

BOOK REVIEWS

AN INTRODUCTION TO THE CONSTITUTION OF MALAYSIA. 2nd Edition.
By TUN MOHAMED SUFFIAN BIN HASHIM, Lord President of the
Federal Court Malaysia. [Kuala Lumpur: Government Printer.
1976. vii+412 pp. \$10.00]

This Second Edition of Lord President Suffian's *An Introduction to the Constitution of Malaysia* is to be welcomed for at least three reasons. *First*, the First Edition, published in 1971, was itself of high quality and hailed by every reviewer as a major contribution to local legal literature and as a work which promoted the understanding of the substantive and procedural aspects of the Constitution of Malaysia. The first edition's success was reflected by the fact that 5000 copies were sold out within four months and the reprinted version is also out of stock. Any revision or improvement of that already excellent work can but only have one effect, namely, that of enhancing its value. *Secondly*, as this reviewer will show, the author has indeed made a serious attempt at overall improvement of many chapters and has not limited himself to mere updating or to minor alterations. *Thirdly*, constitutional law in Malaysia is changing and developing rapidly especially in recent years and this applies to nearly all sources of Malaysian constitutional law: at the level of the written Constitution itself there have been four amendments since the First Edition appeared; at the level of legislation or subsidiary legislation important changes have been instituted as a result of political and security factors (witness the amendments to the Sedition Ordinance by the Emergency (Essential Powers) Ordinance No. 45/1970 and the more recent Essential (Security Cases) (Amendment) Regulations, 1975); and, at the level of judicial decisions nearly forty important judicial decisions have been delivered since the First Edition on important constitutional questions and these decisions are indispensable to proper understanding of existing constitutional law in Malaysia. Therefore any author writing in this fast-changing area of the law owes some duty to readers to periodically revise his work so that readers will be assured of a discussion of the law that is as up-to-date as possible: Lord President Suffian has done precisely this, and more, in this Second Edition.

The revisions in the Second Edition fall into three main categories: *first*, there is updating of material; *secondly*, completely new material has been added, and *thirdly*, there has been revision and modification of some of the author's views expressed in the first edition. (It is interesting to note here that the author has also taken the opportunity in this Second Edition to reconsider at least one aspect of a judgment delivered by him: see, below, comments on Chapter 9 The Judiciary.).

Some general comments on each category of changes may be useful. *Updating*: The author has updated the first edition in two ways. First, he has taken into account amendments to the Constitution

enacted after the appearance of the First Edition but, alas, he was not able to include the most recent constitutional amendments enacted by Act A354 of 1976 nor was he able to consider the earlier amendment by Act A335 of 1976. But this cannot be the fault of the author and this is a risk which every author in law has to take. The second manner of updating the book is the discussion of judicial decisions subsequent to the appearance of the First Edition and cases reported up to the December 1975 issue of the M.L.J. are covered.

Indeed it is a telling commentary on the rapid growth of constitutional caselaw in Malaysia that where the First Edition had cited only 40 cases the Second Edition now makes references to 79 judicial decisions on constitutional law. This recent body of judicial decisions has caused major changes in several parts of the book where, previously, the First Edition's discussion was mainly on the constitutional provisions. Now, in the Second Edition, the discussion has been greatly extended to explain how the Courts have recently interpreted the provisions. The Chapters which most conspicuously demonstrate this impact of new caselaw are Chapter 10—The Public Service, Chapter 14—Fundamental Liberties, and Chapter 15—Subversion, Emergency Powers and Preventive Detention. The author, however, has been faithful to his promise in the Preface to avoid burdening the reader with details and he discusses the cases in a concise manner to highlight the basic principles.

New material: The Second Edition has a completely new Chapter 2 dealing with the important question of "Supremacy of the Constitution". *Revision of the author's own views:* The author has, in true intellectual spirit, given serious review of his opinions expressed in the First Edition and in this Second Edition, he has changed his views on one important point. Where in the First Edition (p. 79) he took the view that of the three branches of Government "the courts are supreme" he now states that "I have changed my view and am now of the opinion that in Malaysia only the Constitution is supreme" (p. 97) a point which is elaborated in his new Chapter 2 on "Supremacy of the Constitution". Interestingly, he has also dropped the following sentence which appeared in the First Edition "In the last resort, Parliament is supreme, because judges are bound to interpret and apply the laws which Parliament makes, provided they are within Parliament's competence and not contrary to the Constitution"* (p. 79). He considers that "In Malaysia no single institution is supreme, corresponding to the British Parliament. What is supreme in Malaysia is the Constitution itself" (p. 19). This is an important clarification of the author's approach to constitutional concepts and the relationship between the supremacy doctrine and different branches of the Government.

