The rule of law and executive power in Malaysia: a study of executive supremacy.

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The Rule of Law and Executive Power in Malaysia:
A Study of Executive Supremacy

by

RAIS YATIM

A Thesis submitted for the Degree of Doctor of Philosophy
King's College
University of London

1994
MALAYSIA & IMMEDIATE NEIGHBOURS IN SOUTH EAST ASIA
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ABSTRACT

This thesis is about the conflict between the rule of law and executive power in Malaysia. The study contends, after examining the relevant constitutional and statutory provisions as well as case law, that supremacy of the executive is achieved and maintained within the so-called democratic process since the country achieved merdeka (independence) in 1957.

The study endeavours to prove that by taking advantage of emergency, security and public order situations the executive has been able to perpetuate emergency rule even though the basis upon which an emergency is based has long elapsed. Further, it is established that by restricting basic rights under the Constitution, especially those pertaining to speech, assembly and association, the executive has suppressed the development of the rule of law and human rights.

Chapter 1 sets out the scope of the study which includes the meaning and scope of the rule of law. This is followed in Chapter 2 by a discussion on the development of the rule of law within the common law from colonial days up to independence in 1957. Chapter 3 is concerned with the escalation of executive power since 1957, as seen from the standpoint of constitutional amendments as well as the introduction of fresh draconian legislation. The escalation of executive power is further established in Chapter 4 by discussing the relevant case law and statutes concerned with the restriction of fundamental rights. Emergency rule, detention without trial under the Internal Security Act 1960 (ISA) and the executively-imposed judiciary crisis of 1988, all of which contribute towards making the executive supreme, are presented and analysed in Chapters 5, 6 and 7 respectively.

The study concludes in Chapter 8 that while the power of the executive is on the rise by virtue of majority rule and parliamentary supremacy, the rule of law and human rights deteriorate. This is compounded by the fact that the courts did and could do little to reverse the situation. Although suggestions are offered, in the final chapter,
to counter executive supremacy in the future, the thesis concludes that the future for the rule of law and human rights in Malaysia is dismal.
ABBREVIATIONS

AC
AJCL
ASP
BMA
BN
CAC
CLJ
Cap.
c.i.f.
clmn.
CMnd.
CPM
Cl
DO
EIC
ESCAR
FAC
FJ
FM
FMS
G.N.
ICJ
ISA
JML
KHEDN
LP
Mal.L R
MCA
MCP
MCS
MIC
MLJ
NDP
NEP
NILQ
NOP
OCPD
PC
EPOPCO
pp
PROCA
PU
RRE
SC
SCJ
SPMA
SSCP
Tunku
UFMS
UMNO
w.e.f

Appeal Cases
American Journal of Comparative Law
Assistant Superintendent of Police
British Malaya Administration
Barisan Nasional (National Front)
Contingent Assessment Committee
Chief Justice
Current Law Journal
Chapter
Came into force
Column
Command paper
Communist Party of Malaya
Detention Order
East India Company
Emergency (Special Cases) Regulations 1975
Federal Assessment Committee
Federal Court Judge
Federation of Malaya
Federated Malay States
International Commission of Jurists
Internal Security Act 1960
Journal of Malaysian and Comparative Law
Kementerian Hal Ehwal Dalam Negeri (Ministry of Home Affairs)
Lord President, the highest judicial officer in Malaysia
Malayan Law Review
Malay Chinese Association
Malayan Communist Party
Malayan Civil Service
Malayan Indian Congress
Malayan Law Journal
National Development Plan
New Economic Policy
Northern Ireland Law Quarterly
National Operations Council
Officer in charge of a Police District
Privy Council
Emergency (Public Order and Prevention of Crime) Ordinance 1969
pages
Prevention of Crime Act 1958
Pemberita Undang-undang (Legal Notification)
Restricted Residence Enactment 1933
Supreme Court
Supreme Court Judge
Dangerous Drugs (Special Preventive Measures) Act 1985
South Seas Communist Party
Tunku Abdul Rahman Putra Al-Haj (the Tunku): first prime minister of Malaysia.
Unfederated Malay States
United Malays National Organisation
With effect from
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Last but not least, I thank my wife, Masnah for her forebearance and understanding during the difficult research years.

RY

15 February 1994

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CHAPTER 1

The Rule of Law and Executive Power: A Preface Towards Conflict


1.1. Aims and Scope of Study

This study aims to present and analyse the on-going conflict between the rule of law and arbitrary executive power in Malaysia. The phrase "arbitrary executive power" here denotes the pervasive executive discretion exercisable in restricting and denying the citizen's fundamental rights. Arbitrary executive power, incompatible with and opposed as it is to a free and democratic life, has been developing since the country attained merdeka¹ (independence) in 1957. Such powers which are unchecked and thus arbitrary, severely transgress freedom and directly confront the rule of law.

Today the Malaysian executive has reached the pinnacle of power in that they have absolute discretion in limiting, and at times denying, basic freedoms under the Malaysian Constitution and various other instruments.² This accumulation of power has been the result of a continuous process of constitutional amendments as well as the introduction of various security and public order statutes over the years. The alternate method used by the executive to have permanent overriding power over the

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¹The term Merdeka will hereinafter be used to mean independence. Thus the Merdeka Constitution means the Constitution of the Federation of Malaya when it achieved independence from Britain on 31 August 1957. The date 31 August 1957 is termed under the Constitution as Merdeka Day (Independence Day) and 16 September 1963 being the date on which the States of Malaya, Singapore, Sabah and Sarawak became a larger federation, is termed as Malaysia Day (Singapore left the Federation in 1965). References to these terms can be found under, inter alia, Articles 5(4) and 162 of the Constitution and the Malaysia Act 1963.

freedom of individuals, especially during the last 12 years, is via the creation and maintenance of emergency rule, detention without trial and the denial of judicial review in cases involving the liberty of the person. This denial of judicial review, in vogue since 1989, has been described as having "sealed off any possible intrusion by an active judiciary which may want to question certain decisions made by the executive." Consequently, judicial power as well as separation of powers have been severely marred.

The approach used in this study is to identify firstly, the prominent escalating powers of the executive after independence and secondly, the deterioration of freedom for the Malaysian people. This approach calls for the identification of developments under four sources: (a) The Federal (Malaysian) Constitution; (b) Constitutional amendments; (c) statutes; and (d) relevant decisions of the courts pertaining to fundamental rights.

As emergency power cannot exist in isolation, the might of the government of the day is examined within what is termed "executive supremacy" i.e. the overall power spectrum of the authorities harnessed and garnered through the mechanism of Malaysia's emergency powers. This power structure and spectrum, facilitated through parliamentary excesses, is represented by emergency statutes and specific executive instruments which equip the various officials with a variety of arbitrary powers of government. These arbitrary and emergency powers, are still in force alongside normal Malaysian laws.

Since a general review of the meaning of the rule of law is relevant to the study, it is introduced and discussed in this chapter. The meanings and scope of the rule of law is thoroughly examined. This is necessary in view of the fact that the term 'rule of law' itself has developed so widely in the context of its meaning and applicability over the years.

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2 See Chapters 5, 6 and 8 infra.
3 The term 'Constitution' will henceforth be used to denote the Federal Constitution of Malaysia.
4 The power to declare a state of emergency is provided under Article 150 of the Constitution. See Chapter 5 infra.
Chapter 2 introduces the pre-merdeka situation in respect of the rule of law through the operation of the common law as modified in the Malay States. The discussion leads to the formation of the Reid Commission which framed the merdeka Constitution in 1957. Here the study also outlines the early invocation of the rule of law through the common law in the Straits Settlements and the early exercise of executive power during the British administration. Chapter 3 deals with the ascending power of the executive through constitutional changes and the diminishing role of the rule of law from 1957 onwards. Relevant comparisons are made between the rights and freedoms under the Reid Commission and those finally enacted under the merdeka Constitution. The alteration of rights thereafter is also discussed through constitutional amendments, new statutes and the relevant decisions of the courts.

The diminishing aspects of fundamental liberties in Malaysia are discussed in Chapter 4. Here the impact of relevant constitutional amendments and statutes are considered along with the relevant cases. The various issues relating to emergency rule in Malaysia are reviewed in Chapter 5. Emergency rule which started in 1948 as a result of communist terrorism officially came to an end in 1960. But emergency rule continues and subsists in a different but more enhanced form under Article 150 of the Constitution and the Internal Security Act 1960(ISA). The study generally highlights the period of emergency rule (1948-1960) through the attainment of merdeka up to the present.

A preliminary discussion of the emergency in its historical as well as its socio-legal perspective is also presented within the same chapter. The discussion further considers whether the present Malaysian emergency rule in peacetime is rational, justified and valid when examined against the premise of the rule of law. The extent of the derogation of rights and freedoms resulting from emergency rule and detention without trial are considered in Chapters 5 and 6 respectively. Other relevant forms of arbitrary executive actions are also discussed in view of the fact that they are also within the sphere of executive supremacy. Judicial review which is the only effective means of safeguard against arbitrary powers of the executive is also examined in
chapters 5 and 6. The actual conflict between the executive and the judiciary, as represented by the 1988 judiciary crisis, is discussed in Chapter 7. In the final chapter, conclusions and suggestions with respect to unbridled executive discretion are considered. An overall assessment of the rule of law in Malaysia is made so as to justify the final contention that complete and final power actually lies within the executive sector of the government and that the courts cannot disregard or effectively counter that power.

In its most general sense, this study is about the plight of the judiciary and the rule of law in the wake of an all too powerful executive. This confrontation between the rule of law and the arbitrary power of the executive epitomises the risks faced by justice and freedom in the midst of changing values in a third world country. The thesis endeavours to establish that executive supremacy had been seized upon by the executive partly as a result of a prolonged application of emergency rule as well as the courts' rather lax and restrictive attitude in dealing with emergency and fundamental rights cases in the past. It has to be noted, however, that the question of emergency rule and arbitrary power whilst being the centrepiece of this study has to be flanked by its other related fields - fundamental liberties, constitutionalism, judicial review and judicial independence, preventive detention and the larger interests of human rights.

The year 1988 saw the dismissal of the Lord President, the highest ranking judge in Malaysia and two other judges of the Supreme Court.¹ This fuelled and sparked the Malaysian judiciary crisis, an event which resulted from executive intervention and the judiciary's own endeavour to sustain its independence. The dilemma faced by the Malaysian judiciary in the wake of its fettered judicial power in the aftermath of the 1988 judiciary crisis is highlighted in Chapter 7. An attempt is also made to evaluate the effect of the 1988 constitutional amendment which, inter alia, took away the "judicial power of the Federation" from the courts and increased the discretionary powers of the Attorney General to prosecute. In the light of this

¹See Chapter 7 infra.
The question to be answered is whether the Malaysian courts are well disposed to stay independent and be seen to be independent in the future amidst the constant power increase of the executive that in turn appears to undermine all other branches of government.

The final chapter not only offers critical reappraisal of the rule of law in the country but also considers the future of the rule of law in Malaysia. These issues relate, for example, to the increasing role of Islamic law as a competing and alternate legal system; the total lack of checks and balances in government and the future of the common law, *inter alia*, are to be given attention. Are the rule of law and human rights in Malaysia isolated from other competing socio-legal environs as a natural phenomenon or are they being isolated by political decision? Will other non-legal considerations have the capacity to eclipse and finally give way to other systems of law in Malaysia? The chapter will also formulate and put forward suggestions with a view to maintaining the survival of the rule of law in this developing multi-racial society.

The present facilities of arbitrary power enjoyed by the authorities to administer the country put in the balance the rationality of having a written constitution that boasts of basic rights. That almost all of the fundamental liberty provisions under Part II of the Constitution are qualified in favour of the executive's intervention, for instance, exemplifies this point. Besides, there are many issues related to preventive detention or detention without trial that need to be addressed. For instance, there is the question of whether at this time and age preventive detention is still necessary. What security threats are the authorities talking about when communist terrorism and collective violence in Malaysia are now non-existent? To what extent are normal laws inadequate to take care of public order offences? Can a state of emergency be real when its immediate ingredients and attributes no longer exist and have long left the Malaysian scene? How does Malaysia face international scrutiny over unilateral executive power of this nature? These queries and others will be analysed and answered in Chapters 5, 6 and 8. It is also contended in Chapter 8.
that with an overwhelming majority in Parliament of the same political party since merdeka in 1957 it has now become a misconception to regard the Malaysian Parliament as the safeguard of rights and freedoms. In many respects that institution is the issuer of licence to violate freedoms.

Major decisions of the courts in respect of the rights and freedom of the individual made over the years are re-examined. Although the courts are now barred from exercising judicial review in cases involving the liberty of the person after the coming into force of certain amendments to the constitution and statutes relating to administrative detention between 1988 and 1989 there were, however, in the past ample opportunities for the courts to effect judicial activism. The executive, through the power of Parliament, has now taken away from the courts most of their powers relating to judicial review which were in any event reluctantly and sparingly used.

It is contended that drastic changes have to be made for the sake of the total resurgence of the rule of law. But this can only be carried out by the executive government and it involves the whole spectrum of nation-building which process is a gargantuan if not an impossible one. Thus by the immensity of the problem as compounded by the lack of understanding and appreciation of the rule of law by the Malaysian people, the task may perhaps be physically beyond the capability of the country's judiciary, the Malaysian Bar and the judicial-legal service - the very institutions by which the rule of law is identified. Hence in the last chapter of this study, attention is also drawn to structural shortcomings of government based on the Malaysian system of parliamentary democracy. The role of Islamic Law in Malaysia and the perceived overriding priority of the economic development of the country are also discussed in the concluding chapter.


2Chapters 5 and 6 infra.
1.2. Controversy over the meanings of the rule of law

Having stated above the scope of the study and the contrasting approach to be taken between the rule of law and the thrust of executive power, it now calls for a discussion of what constitutes the rule of law in its most practical and universally accepted sense. Whilst it is easy to understand what is meant by the terms executive, judiciary and parliament as the ingredients of separation of powers, the same does not seem to apply to the rule of law which has been controversial in terms of its definition, meaning and application, at least since A.V. Dicey published his major work in 1885. Compared to reported cases in India or Australia, Malaysians may not be seen as being particularly litigious, that is if the number of cases reported in the Malayan Law Journal is anything to go by. Nonetheless, the position occupied by the rule of law in Malaysia has not been stated in clear terms in the past in relation to the common law as modified by local conditions although it is possible to get some sense of its impact through the cases and by way of statute law.

We may identify three major ways of looking at the rule of law: the Diceyan view; the viewpoint of constitutionalism and the considered findings of the International Commission of Jurists (ICJ) and other international bodies. In a way, it may be too restrictive to confine our analysis of the rule of law to these three

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2 The Malayan Law Journal (MLJ), has been in monthly publication since 1932 except in the interim years 1941-1944. An average of 15 cases are reported in its monthly issue (currently the MLJ has started to be in issue bi-monthly). Its predecessor, the Kyshe Report (covering major cases in the Straits Settlements) and the Federated Malay States Report (FMSLR) provided earlier reports of significant decisions. Within the last five years a number of new publications have emerged, one of the more notable being the Malaysian Current Law Journal (MCLJ). The latest publication to join case law reporting is the All Malaysia Report (AMR) which commenced publication in April 1992. The Supreme Court Reports (SCR), containing major decisions of the Supreme Courts of Malaysia, Singapore Brunei and those of the Privy Council (on appeals from Singapore and Brunei), commenced publication in 1988. There are three legal journals currently representing Malaysia and Singapore: The Malaya Law Review (Mal. L.R), founded in 1959 when the University of Malaya was still in Singapore (The present Law Faculty, University of Malaya only commenced its session in 1971), The Journal of Malaysian and Comparative Law (JMCL) and the Singapore Law Review (Sing. L.R.) which is managed by law students in the National University of Singapore.

3 See, for example, Ong Cheng Neo v. Yap Kwan Seng (1897) 1 SSLR Supp. 1 p. 3; Re The Will of Yap Kwan Seng (1924) FMSLR 313; Khalid Panjang & Ors v Public Prosecutor (1981) 1 MLJ 214.
4 Civil Law Enactment 1937, as amended in 1956.
perspectives, given the vastness that the topic offers. In view of its relevance to this study, it is necessary to arrive at a fairly broad framework of meaning.

The first admission that must be made at this point is that the rule of law is itself controversial in terms of its many and varied meanings. In view of this it is pertinent to crystallise a set of meanings, if not definitions, of the rule of law. It is thought that this can be realistically achieved by highlighting all the universally accepted ingredients or tenets of the rule of law. For example, for the rule of law to be regarded as existing within a legal system, the rules of natural justice must be integrally recognised; so must the concept of government under law; separation of powers and independence of the judiciary in respect of security of tenure for the judges and their power to hand down judgments without fear or favour. These features are integral to the concept of constitutionalism itself.

The common law also has a vital role to play. Wade and Phillips suggest that the rule of law doctrine consists of a body of inherent values, mainly distilled from the experience of the common law over the centuries which to some extent also include political and legal philosophy of ancient Greece and republican Rome. The authors include the presumption of innocence in criminal cases, the presumption against retroactive legislation, jury trial in serious criminal cases and the requirement that court proceedings be open to the public as examples of these values. Following this historical line, Jennings observed that since the final victory of Parliament in 1689 the rule of law in its liberal sense has existed in England. Although the rule of law and the common law may not be synonymous on all counts, concepts of rights and freedoms within the rule of law are to be found in the common law. In the House of Commons petition to King James I in 1610 the following words are evocative of this:

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Amongst the many other points of happiness and freedom which your Majesty's subjects of
this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there
is none which they have accounted more dear and precious than this, to be guided and
governed by certain rule of law... and not by any uncertain or arbitrary form of government...1
(emphasis added).

1.3. The Diceyan Rule of Law

In any discussion on the rule of law Dicey invariably becomes significant for it was he, who despite several known proponents before his time, brought the topic into open discussion in 1885 with the publication of his major work, An Introduction to the Study of the Law of the Constitution.2 The "Rule of Law" according to Dicey means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government."3 He claimed that Englishmen were ruled by law and by law alone. He denied that in England the government was based on exercise by persons in authority of wide discretionary powers. Dicey maintained that where there was discretion there was room for arbitrariness and that this led to insecurity of legal freedom of the citizens. Another value interest in the concept of the rule of law according to Dicey was "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts."4 He maintained that every person should be subject to one and the same body of law administered by ordinary courts.

Dicey's view on parliamentary sovereignty was unyielding:

"The principle of parliamentary sovereignty means no more nor less than this, namely that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever, and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of the Parliament."5


3A.V. Dicey, op. cit. p. 202

4Ibid. p. 202

Dicey attempts to prove the proposition that Parliament is omni-competent.

Clearly this theory of sovereignty raises a problem for the concept of the rule of law. When he turned to the rule of law, Dicey identified it as three distinct concepts. The first was that no man was punishable except for a breach of the law established in the ordinary legal manner before the ordinary courts of the land. The second was that every man, whatever his rank or condition, was subject to the ordinary law of the realm and was amenable to the jurisdiction of the ordinary tribunals. The third and final meaning of the Diceyan rule of law was that the general principles of the constitution had come about as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts rather than, as in many foreign constitutions, the general principles of a written constitution. In his own words, "the law of the constitution are not the source but the consequence of the rights of individuals, as defined and enforced by the courts...thus the constitution is the result of the ordinary law of the land." (emphasis added). This statement did away with the basic premise that the citizen under common law always had something extra, something in perpetuity in the form of basic rights that no one, not even the King could take away." Clearly such a view could not have stood with Dicey's commitment to the supremacy of parliament. Likewise, in Malaysia, while Article 4 of the Constitution speaks of the supremacy of the Constitution, in reality Parliament can legislate almost on any matter.

Dicey asks none of the big questions about the source of Parliament's authority and it is perhaps this aspect of his work which appeals most to lawyers. If Parliament has the power to make a legally binding command, no matter what the

1A.V. Dicey, op. cit.,. p.329.
2Holdsworth comments, "There was still a large medieval element in men's conceptions about law and politics and this element would certainly have led them to deny the proposition that there were no limits to the things which could be effected by a statute. Many would have doubted the competence of Parliament to pass a law which contravened those fundamental moral rules which seemed to be a part of that law of nature which natural reason teaches all mankind." See W. Holdsworth, History of English Law (2nd. edn. Vol. 2, 366.
3The procedure is spelt out under Article 159.
subject matter and consequence of that command, then it is possible that a direct conflict will arise between the duty to obey the law and the moral duty not to obey wicked laws. This conundrum, in retrospect, was resolved during the age of liberalism by the social contract. If the sovereign failed in the protection of the people's basic liberties then it breached its contract with its subjects and the oppressive "law" would not be viewed as binding. Even the positivist acknowledges this as a non-legal and moral concept. What Hart calls the "rule of recognition" must itself correspond with concepts which are not directed by analysis. Thus Hart identifies elements of natural law as the minimum legal content that all legal systems must have.

Despite the plea by Professor Lawson that "Dicey should be read with reference to the conditions existing when he wrote An Introduction to the Law of the Constitution." Dicey seems to have more critics than supporters. Dicey was the target of some unjustified imputation. For example, Jennings inferred that Dicey must have been in favour of 'child labour, wholesale factory accidents, the pollution of rivers, of the air, and of the water supply... and other nineteenth century industrialism.' Dicey's second meaning (equality before the ordinary law of the land) was criticised on two grounds. Firstly, although it was true that a public official who committed a crime or a tort was liable before the ordinary courts in the same way as private citizen, it was not true that public officials had the same rights as the individual. A tax investigator, for example, has powers which the taxpayer does not have. Secondly, it has been said that Dicey misunderstood the French administrative law as excluding public officers from liability from wrongful acts, whereas in fact it operated within a system that determines the powers and duties of public authorities so as to prevent them from exceeding or abusing their powers.

Dicey has also been accused of having ignored the privileges and immunities enjoyed by the Crown under the constitutional maxim 'the King can do no wrong'. He did not take into account the government's immunity from being sued in the courts for a contractual or tortuous liability which was abolished only in 1947. Dicey failed to take due notice of the many statutes which could not be questioned in the ordinary courts. He also failed to appreciate that government departments and officials had come to discharge adjudicatory powers in many areas. Professor Jain suggests that if Dicey's formulations regarding the rule of law were not fully tenable in the England of his own days they are much less so today in contemporary democratic societies based on the common law system. "Dicey deprecated Administrative Law as being inconsistent with the Rule of Law", he observed, "but every country has now developed it into a fairly well-defined system...".

On balance, however, and despite these difficultiesDicey has contributed much to the concept of the rule of law. After all he did not claim to be breaking new ground to any significant extent and in this regard he freely admitted that he drew on recognised works of authority on the constitution. In his preface to the first edition of his work Dicey admits "It does not even pretend to be even a summary, much less a complete account of constitutional law. It deals only with two or three guiding principles which pervade the modern constitution of England." Notwithstanding, the influence of Dicey has survived the ages in many respects. One vital area is in the doctrine of parliamentary supremacy which has become a pillar in British constitutionalism. It is this powerful doctrine that has somehow retarded the on-going efforts of establishing the English bill of rights.

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3 A. V. Dicey, *op.cit.* p.v.

4 Interest in the area of bill of rights for the United Kingdom has been considerable. See, for example, Scarman, *The Dimension of English Law*, London, 1976; Sir H.W.R. Wade *Constitutional Fundamentals* (The Hamlyn Lectures), London 1989; Stanley de Smith & Rodney Brazier,
In view of strident progress made in nurturing the rule of law in Commonwealth countries like New Zealand and Australia, a modern commentator evaluates Dicey in the following way:

It would thus appear that in the area of Administrative Law in the common law world, the influence of Dicey has now worn thin.¹

1.4. Constitutionalism

Constitutionalism is a concept under public law that recognises both the necessity of government and the freedom of the individual. At the same time constitutionalism places limitations on the powers utilised in governing the governed. Professor Nwabueze, one of Africa's leading academic lawyers, describes the concept of constitutionalism as follows:

Government is universally accepted to be a necessity, since man cannot fully realise himself - his creativity, his dignity and his whole personality - except within an ordered society. Yet the necessity for government creates its own problem for man, the problem of how to limit the arbitrariness inherent in government, and to ensure that its powers are to be used for the good of society. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.²

Constitutionalism is essentially an ingredient that makes up the general framework of the rule of law, developed by constitutional thinkers partly to establish an equilibrium between the major segments of government. It is a concept that weighs rights and freedoms of the individual as against powers of the State to govern.³ In many respects the ingredients that make up or constitute the rule of law are relevant when examining the characteristics of the concept of constitutionalism. Indeed without constitutionalism the rule of law may be said to be fractured and incomplete. It requires accountability for those who hold power as members of the executive as

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well as checks and balance that in turn operate within a system of government. Thus
the mere existence of a written constitution of a country does not necessarily mean or
prove that constitutionalism exists and operates inasmuch as saying that not every
law and order enacted by the legislature reflects the operation of the rule of law,
especially when the statute takes away rights of redress in a court of law. Just because
the relevant law was passed by a parliament at the instance of the executive and
pursuant to the relevant procedure it does not mean that the ingredients of
constitutionalism have been satisfied. Constitutionalism, which partly develops well
within the observance of the doctrine of separation of powers, does not allow the
judiciary to be hindered in administering judicial review over an action of the
executive; it may not muzzle freedom of expression via which an enlightened public
opinion may be harnessed. In this respect the practice of monopolising the media by
the government by way of enforcing restrictive laws must be seen as a step to deny
freedom of expression.

More generalised than what Nwabueze says in regard to constitutionalism, de
Smith offers his own version of the term: "The idea of constitutionalism", he says
"involves the proposition that the exercise of governmental power shall be bounded
by rules, rules prescribing the procedure according to which legislative and executive
acts are to be performed and delimiting their permissible content." He particularises
that the rules may be at one extreme, as in the case of the United Kingdom, mere
conventional norms and at the other directions or prohibitions set down in a basic
constitutional instrument, disregard of which may be pronounced by a court of law. Professor de Smith also states that constitutionalism is a living reality to the extent
that these rules curb the arbitrariness of discretion and are in fact observed by the
leaders of political power. There is envisaged by the doctrine that within the
"forbidden zones" lies "significant room" for the enjoyment of individual liberty on
which the authority may not trespass. But of course during a national crisis or

2 S.A. de Smith, op. cit. p. 107. See also C.H. McIwain, Constitutionalism Ancient and Modern,
emergency the government may act more executively in the interests of national
security and public order. Preceding this, Sir C.T. Carr says, "In the internal dispute
between government and liberty, crises means more government and less liberty." ¹
But this situation of "more government and less liberty" is only for a limited period
and for a specific purpose that is exercised in the interests of national security and
public order. It is not, as we shall see, like the Malaysian experience - a continuous
flexing of executive power-play within a situation of on-going emergency rule.

It is quite clear from the views of Nwabueze and de Smith that
constitutionalism may be equated with the concept of the rule of law itself. It is an
idea that recognises and operates checks and balances within a system of government.

1.5. International and Comparative Norms
The need to provide avenues for judicial control of executive power and the
relationship between the rule of law and executive power have been the subject of
successive declarations by the ICJ in various parts of the world.² Though some may
think that the concept of the rule of law has outlived its usefulness, the ICJ regards
the rule of law as a living concept permeating several branches of the law and as
having practical importance in the life of every human being.³

When the ICJ considers the rule of law it has in mind the idea of the
predominance of law in society as opposed to the predominance of the will of any
individual or oligarchy. The international congress held by the ICJ in New Delhi in
1959 produced a few derivative definitions relating to human rights and the rule of
law. One definition, in part, extracts the essence of the rule of law:

²See Vol. 2 No. 1, Journal of the International Commission of Jurists, pp. 1-42; The Rule of Law in a
Free Society, A Report on the International Commission of Jurists, New Delhi, India (1959);
of Jurists, Rio de Janeiro (1962); African Conference on the Rule of Law, A Report on the
Proceedings of the Conference, Lagos, Nigeria (1961); The Dynamic Aspects of the Rule of Law in
the Modern Age and Pacific Conference of Jurists, Bangkok, Thailand (1965); The Rule of Law of
Human Rights, Principles and Definitions as elaborated at the Congress of Jurists (1966).
L. R. 230.
"The principles, institutions and procedures, not always identical, but broadly similar, which
the experience and traditions of lawyers in different countries of the world, often themselves
of varying political structures and economic backgrounds, have shown to be important to
protect the individual from arbitrary government and to enable him to enjoy the dignity of
man."¹ (emphasis added)

Like constitutionalism, but unlike Dicey, the emphasis is on the content of the law.

The Declaration of Delhi 1959 also generally implies, inter alia, a right to
representative and responsible government; certain minimum standards or principles
for the law, including those contained in the Universal Declaration of Human Rights
1948 and the European Convention on Human Rights, in particular freedom in
religious belief, assembly and association, and the absence of retroactive penal laws;
that a citizen who is wronged should have a remedy against the state or government;
the certainty of the criminal law, the presumption of innocence, reasonable rules
relating to arrest, accusation and detention pending trial, the giving of notice and
provision for legal advice, right of appeal and absence of cruel and unusual
punishment; and finally, the independence of the judiciary. Despite the criticism of
Raz and that of Phillips who assert that the Delhi Declaration is rather "confusing"² it
remains an important aspect in the development and understanding of the rule of law,
especially for developing countries.³

For the ICJ the rule of law embraces the principles embodied in the common
law system. These concepts include: "that all men are equal before the law, whatever
their rank or station, and as such are all subject to the ordinary law and procedures of
the courts; that no man shall be punished unless convicted in an ordinary court for a
definite breach of the law; and that the government is subject to the law."⁴ This
definition is still substantially Diceyan despite the fact that Dicey has been criticised
in most of what he has to say about the rule of law.

E.C.S. Wade "Introduction" in A.V. Dicey, An Introduction to the Study of the Law of the


There have been other attempts to define the rule of law. Justice Khanna of the Supreme Court of India, shortly after he was passed over for the position of Chief Justice for having dissented against the government during the late Indira Gandhi's period of emergency and authoritarian rule between 1975 and 1977, defined three requisites for the rule of law to exist:

If there are three prime requisites for the rule of law, they are a strong bar, and independent judiciary and an enlightened public opinion. There can indeed be no greater indication of decay in the rule of law than a docile bar, a subversive judiciary and a society with a choked or coarsened conscience.¹

Justice Khanna had refused to overrule the decisions of seven state court judges who granted habeas corpus to 43 persons detained without trial under the 1975 emergency powers law.² In so doing he established both his independence of judgement as well that of the judiciary as a whole, albeit at the expense of his own judicial career. More than that, he has summed up for the free world the bare essentials for the rule of law to germinate in the modern environment.

From the events of the Nuremberg Tribunal, we can learn of the minimum requirements of the rule of law in the context of criminal trials. The War Crimes Tribunal identified aspects of trial proceedings which it judged were required to be put into practice:³

1. The right of the accused persons to know the charge against them, and this was to be informed within a reasonable time before the opening of the trial;
2. The right of the accused to full aid of counsel, and preferably counsel of their own choice;
3. The right to be tried by an unprejudiced judge;
4. The right of the accused to give or introduce evidence;

³Trial of Joseph Altstotter & Other Trials of War Criminals (1948) VI L.R. p. 103.
5. The right of the accused to know the prosecution evidence; and
6. The general right to a hearing for a full investigation of the case.

All of the above conditions have become recognised rights of the individual in criminal proceedings in a court of law of a State where the rule of law prevails. Under the Malaysian Criminal Procedure Code\(^1\) (CPC), for example, the accused person has the right to know exactly what charges are brought against him by the prosecution; he may also present evidence for his defence and to cross-examine the prosecution witnesses. This principle is embodied under Chapter XXI of the CPC. But it must be pointed out that, as we shall see, the Malaysian CPC is not invoked when the executive chooses to arrest and detain a subject under any of the security and public order laws of the country.\(^2\)

The leading jurists, Dr. Joseph Raz seems to understand the rule of law through an approach based on *principle*. In this way he avoids tying the rule of law to any particular socio-economic system. He articulates 8 basic principles that are said to be present in any State that professes to recognise the rule of law:\(^3\)

1. All laws should be prospective, open and clear. One cannot be guided by a law which is retroactive since it did not exist at the time of the action. The law should not be ambiguous or obscure.
2. Laws should be relatively stable. If they are changed too often people may have difficulty in knowing what the law is.
3. The making of specific legal directives should be guided by open, stable, clear general rules.
4. The independent of the judiciary must be guaranteed, otherwise the judiciary could not be relied upon to apply the law and the citizen should therefore not be guided by it.
5. The principles of natural justice such as the requirements of open court, absence of bias, the right to be heard etc. must be observed if the law is to be able to guide action.
6. The courts should have the power to examine the actions of the other branches of government in order to determine if they conform with the law.

\(^1\) Chapter XVIII Criminal Procedure Code (CPC) (FMS Cap 6).
\(^2\) The four main security instruments in Malaysia are the Restricted Residence Enactment 1933 (RRE), the Internal Security Act 1960 (ISA), the Emergency (Public Order and Prevention of Crime Ordinance) 1969 (EPOPCO) and the Essential (Special Cases) Regulations 1975 (ESCAR). For further discussion and analysis of these and other 'security and public order' instruments, See Chapters 3 & 4 infra.
The courts should be accessible, so that a person's ability to vindicate legal rights is not made illusory by long delays or excessive costs.

The discretion of law-enforcement agencies should not be allowed to pervert the law.

