat".
[59] See Section 7 of Act 19 of 1964.
[60] For example, such a Speaker cannot be appointed a Minister nor an Assistant Minister nor a Parliamentary Secretary: see Section 7(1), *ibid.*
[61] Prior to the amendment, the Speaker only vacates his office on the dissolution of Parliament.
[62] Prior to the amendment, the Dewan Ra'ayat had no power to remove the Speaker or Deputy Speaker once he had been so elected. The amendment adopted the practice of the English House of Commons. See S.A. de Smith, *Constitutional and Administrative Law* at pp. 268-9 *(Penguin Education Foundations of Law: 1971).*

of the House is willing to assume the office of Speaker. This is because the duties and functions of a Speaker are quite heavy and as such a Speaker who is also a member of the House will not be able to attend to the needs of his constituents. Thus he will be placed in a disadvantageous position in contrast to his opponents when he contests his seat in the next general election.[63]

The number of appointed members of the Senate was increased from twenty-two to thirty-two in order "to get wide representations in the Senate consequent on the formation of Malaysia".[64] There were a few other miscellaneous amendments.[65]

(7) *THE CONSTITUTION AND MALAYSIA ACT (AMENDMENT) ACT, 1965*

Prior to the amending Act,[66] Article 95C(1) of the Constitution provided that the Yang di-Pertuan Agong may by order authorise the Legislatures in the Borneo States to make laws in respect of matters in the Federal List. In the case of the States of Malaya,[67] such an extension required an Act of Parliament. This was considered as incurring too much Parliamentary time.[68] To save such time therefore, the amendments sought to replace the words "a Borneo State" in Article 95C(1) with "any State"[69] This in effect means that the Yang di-Pertuan Agong now has this power in respect of *all* the States of Malaysia.

In the case of the States of Malaya, there exist certain "hybrid laws" in the statute book. "The term hybrid law is taken to mean an Enactment or an Ordinance which contains provisions dealing with matters in the Federal List as well as matters in the State List and/or Concurrent List."[70] Prior to the amendment, such a hybrid law can only be amended or repealed both by an Act of Parliament in respect of Federal matters and a State Enactment in respect of State matters. Section 74 of the Malaysia Act[71] was amended to make it possible for the Yang di-Pertuan Agong to declare a hybrid law to be a "Federal law" so that it can be amended or repealed by Parliament. However the Yang di-Pertuan Agong can only act in this matter with the concurrence of the Ruler or Governor of the State. Although these amendments were designed to smoothen the functioning

[63] As stated by the Minister of Home Affairs and Minister of Justice (Dr. Ismail), "Parliamentary Debates" (Dewan Ra'ayat) 9 July, 1964 at col. 1110. In England until quite recently, the Speaker's seat was not contested at an election. It was even proposed that a special constituency be created and always be held without contest by the Speaker: see E.C.S. Wade and Godfrey Phillips, *Constitutional Law* at p. 124. (E.L.B.S. 1971).

[64] As to the legal significance of this amendment see my article, "The Amendment Process Under the Malaysian Constitution" in [1974] J.M.C.L. 185 at pp. 192-6.

[65] See Appendix, *infra.*

[66] Act 31 of 1965.

[67] The amendment also applied to Singapore which was still at the time of the amending Act part of Malaysia.

[68] See page 7 of the Explanatory Statement to the Amendment Bill.

[69] See Part I of the First Schedule to Act 31 of 1965.

[70] As stated by Tun Dr. Ismail, "Parliamentary Debates" (Dewan Ra'ayat), Thursday, 3 June, 1965, col. 1017-8. Dr. Ismail also said that the work of revision of laws would be facilitated by these amendments.

[71] Act 26 of 1963.

of the machinery of government, some consideration ought to have been given to State rights. The consultation of the Legislative Assembly of a State would have been more appropriate than the concurrence of the Ruler or the Governor, as the former comprises the elected representatives of the people of the State.[72]

The Federal Court which was set up under the terms of the Malaysia Act[73] comprised the Lord President, the Chief Justices of the High Courts and two other judges. The amending Act increased the composition of the Federal Court by another two judges. In addition, provision is made for the appointment of *ad hoc* judges to sit on the Federal Court. These *ad hoc* judges are to be appointed by the Yang di-Pertuan Agong on the advice of the Lord President of the Federal Court.

Article 54[74] and paragraph 5 of the Seventh Schedule[75] to the Constitution were amended to provide that the election of a Senator by a State is not to be invalidated by the mere fact that it is not made within sixty days from the date a vacancy is established. Such an amendment came in the wake of a controversy concerning the legality of the election of a Senator by the Kelantan Legislative Assembly.[76] Article 54 also provides that an election must be held within sixty days from the time a vacancy in the House of Representatives is established. In order to make Article 54 more effective, a new provision[77] was inserted into the Constitution whereby any member of the electorate can seek recourse to the High Court for an order to compel the holding of such an election. This recourse is also to be available if Parliament makes law to provide for direct election of members to the Senate.[78]

(8) *THE CONSTITUTION AND MALAYSIA (SINGAPORE AMENDMENT) ACT, 1965*

This Act[79] was promulgated on 9 August, 1965, to provide for Singapore's removal from Malaysia and for it to become "an independent and sovereign state and nation separate from the independent of Malaysia".[80] The Act also provided for the transfer of executive and legislative powers of the Malaysian Parliament and the transfer of the sovereignty and powers of the Yang di-Pertuan Agong to the Singapore Government and the Yang di-Pertua Negara[81] of Singapore respectively.[82]

In order for Singapore to adjust smoothly to an independent status, the Act provided for the continuation of the existing laws

[72] See speech by Dr. Tan Chee Khoon, "Parliamentary Debates" (Dewan Ra'ayat), Thursday, 3 June, 1965, col. 1039-1041.
[73] Act 26 of 1963, Section 15, in force from 16 September, 1963.
[74] Article 54 deals with "Vacancies in Senate and Casual Vacancies".
[75] The Seventh Schedule deals with "Election and Retirement of Senators".
[76] See "Constitutional Amendments in Malaysia (Part I), etc." *Supra.*
[77] Article 118A, Constitution of Malaysia.
[78] Article 120, para. (c). Refer to Appendix for miscellaneous amendments.
[79] Act 53 of 1965. See "Parliamentary Debates" (Dewan Ra'ayat), Monday, 9 August, 1965, col. 1470-1518.
[80] *Ibid.,* Sections 2 and 3.
[81] The "Yang di-Pertuan Negara" is the Head of State of Singapore.
[82] Act 53 of 1965, Sections 5 and 6.

and court structure until such time as other provisions were made by the Legislature of Singapore.[83] The Act also restored the status quo in respect of all movable and immovable property, rights, liabilities and obligations, which before Malaysia Day were the responsibility of the Government of Singapore but which had been vested in the Government of Malaysia after that day. This restoration of the status quo also applied to Singapore officers who had been employed by the Government of Malaysia after Malaysia Day.[84] With effect from 9 August, 1965, the Senators and Members of Parliament from Singapore ceased to be members of the Malaysian Parliament.[85] From the same date, a *citizen* of Singapore ceased to be a citizen of Malaysia.[86]

The Act also provided for the succession by Singapore to treaties and international agreements entered into before "separation" between Malaysia and other countries.[87] In regard to defence matters, Singapore was to afford to the British Government "the right to continue to maintain the bases and other facilities occupied by their Service authorities within Singapore and will permit the Government of the United Kingdom to make use of these bases and facilities as that Government may consider necessary for the purposes of assisting in the defence of Singapore and Malaysia and for the Commonwealth defence and for the preservation of peace in South-East Asia."[88]

The final provision of the Act contained the mutual guarantees to abide by the terms of the water agreements entered into between Singapore and the State of Johore.[89] The specific modifications to the Malaysian Constitution arising from this Act were made by another subsequent instrument, Act 59 of 1966.

(9) *THE CONSTITUTION (AMENDMENT) ACT, 1966*

This amending Act[90] effected amendments which can be broadly categorised into five groups:[91] (1) amendments necessitated by Singapore's removal from Malaysia, (2) amendments relating to general election in East Malaysia, (3) amendments in pursuance of the Malaysia Agreement, 1963, and in relation to the Federal Court and High Courts, (3) amendments concerning the powers of the Public Services Commission, and (5) amendments to rectify certain grammatical errors and printing errors in the Federal Constitution.

83 *Ibid.,* Sections 7 and 8.
84 *Ibid.,* Sections 9 and 10.
85 *Ibid.,* Section 11. Singapore had two Senators and fifteen members in the House of Representatives of the Malaysian Parliament at the time of "separation".
86 *Ibid.,* Section 12.
87 See Jayakumar, S., "Singapore and State Succession: International Relations and Internal Law", (1970) *International and Comparative Law Quarterly,* 398.
88 Section 13, Act 53 of 1965. This provision was made in regard to the Agreement on External Defence and Mutual Assistance between the Government of the United Kingdom and the Government of the Federation of Malaya on 12 October, 1957, and its annexes which were applied to all territories of Malaysia by Article VI of the Agreement relating to Malaysia of 9 July, 1963. The latter Agreement is subject to the provisions of Annex F of the same which concerns primarily Service lands in Singapore. (In July, 1967, the British Government decided to complete its military withdrawal from Singapore by the mid-1970's. Later the British advanced their withdrawal date to 1971).
89 Act 53 of 1965, Section 14.
90 Act 59 of 1966.
91 As stated by Tun Haji Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), Monday, 22 August, 1966, col. 1186.