For another example of a view which the author has revised, see comments below on Chapter 3—The Yang di-Pertuan Agung:

Chapters which remain substantially unaltered: The following chapters have either not been altered or have been only slightly altered:

* But in Chapter 2 on "Supremacy of the Constitution" in the Second Edition he asks "Is the Malaysian Parliament also supreme like the British Parliament? It is not. Our Parliament does not have unlimited power." (p. 17). The author considers that Parliament is supreme only in the sense that "where it enjoys legislative competence ... there is no law which it cannot make, repeal or amend" (p. 18).

Chapter 1 — Introduction; Chapter 4 — Rulers and Governors; Chapter 5 — Conference of Rulers; Chapter 6 — The Cabinet (but see the amusing footnote on page 54 about the civil servant who “is under no duty to defend publicly government policy. His duty is to give his honest advice.... It is not advisable for him to open his mouth in public.”); Chapter 8 — Elections; Chapter 11 — The States; Chapter 12 — Relations between the Federation and the States; Chapter 13 — Financial Provisions (but see the new Table E on page 194 which provides useful information on grants and other payments to State Governments, 1974); Chapter 16 — Islam (slight changes made for updating on the Federal Territory and references to the present position in Sabah and Sarawak); Chapter 18 — Malays and Natives of Borneo; Chapter 19 — National Language; Chapter 21 — Amendments to the Constitution; Chapter 22 — Conclusion.

We shall now turn to those parts of the book where there is significant revision. *Chapter 2 — The Supremacy of the Constitution.* A major change in this Second Edition is the inclusion of this new chapter. It is a short (4 pages) but succinctly written chapter which brings out clearly the concept of constitutional limitations on the powers of all branches of Government and the principle that violations of constitutional limits can result in the invalidity of such governmental acts. A comparison is drawn between the position in Malaysia and the “supremacy of Parliament” concept in United Kingdom which is probably the best way of driving the point home to the reader. This new chapter does not imply that the First Edition did not deal with this basic concept: it was dealt then under Chapter 8, The Judiciary, under the sub-heading “Courts are Supreme”. But the value of this new chapter in the Second Edition is that this fundamental point of constitutional supremacy and judicial review is considerably elaborated, and placed appropriately at an earlier part of the book. The author has taken the opportunity here to reiterate the vital importance for judges to decide cases brought against Government impartially and, bearing in mind that the author is the head of the judiciary in Malaysia, one cannot help considering the statement as a declaration of what should be expected of the entire judiciary:

But sometimes it [Government] does something to a citizen who thinks that Government has no right to do it. Well, the citizen can take Government to court, and it is then the court's duty to consider his complaint. The Court's duty is not to side with Government, nor with the citizen — the court's duty is simply to act impartially and to apply the law without fear or favour and give judgment in favour of the party on whose side justice lies. If Government has indeed done something contrary to the Constitution, there will be judgment accordingly.” (p. 20).

Chapter 3 — The Yang dipertuan Agung: Two main changes have been made here. First, the discussion on the legal immunity of the Yang di-Pertuan Agung is revised and secondly amendments are made to take into account the election of the current and sixth Yang dipertuan Agung. On the question of legal immunity the author has rephrased the statement of the legal position. In the First Edition it was said that (p. 19):

“The Yang di-Pertuan Agung is not liable for any proceedings whatsoever in any Court, be they taken against him in his *official or personal capacity*” (emphasis added).

In the First Edition the author went on to say that a citizen aggrieved by His Majesty's official act could sue the Federal Government and

the case of *Stephen Kalong Ningkan v. Tun Abang Haji Open & Tawi Sli (No. 2)* [1967] 1 M.L.J. 46 was discussed.

In the Second Edition, however, the author restates the position differently and suggests that the Supreme Head may be liable to proceedings in his official capacity:

Clause (1) of Article 32 provides that the Yang dipertuan Agung is not liable to any proceedings whatsoever in any Court, but the High Court has held in *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli (No. 2)* that this means that His Majesty is not liable to any proceedings only in his *personal* capacity and that he is liable in his official capacity, so that the citizen aggrieved by His Majesty's official act may sue the Federal Government as defendant, (p. 24)

The author then discusses the *Ningkang (No. 2)* case in greater depth than in the First Edition.