The above exposition fails to mention firstly, the requirement of an independent bar or, in the language of Justice Khanna, a strong bar. Secondly, Raz does not include the requirement for the universality of the law. This is a critical omission because only through universal acceptance and application can the rule of law achieve its effectiveness. Third, this formulation contains no requirement for any kind of mechanism to enable the law to remain broadly consistent with public opinion. It is a proven fact that a law which lacks the support of the citizens will ultimately face weakness in implementation. Fourthly, there is no mention of the need for substantive laws against anarchy and private lawlessness. Finally, there is no express stipulation for an effective machinery to enforce those substantive laws.

Although the general definition of the rule of law enunciated by the 1959 I.C.J. Congress in New Delhi still remains as a major resource, the 8-point ingredient principles put forward by Raz is practical for comparative and assessment purposes. That is to say, each item or ingredient of the rule of law may be categorised as a value, a principle, an institution or a procedure of the rule of law. In making a composite assessment of this nature what is being attempted is the creation of criteria by reference to which a country may be judged on whether it adheres to the minimum standards of the rule of law.

If the five omissions are added on to the Raz formulations of the rule of law what we have is a fairly composite and universal concept of the rule of law. Possibly this situation in turn may be criticised as being rather idealistic when the prevailing standards in some contemporary legal systems are taken into consideration. Thus from the efforts of the International Commission of Jurists, the Chicago Colloquium,1

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1 The Rule of Law as Understood in the West (Chicago Colloquium, 1959) Annales de la Faculté de Droit d'Istanbul 69. The Chicago Colloquium held between 8-16 September 1957 was an international conference on the rule of law under the auspices of UNESCO, the Ford Foundation and the University of Chicago.
the works of Dicey, Hayek\textsuperscript{1}, Raz\textsuperscript{2} and other prominent scholars on the rule of law we may now be in the position to identify through subsequent chapters the necessary ingredients that must be present in any legal system if the rule of law is to be deemed to be in operation to its fullest extent.

It is pertinent to point out at this stage that it was only in 1948 that the world began to take serious notice of the rule of law as a universal standpoint in safeguarding man's rights against tyranny pursuant to arbitrary power. This was when the United Nations adopted the Universal Declaration of Human Rights (UDHR). The eight points posited by Raz certainly reflect man's quest for fairness and justice although it is clear that these ingredients will not be present in all legal systems. Thus in its historical perspective, in 1948 when the UDHR was passed at the United Nations, Malaya was still under British rule and was in the midst of defending the country from falling into the hands of terrorists. The twelve-year war against communist terrorism which started in 1948 occupied the formative part of the country's move towards independence, and this has created certain set values in the attitude towards the dispensation of executive powers in the form of security and public order and emergency rule as a whole.

The preponderance of the emergency rule pre-occupied the then Malayan Government with its own scheme of self-preservation. Executive supremacy took precedence over everything for the sake of this self-preservation. The administration of justice was implemented more as a utilitarian need rather than fulfilling the set values of the rule of law per se. When the emergency was declared at an end in 1960, it was only so in form. In substance emergency rule, pugnacious as it is to a democratic life, remains very much as part of the daily life of the Malaysian people. Despite the full operation of the Criminal Procedure Code, the Penal Code, the various courts ordinances establishing the courts and their hierarchy, the Civil Law

\textsuperscript{1}F.A. Hayek, \textit{The Road to Serfdom}, Chicago, 1972.

Ordinance 1956 and the Evidence Act 1950 emergency laws took precedence. It is safe to conclude that the application of the principles of the rule of law through the administration of justice was partial. It was operative within a system that was superceded by emergency rule considerations.

1. 6. Malaysia: A Country Perspective

Malaya or Semenanjung Tanah Melayu became independent on 31 August 1957 after a period of some 160 years under British influence. Malaysia, comprising the states in Malaya, Singapore and the Borneo states of Sabah and Sarawak was established in 1963. In 1965 Singapore withdrew from the federation. The constitutional, economic and social systems in Malaysia still reflect many aspects of Britain's legacy. Present day Malaysia is a federation of 13 states with 130,000 square miles in area and populated by 18 million people. About half are Malays, over a third are Chinese while 10% are Indians. The Malays until recently have tended to be centred in rural areas, and the Chinese as a result of resettlement programmes in the Emergency Years (1948-1960), have been more urban and westernized. Malays generally have dominated political affairs while the Chinese have dominated the economy, a situation that has led to a continuous tussle between political and economic power.

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1The British presence in the Malay States, as opposed to their position in the Straits Settlements of Penang, Singapore and Malacca which were subject to cession, was hinged on various treaties of friendship entered into between His Britannic Majesty and Their Highnesses the Rulers of the Malay States. For representative works in this field, see generally C.D. Cowan, Nineteenth Century Malaya, Oxford University Press 1961; Emily Sedka The Protected Malay States 1874-1895, Kuala Lumpur, 1968; R.O. Winstedt, A History of Malaya, Marican and Sons, Kuala Lumpur 1982.


3Malaysia, Sixth Malaysia Plan 1990-1995 (Official Publication of the Malaysian Government), National Printing Department, Kuala Lumpur 1991 pp. 28-35. The population consists of Malays (48%), Chinese (39%), Indians (11%) and others (2%). Malaysia which falls below Japan, Korea, Taiwan, Singapore and Brunei in Gross Domestic Product (GDP) earnings, enjoys a fairly high standard of living compared to other developing countries. However, its rural dwellers, mostly Malays, still suffer from poverty of rural subsistence economy. Rubber, palm oil and tin are its top export earners. Its industrialisation programme, commenced by the present government a decade ago, has proven to be partially successful after heavy state funding. Malaysia is now in its sixth five-year development plan, the first of which was started in 1970. It currently owes an external debt of about US $13 billion. See Malaysia, Sixth Malaysia Plan 1990-1995, op. cit. at p. 69.
The country is governed by a strong Federal government which under the Ninth Schedule of the Constitution controls defence, finance, the civil service, internal security (the police), administration of justice (other than Syariah\textsuperscript{1} jurisdiction) and other items.\textsuperscript{2} To the States are assigned land, forestry, mining, Islamic affairs, \textit{adat} (Malay custom), local government and other matters that fall within List II of the Ninth Schedule of the Constitution.\textsuperscript{3} Items such as Social welfare, scholarships, public health, drainage and irrigation, culture, housing and other matters fall within the Concurrent List under List III of the same schedule.\textsuperscript{4} However, federalism in Malaysia has tended to make the States lose control of many aspects of land, forest and local government administration to the central government.

The Head of State of the Federation is the \textit{Yang Di Pertuan Agong}\textsuperscript{5} (King - hereinafter referred to as the \textit{Agong}) constitutionally elected on a five-year term by the Sultans of the nine Malay States in the Peninsula.\textsuperscript{6} Malaysia is probably the country with the most number of reigning constitutional monarchs.\textsuperscript{7} All constitutional

\begin{itemize}
\item \textit{Syariah} is a general term for Islamic law. Thus \textit{hudud}, being Islam's concept of criminal sanctions is part of \textit{Syariah}.
\item See Articles 74 and 77 of the Constitution. The matters falling under the Federal and State Lists are provided under the Ninth Schedule of the Constitution. For the Concurrent List, see List III under the same Schedule (read with Article 95B).
\item See Article 95B. The States of Sabah and Sarawak have such extra matters as ports and harbours, immigration, native courts, cadastral land surveys and other items as per List II A under the Ninth Schedule.
\item List III is to be read with Article 95B(1)(b).
\item Cf. The Reid Commission's original recommendation was styled \textit{Yang Di Pertuan Besar} (One that is made Overlord), however the term was already used in reference to the Ruler of the State of Negeri Sembilan. To avoid any confusion, the Commission's version was changed slightly to that of \textit{Yang Di Pertuan Agong}. The word \textit{Agong} though similar in meaning to \textit{Besar}, accords a more significance to the latter. The original idea of creating an elected federal kingship in rotation was mooted by Tunku Abdul Rahman, the first prime minister of Malaya after being inspired by the Negeri Sembilan experience where \textit{Adat Perpatih} constitutionalism of old has held sway since the 16th century. \textit{(Adat Perpatih} is the generic term for custom, usage or convention which originated from Minangkabau, Sumatra and is still observed in the State of Negeri Sembilan). In Negeri Sembilan the Ruler is elected from the \textit{Tuanku Radin} lineage by the four Ruling Chiefs styled as \textit{Undang}. Malacca which used to be the seat of the Malay Sultanate from 1403-1511 is now, like Penang, Sabah and Sarawak, having its own Governor as head of state. The \textit{Yang Di Pertuan Agong} (King) of Malaysia, elected by the Rulers of the respective Malay States once in five years, has been a constitutional monarch only since \textit{Merdeka} in 1957 pursuant to Article 32 of the Constitution.
\end{itemize}
functions of the Agong are subject to the advice of the Cabinet or "a Minister acting under the general authority of the Cabinet"¹ from which all executive powers and functions emanate. The Agong appoints the Prime Minister from among members of the House of Representatives who "in his judgement is likely to command the confidence of the majority of the members of that House"² Hereditary Sultans and Chiefs still remain relevant in Malaysia and despite the recent loss of their pre-British status and the diminished monarchical privileges following a recent constitutional amendment³, they are still much revered. The tense relationship between the executive, particularly the prime minister, and the rulers has been a topic of some concern since 1990 as the rulers have been forced to accept a "less than traditional position"⁴ as a result of several constitutional amendments and political manoeuvres⁵. Parliament, controlled by the Barisan Nasional (BN)⁶ coalition since merdeka and modelled substantially along the Westminster model, has a legislative life of 5 years. Malaysia's Parliament is bicameral and is constituted by the Agong, the Dewan Rakyat (House of Representatives) with 180 elected members⁷ and Dewan Negara (Senate) with 65 members out of which 40 are appointed by the Aong on the advice of the Prime Minister.⁸ Apart from the Public Accounts Committee and the

¹Article 40 of the Constitution.

²Article 43(1) of the Constitution.

³Constitution (Amendment) Act 1993. Under this amendment (Article 181(2)), the Rulers, may now be sued or charged in a Special Court as per the discretion of the Attorney General. See Chapter 3 infra.

⁴Local newspapers like the New Straits Times, The Star, Tamil Nesan, Sin Chew Jit Poh, Nanyang Siang Pau, Utusan Malaysia and Berita Harian which are owned by nominees of the ruling Barisan Nasional party published numerous articles severely criticising the rulers for the period 1990-1993. See Chapter 8 infra.

⁵Constitution (Amendment) Act 1993: The rulers were also forced by the executive to sign a royal code called Kanun Atika Raja-Raja in 1992.

⁶From 1957 until 1974 the coalition was known as the Alliance which in 1974 was reorganised and renamed Barisan Nasional (BN).

⁷Article 46(1) of the Constitution. The present session of the Dewan Rakyat has only 177 members. Each state is allocated a specific number of Dewan Rakyat Representatives as allowed by Article 46.

⁸See Article 45(1)(b) of the Constitution. Under Article 40 the Yang Di Pertuan Agong acts on advice of the Cabinet or the Prime Minister. Thus the Prime Minister decides in all appointments to the Dewan Negara. See Chapter 8.
Committee of Privileges set up under parliamentary arrangements, there are no other "watch dog" parliamentary committees answerable to Parliament. Even these two committees are controlled by the BN. There is a unicameral legislative assembly in each of the 13 states whose heads of state are the sultans and governors. Despite claims made by Malaysian leaders that Parliament is supreme, it is the Constitution that is so. However, as we shall see, in view of Parliament's pervasive power to make and amend laws, including the Constitution, legislative supremacy may still be achieved despite the fact that under Article 4 it is the Constitution that appears to possess supreme status. Country-wide general elections which are not predicated by compulsory voting are supervised by the Election Commission, established under Part VIII of the Constitution. There are five other Commissions established under the Constitution pertaining to other matters.

Although the Constitution says that executive authority vests in the Agong and is "exercisable...by him or by the Cabinet or any Minister authorised by the Cabinet", real executive power vests in the Prime Minister who heads the Malaysian Cabinet. In common with Westminster practice, the Agong is a constitutional monarch. Thus when he performs under the constitution or any federal law he does so "in accordance with the advice of the Cabinet...".

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1See Standing Orders (SO) 77 and 80 respectively. The Committee of Selection (SO 76), Standing Orders Committee (SO 78) and House Committee (SO 79) are the remaining parliamentary committees which may be regarded as insignificant in the context of exercising checks and balances.

2With the exception of Penang, Melaka, Sabah and Sarawak whose heads of state are styled Governors, the rest of the states have Sultans. All of them are now merely constitutional rulers.

3See New Straits Times, 21 August 1983.

4Article 4 of the Constitution.

5See discussion in Chapter 3 infra on the failure of the courts to appreciate this point in the early years after merdeka.

6See Articles 113-120.

7These are Commissions pertaining to public services (Article 139): the Police Force Commission (Article 140), the Judicial and Legal Service Commissions (Article 138) and Education Service Commissions (Article 141A) as provided under Part X of the Constitution. The armed forces are regulated by the Armed Forces Council (Article 137).

8Article 39. Under Article 41, the Yang Di Pertuan Agong is also the Supreme Commander of the armed forces while being the head of Islam at the federal level. He grants, under Article 42 "pardons, reprieves and respites of all offences committed in the Federal Territories of Kuala Lumpur and Labuan".

9Article 40. However, the Agong may, under clause (2) of the same article, act under his discretion in the performance of (a) the appointment of the Prime Minister; (b) the withholding of consent to a
The country's judiciary, regulated under Part IX of the Constitution and the
Courts of Judicature Act 1964 had been fairly independent until 1988 when the
judiciary crisis of that year constituted a setback in its independence.\(^1\) Its highest
court is the Supreme Court under which there are "two High Courts of co-ordinate
jurisdiction"\(^2\) each in the Borneo States of Sabah and Sarawak and in Peninsular
Malaysia. Below the High Court are the Sessions Court, the Magistrate's Court and
the Penghulu's Court (Headman's Court). Although the appointment of judges is no
longer subject to the pleasure of the sovereign as was the case during British rule\(^3\),
current appointments are made pursuant "to the advice of the Prime Minister."\(^4\)

Malaysia’s present prosperity as one of Asia’s better-performing economies is
largely the result of trade in oil, rubber, palm oil, tin and other commodities.
Immigrant labour, which eventually settled in the country in the 1930's, had been a
characteristic feature in the Malayan economy since early British intervention. This
trend has recurred in recent years consequent upon the influx of more than a quarter
of a million Indonesian, and other foreign Asian workers\(^5\) seeking employment in the
construction and agricultural sectors in the country. As a result of this and other
factors, Malaysia today is a society of several distinct ethnic and cultural
communities.

Although Malaysia is not a Muslim state as are Pakistan and Iran, Islam is the
official religion under Article 3 of the Constitution. Most Malays are Muslims but
Malaysians are free to practise their own faiths, as most of the Malaysian Chinese
follow Buddhism, Confucianism, or Taoism. Most Indians follow Hinduism.

It is helpful to understand the developments in the country since 1969,
particularly in respect of the outbreak of racial violence in May of that year and the
government's plan to restructure the Malaysian society that followed this disorder.

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\(^1\)See Chapter 7 infra.
\(^2\)Article 121.
\(^3\)See for example Terrell v. Secretary of State for the Colonies (1953) 2 Q.B.D. 482. Per Lord Goddard CJ.
\(^4\)Article 122B(1).
Briefly, the riots which involved Malays and Chinese in Kuala Lumpur on 13 May 1969 were initially sparked as a result of political and economic differences between the two communities. The Malays were dissatisfied with their economic welfare while the Chinese, economically superior, wanted more political rights. The government acted on both the political and economic levels to prevent a recurrence of such violence by proclaiming another state of emergency which the Agong did under Article 150. The government also resorted to the use of authoritarian powers to back up its political manoeuvring, including the restricting of the activities of opposition parties. On the political level, Parliament was suspended for almost two years and the country was once again placed under emergency rule.

Several matters such as special privileges of the Malays, the National Language, citizenship and the position of the Rulers were, following a constitutional amendment, barred from public debate. While the 1969 emergency proclamation has never been officially terminated the Malaysia Plan, created especially to accommodate the daunting task of nation-building after racial tension, continued at five-year intervals until 1990.

The phrase 'Rule of Law' is widely known in Malaysia because it was made part of the Rukunegara or the 'pillars of the nation', a five-point national philosophy

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1The incident is known locally as the "May 13 Racial Riots". The clash was between Malays and Chinese over issues concerned with economic imbalance and political powers. See generally Tunku Abdul Rahman, May 13: Before and After, Pustaka Antara, Kuala Lumpur, 1974; Goh Cheng Teik, Racial Politics in Malaysia, Kuala Lumpur 1978.


4The first emergency rule, effected to counter communist terrorism, was for the period 1948-1960. See Chapter 5 infra.

5See Article 153 of the Constitution.

6I. e. Malay: see Article 152.

7Constitution (Amendment) Act 1971 (A30).


10The Rukunegara, created soon after the 1969 racial riots in Kuala Lumpur, was aimed at unifying the people under one national concept. Although it has been likened to the Indonesian Pancasila which is part of a presidential decree and thereby has the force of law, the Rukunegara has no legal backing. It is more of a social restructure campaign which of late has lost its significance and zeal. See Rukunegara (pamphlet), Department of Information, Kuala Lumpur, 1971. The Rukunegara is also included as preamble in all the Five-Year Malaysia Plan publications produced by the government. For a discourse on the Rukunegara by one of its progenitors, see Tan Sri Ghazali Shafei, Rukunegara, A Testament of Hope, Kuala Lumpur, 1983.
publicised by the Government in the aftermath of the May 1969 racial disturbance. With a view to harnessing ethnic and national unity for the whole country the Rukunegara enunciated the following five principles:

1 Belief in God
2 Loyalty to King and Country
3 Upholding the Constitution
4 Rule of Law
5 Good Behaviour and Morality

Although 'loyalty to King and Country' occupies the second position in the Rukunegara, in effect it supercedes the other principles. The Rule of Law in the Rukunegara did not necessarily mean the same as the rule of law conceived by Dicey or the various ICJ congresses. It was not particularly concerned with the checks and balances necessary in the popular notion under a modern democratic system. It was proclaimed to mean no more than that the rules and regulations made by the government must be followed. In 1971 Tun Abdul Razak who succeeded Tunku Abdul Rahman as Prime Minister made the following statement:

Ours is a young nation and the democratic system is still new to our country. We cannot practice the democratic process as it is practised in such developed nations as Britain, Sweden or the U.S. We must understand the background of the democratic evolution of those countries... National unity cannot be achieved in Malaysia unless the economic of imbalance existing among the communities is rectified and unless the nation's prosperity is enjoyed much more equitably among the people.

In 1974 the Alliance coalition was enlarged and reorganized into the Barisan Nasional (BN) or National Front, which encompassed a wider political spectrum. Its three major components are the United Malays National Organisation (UMNO), the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC).

1 The Rukunegara was proclaimed by the Agong on 31 August 1970 in a speech delivered in Parliament. The 13 May 1969 racial riots, resulting in the death of thousands was caused by economic, political and social differences in post-Merdeka Malaysia. The incident caused the government to re-evaluate and implement new strategies. Security as well as economic considerations were put in priority. The New Economic Policy (NEP), giving Malays an assured 30% stake in the national economic cake was implemented.

2 Speech to the Alliance members of Parliament and Assemblymen on the eve of the opening of Parliament House after the emergency: the Straits Times 18 February 1971.

3 The BN absorbed the major opposition party - the Pan-Malayan Islamic Party (PMIP) or PAS as it has been popularly known to become a component of the Barisan Nasional (the former Alliance) in
In terms of an economic response to the May 1969 racial disturbance, the government created the First Malaysia Plan under which the New Economic Policy (NEP) was introduced with its avowed two-prong objectives: to eradicate poverty irregardless of race and to restructure society. The NEP sought discriminately to emplace Malays and Bumiputra (natives or 'sons of the soil') in at least 30% ownership of all commercial and industrial mainstream activities in the country by 1990. This essentially pro-Malay policy was the brunt of the NEP following the 1969 racial riots. Although the NEP has been accepted as a fair socio-economic redress, it has not been without its problems. Segments of the Chinese population resent these Bumiputra affirmative action programmes. The quota system also leaves room for abuse. Under the so-called Ali Baba ruse, for example, a Malay obtains a contract, licence, or franchise on behalf of a Chinese. In this way a substantial number of Malays make up the middle class and politically allign themselves to safeguard the interests of UMNO and its leaders.

The granting of business tenders, scholarships and appointments in both public and private sectors are substantively controlled through the ethnic and political affiliations to the UMNO and other component parties in the BN. A more significant problem, however, is the large number of Malays who have not substantially benefitted from the NEP quotas. They remain too poor to leave their rural homes, or not skilled enough to find a job. The NEP programme may be creating a small elite of government-sponsored Malay businessmen, while leaving most Malays in the pre-NEP circumstances. The objective of apportioning to the Malays 30% ownership of all commercial and industrial mainstream activities in the country failed. For these

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3 Harold Crouch, op. cit., pp. 140-50.
4 Ibid. p. 142. It was this tendency that was challenged in the case of Lim Kit Siang v. UEM (1988) 1 SCR 71.
reasons the NEP has been a failure and when it expired under the 5th Malaysia Plan (1985-1990) the government replaced it with the National Development Plan (NDP) under which the Malaysian Government announced in 1991 that by the year 2020 the entire country is to be fully industrialised.¹

1.7. Politics and Government

The Barisan Nasional (BN) Government, as has been seen, has ruled Malaysia since Merdeka. It enjoys a political base constructed upon the support of its rural constituencies which are predominantly Malay-based.² Political affiliation in the country has been structured on racial lines. The UMNO, the spinal party within the BN draws its grass-roots support from the Malays but formulates the necessary power hierarchy and the system of administration for the whole country on a communal basis. The three major racial denominations in the country - Malays, Chinese and Indians are roughly divided into three political parties: The United Malays National Organisation (UMNO), the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC) respectively. Although there has been an attempt in 1992 to invite non-Malays into the UMNO, the effort failed because the UMNO constitution stipulates that only Bumiputras³ may be conscripted as members.⁴ Thus, while multiracialism is the country's avowed philosophy, political racialism has been a fierce competing phenomenon. The UMNO leads the political pack within the BN. Of the 25-member Malaysian Cabinet in 1993, fifteen are

¹See Dr. Mahathir Mohamed, "Malaysia: The Way Forward", (pamphlet), Biro Tatanegara, PM's Department, Kuala Lumpur, 1991. This was a policy speech delivered at the launching of Malaysia's Business Council in Kuala Lumpur on 28 February 1991. The speech has since been titled Wawasan 2020. For an official appraisal of Malaysia's role in the years 1990-1995, see Rancangan Malaysia Ke Enam (Sixth Malaysia's Plan), op. cit.
³Bumiputra literally means "sons of the soil". This is a political term used to denote the Malays and other indigenous peoples of Malaysia. It was coined soon after the 13 May 1969 racial riots. According to the late Tan Sri Abdul Kadir Yusof, a former attorney general interviewed by the writer in 1990, the term was suggested by Tan Sri Ghazali Shafie, a former Home Minister who membered the National Operations Council (NOP) at its 2nd meeting in May 1969. Malaysians of Chinese or Indian stock are not embraced by the term.
⁴Article 3 of the constitution of the United Malays National Organisation (UMNO).
Malays. Key portfolios such as the premiership and its deputy, education, defence, finance and internal security have been filled by Malay leaders from UMNO since merdeka.

The judicial as well as the Malaysian Civil Service, the Police and Armed Forces are also predominantly Malays, a state of affairs very much similar to the policy applied during the British administration. Indeed it is correct to say that this policy has been unhindered since the protectorate system of government in the Malay States in the last quarter of the nineteenth century. As a result, Malay political assertion and its pivotal role in government have become one of the chief concerns of political observers in recent years.

1The MCA holds 3 ministerial posts, the MIC 1 and the Gerakan 1.
2The total number of the public sector personnel as represented by the Civil servants inclusive of the police and military is in access of 850,000. See Government of Malaysia, Anggaran Belanjawan Program dan Prestasi 1993, National Printing Department, Kuala Lumpur.
3This policy was made part of the preamble to the Federation of Malaya Agreement 1948. It stems from the British willingness and agreement that the sovereignty of the Malay Rulers (hence their subjects) was to remain intact despite British Rule under the Protectorate system. See generally R. Braddell, The Legal Status of the Malay States, Singapore, 1931.
CHAPTER 2

The Development of the Rule of Law and Executive Power in Malaya Leading up to the Reid Commission 1957

And whereas the time has now arrived when the people of the Persekutuan Tanah Melayu (Malaya) will assume the status of a free independent and sovereign nation among the nation of the world and . . . whereas a Constitution for the government of the Persekutuan Tanah Melayu has been established as the supreme law thereof and provision is made to safeguard the rights and prerogatives of their Highnesses the Rulers and the rights and liberties of the people and to provide for the peaceful and orderly advancement of the Persekutuan Tanah Melayu as a constitutional monarchy based on parliamentary democracy. - Tunku Abdul Rahman, 31 August 1957, Malaya's Merdeka (Independence) Day.

2.1. Introduction

By the time Malaya received its merdeka or independence in 1957 the constituent Malay States1 had experienced a long history of their own administration of justice. This chapter puts into perspective the development of the rule of law and executive power through the relevant phases of British administration in the Malay States before merdeka (independence) in 1957. As we shall see, the basic characteristics of the rule of law were not in place well before independence.

The history of Malaysian law is inevitably interrelated with the history of British intervention in Malaysia. The essence of British involvement in Peninsular Malaysia until 1946 can be divided into three stages. Firstly, the East India Company (EIC) established outposts in Penang, Singapore and Malacca between 1786 and 1867. These outposts were later transferred to the British Crown and subsequently formed into the colony of the Straits Settlements under the responsibility of the British Colonial Office.

In the second stage, between 1874 and 1895, Britain entered into treaties with the State Rulers of Perak Selangor, Negeri Sembilan and Pahang whereby in exchange for British recognition of their claims to be rulers of these states, each agreed to accept a British Resident whose advice had to be asked for and acted upon

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1 The original Malay States comprised of the states of Perlis, Kedah, Kelantan, Terengganu, Perak, Selangor, Negeri Sembilan, Pahang and Johore. Penang and Malacca, formerly being part of the Straits Settlements, joined the Federation of Malaya by virtue of the Federation of Malaya Agreement 1948.
on all matters other than those touching on Islam and *adat* (Malay custom).\(^1\) This modality of government called the Resident System made the Resident the chief executive in the state. In 1895 the Rulers of these states formed a federation known as the Federated Malay States (FMS)\(^2\) which was administered under the advice of the British Government.\(^3\)

The last stage was between 1909 and 1923 when the Unfederated Malay States (UFMS) of Kedah, Perlis, Kelantan, Terengganu and Johore came under British protection by separate treaties with the Rulers of these states. The import of these treaties were similar to those entered into by the rulers of the FMS, namely, that each agreed to accept a British Resident whose advice had to be asked for and acted upon on all matters other than those touching on Islam and *adat*.

The term Malay States refers to both the Federated and Unfederated States each of which group were British protectorates in contrast to the Straits Settlements which were Crown Colonies. In East Malaysia, the British North Borneo Company succeeded in securing several concessions from the Sultan of Brunei from 1865 onwards. By its charter, the Company was required, *inter alia*, to administer justice with due regard to the native customs and laws and not to interfere in the religion of the inhabitants.\(^4\) In 1882 the British North Borneo Company was formed to take over the administration and by an agreement of 1888 North Borneo, together with Brunei and Sarawak became protected States.\(^5\) In June 1946 the British North Borneo Chartered Company ceded the territory of North Borneo to the British Crown. Similarly, the cession of Sarawak to the Crown was authorised in May 1946, by order made by the Rajah acting with the advice of the Council Negeri (State Council).

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1. A typical clause contained in all these treaties is worded thus: "They (the Rulers) undertake to provide him (the British Resident) with suitable accommodation, with such salary as is determined by His Majesty's Government, and to follow his advice in all matters other than those touching the Mohammedan religion." - Clause 4 of Treaty of Federation 1895, W.G. Maxwell and W.S. Gibson, *Treaties and Engagements affecting Malay States and Borneo*, Jas Truscott & Son Ltd., 1924, p. 71.

2. The constituent states of the FMS were Perak, Selangor, Negeri Sembilan and Pahang. The first treaty entered into was the Treaty of Pangkor 1874 between the State of Perak and His Britannic Majesty.


Much of what is understood to be the rule of law prior to merdeka depended on what the English common law brought into the Straits Settlements and the Malay States.\(^1\) Despite the impact of Dicey's elucidation of the rule of law in England in 1885\(^2\), there had been no particular and direct reference made to the doctrine of the rule of law either by the local courts or the pre-merdeka legislature. Despite this, the notion of justice in the English common law had not been overlooked.

The legal systems of Malaysia and more particularly that of Singapore\(^3\) have drawn much from the English common law in the past 160 years. The common law still occupies a central position in the legal systems of the two countries. As for Malaysia, many of its legal norms have resulted from the direct and indirect application of common law principles and rules of equity. With the attainment of merdeka in 1957 the Malay States experienced for the first time the force of a formal constitution that boasted of the several tenets of the rule of law, including fundamental rights\(^4\) and a demarcation of powers and functions for the executive\(^5\), legislature\(^6\) and the judiciary\(^7\).

2. 2. Reception of English Law in the Straits Settlements and the Malay States.

The British administration of justice in the early days of the country was characterised by a lack of separation between the judiciary and the executive. In the Straits Settlements which in the main comprised Penang, Singapore and Malacca the courts established under the First and Second Charters of Justice of 1807 and 1826 respectively were of this type. The 1807 Charter established the Court of Judicature of the Prince of Wales Island while the second Charter established the Court of Judicature of the Prince of Wales Island, Singapore and Malacca. Both courts were

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1 See note 1 at p. 42 in Chapter 1 ante.
3 Singapore first attained self-government in 1959 and received independence within Malaysia on 23 September, 1963.
4 See Part II of the Constitution.
5 Articles 39-43 (Part IV Chapter 3).
6 Articles 44-66 (Part IV Chapter 4).
7 Articles 121-131 (Part IX).
comprised of lay as well as professional judges known as Recorders. The lay judges comprised the Governor, being the chief executive authority of the State and members of the Executive Council.\footnote{W.J. Napier, \textit{An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements}, Government Printer, Singapore, 1898, p. 7} The Charter provided that the Governor was to take precedence over the Recorders.

It was only in 1867 when the Straits Settlements ceased to be under the control of the EIC and came under that of the British Government in India that the judiciary became separate from the executive. The Governor only ceased to be a lay judge under the Straits Settlements Act III of 1867 while the Councillors gave up their judicial office under the Straits Settlements Ordnance No. 5 of 1868.\footnote{J.W.N. Kyshe, \textit{Cases Heard and Determined in H.M's Supreme Court of the Straits Settlements}, Singapore & Straits Printing Office, Singapore 1885, Vol. 1 p. civ.} With the establishment of the Supreme Court of the Straits Settlements in 1868 the Recorders of the former courts of judicature became the sole judges.

The majority of the Straits Settlements statutes on civil and criminal jurisdictions were directly derived from Indian Statutes, pursuant to British rule there. There were efforts to recognise Islamic Law as \textit{lex loci} in the courts but the Privy Council rejected the attempts.\footnote{Fatimah v. Logan (1871) 1 Ky. 611} As colonies of the Crown, the Straits Settlements were regulated through English law and its administration, causing one scholar to wonder:

\ldots how does it come about that Singapore, a small island situated at the southern tip of the Malay Peninsula, inhabited in the main by Chinese, Malays and Indians, \ldots and who practise most known varieties of religions, is in large measure governed today by a law which is to a great extent recognisably English in derivation?\footnote{G.W. Bartholomew, "The Singapore Legal System", in Riaz Hassan (ed.), \textit{Singapore: Society in Transition}, Oxford University Press, Kuala Lumpur, 1976 at p. 84.}

After examining the relevant administrative elements of British administration in Penang, Malacca and Singapore he drew a clear conclusion:

The short answer is, of course, colonialism. The application overseas of law which is historically derived from that of England is but one of the consequences of the establishment of the British maritime empire - in other words of colonialism.\footnote{\textit{Ibid.}}
Thus the common law became the law of the land in the Straits Settlements through the First, Second and Third Charters of Justice. It was under the specific direction of the above Charters of Justice that the Straits Settlements courts recognised and practised what was handed down as "justice and right" a phrase which is thought by some scholars to have been probably drawn from the Magna Carta.¹

Actions began to be instituted by way of writs of summons in 1868.² The year 1870 saw the enactment of the Civil Law Ordinance under which the Supreme Court of the Straits Settlements were to administer common law and equity concurrently.³ The Straits Settlements Civil Law Enactments of 1870 and 1878 were the first pieces of legislation that directly imported the English law of partnerships, corporations, banking, principals and agents, carriers by sea, marine insurance, life and fire insurance and mercantile law. These eventually found their way into section 5(1) of Singapore's Civil Law Ordinance (1906) which was in turn imported into the Federated Malay States to become part of their Civil Law Enactment 1937. The latter then became the Federation of Malaya's Civil Law Ordinances 1956 but the law of England relating to conveyancing and succession in immovable property was excluded, with the Australian system of indefeasibility of title by registration being preferred.⁴ By this time there was in existence a Legislative Council which provided for a law-making process for the Settlements.