The more controversial of these amendments is the one which transferred the powers of promotion and discipline from the Public Services Commission to Heads of Department and senior officers. This was effected by inserting a new Clause 5B into Article 144. The new Clause 5B(i) provides that all the powers and functions of the Public Service Commission, other than the power of first appointment, may be exercised by a board appointed by the Yang di-Pertuan Agong "notwithstanding the provisions of Clause 1 of Article 135 and Article 139". This board to be appointed by the Yang di-Pertuan Agong is to comprise Heads of Department. The stated aim behind this amendment was to ensure that civil servants carry out their work efficiently by giving more powers to the Heads of Department.[92] Fears were expressed in Parliament that the transfer of powers of promotion and discipline will undermine the morale of the Civil Service and may result in the Civil Service being "riddled with nepotism, corruption and patronage".[93] Safeguards are however provided for any person aggrieved by the exercise of powers by these new boards. Such an "aggrieved" person can appeal to an Appeal Board which is appointed by the Yang di-Pertuan Agong.[94] If the Yang di-Pertuan Agong has appointed a board under Clause 5B for the purpose of exercising any of the powers of the Public Services Commission (other than the power of first appointment), such powers shall so long as they remain to be exercised by the board, cease to be exercisable by the Commission.[95] The Government has taken advantage of the Clause 5B by making regulations whereby the power to promote and discipline is exercised by boards of serving government servants.[96] On the whole, the amendment made to Article 144 is, it is submitted, a deviation from the recommendations of the Reid Commission.[97] The establishment of an independent Public Services Commission was recommended by the Reid Commission to ensure the observance of certain principles.[98]

[92] Tun Abdul Razak, in moving the Second Reading of the Bill, stated that in certain Departments, peons and clerks did not even care for the Heads of Department because they knew that the Heads of Department could not do anything to them. Tun Abdul Razak was Head of the Civil Service in the State of Pahang for live years.

[93] See "Parliamentary Debates" (Dewan Ra'ayat) Monday, 22 August, 1966: C.V. Devan Nair (Bungsar) at col. 1190-4 and Dr. Tan Chee Khoon (Batu) at col. 1203-13.

[94] See Article 144 (5B) (ii-iv), Constitution of Malaysia.

[95] Article 144 (5B) (iv), *ibid.*

[96] See (a) Public Services Promotion Board Regulations, 1967, in P.U. 291/1967, as amended by P.U. 180/1968, 249/1968. (b) Public Services Disciplinary Board Regulations, 1967, in P.U. 292/1967 as amended by P.U. 181/1968, 249/1968. (c) Public Services Commission (Promotion) (Appeal Board) Rules, 1968, in P.U. 386/1968.

Note: This is in contrast to the Constitution (Amendment) Act, 1960 (i.e. Act 10 of 1960) where although a new Clause 5A was inserted into Article 144, the Government did not take advantage of it since no federal law and no regulations were made under it. See Suffian, *An Introduction to the Constitution of Malaysia,* at pp. 112-113.

[97] With regard to the Public Services, the Reid Commission fully accepted the recommendations contained in the Report of the Federation of Malaya Constitutional Conference held in London in January and February, 1956. The Reid Commission's proposals were based on these recommendations. Tun Abdul Razak was in fact a participant in the London Conference.

[98] Reid Commission Report, para. 153 and 154 at p. 66.

Two of these principles were as follows:[99]

(1) Promotions policy should be regulated in accordance with publicly recognised professional principles. The promotions must be determined impartially on the basis of official qualifications, experience and merit, and

(2) Reasonable security of tenure and an absolute freedom from the arbitrary application of disciplinary provisions are essential foundations of a public service.

It was acknowledged that the Public Services Commission prior to the amending Act, was not functioning satisfactorily.[1] Opinion will have to differ as to whether the better way of "curing" this unsatisfactory situation ought to have been by constitutional amendment along the lines proposed by the Government.[2]

As noted earlier, Singapore's removal from Malaysia was effected by the Constitution and Malaysia (Singapore Amendment) Act, 1965. However, it was this Constitution (Amendment) Act, 1966 which was responsible for making the necessary modifications to the Malaysian Constitution arising in consequence of the separation.[3] It was agreed that with effect from 9 August, 1965, a Singapore citizen ceased to be a citizen of Malaysia. Thus where relevant references and provisions concerning citizenship in respect of a Singapore citizen were either omitted or deleted. Many other constitutional provisions had to be modified to adjust to a Malaysia without Singapore but most of these modifications were not of major significance.

Article 54 of the Malaysian Constitution was replaced by a completely new provision. Under the repealed Article 54, whenever a casual vacancy arose among the members of the House of Representatives it had to be filled within sixty days from the date of existence of the vacancy. This general rule is retained in a modified form. In regard to the Borneo States of Sabah and Sarawak, the time period laid down for filling the vacancy is extended to ninety days. The reason for the longer period for the Borneo States is because of the inaccessibility of certain areas which renders transportation and com-

[99] *Ibid.,* para. 153.

[1] Even Opposition members of Parliament acknowledged this. See "Parliamentary Debates" (Dewan Ra'ayat), Monday, 22 August, 1966, col. 1185.

[2] Tun Abdul Razak said: "At that time, I honestly believed that this system of Public Services Commission as embodied in the Constitution was the right one, because I thought that there was a change from the system we had under the colonial government and, perhaps, this new system might lead to efficiency and better service by the civil servants. However. . . after seeing the system work for nine years, we have found that the system as embodied in the Constitution now — that is to say that the Public Services Commission has all the powers of discipline, promotion and appointment of civil servants and the heads of departments and senior civil servants are not vested at all with the powers of discipline and promotion — does not suit present conditions in our country." See "Parliamentary Debates" (Dewan Ra'ayat), *ibid.,* at col. 1225-6.

[3] The following provisions of the Malaysian Constitution were affected: Articles 1, 3, 14, 15, 16, 16A, 18, 19, 19A, 26A, 28A, 30, 30A, 30B, 42, 46, 88, 95B, 95D, 95E, 112A, 112B, 112E, 113, 121, 122A, 122B, 146B, 146C(1), 159, 160, 161F, 161G, 161H, and 169, Second Schedule, Eighth Schedule (Section 23) and Ninth Schedule. All these amendments came into force on 9 August, 1965.

munication difficult.[4] For the same reason, Article 55 was amended. Instead of sixty days as in the States of Malaya, a general election is to be held within ninety days in the Borneo States from the date of dissolution of Parliament. Parliament must now be summoned to meet on a date not later than one hundred and twenty days from the date of dissolution instead of ninety days. Similar amendments were made to the Eighth Schedule in respect of elections to the Legislative Assemblies of the Borneo States. Article 54 also provides that an appointment to the Senate[5] is not to be invalidated merely because it is made after the expiry of sixty days, an amendment to prevent a future similar "Wan Mustapha" affair.[6]

In pursuance of the Malaysia Agreement, 1963, a Federal Court was established to serve as a separate. Court of Appeal from the High Courts. To dispel any doubts that it is a separate and distinct Court, the amending Act inserted a new Clause 10 into Article 125. This new provision provides that a judge of the High Court who is appointed to be a judge of the Federal Court shall cease to be a judge of the High Court.[7]

Other than all these amendments, the rest concerned amendments to correct grammatical and printing errors.[8]

(10) *THE EMERGENCY (FEDERAL CONSTITUTION AND CONSTITUTION OF SARAWAK) ACT, 1966*

This Act[9] which was passed by the Federal Parliament at the height of the "Stephen Kalong Ningkan" controversy,[10] recited that it was "an Act to amend the Federal Constitution and to make provision with respect to certain constitutional matters in the State of Sarawak, consequent upon a Proclamation of Emergency having being issued and being in force in that State".

The major effect of the Act was to empower the Federal Parliament to modify the Constitution of Sarawak. Prior to the Act, when a Proclamation of Emergency is in force, the Federal Parliament has the power to make laws with respect to any matter notwithstanding anything in the Federal Constitution.[11] The amending Act expanded this power of the Federal Parliament to make laws to any matter "notwithstanding anything in the Federal Constitution *or in the Constitution of the State of Sarawak.*[12]

[4] As stated by Tun Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat) Monday, 22 August, 1966, col. 1187.

[5] If the vacancy is created among Senators who are elected by the States, the period of sixty days required by Article 54(1) does not apply as such a Senator is to be elected in accordance with the Seventh Schedule. See Article 54(3), Constitution of Malaysia.

[6] See "Constitutional Amendments in Malaysia (Part 1), etc." *supra.*

[7] But a judge of a High Court who is appointed to the Federal Court shall continue to be a judge of a High Court for the purpose only of giving judgment in any case tried by him prior to his appointment as a judge of the Federal Court. See Section 2, Act 59 of 1966.

[8] One other miscellaneous amendment is to Part II of the Tenth Schedule which deals with "State Road Grants": see Section 4, Part II of Tenth Schedule.

[9] Act 68 of 1966. See "Parliamentary Debates" (Dewan Ra'ayat), Monday, 19 September, 1966, col. 2064-2192.

[10] See "Constitutional Amendments in Malaysia (Part I), etc." *supra.*

[11] Article 150(5) of the Federal Constitution.

[12] See Section 3(1) (a), Act 68 of 1966. Emphasis added.

Section 4 of the Act drastically enlarged the powers of the Governor of Sarawak in regard to summoning meetings of the Council Negri and the transaction of business thereat. Section 5 enacted specifically that the Governor may, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council if (a) at any meeting of the Council Negri a resolution of no confidence in the Government is passed by a majority of members present and voting, and (a) the Chief Minister after the passing of such a resolution fails to resign and to tender the resignation of the members of the Supreme Council. The main aim of these provisions was to make good the "lack of powers" on the part of the Governor.