This reviewer respectfully submits that this different statement of the legal position may not be correct, and that the statement of principle in the First Edition is probably more correct. It is true that in the second *Ningkang* case the Court said:

Counsel also argued that since the power was vested in the Yang di-Pertuan Agung and since by Article 32(1) the Yang di-Pertuan Agung is not liable to any proceedings whatsoever in any Court the act of the Yang di-Pertuan Agung is not challengeable in any Court. Article 32(1) only protects the Yang di-Pertuan Agung personally from proceedings in a Court but cannot be construed to protect the Federal Government from action in the Courts in respect of its acts committed in the name of the Yang di-Pertuan Agung, and when the Yang di-Pertuan Agung acts on the advice of the cabinet his act must be deemed to be the act of the Federal Government.

This reviewer is of the view that the above passage of the judgment can be authority only for the propositions, that (a) action cannot be brought against the Yang di-Pertuan Agung personally; and (b) Article 32(1) does not give immunity to *Government* from suits in respect of Governmental acts, even though the acts may have been formally in the name of His Majesty (for where His Majesty acts on advice, his act is deemed to be a governmental act).

It is respectfully submitted that it may be going too far to infer from the judgment that His Majesty is liable to proceedings in his official capacity. This point is very important because the *official* acts (as distinguished from his personal acts such as marriage) of His Majesty are of two types (a) those where he acts on advice and (b) those where he acts in his personal discretion. If he indeed is liable to proceedings in his official capacity, then we can have a situation where he can be sued for his decision of appointment a Prime Minister or withholding his consent for a request for Parliament's dissolution — which are clearly official acts but decisions where he does not act on advice. Here the Federal *Government* cannot be sued (since it did not advise him and these are not governmental acts) but it is submitted that the Yang di-Pertuan Agung also cannot be sued for such official acts precisely because of the immunity provision in Article 32(1). In respect of official acts done on advice of Cabinet here, too, the Yang di-Pertuan Agung himself cannot be sued; action has to be brought against the Government.

Chapter 7 — Parliament. The chapter has been amended in several ways. First, in the discussion on the legislative procedure there

is much elaboration of the various stages involved in enacting a law (first reading, second reading, committee stage, third reading, delaying powers of the Senate etc.) all of which will be very useful indeed for students. Secondly, the important case of *Fan Yew Teng v. Setia Usaha Dewan Ra'ayat & Ors.* [1975] 2 M.L.J. 40 is dealt with in the discussion of Article 48(1)(e), Article 50(1) and Article 53. Furthermore, there is additional material introduced to discuss the question of vacancies and casual vacancies and the author has given useful background information to certain constitutional amendments such as the amendment by Act 31 of 1965 (failure to hold an election within time will not in itself invalidate an election) and the Constitution (Amendment) Act 1969 (where a casual vacancy in the lower House is established within six months of the date when the life of Parliament will automatically end the vacancy must not be filled).

Chapter 9—Judiciary. The revisions in this chapter are partly a result of the fact that certain points previously dealt with in this chapter are now treated separately in the new Chapter 2 on supremacy of the Constitution. One significant change which has been pointed out earlier is that he no longer states (as he did in the First Edition) that the courts are supreme.

There is also considerable revision of the discussion of the court's power to pronounce on the validity of legislative acts. The proper interpretation of article 128 is discussed in greater length for the author expands on some of the case law. He seems to have reconsidered his judgment in *Gerald Fernandez v. Attorney-General* [1970] 1 M.L.J. 262 where he said, *inter alia*, that the original text of section 48(1) of the Courts of Judicature Act 1964 was probably inconsistent with the Constitution. He now feels that, upon reflection, there was no inconsistency between that legislation and Clause (2) of Article 128 since Article 128 says the jurisdiction of the Federal Court to determine constitutional questions was subject to any rules of court regulating such jurisdiction; therefore section 48(1) may be regarded as one such rule.