²See Ahmad bin Ibrahim, Towards a History of Law in Malaysia and Singapore, Singapore. 1970 at p. 39
³In England the rules of equity have always interacted closely with the common law. In 1873 common law and equity were merged and administered jointly, supremacy being given to equity. See Re Hallet's Estate (1879) 13 Ch.D. 696 where Jessel M.R. ruled: "The rules of equity have been established from time to time, altered, improved and refined from time to time." p. 710.
Although the colony's criminal law followed the principles laid out in the English criminal law, the Penal Code (fashioned after the Indian Penal Code) was introduced in 1872 together with the Criminal Procedure Code (CPC), also almost a clone of the Indian CPC.¹ During Singapore's interim period as a constituent state within the Federation of Malaysia² her Court of Appeal was positioned directly under Malaysia's Federal Court in Kuala Lumpur. Singapore did not create her own Supreme Court of Judicature immediately after breaking away from Malaysia but waited until 1970, five years after her separation from Malaysia have become effective.

Unlike the Straits Settlements, the Malay States - denoting the present states in Peninsular Malaysia - were, as we have seen, not technically colonised but were British Protectorates.³ In the Malay States the administration of justice followed the general trend in the Straits Settlements but came about in rather a different way. There were no Charters of Justice to begin with and the common law and rules of equity came about through direct influence of the British civil service. As one writer observes, "What little we know and understand of Malay legal and judicial systems, we owe to the reconstructions of a generation of colonial officers of impartial scholarship, who worked and wrote when Malay justice, as a function of government, was receding into the past."⁴

Although the introduction of English law into the Straits Settlements was by way of the three Charters of Justice referred to above, as subsequently confirmed by

¹ R. Braddel, op. cit. p. 41.
² Singapore was within Malaysia from 16 September 1963 until 9 August 1965.
³ Braddell, penned thus in 1931: "Great Britain's protectorate over the Federated Malay States and Johore does not amount to full right of property or sovereignty but is good as against other civilized states so as to prevent occupation or conquest by them and so as to debar them from maintaining relations with the protected states. It differs from a colony in that the protected states do not form an integral portion of the territory of Great Britain." See Roland Braddell, *The Legal Status of the Malay States*, Singapore, 1931. For the distinction between a "protected state" and a protectorate with special reference to Malaya, see A.B. Keith, *The Governments of the British Empire*, London, 1936 at p. 509.
the series of cases commencing from 1808\(^1\), it was the Straits Settlements Civil Law Ordinance 1878\(^2\) that properly effected reception of English law into the colony towards the close of the nineteenth century. The main instrument that formally introduced the common law and equity into the Malay States was the Civil Law Ordinance 1937 which was later largely enacted as the Civil Law Ordinance 1956.\(^3\) Section 3 of the Civil Law Ordinance 1956 provides, inter alia:

(1)...the court shall apply the common law of England and the rules of equity as administered in England at the date [April 7, 1956] of the coming into force of this Ordinance; Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(2) subject to the express provision of this Ordinance or any other written law in force in the Federation...in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

The Rules of the Supreme Court 1883 of England as revised in 1962 and 1965 were adopted with minor modifications for use in the Federated Malay States. Thus by way of British administration, the common law was slowly accepted as the legal system, as Islamic law gradually lost its position as *loxi loci*.\(^4\) While *adat* (custom)\(^5\) continued to hold sway over the Malays it also did not develop into a


\(^{3}\)Civil law Ordinance No.5 of 1956

\(^{4}\)Wilkinson concluded in 1922: "There can be no doubt that Moslem Law would have ended by becoming the law of Malaya had not British Law stepped in to check it." Wilkinson’s finding holds water because as a keen student of Malay subjects he saw the prevalence of Islamic law intertwined with *adat*; and there being no other views to the contrary, one may assume that the British did decide very early in their administration to confine local laws to a subsidiary position. See R.J. Wilkinson, *Papers on Malay Subjects*, "Malay Law Part I", 1922, p. 89.

\(^{5}\)Adat in Malay means convention, usage or custom, having some attributes of law. They are the society's tradition often interlaced with Hindu and Islamic traits, passed from generation to generation. *Adat Perpatih*, derived its origin from the Minangkabau Malays in West Sumatra in the 15th century. *Adat Temenggung* is the body of traditions, usage and conventions largely observed by royal courts, on the *pesisir* or coastal areas of Negeri Sembilan, Malacca and parts of Selangor. Like *Adat Perpatih*, *Adat Temenggong* also originated from Sumatra. See R.J. Wilkinson *Malay Law*, London 1963 pp. 24-43; M. B. Hooker, *Readings in Malay Adat Law*, Singapore, 1970. Most of the *adat* or customary laws of the Malays in Peninsula Malaysia fall under either *Adat Perpatih* or *Adat Temenggung*. Of the two, the former is considered more equitable and democratic while the latter is more harsh and direct. As for the application of Adat Laws in the State of Negeri Sembilan - see Rais Yatim, *The Hierarchy of Adat Perpatih in Negeri Sembilan*, (unpublished LL.B research paper)
distinct legal system although its position as the customary law of the Malays has been maintained. Isabella Bird, the renowned English traveller who visited the Malay States for five weeks in 1879 had this to say about adat:

"It is from the Golden island, the parent Empire of Menangkabau, that the Malays profess to derive both their criminal and civil law, their tribal system, their rules for the division of land by boundary marks and the manner of government as adapted for sovereign and their ministers. The existence of the various legal compilations has led to much controversy and even bloodshed between zealots for the letter of the Koran on one side and the advocates of ancient custom on the other." 1

However, this observation had been superseded by events connected with British intervention in the Malay States. The common law tradition and a broadly similar court system as practised in the Straits Settlements had by this time taken root in the various territories.

2.3. The Administration of Justice in the Malay States

The Malay States2 have had a chequered history and the many historical works on modern Malaysia adequately depict this claim.3 Malay political power started in 1403

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2Singapore and the States on the Malay Peninsula (including Penang and Malacca) were historically identified by the British as the "Malay States" from the time Penang was ceded to the East India Company in 1786 by the Sultan of Kedah. But after the establishment of the Straits Settlements in 1824 the term Malay States narrowed down to the following states on the Malay Peninsula: Kedah, Perlis, Kelantan, Terengganu, Perak, Selangor, Negeri Sembilan, Pahang and Johore. Each of these states has its own Sultan or the Ruler. Among these, Johore state had its first constitution in 1895 followed by Terengganu in 1911. The rest of the Malay States received their respective constitutions only after the signing of the Federation of Malaya Agreement in 1948. See Report of the Federation of Malaya Constitutional Commission (The Reid Commission), Government Printer, Kuala Lumpur, 1957 pp 7-13.

with the founding of Malacca on the western coast of the Malay Peninsula as the seat of the Malay Sultanate. It prospered as the centre of entrepot trade in South East Asia and attracted merchants from as far away as China, Portugal and Holland.

Under the authority of various Order-in-Council a variety of instruments, inclusive of those regulating the courts, criminal offences and criminal procedure came into force, firstly in the FMS and later followed in the UFMS. Among the early instruments were the Courts for Civil cases 1884 Order-in-Council, (Perak). The Criminal Procedure Code (CPC) and the Penal Code were introduced in 1902 and 1905 respectively. In 1909 the first comprehensive Evidence Enactment was in force.\(^1\) The Sultan in Council was established as the final court of appeal and conferred with full powers of revision, confirmation and reversal. In effect, however, the Resident was the real decision maker in the State Council. There was no separation of the judiciary from the executive.

The pressure on both judicial and administrative duties on the Residents necessitated the establishment of Courts of Senior Magistrates with unlimited original jurisdiction and appellate jurisdiction to hear cases from the Magistrates' Courts. The Senior Magistrates' Courts heard most of the serious civil and criminal cases and relieved the Resident of much of his judicial duties. In theory the Resident remained the chief judicial officer and retained for himself the power to review the decisions of the Senior Magistrates.\(^2\) In addition to having an appellate jurisdiction to hear appeals from the Senior Magistrates the Resident, on his initiative, could impose further changes on the judicial powers of the Senior Magistrates. For example, in Selangor, the Senior Magistrate had to submit a weekly return of the proceedings of criminal cases to the Resident who could then order further enquiries or review the sentence according to his discretion.\(^3\) As subordinate executive officers, the Senior Magistrates

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were subject to the control of the Resident. When the FMS were formed in 1895 a common form of legislation was passed in each of the States\(^1\) establishing a common Court of Appeal called the Court of the Judicial Commissioner. This court was presided over by a professional judge who heard serious criminal and civil appeals. The Judicial Commissioner, in addition to being sole judge of the highest court in these states acted as the central administrative body co-ordinating the development of the courts and judiciary in these states and being generally responsible for the administration of justice in the FMS as a whole.\(^2\)

The origins of the High Court in present day Malaysia can be traced to 1900 when the powers of the Senior Magistrates Court were re-defined by means of legislation.\(^3\) The jurisdiction of the present day High Court is very similar to that of this Court. In 1903 the Supreme Court of the FMS was established consisting of a Court of Appeal and a Court of Judicial Commissioners. This was designed to take the place of the former court of Judicial Commissioners and the Senior Magistrates' Court respectively. The Supreme Court was not a federal court, having been established in each of the States by state legislation passed with the assent of the Ruler of the State and having jurisdiction only in respect of the state concerned. It was only in 1918 that a federal Supreme Court was created for the FMS by federal legislation.\(^4\)

In 1925 the title Judicial Commissioner for the judges of the Supreme Court was abolished and the title was formally altered to "Judge".\(^5\) The UFMS had each their own Supreme Court though the constitution of the court varied from state to state. Thus the UFMS were independent units, each with a separate constitutional structure and a separate judiciary that was more suited to the administrative needs of

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1 See Perak Order in Council 6 of 1896; Pahang Enactment 2 of 1896; Selangor Regulation VII of 1896 and Negeri Sembilan Enactment VIII of 1896.
3 Perak Enactment No.5 of 1900; Selangor Enactment No. 2 of 1900; Negeri Sembilan No. 7 of 1900 and Pahang Enactment No. 8 of 1900.
4 Federal Enactment No. 14 of 1918.
5 The Judicial Title Enactment 1925 (Section 2 of the FMS Enactment No. 5 of 1925).
the day than to any demand that may be made by the concept of separation of powers. For such a small region the multiplicity of governmental structures was remarkable. This arrangement could generally be regarded as inefficient and inimical to the development of a common policy for the whole region. Although this was generally the case, it would be inaccurate to regard the sphere of judicial administration in these territories as exhibiting major dissimilarities. Certainly there were more similarities than differences.

The British did much to encourage the Malay Rulers to participate in the affairs of government of each State. From 1915 until 1927, for example, Rulers of the Federated Malay States took turns to co-preside over the Federal Council proceedings in Kuala Lumpur together with the respective British High Commissioners. The encouragement to enlist Malays in the civil service started very early during British rule. This was to have a lasting effect. The general safeguards of Malay rights and privileges became entrenched in the Merdeka Constitution of 1957. The overriding policy of the British administration was one of measured restraint. Sir Hugh Clifford who was High Commissioner in 1927 addressed the Federal Council in Kuala Lumpur in the following term:

These States were, when the British Government was invited by their rulers and chiefs to set their troubled house in order, Mohammadan Monarchies: such they are today and such they must continue to be. No mandate has ever been extended to us by Rajahs, Chiefs or people to vary the system of government which has existed in these territories from time immemorial.

In terms of statutes, the Criminal Procedure Code, the Penal Code, the Evidence Enactment and the Courts Enactment 1906 strengthened the presence of the
rule of law in the Malay States as these laws established the necessary provisions that countered arbitrary powers by safeguarding the rights of the accused person. In 1896, for instance, it had already been stressed in a judicial report that every effort ought to be taken in order to ensure that fair trials in the Federated Malay States be maintained.\(^1\) In the late 1920's it was already common for the citizens to apply to the courts for the writs of *habeas corpus* where a detention had been effected by the executive. In the 1933 case of *Re Abdul Hamid* \(^2\), for example, the FMS Supreme Court ruled that an application for the discharge of a person detained under the Extradition Enactment 1914 had to be made under section 363 of the Criminal Procedure Code 1926.\(^3\) Earlier, in *Ho Chik Kwan v. Public Prosecutor*\(^4\) it was ruled that it was the duty of the Supreme Court to satisfy itself that the necessary preliminary steps conferring the right upon the British Resident to exercise his powers under the Banishment Enactment 1900 have been taken strictly in accordance with the law. In 1930 it was already well established that a person was not improperly nor illegally detained when he had been sentenced to imprisonment by a judge of the Supreme Court in a case properly brought before him and the legality of the sentence could not be challenged in an application of *habeas corpus* under section 363 of the Criminal Procedure Code 1926.\(^5\)

More than two decades prior to *Merdeka* the rules of natural justice were already clear and guiding principles in the Malay States. In *Motor Emporium v. Arumugam*\(^6\) Terrell Ag. C.J. made the following observation regarding the common law, the rules of equity and natural justice in the Malay States:

> It is said that the English rules of equity, as administered by the Court of Chancery, have no application in the courts of the Federated Malay States as the court has not been given the jurisdiction of the Court of Chancery, nor is there any Civic Law enactment incorporating into the law of the Federated Malay States the equitable principles applied in England. This is perfectly true, so far as it goes, but under Section 49(1) of the Courts Enactment, the Supreme

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\(^1\) See *The Judicial Commissioners' Report to the Resident-General for the Year 1896*, Kuala Lumpur, pp. 131-134.

\(^2\) (1933-1934) FMSLR 105

\(^3\) Cap. 6 FMS

\(^4\) (1931-1932) FMSLR [C.A.] 271

\(^5\) *Gurbit Singh v. Public Prosecutor* (1930) FMSLR 173

\(^6\) (1933) M.L.J. 276
Court has the widest possible jurisdiction in all suits, matters, and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered. Looked at in this light, it would hardly be reasonable to exclude in the Federated Malay States a principle of natural justice merely because a not less civilised community, namely England, has adopted such a principle as part of its recognised legal system. On the contrary it is a cogent reason for adopting the same principle in the Federated Malay States. The Courts of the Federated Malay States have on many occasions acted on equitable principles, not because English rules of equity apply, but because such rules happen to conform to the principles of natural justice. (emphasis supplied).

There was, however, to be an irony in the fate of a judge like Terrel who twenty years later, in 1953, had to take action against the Secretary of State for the Colonies for having prematurely dismissed him as a judge. Terrell was 52 when he was appointed as a puisne judge of the Supreme Court in Malaya in 1930 by the Crown by Letters Patent. Inclusive in the appointment was that he was to serve 'at pleasure of His Majesty'. Terrell was to be put on the pensionable scheme and that he was to serve until he attained the age of 62. Terrel was on leave in Australia when the Malay States fell to the Japanese in 1941. After the War he was notified by the Secretary of State that his services as a judge could not be continued on certain technical grounds. Lord Goddard CJ, delivering judgment of the court, found that judges appointed to serve in the colonies were to be truly serving at His Majesty's pleasure and thus rendered themselves defenceless at the instance of a termination notice. His Lordship was unable to equate the position of a Supreme Court judge in the colonies with that of a Supreme Court judge appointed in England under section 3 of the Act of Settlement 1700. Thus Terrel's case stands for the proposition that there was no actual independence of the judiciary in the Straits Settlements and the Malay States although through the judgments of the court justice was seen to be done.

By 1933, however, the FMS executive government had already a number of draconian laws to its credit. In 1914, consequent to the First World War the first

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1 Terrell v. Secretary Of State for the Colonies (1953) 2 QB 482
2 No.12 & 13 Will 3 c.2
Emergency Enactment\(^1\) was passed and this was followed by two other emergency instruments in 1917\(^2\) and 1919.\(^3\) At the same time there were specific powers pertaining to \textit{inter alia} the control of printing and publications,\(^4\) arrests, detention, expulsion and deportation; the registration of aliens\(^5\), censorship and the control and suppression of publications.\(^6\) The third and more comprehensive Emergency Enactment was enacted in 1930.\(^7\) In 1933 the Restricted Residence Enactment,\(^8\) empowering the British Residents to restrict movement as well as residence of a person in the FMS, came into effect.\(^9\) With the coming into force of the Sedition Enactment in 1948\(^{10}\) it became unlawful to utter or publicise on seditious matters.\(^{11}\) As proven later, these experiences in security and public order maintenance proved useful not only for the British administrators prior to \textit{merdeka} in 1957 but also to the local executive government after the attainment of independence.

2.4. The Malayan Union 1945-1946

Immediately after the surrender of the Japanese forces in Malaya, the peninsula was placed under the governance of the British Military Administration (B.M.A.), a move intended as a transitional phase prior to the reintroduction of civilian rule. The B.M.A., as the governing authority of Malaya, only lasted for seven months\(^{12}\). During this period the administration of justice was not neglected for the Administration instituted a system of Courts of its own.\(^{13}\) All proceedings in the

\(^{1}\)No. 1 of 1914. This instrument contained certain provisions of the United Kingdom Defence of the Realm Act 1914. For further elaboration, see \textit{Federal Council Proceedings}. 27 April 1915.

\(^{2}\)The Public Emergency Enactment 1917 (No.1 of 1917)\(^{2}\).

\(^{3}\)The Continuance of Powers Enactment 1919 (No. 15 of 1919).\(^{3}\)

\(^{4}\)The Printing And Books Enactment [No 17 of 1915]. For the debate on this instrument, see \textit{Federal Council Proceedings} 16 Nov. 1915.

\(^{5}\)The Registration of Aliens Enactment [No 4 of 1917]. See also the Aliens Enactment No.1 of 1933. These legislation were repealed after \textit{Merdeka}.

\(^{6}\)These were provided under section 3(ii) of the Emergency Regulations Enactment 1930 (No. 10 of 1930)\(^{7}\).\(^{7}\)

\(^{8}\)Cap. 39 FMS \textit{Gazette} No. 2059/1933.

\(^{9}\)See Chapter 4

\(^{10}\)Act 15; c.i.f. 19 July 1948

\(^{11}\)See section 3.

\(^{12}\)From September 1945 to April 1946

\(^{13}\)For Rules and Procedure for Military Courts of the BMA, see \textit{BMA Gazette} 1945 Vol. 1.
BMA Court were by way of summons.1 The Superior Court of the B.M.A. was by the very nature of the Administration manned by military officers. Reported cases appear to suggest that the style of justice administered was rather "rough-and-ready" designed to accord with a common sense view of an idea rather than conform to principles of law.2 But civil liberties were not forgotten. In *Re Eric Woodford*3, for example, the accused charged with the offence of "helping the enemy" under section 3 of the War Offences Ordinance 1941 was released by the B.M.A. Superior Court on the ground that the prosecution failed to prove that the act of the accused was done with intent to help the enemy. Wing Commander Briggs, presiding, found that the act was "not designed or likely to give assistance to the military operations of the enemy or to endanger human life".4 The decision, handed down without the citation of a single case, can be regarded as fair even made in the midst of war. The B.M.A. period, a brief interlude in the development of Malaysia's legal system, remains insignificant.5

In 1946 the Colonial Office in London, partly influenced by certain quarters within the Malayan Civil Service, was enthusiastic about the "Master Plan" of amalgamating all of Britain's protectorates and colonies in Malaya and Borneo under one generic administration so that "... Britain's colonial empire should be made into a viable organisation in an age of giants."6 This master plan later became reality and was called the Malayan Union.7 Singapore, dictated by its favourable position as an economic as well as geo-political entity, became a separate colony by itself while Penang and Malacca were absorbed into the Union with the rest of the Malay States

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2Mohd Ariff Yusof, *op cit.* p. 80.
3(1946)12 MLJ 19. Decision of the Superior Court, B.M.A. before Wing-Commander F.A. Briggs (President), Major M.D. Wein and Captain J.T. Kerrigan.
4Ibid., p. 81
5Principal laws passed during the Malayan Union Government are compiled in *The Malayan Union Government Gazette* from 1 April 1946-31 January 1948, Kuala Lumpur, 1948.
7The Straits Settlements Repeal Bill was introduced in the House of Lords on 19.12.1945 and passed by the House of Commons on 18th March 1946 It became law on 19th March 1946. Great Britain, 420 H.L. Deb. 639-729.
of the Peninsula.\textsuperscript{1} There was no federal separation of powers. As a whole the states within the Union were to remain British protectorates. There was much dissatisfaction with the Malayan Union constitution, principally on account of its emphasis on centralisation. Arguments used by Malays opposed to the union scheme were directed not so much against the idea of closer integration of the Malay States, but against the "form and manner in which the proposals had been presented and the loss of rights, prerogatives and powers of the State Rulers and the destruction of Malay rule as it had been prior to the Japanese occupation."\textsuperscript{2} They contended that the result was the reconstitution of the Malayan States into a Crown Colony for all practical purposes except that of nationality.\textsuperscript{3}

The formation of the Malayan Union brought a great deal of dislocation to British rule in the Malay States. The Rulers were reduced to being mere figureheads in their respective states and citizenship was made open to all. The Malays were to lose their special privileges\textsuperscript{4} as subjects of their respective sultans. This development was vehemently opposed by the Malays who hitherto had given complete trust to British rule. The idea of a Union nationality had also caused concern to Malays on the ground that it might allow non-Malay citizens to be the majority, a fear which had been substantiated since the 1930's when the Chinese immigrants had already outnumbered the Malays.\textsuperscript{5} Opposition to the Union, partly encouraged by some former British civil servants like Sir Frank Swettenham and others,\textsuperscript{6} peaked at this

\textsuperscript{1}See Malayan Union and Singapore: Statement of Policy on future Constitution, Cmd. 6724, London 1946.
\textsuperscript{2}Ibid. p.11
\textsuperscript{3}Report of the Working Committee on Constitutional Proposals for Malaya (G.N.4122/1946 p. 67.
\textsuperscript{4}The special privileges of the Malays have been taken for granted as representing traditional elements of Malay constitutional and political rights ever since the Treaty of Federation 1895. See Tun Salleh Abas, "Traditional Elements of the Malaysian Constitution", in F.A. Trindade & H.P. Lee (Ed.), The Constitution of Malaysia: Further Perspectives and Developments, Essays in Honour of Tun Mohamed Suffian, Oxford University Press, Singapore, 1986, pp.10-12.
\textsuperscript{6}Many British civil servants at that time were discreetly opposed to the idea of forming the Malayan Union. Two of the notable ones were Mubin Shepherd, British Resident and Roland Braddell, legal advisor to Sir Ibrahim, Sultan of Johore. For a comprehensive analysis of the developments and issues leading to the failure of the Malayan Union, see generally C.J. Stockwell, British Policy and Malay
period and through the *United Malays National Organisation* (UMNO) formed in June 1946 with Malay royalty backing, the Colonial Office in London was under pressure to abandon the plan. The Malayan Union constitution\(^1\) never really got going and was soon superseded by the Federation of Malaya Agreement 1948. The Malayan Union remains as an object lesson in the folly of establishing a constitutional structure without prior local consultation.\(^2\)

In place of the Union was put into force the Federation of Malaya Agreement 1948 (FM Agreement). Although independence was not to be a reality until nine years later, it was this FM Agreement that partly paved the way for self-rule. It was provided *inter alia* that the British were to safeguard the sovereignty of the Rulers, the special rights of the Malays and legitimate interests of the other communities.\(^3\) Of great significance was the provision in the preamble to make preparations for self-government. This development disappointed the Communist Party of Malaya (CPM) which had been fighting for a "Communist Malaya" since the 1930's. Through their military wing, the CPM took arms against the British administration and began their tactics of banditry through mass murders and destruction to property, largely owned by British concerns.\(^4\)

It is worthy of note that during the Japanese occupation of Malaya the CPM co-operated with British forces and their cadres were even trained by British soldiers.\(^5\) Malayan communism had been the result of massive migration of Chinese workers from Shanghai and Canton through Singapore in the period after the First World War. This escalated and in the 1930's the Chinese began to outnumber the Malays. This development caused considerable security problems because of the

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\(^1\)Promulgated on 27 March 1946 (Malayan Union Gazette G.N. 2/1946)

\(^2\)See James P. Ongkili, *Nation-Building in Malaysia*, Singapore, 1985, Chapter 2. See also Mohd Yusoff Ariff *op cit.* p.46.

\(^3\)Section 19(1)(d) Federation of Malaya Agreement 1948.

\(^4\)James P. Ongkili, *op. cit.* p. 76.

communists' tendency to resort to violence and infiltrate local associations, especially the trade unions.\(^1\) As legislation on conventional crimes, security and public order were inadequate to counter this insurgency, a State of Emergency was proclaimed in June 1948.\(^2\) This was the first full-scale emergency declared and fought by native as well as British Forces. For the twelve years that it lasted, the emergency produced a deep-set impact on the lives of the locals particularly in relation to emergency rules and regulations that practically curtailed all forms of basic freedoms.

2.5. **The Federation of Malaya Agreement 1948**

Under the Federation of Malaya Agreement 1948\(^3\) (FM Agreement), there was a joint exercise of power by the United Kingdom Government and the respective Rulers of the Malay States. A strong federal government was established at the centre with a measure of State autonomy.\(^4\) Broadly, it demarcated legislative power to the centre and executive power to the States. It is to be noted that power was constitutionally weighed in favour of the federal executive; the High Commissioner\(^5\) appointed by the British Government with the consent of the Rulers ruled the Malay States as he deemed proper pursuant to an almost unbridled set of powers given to him under the said agreement. One overriding clause of the FM Agreement was that the Rulers were bound to act on the advice of the British Residents who led the administration of

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2. Proclamation of Emergency 1948 & Emergency Regulations 1948 (No. 10 of 1948)

3. No. 6 of 1948. The Agreement was signed by the then High Commissioner, Sir Edward Gent on behalf of His Majesty and the Malay Rulers on their own behalf.

4. The Preamble of the Agreement which was essentially Malaya's first uniform constitution under British rule, states: "And Whereas ...the Malay States and the Settlements should be formed into a Federation with a strong central government and that there should be a common form of citizenship...to be extended to all those who regard the said Federation or any part of it as their real home and the object of their loyalty." UMNO (the United Malays National Organisation), formed in 1946 criticised the common citizenship formula advocated on the ground that this would neutralise Malay rights as natives of the land.

5. The office of the High Commissioner was created pursuant to the "Agreement for the Constitution of a Federal Council" signed by the Malay Rulers in 1909. See also the Wilson Report, Appendix III, Treaty of Federation 1895, p. 41. This 'Treaty' was the Federated Malay State (FMS) Treaty 1895 which created the FMS as a limited form of federation from the component states of Perak, Selangor, Negeri Sembilan and Pahang."
each state except in matters pertaining to Islam and adat. Thus the FM Agreement continued to subsist with the High Commissioner wielding wide executive powers. Apart from Johore which had its own written constitution since 1895, written constitutions of many of the States date from 1948 and follow the broad aspects of the Agreement. At the centre as the Chief Executive was the High Commissioner who exercised power in some respects as a representative of the British Government and in other respects under authority jointly delegated to him by that government and the Malay Rulers. In this dual capacity, he held wide legislative and executive powers.

In exercising legislative power he acted upon the advice of the Federal Legislative Council of which he was President. It is clear that the Council was advisory in nature since the High Commissioner had overriding and reserve powers; he could refuse his assent to a Bill on the grounds of "public order, public faith, or good government", and he could declare any Bill not passed by the Council as having effect as if it were passed by that body on the same grounds. He was, of course, accountable to the Colonial Secretary who could reverse his decisions ultimately. At the State level, the Rulers were given similar reserve powers on matters within the State's competence.

Executive power at the federal level was exercised by the High Commissioner with the assistance of an Executive Council. In the States, State Executive Councils were established and the State administration functioned under a Menteri Besar (Chief Minister). At both levels, the High Commissioner or the Ruler could act in opposition to the advice given by the respective executive bodies.

1 Section 8 of the Agreement. The term British Resident had since 1874 been interchangeably used with that of British Adviser. The term 'advice' received, in 1876, a somewhat cynical reference in a letter by one of the Governors of the Straits Settlements that "Everyone in the Straits always knew that the Residents were actually ruling, hence it was surprising that the Colonial Office professed not to know." See Letter from W. Jervois to Lord Carnarvon, 10 February 1876 in CO 273/83 No. 62. Cited in D.A. Calman Indian Labour Migration into Malaya, 1967-1910 (Unpublished B. Litt Thesis), Oxford University, 1954 p. 137.

2 Powers to administer Malaya as an emergency state were amply given under the Emergency Regulations 1948. See Chapter 5 infra.

3 Section 17 of the FM Agreement states that "the executive authority of the Federation shall be exercised by the High Commissioner either directly or through officers subordinate to him..." Cf. the constitutional power of the Agong (King) under Article 32 of the merdeka Constitution 1957.

4 In the Settlements of Malacca and Penang the corresponding bodies were the Nominated Council and the Settlement Council. The principal officer was the Resident Commissioner who acted in the name of the High Commissioner. The latter held the reserve powers vis-a-vis the Settlements.
The innovative feature of the Federation of Malaya structure can be seen in the introduction of a body expressly vested with the power to interpret the FM Agreement. This was the Interpretation Tribunal established under section 153 of the Agreement. Headed by the Chief Justice and two other members - one appointed by the High Commissioner and the other by the Rulers "as and when occasion shall arise." Members of the Tribunal were Sir Harold Willan C.J. who acted as chairman, Pretheroe J., Haji Abdul Wahab bin Haji Abdul Aziz and Dato' Panglima Bukit Gantang, the Menteri Besar of the State of Perak. As may be seen, the composition of the Tribunal included only two judges, both British. It is also interesting to note that it did not debar a member of the State Executive Council i.e. the Menteri Besar from sitting and exercising what was essentially a judicial function. It is also significant that the other two members of the Tribunal were Malays, an important example of indigenous participation in the administration of justice at a high level preceding the Malayanisation programme of the judiciary in later years. At the State and Settlement level, local legislatures known as Council of States and Settlement Councils were established, and to this end States which hitherto had functioned without written constitutions now functioned under written ones.

The Tribunal was established with the power to interpret "this Agreement and every provision thereof" and its decision "shall be binding upon the parties to this Agreement....and shall not be called in question in any Court." This creates a curious position in view of the fact that the Supreme Court, established under Part VII of the Agreement, was not allowed to have this function. It would appear that there was here a latent intent to have political inputs to the decisions of the Tribunal. Hitherto, such broad power of review were by no means generally accepted. In 1940, for example, it was denied by the Court of Appeal in Anchom v Public Prosecutor. The issue before the Court was whether section 3 of the Offences by Muhammedan Enactment 1937, a Johore state law, was ultra vires the State Constitution and

1Section 153(2) of the FM Agreement.
2 (1940) M.L.J. 18 (McElwaine C.J.(S.S.); Poyser C.J. (F.M.S.); Gordon-Smith Ag. J.A.; Pedlow J.; Manning J.).
3(No. 47 of 1937)
therefore void. The court did not deem it proper to interpret the validity or otherwise of the impugned legislation on the ground that such an act on the part of the court would affect the sovereignty of the Sultan who had created the Johore Legislature and signed the relevant enactment into law. The court held that sovereignty in the State resided in the Sultan and the Legislature. The written Constitution of Johore, which was termed "this remarkable document",¹ could not, therefore, control enactment passed by the Sultan-in-Council. To hold otherwise, so the court found, would mean treating enactments "as the English Courts treat by-laws."²

The Interpretation Tribunal's life was brief and it heard only one reference, namely In Re Land Acquisition by the State of Selangor ³ where the Court of Appeal struck down a land acquisition order issued by the Selangor State in respect of a parcel of land intended for defence purposes. Willan CJ, chairman of the Tribunal, found that the High Commissioner had not fulfilled his duty under section 21 of the FM Agreement. Under section 21, before any parcel of land was to be acquired for any specific public purpose, the High Commissioner was bound to facilitate the state authority with a certification of public purpose. That this was not done became the key point for the Tribunal and the said acquisition was adjudged null and void. If the

¹Per Gordon-Smith Ag. J.A., at p. 23. One of the remarkable aspects of the Constitution of Johore 1895 was that under article 15 the Sultan was categorically debarred from any act to "surrender the country and its government" to any other government. Similar provision prevailed under section 14 of the Constitution of Terengganu 1911.

²Per Poyser C.J. (F.M.S.), at p.22. See also judgement by McElwaine C.J. (S.S.) at p.21: "While it is unusual, I see no reason to think that a sovereign legislature cannot say that a particular enactment shall be interpreted by a particular person or body of persons and that it shall not be interpreted by the Courts ... The position then is that the Legislature is the sole authority which can decide whether what it does is intra vires or not. It is constituted by enactment and the sole judge of its own cause. In legislating, it must be presumed to have interpreted the Constitution as permitting that legislation ." Cf. Wong Ah Pook v. State of Johore (1937) M.L.J. 121 (Supreme Court), per Whitley J., where an executive act of the Sultan (grant of gambling rights) was successfully challenged on the argument that the Sultan was himself subject to law since he had made a solemn declaration to that effect in 1908. Wong Ah Pook is a decision before a single judge. Its holding is open to question in the light of the decision handed down by the full bench in Anchom. Generally, see also the following older Straits Settlements cases as examples of judicial restraint: In Re ex Sultan Abdullah (1877) 2 Ky.(H.C.); Yap Hon Chin v Jones Parryand Cowan (1911) FMSLR (PC) 70; Wah Ah Jee (1919) 2 F.M.S. 193. As to the legal immunity of the Rulers, see Mighell v. Sultan of Johore (1894) 1 QB 149 where the ratio decidendi is that once the Sultan or Ruler submits himself to the jurisdiction of the court, he is disallowed subsequently to put up sovereign immunity as a defence. Cf. Duff Development Company Ltd. v. Government of Kelantan & Anor. (1924) AC 797. In this case the Privy Council confirmed the sovereign status of a Malay Ruler and that the court was to have no jurisdiction over him.

cautious and narrow attitude shown by the judges in Anchom is anything to go by, the Tribunal's decision was indeed welcomed as a sound departure notwithstanding that the Tribunal was not established as a court of law.¹

It must be pointed out also that under the FM Agreement judicial independence appeared to be limited as well. The Chief Justice and the judges of the Supreme Court were appointed by the High Commissioner "for and on behalf of His Majesty and Their Highnesses the Rulers by Letters Patent".² Moreover, it was provided that "the constitution, powers and procedure of the Supreme Court and provisions relating to appeals therefrom...be prescribed by Order of His Majesty in Council". Federal law could "prescribe provisions relating to the qualifications...duties and powers of judges and appointment of temporary judges."³

The Agreement did not introduce constitutional government. Both the High Commissioner and the respective Rulers were as such not constitutional rulers under the Agreement.⁴ Nevertheless, the constitution which was established remains an important milestone as one which maintained a generally acceptable degree of political equilibrium, and provided a structure which made it possible to advance towards self-government.