The amendments effected to Article 150 by the Act ceased to have effect on the expiration of six months of the date the Proclamation of Emergency ceased to be in force.[13] Such a provision by the Act was not necessary as it is similarly contained in Article 150(7) of the Federal Constitution.[14] The validity of this Act was subsequently challenged without success in *Stephen Kalong Ningkan* v. *Government of Malaysia.*[15]

(11) *THE CONSTITUTION (AMENDMENT) ACT, 1968*

Section 9(3) of the Eighth Schedule to the Federal Constitution provides that the Legislative Assembly of a State unless sooner dissolved shall continue for five years from the date of its first sitting and shall then stand dissolved. This provision can be found in Article 21(3) of the Sarawak Constitution. The application of Section 9(3) of the Eighth Schedule was varied in respect of Sarawak. It was provided by the amending Act that the Council Negri of Sarawak which was existing at the commencement of the Act[16] would be dissolved at the same time as the Federal Parliament.[17] The tenure of the Council Negri was to end on 4 October, 1968. The amending Act came into force on 9 September, 1968 and the Federal Parliament was then subsequently dissolved on 20 March, 1969.[18] The stated purpose for the temporary amendment to the Eighth Schedule was to enable the Sarawak Legislative Assembly to effect a similar temporary amendment in their State Constitution to comply with the new provision in the Eighth Schedule so that the life of the Council Negri could be extended accordingly.[19]

The legislative measure indicates how flexible it is for the Federal Government to legislate across the State sphere even in matters of the State Constitution. Any amendments to the Sarawak Constitution must be supported by a two-thirds majority in the Sarawak Council Negri on Second and Third Readings.[20] One of the exceptions to this requirement is where the amendment is for the purpose of bringing the State Constitution into accord with any of the provision of the

[13] Section 3(2) of Act 68 of 1966.
[14] See Thio, "Dismissal of Chief Ministers" (1966) 8 Mal. L.R. 283.
[15] *Stephen Kalong Ningkan* v. *Government of Malaysia,* [1968] 1 M.L.J. 119 (Federal Court); [1968] 2 M.L.J. 238 (Privy Council).
[16] Act 27 of 1968.
[17] *Ibid.,* Section 4.
[18] *Vide* P.U. (A) 94/1969.
[19] As stated by Tuan Bahaman bin Samsudin, "Parliamentary Debates" (Dewan Ra'ayat), Wednesday, 21 August, 1968, col. 1809-1810.
[20] Article 41(2), Sarawak Constitution.

Eighth Schedule to the Federal Constitution.[21] By so amending the Eighth Schedule, the Federal Parliament could change the requirement of a two-thirds majority in the Sarawak Council Negri to a simple majority.[22] It is submitted that the better move would have been to allow the Sarawak Council Negri to make a decision regarding the amendment to their own State Constitution.[23]

It was stated that several State Governments wanted to transfer the powers of promotion and discipline from the State Public Service Commissions to appointed Boards comprising Heads of Department and senior officers.[24] To achieve this aim a proviso was added to Article 135(3).[25] Clause 3 of Article 135 provides that no dismissal or reduction in rank of a member of the railway service, the joint public services or the public service of a State in respect of anything done or omitted by him in the exercise of a judicial function conferred on him by law shall be effected without the concurrence of the Judicial and Legal Service Commission. The new proviso states that in respect of members of the public services of a State (other than Penang and Malacca), Clause 3 of Article 135 shall not apply to any law which the legislature of any State may make to provide that all powers and functions of a Public Service Commission of such State be exercised by a Board appointed by the Ruler of such State. But the power of first appointment to the permanent or pensionable establishment is excepted from this amendment.

Article 139(2) provides that the Legislature of a State (other than Penang and Malacca) may by law extend the jurisdiction of the Public Services Commission to all or any persons in the public service of that State. The amending Act further provides that any such extension of the jurisdiction of the Public Services Commission made by the Legislature of a State may be revoked or modified by the Legislature of that State.[26]

(12) *THE CONSTITUTION (AMENDMENT) ACT, 1969*

A "casual vacancy" is defined as a vacancy in the House of Representatives or a Legislative Assembly otherwise than by a dissolution of Parliament or of the Assembly.[27] Prior to this Act,[28] a

[21] *Ibid.,* Article 41 (3) (b).

[22] See speech by Stephen Yong Kuet Tze, "Parliamentary Debates" (Dewan Ra'ayat), Wednesday, 21 August, 1968, col. 1791-4.

[23] Tuan Edmund Langgu Anak Saga (Sarawak) insisted that such an amendment should not be made by the Federal Parliament without the prior consent and approval of the Sarawak Council, "because we cannot agree to the proposition that a two-thirds majority in Parliament could amend the State Constitution." *Ibid.* col. 1796. Although the Minister of Justice stated that there was no intention of amending the Sarawak Constitution, it was alleged that the legislative measure amounted to "amending the Sarawak Constitution by the backdoor." *Ibid.,* col. 1791.

[24] As stated by the Minister of Justice (Tuan Bahaman bin Samsudin), "Parliamentary Debates" (Dewan Ra'ayat), Wednesday, 21 August, 1968, col. 1788-9.

[25] Article 135 has been highly adjudicated upon, especially in connection with dismissal of public servants. See Jayakumar, S., "Protection for Civil Servants: The scope of Article 135(1) and (2) of the Malaysian Constitution as Developed Through the Cases" (1969) 2 M.L.J. liv; Trindade, F.A., "The Security of Tenure of Public Servants in Malaysia and Singapore" in *Malaya Law Review Legal Essays* (University of Singapore) p. 256.

[26] See Section 3, Act 27 of 1968.

[27] Article 160, Federal Constitution.

[28] Act Al of 1969.

by-election would have to be held even though the casual vacancy arose just as the five year term of Parliament was about to come to an end. It is now provided that such a casual vacancy shall not be filled if it arises on a date within six months of the date Parliament stands to be dissolved.[29] Similarly, Section 9 of Part 1 of the Eighth Schedule was amended to provide for the situation where the casual vacancy arises in a State Legislative Assembly.[30] The provision in respect of the State Legislative Assembly was expressly declared to have effect in every State in Malaysia in accordance with Article 71(4) of the Malaysian Constitution.[31] The possibility was raised as to a situation where a number of members of Parliament might resign and thereby causing the Government to lose its majority.[32] In response to this, Tun Abdul Razak replied:

> "Under these circumstances, obviously the Government would have to call for a General Election."[33]

(13) *THE CONSTITUTION (AMENDMENT) ACT, 1971*

Coming in the wake of the May 13 racial violence, the amending Act or Act A30 of 1971[34] amended Article 10 of the Federal Constitution to empower Parliament to pass laws to impose restrictions on the right to freedom of speech. The restrictions aimed at restricting public discussion on four "sensitive" issues — citizenship, the National Language and the languages of other communities, the special position and privileges of the Malays and the natives of Sabah and Sarawak and the legitimate interests of other communities in Malaysia and the sovereignty of the Rulers. These restrictions extend right up to members of Parliament who are no longer able to seek protection behind the shield of parliamentary privilege.[35]

In relation to the national language, Article 152 expressly declares the Malay language to be the national language, but this declaration is subject to the proviso that no one can be prohibited or prevented from using any other languages except for "official purposes". Originally there was no definition of "official purposes". To clear doubts arising from the absence of a definition, a new clause has been added to Article 152 which defines "official purposes" as meaning "any pur-

[29] *Ibid.,* Section 2.
[30] *Ibid.,* Section 3.
[31] *Ibid.,* Section 4. Article 71(4) of the Constitution of Malaysia states: "If at any time the Constitution of any State does not contain the provisions set out in Part I of the Eighth Schedule, with or without the modifications allowed under Clause (5) (referred to as "the essential provisions") or provisions to the same effect, or contains provisions inconsistent with the essential provisions, Parliament may, notwithstanding anything in this Constitution, by law make provisions for giving effect in that State to the essential provisions or for removing the inconsistent provisions."
[32] See speeches by D.R. Seenivasagam (Ipoh) and Dr. Lim Chong Eu (Tanjong), "Parliamentary Debates" (Dewan Ra'ayat), Tuesday, 14 January, 1969.
[33] "Parliamentary Debates" (Dewan Ra'ayat), Tuesday, 14 January, 1969, at col. 3145.
[34] See the Introduction by Professor Ahmad Ibrahim at pp. ix-xvi of "Parliamentary Debates on the Constitution Amendment Bill, 1971" (Government Printers, Kuala Lumpur, 1972).
[35] The deprivation of the protection of parliamentary privilege of members of Parliament and the Legislative Assemblies of the States was effected by an amendment of Articles 62 and 72 respectively. See Sections 3 and 4 of Act A30 of 1971.

pose of the Government, whether Federal or State, and includes any purpose of a public authority". The ambit of the usage of the National Language for official purposes can now be visualised as "public authority" means the Yang di-Pertuan Agong, the Ruler or Governor of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by federal or state law, any court or tribunal other than the Federal Court and High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities.[36]

The Constitution (Amendment) Act, 1971 also amended Article 153. Article 153 is the provision which places in the Yang di-Pertuan Agong the responsibility to safeguard the special position of the Malays and the legitimate interests of the other communities. Furthermore, the Yang di-Pertuan Agong is empowered to ensure the reservation for Malays of such proportion "as he may deem reasonable" of positions in the public service (other than the public service of a State) and of scholarship, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then subject to the provisions of that law and Article 153 of such permits and licences.[37]

By virtue of Section 6 of the amending Act, the words "and natives of any of the Borneo States" were inserted immediately after the word "Malays" wherever appearing in Article 153. The intention of such an amendment is, according to the Explanatory Statement of the Constitution (Amendment) Bill, 1971, to "provide for parity of natives[38] of any of the Borneo States with Malays in West Malaysia." Prior to the amendment the natives of the Borneo States were entitled to reservation of positions in the public service but it was expressly provided that there was to be no reservation of "fixed proportion in relation to scholarships, exhibitions and other educational or training privileges and facilities for the natives." The amendment means that the natives of the Borneo States have been given the same status as the Malays.