The case of *City Council of George Town and Anor. v. The Government of the State of Penang and Anor.* [1967] 1 M.L.J. 169 continues to be discussed in the Second Edition. In the First Edition itself the author hinted his view that the court decided the case wrongly ("Probably it might have come to a different conclusion if the case had been fully argued" p. 96). In the Second Edition the author seems to come out even more strongly in suggesting that the case was decided in error for not only does he say "probably it might have come to a different conclusion if counsel for the Government had been allowed to develop his arguments" (p. 109) but, in another reference to the case, he states "The Federal Court has never been asked to exercise its original jurisdiction except once and probably wrongly in the *City Council of George Town case...*" (p. 117). In this reviewer's opinion the author is justified in his unhappiness over that decision. In that case the Federal Court had not been asked to declare the state legislation void on the grounds that the State legislature was *incompetent* to enact such law but on ground of *inconsistency* with Federal law. In other words, Article 75 was invoked. Since it is possible for a State law to be enacted within the legislative competence of State legislature but yet still invalid because of inconsistency with Federal law, the case did not fall within Article

128(1)(a) which dealt with legislative competency (the competency of the legislature to pass a law) nor did the case come within 128(1)(b) for it was not a dispute between State or a Federation or between two States. Therefore the case was not one which entitled the Federal Court to exercise original jurisdiction.

Chapter 10—Public Service. This has been considerably rewritten to bring to the readers' attention the numerous new judicial decisions on powers of the various commissions or on the constitutional protection for public servant. Even though the author might not have wished to burden the lay reader with too much caselaw, it is impossible to avoid reference to judicial decisions in the area of public service for here constitutional law is indeed being developed largely through judicial decisions. In fact the provisions on public service have become one of the most heavily litigated parts of the Constitution. The caselaw which the author cites include judicial decisions from Singapore after Singapore's separation.

Chapter 14—Fundamental Liberties has undergone extensive revision. First, the author makes a plea for duties of citizens to be incorporated into the Constitution and in this respect he commends the approach of the 1973 Constitution of the Philippines. Secondly, under "Liberty of the person" there is much rewriting in order to take account of the case law which has emerged under the relevant provisions of the Constitution. Where the first edition had discussed only the cases of *Chia Khin Sze* [1958] M.L.J. 105; *Aminah* [1968] 1 M.L.J. 92 and *Assa Singh* [1969] 2 M.L.J. 30, the Second Edition deals with the cases which have subsequently arisen e.g. on the question when the constitutional right to a lawyer commences (*Lee Mau Seng* [1971] 2 M.L.J. 137, *Ooi Ah Phua* [1975] 2 M.L.J. 198) as well as on other specific questions on the right to consult and be defended by a legal practitioner of one's choice (e.g. cases of *Ponnam-balam* [1969] 2 M.L.J. 263 and *D'Crux* [1971] 2 M.L.J. 130). Likewise, the discussion of Article 7 and Article 8 of the Constitution has been altered to take into account the case law which has emerged since the first edition.

On freedom of speech, this reviewer feels that it would have been helpful if the author had, at that point, drawn the readers' attention to cases like *Public Prosecutor v. Ooi Kee Siak and Ors.* [1971] 2 M.L.J. 108 and *Fan Yew Teng v. Public Prosecutor* [1975] 2 M.L.J. 235 where the judges in those cases had commented on the relationship between freedom of speech and the permissible limits of such freedom (such as those found in the law of sedition). However these cases are mentioned at other appropriate places in the book.

On property rights and Article 13, there is significant revision. First, there is good discussion of the case of *Selangor Pilot Association (1946) v. The Government of Malaysia and Lembaga Pelabohan Kelang* [1975] 2 M.L.J. 66 which is now a leading case on the Malaysian Article 13. Secondly, the author makes a significant observation that in India the constitutional provision has been amended and that the result in the *Selangor Pilot Association* case would have been different if the Malaysian Article 13 was worded like its Indian counterpart. The author also has noted that Singapore "deleted this article from its constitution after leaving Malaysia". In view of the comparison drawn with the Indian position, it might have been helpful to note that the Indian experience appeared to strongly influence the Singapore

Government in deciding that Article 13 should not apply after separation; the Singapore Government did not want interminable litigation on the adequacy of compensation.