The movement towards self-government was gradual, and it was only in 1955 that the first election was held, although between 1950 to 1953 local elections to elect members to local authorities were undertaken to introduce the population to participatory democracy. During the period leading up to the first general election, numerous significant developments occurred: the Member system was introduced in 1951 by which a number of Unofficial Members of the Federal Legislative Council were given quasi-ministerial posts; in 1952 amendments to the citizenship provisions of the Agreement loosened further the eligibility rules for citizenship; in 1953 a

¹The Tribunal was constituted under Part XIV of the Agreement under the heading "Miscellaneous" whereas Courts were dealt with under Part VII, headed appropriately "Courts".

²Section 77(4) of the FM Agreement.

³Section 77(5) of the FM Agreement.

⁴See Report of The Federation of Malaya Constitutional Commission 1957 (hereafter Reid Commission Report) para 177 for an acknowledgement that the Rulers could not then be regarded as constitutional Rulers.
representative committee was appointed to consider and report on the composition of the various legislatures and the introduction of general elections. When finally elections were held, the Federal Legislative Council came to consist of an Unofficial majority of 52 seats out of a total of 99.\footnote{1} The growth in the power of these elected Unofficials was matched by a gradual decline in the power of the High Commissioner. Thereafter, the momentum towards independence accelerated and the principle was accepted by the British Government, the Rulers and the Alliance Party (consisting of the UMNO, the MCA and the MIC) that a "Commonwealth Constitutional Commission" should be appointed to review the constitution established under the FM Agreement.

2. 6. The Reid Commission 1956-1957

As has been seen, the commitment and preparation for self-government that would pave the way for independence started in earnest with the Federation of Malaya Agreement 1948.\footnote{2} From 1948 until 1960 the country was enmeshed in a continuous guerrilla warfare with bandits or communist terrorists.\footnote{3} With the formation of the United Malays National Organisation (UMNO) in 1946 and other political organisations based on ethnicity like the Malayan Chinese Association (MCA) in 1948 and the Malayan Indian Congress (MIC) in 1951, the objective of making Malaya independent was much hastened. In the meantime the idea of being merdeka or independent was popularised through the Malay print media which was in the main fairly liberally treated by the British authorities.\footnote{4} Moreover, the independence of

\footnote{1}Federation of Malaya Annual Report 1955, Government Printer, Kuala Lumpur, p. 25
\footnote{2}See Preamble to the Federation of Malaya Agreement 1948.
Indonesia from Dutch rule in 1948 heightened local nationalism especially among the Malays although non-Malays in the peninsula were also known to have participated in pro-merdeka movement. It would be a major omission indeed if the Reid Commission were to be overlooked, for within its report is contained the necessary background for the understanding of the present Federal Constitution.

The Reid Commission, constituted pursuant to a constitutional conference held in London from 18 January to 6 February 1956 on behalf of Their Highnesses the Malay Rulers, the Chief Minister of the Federation of Malaya and three other Ministers and representatives of the British Government, was the originator of the Malayan Federal Constitution. A Constitutional Conference attended by representatives of the British Government, the Malayan Government, the Rulers and the Alliance met in London in early 1956, and reached agreement on a fundamental point — that full self-government and independence should be proclaimed by August, 1957. Subsequently, upon the further recommendation of the Conference, agreement on the composition and terms of reference of the Constitutional Commission was finalised. The Reid Commission, as it has come to be called and appointed by Her Majesty's Government with the consent of the Malay Rulers, was charged with the following terms of reference:

To examine the present constitutional arrangements throughout the Federation of Malaya, taking into account the positions and dignities of Her Majesty The Queen and Their Highnesses the Rulers; and to make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature, which would include provisions for:

(i) the establishment of a strong central government with the States and the Settlements enjoying a measure of autonomy . . . and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution:

3See the Tunku Abdul Rahman Papers, Penang, 1991. These are the personal papers of the late Tunku Abdul Rahman who died in 1991.
4For details of the London mission and the Conference see the Tunku Abdul Rahman Papers op.cit. The Tunku also penned a brief account of the Conference in his Looking Back, Kuala Lumpur, 1986, p. 32.
(ii) the safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States;

(iii) a constitutional Yang di Pertuan Besar (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers;

(iv) a common nationality for the whole of the Federation;

(v) the safeguarding of the special position of the Malays and the legitimate interests of other communities.¹

Chaired by Lord Reid, Lord of Appeal in Ordinary from the United Kingdom, the Commission was comprised of eminent legal personalities from the United Kingdom (Sir Ivor Jennings), Pakistan (Mr. Justice Abdul Hamid of the West Pakistan High Court), Australia (Sir William McKell, former Governor-General of Australia) and India (Mr. B. Malik, former Chief Justice Allahabad High Court)².

The Commission held 118 full meetings in Malaya between June and October 1956. During its five-month field work in Malaya, from May to October 1956, it received 131 memoranda from various sectors of the Malayan community concerned with a nation that was about to be independent and self-governing.³ The Commission worked under trying conditions in view of the fact that emergency rule declared in 1948 remained in force. There were nine Rulers to start with, not to mention several chieftains and traditional chiefs in Negeri Sembilan and Perak all of whom held traditional positions that called for constitutional recognition. At the same time local communists were preoccupied by acts of banditry and jungle skirmishes. In recognition of this the Commission expressed their agreement in recommending that certain powers be allocated to cater for emergency situations but not without due regard to checks and balances in the interests of basic rights.⁴ After four months,

¹See Reid Commission Report, para 3.²

²The original composition of the Reid Commission was also to include a representative of Canada but due to sudden illness the nomination lapsed. The Chief Minister of Malaya, Tunku Abdul Rahman stated the following in his letter to Sir Donal MacGillivray, High Commissioner dated 16 May 1956: "These are eminent and able representatives who will no doubt translate Malaya's aspiration in becoming an independent member state within the Commonwealth." See The Tunku Abdul Rahman Papers (1955-61) Folio No. 2, Penang 1991.

³The Reid Commission op.cit. para 12 at p.4

⁴The Commission recommended thus: "The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion infringement of fundamental rights or of
inclusive of its retreat to Rome for the final phase of its report, the Commission submitted its report to Her Majesty the Queen and Their Highnesses the Rulers. In February 1957 it was published.

2.7. The Reid Commission's Proposal on The Rule of Law

The Reid Commission submitted a comprehensive constitutional document entitled *The Draft Constitution of the Federation of Malaya* (the Reid Constitution). The Commission's report consisted of general submissions and recommendations on the first part and a model constitution on the second part. The Reid Constitution, divided into 13 parts and 156 articles, represents an elaborate outlay of rights and duties of persons, states and bodies in the Federation of Malaya. These represent the Federal Territories, Fundamental Liberties, Citizenship, the Federation (The Federal Executive and the Federal Parliament), the States, the Relations Between the Federation and the States, Financial Provisions, Elections, The Judiciary, state rights is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation. - *The Reid Commission Report* at p. 75 para 172.

1Ibid. para 13 at p. 4. There were no specific reasons given for conducting the last lapse of the Commission's business in Rome other than the obvious desire to write the report in a neutral place, far from the possible lobbying by contending parties from the Federation.


3See Appendix II of the Reid Commission. It also submitted draft constitutions for the states of Penang and Malacca. For easy identification, the Reid Commission refers to the general *Report of the Federation of Malaya Constitutional Commission* 1957 while the Reid Constitution refers specifically to the proposed Federation of Malaya Constitution as drafted by the Reid Commission.

4Pages 1-95. The dissenting views of Justice Abdul Hamid are within pages 96-106.

5Pages 111-211. The Commission also submitted a model constitution each for Penang and Malacca in the Appendix (pp. 212-235).

6Cf. the *Merdeka* Constitution 1957 which has been enlarged into 14 Parts and 181 articles.

7Part I
8Part II
9Part III
10Part IV
11Part V
12Part VI, incorporating the distribution of legislative and executive powers.
13Part VII
14Part VIII
15Part IX
Public Services\textsuperscript{1}, Special Powers Against Subversion and Emergency\textsuperscript{2} and other general and transitional matters.\textsuperscript{3} Whilst the overall proposals of the Reid Commission may be said to have been adopted in the final Merdeka Constitution, there were several material changes made by the Working Party, a committee set up by the Alliance Government in March 1957 and chaired by the High Commissioner.\textsuperscript{4} As a result of this committee's recommendation, certain aspects of the rule of law provisions were altered\textsuperscript{5}.

The Reid Commission's intent to help create a Malayan Constitution based on the rule of law is unmistakable. In fact so profound and singular was its intent towards that direction, it made the Pakistani member of the Commission - Justice Abdul Hamid from Pakistan - sceptical about its practicality. Of particular interest to this study is Part II of the Constitution within which are to be found the fundamental liberty provisions prepared by the Reid Commission. It is clear that if the original versions of Articles 3, 4 and 10 of the Reid Commission recommendations in respect of fundamental liberties had been accepted \textit{in toto}, Malaysia would now be more formally rooted in the rule of law than it is at present. In its draft proposal, Article 3(1) reads:

\begin{quote}
The Rule of Law:

The Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnance, be void." (emphasis supplied)

(2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or any law, such act shall be void.
\end{quote}

\textsuperscript{1}Part X
\textsuperscript{2}Part XI
\textsuperscript{3}Parts XII and XIII
\textsuperscript{4}The other members were representatives of the of the Alliance Party and the Rulers: Federation of Malaya Gazette, 12 March 1957. See also statement by Ong Yoke Lin, Minister for Transport in the \textit{Proceedings of the Federal Legislative Council}, 10 July 1957, Clmn. 2889.
\textsuperscript{5}See below.
The column heading to this article is: "The Rule of Law." 1 Clause (2) of Article 3 of the Commission's draft Constitution determines further that where any public authority within the Federation performs any executive act which is inconsistent with any provision of the Constitution such law shall be void. The Commission's draft Article 3 never saw the light of day and there were no explanations given for the scrapping of it in the final White Paper of the Alliance Government. In its place, as we shall see, came Article 4 whose clause (1) reads:

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency, be void.

Clause (2) of Article 4 of the final Merdeka Constitution goes on to state that "the validity of any law shall not be questioned on the ground that "(a) it imposes restrictions on the right under Article 9(2)" [right against banishment and freedom of movement]. Under Clause (2)(b) of Article 4 the position is the same vis-a-vis rights under Article 10(2) [freedom of speech, assembly and association.] Article 4(2) of the Merdeka Constitution, therefore, renders meaningless the freedom of movement under Article 9 and the freedom of speech, assembly and association under Article 10.

The Commission had also recommended the following in Article 4(1):

Without prejudice to any other remedy provided by law-

(a) where any person alleges that any provision of any written law is void, he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.

(b) where any person affected by any act or decision of a public authority alleges that it is void because -

(i) the provision of the law under which the public authority acted or purported to act was void, or

(ii) the act or decision itself was void, or

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1See Appendix II Draft Constitution of the Federation of Malaya at p.123 of the Reid Commission Report, op.cit. See also Federal Council Proceedings 11 July 1957 op. cit at Clms. 2983-84
(iii) where the public authority was exercising a judicial or quasi-judicial function
that the public authority was acting without jurisdiction or in excess thereof or
that the procedure by which the act or decision was done or taken was contrary
to the principles of natural justice,

he may apply to the Supreme Court and if the Court is satisfied that the allegation is correct,
the court may issue such order as it may consider appropriate in the circumstances of the case.

The above provision would have given the courts a bigger jurisdiction within
which to operate the rule of law through judicial review. In its sweeping
recommendations on Articles 3 and 4, the Commission asserted two broad
constitutional rights of the citizen: (i) the right to seek judicial review when a subject
is imposed by any written law that is void and (ii) the right to be protected by the
principles of natural justice. Under Clause (2) of the Commission's proposed Article
4 only two categories of persons were precluded from having recourse to the Supreme
Court: a person subjected to military law\(^1\) and an alien enemy.\(^2\) At the top left-hand
corner of Article 4 of the draft Constitution were these apt words: "Enforcement of
the Rule of Law." And under para 161 of its report the Commission explained:

The guarantee afforded by the Constitution is the supremacy of the law\(^3\) and the power and the
duty of the Courts to enforce these rights and to annul any attempt to subvert any of them
whether be legislative or administrative action or otherwise.

This could be the epitome of the rule of law and by giving the courts the
requisite wide discretionary powers it would have augured well for the new nation.
Clause (2) of Article 10 as proposed by the Commission provided that every citizen
should have the right to assemble peaceably and without arm, subject to any
reasonable restriction imposed by federal law in the interest of the security of the
Federation, or public order or security. Clause (3) stated that every citizen should
have the right to form associations, subject to any reasonable restriction imposed by

\(^1\) Clause (2)(a) of the \textit{Reid Constitution}.

\(^2\) \textit{Ibid.} Clause (2)(b)

\(^3\) \textit{Reid Constitution} Article 3 (i) declares: that the Constitution shall be the supreme law of the
Federation, and any provision of the Constitution of any State or of any law which is repugnant to any
 provision of this Constitution shall, to the extent of the repugnance, be void."
federal law in the interest of the security of the Federation, public order or morality.

The recommended Article 10(1) was worded thus:

Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restriction imposed by federal law in the interest of the security of the Federation, friendly relations with other countries, public order, or morality or in relation to contempt of court, defamation or incitement to any offence. (emphasis added)

The Commission's recommendations on the rule of law and the fundamental rights of the subject were soon altered to suit the new sentiments as briefly expressed in the Alliance Government White Paper.1 There is a specific background to this and it pivots around the dissent of one man within the Reid Commission. The dissent was by Justice Abdul Hamid of Pakistan.2

2.8. **Dissent by Justice Abdul Hamid of Pakistan**

To the misfortune of Malaya then and Malaysia now, one of the members of the Commission, Mr. Justice Abdul Hamid from Pakistan vehemently opposed the inclusion of an express provision of the rule of law within Article 4(1)(a) of the Commission's draft Constitution and went on also to ridicule the presence of the principles of natural justice under Clause (1)(b)(iii) of the same. On this he wrote:

But paragraph (iii) of sub-clause (b) [of article 4] seeks to protect not the constitution but "the principles of natural justice". The principles of natural justice are not part of the Constitution, nor are they part of any written law. They have not been defined in the Constitution or in any other law. If a constitution has a provision which seeks to protect the principles of natural justice without having defined those principles anywhere, the result would be chaos. Principles of natural justice are capable of innumerable interpretations. No two jurists are agreed upon the extent of those principles. Some rules of natural justice have been laid down in judgements but as views in judgements are liable to alterations, rules of law based on judgements do not provide safe and definite standards. . . a provision like that has no place in any known constitution. My suggestion is that the words or that the procedure by which act or decision was done or taken was contrary to the principles of natural justice should be deleted." (emphasis added)3.

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1The White Paper, containing the Draft Federal Constitution were prepared by a working committee, comprised of representatives from the Alliance Government inclusive of the Attorney General and the Chief Secretary to the Government: The Tunku Abdul Rahman Papers, op. cit., (File: Notes 1956-1958)


3Reid Constitution Article 3 (i) . The Reid Commission Report op. cit., pp. 96-106.
As if voicing his views within the deliberations of the Commission was not enough, he subsequently produced a lengthy written attack on the inclusion of those very basic and sterling provisions mentioned above.\(^1\) His criticism was mainly against giving substantial powers in the form of open-ended judicial review to the courts. For example the Commission recommended the provision relating to freedom of speech and expression to be subjected to *reasonable* restrictions in the interest of security and public order or morality or in relation to incitement, defamation or contempt of court.

Justice Abdul Hamid made the other members of the Commission appear to be receptive to his criticisms as they did not offer any counter suggestions to those advanced by Hamid. Being a Muslim himself, he was quick to suggest that Islam be written into the constitution as religion of the Federation.\(^2\) This in hindsight is hardly objectionable because it was also in line with the wishes of the Rulers. The only lamentation to be made at this point is that by making Islam as the official religion of the Federation extensive ramifications have occurred because many aspects of Islamic values that are opposed to a secular form of government have been used by various groups, including extreme ones, to effect a destabilizing situation in a multi-racial society such as Malaysia.

Hamid's written dissent which the Commission's report faithfully reproduced\(^3\), objected to the use of the word *reasonable* whenever it occurred before the word *restriction* in the three sub-clauses of the proposed Article 10. He opined that the word *reasonable* should be omitted on the ground that with its inclusion in those sub-clauses the constitutional provision would suffer from ambiguity consequential on the latitude of meaning that the word might bring and this, he said,\(^1\)

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\(^1\) Justice Hamid's dissent, contained in 11 pages of single-spacing, type-written opinion, includes various other constitutional topics such as Citizenship, Islam as the official religion of the Federation, special rights of the Malays- see *Report of Malaya Constitutional Commission (The Reid Commission Report)*, op. cit., at pp. 96-106.

\(^2\) Justice Abdul Hamid's contribution finds its way into the present Article 3 of the Federal Constitution.

\(^3\) *The Reid Commission Report*, op. cit at p. 101.
would cause litigation in court - the very thing that he deemed the legislature was trying to avoid. Finally he summed up:

If the word *reasonable* is allowed to stand, every legislation on this subject will be challenged in court on the ground that the restrictions imposed by the legislature are not reasonable. This will in many cases give rise to conflict between the views of the legislature and the views of the court on the reasonableness of the restrictions. To avoid this situation it is better to make the legislature be the judge of the reasonableness of the restrictions... There will always be a fear that the court may hold the restrictions imposed by it to be unreasonable. The laws would be lacking in certainty. ¹

The Attorney General read out Justice Abdul Hamid's dissent in the July 1957 session of the Federal Legislative Assembly in answer to a query from a member who was not happy at the disappearance of the Commission's version of Article 10 (freedom of speech and expression).² No objection was made in the Council debates in respect of the written dissent. In fact the Attorney General, as a matter of course, lent his support to it when he said in reply to a query on why the side-heading *The Rule of Law* was changed to *Supreme Law of the Federation* in respect of the replaced Article 3: "... the only reason is because... the side note "Supreme Law of the Federation" represented more accurately what was in the (amended) Article than the side note that had been put into the Reid draft. The only effect of Article 4 is that the Constitution is the supreme law of the Federation."³ This is hardly a satisfactory explanation given that the rule of law was being effectively discarded from the Constitution for something else that hardly resembled it.

It is as clear now as it was in 1957 that Justice Hamid's argument was untenable in the wake of the general principle of safeguarding the rights of the individual under judicial review. It could be seen that even at that formative stage of the Constitution there was already pro-executive thinking evident in not wanting to equip the judiciary with the necessary rule of law safeguard. Taking Hamid's contention that the concept of natural justice was vague, it could be countered in that


²The dissatisfied member was Mr. K.L. Devaser. See Federal Legislative Council Proceedings 11 July 1957 Clmn. 3018.

any number of words in the English language could be made ambiguous if taken out of context. His misgivings ought to have been countered not so much by lesser members of the Federal Legislative Council which they did, but by the then government leaders. It would appear that Hamid was more concerned with political repercussions than with the rule of law itself when he opined in his note of dissent: "... I found it difficult to accept such decisions of the Commission on ... matters as are not in accord with the solutions produced by the Alliance." 2

When the Federation of Malaya Constitutional Bill was tabled on 11 July 1957 in the Federal Legislative Council in Kuala Lumpur, the Commission's entire Article 4 was scrapped. 3 It may now be seen that Justice Abdul Hamid had singularly, as against majority view of the Reid Commission, contributed towards the nipping-in-the-bud of natural justice as a constitutional provision in 1957 - an act that must now be seen as unfortunate and regrettable. Had the original version of what was Article 4 been accepted, the future course of the country's judiciary may have been positively enriching and different in the context of entrenching the rule of law in a written constitution of an emerging nation. It would in the long run have meant that the courts would have been in a continuous position to have administered judicial review and thereby to have achieved accountability to the law.

It may now be asked: What possible damage or harm would really have been entailed if the original Reid version of Article 4 were to be left intact? The answer is obvious: There would have emerged a very much stronger judiciary and a society anxious to safeguard its rights under the Constitution whenever the executive or a branch thereof violated or infringed the rights of the citizen. In other words the Courts would always have been more open to the pleas of aggrieved citizens. There ought to be no concern for the so-called lack of definition of natural justice as expressed by

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1 The Reid Commission Report, op. cit., at p. 102.
2 Ibid, p. 103
3 Against this development, Mr. K.L. Devaser, Leader of the Malayan Indian Congress (MIC) in the Federal Legislative Council debate on 11 July 1957 made a specific query to which Mr. Brodie, the Attorney General replied, by stressing the above-referred dissent of Justice Abdul Hamid. See Federal Legislative Council Proceedings 11 July, 1957 Clmn. 3018.
Justice Abdul Hamid so long as the principles of natural justice are well understood by the courts to mean that a man is entitled to be heard before a decision is made against his interests and that natural justice goes against bias. To say that "rules of law based on judgements do not provide safe and definite standards..." is in one breath to declare little confidence in judge-made laws. In other words, Justice Hamid appreciated little of the process of the rule of law. The dissenting Reid Commission member opined that the principles of natural justice "have not been defined in the Constitution or in any other law." Surely any amount of defining could have been done in the Merdeka Constitution provided that there was a will and readiness to accept natural justice in constitutional form. If what he meant by "written law" was a form of written constitution, then perhaps he might have been right but he erred when he said that written laws had not defined natural justice. In the first place, reported cases involving natural justice are aptly written laws. Case law may not be as well-defined as statutes. They are nevertheless written laws and the number of cases enunciating the rules and principles of natural justice abound. In extension, Hamid may even be blamed for stifling what ought to have been the smooth evolution of the common law process. Too much weight was given to an opinion of one man as against the other four in the Reid Commission. This is, to say the least, strange and incongruous in view of the position of natural justice within the common law.

Lord Reid himself, however, appeared not to be much concerned with Hamid's scoring most of the points for in the House of Lords' debate on the Federation of Malaya Independence Bill he is reported to have said:

... a greater part of the changes have been in the direction of giving more freedom to the executive and Parliament of Malaya and correspondingly less extensive guarantees of individual rights that we had recommended. I cannot speak for my colleagues but speaking for myself I am not dismayed at the changes which have been made. The other changes which do not come into this category I have described are mostly of minor importance.¹

Thus as far as Lord Reid was concerned the matter rested there. However, one wonders why the Alliance Government under the Tunku in 1957 accepted the reasoning of one man as against the majority view of the remaining "four wise men" in the Commission.\(^1\) Throughout the Federal Council's debates on the constitutional Bill, the final replacement of the Reid Commission's Articles 3 and 4 became controversial despite the typical excitement on the threshold of creating a new nation. Members who took part in the debate on 10 July 1957 touched upon one aspect or another of the fundamental liberty provisions in the draft Merdeka Constitution. S.M. Yong and K.L. Devaser rose above others in the Federal Legislative Council in wanting to see the rule of law stand and reach out for justice. But their views, though they appeared then to be given attention to by the Attorney General, did not have the effect of resurrecting the disposed original Articles 3 and 4. With special reference to Justice Hamid's protest over the wording of the Commission's proposed Article 10, Council member Devaser said:

\[
\ldots\text{in my submission, the draft Constitutional proposals take away the right of the court of law because the government can decide what is necessary and expedient, whereas the Reid Commission Report gives power to the court of law and the court of law can say that it is not in the interest of security of the Federation. As a lawyer I do feel that the right of the subject is much better safeguarded if the last say is in the court of law rather than in the hands of the executive authority.}\ldots
\]

Those could have been the saving words for the rule of law. But they did not receive a proper response from either Mr. Brodie, the Attorney General or the Tunku as Chief Minister.\(^3\) Perhaps it could now be surmised that the practice of ignoring the views of back-bencher legislators by their own superiors in Parliament is a constant theme throughout parliamentary history and practice.

\(^1\)It was Mr. K.L. Devaser, \emph{op. cit} who coined these words in reference to Lord Reid and his Commission members. See \textit{Federal Legislative Council Proceedings} 11 July, 1957 Clmn. 3019


\(^3\)A hand-written note in \textit{The Tunku Abdul Rahman's Papers (1956-1957)} \emph{op. cit} reads: "...Alliance('s) view well conveyed by Mr. Justice Hamid..."
2.9. Independence (Merdeka)

The Federation of Malaya received merdeka (independence) on 31 August 1957.

Tunku Abdul Rahman Putra, the first Prime Minister, proclaimed these words:

And whereas the time has now arrived when the people of the Persekutuan Tanah Melayu will assume the status of a free independent and sovereign nation among the nations of the world and... whereas a Constitution for the government of the Persekutuan Tanah Melayu has been established as the supreme law thereof and provision is made to safeguard the rights and prerogatives of their Highnesses the Rulers and the rights and liberties of the people and to provide for the peaceful and orderly advancement of the Persekutuan Tanah Melayu as a constitutional monarchy based on parliamentary democracy..." (emphasis supplied).

He ended the proclamation with submission to God that the new nation be blessed and "be forever sovereign, democratic and independent founded upon the principle of liberty and justice..." (italics supplied). And so began Malaysia's position in world history as a developing nation within the Commonwealth, braced in hope, liberty and justice. Earlier, the United Kingdom, pursuant to formal negotiations between Her Majesty's Government and representatives of the Rulers of the Malay States and the Federation of Malaya Agreement 1948, had passed the Federation of Malaya Independence Act 1957.

During a special debate on the Merdeka Constitution in the Federal Legislative Council on 15 July 1957, the Tunku reminded Malayans:

We have now reached the end of the journey and before us we see the gate of freedom ready to admit us. Let us pass through this gate with real joy in our hearts on 31st day of August 1957.

5 and 6 Eliz. 2 Ch. 60 (Chapter 60) 31 July 1975. Section 1 of The United Kingdom's Federation of Malaya Independence Act 1957 states: "...the approval of Parliament is hereby given to the conclusion between Her Majesty and the Rulers of the Malay States of such agreement as appears to Her majesty to be expedient for the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth." On 5 August the Federation of Malaya Agreement 1957 was signed again by representatives of both parties with the objective, inter alia and as per section 3 thereof, of legally and constitutionally establishing the new, independent and sovereign Federation of Malaya. Subsequently, the Federal Constitution Ordinance 1957 (No. 5/1957) was passed on 27 August 1957 by the Federal Legislative Council in Kuala Lumpur while the Federation of Malaya Independence Order in Council, 1957 was executed at the Court at Balmoral in London on 23 August and passed by the British Parliament on 29 August 1991. See Federation of Malaya (FM). Gazette 11 December 1957 LN [New Series] 889.

Federal Legislative Council Proceedings, Kuala Lumpur, 15 August 1957, Clmns. 3141. The original constitutional proposals were put to a motion by the Tunku as Leader of the Alliance Party bearing Legislative Paper No. 42 of 1957 on 10 August 1957 and seconded by Tan Siew Sin, leader of the Malayan Chinese Association (MCA). See Proceedings of the Federal Legislative Council of 10 August 1957. For details of the Tunku's elaboration, see Clmns. 2837-2866.
In tabling the draft form of the Federal Constitution he pointed out that "only time can tell how effective and good the Constitution is." Before his death in 1991 the Tunku, revered as he was by Malaysians not only as Bapa Malaysia (Father of Malaysia) but also as the symbol of multi-racialism and harmony, began to opine that the country was governed like a police state. Whilst this opinion is debatable, the fact remains that his observation was evidently based on his surprise at finding the rights of Malaysians change for the worse compared to those which existed when he ushered in the Malayan nation 34 years before.


2 Rocket, vol. 23 No. 3 1990.
CHAPTER 3

The Escalating Powers of the Executive under Constitutional Changes

It is not power that corrupts but fear. The Fear of losing power corrupts those who wield it and fear of the scourge of power corrupts those subject to it.

- Aung San Suu Kyi
Nobel Prize Winner for Peace 1991

3.1. Introduction

We have seen in Chapter 2 that the rule of law in the Malay States, and later Malaya, could only be discerned by way of the common law introduced through British administration. The rule of law under such an administration was easily identifiable under civil and criminal law instruments, the Criminal Procedure Code, the Penal Code, the Civil Law Enactment 1937, the Evidence Enactment 1950 as well as case law. Constitutional concepts of fundamental liberties, for example, were not present even during British rule. Neither was separation of powers in the Malay States easily identifiable because, as we have seen, the Residents in the various states and the High Commissioner in Kuala Lumpur wielded overriding powers over all sectors of government except adat and Islamic law. As was seen in Terrell’s case, even the judges did not enjoy security of tenure. In spite of this state of affairs judicial propriety had never been questioned.

The rule of law became quite substantive but not fully guaranteed under the recommendations of the Reid Commission. The final version of the Merdeka Constitution, although substantially similar to the Commission’s recommendations, did not adopt the latter in toto. Notwithstanding this, the norms found in the Draft

1The adoption of English law was formalised in the Federation of Malaya Agreement 1948 (FM Agreement). Its s.50 says: "The power of the Legislative Council to make Federal Ordinances shall extend to the adoption...of so much as shall seem expedient of the common law and mercantile law of England and of the rules of equity as administered in England..."

2Under s. 77(4) of the FM Agreement the High Commissioner appointed the Chief Justice and judges of the Supreme Court of the Federation. He also appointed the Attorney General and Solicitor General (ss. 84 & 85 respectively). At the same time he presided over the Federal Legislative Council whose decision he could overrule. (s. 52 of the FM Agreement).

3Terrell v. Secretary of State for the Colonies (1953) 2 QB 482. See Chapter 2 ante.
Constitution of the Federation of Malaya (hereinafter referred to as the Reid Draft) have become significant elements in defining Malaysian constitutionalism.

Administrative powers and functions in Malaysia have grown tremendously since Merdeka. This is so in terms of quantity as well as relative significance. In essence this 'growth' has been about the escalation of the power of the executive and the corresponding diminution in human rights which has resulted from constitutional changes and the enactment of new statutes. The erosion of basic rights under the Constitution has been implicit, especially in respect of fundamental liberties and judicial functions. The escalation of executive power has been achieved by means of three mechanisms. First, by way of constitutional amendments; second, by the creation of new statutes and amendments thereto; and third, by decisions of the courts. It is instructive, therefore, to review major constitutional changes that have taken place since merdeka in order to see how these changes have affected basic rights under the Constitution. Executive power through the cases and statutes will be examined in Chapter 4.

3.2. The Scheme for Fundamental Liberties and the Judiciary under the Reid Draft Constitution and the Merdeka Constitution

Before discussing the relevant constitutional amendments after Merdeka it is pertinent to set out the general scheme or arrangement of the Reid Draft with respect to fundamental liberties and the judiciary in order to see how far this was varied by the Merdeka Constitution. We have seen in the last chapter the general scheme of the Reid Draft in reference to the rule of law and how it came to be restricted as a result of criticisms mounted by one of the members of the Reid Commission - Justice Abdul Hamid from Pakistan. Although generally the Reid Constitution was accepted

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1 See Appendix II of The Reid Commission Report op. cit.. The Commission also submitted draft constitutions for the states of Penang and Malacca. For easy identification, the Reid Commission Report hereinafter refers to the general Report of the Federation of Malaya Constitutional Commission 1957 while the Reid Draft refers specifically to the proposed Federation of Malaya Constitution as drafted by the Reid Commission.

2 The Constitution of the Federation of Malaya, in force from 31 August 1957 to 15 September 1963, is hereinafter referred to as the "Merdeka Constitution". It was the substantial embodiment of the Reid Draft Constitution proposed by the Reid Commission. The Malaysian Constitution, in force since Malaysia Day (16 September 1963) is hereinafter referred to as the "Constitution".
as the basis of the Merdeka Constitution, there were a number of alterations made by the Alliance Government with a view to bringing the Reid Draft into accord with the then 'current political aspirations'. For example, the making of Islam as the official religion of the Federation was not an element in the Reid Draft. It did not recommend that the Malay special rights be entrenched, yet these rights became so under Article 153 of the Merdeka Constitution. Nor was there a guarantee for the Rulers' sovereignty or any provision which would render them to be above the law in their personal capacity. Yet all of these found their way into the Merdeka Constitution.

The Reid Commission recommended that the Constitution should include "certain fundamental individual rights which are as essential conditions for a free and democratic way of life". Although the Commission did not recommend that these fundamental rights ought to be entrenched nevertheless it was felt that there should be constitutional safeguards against the abuse of power because of the presence of what were termed as "vague apprehensions about the future". Under these circumstances,
it is ironical to find that the Reid Commission did not find any necessity to recommend the entrenchment fundamental liberties in any absolute way. It emphasised that these rights "... should be guaranteed in the Constitution and the courts should have the power of enforcing these rights,"¹ but the word "guaranteed", after analysing the exceptions and overriding clauses of the fundamental liberties, seemed to be without much substance.