[36] See Article 160, Federal Constitution. Also refer to the National Language Act 1967.

[37] It is however provided in Article 153 that the Yang di-Pertuan Agong in exercising his functions shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him. Neither will Article 153 operate to deprive any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

[38] It is also provided in Section 6(c) of the Constitution (Amendment) Act, 1971 that the expression "natives" in relation to a Borneo State shall have the meaning assigned to it in Article 161A, i.e. in relation to Sarawak, "native" means a person who is a citizen and either belongs to one of the following races, the Bukitans, Bisayans, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kelabits, Kayans, Kenyans (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagols, Tabuns and Ukits, or is of mixed blood deriving exclusively from these races. In relation to Sabah the expression refers to a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth. See Article 161A Clauses (6) and (7).

In addition to elevating the status of the natives of the Borneo States on par with the Malays, the Act also empowers the Yang di-Pertuan Agong to direct any University, College and other educational institution providing education after the level of Malayan Certificate of Education or its equivalent where the number of places offered to candidates for any course of study is less than the number of candidates qualified for such places, to reserve such proportion of such places for the Malays and natives of the Borneo States as the Yang di-Pertuan Agong may deem reasonable.

Another striking aspect of the amending Act is the attempt to "entrench" various provisions of the Constitution. This was achieved by enhancing the power and role of the Conference of Rulers in the amendment process. The consent of the Conference is now required for the amendment of Article 10 as amended and any law made thereunder, Article 63, Article 72 and Article 152 as amended. Section 7 of the amending Act achieves this purpose by amending Article 159(3) and brings about effective entrenchment by making the consent of the Conference an essential requirement before the amended Article 159(3) can be altered.[39]

(14) *THE CONSTITUTION (AMENDMENT) (No. 2) ACT, 1971*

The amending Act[40] provided a wider definition of the word "borrow" in Article 160(2) of the Federal Constitution. "Borrow" now includes the raising of money by entering into any agreement requiring the payment before the due date of any taxes, rates, royalties, fees or any other payments or by entering into any agreement whereby the Government has to repay or refund any benefits that it has enjoyed under that agreement.[41]

Other than this major amendment, the remaining sections of the Act merely provided for minor modifications to various provisions of the Constitution either to rectify certain grammatical errors or to streamline the Constitution, such as, by substituting the word "of" with "to"[42] or vice-versa,[43] the substitution of "Deputy Minister" for the designation of "Assistant Minister". Some minor modifications were made to the amendment process in Article 159.[44]

THE 1973 AMENDMENTS TO THE MALAYSIAN CONSTITUTION [45]

(15) *THE CONSTITUTION (AMENDMENT) ACT, 1973*

[39] For a more detailed discussion of the "entrenchment" issue see my article, "The Amendment Process under the Malaysian Constitution". [1974] J.M.C.L. 185 at pp. 198-199.

[40] Act A31 of 1971. This Act was passed to negative the decision in *Government of Malaysia* v. *Government of Kelantan* [1968] 1 M.L.J. 129. See "Constitutional Amendments in Malaysia (Part I), etc." *supra,* and Suffian, *op. cit.,* 173.

[41] Act A31 of 1971, Section 8.

[42] *Ibid.,* Section 9.

[43] *Ibid.,* Section 6.

[44] These amendments consist of: (a) the omission of the words "incidental to or consequential on the repeal of a law made under Clause (2) or" appearing in Clause 4(c), and (6) the substitution of the words "repeal; and in this Article and in Article 2(a) "State" includes any territory" for the words "repeal and "State" includes any territory" in Clause (6).

[45] This part of the article is, except for some modifications, also an extract from the LL.M. dissertation which was submitted to the University of Malaya. Notice of submission was effected in March, 1974.

(16) *THE CONSTITUTION (AMENDMENT) (No. 2) ACT, 1973*

Introduction

On Tuesday 17th April, 1973, the Yang di-Pertuan Agong ceremoniously opened the third session of the Malaysian Parliament. Among the twelve Bills presented by the Government during this session was the Constitution (Amendment) Bill, 1973.[46] This Bill has been passed and entitled the Constitution (Amendment) Act, 1973, it represents the fifteenth legislative instrument effecting amendments to the Malaysian Constitution. The sixteenth instrument, the Constitution (Amendment) (No. 2) Act, 1973 came closely on the tail of the Constitution (Amendment) Act, 1973.[47] Both these Acts have effected important changes to the Malaysian Constitution. As they are inter-related, the legal aspects of the provisions of both Acts will be analysed together, and an attempt is made to emphasise the "fundamental" changes which have been effected to the provisions in the Malaysian Constitution in regards to the election system.

The Constitution (Amendment) Act, 1973

Section 6 of this Act[48] inserted a new provision into the Eighth Schedule to the Malaysian Constitution. The amendment, it is submitted, was a device aimed at circumventing the two-thirds majority required in the Selangor State Legislative Assembly to enable the Federal Parliament to enact legislation to declare Kuala Lumpur as federal territory.

To declare Kuala Lumpur as federal territory would amount to an alteration of the boundaries of the State of Selangor.[49] In order that the States have the final say in the alteration of their boundaries, the Federal Constitution has laid down a specific procedure which had to be adopted. Under Article 2 of the Federal Constitution, Parliament is empowered by law to alter the boundaries of any State. This power is subject to the following qualification:

> "... a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of that State) and of the Conference of Rulers."

Therefore, before Parliament could enact legislation to carve out Kuala Lumpur as federal territory, Parliament must first obtain the prior consent of the Selangor State Legislature and of the Conference

[46] See the *Straits Times,* Wednesday, 13 April, 1973.

[47] The Constitution (Amendment) Act, 1973 or Act A193 of 1973 received the Royal Assent on 4th May, 1973 and was gazetted on the same day. The Constitution (Amendment) (No. 2) Act, 1973 or Act A206 of 1973 received the Royal Assent on 20th August and was gazetted on 23rd August, 1973.

[48] Act A193 of 1973. Section 6 reads as follows: —

'The Eighth Schedule to the Constitution is hereby amended by inserting immediately after section 19(5) (a) the following —

"(aa) any amendment to the definition of the territory of the State which is made in consequence of the passing of a law altering the boundaries of the State under Article 2 of the Federal Constitution to which the State Legislative Assembly and the Conference of Rulers have consented under the said Article; and".'

[49] An Opposition member, Mr. V. David (Gerakan-Pantai), raised the interesting point that there was no provision in the Constitution for alteration to boundaries within a State. There were only provisions for altering a State's boundaries. — See the *Straits Times,* Thursday, 5 July, 1973.

of Rulers. What is important is that the consent of the Selangor State Legislature must be expressed in the form of a State enactment. It must be emphasised that the consent to be required is the consent of the State Legislature and not the State Government. In order for the consent to be constitutionally valid, the State enactment must be in the form of an amendment to the Selangor State Constitution for to alter the State boundaries would require an amendment of the definition of "State" in the State Constitution.[50] Such an amendment required the approval of *not less than two-thirds of the total number of members of the Selangor State Legislative Assembly.*[51]

In Parliament, attention was drawn to the requirement of a two-thirds majority for amending the definition of "State" in the Selangor State Constitution and a mere simple majority in the Federal Parliament to pass a federal law to alter the boundaries of a State. The justification for the amendment was attributed to this discrepancy between the Federal Constitution and the State Constitution with regard to the implementation of Article 2 of the Federal Constitution.[52] It is difficult to comprehend the logic of such an argument. Surely if such a "discrepancy" existed, it existed because of a good reason. Alteration of State boundaries must naturally affect State rights and therefore one can see the justification for such a strict procedure as the requirement of a two-thirds majority in the State Legislative Assembly.

The Federal Government sought to help the Selangor State Government overcome the two-thirds majority "hurdle" by first amending the Eighth Schedule to the Federal Constitution.[53] Thus Section 6 of the Constitution (Amendment) Act, 1973 inserted a new provision into the Eighth Schedule to the effect that "any amendment to the definition of the territory of a State which is made in consequence of the passing of a law altering the boundaries of the State under Article 2 of the Federal Constitution to which the State Legislative Assembly and the Conference of Rulers have consented under the said Article" shall be excepted from the two-thirds majority requirement.

The Eighth Schedule already has a provision, Section 19(5)(b), which provides that any amendment of a State Constitution, the effect of which is to bring a State Constitution into accord with any of the provisions of the Eighth Schedule shall also be excepted from the requirement of a two-thirds majority As a result of the amendment to the Eighth Schedule by the Federal Parliament the Federal Government *thought* that the Selangor State Legislative Assembly could then amend the State Constitution by simple majority to incorporate a provision similar to the new provision inserted into the Eighth Schedule

[50] In most State Constitutions the word "State" is defined. The definition must be construed together with the provision of Article 1(3) of the Federal Constitution which provides that the territories of each of the States are the territories comprised therein immediately before Malaysia Day.

[51] See Article XCVIII of the Selangor State Constitution.