In respect of the property rights, the author raises a very interesting point with respect to the case of *Government of Malaysia v. Arumugam Pillai* [1974] 1 M.L.J. 127.* The author points out that the case seems to decide that income tax may constitute deprivation of property but that the case also decided that such a deprivation in any case was in accordance with law. The author then proceeds to raise the question (not argued yet in any court) as to whether such a deprivation is nonetheless unconstitutional since the law does not provide for payment of adequate compensation as required by Article 13. On this point the author is of the view that: "... I doubt if such an argument would ever succeed. Before independence the income tax laws could deprive us of part of our income without compensation and if our constitution-makers had intended to make such deprivation unconstitutional after independence, surely they would have used the clearest of language in the constitution." (p. 222)

This reviewer agrees with the conclusion of the author but, with respect, has difficulty in accepting his reasoning, for there is a danger in approaching constitutional questions by reference to the pre-Constitution or pre-Independence period (witness the difficulty which was created by the *Chia Khin Sze* decision); would not it be a better reason to say (which appears to be the Indian approach) that taxation on income is outside the scope of Article 13 as it is dealt with under a separate provision of the Constitution, namely Article 96? Article 96 reads:

96. No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.

Chapter 15: Subversion, Emergency Powers and Preventive Detention. No changes have been made in this Chapter in respect of discussion of the constitutional provisions as such. However, this area of the Constitution has seen important litigation in recent years and the Chapter has been expanded to enable discussion of the cases on Articles 149 and 150 (such as *P.P. v. Ooi Kee Saik & Ors.* [1971] 2 M.L.J. 108, *Government of Malaysia v. Mahan Singh* [1975] 2 M.L.J. 155 and *Madhavan Nair v. Government of Malaysia* [1975] 2 M.L.J. 286). The impact of judicial decisions in this area is also evidenced by the fact that where the First Edition discussed Preventive Detention in 2 paragraphs, the Second Edition now has broadened the coverage (4 pages) to take account recent case law, including decisions from Singapore, such as *Lim Hock Siew & Ors. v. The Minister of the Interior and Defence* [1968] 2 M.L.J. 219, *Lee Mau Seng v. Minister for Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137 and *Wee Toon Lip & Ors. v. Minister for Home Affairs and Anor.* [1972] 2 M.L.J. 46.

Chapter 17 on Citizenship is by and large unchanged except for the discussion of Abdoolcader J.'s extremely important judgments in the two *Mak Sik Kwong* cases [1975] 2 M.L.J. 168, [1975] 2 M.L.J. 175 concerning deprivation of citizenship.

* A High Court decision; the Federal Court decision came too late for mention in the Second Edition: *Arumugam Pillai v. Government of Malaysia* [1975] 2 M.L.J. 29.

It may not be out of place to ask whether footnote 47 at p. 276 is really necessary. In discussing Article 30 the footnote states "the views expressed herein are only personal. The construction of article 30 has as yet to be tested in the Courts". The caveats in his Prefaces to both editions have made it clear that the author is not "committing himself in advance" to any decision he may render as a Judge. However, since there are several other places in the book where opinions are expressed, to single out one instance only and give this qualifying footnote may give rise to erroneous inferences being drawn about the other views expressed.

Chapter 20: The Federal Capital. This chapter has been re-written because of the creation of Federal Territory since 1st February 1974. The author concisely describes how the Constitution was amended twice (Act A193 1973 and Act A206 1973) and how the State Constitution was amended to bring about the establishment of the Federal Territory.

From the preceding observations it must be very clear to the reader of this review that the Second Edition is more than mere updating of an earlier work. The updating is there and is done very well, especially with regard to the case law. But as pointed out, many parts of the book have been expanded, new material has been added, and some important views have been reconsidered. The end result is a truly readable and authoritative exposition of the Constitution of Malaysia.

The author had thought that the book will mainly serve non-lawyers ("to reach as wide a public as possible outside the university and the courtroom"). If he had assumed that the book would have little usefulness inside the university and inside the courtroom, it must be rewarding for him to know that his assumptions were wrong on both counts. The book, for instance, is an essential teaching tool for law students in Malaysia and Singapore. As regards its usefulness in courts, instances have already occurred where the book has been quoted with approval, if not authority, in the Courts of Malaysia: see *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors.* [1975] 2 M.L.J. 41 (*per* Mohammad Azmi J.) and *P.P. v. Khong Theng Ken and Anor.* unreported, Federal Court Special Case No. 1 of 1976 (*per* Ong Hock Sim F.J.).

Such citations of the book in Courts are not only clear testimony of the high regard which the Courts have for the author's exposition but also confirm that the book is unique in that it serves numerous categories of readers, from "the man in the street" right up to the learned judges themselves.