The working committee of the Merdeka Constitution, in line with Justice Hamid's criticism, recommended the deletion of the word reasonable whenever it appeared in Article 10 (freedom of speech, assembly and association).² The Alliance Government accepted the explanation that by including the word "reasonable" within the provisions, the courts and not the legislature, became the determining authority as to the validity of restrictions imposed on certain liberties. Thus as far as the freedoms of speech, assembly and association are concerned, the first major difference between the Reid Draft and the Merdeka Constitution was that while the Reid Commission wanted the courts to have judicial freedom to determine the reasonableness of certain restrictions imposed on liberty, the Federal Legislature in 1957 did not want that power to be with the court. Rather, it wanted Parliament to determine the exceptions to the liberties. It hardly needs to be said that without Justice Hamid's dissent on this point, the three freedoms under Article 10 would have been more satisfactorily guarded by the courts.

Fundamental liberties which were reduced to nine items³ under the Merdeka Constitution were more restrictive than those found under the Reid Draft. Under Part II of the Reid Draft, fundamental liberties were itemised under eleven items, viz.: the Rule of Law (Article 3); Enforcement of the Rule of Law (Article 4); Liberty of the person (Article 5); Prohibition of slavery and forced labour (Article 6); Protection against retrospective criminal laws and repeated trials; Article 8-Equality before the law; Article 9-Prohibition against banishment and freedom of movement; Article 10- Freedom of speech, assembly and association; Article 11- Freedom of religion; Article 12- Rights in respect of education; and Article 13- Rights of property.

¹The Federation of Malaya Constitutional Commission, 1957. (The Reid Commission) p. 92 para 70.
²See Chapter 2 ante.
³These are grouped under Articles 5-13 (Part II) of the Constitution. These are as follows: Article 5- Liberty of the person; Article 6- Freedom from slavery and forced labour; Article 7- Protection against retrospective criminal laws and repeated trials; Article 8- Equality before the law; Article 9- Prohibition against banishment and freedom of movement; Article 10- Freedom of speech, assembly and association; Article 11- Freedom of religion; Article 12- Rights in respect of education; and Article 13- Rights of property.
against retrospective criminal laws and _autrefois acquit_ (Article 7); Equality before the law (Article 8); Freedom of movement (Article 9); Freedom of speech, assembly and association (Article 10); Rights in respect of education (Article 11); and Rights to property (Article 11). When the Federal Legislative Council deliberated on the proposed _Merdeka_ Constitution on 15 August 1957\(^1\), Article 3 (Enforcement of the Rule of Law) was replaced by a new article which proposed to make Islam the official religion of the Federation. Article 3(1) of the Reid Draft which proposed to make the Constitution the supreme law of the land was pushed down to become Article 4(1) in the _Merdeka_ Constitution. Article 3(1) in the Reid Draft provided:

\[3(1) \text{This Constitution shall be the supreme law of the Federation and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.}\]

In the _Merdeka_ Constitution the above provision was revised thus:

\[4(1) \text{This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.}\]

Clause (2) of Article 3 of the Reid Draft provided that where any public authority in the Federation...performs any executive act inconsistent with any provision of "this Constitution"...such act shall be void. This provision appears somewhat duplicative of Clause (1) above and perhaps it was on account of this that the clause was dropped from the _Merdeka_ Constitution.\(^2\) For some years after _merdeka_ the supreme law status envisaged under Article 4 appeared to be in a state of confusion as the courts were not yet prepared to bring certain _pre-merdeka_ laws into accord with the Constitution.\(^3\)

The restrictive nature of Article 4 of the _Merdeka_ Constitution may be seen in its creation of a new Clause (2) which provides:

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\(^1\)Federal Legislative Council Paper FLC 1/1957.

\(^2\)No explanation was given for the dropping of this provision either in the deliberations of the Working Committee or the speeches of the _Alliance_ Government leaders in the Federal Legislative Council in August 1957.

\(^3\)See Chapter 4 _infra_. The courts' reluctance to recognise the supremacy clause of the Constitution was well reflected in _Chia Khin Sze v. Menteri Besar of Selangor_ (1958) MLJ 105 and _Ex parte Tan Kheng Long_ (1958) 3 MC 205.
The validity of any law shall not be questioned on the ground that:

(a) it imposes restrictions on the right mentioned in Article 9(2)\(^\text{1}\)...(b) it imposes such restrictions as are mentioned in Article 10(2)\(^\text{2}\).

It is clear from the above provision that freedoms of movement (Article 9), speech, assembly and association (Article 10) were intended to be restricted \textit{ab initio}.. Clause (3) of Article 4 goes on to say that the validity of any law made by Parliament or the Legislature of any State shall not be questioned "on the ground that it makes provision with respect to any matter which Parliament...or the Legislature of the State has no power to make laws." This proviso, therefore, rendered Parliament supreme in the business of law making so long as the subject matter pertained to the Federal List under the Ninth Schedule. As pointed out in the last chapter, the inclusion of "the principles of natural justice" as a formal constitutional safeguard against arbitrariness was totally eliminated from the \textit{Merdeka} Constitution.

The fundamental liberties recommended in the Reid Draft were not fully entrenched in that Reid envisaged that they could be amended by an ordinary two-thirds majority in Parliament.\(^3\) The Commission said that these liberties were "...all firmly established in Malaya, and it may seem unnecessary to give them special protection in the Constitution..."\(^4\) It is submitted that this finding on the part of the Reid Commission was erroneous because there were no evidence to show that fundamental liberties in Malaya then were "firmly established" prior to or in 1957 itself. The Commission did not give any reason or explanation as to why the fundamental liberties ought not to be fully entrenched.\(^5\) The Commission appeared to

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1. Article 9(2) of the \textit{Merdeka} Constitution pertains to freedom of movement subject to the restrictions of security and public order allowed under federal law.
2. Article 10 caters for freedoms of speech, assembly and association. These rights are also subject to restrictions of security and public order allowed under federal law.
3. Article 150(1) of the Reid Draft stipulated that "...any provision...may be amended or repealed by an Act of Parliament if a Bill for that purpose is passed by each House of Parliament by a majority of the total number of that House and by the votes of not less than two-thirds of the members of that House present and voting..."
5. The discussion on fundamental liberties are contained in paras 161 and 162 of the Commission's \textit{Report} as well as under para 70 of its Chapter XII under "Summary or Recommendations" (pp. 87-95). As to the common law meaning of "entrenched", see the dissenting judgement of Viscount Dilhorne in the 1977 case of \textit{Hinds v. The Queen} (1977) AC 95 at 110.
be in favour of applying a general approach in so far as amending the Constitution was concerned. At para 80 it said:

It is important that the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides.1

In line with this opinion the Commission recommended that a referendum would not be suitable for Malaya. Thus it went on to recommend that an amendment to the Constitution could only be by Act of Parliament "passed in each House by a majority of at least two-thirds of the members voting.2 In the Merdeka Constitution a slight variation occurred in that it was provided that a Bill for making any amendment to the Constitution..."shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of that House." (italics supplied). The Commission did not find it necessary to entrench the sovereignty, powers and privileges of the Rulers and Malay special rights. The Merdeka Constitution, however, altered this standpoint and recognised the need to entrench the provisions relating to the Conference of Rulers (Article 38), the special rights of the Malays (Article 153), the precedence of Rulers and Governors (Article 70) and the federal guarantee of State Constitutions which inter alia provided for the safeguard of the sovereignty, prerogatives, powers and jurisdiction of the Rulers.3 To amend these provisions the consent of the Conference of Rulers was required.4 It is clear, therefore, that fundamental liberties even under the Reid Draft did not receive their proper constitutional safeguards against normal amendments.

With respect to the judiciary, the Merdeka Constitution differed from the Reid Draft in two major aspects. First, the appointment of the Chief Justice and Supreme Court judges under the Reid Draft was made by the Agong.5 While the appointment of a judge of the High Court was to be made by the Agong in consonance with the

1Reid Commission op. cit. p. 31.
2Article 150(1) of the Reid Draft.
3Article 181 of the Merdeka Constitution also guarantee these rights.
4Articles 38(4) and 159(5) Merdeka Constitution.
5Article 114(2) in the Reid Draft.
recommendations of the Judicial and Legal Services Commission (JLSC)," such
appointment must be made only "after consultation with the Chief Justice. Under the
Merdeka Constitution the appointment of the Chief Justice and judges of the Supreme
Court, for example, was made by the Agong "on the advice of the Prime Minister,
after consulting the Conference of Rulers." Second, under the Reid Draft the removal
of a judge from office had to be with the Agong's order "made in pursuance of an
address by Parliament supported by the votes of not less than two-thirds of the
members present and voting in each House of Parliament." The condition-precedent
under the Reid Draft was that "there shall be such proof as Parliament may by law
require that the said judge has been guilty of misbehaviour or suffers from such
infirmity of body or mind as renders him incapable of acting as judge of the Supreme
Court." Furthermore, the notice of motion must be signed by not less than one-
quarter of the members of the House in which the motion originates. In contrast the
Merdeka Constitution provided that a Supreme Court judge could be removed by
way of a representation by the Prime Minister or the Lord President to the Agong on
the ground of misbehaviour or of inability, from infirmity of body or mind or any
other cause. In pursuance of this representation the Agong "shall appoint a
tribunal...and refer the representation to it." In addition, the Merdeka Constitution
provided that the conduct of a Supreme Court judge "...shall not be discussed in
either House of Parliament except on a substantive motion of which notice had been

1Formed under Article 130 of the Reid Draft and Article 138 of the Merdeka Constitution. Under s.15
of the Constitution (Amendment) Act 1960 the Judicial and Legal Service Commission (JLSC) was
abolished. The JLSC was, however, reinstated by way of the Constitution (Amendment) Act 1963
[Act 25/1963].
2Article 122(3) of the Merdeka Constitution.
3Article 116(c) in the Reid Proposal.
4The history, nature and scope of 'misbehaviour', in the context of the removal of judges, has been
carefully and exhaustively considered in Australia (Parliamentary Commission of Inquiry - Re The
Hon. Mr. Justice Murphy, Australian Bar Review, 1986 Vol. 2 No. 3 p. 203) as well as by Professor
5Ibid. Article 116(2)(a).
6Ibid. Article 116(2)(b).
7Article 125(3) of the Merdeka Constitution.
8Article 125(3) of the Merdeka Constitution. This proviso became an issue in the 1988 judiciary crisis
because it was alleged that there was no such representation. See Chapter 7 infra.
given by not less than one quarter of the total number of members of that House, and shall not be discussed in any Legislative Assembly of any State".1

3.3. Fundamental Rights in the Constitution

We now examine the general arrangement of fundamental liberties under the Malaysian Constitution (the Constitution)2 before discussing the relevant amendments made thereto after merdeka. In its general structure, the Merdeka Constitution followed the Reid Draft and, apart from certain new provisions relating to the rights of the Borneo States of Sabah and Sarawak3, the Malaysian Constitution has followed closely the Merdeka Constitution. However, what is significant is that after thirty-four constitutional amendments since merdeka, the rights the Constitution was supposed to protect have been subject to severe inroads from the long arm of the executive. The first point to be noted is that not all fundamental rights are treated with equal respect under the Constitution.

Part II of the Merdeka Constitution, known as the fundamental liberties, contained restricted aspects of human rights. These restrictions, as we have seen, started with the Reid Draft. The subsequent alterations made by the Alliance Government to the Reid Draft and alterations to the Merdeka Constitution itself in later years sharply reduced the protection of these rights. Nevertheless, some of these liberties enjoyed a higher status by virtue of the fact that it was difficult for ordinary law to abridge them. The scope of these rights and the power of Parliament to limit

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1 Article 127 Merdeka Constitution.
3 The following Articles were amended to accommodate the interests of Sabah and Sarawak: Article 1(2) (States and territories in the Federation of Malaysia after 1963); Article 95B (Modifications for States of Sabah and Sarawak of distribution of legislative powers); Article 95C (Power to extend legislative or executive powers of States); Article 95D (Exclusion for States of Sabah and Sarawak of Parliament's power to pass uniform laws about land or local government); Article 95E (Exclusion for States of Sabah and Sarawak from national plans for land utilisation, local government, development etc.). See also Part VII Chapter 2 with respect to certain financial provisions especially applicable only to Sabah and Sarawak. For a review of Sabah's and Sarawak's constitutional positions within the Federation, see F.A. Trindade & H.P. Lee (Ed.), The Constitution of Malaysia: Further Perspectives and Developments. Essays in Honour of Tun Mohamed Suffian, Oxford University Press, Kuala Lumpur, 1986, Chapters 6 and 7.
them are clearly spelled out in the Constitution. Among these 'better' protected rights are:

1. Freedom from slavery and forced labour (Article 6)
2. Protection against retrospective criminal laws and repeated trials (Article 7A)
3. Prohibition against banishment of citizens (Article 9)
4. Freedom to profess and practise a religion (Article 11(1))
5. Freedom from special but not general taxation to support a religion other than one’s own (Article 2).
6. Freedom of a religious group to manage its own religious affairs and to establish and maintain institution for religious or charitable purposes (Articles 11(3) and 12(2)).
7. Right to adequate compensation for compulsory acquisition or use of private property (Article 13(2)).

The above rights are better protected in that they are not subject to exceptions or overriding clauses such as the considerations of security, public order or morality. In contrast, the freedoms of movement (Article 9), speech, assembly and association (Article 10) for example, are predicated by such exceptions as security, public order, public health or morality.

Other fundamental freedoms under Part II are well guarded against executive arbitrariness but not as well secured against legislative interference. The Constitution formulates them more as goals, standards and targets than as iron-clad guarantees. Their scope is left undefined and Parliament is given extensive power to regulate them on grounds of security, public interest, public health and morality. Among these lesser protected rights are:

1. The right not to be deprived of life or liberty "save in accordance with law." (Article 5(1))
2. Equality before the law (Articles 8 and 12(1))
3. Freedom of movement (Articles 9(2) & 9(3)).
4. Freedom of speech, assembly and association (Article 10).

A second way to categorise fundamental rights would be to divide them according to those to whom they apply. Some liberties are conferred on all persons; others are granted to citizens only. In the first category of rights with a wider applicability are personal liberty, the right to property, freedom of religion, protection
against retrospective criminal laws and repeated trial and prohibition against slavery and forced labour. In the second category are rights in respect of education, equality before the law, freedom of speech, assembly and association and prohibition against banishment. A third way to categorise the liberties in Part II would be to view them in the context of emergency powers. There is only one fundamental right - the right to religion that cannot be suspended in times of emergency.\textsuperscript{1} All other rights under Part II must give way to emergency laws. Article 150(6A) lays down that during an emergency the power of Parliament shall not extend to any matter of Islamic law, the custom of the Malays (\textit{adat}) native law or custom in the States of Sabah and Sarawak, matters of religion, citizenship and language. In view of the power of Parliament under Articles 149\textsuperscript{2} and 150 to override most provisions of the Constitution dealing with fundamental liberties, the only genuinely viable provisions of the Constitution are not those contained in Part II but those given under Article 150(6A). They enjoy greater sanctity and are more entrenched in the Constitution than any other rights.

Malaysia's constitution is said to be based on the Westminster model.\textsuperscript{3} As to what constitutes the Westminster model, Professor de Smith has written:

\begin{quote}
In its narrow sense - the Westminster model can be said to mean a constitutional system in which the head of state is not the head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature...\textsuperscript{4}
\end{quote}

In a constitutional modality that has been claimed to be substantially fashioned after that of Westminster which is "desperately fragile and precariously balanced"\textsuperscript{5}, there can be no total independence of each segment of government because Parliament is supreme within the framework of an unwritten constitution and as such it may legislate on almost any matter. In the United Kingdom where the Constitution is

\textsuperscript{1}See Article 150(6A)
\textsuperscript{2}Special powers against subversion, organised violence, and acts prejudicial to the public.
\textsuperscript{5}ibid. al. p. 2.
unwritten, conventions help to determine the breadth of constitutionalism. But checks and balances inherent in such a system are not as demarcative as, say, the constitutional institutions of the United States and they are not easily identifiable - a state of affairs that is perhaps attributed by the very nature of an unwritten constitution. It has been remarked that "the Westminster model...will never appear in a legal dictionary."4

It has been said also that the constitution guarantees no more than what are the basic rights of citizens and that the constitution only manifests the sum total of such rights and liberties before the existence of the constitution. These pre-constitution rights, so to speak, suggest that they are inalienable. However, this has not proven to be so in the case of Malaysia because these 'rights' were not clearly in existence prior to the adoption of the Constitution in 1957. Prior to independence in 1957 these basic rights had not been clearly formulated or seen as being concrete and traditional. In contrast, what were really regarded as "traditional elements" of the Constitution were matters like citizenship rights (Part III), the special position of the Malays (Article 153), the national (Malay) language (Article 152), and the sovereign rights of the Rulers (Article 181). These may not be amended unless they are supported by at least two-thirds of the total number of members of each House and consented to by the Conference of Rulers.7

1 In respect of constitutional convention, Dicey says that these are "rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised". See A.V. Dicey, An Introduction to the Study of the Law of the Constitution (10th edn.), With An Introduction by E.C.S. Wade at p. clii. See also Ibid. p.423 where Dicey reiterates that in a constitutional convention, e.g. the exercise of discretionary power by the government, there is no necessity to go back to Parliament for new statutory authority. Cf. the notion of convention as in the Geneva Convention 1949 (which became the Geneva Convention Act 1950 of the United Kingdom).

2 Constitutional conventions have been described as "rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution but which are not enforced by the law courts...": G. Marshall & G.C. Moodie, Some Problems of the Constitution, 5th edn. 1971 pp. 22-23.

3 See, for example, Bernard Schwartz The Greatest Rights of Mankind, New York, 1977 pp. 67-72.


5 A.V. Dicey, Laws of the Constitution, op cit. p.135. However, in New Zealand where the common law is still strongly followed, there are instances where the courts are beginning to subscribe to the view that Parliament cannot assume to be subjecting all rights as a part of them are always with the people. See Adam Ross, "Diluting Dicey", Auckland University Law Review, (1988) Vol. 6 p. 176.


7 Article 159(5).
In the light of these entrenched provisions, the fundamental liberties, on the contrary, appear to occupy secondary importance in the Constitution. It could also be discerned that what were finally translated into Part II were matters which were more in the nature of superimposed rather than basic rights. Of course, Parliament in its basic power to make laws does not deviate from the Federal and Concurrent Lists as set out under the Ninth Schedule. This is one aspect which, at least in theory, sets the Malaysian Constitution apart from the Westminster model. The other aspect is that while the checks and balances are in-built within the Westminster model, particularly by way of a powerful public opinion mechanism generated by a free media, under the Malaysian Constitution the balancing infrastructure, while intrinsically limited since the Reid Draft, has been progressively dismantled through constitutional changes. The situation gets worse through the creation of various statutes over the years, not to mention the attitude of the Malaysian courts towards the exercise by the executive of its powers especially in cases involving administrative detention.

Whether it is sound to attribute the notion of the 'Westminster model' and its purported separation of powers to the English tradition is open to question. Hood Phillips argues that the Westminster model implicitly involves the concept of separation of powers but "not because that model ever fully operated at Westminster but because it was enacted at Westminster for various former dependent territories. The idea behind it was evidently conceived in the old Colonial Office, and so perhaps it would be more appropriately called the "Whitehall model".

In view of the fact that the judiciary provisions under Part VI and the fundamental liberties under Part II of the Constitution are not entrenched, the

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1. Article 74(1) provides that Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List, i.e. the First and Third List set out in the Ninth Schedule. Clause (2) of Article 74, on the other hand, provides that the Legislature of a State may make laws with respect to any of the matters enumerated in the State List set out in the Ninth Schedule or the Concurrent List.


position of the rule of law can be quite precarious especially with the continued presence of more than two thirds majority in Parliament of the same ruling party since merdeka. As this has indeed been the case in the last thirty five years and especially during the 1988 judiciary crisis which resulted in the further strengthening of the executive under the Constitution (Amendment) Act 1988, it is pertinent now to take stock of some of the major amendments made to the Merdeka Constitution in particular with respect to fundamental liberties, the judiciary and the powers of the executive.


For the period 1957-1977 the Merdeka Constitution and its successor, the 1963 Constitution, was amended twenty-three times and from 1977 to mid-1993 eleven more amendments were effected. In 1993 alone the Constitution was amended three times to accommodate the policy of doing away with certain powers and immunities of the Rulers and to curtail democratic rights during the currency of each Parliament. Of these thirty-four amendments, thirteen affected fundamental liberties, the judiciary and federal-state rights.

Even as late as July 1993 the Government pushed through its third constitutional amendment for that year dealing with policy in appointing ministers from among members of state legislatures and the curtailment of parliamentary rights.

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1Chapter 7 infra.
3The Constitution (Amendment) Act 1993 pertains to the curtailment of the powers of the Agong and the Rulers. For a comprehensive list of amendments to the Constitution, see "List of Amendments to the Federal Constitution" in the Federal Constitution, op. cit. These figures are arrived at by adding all the amendments under each given amendment Act of Parliament.
5The Constitution (Amendment) Act 1993 (No. 3) sought to obtain two objectives: (1) power to appoint Ministers from among members of the State Legislature which hitherto was barred by Article 43(8) of the Constitution which reads: "If a member of the State Legislative Assembly of a State is appointed a Minister he shall resign from the Assembly before exercising the functions of his office"; (2) to establish a mechanism by amending Article 54 whereby a casual vacancy of a parliamentary seat within the last two years of Parliament's life will not be filled if the majority of a party in power is not affected by such casual vacancy.

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3.5. Constitution (Amendment) Act 1960

The first major amendment that changed the course of the judiciary and restricted liberty was the Constitution (Amendment) Act 1960\(^1\), enacted the same year as the Internal Security Act 1960\(^2\) (ISA)\(^3\). On the one hand, the 1960 amendments abolished Article 138 which enacted the Judicial and Legal Service Commission (JLSC). On the other, it enhanced the grounds for establishing anti subversion powers under Article 149 as well as broadening the scope of emergency powers of the Merdeka Constitution. The JLSC functioned, since merdeka in 1957, as the authority for the appointment of judicial and legal officers.\(^4\) The repealed Article 138 provided, inter alia, that "the jurisdiction of the Judicial and Legal Service Commission (JLSC) shall extend to all members of the judicial and legal service other than the Chief Justice and the other judges of the Supreme Court and the Attorney general." This was in line with the Reid recommendation.\(^5\) Clause (3) of Article 138 provided for the membership of the JLSC which consisted of the Chief Justice (Chairman), the Attorney general (member), the senior puisne judge, the deputy chairman of the Public Service Commission and one or more other members who were appointed by the Agong from among judges or former judges of the Supreme Court. In the context of separation of powers, it is ironical to note that the Attorney General was a member of a commission that supplied the country’s judicial and legal officers.\(^6\)

With the abolition of the Judicial and Legal Service Commission, a new method of appointing judges was set out in a new clause, Clause (3) of Article 122:

\(^{1}\)Section 28(a) Act 10 of 1960.
\(^{2}\)Act 82 Revised 1972. The ISA and other administrative detention instruments are discussed in Chapter 5.
\(^{3}\)The ISA replaced the Emergency Regulations 1948 (No. 10 of 1948)
\(^{4}\)Section 15 Constitution (Amendment) Act 1960. The JLSC was recommended in the Reid Draft: Part X and Article 130 p. 167.
\(^{5}\)At p. 91 of the Reid Commission Report it was recommended: "The Chief Justice should be appointed by the Yang Di Pertuan Besar (Agong) and other judges should be appointed by the yang Di Pertuan Besar in consultation with the Chief Justice." See also para 124
\(^{6}\)In Public Prosecutor v. Datuk Yap Peng (1987) 2 MLJ 311 Abdoolcader SCJ categorised the Attorney General as being part of the executive and that it was improper for him to transfer cases from one court to another as this was, so his Lordship said, judicial function.
In appointing the Chief Justice the Yang Di Pertuan Agong shall act on the advice of the Prime Minister, after consulting the Conference of Rulers and in appointing the other judges of the Supreme Court he shall act on the advice of the Prime Minister after consulting the Conference of Rulers and considering the advice of the Chief Justice.

Article 122(3) was created by section 15 of the 1960 amendment Act.1 Basically, this provision has survived under the present Article 122B which provides that "the Lord President of the Supreme Court, the Chief Justices of the High Courts...and other judges of the Supreme Court and of the High Courts shall be appointed by the Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers." So is the provision relating to the removal of judges under Article 125(3), which calls for a 'representation' to the Agong by the Prime Minister "or the Lord President after consulting the Prime Minister". Thus the political supremacy in the appointment and removal of judges is unambiguous.2 It is to be noted again that the Reid Commission recommended none of this.

The second limb of the Constitution (Amendment) Act 1960, as pointed above, furnished extra grounds to legislate on anti-subversion matters. The provisions against subversion under Article 137(1) of the Reid Draft provided that a law designed to combat organised violence against persons or property, was lawful notwithstanding that it was repugnant to any of the provisions of Articles 5 (liberty of the person), 9 (freedom of movement), 10 (freedoms of speech, assembly and association), 68 (subject matter of federal and state laws), or 73 (legislative power of a state). The main ground required for such a law was merely that "if action has been taken or threatened by any substantial body of persons to cause or to cause any substantial number of citizens to fear, organised violence against persons or property". This became Article 149 in the Merdeka Constitution which provided:

149(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property, any

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1The Judicial and Legal Service Commission (JLSC) was reinserted in 1963 by section 52 of the Malaysia Act 1963. See below. However, judges are not appointed pursuant to it as their appointments are governed directly by Article 122B(1), inserted by the Malaysia Act 1963.

2This was the salient point that prevailed in the 1988 judiciary crisis when the Prime Minister outrightly exercised his discretion in advising the Agong to effect the removal of Tun Salleh Abas as Lord President in 1988. See Chapter 7 infra.
provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, or 10, or would apart from this Article be outside the legislative power of Parliament...

Such law if enacted by Parliament would only be valid for one year at a time "without prejudice to the power of Parliament to renew such Act..." The 1960 amendment, in expanding the grounds for enacting anti-subversion laws, altered the generality of the above provisions by enumerating 4 disjunctive grounds. The new Article 149(1) reads:

If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation, (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or (b) to excite disaffection against the Yang Di Pertuan Agong or any Government in the Federation; or (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or (d) to procure the alteration, otherwise than by lawful means, of anything by law established.

In 1978 two new grounds were added i.e. (e) any action that is "prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public" and (f) "which is prejudicial to public order in, or the security of, the Federation or any part thereof". A new proviso was also added to the effect that any law designed to achieve any of the above objectives is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5 (liberty of the person), 9 (prohibition of banishment and freedom of movement), 10 (freedom of speech, assembly and association) or 13 (right to property) or be outside the legislative powers of Parliament.

The original Clause (2) which gave life of only one year to an anti-subversion law was deleted. Instead, under the new Clause (2) such legislation ceases to have effect only "if resolutions are passed by both Houses of Parliament annulling such law". Thus in a situation like the present where the Barisan Nasional government has enjoyed more than two thirds majority in Parliament since merdeka, legislation like

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1 Article 137(2) in the Reid Draft.
2 This Clause was taken straight from the original Clause (1) of the Merdeka Constitution.
3 Clause (e) of Article 149(1): inserted by A442/1978
4 The words "10 or 13" in Clause (f) of Article 149(1) were inserted to substitute the words "or 10" by section 14 of the Constitution (Amendment) Act 1981 [Act A514/1981].
the Internal Security Act 1960 (ISA) which gets its life from Article 149 may never be annulled by both Houses because the power benefits derived from its enforcement are obvious. In regard to this situation Dato' Abdul Razak Hussein, the then Deputy Prime Minister explained to the Dewan Rakyat:

"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 legislation by resolution at any time."

The 'any time' referred to in that speech never came. Today the ISA continues to be enforced as a normal law although, in view of its draconian attributes, it was originally supposed to have been terminated at the end of each year. In 1989 the ISA itself was amended so as to deny judicial review in respect of acts done or omitted by the Minister.

3.6 The Malaysia Act 1963

The Malaysia Act 1963 gave birth to the new Federation of Malaysia. This Act has been described as being responsible for the birth of a new Constitution of a new enlarged nation. Primarily, the Malaysia Act amended the Constitution of the Federation of Malaya. The amendments accommodated Singapore, Sabah and Sarawak within a substantially restructured framework along 'the lines of negotiated terms'. Major changes occurred in matters concerning the judiciary, citizenship, financial arrangements, distribution of legislative powers, the public services and the special protection of the Borneo States.

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1Parliamentary Debates, Dewan Ra'ayat 22 April 1960 clmn. 306. [The modern spelling for the Dewan Ra'ayat is Dewan Rakyat.]
3Act No. 26.
6Article 161E provided that with regard to the application of the Constitution to the Borneo States, an amendment of the Constitution would still require a two-thirds majority in both Houses of Parliament and in a number of special cases would require the concurrence of the Governor of the Borneo States or each of the Borneo States concerned.
Under amendments affecting parliament's membership of the upper House, the *Dewan Negara* was enlarged to fifty members - 28 chosen by nomination from the States Legislatures (two from each state) while the remaining 22 were appointed by the Agong.\(^1\) Although the amendments directed that persons to be appointed as Senators ought to have certain qualifications such as distinction in the profession, commerce, industry social service or are representative of racial minorities\(^2\), ultimately it was the Prime Minister who decided whether a person was fitting and qualified to be appointed as a Senator.

In respect of the judiciary, the term 'Supreme Court' wherever it appeared in the Constitution was substituted by 'Federal Court'.\(^3\) Three High Courts of co-ordinate jurisdiction and status were designated: one in the States of Malaya, one in the Borneo States and one in the State of Singapore. The new Federal Court, having replaced the Supreme Court, with its principal registry in Kuala Lumpur, became the highest court of appeal in the land, presided over by the Lord President as its highest judicial officer.\(^4\) The leading proviso under Article 121, viz. "the judicial power of the Federation shall be vested in a Supreme Court . . ." was changed by the 1963 Act so as to read ". . .the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status..."\(^5\).

The Malaysia Act 1963 re-established the Judicial and Legal Service Commission. Under the 1963 amendment the Chairman was no longer the Chief Justice as was the case from 1957 to 1960. The position was taken over by the Chairman of the Public Service Commission. The Attorney General remained an *ex*

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1 Under Article 40 the *Agong*, it must be noted, appoint these persons as per the 'advice' of the Prime Minister. Cf. Chapter 1 *ante*. In 1993 the Senate has 60 members who are all, with the exception of 2, appointed under the Barisan Nasional banner. See *New Straits Times*, 7 June 1993.
2 Article 49
3 This was to change again in 1985 when sections 15, 16 and 17 of the Constitution (Amendment) Act 1985 [Act A566], following the final termination of appeals to the Privy Council, reinstated the term 'Supreme Court' in place of 'Federal Court'.
4 The following year the Courts of Judicature Act 1964 was enacted, providing for the hierarchy, powers and functions of the courts in the land. The term 'Lord President' was suggested by Thompson CJ who was himself of Scotts origin: See M. Suffian, "Four Decades in the Law - Looking Back", in F.A. Trindade, & H.P. Lee, *op. cit.* at. p. 221.
5 Section 13 Constitution (Amendment) Act 1963.
officio member; and one or more other members were appointed by the Agong, after consultation with the Lord President of the Federal Court.1

The formation of Malaysia under the Malaysia Act 1963 sparked for the first time a state-federal controversy when the State of Kelantan objected to its formation on the ground that the state was not brought into prior consultation and agreement.2 The Malaysia Act 1963 forged ahead with the continued supremacy of the Federation over the individual states. A new clause (4) was inserted under Article 71 which gave the overall authority to Parliament to enact law which the State must adopt under Part I of the Eighth Schedule. Having done that Parliament was in a position to enforce it on the States. At the same time, it was provided that "Parliament may, notwithstanding anything in this Constitution, by law make provision for giving effect in the State to the essential provisions or for removing the inconsistent provisions."3 The Malaysia Act 1963 drew its fair share of controversy both in the courts as well as in the Dewan Rakyat. In the main the criticisms centred on the issues of state rights and the lack of consultation between the Federal Government and the States on the formation of Malaysia.4 The government reacted to the criticism on lack of consultation by saying that "if it is intended that the States should be consulted when the question of admission of new States arises, then it would have been written in the Constitution."5 In 1967 a prominent political leader from Sabah issued a strong statement censuring the federal leadership on the inroads against state rights:

... a number of our safeguards are no longer safe; promises have been broken and although we are supposed to have a federal system of government, action taken on the part of the Central Government indicates that the policy is to do away with state rights as soon as possible and all

3Act 25/1963 c.i.f. 29 August 1963.
4For example, see speech of Tan Phock Kim MP during the Malaysia Act 1963 debates: Parliamentary Debates, Dewan Rakyat Vol. V No. 6, 12 August, 1963, clmn. 717. In The Government of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-haj (1963) MLJ 355 the plaintiff state government objected to the formation of Malaysia and claimed that without the consent of the plaintiff government the Malaysia Agreement entered into between the various state governments and the Federal Government was null and void. See Chapter 4 infra.
5Parliamentary Debates Dewan Rakyat Vol. V No. 12, 19 August, 1963, clmn. 1316, per Dr. Ismail bin Dato Abdul Rahman.
power will be given to Kuala Lumpur...we are moving towards a unitary state system thinly
disguised as a federation.¹

3. 7. Constitution (Amendment) Act 1966

Under the Constitution (Amendment) Act 1966² the Constitution received five
categories of major amendments: (i) amendments occasioned by Singapore's removal
from Malaysia, (ii) amendments relating to general elections in the Borneo States of
Sabah and Sarawak, (iii) amendments in pursuance of the Malaysia Act 1963, (iv)
amendments affecting the High Court and the Federal Court, and (v) amendments
relating to the powers of the Public Services.³ The amendment under category (v)
requires some comments as it posits controversy. By the insertion of the new Clause
5B into Article 144 which provided for the appointment, confirmation and
emplacement of public servants, the powers of promotion and discipline were
transferred from the Public Services Commission to the Heads of Departments in the
various ministries. The new Clause 5B(i) provides that the power and functions of the
Public Services Commission, other than the power of first appointment, were to be
exercised by a board appointed by the Agong. This Board was to be appointed by the
Agong and to be comprised of Heads of Department. The Deputy Prime Minister
stated that the aim of the amendment was to ensure that civil servants carry out their
work more efficiently by giving more powers to the heads of departments.⁴ The
criticism against this change was that the civil service might as a result be "riddled
with nepotism, corruption and patronage".⁵ It is easy to notice that the amendment to
Article 144 in the light of this amendment appears to be a deviation from the

²Amendments with respect to certain grammatical and printing errors in the Constitution were also made under the Constitution (Amendment) Act 1966.
³Dato' Abdul Razak Hussein, the Deputy Prime Minister in tabling the Constitution (Amendment) Act 1966 on 22 August 1966.
⁴Speech of C.V. Devan Nair (Bungsar) in Parliamentary Debates, Dewan Ra'ayat, 22 August 1966 clmn. 1190-1194; Dr. Tan Chee Khoon (Batu) clmn. 1203-1213.
recommendations of the Reid Commission.\textsuperscript{1} The establishment of an independent Public Services Commission was recommended by the Reid Commission with a view to ensuring the observance of certain principles, one being the impartiality of the civil service and its "absolute freedom from arbitrary application of disciplinary provisions".\textsuperscript{2} Although more drastic changes were introduced in the late 1980's which submit the civil servants to the political control of the executive, it may be said that one of the early changes which the Malaysian Civil Service (MCS) had to undergo took place by way of this constitutional amendment.