[52] See speech by the Prime Minister, Tun Abdul Razak in "Siaran Akhbar" (Printed by Jabatan Penerangan Malaysia, PEN. 4/73/327 PARL.).

[53] In 1969, the Alliance Party was returned in only 14 seats in the then 28-seat assembly. The remaining 14 seats were won by the Opposition made up of DAP (nine), Gerakan (four) and Independent (one). In the recent election held in August, 1974, the Alliance in the form of the "National Front" captured 30 seats in the enlarged 33-seat Selangor State Assembly.

of the Federal Constitution by the Federal Parliament. It is questionable whether such an assumption was correct, basically because Article XCVIII(5) of the Selangor State Constitution in providing for a two-thirds majority for a Bill that seeks to amend the Constitution has not excepted from its ambit an amendment Bill that seeks to incorporate the essential provisions of the Eighth Schedule.[54] It was unlikely that the State Government could have mustered the required two-thirds majority to amend the definition of "State" in the State Constitution or to modify Article XCVIII to accord with the provisions of the Eighth Schedule. It is submitted that the Federal Government could have helped the Selangor State Government achieve the objective of converting the two-thirds majority requirement to a simple majority by invoking Article 71(4) of the Federal Constitution. This Article provides: "If at any time the Constitution of any State does not contain the provisions set out in Part I of the Eighth Schedule, with or without the modifications allowed under Clause (5) (hereinafter referred to as the "essential provisions") or provisions substantially to the same effect, or contains provisions inconsistent with the essential provisions, Parliament may, notwithstanding anything in this Constitution, by law make provision for giving effect in that State to the essential provisions or for removing the inconsistent provisions." Thus Section 6 of the Constitution (Amendment) Act, 1973 in inserting the new provision into the Eighth Schedule should also at the same time have directed for the new provision in the Eighth Schedule to have effect in the State of Selangor.[55]

In pursuance of its second objective, the Act inserted a new Article 141A into Part X of the Constitution.[56] Article 141 (A) (1) establishes the new Education Service Commission and entrusts it with the usual functions of a Commission under the Constitution. The new Article provides for the composition of the new Commission. It is to comprise a Chairman and four members, all of whom are to be appointed by the Yang di-Pertuan Agong "in his discretion but after considering the advice of the Prime Minister and after consultation with the Conference of Rulers". To accommodate the new provision in the Constitution, minor modifications were made to Article 132(1) and (2A), and Article 135 to give mention to the new Commission. The creation of the new Education Service Commission is a concretisation of a recommendation by the Aziz Commission.[57] The Aziz

[54] The author's attention was drawn to the absence of this exception by a note in [1974] 1 J.M.C.L. at p. 122.

[55] This submission is reinforced by the fact that the Selangor State Constitution "shall be read subject to the Federal Constitution" (Article 1, Selangor State Constitution), and therefore read subject to Article 71(4) of the Federal Constitution. The employment of Article 71(4) is not unprecedented. In the Constitution (Amendment) Act, 1969 (i.c. Act A1 of 1969), Section 4 declares: "In accordance with Clause (4) of Article 71 of the Constitution, it is hereby provided that the amendment specified in section 3 shall have effect in every State in Malaysia". Section 3 in effect amended Section 9 of Part I of the Eighth Schedule so that a by-election need not be held if a casual vacancy arises within six months of the date a State Legislative Assembly stands to be dissolved.

[56] See Section 4, Act A193 of 1973.

[57] As a result of the recommendations of the Aziz Commission, a Committee of Officials was appointed by the Cabinet in September, 1971, to study certain aspects of those recommendations. The Committee of Officials agreed with the establishment of a new Education Service Commission. Pending its establishment, the Cabinet had directed the formation of a separate secretariat in the Public Services Commission to take charge of all matters relating to officers in the teaching service.

Commission has earlier been established by the Federal Government to make recommendations on salaries and conditions of service for all categories of teachers and also to make recommendations concerning the machinery for appointment, confirmation, promotion, transfer and discipline of all teachers. This amendment is justified in view of the fact that at the present moment, there are 64,046 officers in the education service including those serving in schools and colleges.[58]

The Constitution (Amendment) (No. 2) Act, 1973

This Act[59] consists of three parts. Part I deals with the creation of the Federal Territory of Kuala Lumpur and all the necessary consequences flowing from such an Act. Part II contains provisions which relate to increasing the number of seats in the House of Representatives in the Malaysian Parliament and the deletion of a vital clog imposed upon the power of delineating electoral constituences. Part III provides mainly for the consequential amendments as a result of the changes embodied in Part I and Part II.

The Constitution (Amendment) Act, 1973[60] has earlier been described as a move to enable the State Government of Selangor to by-pass the two-thirds majority requirement as laid down in the Selangor State Constitution so as to pave the way for the creation of the Federal Territory of Kuala Lumpur. This assertion was subsequently borne out by events. In pursuance of the constitutional amendment effected by the Constitution (Amendment) Act, 1973 to the Eighth Schedule, the Selangor State Legislative Assembly passed the Selangor Constitution (Amendment) Enactment, 1973 to adopt a similar provision as that contained in the Act. As this amendment was made to bring the State Constitution in line with the amended Eighth Schedule to the Federal Constitution, the Enactment stated in its preamble that a two-thirds majority was not required for its passage. After this amendment was effected to the State Constitution, the Selangor State Legislatives Assembly passed the Federal Territorial Enactment (1973) on *5* July, 1973. Upon the completion of these various acts, including the granting of consent by the Conference of Rulers, the way was cleared for the Federal Parliament to set out details for the carving out of Kuala Lumpur and its surrounding areas as Federal Territory. The Federal Territory of Kuala Lumpur extends over an area of ninety-four square miles, i.e., an increase of fifty-eight square miles from the present thirty-six square miles of the Federal Capital. Part 1 of the Act contains the necessary provisions to give legal and constitutional effect to the establishment of the Federal Territory.[61]

[58] It is estimated that this number will increase at the rate of 3% per year. Apart from these officers, there are about 2,400 trained teachers in the various Teachers Colleges and 700 who are following the diploma of education course in the University of Malaya.

[59] Act A206 of 1973.

[60] Act A193 of 1973.

[61] The Federal Territory is identified by reference to a plan certified by the Chief Surveyor, Selangor and which is dated and deposited in the latter's office (Section 2). According to the Mentri Besar (i.e. Chief Minister) of Selangor, Datuk Harun, the Federal Government had wanted one hundred and twenty square miles, including Petaling Jaya, but the State Government had managed to cut them down to ninety-four: *Straits Times, 5* July, 1973. The Federal Government has also agreed to make an interim payment of $200 million to the State Government while awaiting a final figure mutually agreed by both parties. The Prime Minister, Tun Abdul Razak also announced special pay-

Sections 3 and 4 of the Act provide for the extinguishment of sovereignty of the State Ruler and all power and jurisdiction of the State Ruler and State Legislative Assembly, and the transfer of such sovereignty, power and jurisdiction to the Federation. Section 5 deals mainly with the transfer of lands and the rights to all minerals and rock material within or upon lands which prior to the Act were vested in the State of Selangor to the Federation.[62] Section 6 ensures the continuous application of the State laws in force in the Federal Territory until such time they are repealed, amended or replaced by laws passed by Parliament. In respect of such State laws, any power or function in relation to the Federal Territory which is vested in the State Ruler or in any authority of the State is to be vested in the Yang di-Pertuan Agong or the Minister responsible for the Federal Territory or such other persons or authorities as the Yang di-Pertuan Agong may by order direct.[63] The Yang di-Pertuan Agong is also empowered to make modifications to any provisions in any existing laws[64] as he may think fit for the purpose of removing difficulties in transition. Section 7 provides for members of the Selangor State Legislative Assembly and members of Parliament from the federal constituencies within the Federal Territory to continue holding their seats until the next dissolution of the Assembly and Parliament following the passing of the Act. The administration of the Federal Territory as extended by an order of the Yang di-Pertuan Agong is to continue to be administered in accordance with the Federal Capital Act, 1960[65] and any amendments as may be made to it from time to time by the Federal Parliament. Section 9 provides for the Federal Government's succession to all rights, liabilities and obligations relating to any matter which immediately before the commencement of the Act was the responsibility of the Selangor State Government. Section 10 provides for succession in legal proceedings relating to civil matters.[66]

ments to Selangor. The payments include: (1) an annual grant as compensation for the loss of the capitation grant, (2) payment for loss of annual revenue after deducting operating expenses, and (3) payment for immovable property such as land and buildings which would be taken over by the Federal Government. The Federal Government also promised to help the State of Selangor in setting up a new State capital at Shah Alam. See *Straits Times,* 10 July, 1973, at p. 6.

[62] The National Land Code, the Mining Enactment, the Forest Enactment continue to apply in respect of the Federal Territory but references to the State of Selangor or State Authority are to be construed as references to the Government of the Federation and these legislative instruments may be modified from time to time in an Order by the Yang di-Pertuan Agong — See Section 5(1)-(3). Titles in estates and interests in land, mining rights and forest rights continue to be held on the same terms and conditions but from the Government of the Federation — Section 5(4).

[63] Section 6(2). In the interim period, the Yang di-Pertuan Agong can with the concurrence of the State Authority direct the performance of such power or function by an agency of the State on behalf of the Federation — Section 6(2) proviso.

[64] The expression "existing laws" means federal or State laws and includes any subsidiary legislation — 6(5).

[65] Act No. 35 of 1960. This Act provides for the establishment of an Advisory Board to advise in the administration of the Federal Capital (Section 5); and the power of appointing members to the Board is vested solely in the Yang di-Pertuan Agong. Section 8 of Act A206 of 1973 provides however that the Yang di-Pertuan Agong shall appoint two persons nominated by the Ruler in Council of the State of Selangor to be members of the Advisory Board.

[66] An interested party can apply to the Attorney-General for a certificate in respect of the matters stated in Sections 9 and 10. In the case of Section 9, it must be a party in any legal proceedings other than proceedings between the Federation and the State of Selangor.

The second of the two major objectives of the Act was stated to be the reconstitution of the membership of the House of Representatives "on the basis of allocation to the States in West Malaysia similar to the scheme which has been applied to the Borneo States after Malaysia Day."[67] The result of such an amendment is an increase of ten seats in the House of Representatives, i.e. an increase from one hundred and forty-four members to one hundred and fifty-four members.[68] A new provision was included in Article 113 to enable the periods for review for the unit of review of the States of Malaya to be calculated from the first delimitation of constituencies immediately following the passage of the Act.[69] Section 15 effected an amendment to the Thirteenth Schedule, an amendment which has removed a vital clog on the power of delimiting constituencies.[70]

Part III directs the Election Commission to undertake a review of the division of constituencies in peninsular Malaysia and to recommend changes in line with Parts I and II of the Act. Part III also seeks to negate the effect of the reports and recommendations of the Election Commission.[71] All consequential amendments arising from the Constitution (Amendment) (No. 2) Act, 1973 are provided for in a Schedule to the Act.

The consequential amendments are of significance in the sense that they provide the answer to the "difficulty" posed by Sheridan and Groves in their book "The Constitution of Malaysia".[72] These learned authors queried:

> "... Can the Malaysian Parliament acquire federal territory or, subject to any requisite consents, carve federal territory out of a State? The Congress of the U.S.A. can. There is a difficulty in the Malaysian Parliament doing so. Under Article 74..., the legislative powers of Parliament are limited, and there would be no authority to legislate for the territory on State matters."[73]

The demarcation of legislative powers under the Malaysian Constitution is effected through an "orthodox" arrangement into three Lists, namely, the Federal, State and Concurrent Lists. An examination of these lists would show that the only areas of significance for the States are in matters of land, local government and Muslim law and affairs. Article 74 restricts the Federal Parliament to making laws with respect to matters enumerated in the Federal or Concurrent Lists only.[74]

[67] See the Explanatory Statement to the Constitution (Amendment) (No. 2) Bill, paragraph 3.

[68] This includes five members from the newly-created Federal Territory. A new Article 46 was substituted for the existing one.

[69] The new provision is Clause (8) of Article 113 of the Federal Constitution.

[70] See "Delineation of Constituencies", *infra.*

[71] According to the Prime Minister, Tun Abdul Razak, these reports and recommendations of the Election Commission have been made but have not been adopted. However, the Prime Minister did not elaborate on what the recommendations were.

[72] N.Y. Oceana Publications 1967.

[73] *Ibid.,* at p. 27.

[74] There are certain exceptions whereby the Federal Parliament can make laws in respect of matters in the State List — See Article 76, Federal Constitution. Another difficulty is posed by Article 1(3) which provided as follows: "The territories of each of the States... are the territories comprised therein immediately before Malaysia Day". This provision is now made subject to a new Clause (4) to Article 1. Clause (4) reads: "The territory of the State of Selangor shall exclude the Federal Territory established under the Constitution (Amendment) (No. 2) Act, 1973".

To overcome this difficulty, the consequential amendments provide for the substitution of item 6(e) in the Federal List with the following:—

> "(e) Government and administration of the Federal Territory including Muslim law therein to the same extent as provided in item 1 in the State List".

As a result of this amendment, the Federal Parliament is empowered to legislate on matters in the State List in relation to the Federal Territory.[75]

Other important consequential amendments provide for the Yang di-Pertuan Agong to be Head of the Muslim religion in the Federal Territory.[76] The Federal Parliament is also empowered to make provisions for regulating Muslim religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the Muslim religion.[77] A Pardons Board is to be established to cover the Federal Territory.[78]

1 February, 1974, was specified as the date for Kuala Lumpur to acquire the status of Federal Territory.[79]

Constitutional Amendments and Elections

A system of free elections is a fundamental pillar of a democratic nation. To provide for an election process whereby Parliament can comprise genuine representatives of the people, the Reid Commission[80] had recommended various safeguards, e.g., the setting up of an independent Election Commission, the provision of avenues for recourse to the Court in the case of disputes, etc.[81] For Malaysia, the election process is also important when looked at in relation to the amendment process. A government which is afraid of losing a two-thirds majority control in Parliament in a next election can, through a process of "gerrymandering",[82] ensure its retention of power. It is in this light that the writer deems amendment to the constitutional provisions on "Elections" to be of fundamental importance.

[75] To provide for consistency with the State List, the words "Except with respect to the Federal Territory" were inserted in items 1, 2, 3 and 5 of the State List. The words "Federal Territory" were substituted for "federal capital" in item 4.

[76] This was done by adding a new Clause (5) to Article 3. Article 11 was amended to permit federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion. Article 97 was also amended to deal with the raising and paying out of Muslim revenues, Zakat, Fitrah, Bait-ul-Mal.

[77] *Ibid.*

[78] This was achieved by amending Article 42 of the Federal Constitution.

[79] See *Straits Times,* 30 June. 1973.

[80] This was an Independent Constitutional Commission which was entrusted with the task of drawing up a constitution to provide for full self-government and independence for the Federation of Malaya. The Commission was headed by Rt. Hon. Lord Reid. See the Reid Commission Report.

[81] E.g. see *All Amberan* v. *Tunku Abdullah* [1970] 2 M.L.J. 15, where an election petition was filed alleging corrupt practices against the successful candidate. The presiding judge, Raja Azlan Shah J. said: "It is the concern of the courts to purge elections of all kinds of corrupt or illegal practices so as to protect the political rights of the citizens and the constituency" (at p.17).

[82] "Gerrymandering" can be defined as "simply discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another" — Dixon, "The Court, The People, and 'One Man, One Vote'" at p. 29.

Allocation of Seats

For the first General Election, the Reid Commission had recommended that the number of members for the House of Representatives should be one hundred and four. This figure was obtained by dividing into two the fifty-two constituencies which had been created for the elections to the last Federal Legislative Council in 1955.[83] The Reid Commission had also recommended that the first redistribution of constituencies should take place after the election of the first Federal Parliament but before the election of the second.[84] The number of constituencies was then recommended to be reduced to one hundred and to be allocated among the eleven Malayan States on a quota basis.[85] The number of one hundred and four members of the House of Representatives was retained by the Constitution (Amendment) Act, 1962 on the grounds that the existing set-up had worked very satisfactorily and that considerable expenditure and inconvenience would result from the exercise of reducing the constituencies.[86] The formation of Malaysia saw an increase of members to one hundred and fifty-nine. This number was reduced to one hundred and forty-four as a result of Singapore's separation from Malaysia.[87]

Among the changes effected by the Constitution (Amendment) Act (No. 2) 1973 is the provision which provides for the reconstitution of the membership of the House of Representatives. Part II of the Act re-enacted Article 46 of the Federal Constitution for the purpose of reconstituting the membership of the House of Representatives by way of allocation by States in peninsular Malaysia. The total number of seats for the House of Representatives will stand at one hundred and fifty-four for the next general elections after 1 February, 1974.

STATES	NUMBER OF SEATS IN THE NEXT ELECTIONS	PLUS OR MINUS
Kelantan	12	+2
Pahang	8	+2
Kedah	13	+1
Penang	9	+2
Perak	21	+1
Trengganu	7	+1
Selangor	11	-3
Federal Territory	5	+5
Johore	16	No Change
Negri Sembilan	6	" "
Malacca	4	"
Perils	2	" "
Sabah	16	" "
Sarawak	24	"
TOTAL	154 seats	

(Straits Times, Saturday, 7 July, 1973)

[83] Reid Commission Report, para. 75.
[84] *Ibid.,* para. 76.
[85] *Ibid.,* para. 73.
[86] See speech by Tun Abdul Razak, "Parliamentary Debates" (Dewan Ra'ayat), Monday 29 January, 1962, col. 4177. Cf. speech by Mr. Lim Kean Siew (Dato Kramat), at col. 4211.
[87] Act 59 of 1966, Section 2.

At a glance it can be seen that Kelantan and Pahang obtained two additional seats and Kedah, Penang, Perak and Trengganu each obtained an extra seat. Selangor alone lost three seats, whilst Johore, Negri Sembilan, Malacca, Perils, Sabah and Sarawak retained their existing number of seats.[88] The Prime Minister, Tun Haji Abdul Razak, in moving the Constitution (Amendment) (No. 2) Bill, 1973 said:

> "The Government after consultation with the Election Commission considers it desirable on the grounds of population increase, movement of people as a result of economic development and future potentials of the country, — that the number of constituencies in Peninsular Malaysia be increased accordingly so as to give the electorate equitable representation in this August Assembly."[89]

The Opposition party members responded to this amendment by accusing the Central Government of gerrymandering. Dr. Tan Chee Khoon, a leading Opposition member of Parliament, noted that thousands of people had migrated into Selangor and particularly Kuala Lumpur over the last few years. He pointed out that although the present number of voters in Selangor was far more than in Perak, yet, Perak was given twenty-one members in the House of Representatives in contrast to the eleven given to Selangor.[90] Dr. Tan also drew attention to the fact that the Election Commission in 1968, had recommended that the number of Johore seats be reduced by two and the number of Negri Sembilan seats by one.[91] The Election Commission had also recommended that one seat be added to each of the states of Selangor, Penang and Kedah.[92]

Three reasons were given to justify the re-apportionment of seats among the various states, i.e. population increase, movement of people as a result of economic development, and future potentials of the country.[93] The reasons of population increase and movement of people are not tenable in the light of the arguments raised by Dr. Tan Chee Khoon. Dr. Tan pointed out that in the case of the Federal Capital, its electoral strength of 239,869 in 1969 was more than that of Pahang or Trengganu, yet it has less seats than either State.[94]

Since more people from other peninsular States had moved to Selangor and Kuala Lumpur, it would be expected that the number of seats for Selangor and Kuala Lumpur ought to be increased rather than decreased.[97] Dr. Tan concluded that Selangor, with the highest population in Malaysia, had been given "a very raw deal".[96]

[88] The Government explained that the figure allocated to Sabah and Sarawak was fixed by negotiations and not based on population, and that the "potential" of the Borneo States was considered by the Cobbold Commission in arriving at this figure — "Siaran Akhbar" (Jabatan Penerangan Malaysia), PEN/7/73/78 (PARL) at p. 1.