In 1983 a constitutional crisis occurred consequent upon the Constitution (Amendment) Act 1983\textsuperscript{3}. The crisis was on account of two matters. The first pertained to a constitutional amendment that affected the position of the Agong \textit{vis-a-vis} his power to proclaim a state of emergency under Article 150 and the second was with respect to the taking away of the Agong's residual power under Article 66 to refuse to sign a Bill into law. Under section 20 of the Constitution (Amendment) Act 1983, the power of the Agong to declare a state of emergency was directly taken over by the Prime Minister.\textsuperscript{4} By this amendment the Prime Minister took it upon himself to determine whether or not to effect that declaration, although this was hardly necessary in view of the provisions of Article 40 which require the Agong, in the exercise of his functions under the Constitution, to act on advice of the Cabinet "or of a minister acting under the general authority of the Cabinet". The words "if the Prime Minister is satisfied that certain circumstances exist which render it necessary that immediate action be taken, he shall advise the Agong to promulgate such ordinances as the

\textsuperscript{1}See paras 153 and 154 of the \textit{Reid Commission Report}.
\textsuperscript{2}\textit{The Reid Commission Report}, (para 153) laid down two principles: (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 arbitrary application of disciplinary provisions are essential foundations of a public service.
\textsuperscript{3}Act A566/1983
\textsuperscript{4}Article 150 has been amended six times since 1960. These amendments are further discussed in Chapter 5 \textit{infra}.
Prime Minister deems necessary, and the Agong shall then accordingly promulgate such ordinances" were substituted for the words "if the Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require."1 This awesome and direct transfer of power to the Prime Minister from the Agong in the business of administering emergency rule caused temporary convulsions in the country and received wide comments.2 It is interesting to note that the reasons given by the Prime Minister for all these changes were "for the interests of the people and the management of the administration."3 At the same time it is pertinent at this point to appreciate what a scholar on the separation of powers has said:

"The granting of extraordinary powers to the executive for the purpose of dealing with emergencies seriously affects the utility of the doctrine of separation of powers unless the declaration of emergency is left to the legislative branch and unless the courts have the power - and exercise it - to enjoin the executive from acting in the absence of such a declaration and from taking action not reasonably necessary to cope with a declared emergency."4

Turning now to the second source of controversy, the original Article 66(4) provided that the Agong "shall signify his assent to a Bill by causing the Public Seal to be affixed thereto, and after assenting to a Bill he shall cause it to be published as law." Although by virtue of Article 40 the Agong was invariably subject to the advice of the Cabinet in the exercise of his functions under the Constitution, and thereby he is duty-bound to sign all Bills into law, the executive thought that was not good enough. Thus under the 1983 amendment they compelled the Agong to "signify his assent to a Bill within fifteen days after the Bill is presented to him."5 These two

1Section 20 Act A566/1983 c. i. f. 16 December 1983.
3Lapuran Parlimen Dewan Rakyat) 1 August 1983, Clmn 8554. The original Malay version runs thus: "peruntukan baru terpaksa diadakan untuk 'menjaga kepentingan rakyat dan pengurusan pentadbiran'"- Clmn 8555.
5Section 2 Constitution (Amendment) Act 1983.
unprecedented moves initiated by the Prime Minister met with widespread opposition, even from some quarters within his own Cabinet,\(^1\) former Prime Minister, Tunku Abdul Rahman\(^2\) and of course from the Rulers themselves. Seeing the solidarity of the Rulers in opposition to this amendment and the unpopular political repercussions it brought, the amendments were withdrawn in January 1984\(^3\), four months after they were tabled at the *Dewan Rakyat* \(^4\) and only about a month after they had become law.\(^5\) No other law had such a short-lived duration in the history of Malaysian constitutionalism. The Agong and his brother Rulers did not conceal their displeasure at this unprecedented move of the Prime Minister\(^6\) and consequently there were months of tiff between the Prime Minister and the Rulers which event marked the first constitutional crisis between the Rulers and the Prime Minister.\(^7\) The Prime Minister conducted 12 major rallies, most of which were without police permits\(^8\) in the various states with the objective of explaining the reasons for his attempt at massive constitutional change. A political scientist summed up these events this way:

*The New Straits Times*, being owned by UMNO, gave prominence to the rallies supporting Dr. Mahathir, but almost no coverage of the pro-Ruler rallies. Technically, all the rallies were 'illegal' since they were held without police permission and in contravention of the ban on large political rallies. Estimates of those attending the rallies indicate they attracted from 15,000 to 100,000. . .The domestic press tended to give the larger figures for the pro-government rallies.\(^9\)

On 9 January 1984 the Prime Minister, taking into account what he referred to as the "apprehension of Their Royal Highnesses the Rulers"\(^10\) introduced the Constitution

\(^1\)Tengku Razaleigh Hamzah, Minister of Finance and one of the aspirants to premiership, stayed away from the various rallies organised by Dr. Mahathir around the country.


\(^3\)Act 584 c.i.f. 20 January 1984.

\(^4\)The Constitution (Amendment) Bill 1983 was tabled by the Prime Minister at the *Dewan Rakyat* on 1 August 1983. It became law (Act A566), c.i.f. on 16 December 1983.

\(^5\)Constitution (Amendment) Act 1984 Act A566.

\(^6\)Datuk Seri Dr. Mahathir Mohamed.


\(^9\)Gordon P. Means *op. cit.* p. 116

\(^10\)Parliamentary Debates: Dewan Rakyat - 9 January 1984 p.10
(Amendment) Act 1984 with the objective of amending the two matters whose earlier enactment had triggered the 1983 Constitutional Crisis. In retrospect, the Prime Minister indeed had another reason for attempting to do away with the Agong’s original power under Articles 66 and 150. In a mammoth rally held in Malacca he declared that he wanted 'the feudal system' to be over.¹ In respect of Article 150, reversion to status quo was made in that the words "Yang Di Pertuan Agong" were again substituted for the words "Prime Minister". In the case of a non-money Bill, the Agong "shall within thirty days after a Bill is presented to him - assent to the Bill by causing the Public Seal to be affixed thereto". Clause (5) gives the Agong thirty days (instead of fifteen in the 1983 Act), within which period he must give his assent to any non-money Bill that has been passed in the prescribed manner by Parliament.²

3.9. Liberty of the Person

One of the most trodden upon human rights provisions of the Constitution is Article 5 which guarantees that "no person shall be deprived of his life or personal liberty save in accordance with law".³ The original version of this article in the Merdeka Constitution was largely similar to the one recommended by the Reid Commission.

The article, as it was in the Merdeka Constitution, read:

5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate’s authority.⁴

¹New Straits Times, 20 December, 1983. See also Dr. Mahathir’s interview in the New Straits Times, 17 December 1983.
²Section 2 Constitution (Amendment) Act 1984 : c.i.f. 20 January 1984
³For a discussion on cases involving Art. 5, see Chapter 4.
⁴Clause (4) of Article 5 has undergone 3 amendments since merdeka.

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Thus, on the authority of Clause (1) of Article 5, if Parliament created a law that deprived life consequent upon certain prohibitions, e.g. the trafficking of dangerous drugs, that law would be valid.\textsuperscript{1} Thus it is true to say that the government of the day can freely violate the personal liberties of an individual "provided it enacts a law to sanction such breaches."\textsuperscript{2} Clause (2) is the \textit{habeas corpus} provision of the Constitution. Under the Constitution (Amendment) Act 1976 Article 5(4) was amended.\textsuperscript{3} The amendment makes an exception to this general rule in that a person arrested or detained under "the existing law relating to restricted residence"\textsuperscript{4} is to be excluded from the contemplation of the said clause. The amendment, which was backdated to Merdeka Day, was effected to overcome a particular handicap faced by the executive in connection with the case \textit{Loh Kooi Choon}\textsuperscript{5} where the detaining authorities under the Restricted Residence Enactment 1933 (RRE) failed to satisfy the requirements of Article 5 (4). One immediate point to be raised consequent to the amendment is that the Constitution is made subservient to the RRE, a pre-Merdeka law restricting the freedom of movement of the person.\textsuperscript{6}


In 1988 the Government introduced a further set of amendments by way of the Constitution (Amendment) Act 1988\textsuperscript{7}. The Bill sought to bring about a multiplicity of changes that increased the power of the executive in several aspects while diminishing that of the judiciary and the states\textsuperscript{8}. Liberty of the person under Article

\begin{itemize}
\item \textsuperscript{1}For instance, see s. 39(B) of the Dangerous Drugs Act 1952, Act 234; s. 66 of the Internal Security Act 1960; s. 25 of the Firearms (Increased Penalties) Act 1971, Act 37; s. 6 of the Kidnapping Act 1961, (Act 365).
\item \textsuperscript{2}Harry M. Scoble & Laurie S. Wiseberg, \textit{op. cit.} p. 93
\item \textsuperscript{3}section 4 Constitution (Amendment) Act 1976 Act A 354/1976.
\item \textsuperscript{4}i.e. the Restricted Residence Enactment 1933. Cap 39 FMS.
\item \textsuperscript{5}(1977) 2 MLJ 187. See Chapter 4 \textit{infra}.
\item \textsuperscript{6}This point is taken up again in Chapter 4 \textit{infra}.
\item \textsuperscript{8}The constituent states in Malaysia have been experiencing a gradual but steady process of power decrease over the years as a result of federally imposed supremacy. In the Constitution (Amendment) Act 1988, for example, the States lost further rights over land that were designated for federal use. For a critique of this disproportionate State-Federal imbalance see, Dr. Jeffrey Kitingan, "The Imbalance", in Aliran, \textit{Reflections on the Malaysian Constitution}, Penang 1987 p.118. The original
\end{itemize}
5(4) was also reduced. Five substantive matters were amended: Article 5(4) was amended so as to enlarge the power of arrest or detention by immigration authorities of non-citizens. Instead of producing an arrested person before a magistrate within twenty-four hours as mandated in clause (4) of Article 5, the amendment allows the immigration authorities to detain the non-citizen for up to fourteen days. Secondly, a judge of a Syariah court was deemed to have the powers of a magistrate under the provision of clause (4). This means a Muslim arrestee "for an offence which is triable by a Syariah court" must be produced before a Syariah judge within twenty-four hours of his arrest.\(^1\) This does not only equate the constitutional power of a Syariah judge with that of a magistrate in terms of an arrested person but also, for the first time, puts the jurisdiction of an Islamic court with that of a magistrate court. This move pleased the Islamic scholars in the country.\(^2\)

Thirdly, the amendment effected an enlargement of the property rights of the Federal Government over land reserved for federal purposes. Although land has always been a state matter, the 1988 constitutional amendment divested the States from any residuary rights in respect of land parcelled out for federal purposes.\(^3\) While under the former Article 85 federally-acquired state land may revert to the State, under the new Article 85 there is no longer any such reversionary right because the amendment forces the property to devolve perpetually on the Federal Government and this is so despite the fact that annual premiums are payable to the State. It is strange that this amendment was not opposed by the States.\(^4\)

The fourth major amendment concerns the judiciary and affected Article 121. There are two aspects to the amendment: (a) the taking away of the "judicial power of
the Federation" from the High Courts\(^1\) and (b) the denying to the High Courts of any jurisdiction "in respect of any matter within the jurisdiction of the Syariah Courts".\(^2\)

The constitutional doctrine of separation of powers was itself endangered by a seemingly innocuous change in the wording of Article 121 which reads: "...the \textit{judicial power} of the Federation shall be vested in two High Courts...and in such inferior courts as may be provided by federal law..."\(^3\) After the 1988 amendment there is no longer any reference to the "judicial power of the Federation" that had been vested in the High Courts since 1963. Instead, the High Courts and inferior courts now "...shall have such jurisdiction and powers as may be conferred by or under federal law."\(^4\) It is significant to note that this amendment was made during the currency of the judiciary crisis in 1988. The obvious intention on the part of the Government was to confine powers of the judiciary only to federal law as enacted by Parliament from time to time. In this way common law principles such as the rules of natural justice, which the Prime Minister criticised so intently as being inconsistent with the Malaysian way of life\(^5\), may not be freely invoked by the courts.

The idea of giving a distinct and separate jurisdiction to the \textit{Syariah} Court has been voiced increasingly over the years. This move has been largely seen as the starting point towards the development of the country's own common law.\(^6\) In appreciating this particular constitutional amendment Professor Ahmad Ibrahim of the International Islamic University said, "For too long now the \textit{Syariah} Law and courts have been treated like a distant cousin and kept away from the mainstream of

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\(^1\)Section 8 Constitution (Amendment) Act 1988.

\(^2\)Sections 8(c) Constitution (Amendment) Act 1988. The new Clause (1A) of Article 121 now reads: "The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

\(^3\)In \textit{Public Prosecutor v. Dato Yap Peng} (1987) 2 MLJ 311, Zakaria Yatim J on an issue involving the power of the Attorney General (A-G) as Public Prosecutor in transferring cases from one court to another, dealt with the meaning of "judicial power" as "...the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects whether the right relates to life, liberty of property." Abdoolcader SCJ, in the same case, described the A-G as an ambi of the executive.

\(^4\)Constitution (Amendment) Act 1988 s. 8(a).


\(^6\)See Dr. Abdul Munir Hj. Yaacob, "Syariah Sebagai satu Sumber Undang-Undang Malaysia" (The Syariah as a Source of Malaysian Law) a paper presented at the \textit{Seminar on Syariah and Common Law in Malaysia} \textit{op.cit.}
the country's legal system."¹ While this development delights Islamic jurists and scholars, the position of the rule of law becomes even more competitive.²

The decision to do away with the courts' judicial power under the first part of the amendment to Article 121 may also be seen as a direct reaction by the executive to the attitude of the courts in certain decisions that went against the government, particularly during the two years preceding the amendment.³ The judiciary crisis of 1988 was another factor that may be seen as a catalyst in this regard. This sudden change has been described as "a deft stroke of the parliamentary draughtsman's pen and the voice of the mighty majority in the legislature have begun to deal death strokes to judicial independence."⁴ But the 'deft stroke' was more felt through the Prime Minister's speech in the Dewan Rakyat when he ridiculed the concept of natural justice, the common law and the English legal system in general. His idea of judicial function was strictly to adhere to the printed word of the law as desired by the government. Any elements of reasoning that favours freedom through other concepts and principles such as the rules of natural justice should not be tolerated.⁵ In the Dewan Rakyat, in the course of presenting the 1988 Act his broadside attack on the judiciary and natural justice is unmistakable:

There are courts that completely ignore the written law simply because they put in priority cases in Britain and other countries. Once more I would like to draw your attention to the fact that Malaysia is not Britain. How is it that only their (the judges') interpretation and logic are to prevail to the point that we have to turn a blind eye to our own laws which we have created through a process that is both lengthy and involving in-depth debates. Is their natural justice more in priority than our own laws? What is this natural justice? What is so "natural" about the justice that is administered by the courts in the West?⁶

¹See Hani Ahmad, "Time to have our own Common Law", Sunday Mail, 20 October 1991.
²See Chapter 7.
³See J.P.Berthelsen v. Director-General of Immigration (1987) 1 M.L.J 134.; Chai Choon Hon v. Ketua Polis Daerah Kampar and Govt. of Malaysia (1986) 2 M.L.J. 203; see also Patto v. Chief Police Officer Perak (1986) 2 M.L.J. 204. Both decisions were in favour of the opposition Democratic Action Party; In Re Tan Sri Raja Khalid bin Raja Harun (1988) 1 MLJ 182 the Supreme Court rejected the Government's contention that the ISA could be used for cases involving white collar crime.
The Prime Minister also exhorted in the same speech that "in our democracy, the rakyat (people) is in power. . .because of that, laws which are made by the people’s representatives must be observed. Whoever ignores laws made by the Government elected by the rakyat he is tantamount to denying democracy."\(^1\)

The fifth substantial amendment in the Constitution (Amendment) Act) 1988 enlarges the power of the Attorney General which the High Court was trying to curtail. Under the Constitution the Attorney General, who wields a formidable range of constitutional and non-constitutional powers, "shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial."\(^2\) In *Public Prosecutor v. Datuk Yap Peng*\(^3\) the Attorney General was ruled to have exceeded his prosecutorial power in transferring a case from one court’s jurisdiction to another and that s. 418A of the Criminal Procedure Code which allows this case-transfer was ultra vires Article 121(1) of the Constitution. Section 418A had been introduced by way of a 1976 amendment to the CPC, a process that took place suddenly during an earlier case involving the same issue.\(^4\) The Supreme Court ruled that "the power of the Attorney General under Article 145(3) cannot and does not connote or extend to the regulation of criminal procedure or the jurisdiction of the courts or the power or discretion to do so. The power to transfer a case is a judicial power exclusively exercisable by a court in a manner provided for in ss. 138, 177 and 417 of the Code."\(^5\) It is clear that the Constitution (Amendment) Act 1988 was intended to deny the effect of *Datuk Yap Peng*. It enlarged the Attorney General’s power to determine the court in which he could institute proceedings or to which he could transfer such proceedings.\(^6\)

\(^1\) *Ibid.* clmn. 1358

\(^2\) *Article 145(3)*

\(^3\) (1987) 2 MLJ 311 (Supreme Court Malaysia).

\(^4\) Criminal Procedure Code (Amendment and Extension) Act 1976 (A324). This amendment was made by Parliament during the 1976 trial of the accused in *Dato Hj. Harun bin Idris v. Public Prosecutor* who contended that the Attorney General lacked the power to transfer a case from a lower court to a superior court since that power was inherently with the courts.

\(^5\) (1987) 2 M.L.J. 311 at 317 per Abdoolcader SCJ.

\(^6\) See Article 3(3A), inserted by section 10 of the Constitution (Amendment) Act 1988: Act A704.
Dr. Mahathir Mohamed, the Prime Minister who is also the Minister for Home Affairs, in the Second Reading of the Constitution (Amendment) Bill 1988 at the Dewan Rakyat said that these amendments were merely an "updating and co-ordinating exercise with a view to upgrading departmental and service efficiency".  

Amidst much controversy and reassurance from the Prime Minister that the proposed amendments "were not extraordinary or strange and were not aimed at curbing the Judiciary's powers", the 1988 amendments may be seen to have reduced freedom, States' rights, and to have diminished the judicial power of the courts while enlarging the already formidable power of the Attorney General.

3. 11. Constitution (Amendment) Act 1993

In 1993 the relationship between the Rulers and the Prime Minister, closely following the trend set a decade earlier in 1983, again underwent an antagonistic development. Like the Constitution (Amendment) Act 1983, the Constitution (Amendment) Act 1993 was tabled in Parliament on account of what the executive termed as the demand of the rakyat (people). In 1988 the Prime Minister said that whoever ignored laws made by the Government elected by the rakyat (people) he was tantamount to denying democracy. In the 1993 amendment, more or less the same message was drummed out by the Government in pursuance of the objective of controlling and diminishing the residual power and functions of the Rulers who hitherto have had a set of entrenched constitutional roles. The 1993 amendment, like the 1983 amendment, also had to be tabled in Parliament twice before it came into force on account of political ramifications.

The constitutional position of the Rulers in Malaysia goes back a long way. Their unquestioned position as absolute monarchs may be traced to antiquity and it was only in 1874, with the advent of British protection, that they began to lose some of their royal powers and prerogatives. Indeed as late as 1931 when Braddell gave his account of the legal status of the Malay States, the titah or command from a Malay Sultan was still law. Their special position in the Federation of Malaya Agreement, the Merdeka Constitution and the 1963 Constitution was well preserved. The Malays in particular, have shown tremendous loyalty to their sultans and this naturally involves political loyalty as well, a state of affairs which perhaps did not go down too well with the present political leadership in Malaysia. In view of this, it is surprising that the Prime Minister said that "...these amendments as proposed are intended to check the feeling of hatred against the Rulers..." a tendency which he claimed could lead to the demand that the monarchy be abolished. It must be pointed out that there was no evidence to show that there was widespread 'hatred' among the people towards the Rulers. It is to be admitted that while it is in line for the Rulers to lose their position as being above the law, the manner imposed by the executive in achieving this objective has been questionable as it ignored certain constitutional provisions.

The Rulers have wielded considerable constitutional as well as political powers at federal and state levels and enjoy widespread influence over many aspects of government. In the states, they appoint the Menteri Besar (Chief Ministers) and until very recently also appointed key officials of the state government. At the

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1 Sejarah Melayu (Malay Annals). See the Shellabear version, Malaya Publishing House, Singapore, 1951, pp. 51-83. The Sejarah Melayu is purported to have been written by Tun Sri Lanang, a palace nobility in antiquity Malaya.
2 See Chapter 1 ante.
3 R. Braddell, The Legal Status of the Malay States, Singapore, 1931, p.6
5 Parliamentary Debates, Dewan Rakyat. 18 January 1993 clmn. 5.
6 In June 1993, the States, beginning with the State of Negeri Sembilan, began to take away the formality of getting approval of the Rulers in the appointment of the State Secretary, the State Legal Adviser and the State Financial Officer. In Negeri Sembilan this practice ended with the coming into force of the Constitution (Amendment) Enactment 1993, passed by the Negeri Sembilan State
federal level the Agong appoints the Prime Minister although in so doing he has to choose the candidate who in his judgment is likely to command the confidence of the majority of the members of the House of Representatives. Article 38(4) of the Federal Constitution provides: "No law directly affecting the privileges, position, honours and dignities of the Rulers shall be passed without the consent of the Conference of Rulers." Article 66, prior to the Constitution (Amendment) Act 1983, used to be a safeguard provision in that the Agong could refuse the signing of a Bill into law. Article 71(1) guarantees the right of a Ruler of a State to "succeed and to hold, enjoy and exercise the constitutional rights and privileges of a Ruler of that State..." while Article 181 guarantees that the sovereignty, prerogatives, powers and jurisdiction of the Rulers "shall remain unaffected". Clause (2) of Article 181, which became the core of the controversy in the amendment of the Constitution in 1993, provides that "no proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity." The combined effect of these provisions continue to make the Ruler a lofty personage, not totally without political clout. Their involvement in various sectors especially business and politics has been a source of worry to the UMNO politicians who had started openly to attack the Rulers in their annual convention.

There were three main matters which the 1993 amendments sought to achieve: Firstly the amendment sought to nullify the effect of the Constitution (Amendment) Act 1971 in respect of Article 63(4) which makes it seditious since 1971 to question (even in Parliament) matters related, inter alia, to the sovereignty, privileges, status and position of the Rulers. What the amendment sought to retain was to make it an offence for advocating "the abolition of the constitutional position of the Agong as the Supreme Head of the Federation or the constitutional position of the Ruler of a State, as the case may be." In other words, henceforth it would no longer be a

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1 Article 43(2)(a)
3 Act A30 of 1971
4 Proposed new Article 63(5) as contained in section 5 of the Constitution (Amendment) Act 1993.

seditious matter to question matters relating to the Rulers. Secondly, the amendment sought to make each Ruler liable in law for anything "done or omitted to be done by him" outside "the exercise or purported exercise of his functions under any written law". The amendment was intended to take away the legal immunity of the sultans and to render them liable to a multiplicity of matters, including - as asserted by a commentator - petty traffic offences. Thirdly, "any law which provides for the immunity of the Ruler of a State in his personal capacity from any proceedings whatsoever in any court, or attaches sanctity to his residence, shall to that extent be void". Although there were calls for the establishment of a special court to try all matters relating to the Rulers, the Government refused to comply.4

It must be mentioned that the amendments augured well with the rule of law. However, it was not the rule of law which the executive were concerned about. They were concerned about subjecting the sultans to their overall authority. The process of achieving this was greatly speeded up by events in which the Rulers themselves were involved. From January to March 1993 practically every one of the nine State Rulers was exposed by the media in connection with their business and personal affairs. On 11 March 1993 severe criticisms were made by certain Members of the Dewan Rakyat in respect of the Rulers. Under normal circumstances these utterances would have amounted to sedition because the speeches contained what were clearly 'seditious tendencies' as envisaged by section 3(1) of the Sedition Act 1948. However, the Attorney General refused to take the normal course of action. The government-controlled media splashed stories on the sultans and their wealth,

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1 Article 181(2) as amended by s. 7 Constitution (Amendment) Act 1993. 
3 New clause (3) of Article 181: s. 8 Constitution (Amendment) Act 1993. 
4 See the suggestion made by the President of the Malaysian Bar: New Straits Times, 14 March 1993. 
5 Especially, see speech of Shahidan Kassim, member for Arau: Parliamentary Debates, Dewan Rakyat, 11 March 1993. 
6 Section 3(1) says: A "seditious tendency" is a tendency- (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government. Further, clause (f) of Section 3(1) goes on to prescribe that it is also a seditious tendency to "question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III (citizenship) of the Constitution or Articles 152 (national language), 153 (special rights of Malays) or 181 (saving clause for the Rulers) of the Federal Constitution.
business activities and personal excesses.\(^1\) An alleged assault by the Sultan of Johor of a hockey coach was given extensive coverage and it was this incident that was seen to propel the first parliamentary motion against the Rulers.\(^2\) It was against this background that the Constitution (Amendment) Act 1993 was planned by the UMNO leaders and passed by the *Dewan Rakyat* on 20 January 1993. As usual the Prime Minister used the name of the *rakyat* (people) in bringing home his message. He said "The people are demanding the amendment. This is evident from the written and verbal statements of the people that the privilege be removed."\(^3\) However, the Prime Minister asserted that there was no need to have the prior consent of the Rulers in bringing about the desired constitutional changes affecting the Rulers themselves.\(^4\) Essentially this is illegal as such an omission would appear to be clearly contrary to Articles 38 and 159 of the Constitution whose combined effect is that any amendment affecting the interests of the Rulers has to be accompanied by the prior consent of the Conference of Rulers established under Article 38. Article 38(4) provides:

\[\text{(4)} \text{ No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.}\]

Despite the Attorney General's advice that the proposed amendments affecting the Rulers must first receive the Conference's consent\(^5\), the Prime Minister went

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\(^1\) In particular see issues of the *New Straits Times, The Star, Utusan Malaysia, Nanyang Siang Pau, Sin Chew Jit Poh, Tamil Nesan* and *Berita Harian* on the following dates: 14, 16, 19, 29 January 1993; 12, 14, 18, 19, 28 February 1993; 2, 3, 5, 7, 8, 11, 15, 16, 17, 18, 19, 20, 21 and 23 March 1993. The above-mentioned newspapers are owned by component parties of the Barisan Nasional (BN). There are no newspapers owned by opposition parties. *The Rocket, Harakah and Media Malaysia* are merely party publications (allowed to circulate internally) of the Democratic Action Party (DAP), Pan Malaysia Islamic Party (PAS) and Semangat 46 (Spirit of 1946 Party) respectively.


\(^3\) *New Straits Times*, 13 December 1992

\(^4\) *Ibid.*. The newspaper report contained these words "Asked if the Government would get the consent of the Rulers' Council (Conference) before tabling the amendments, he said: "No."

ahead tabling the Constitution (Amendment) Bill 1993 in the Dewan Rakyat. The Constitution (Amendment) Bill 1993 was tabled on 18 January 1993 and passed by the Dewan Rakyat by more than two-thirds majority. The same was tabled at the Dewan Negara (Senate) on 20 January 1993 and passed after a one-day session. The oppositions, namely the DAP, PAS and Semangat 46, opposed the Bill on the ground that the consent of the Conference of Rulers was not obtained prior to the tabling of the Bill - as per the requirement of Articles 38(5) and 159 of the Constitution. This constitutional violation was never explained, even after the Bill was passed at its second and third reading. After criticisms from the Rulers, the Bar Council and the oppositions, the Constitution (Amendment) Act 1993 was left in abeyance for almost two months and the Agong did not sign it into law.

The Prime Minister agreed that the amendment passed on 20 January 1993 needed to be revised. Finally on 11 February 1993, after the "assurance that their sovereignty would not be infringed", the Conference of Rulers was convened and it was made to 'give consent' to a revised version of the amendments passed by Parliament on 20 January 1993. The questionable matter here is that there were no copies of the revised amendments made available to the Rulers during the Rulers Conference meeting on 11 February 1988. The Rulers appeared to have 'consented' to a matter that they did not know about. On 18 February 1993 the Agong transmitted a written message to the Speaker of the Dewan Rakyat stating that while the Conference of Rulers rejected the original form of the amendment it 'consented' to the

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2 See communiqué dated 11 February 1993 signed by the Attorney General on behalf of the Government and Keeper of the Royal Seal on behalf of the Rulers Conference. The Yang Di Pertuan Besar of Negeri Sembilan (The Deputy Agong) informed the writer after the meeting of the Conference of Rulers on 11 February 1993 that while the Rulers did not not receive the proper documents relating to the original amendment, they were also not given sufficient time to study the revised amendment and the communiqué.

3 As told to the writer by the Sultan of Johor and the Yang Di Pertuan Besar of Negeri Sembilan on 15 February 1993. They admitted that they did not fully understand the revised amendment.
so-called 'amended draft' of the revised amendment.\(^1\) It would appear that all these arrangements were prepared by the Government for the Agong in the most discreet and questionable manner. Even his brother Rulers were in the main not adequately informed of the step-by-step development. The speaker, for what he described as 'lack of established procedure and practice', proceeded to allow the Bill to be reintroduced by the Prime Minister at Second and Third Reading by making a special ruling under Standing Order 100\(^2\) and then allowing the Bill to be debated. The smoothness with which the Speaker 'improvised' the procedure caused the Leader of Opposition to remind the Speaker that Parliament was not "an instrument of the Government".\(^3\)

The method of acquiring the 'consent' of the Conference of Rulers was later questioned by the Sultan of Kelantan who was not present at the particular session of the Conference of Rulers in Kuala Lumpur. He doubted the sincerity of the amendments and its revised version. He suggested that the real motive was to nullify the power of the Rulers and thus making them subservient to the political leadership of the country.\(^4\)

Under the revised amendment, two new elements were introduced. First, in the event that the Agong or any Ruler of a State is indicted for any offence, for the period that he stands indicted he shall not be allowed to act as Agong or the Ruler of a State as the case may be. Second, a new Article 183 was proposed under which a special court was to be constituted for the purpose of trying cases concerning the

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\(^1\) The Speaker of the Dewan Rakyat read out the Agong’s letter to the members present on 8 March 1993: Parliamentary Debates, Dewan Rakyat, 8 March 1993 clmn. 2.

\(^2\) Standing Order 100 of the Dewan Rakyat contains a residual power of the Speaker which allows him to improvise a ruling on any procedure or matter that is not covered by the Standing Orders. In so doing he "shall have regard to the usage of Commonwealth Parliamentary practice so far as such usage can be applied to the proceedings of the House."

\(^3\) Parliamentary Debates, Dewan Rakyat, 8 March 1993 clmn. 10.