[89] *Siaran Akhbar, ibid.,* at p. 2.

[90] *Straits Times,* July 10, 1973.

[91] *Ibid.*

[92] However these recommendations were not implemented in time for the 1969 elections, *ibid.*

[93] *Siaran Akhbar* (Jabatan Penerangan Malaysia), PEN. 7/73/78 (PARL) at p. 2.

[94] *Straits Times,* 10 July, 1973, at p. 7.

[95] *Ibid.*

[96] *Ibid.*

Delineation of Constituencies

One of the more far-reaching amendments contained in the Constitution (Amendment) (No. 2) Act, 1973 was the amendment to paragraph C of Section two of the Thirteenth Schedule.[97] The paragraph prior to the amendment read as follows:

> "The number of electors within each constituency ought to be approximately equal throughout the unit of review except that, having regard to the greater difficulty of reaching electors in the country districts and other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies, to the extent that in some cases a rural constituency may contain as little as half of the electors of any urban constituency."

The Act deleted the words "to the extent that in some cases a rural constituency may contain as little as half of the electors of any urban constituency."[98] It was asserted that such an amendment was "merely intended to give the Election Commission more room to exercise their discretion in deciding the measure of weightage in respect of rural areas which, because of prevailing circumstances, suffer disadvantage as compared with urban areas."[99] It was further said:

> "Difficulty of communication with people living in remote kampongs necessarily requires a review of the present situation with the objective of restructuring parliamentary constituencies so that members of Parliament can give closer attention and better services to their electorates."[1]

To determine whether the removal of this check against too great a disparity between urban and rural seats is necessary, one must note that the Reid Commission in drawing up its recommendation had already taken into consideration factors like total population, the sparsity or density of population, the means of communication, and the distribution of different communities.[2] The Reid Commission had recommended that all these factors should be taken into consideration by the Election Commission but to prevent too great weight being given to any of them, the Reid Commission had advised "that the number of voters in any constituency should not be more than 15 per cent above or below the average for the State."[3] This proposal of the Reid Commission was embodied in the 1957 Constitution. In 1962 this safeguard against too great a disparity between rural and urban constituencies was sliced down by the Constitution (Amendment) Act, 1962.[4] The disparity was enlarged from a 15 per cent disparity to "as little as one half of the electors of any urban constituency."[5] The criticisms which were levelled at the 1962 amendment alleged that the alteration was contrary to the "foremost fundamentals of

[97] Act No. A206 of 1973, Section 15.

[98] The words "the number of electors within each constituency ought to be approximately equal throughout the unit of review" in paragraph C of Section Two of the Thirteenth Schedule were also substituted with the words "the number of electors within each constituency in a State ought to be approximately equal", *ibid.*

[99] *Siaran Akhbar* (Jabatan Penerangan Malaysia), PEN. 7/73/78 (PARL) at p. 2.

[1] See speech by the Prime Minister, *ibid.*

[2] Reid Commission Report, para. 74.

[3] *Ibid.*

[4] Act 14 of 1962.

[5] This change was not considered as novel because it had been applied by the Merthyr Commission (headed by Lord Merthyr). This Commission was. entrusted with the task of delineating constituencies for the first elections.

democratic representations" and that in effect, certain rural electorates which are nearly equal to some urban electorates can send two representatives in opposition to one from the urban area.[6] With the deletion of this watered-down safeguard by the 1973 amendment Act, there is nothing to fetter the Election Commission's discretion at all.[7]

(17) *THE CONSTITUTION (AMENDMENT) (NO. 2) (AMENDMENT) ACT, 1976.*

On 18th November, 1975, a Bill was presented and read a first time in the Dewan Rakyat to amend the Constitution (Amendment) (No. 2) Act, 1973 (i.e. Act A206 of 1973). The Bill has been passed and is cited as the Constitution (Amendment) (No. 2) (Amendment Act, 1976 (Act A335 of 1976). The Act mainly amends Section 6 of the Constitution (Amendment) (No. 2) Act, 1973. Subsection (1) of Section 6 ensures that *State laws* existing and in force in the Federal Territory shall continue to be in force until such time they are repealed, amended or replaced by the laws passed by the Federal Parliament. Subsection (2) of Section 6 provides for the transfer of the executive authority of the State of Selangor as is found in *"any such law"* in relation to the Federal Territory to the Federal Authority. Executive authority of the State of Selangor however can also be found in Federal law but because of the use of the words "State laws" in Section 6(1), a possible interpretation could arise where only the executive authority of the State of Selangor is transferred to the Federal Authority whilst that found in the Federal law is not so transferred. To avoid such an interpretation, the Act substituted the words "any written law" for the words "State laws" in Section 6(1). This amendment is given retrospective force to the 1st day of February, 1974 i.e. the date on which Kuala Lumpur acquired the status of Federal Territory.

[6] "Parliamentary Debates" (Dewan Ra'ayat), Monday, 29 January, 1962, at col. 4184-4190. The disparity can be greater in practice. For instance, in the 1969 general elections, the Bungsar parliamentary constituency had an electorate which was six times as large as the constituency of Johore Tenggara. Bungsar has an electorate of 81,086 whilst Johore Tenggara had an electorate of 13,821. See speech by Mr. Lim Kit Siang (DAP — Bandar Melaka), *Straits Times,* 10 July, 1973, at p. 7.

[7] In accordance with the recommendations of the Reid Commission, the Election Commission was originally entrusted with the functions of delimiting constituencies, conducting elections to the House of Representatives, and preparing and revising electoral rolls for such elections (see Reid Commission Report, para. 71, at pp. 27-28). As a result of the Constitution (Amendment) Act, 1962 (i.e. Act 14 of 1962), the recommendations of the Election Commission no longer have binding force. Instead they are made subject to the approval of the House of Representatives. In other words, the power of delimiting electoral constituencies has been transferred from the Election Commission to the House of Representatives. In the light of this amendment the procedure for altering the boundaries of constituencies is as follows: The Election Commission after holding a review as the Constitution provides, will formulate provisional recommendations, framed in accordance with the principles set out in Part I of the Thirteenth Schedule to the Constitution. The recommendations will be published, and the Commission will revise them in the light of any representations received and submit them to the Prime Minister. The results of the Commission's work will be laid before the House of Representatives and unless the Commission has recommended no change the Prime Minister will lay a draft Order giving effect to the Commission's recommendations, with or without modifications. On the draft Order being approved by not less than half of the total number of members of the House, it will be submitted to the Yang di-Pertuan Agong for the making of an Order in terms of the draft.

Conclusion

The 1973 amendments to the Malaysian Constitution indicate how flexible it is for the Federal Government to legislate across the State sphere even in matters of a State Constitution. By amending the Eighth Schedule to the Federal Constitution,[8] the Federal Parliament can change the requirement of a two-thirds majority in a State Legislative Assembly to a simple majority.[9] The analysis of the amendments in relation to the election system points indubitably to a truncation of safeguards which had been considered by the Reid Commission as vital for the growth of a viable democratic nation. All in all, from a conspectus of the 1973 amendments, one arrives inevitably at the conclusion that some provisions of the Malaysian Constitution have been fundamentally altered.

APPENDIX

ACT 10 of 1960

(1) In respect of public servants, the Constitution now declares that such persons of the public services hold office during the pleasure of the Yang di-Pertuan Agong except where the Constitution provides otherwise.[10] Similarly, members of the public services of a State hold office during the pleasure of the Ruler or Governor.[11]

(2) Every citizen is entitled to vote if he has attained the age of twenty-one.[12] Previously he could only vote in a constituency provided he had been resident there for at least six months immediately preceding the "qualifying date", i.e. the date by references to which the electoral rolls are prepared or revised. The requirement of a six months residence is no longer mandatory.[13] The amendment was aimed at ironing out the anomalies produced between the Federal and State rolls created by an "absent voter". Furthermore, it enables a person serving the Federation abroad to vote.

(3) A member of the State Legislative Assembly is now required to resign from the Assembly on his election as President of the Senate or Speaker of the House of Representatives.[14]

(4) New posts of "Assistant Ministers" have been created and such Assistant Ministers shall be appointed from among the members of

[8] See R.H. Hickling, "The First Five Years of the Federation of Malaya Constitution", (1962) 4 Mal. L.R. 183 at pp. 191-192.

[9] Another instance where the Federal Parliament similarly employed the Eighth Schedule was when the Constitution (Amendment) Act, 1968 (i.e. Act 27 of 1968) was passed to extend the life of the Council Negri of Sarawak to enable it to be dissolved at the same time as the Federal Parliament. It was alleged that the legislative measure amounted to "amending the Sarawak Constitution by the backdoor". — See "Parliamentary Debates" (Dewan Ra'ayat), Wednesday, 21 August, 1968, col. 1791.