\(^4\) As intimated to the writer in a special audition at Istana Johor in Kuala Lumpur on 15 February 1993. The press version of this sentiment may be found in Utusan Malaysia 17 February 1993. Earlier, on 21 December 1992 the following Rulers granted the writer an audience at the Istana Negeri (the Negeri Palace) in Kuala Lumpur: The Sultans of Johor, Kedah, Terengganu, the Yang Di Pertuan Besar of Negeri Sembilan, the Raja of Perlis, the Raja Muda (Crown Prince) of Selangor and the Regent of Perak. Previously, on 16 December 1992 the Sultan of Johor met the writer at the Shangri-La Hotel in Singapore and on 17 December 1992 the writer interviewed the Yang Di Pertuan Besar of Negeri Sembilan at the Istana Hinggap in Seremban, Negeri Sembilan which meeting was also attended by the Ruling Chiefs of the Minangkabau State. As to a political analysis of the Constitution (Amendment) Act 1993, see the article "Mengapa Dr. Mahathir Mahu Lemahkan Institusi Raja" (Why Dr. Mahathir Wants to Weaken the Rulership), Harakah 1 March 1993.
Rulers. The court has its own set of procedure as may be determined by a committee headed by the Lord President. The Lord President and two other Supreme Court Judges make up the first segment of judicial officers of the court while two others are to be appointed by the Conference of Rulers. The Attorney General again plays a pivotal role in that all prosecutions relating to the Rulers under the jurisdiction of the special court are not to be instituted without his endorsement.

3. 12. Conclusion

We have seen how executive power escalated since merdeka through major constitutional amendments. Even the Rulers were made to lose their legal immunity. This steady 'growth' of power has been the result of a government that has succeeded itself\(^1\) for the last 35 years.\(^2\) The amassing of power has arisen out of political incidents within the country but once these incidents have subsided, the constitutional power has remained. Malaysia’s constitutional development does not appear to support the growth of freedom and human rights but rather the growth of the power of the executive. The executive government which has taken over legislative functions on account of its overwhelming majority can fashion and create any law it desires, including whatever constitutional amendment it fancies. Each constitutional amendment chips away at freedom and human rights.

\(^1\)From 1955 to 1974 the ruling coalition was called the Alliance Party. Since 1974 it has been renamed the Barisan Nasional Party.

\(^2\)Barisan Nasional is only an extended variation of the Alliance. Its three main components remain the same - the UMNO, MCA and MIC. See Chapter 1 ante.
CHAPTER 4

The Deterioration of Freedom

"The residue of liberty just gets smaller and smaller, until eventually, in some areas, it is extinguished altogether, with freedom becoming no more than the power to do that which an official has decided for the time being not to prohibit. The British approach of refusing to assert positive rights gives freedom no weapon with which to retaliate. K.D. Ewing & C.A. Gearty, Freedom Under Thatcher: Civil Liberties in Modern Britain, Clarendon Press, Oxford, 1990 p. 9

4. 1. Introduction

While Chapter 3 deals with the escalation of executive powers through constitutional amendments since merdeka, this chapter endeavours to examine the deterioration of primary liberties through the relevant cases after the country attained independence in 1957. These cases, discussed in the context of relevant statutes, are confined to those affecting basic freedoms under Part II of the Constitution. The deterioration of freedom after merdeka as evidenced by the cases and statutes cover a wide field. Hence for the purpose of this chapter only major rights under Part II of the Constitution as affected by the relevant cases and statutes will be discussed, but this will be sufficient to show the gradual but consistent deterioration of freedom as the case law developed and as new statutes were enacted and amended. This Chapter will establish that for a short spell of two years, from 1986 to 1988, the courts did endeavour to salvage freedom by being innovative in their judgments and thereby attracting the wrath of the executive. However, this trend was buried by the sudden and overwhelming interference of the executive in the 1988 judiciary crisis.¹

4. 2. Constitutional Supremacy versus Parliamentary Supremacy

One of the most important elements introduced by the Merdeka Constitution was the concept of constitutional supremacy under which the Constitution supersedes all other laws in the country. It is this concept of supremacy that creates the grundnorm in the

¹This is discussed in Chapter 7 infra.
Constitution which, theoretically at least, would always be in the position to counter inroads into basic rights. The supremacy clause is the keystone to a federal polity without which the federal structure may collapse. Paramountcy of the constitution over ordinary legislation is an attribute of every written constitution. As John Marshall CJ expounded in *Marbury v. Madison*:

> Certainly those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void.

The early judges of Malaya, who were either English or Malayans and who had their legal training in England, took quite some time before this element was put in its proper perspective. Even some Malaysian judges in recent cases appear to have distanced themselves from the significance of the concept of constitutional supremacy, especially in refusing to recognise the existence of 'the spirit' or the 'basic structure' of the Constitution in relation to the basic rights enshrined in the Constitution. Thus a perusal of the cases on this subject reveals a curious fact: Malaysian judges were reluctant to grasp the full significance of the supremacy of the Constitution. It was partly because of this initial inability to recognise constitutional supremacy that the deterioration in the protection of rights took hold almost immediately after merdeka.

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2. 1 Cranch 137 (1803).
4. On Merdeka Day (31 August 1957) there were 11 puisne judges and one Chief Justice (James B. Thomson). Out of this total there were 2 locals - Syed Sheh S. Barakbah and Ismail Khan JJ. On Malaysia Day (16 September 1963) besides the Chief Justice who headed the new Federal Court, there were two judges of appeal, one of whom was a local - Syed Sheh S. Barakbah; of the 9 puisne judges there were 7 locals thus changing the pre-Malaysia composition dramatically. The first Malay to be appointed Chief Justice was Syed Sheh S. Barakbah in 1964 by which time there were already 10 local judges as compared to only 1 expatriate i.e. T.R. Hepworth J. By 1967 the Malaysian judiciary on the Peninsular was wholly Malaysianised. The following year the courts in the Borneo states followed suit. See the list of judges and legal officers in the *Malayan Law Journal* for the respective years - 1957, 1958, 1964, 1967 & 1969. See also M. Suffian, "Four Decades in the Law - Looking Back", in F.A. Trindade, & H.P. Lee, *The Constitution of Malaysia: Further Perspectives and Development*, Oxford University Press, Kuala Lumpur, 1989 at. p. 221.
5. See *Loh Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187; *Phang Chin Hock v. Public Prosecutor* (1980) 1 MLJ 70. These two cases are discussed below.
6. These are the fundamental liberty provisions under Part II of the Constitution, discussed in preceding chapters.
Before discussing the diminishing rights under Part II of the Constitution, it is pertinent to review generally the structure in respect of the supremacy of the Constitution as provided under Article 4(1) of the Constitution:

4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Article 4 is fundamental as to the meaning and effect of the Constitution. It has been observed that to "misunderstand Article 4 is to misunderstand the whole document" (i.e. the Constitution). It is this Article that purports to establish the doctrine of constitutional supremacy in Malaysia in place of the doctrine of parliamentary supremacy. On whether there is such a thing as parliamentary supremacy in the country Suffian LP said in Ah Thian v. Government of Malaysia:

The doctrine of supremacy of Parliament does not apply in Malaysia...The power of Parliament and the State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please.

Theoretically this may be true because all organs of government including the states and the federation derive their respective powers from the Constitution. However, in practice parliamentary supremacy has held effective sway despite the Lord President's denial of its applicability in Malaysia. This can be discerned from Parliament's overall power to amend the Constitution. The following cases, which reflect the attitude of the courts towards a new written constitution, failed to give effect to the supreme position of the Constitution.

In Chia Khin Sze v. The Menteri Besar of Selangor, a 1958 High Court decision, the issue raised was whether a detainee under the Restricted Residence

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3 (1976) 2 MLJ 112.
4 See Chapter 3 ante.
5 (1958) MLJ 105. Menteri Besar is Malay for Chief Minister.
Enactment 1933 (RRE) could be allowed "to consult and be defended by a legal practitioner of his choice" a right guaranteed by Article 5(3) of the Merdeka Constitution. This issue was the first to be reported and possibly the first case to be decided on the construction of the Merdeka Constitution. As there was no such right under the 1933 enactment, the question arose whether Article 5(3) of the Constitution applied to the RRE. Article 5(3) reads:

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

In arriving at his decision that a person was not entitled to be represented by counsel at an enquiry under the RRE, Sutherland J said that the fundamental liberty envisaged under the Constitution "was intended to be merely declaratory of existing laws i.e. the law anterior to the Constitution". His Lordship's finding appeared to be influenced by three factors. Firstly, the similarity between Article 5(3) of the Constitution and s. 28 of the Criminal Procedure Code led him to the view that Article 5(3) referred only to arrests generally and not under the RRE. Secondly, the court was persuaded by the English authority on this point, The King v. The Inspector Lemon Street Police Station, ex parte Venicoff where the Home Secretary's power under Article 12 of the Aliens Order 1919 to deport an alien "if he deems it conducive to the public good" was held to be a valid power despite there being no right of hearing on the premise that such powers of the Home Secretary was not a judicial but purely an executive power. Likewise his Lordship viewed the Menteri Besar as merely performing an executive and not a judicial act in effecting the arrest and

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1Clauses (1) and (3) of Article 5 have not been amended since merdeka. The words "High Court" in Clause (2) of the Article were substituted for "Supreme Court" in 1963 by Act 26/1963, in force from 16 September 1963, i.e. on the date Malaysia was formed (Malaysia Day).
3Section 28(1) of the CPC provides, "A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate's Court." Cf. Article 5(3) of the Constitution.
4(1920) 3 KB 72.
5For the meaning of the word "deem" see Russell v. Russell 14 Ch.D 471 where Sir George Jessell observed that the term implied the invocation of the audi alteram partem rule, i.e. the right to a hearing prior to the execution of a power, at pp. 478-9.
detention under the RRE\textsuperscript{1} and that pursuant to his discretionary power under section 2(ii) of the RRE, he had held an inquiry where the detainee's right to counsel had been waived. In the absence of such a right to a hearing under the 1933 instrument, the learned judge said that he could not see how the applicant could have a right to be defended by a legal practitioner since such a right only presupposed a right (and not an indulgence) to be heard. Thirdly, his Lordship was of the view that Article 5(3) was merely declaratory and not mandatory. Having reached the opinion that apart from the Constitution, there could be no right of representation in this case, Sutherland J ruled that the Article was intended to be merely declaratory of existing law. In holding this view the judge appears to have been influenced by the *Report of the Federation of Malaya Constitution Commission 1957* which in part provided:

The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution.\textsuperscript{2}

This decision is significant in that even after the promulgation of a written constitution, English decisions were still being relied upon, albeit to supersede the written Constitution in spite of the fact that there is no written constitution in England. Secondly, in treating the provisions of the Constitution on the same footing as those of other legislation, the judge appears to have failed to appreciate the supremacy of the Constitution. This second characteristic is featured again in the following case which was decided in the same year. *Chia Khin Sze* has been criticised solely on the court's failure to accord the right of hearing under Article 5(3) of the Constitution\textsuperscript{3} and on this account was overruled ten years later in *Aminah v. Superintendent of Prisons, Pengkalan Chepa Kelantan*.\textsuperscript{4}

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\textsuperscript{1}The word 'Resident' in the RRE was substituted by the word 'Menteri Besar' (Chief Minister) \textit{vide} LN 279/1959. The Minister for the Interior withdrew this delegation of power \textit{vide} LN 9/1964.

\textsuperscript{2}The Reid Commission, 1957 at p. 70.

\textsuperscript{3}For a criticism of Rigby J's judgment in *Chia Khin Sze* see, for example, Loke Kit Choy, "Constitutional Supremacy in Malaysia in the Light of Two Recent Decisions", Vol. 11 No.2 Mal L.R 260; L.A. Sheridan, "Constitutional Problems of Malaysia", (1964) 13 I.C.L.Q. 1349.

\textsuperscript{4}(1968) 1 MLJ 92.
In *Ex parte Tan Kheng Long*¹, also decided in 1958, the applicant, a British subject and a federal citizen by virtue of Article 124(1)(b) of the Federation of Malaya Agreement 1948, had been served with a banishment order and deported. Being a Federal citizen, it was argued that he could not be banished under Article 9 of the Constitution.² This Article reads:

9 (1) No citizen shall be banished or excluded from the Federation.

Rigby J held that the court could not, in view of section 13 of the Banishment Ordinance 1959, go behind the banishment order of the Minister in order to ascertain the nationality of the applicant. Section 13 of the Banishment Ordinance reads:

Every banishment or expulsion order made under this Ordinance shall be conclusive evidence in all courts of justice and for all purposes that the person thereby ordered to be banished or expelled is not a natural born British subject; provided that nothing herein shall prevent a person against whom a banishment or expulsion order has been issued from submitting fresh evidence before the Governor in council to prove his nationality, and if after hearing such evidence, the Governor in Council is satisfied that such a person is a natural born British subject, such banishment or expulsion order shall forthwith be cancelled.

If the court gave due regard to Article 9(1) the applicant could have been spared from banishment as he was a Federal citizen. The possibility of a conflict between Article 9 of the Constitution and s. 13 of the Banishment Ordinance was apparently never considered by the judge.

In the 1960 case of *Surinder Singh Kanda v. The Government of the Federation of Malaya*³ however, the question of the supremacy of the constitution was considered at certain levels by the court hierarchy when hearing the case: The plaintiff was an Inspector in the Royal Malayan Police Force. He claimed a declaration that his dismissal from the Force purported to be effected by the Commissioner of Police was void, inoperative and of no effect on ground *inter alia* that by virtue of Article 135 of the Constitution, the power of appointment and dismissal of senior police officers was no longer vested in the Commissioner of

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¹(1958) 3 MC 205.  
²While it is provided that a citizen cannot be banished from the Federation, Clause (2) of Article 9 does not guarantee freedom of movement or "the right to move freely throughout the Federation and to reside in any part thereof" as this right is secondary to "any law relating to the security of the Federation, public order, public health or the punishment of offenders".  
³(1960) MLJ 115; (1961) MLJ 161(FC); (1962) MLJ 169 (PC).
Police. The governing provision of the Constitution on this point is Article 135 which reads:

(1) No member of any of the services mentioned in paragraphs (b) to (h) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank..."

Under the law as it existed prior to Merdeka Day the Commissioner of Police could appoint and dismiss police officers including Inspectors.2 The Constitution established the Police Service Commission and entrusted to it the power to appoint members of the Police service.3 The jurisdiction of the Police Commissioner conferred by Article 140 is subject to the provision of Article 144(1) which provides:

Subject to the provisions of any existing law and subject to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends.

One can see that the problem was one of conflict between the existing law as to the powers of appointment and dismissal given to the Commissioner of Police under the Police Ordinance 1952 and the provisions of the Constitution relating to the duties of the Police Service Commission. If due consideration had been given to the supremacy of the Constitution, such a conflict would have been resolved by giving preference to the constitutional provisions. It is surprising to note, however, that the problem was not viewed in terms of an attack on the supremacy of the Constitution by any of the Malayan judges who dealt with this case.

In the court of first instance, Rigby J approached the problem on the basis that it was the whole purpose and effect of Part X of the Constitution to entrench within its provisions the security of tenure of persons in the public service and to place the control thereof in so far as it relates to powers of appointment, promotion and

1Paragraphs (b) to (h) referred to under Article 132 pertain to the various public services under Part X of the Constitution. The police force is provided under para (d) of Article 132(1).
2See ss. 9(10) and 45(1) of the Police Ordinance 1952. With the coming into force of the Police Act 1967, replacing the 1952 Police Ordinance, the power to appoint, confirm, emplace, promote, transfer and exercise of disciplinary control over members of the police force were taken over by the Police Force Commission, established under Articles 140 of the Constitution.
3Article 140 of the Constitution. Prior to the Constitution (Amendment) Act 1960 the "Police Force" was known as the "Police Service".

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dismissal in the various commissions. The judge held that the previously existing statutory powers of the Commissioner (i.e. to appoint, confirm and dismiss superior police officers) had been impliedly revoked by Article 144 which placed such powers in the hands of the Police Service Commission.

In the Court of Appeal Thomson CJ saw the problem as one of construction of Article 144 of the Constitution. The underlying basis of this approach was the need to ascribe some meaning to all the words of a statute and the necessity to assign to the words their plain ordinary meaning. It was the application of this principle to the words "subject to the provisions of any existing law" in Article 144(1) which resolved the issue for them. His Lordship maintained that as the Police Ordinance 1952 which gives power to the Police Commissioner to appoint and dismiss superior officers was in force on Merdeka Day it was one of the "existing laws" within the meaning of the Constitution. It was inevitable, therefore, that the conclusion reached by their Lordships was that the Police Commissioner after Merdeka Day still had the power to appoint superior police officers and that there was nothing in Article 135(1) which affected his power under the Police Ordinance to dismiss such superior police officers.

On appeal to the Privy Council Lord Denning, delivering the judgement of the Judicial Committee, approached the problem on the basis that there cannot, at one and the same time, be two authorities each of whom has a concurrent power to appoint members of the police service. One or the other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the latter must prevail. His Lordship held that in a conflict of this nature the Yang Di Pertuan Agong, in exercise of his power under Article 162(4), could have made the necessary 'modifications' to the powers of the Police Commissioner under the 1952 Ordinance. The Privy Council resolved the problem presented by the words

2(1962) MLJ 169.
3(1962) MLJ 169 at p.171. Article 162(4) which was repealed by the Malaysia Act 1963 (Act 25/1963) provided: "The Yang Di Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law, other than the Constitution of any State, as appear to him necessary or expedient for the purpose of bringing the provisions of that
"subject to the provision of any existing law" by holding that this meant only such provisions as were consistent with the Police Service Commission carrying out the duty entrusted to it as provided under Article 140. The outcome of such reasoning was that on the day the appellant was dismissed, the Police Service Commission was the authority to appoint an officer of the rank of Inspector and therefore under Article 135(1) it was the authority to dismiss him. Since the Police Commissioner had no authority to dismiss the appellant as he did, the dismissal was void.

It can thus be seen that none of the Malayan judges, including the dissenting judge in the Court of Appeal Neal J, saw the problem in the light of an attack on the supremacy of the Constitution. The decision in Kanda was a turning point in the approach of the Malaysian judiciary on this subject. The cases decided after Kanda show that the Malayan judges finally appreciated the significance of a written constitution and its supremacy over other laws. It was by way of the decision in Kanda that the utilisation of Article 162, especially its clause (6) became increasingly relevant because under the provisions of that clause any court or tribunal could apply unmodified provisions of an existing law (after Merdeka Day) "with such modifications as may be necessary to bring it into accord with the provisions of this Constitution". However, one problem remains: How was Article 4(1) to be reconciled with Article 162(6) in the event that a pre-Merdeka law conflicted with the Constitution? The simple and direct approach appeared to be that when a pre-

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1 Similar to the Armed Forces Commission, which is headed by the Minister charged with the responsibility for defence, but unlike the other Commissions established under Part X of the Constitution, the Police Force Commission is headed by the Minister charged with the responsibility for the police. See Article 140(3)(a).

2 The dissenting judge, Neal J in the Court of Appeal, similarly saw the issue not as one of conflict between the existing law and the Constitution but as one of construction. However, he differed from his colleagues in his manner of approach; he preferred to construe Article 144 not in isolation but in conjunction with Articles 4 (supremacy clause of the Constitution), 140 (establishment of Police Force Commission), 160 (interpretations) and 176 (transfer of officers) of the Constitution.


5 Article 4(1) provides that the Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.
Merdeka law, for example the RRE, contravened, Article 5 it should have been declared null and void. But under Article 162(6) the RRE could be brought into accord with the provisions of the Constitution, thereby validating the impugned law. This treatment was adopted in the following case.

In Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan, the housewife of a detainee applied to the High Court for a writ of habeas corpus challenging her husband's detention under the Restricted Residence Enactment 1933 (RRE) on the ground that there had been non-compliance with Art 5(3) of the Constitution in that the detainee had not been informed "as soon as may be of the grounds of his arrest." She also argued that the power to detain was exercised \textit{mala fide} by the authority. In consequence, she maintained, the court had jurisdiction to look into and examine whether the grounds for the arrest and detention were reasonable. Wan Suleiman J expressed his disagreement with the decision in Chia Khin Sze in that Article 5 was clearly meant to apply to arrests under any law whatsoever in force in the country. He accepted the suggestion that, in respect of a pre-Merdeka law the correct approach was for the court to apply Article 162(6) of the Constitution, the full text of which reads:

\begin{quote}
Any court or tribunal applying the provisions of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
\end{quote}

It has to be noted that the application of "such modifications as may be necessary to bring it into accord with the provisions of this Constitution" has not been easy to implement. In the first place, the phrase "to bring it into accord with the provisions of this Constitution" under Article 162(6) lacks clarity. Is the court merely to suggest the requisite amendment in a given decision and leave the rest to the draughtsman

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2 (1968) 1 MLJ 92.

3 For the position in India with respect to the interpretation of the clause "as soon as may be" contained in Article 22(1) of the Indian Constitution (Article 5(3) of the Malaysian Constitution), see \textit{Tarapade v. State of West Bengal} (1959) SCR 212.

who works in the Attorney General Chambers? What is the proper methodology to satisfy and effect the requirement of the phrase? The court did not pay attention to these questions.

In concluding that the detention order was legally executed, Wan Sulaimen J said that once the detention was carried out in the exercise of a valid legal power, it was up to the detainee to show that the power was exercised improperly. He relied on a well-known work on Indian Constitutional law in arriving at this conclusion.¹ This task of showing that the power was exercised improperly, he said, was not discharged by the applicant. With respect, this was already shown by the applicant by way of bringing to the notice of the court that by not adhering to the conditions set out under Article 5(3) the impropriety had been already established. Aminah would have been decided differently and in favour of the applicant only if Wan Sulaiman J accepted the argument that since the RRE was repugnant to Article 5(3) therefore it ought to have been deemed as having violated the supremacy of the Constitution under Article 4(1). The act of bringing into accord a pre-Merdeka law such as the RRE is no doubt allowable under Article 162(6) but that must necessarily be regarded as a separate exercise. It should not be done to the detriment of the aggrieved party in search of liberty who has, for example, successfully pointed out to the court that a given legislation violates Article 5(3). Moreover, his Lordship failed to consider the true effect of the subjection of every law under Article 5 although he advocated that the provision was meant to apply to arrests under any law.² If indeed every law was to be subjected by Article 5 as he rightly accepted then finding that the arrest and detention of the subject was according to law cannot be regarded as sound reasoning. His Lordship said, "...I am satisfied that the detention had been in the exercise of a valid legal power."³ How can an arrest and detention under the RRE be a valid legal power when thereunder there were no provisions similar to Article 5(3)? Although he purported to overrule Chia Khin Sze for not subjecting a pre-Merdeka law to the

² (1968) 1 MLJ 92 at p. 93.
³ Ibid. at p. 93.
provisions of Article 5(3), the overall effect of his decision in *Aminah* appears to be the denial of the constitutional supremacy concept enunciated under Article 4(1).

In *Loh Kooi Choon v. Government of Malaysia*¹, a 1977 Federal Court decision, the appellant had been arrested and detained under a warrant issued under the provisions of the Restricted Residence Enactment 1933 (RRE). The appellant had not been produced before a magistrate within twenty-four hours of his arrest as required under Clause (4) of Article 5. He claimed damages but it was held that no action could be brought against the police officer as he was acting in compliance with a warrant issued by a competent authority. The appellant appealed but before the appeal was heard the Federal Constitution was amended whereby Article 5(4) of the Constitution was declared not to "apply to the arrest or detention of any person under the existing law relating to restricted residence". This amendment was backdated to Merdeka Day.² It is relevant to note that it took four years for the appellant to have his appeal heard and disposed off by the Federal Court.³ The main contention put up by the applicant in *Loh Kooi Choon* was that the Constitution may not be amended to an extent that destroys its 'basic structure'. Relying on the force of Article 4(1) (the supremacy clause) and Indian authorities, it was argued that Article 5(4) which compels an arrested person to be produced before a magistrate within twenty-four hours should not be amended because to do this would destroy both the spirit of the Constitution as well as its basic structure. Raja Azlan Shah FJ, rejected this argument. He said that the Constitution as the Supreme Law cannot be inconsistent with itself, inclusive of amendments made to it. The finding was primarily based on the reasoning that the term 'law' as defined in Article 160 (definitions)⁴ must be taken to mean 'law' made in the exercise of ordinary legislative power and quite different from

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¹(1977) 2 MLJ 187. See Chapter 3 ante.
²See s. 4 Constitution (Amendment) Act 1976 (A354)
³The appellant was arrested on 19 September 1972 under the RRE. By 27 August 1976 the Constitution (Amendment) Act 1976 [Act A354] became law.
⁴Under Article 160 'law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.
'law' made as a constitutional amendment under Article 159 with the result that "constitutional amendments" are not affected by Article 4(1).\(^1\)

Raja Azlan Shah FJ defined the court's constitutional outlook in respect of rights under the Constitution in the following way:

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial Branches of government, compendiously expressed in modern terms that we are government of laws, not men.\(^2\) (italics supplied)

One may ask: Is it true to say that "not even the power of the State may encroach" on individual rights? It hardly holds substance when one views the overwhelming powers of the State in administering emergency laws under Article 150 or exercising the power of arrest and detention under the ISA and other kindred legislation?\(^3\) With the RRE, the Internal Security Act 1960 (ISA), the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and other kindred legislation which are equipped with arbitrary powers of arrest and detention, how could his Lordship opine such an incongruent premise? At best such an opinion is no more than a judicial rhetoric. Similar eloquence in pronouncing basic rights under the Constitution may be found in other cases\(^4\) but they did not necessarily spell freedom for the individuals arrested and detained under the detention laws of the country. Indeed a local commentator has referred to such judicial rhetoric as "taking refuge behind attractive-sounding phrases which do not really help."\(^5\) At any rate, it is left to be seen whether the above eloquence holds substance in view of the relevant decisions on

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\(^1\)(1977) 2 MLJ 187 at 190. Cf. para 97 of the Interpretation and General Clauses Ordinance 1948 which defines "written law" as including the Federal Constitution.

\(^2\)Ibid. 188.

\(^3\)Administrative detention of up to two years in each case by the Minister of Home Affairs is also exercisable under s. 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and s. 6 of the Dangerous Drugs (Special Preventive Measures) Act 1985.


liberty after *Merdeka*.

It would appear that "to bring into accord with the provisions of this Constitution" was no longer sufficient. Instead of bringing the impugned legislation, i.e. the RRE, into accord with the constitution it was the Constitution that was brought into accord with the impugned legislation. It is inevitable to conclude that after the decision in *Loh Kooi Choon* the RRE was accorded a supreme position over the Constitution in regard to arbitrary arrest and restriction of movement just because the authorities forgot to apply Article 5(4) in the course of arresting and detaining a subject. Of course, the better course would have been to have allowed Loh free by not amending the Article. Obviously this did not appeal to the Government.

In *Phang Chin Hock v. Public Prosecutor* 3, a 1980 decision, Suffian LP also denied the existence of the 'basic structure' concept in the Malaysian Constitution. The appellant had been convicted of the offence of unlawful possession of ammunition and had been sentenced to death under s. 57(1) of the Internal Security Act (ISA). He was tried under the Essential (Security Cases) Regulations 1975 (ESCAR). It was argued, *inter alia*, that if the amendments made by Parliament in accordance with Article 159 were inconsistent with the existing provisions of the Constitution, the court should read into the Constitution implied limitations on the power of Parliament to destroy the basic structure of the Constitution. The court refused to accept this line of reasoning.

His Lordship, speaking for a unanimous court which included Wan Sulaiman and Syed Othman JJ, did not make use of the definition of 'law' under Article 160 as had occurred in *Loh Kooi Choon*. On the contrary, following the approach adopted by Lord Denning in *Surinder Singh Kanda* he argued for a harmonious reading of Article 4 and Article 159. This led the court to the conclusion that the term 'law' in Article 4(1) referred only to ordinary law as opposed to constitutional amendments;

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1See for example, *Public Prosecutor v. Masran bin Abu & Ors.* 4 Malaysian Cases 192.

2Chapter 3 ante. See also Constitution (Amendment) Act 1976: Act A354.

3(1980) 1 MLJ 70.

4See Chapter 3 ante. The Essential (Security Cases) Regulations 1975 (ESCAR) was held to be invalid by the Privy Council in *Teh Cheng Poh v. Public Prosecutor* (1979) 1 MLJ 50 but were subsequently validated by the Emergency (Essential Powers) Act 1979.

5Article 159 contains the amending provisions of the Constitution. See Chapter 3 ante.
thus only 'ordinary law' needed to conform to the Constitution. While applying the principle in *Surinder Singh Kanda* that a pre-merdeka law ought to be brought into accord with the Constitution by virtue of Article 162(6), Suffian LP, following Raja Azlan Shah FJ in *Loh Kooi Choon*, refused to acknowledge the existence of the 'basic structure' concept in the Constitution which was held in India as existing. Suffian LP said:

For the purpose of this appeal it is enough for us merely to say that Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself.

This view only strengthens parliamentary supremacy as opposed to constitutional supremacy. The Lord President, in restricting the interpretation of the Constitution, reasoned at length as to why the court should not follow the amendment pattern of the Indian Constitution in regard to fundamental liberties. It is in this regard perhaps that the decision shows its weakness. At page 73 his Lordship said: "...in our judgment the position here is the same as that declared in India by the Supreme Court in 1951 in *Shankari Prasad Singh Deo & Ors. v. Union of India & Ors.* and in 1965 in *Sajjan Singh v. State of Punjab*." (Both cases recognised the constitutional supremacy of the Indian Constitution). However, his reasoning appears to be hesitant and unclear as he later observed: "Indian courts draw a distinction between the power of the Indian Parliament to amend the Constitution in its constituent capacity and to make ordinary law in its ordinary legislative capacity. We do not think that we can draw such a distinction here as our Constitution was not drawn up by a constituent assembly and was not 'given by the people'. It is difficult to accept that the grundnorm of the Malaysian Constitution is to be regarded as being lost or insignificant simply on

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1(1980) 1 MLJ 70 at p. 72.
3(1980) 1 MLJ 70 at p. 74.
4AIR 1951 SC 458.
5AIR 1965 SC 845.
6(1980) 1 MLJ 70 at p. 73.
account of the supposition that it was 'not given by the people'. It is submitted that the elaborate and drawn-out negotiations which took place between the parties prior to Merdeka is proof enough that the Constitution was the wish of the then Malayan people.\textsuperscript{1} It is further submitted that the purported lack of mandate 'not given by the people' is an extra-legal finding, quite peripheral to the central issue.

By denying the existence of the concept of the spirit or the basic structure of the Constitution both \textit{Loh Kooi Choon} and \textit{Phang Chin Hock} stultified freedom under the Constitution. The above cases, with the exception of \textit{Surinder Singh Kanda}, have proven that freedom became more restrictive in the succeeding years after merdeka. Indeed it is ironical to note that it took the Privy Council to correct a cardinal misinterpretation by local judges who should have been more sensitive towards the supremacy of a written constitution.

4.3. Erosion of Fundamental Liberties

It is universally accepted that a country's constitution is the supreme law of the land and rights granted by it are not meant to be trifled with at will by Parliament and the executive.\textsuperscript{2} Nevertheless, the framers of the Malaysian Constitution were not unaware of the need for growth and change in the basic law and of the desirability of arming the government with sufficient powers in times of emergency. In recognising this need, the Reid Commission had recommended that "...the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides."\textsuperscript{3} However, in allowing such growth, basic rights were envisaged to be intact despite the existence of certain allowances for the interplay of consideration of security, public order and morality.\textsuperscript{4}

\textsuperscript{1}See Chapter 2 ante.
\textsuperscript{2}Shad S. Faruqi, "Fundamental Liberties in Malaysia - An Overview", INSAF, September 1985 Vol. XVIII No. 3, 50 at p. 55.
\textsuperscript{4}For example, see the constraints placed on the freedoms of speech, assembly and association under Article 10(2) of the Constitution.
Amending the provisions of the Constitution has been described by a scholar on the subject as the process of "deconstituting and reconstituting". The process involves growth and change. Growth of executive power in this sense is certainly a plus factor for the executive while at the same time it leads to a deprivation of fundamental liberties. In the Malaysian experience the terms 'growth and change' have been identified as being more in line with the wishes of the executive than with those of the other branches of government. As we have seen, restrictions on freedom have been in-built since the Merdeka Constitution. For example, Article 4(2) validates a law that restricts freedoms of movement, speech, assembly and association and the validity of such law cannot be questioned. Under the substantive provisions of Articles 9(2), "every citizen has the right to move freely throughout the Federation and to reside in any part thereof" subject to "any law relating to the security of the Federation...public order, public health or the punishment of offenders". Freedoms of speech and expression, assembly, and association may be restricted by Parliament on grounds of security of the Federation, friendly relations with other countries, public order or morality. The awesome features of emergency power under Article 150, not to mention the wide and unbridled executive power in surmounting security-related matters under Article 149 and the preventive detention set out in Article 151 have all contributed towards the constriction of fundamental liberties under Part II of the Constitution. As we have seen in Chapter 3, these restrictions were recommended by the Reid Draft although the recommendations of the latter were well within proper limitations justified by the rule of law. It may be noted that the power of the state over the freedoms of speech and expression, assembly and association has been in-built

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2 To be read with Articles 9 and 10.
3 Article 10(1)(a).
4 Article 10(1)(b).
5 Article 10(1)(c).
6 Article 10(2). It is interesting to note that even the Reid Draft had proposed to restrict freedoms of speech and expression, assembly and association. The present Constitution, following the Merdeka version, retains this feature.
initio within the Constitution. At the same time the supreme position of the Constitution, as we have seen, was not given a liberal interpretation.