[10] See Section 17, Act 10 of 1960.

[11] *Ibid.* Note: The amendment was stated by Tun Abdul Razak as not affecting the normal procedure under the Constitution. See "Parliamentary Debates" (Dewan Ra'ayat), Friday 22nd April, 1960 at col. 312-313. Cf. R.H. Hickling, "The First Five years of the Federation of Malaya Constitution". Hickling, at p. 193, considered the amendments as highly significant and as a form of subtle erosion of the independence of the civil service.

[12] Article 119(1), Constitution of Malaysia.

[13] See Section 14, Act 10 of 1960.

[14] Sections 8 and 9, *ibid.*

either House of Parliament by the Yang di-Pertuan Agong acting on the advice of the Prime Minister. The functions of an Assistant Minister consist solely of aiding the Minister in the discharge of his duties and functions. An Assistant Minister is also extended the right to participate in the proceedings of one House of Parliament although he is a member of the other House.[15]

(5) Previously, the appointment of members to the Railway Service Commission was effected solely by the Yang di-Pertuan Agong himself. This was however amended to provide that such appointment shall be made by the Yang di-Pertuan Agong "in his discretion but after considering the advice of the Prime Minister and after consultation with the Conference of Rulers."[16]

(6) A new Clause (5A) has been inserted into Article 144 whereby some of the functions of the Public Services Commission can be delegated by Federal Law to officials under the jurisdiction of the Commission.[17] The amendment was intended to lessen the burden of the Commission.[18]

(7) Some Articles of Part III and the second Schedule of the Constitution relating to citizenship were subjected to some minor modifications.[19]

ACT 14 of 1962

The miscellaneous amendments include the following:—

(1) Parliament is now empowered to provide by law for the terms of office of members of the Election Commission[20] and judges of the Federal Court[21] other than their remuneration. However it is provided in the Constitution that the terms of office cannot be altered to the disadvantage of a member of the Election Commission or to a judge after his appointment.[22]

(2) Instead of two Civil Lists, a single Civil List is now provided which includes provisions for the Raja Permaisuri Agong.[23]

(3) Section 18(1) of the amending Act made it possible for the publication of the Revenue Estimates to be delayed until after the beginning of the new financial year. This change will meet situations where it is not practicable or convenient for the Budget debate to

[15] Section 10, *ibid.*

[16] See Section 23, *ibid.*

[17] See Section 25, *ibid.* However, the powers of first appointment and of promotion cannot be delegated. They remain within the exclusive jurisdiction of the Public Services Commission. The powers which can be delegated include the powers of transfer and of disciplinary control. In regard to the latter power, a person who is aggrieved by the exercise of it by a delegated official can appeal to the Commission.

[18] "Parliamentary Debates" (Dewan Ra'ayat), Friday 22nd, April, 1960 at col. 310-311.

[19] See Sections 2 and 33, Act 10 of 1960. A minor modification is made to Article 42 to provide for the exercise of the power of granting pardons by the Yang di-Pertuan in respect of Penang and Malacca (See Section 4, Act 10 of 1960).

[20] Section 21, Act 14 of 1962.

[21] Section 23, *ibid.*

[22] See Article 114(6) and 125(7) of the Malaysian Constitution.

[23] Section 12, Act 14 of 1962.

begin before the beginning of the year to which the Budget relates. Without the amendment, it was necessary for the Estimates of Expenditure to be laid on the Table before the beginning of the year to give the Ministries and Departments basis for their operations. This meant that the Revenue Estimates would be made public before the Minister of Finance had announced any proposed changes in the tax structure in his budget speech.

(4) Section 18(2) added another paragraph to Article 99(3). Article 99(3) specifies the categories of payments for which provision does not have to be included in the annual Estimates, payments from the proceeds of loans raised for specific purposes and from trust monies.

(5) Miscellaneous amendments were made to the Second, Eighth[24] Part II of the Tenth and Eleventh[25] Schedules of the Federal Constitution. A new Schedule, the Thirteenth Schedule is added which contains provisions relating to the delimitation of Constituencies.

(6) A new paragraph was added to Clause (4) of Article 159.[26]

ACT 25 of 1963

Other amendments effected by 25 of 1963 include:

(1) The empowering of the Public Services Commission to delegate minor disciplinary powers to officers of the Armed Forces, or the Police, where a member of the general public services is employed by them.[27]

(2) The replacement of "federal purposes" and "state purposes" in Article 160(2) with more precise definitions.[28]

(3) The amendment of the Legislative Lists in the Ninth Schedule to ensure that, where Parliament or a State Legislature legislates on matters in the Concurrent List, it can also legislate on incidental matters, such as offences and fees.[29]

(4) A slight alteration, for clarification purposes, was made to Section 2(a) of the Tenth Schedule[30] whilst a number of provisions which had "already outlived their purposes" were repealed.[31]

[24] Section 28 of the amending Act brought the compulsory provisions of the State Constitutions into line with the amended Federal Constitution and with current practice.

[25] Section 30 of Act 14 of 1962 filled a gap in the application to the Federal Constitution of the statutory rules of Interpretation.

[26] The new paragraph appears as Clause (4)(bb). See Section 24, Act 14 of 1962. For an analysis of this "puzzling" amendment, see Groves, "The Constitution (Amendment) Act of 1962" (1962) 4 Mal. L.R. 324 at p. 329.

[27] Section 4 of Act 25 of 1963.

[28] Section 5, *ibid.*

[29] Section 6, *ibid.*

[30] Section 7, *ibid.*

[31] The Articles affected were as follows: Article 16, 18, 71, 109, 131, 139, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 172, 173, Third Schedule (Section 9), Seventh Schedule, (Sections 1(1), 6, 7), Tenth Schedule (Sections 1 and 2), Eleventh Schedule (Section 21 and Section 25 of the Interpretation and General Clauses Ordinance, 1948), and the Twelfth Schedule.

ACT 19 of 1964

Act 19 of 1964 effected also the following amendments:

(1) Section 4(1) of the amending Act provides for the remuneration of the Yang di-Pertuan Agong to be charged on the Consolidated Fund.

(2) A minor amendment was made to Section 14(3) of the Eighth Schedule of the Federal Constitution in connection with the Annual Financial Statement which is to be laid before a State Legislature. The amendment enabled a State to amend its Constitution to bring it in line with the Federal Constitution and served to cure a legislative "oversight" in the 1962 constitutional amendments.

(3) There were two other minor amendments. One was the amendment of Article 9 in order to implement the terms of Article 11(2) of the Supplementary Agreement relating to Malaysia made between the Governments of the former Federation of Malaya, Great Britain and Singapore. This has been repealed by Act 59 of 1966 (Section 2) which came into force from September 19, 1966. The other amendment consisted of the deletion of Clause (4) of Article 26 of the Constitution. Clause (4) of Article 26 had referred to Clause (3). However Clause (3) of Article 26 had earlier been repealed by Act 14 of 1962. Therefore Clause (4) served no purpose and had to be repealed.

ACT 31 of 1965

(1) An amendment was also made to Article 132[32] to make it clear that appointments to certain religious offices are outside the jurisdiction of the Federal Public Services Commission[33] in regard to Penang and Malacca.

(2) The remaining amendments include:[35]

(a) The insertion of another provision of the Interpretation and General Clauses Ordinance, 1948,[36] into the Eleventh Schedule

[32] Article 132 deals with "Public Services".

[33] These religious offices are: (i) The President of the Religious Affairs Department; (ii) the Secretary of the Religious Affairs Department; (iii) the Mufti; (iv) the Kathi Besar; or (v) the Kathi.

34 In the other States of Malaya, the Ruler is also the Head of the Muslim religion in his State (Article 3(2)). In the case of Penang and Malacca, the Yang di-Pertuan Agong assumes the position of Head of the Muslim religion in these two States (Article 3(3)). Under the Muslim Law Enactments of these States, the Yang di-Pertuan Agong is empowered to make the appointments to the religious offices. The amendment was necessary as it could be argued that these appointments should be made by the Federal Public Services Commission under Article 139, in that the general public service of the Federation comes under the jurisdiction of the Commission.

[35] Other very minor amendments touched upon the Ninth Schedule to the Malaysian Constitution, Sections 37, 73, 76 and the First Schedule of the Malaysia Act.

[36] I.e. Section 33C which provides: "Where by or under any written law any board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless the contrary intention appears, the powers and proceedings of such board, commission, committee or similar body shall not be affected by:—

(a) any vacancy in the membership thereof;
(b) any defect afterwards discovered in the appointment of qualification of a person purporting to be a member thereof; or
(c) any minor irregularity in the convening of any meeting thereof."

to the Constitution;[37]

(b) the repeal of Clause (4) of Article 146A.[38]

H. P. LEE*

37 The Eleventh Schedule to the Malaysian Constitution contains provisions of the Interpretation and General Clauses Ordinance, 1948 (Malayan Union Ordinance No. 7 of 1948) which can be applied for the interpretation of the Constitution.

38 Under the Malaysia Act, a branch of the Judicial and Legal Service Commission was established in the Borneo States. The Commission consists, *inter alia,* of the Chairman of the State Public Service Commission of each of the Borneo States. Under Article 146A(4), it was provided that both of these chairmen could not attend the same meeting of the branch Commission. Appointments to any State could not be made if the Chairman of the State was not present. The amendment cured this cumbersome procedure by enabling both Chairmen to be present at the same meeting.

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