Of the 840-odd Acts of Parliament passed since merdeka\(^1\) fourteen instruments which invariably equip the executive with wide discretionary powers are restrictive of human rights. These are:

Restricted Residence Enactment 1933 (RRE)\(^2\)
Sedition Act 1948\(^3\)
Public Order (Preservation) Act 1958 (POPA)
Prevention of Crime Act 1959 (PROCA)
Trade Unions Act 1959
Internal Security Act 1960 (ISA)
Police Act 1967
Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO)
Societies Act 1966
Universities and University Colleges Act 1971 (UUCA)
Official Secrets Act 1972 (OSA)
Essential (Security Cases) Regulations, 1975 (ESCAR)
Printing Presses and Publications Act 1984 (PPPA)
Dangerous Drugs (Special Preventive Measures) Act 1985 (SPMA)

The RRE and the Sedition Act 1948 are both pre-merdeka laws. The above list, which is by no means exhaustive\(^4\), fall into three categories. The first category is ordinary legislation, enacted for the purpose of restricting the freedoms of speech, assembly and association as allowed specifically under Articles 4(2), 9(2) and 10(2) respectively. Under this category are the Sedition Act 1948\(^5\), the Public Order (Preservation) Act 1958 (POPA)\(^6\), the Prevention of Crime Act 1959 (PROCA)\(^7\), the

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\(^3\)Pre-merdeka law. Revised 1969 as Act 15 c.i.f. 17 July 1948. Gazetted as PU(A) 282/70.
\(^5\)Section 3 prohibits open discussion on a number of 'sensitive' matters such as sovereignty of the Rulers, the special position of the Malays, the National Language and citizenship. This is reflected in Standing Order 36 of the Dewan Rakyat (House of Representatives).
\(^6\)The minister under s. 3(1) of the POPA is empowered to proclaim a state of danger, and not a state of emergency, if in his opinion in doing so the maintaining or the restoring of public order in respect of any area in a state is achievable.
\(^7\)The PROCA's objective, as prescribed in its preamble, is "to provide the more effectual prevention of crime in West Malaysia and for the control of criminals, members of secret societies and other undesirable persons and other matters incidental thereto". A police officer may arrest a person suspected of an offence without warrant and with a view to subjecting him to an inquiry under section 8 if he is satisfied that the arrest may justify "the holding of an inquiry" into his case under the PROCA. A person may be detained in police custody for 14 days and then if an inquiry is to be held.

The second category is legislation "to provide for the internal security of Malaysia, preventive detention and the prevention of subversion" (allowed under Articles 149 and 151). Although the ISA singularly represents this category, the Restricted Residence Enactment 1933 (RRE) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (SPMA) may also be itemised under this category as both instruments encompass preventive detention in relation to security and public order. As we have seen, the RRE, a pre-merdeka law, has since 1976 been given a special position or 'special licence', so to speak, of not being subject to Article 5(4) of...
the Constitution and the effect of this is to perpetuates arbitrary arrest and residential confinement for any person who in the opinion of the Minister ought to be so confined in any district.\(^1\)

The third category is represented by emergency and delegated legislation (Article 150).\(^2\) Under this category are the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and the Essential (Security Cases) Regulations, 1975 (ESCAR). The EPOPCO was promulgated at the beginning of the 1969 emergency "for securing public order, the suppression of violence and the prevention of crimes involving violence"\(^3\) while the ESCAR provides for special procedure and evidence in conducting the prosecution of security offences.\(^4\) Because of the EPOPCO's wide 'net' of power - in particular relating to arbitrary arrest and detention - it has somewhat replaced the Public Order (Preservation) Act 1958 (POPA) and the Prevention of Crime Act 1959 (PROCA) both of which are peacetime public order instruments and are subject to the provisions of the Criminal Procedure Code.

As may be seen from the above list, from 1966 to 1988 alone, there have been nine statutes that contribute in one way or another towards the erosion of fundamental rights.\(^5\) However, the inherently draconian and anti-human rights statutes\(^6\) are the Restricted Residence Enactment 1933 (RRE), the Internal Security Act 1960 (ISA), Police Act 1967, Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO), Essential (Security Cases) Regulations, 1975 (ESCAR), the Printing

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\(^2\) This is discussed in Chapter 5.

\(^3\) Third para of the EPOPCO's preamble: PU(A) 94/69.

\(^4\) Under s.2(2) of the ESCAR only the Attorney General determines whether to classify a case as a "security case" or an ordinary case.


\(^6\) The Public Order (Prevention) Act 1958 (POPA) and the Prevention of Crime Act 1959 (PROCA) have been somewhat overshadowed by the Police Act 1967, the ISA and the EPOPCO in recent years. It is to be noted that in 1979 Parliament enacted the Emergency (Special Powers) Act 1979 which consolidated and revalidated all acts and things done pursuant to the Emergency (Essential Powers) Ordinance 1969 [P.U.(A) 146/69].
Presses and Publications Act 1984 (PPPA) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (SPMA). Of these, four instruments allow arbitrary arrest and detention: the RRE, the ISA, the EPOPCO and the SPMA. Although, as in the case of the RRE, the Minister may restrict a citizen up to his natural life in any district or place, ministerial power to detain a person under the ISA, the EPOPCO and the SPMA is enforceable for a period of two years for each detention order. However, the Minister may extend the detention at the end of the two-year period if he is satisfied that this is necessary. These pieces of legislations conform to some common objectives most of which are based on the dictates of 'security and public order' or as was claimed recently, 'towards the smooth and efficient running of the government machinery'.

The Restricted Residence Enactment 1933 (RRE), the Internal Security Act 1960 (ISA), the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and the Dangerous Drugs (Special Preventive Measures) 1985 (SPMA) have distinct and separate objectives in the areas of security and public order. However, the police and ministerial power to arrest and detain persons provides a benchmark in each statute. For example, section 3(1) of the EPOPCO empowers the police to arrest without warrant and detain a person for a period of up to 60 days upon suspicion that there are grounds which would justify his detention by the minister under section 4(1) thereof. Under Clause (2) of section 3 of the EPOPCO the police are empowered further to arrest without warrant "and detain pending enquiries any

1 Section 2(3) RRE.
2 Speeches of the Agong at the opening of Parliament invariably includes this prodding. See for e.g. the Agong's speeches for 1971, 1972, 1974, 1978, 1980 contained in Penyata Rasmi Parlimen (Official Report of Parliament) for the respective years.
3 For example, see speech of Dr. Mahathir Mohamed, Prime Minister, at the Dewan Rakyat on 18 March 1988 when he tabled the Constitution (Amendment) Act 1988. The Chief Minister of Negeri Sembilan, in tabling the State's Constitution (Amendment) Bill 1993 that effectively took away the saving powers of the Yang Di Pertuan Besar (Sultan) as Ruler of the State explained that the amendment sought was to "improve the government machinery..." See New Straits Times 18 May 1993.
4 The Dangerous Drugs (Special Preventive Measures) 1985 (SPMA) which also provides for ministerial detention of up two years in each case, has been utilised purely against drug traffickers. The SPMA compliments the Dangerous Drugs Act 1952 whose section 39(B) carries the death penalty upon conviction of trafficking of hard drugs (e.g. heroin and morphine). In 1988 the Dangerous Drugs (Forfeiture of Property) Act was enacted specifically to counter the illicit drug trade.
person" who fails to satisfy the police officer on matters pertaining to his identity or the purpose "for which he is in the place where he is found if the police officer suspects that person of having acted or being about to act or being likely to act in any manner prejudicial to public order." Alternatively, a police officer may arrest and detain a person upon suspicion if he "has reason to believe" that the arrest of that person "is necessary for the suppression of violence or the prevention of crimes". Section 4(1) of the EPOPCO empowers the Minister to detain any person for any period not exceeding two years each time with a view to preventing that person "from acting in any manner prejudicial to public order" or if it is necessary "for the suppression of violence or the prevention of crimes involving violence". (italics supplied). While under the provisions of section 3(1) of the EPOPCO police suspicion is supposed to be based on consideration of public order, "the suppression of violence" or "the prevention of crimes"¹, under section 73(1) of the ISA the police suspicion is focused towards security of the country or essential services or economic life. Section 73(1) of the ISA is also an enabling provision for the police to arrest and detain any person on considerations of security for up to 60 days so as to enable ministerial detention under section 8(1) thereof. It must be pointed out that the ISA under its general heading has already specified the "suppression of organised violence" as one of its avowed objectives.²

Under s. 8(1) of the ISA it is provided that if the Minister is satisfied that the detention of any person is necessary "with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order directing that person be detained for any period not exceeding two years." The phrases in italics denote the three disjunctive grounds.

¹See preamble to the EPOPCO P.U. (A) 145/69.
Turning again to the Restricted Residence Enactment 1933 (RRE), it is now the oldest law in the country that thwarts freedom of movement and liberty of the person. Its s. 2(i) provides:

Whenever it shall appear to the Minister on such written information and after such enquiry he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim in the State or should be prohibited from entering into any particular district. . .or mukim in the State, the Resident may issue an order for the arrest and detention or, if he is already in prison, for the detention of such person.

It will be noticed that under the above provisions there is no mention of security or public order or the prevention of crime. Thus the Minister may indeed restrict any person whom it appears to him it is necessary to restrict. Note that there are no specified grounds for restricting a person in any district although in practice those restricted have been members of secret societies and recurrent offenders whose petty crimes could not be proven in a court of law.

The Minister may also issue an order "for the arrest and detention or, if he is already in prison, for the detention of such person." Under Clause (iii) of section 2 the Minister's order to restrict a person in any district "may be for the life of the person to whom it relates..." This legislation, originally specified for use against recurrent offenders, secret society members and "suspected wrongdoers or nuisance to society" in the early 1930's has been on the statute book for over 60 years without any appraisal or review. During the emergency years (1948-1960) the RRE continued to be used although criminal suspects also made up the RRE's target group.

The RRE should have met its demise in 1958 when it was first challenged in Chia Khin Sze v. Menteri Besar of Selangor on the ground that it violates Article 5(3) of the Constitution which provides that "where a person is arrested he shall be informed as

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1 *Federal Legislative Proceedings* 16 May 1933, p.23.
2 The only significant change that it received after Merdeka was that the word "Resident" was substituted by "Minister". In 1969 the Minister for the Interior (Home Minister) delegated his powers under the RRE to the Chief Ministers in the states: see Assa Singh v. Menteri Besar Johore 1969) MLJ. 30. Since 1971 such delegation of power was revoked.
3 For the period 1933-1948 the RRE was limited in use to the four Federated Malay States of Perak, Selangor, Negeri Sembilan and Pahang. By way of the Restricted Residence (Amendment) Enactment 1948 the instrument was applied to the whole of the Federation. See Assa Singh v. Menteri Besar Johore 1969) MLJ. 30 at p. 32.
soon as may be of the grounds of his arrest and shall be allowed to consult and be
defended by a legal practitioner of his choice".¹ However, as we have seen, by virtue
of the Constitution (Amendment) Act 1976, following the decision of Loh Kooi
Choon, a person arrested under the RRE need no longer be brought before a
magistrate within twenty-four hours. In this way the RRE has superseded the
Constitution.

In Assa Singh v. Menteri Besar of Johore², a 1969 decision, the RRE became
entrenched as a security and public order instrument when a panel of five Federal
Court judges³ unanimously decided that even though the rights of an arrested person
under Article 5 (especially clauses 3 and 4) were violated, a pre-Merdeka law such as
the RRE could be saved by 'reading these rights into the Enactment'.⁴ The applicant
was arrested and detained under the RRE with a view to restricting him in another
district on consideration of security or public order. He argued that the RRE violated
his rights under Articles 5 (liberty of the person) and 9 of the Constitution (freedom
of movement) in that no provisions were made to guarantee him these rights. The trial
judge referred the matter to the Federal Court for the determination of the issue
whether the RRE was unconstitutional. Suffian FJ conceded, on the submission of the
Solicitor General acting for the authorities, that a post-Merdeka law if found
inconsistent with the Constitution shall, to the extent of the inconsistency, be void
but in respect of a pre-Merdeka law, Article 162 provides its saving in that the
enactment in question may be modified by the Agong (within two years after
merdeka) without going to Parliament within a period of two years after Merdeka
Day. Alternatively, any court applying the provision of clause 6 of Article 162 may
apply it with the necessary modifications to bring it into accord with the Constitution.
As we have seen, this approach was recommended by Lord Denning in Surinder
Singh Kanda v. The Government of the Federation of Malaya ⁵ when it was found

¹See above.
²(1969) 2 MLJ 30.
³Azmi LP, Ong Hock Thye CJ, Suffian FJ, Gill FJ and Raja Azlan Shah J.
⁴This view was unanimously suggested by the five judges.
⁵(1962) MLJ 169.
that the pre-Merdeka law on the Police Commission in the Police Ordinance 1952 responsible for the appointment of police personnel was not in accord with the Constitution. In Kanda Lord Denning suggested the 'accord' approach. In doing so Inspector Kanda successfully sought redress for wrongful dismissal whereas in Assa Singh, despite bringing into accord the 1933 enactment with the Constitution, the applicant was not set free.

What was involved in Assa Singh was the question of the liberty of the subject. It was not an ordinary matter such as the power of appointment or the power of dismissal which was the issue in Kanda. The Federal Court should have made a clear distinction between a freedom right and an ordinary right just as the writ of habeas corpus has been rightly regarded as a high prerogative writ compared to an ordinary writ\(^1\) and the other prerogative writs envisaged under Order 53 of the Supreme Court Rules. It is clear that the one salient distinction which the court in Assa Singh failed to appreciate and distinguish was the fact that persons detained or restricted under the RRE are faced with the violation of their freedom for which the court should pay particular attention. For the court to bring into accord an impugned pre-Merdeka law such as the RRE under the authority of Article 162(6) is to disregard the supremacy of the constitution. Furthermore, if this process of bringing into accord is carried out in every case involving an impugned pre-Merdeka law, every such law violative of the Constitution will be saved - at the expense of freedom. What results, needless to say, is a mockery of the Constitution whose Article 4 declares it to be the supreme law of the land.

It will be recalled that just prior to the decision of Loh Kooi Choon discussed above, the Constitution was amended so as exclude the RRE from the operation of clause 4 of Article 5.\(^2\) Thus a person arrested and detained for onward restriction under s.2(i) of the RRE cannot benefit from the basic right of being produced before a


\(^2\)Constitution (Amendment) Act 1976.
magistrate within twenty-four hours of his arrest. It is noted that the RRE, unlike the
ISA, is not a creature of Article 149, nor is it authorised by Article 150. That it was
made to take a higher status than the Constitution shows that the Constitution is not
supreme. Since 1976 the plight of a restrictee under the RRE has deteriorated further.
Recent cases tend to show that the courts were not concerned with basic technical
deficiencies affecting restriction under the RRE. In Phua Hing Lai & Ors. v.
Timbalan Menteri hal Ehwal Dalam Negeri 1 the four appellants were arrested under
s. 2(ii) of the RRE and detained in various prisons in the country pending the issue of
restriction orders by the minister under the same provision. When the orders were
finally issued, there were delays ranging from one to six days. The appellants
contended that such delays rendered their detention unlawful. In dismissing the
appeal, Hashim Yeop Sani SCJ did not consider that there were material delays in the
service of the restriction orders on the restrictees and as such did not vitiate the
interim detention of the appellants. The delay was, in his lordship's view, merely
'administrative'.

4. 4. Protection of life and liberty

Life and personal liberty are protected by Article 5(1) but can be deprived "in
accordance with law". The Constitution does not give any guidance as to what the
substantive content of such a law should be. In many cases it has been held that
Article 5(1) does not import the American concept of "due process" which includes
the principle of natural justice and natural law; the term 'law' in Article 5(1) refers to
'lex' and not 'jus'. It has also been ruled by the court that "...the reasonableness of the

1 (1990) 1 MLJ 173.
2 Cf. Timbalan Menteri Hal Ehwal Dalam Negeri v Liau Nyun Fui (1991) 1 MLJ 350. In this case the
Supreme Court used the yardstick 'with all convenient speed' pursuant to s. 38 of the Interpretation
and General Clauses Ordinance 1948 in determining whether the minister acted within a reasonable
time in issuing his restriction order under the RRE. For a judicial determination of the phrase 'as soon
as may be' under s. 2(ii) of the RRE, see Public Prosecutor v Koh Yoke Khoon (1988) 2 MLJ 30;
Teoh Lian Fatt v Timbalan Menteri Hal Ehwal Dalam Negeri (1988) HC/OS No. 31-379-88
[unreported].
3 Loh Kooi Choon v Government of Malaysia op. cit. per Raja Azlan Shah LP.
law is not for the court to review. The law may be harsh but the role of the court is only to administer the law as it stands.”¹ Article 5 as a whole reads:

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day. Provided further that in its application to a person, other than a citizen who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days";

And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

Article 5(2) may be termed as the habeas corpus Article of the Constitution in that a citizen may petition the High Court with respect to a person being unlawfully detained. The effective words are "where complaint is made to a High Court." Unlike in India where the development of public interest litigation (PIL) have risen to such commendable heights as to allow an aggrieved person merely to write a letter of complaint to the court without the requisite form, in Malaysia form is still strictly required.² That form is provided by the Criminal Procedure Code.³ To date there has not been a case involving a writ of habeas corpus or a petition of any nature that

¹Attorney General Malaysia v. Chiow Thiam Guan (1983) 1 MLJ 50.
²Munusamy v. Subramaniam & Ors (1969) 2 M.L.J. 108. As a matter of comparative interest, in New Zealand no definite formality is required apart from the need to adhere to English practice. The power to issue habeas corpus writ is vested in the New Zealand Supreme Court in relation to detention by official action, though this application is not often sought. As in England, this is a discretionary writ at the instance of the Supreme Court. Rule of the Code of Civil Procedure 1908 of New Zealand merely says that the procedure shall be the same as in England as consistent with the law of New Zealand, i.e. by motion, without notifying the official detaining the subject concerned. But normally the court adjourns the application after hearing the complaint so that the official concerned could be notified. See D.E. Paterson, An Introduction to Administrative Law in New Zealand, Wellington, 1967 at p.197. See also Sim’s Practice and Procedure, 10th edn. Wellington 1966 pp 386-387.
³Federated Malay States (FMS) (Cap. 6).
originated from a mere complaint such as by way of letter-writing. The need of having to satisfy form and formality still entails as is the case in England.¹

The Malaysian fundamental liberties are set out with varying degrees of absoluteness under Part II of the Federal constitution.² At one extreme, the right of an arrested person to know the grounds for his arrest and to be allowed to consult and be defended by a legal practitioner of his choice (Article 5(2), the prohibition of slavery (Article 7) and the prohibition of expropriation without adequate compensation (Article 13) are all stated promisingly. The meaning of the words "save in accordance with law" is relevant in issues concerned with the deprivation of life or liberty by governmental action. The same phrase occurs under Article 13(1) - the right to property. In Arumugam Pillai v. Government of Malaysia³ on an issue involving taxation, the phrase "save in accordance with law" was invoked and the Federal Court, through the judgement of Gill CJ said, "The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be." In this decision it would appear that the American concept of due process is rejected in preference to literal legislative intent. It follows that there is to be little hope of getting protection through the process of judicial review. In an earlier case, Comptroller-General of Inland Revenue v. N.P.⁴ the High Court rejected any resort to the rules of natural justice in interpreting the

¹Malaysia's Order 53 of its Rules of the Supreme Court is basically similar to its English counterpart.
²In Singapore, fundamental liberties are set out under Part IV (Articles 9-16) of the Singapore Constitution. In the case of India, these are found under Part III of the Indian Constitution consisting of 26 Articles (Arts 12-35). In Gopalan's Case, (1950) SCR 88 at p. 198 Shastri J. said that "the people of India in delegating to the legislature, the executive and the judiciary their respective powers reserved to themselves certain fundamental rights, so called because they had been retained by the people..." However Seervai refutes this by saying that the Indian Constitution while mixing the positive aspects of the American and the British systems is really unique in its own way but "no rights are reserved to the people". See H.M. Seervai, Constitutional Law of India, Tripathi, Bombay 1983 at pp. 212-213.
⁴(1973) 1 M.L.J. 92.
phrase. In *Superintendent of Pudu Prison v. Sim Kie Chon* \(^1\) the Supreme Court held that the rules of natural justice do not apply to deliberations of the Pardons Board and earlier in *Sim Kie Chon v. Superintendent of Pudu Prison* \(^2\) the same court found that the Agong's power to commute or pardon after the Pardons Board made its recommendations is a power of mercy and not subject to challenge in court. \(^3\)

At a glance Article 5(1) suggests that it imports an absolute and unqualified right to personal liberty and life. It is, on closer perusal, not so for the phrase "in accordance with law" allows the life and liberty of a subject to be taken. All that is necessary is for the law to prescribe it through the normal Parliamentary law-making process. Therefore the question that requires an answer is the meaning of the phrase "in accordance with law" or in essence, the word "law." In the Singapore case of *Ong Ah Chuan v. Public Prosecutor* \(^4\) the issue was whether the imposition of the death penalty under s. 29 of the Republic's Misuse of Drugs Act 1973 for trafficking in controlled drugs was constitutional. The question of constitutional validity of mandatory death penalty was raised against an order passed by Choor Singh and Raja JJ as confirmed by Wee Chong Jin CJ of the Singapore Court of Criminal Appeal. The appellant in this case was convicted for trafficking in controlled drugs and punished with death. The Privy Council, through Lord Diplock expressed the view that the Board of the Privy Council could not bring themselves to question the merits or demerits of the death penalty. This question, their Lordships found, was competently dealt with by the Singapore Parliament and as such "their Lordships... are in no way concerned with arguments for or against capital punishment or its

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\(^1\)(1986) 1 MLJ 494 [SC].  
\(^2\)(1985) 2 MLJ 385 [SC].  
\(^3\)The Agong has a constitutional power of pardon under Art. 132 of the Constitution. He has exercised this on a number of occasions, the latest being in the case of *Datuk Mokhtar Hashim*, a former Cabinet Minister convicted of murder in 1982 (see *Datuk Mokhtar bin Hashim & Anor v. Public Prosecutor* (1983) 2 MLJ 232. On the authority of *Sim Kie Chon v. Superintendent of Pudu Prison* (1985) 2 MLJ 385 the act of pardon by the Agong is a non-judicial matter. It is a royal prerogative of exercising mercy. On the question of the philosophy of pardons generally in other jurisdictions, see Kathleen Dean Moore, *Pardons, Justice, Mercy and the Public Interest*, Oxford, 1989.  
\(^4\)(1981) 1 M.L.J. 64.
efficacy as a deterrent to so evil and profitable a crime as trafficking in the addictive drug..."1

The prosecution contended that the requirements of the Singapore Constitution were satisfied if the deprivation of life or liberty complained of had been carried out in accordance with the provisions in any Act passed by Parliament (i.e. "according to law") however arbitrary or contrary to the fundamental rules of natural justice the provisions of such an Act might be.

The Privy Council laid down the principle that in constitutions like that of Singapore and others "founded on the Westminster model" reference to "law" in such context as "in accordance with law", "equality before the law", "protection of the law" and the like must conform to the rules of natural justice. This is one of the more assuring judicial statements on the liberty of the person provision of Article 9(1) of the Singapore Constitution which is pari materia with Article 5(1) of the Malaysian Constitution. It follows that when deciding upon the fate of arbitrarily arrested or detained persons the courts should utilise this ruling in its broadest possible sense so as to lend credence to the rule of law. It would certainly be incongruent if the courts were merely to interpret the statute to the letter and be oblivious to broad principles that would otherwise benefit the aggrieved party.

Ong Ah Chuan has been followed in Malaysia not so much for the rules of natural justice it recommends for constitutions based on the Westminster model, but more for the proposition that the legislature must be allowed to pursue its own policy of applying the death penalty.2

4. 5. The Death Penalty

The death penalty for murder has been part of Malaysia's judicial sentencing policy ever since the Penal Code3 was made part of the laws of the Federated Malay States

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1(1981) 1 MLJ 64 at p. 72.
2See below.
3The Penal Code (FMS Cap. 45) is the oldest statute that prescribes the death penalty (under s. 302) for the offence of murder. Kidnap with intent to murder under s. 364 of the Penal Code is also punishable with death..." Cf. sections 8 & 32 of the Arms Act 1960.

Unlike other liberal democratic countries, the death sentence in Malaysia and Singapore does not appear to be of concern to the citizenry. News about death sentences being passed by the courts fill the dailies with such regularity that it has ceased to amaze or surprise the ordinary man. Neither the Bar Council nor any other body or association has made representations to the government on the point that the death penalty ought to cease although the former has been a champion of civil liberties to some degree in that it has condemned the Internal Security Act 1960 (ISA 1960) and the Essential (Security Cases) Regulations) 1975 (ESCAR).

Since 1976 the trafficking of controlled drugs has been a crime whose commission attracts the death penalty. Under the Dangerous Drugs Act 1952 mere possession of a dangerous drug like heroin or morphine is presumptive of guilt. Hence the offence once proven in a court of law carries the death penalty. In the area

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1Section 57 of the Internal Security Act 1960 prescribes the death penalty for the offence of possession of unlicensed firearms within a security area. Under section 8 of the Arms Act 1960 the penalty for similar offence [i.e. within a non-security area] is 7 years imprisonment or a fine of $10,000 or both.

2Section 39B of the Dangerous Drug Act 1952 prescribes the death penalty by hanging upon conviction of drug trafficking of scheduled drugs beyond certain prescribed quantity. For example, trafficking in 15 grams or more of heroin or morphine under the Act attracts the death sentence upon conviction.

3In 1990 there were 51 persons awaiting execution by hanging. By 1991, 12 were executed consequent to the tough anti-drug provisions under the Dangerous Drugs Act 1952. Source: Jabatan Penjara Malaysia, Kuala Lumpur. During British rule and up to 1960 (i.e. after merdeka), each Government Department produced detailed annual reports on its annual performance and expenditure. This practice ceased thereafter. Today one may get an overall report from the Statistics Department. However 'sensitive' statistics on matters like preventive detention and remand prisoners are not readily available. With the tightening of the Official Secrets Act in 1983 it is virtually impossible to get public information of this nature without official release by the Ministry concerned.

4See the Bar Council's memorandum urging the government to withdraw the ESCAR to Members of Parliament: INSAF Vol. 2/1975.

5The drug or dadah menace in Malaysia has been a major social problem since 1976. The authorities began in earnest creating an anti-drug culture through a multi-prong approach including the creation of PEMADAM, the National Anti-Drug Association. Malaysia has a population of about 250,000 drug addicts. (See PEMADAM Newsletter, Kuala Lumpur, November 1990). The Dangerous Drug Act 1952, pre-cursor to the Dangerous Drug (Special Preventive Measures) Act 1985 was thought to be inadequate.

6Section 37(d)(da) Dangerous Drug Act 1952. Possession of 15 grams or more of heroin or morphine under section 37(da)(i) & (ii) is presumed to be trafficking in the said drugs. The mandatory death penalty in such cases is prescribed under s. 39B(2) of the Act (as amended by the Dangerous Drugs (Amendment) Act A563/1983).

7Dangerous Drugs Act 1952, s. 39B(2). Prosecution under S. 39B must be with the consent of the Public Prosecutor (See Dangerous Drugs (Amendment) Act (A318/No.2/1975).
of trafficking dangerous drugs, (like heroin or morphine), and internal security, Parliament has prescribed punishment requiring the mandatory death sentence to be imposed on the offenders. The constitutional validity of such provisions has been challenged in a few cases as offending Article 5(1). However none of the cases in this category had been successful. Now, since the coming into force of the Dangerous Drugs (Special Preventive Measures) Act 1985 (SPMA) the authorities have wide powers of arrest and detention in respect of persons suspected of trafficking illicit drugs but in order for the arrest and detention to be lawful the Home Minister must effect his order in clear unequivocal language although no special form is necessary.

In a series of cases the question of the death penalty has been before the courts in the context of section 57(1) of the ISA but none of these cases appears sufficiently to weigh the importance of freedom and liberty in the light of Article 5(1) of the Constitution. The section provides that "any person who without lawful excuse...in any security area carries or has in his possession or under his control (a) any fire-arm without lawful authority therefor; or (b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence and shall, on conviction, be punished with death." The crux of the government's argument is that since the ISA was enacted constitutionally under Article 149 it therefore follows that the requirement under Article 5(1) "in accordance with law" is satisfied. In The Attorney General v. Chow Thian Guan 2 the court ruled that "It is not within the province of the Court to adjudicate upon the wisdom of the law. The court is only to administer the law as it stands." 3

1 Sections 3 and 6 SPMA.  
2 (1983) 1 MLJ 51.  
3 Lord Devlin, for example, reflected this view when he said, "I have now made it plain that I am firmly opposed to judicial creativity or dynamism..." See Patrick Devlin, The Judge, Oxford University Press, 1981, p. 9. See also Michael de Freitas v. George Ramoutar Benny & Ors. (1976) AC 239. However, the more preponderant view is that judges do and are able to change the law if fundamental principles are adversely affected. See Lord Mackay, 1987 Macabean Lecture in Jurisprudence, "Can Judges Change the Law?" Lord Denning also admitted, "All judges know that judges change the law but in England they have always been careful not to draw attention to it." See Edmund Heward, Lord Denning: A Biography, Weidenfeld & Nicholson, London, 1990, p.213. Justice Holmes stated that "Judges do and must legislate but they can do this only interstitially" - cited in Edmund Heward, Lord Denning: A Biography, op cit. at p. 213.
In another case, *Public Prosecutor v. Yee Kim Seng* ¹ the court again did not accept the plea to invalidate s.57(1) of the ISA 1960. The court was not convinced that Article 5(1) was infringed and reasoned that "... the accused [was] not going to be deprived of his life or liberty except in accordance with law." By this it was meant that the ISA was indeed made in accordance with law. Not satisfied with this reasoning, Suffian LP added that without suitable sanctions, the ISA would be inadequate and ineffective to achieve its purpose i.e. to provide for the internal security of Malaysia, preventive detention and the prevention of subversion in the country "and for matters incidental thereto." Here it is clear that it was the court that supplied the justification that the executive needed to rationalise the death penalty sanction under section 57(1) of the ISA.

Suffian LP in *Public Prosecutor v. Lau Kee Hoo* ², following *Ong Ah Chuan*, determined that the death penalty was a perfectly valid prescription made by Parliament. The Lord President in arriving at this conclusion distinguished the Malaysian Constitution from that of the United States pointing out that the prohibition against "cruel and unusual punishment" ³ was not in the Malaysian Constitution and that the provision prohibiting "torture or inhuman or degrading punishment" which was to be found in the Rhodesian and Nyasaland⁴ constitutions was also not within the ambit of the Malaysian Constitution. He also said:

In parenthesis it may be remarked that one would not expect Parliament to countenance torture or any punishment that is inhuman or degrading : that as regards the death penalty which has existed here for well over a century, while it may be cruel in certain other countries, public opinion here is not quite ready to follow suit.⁵

Suffian LP simplifies the question of the validity of the ISA by saying that since that legislation is constitutional by virtue of Article 149 of the Constitution there can be no further query as to its repugnancy under Article 5(1). The court also preferred the

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¹(1983) 1 MLJ 252.
³Article VIII of the United States Constitution
⁴See *Runyowa v. The Queen* (1967) 1 AC 26 for the Privy Council's view on the death penalty and torturous acts.
majority judgement in *Bachan Singh v. State of Punjab*¹ which counsel also urged the court to consider in the light of the minority judgement there which had argued that the death penalty was repugnant to India's Article 32. The court while rejecting the minority judgment in *Bachan Singh* replied that the Malaysian Constitution was to be interpreted and decided the Malaysian way. In Suffian LP's own words:

... we should decide cases before us in the light of our own constitution, our own laws and the conditions in our own country which are not necessarily the same as in other countries.²

The Federal Court through Suffian Hashim LP gave the ISA a boost by saying:

In our judgement there is no merit in this argument. True, the ISA is designed to stop or prevent subversive action but as the whole of it is valid and is still in force it can be used as authority for prosecuting persons who have completed acts made criminal by the Act, not only for stopping or preventing such acts. In any event what better way is there is for preventing similar acts than by prosecuting offenders such as the respondent?³

The court followed the Federal Court's decision in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*⁴, a case which established the principle that once a detaining authority established a valid legal power for a detention it was incumbent upon the court to question that power since matters of security were strictly outside the expertise of the court.⁵ In *Karam* the applicant argued that although the order for his detention under s. 8 of the ISA stated three grounds, only one ground was supplied to him and that ground was vague and insufficient. The Federal Court held that the defect (if any) was a "defect of form and not of substance." It is reasoning of this nature that gives encouragement to the executive to continue ahead with draconian changes to the law.

¹AIR 1980 SC 898. In this case Bhagwati J. gave a dissenting judgement favouring to rule the death penalty as *ultra vires* Articles 14 and 21 of the Indian Constitution.
⁴(1969) 2 MLJ 129. This is a landmark case that established the subjective test in cases involving executive decisions in security matters. This is Malaysia's version of the rule in *Liversidge v. Anderson* (1942) AC 206. *Karam Singh* will be discussed in Chapter 6 infra.
⁵See judgment of Azmi LP (1969) 2 MLJ 129 at p. 140.
4.6. The Right to Counsel

Article 5(3) provides that an arrested person "shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice." In *Ooi Ah Phua v. Officer in Charge Investigation, Kedah/Perlindia* 1 the issue was whether the right to counsel was immediate or as determined within a reasonable time at the instance of the police. This was an appeal from the decision of Hashim Yeop Sani J dismissing an application for a writ of habeas corpus arising out of police custody. The subject was arrested on 26 December 1974 and formally charged with abatement in an armed robbery only on 7 January 1975. The applicant, the father of the subject, instructed his solicitor to see the subject who was being interrogated by the police but access was refused. The applicant applied for a writ of habeas corpus and it was alleged that the right of the subject to consult and be defended by counsel of his choice commenced immediately after his arrest and that this right was an unqualified right the denial of which had rendered the detention unlawful.

The Federal Court dismissed the appeal. Suffian LP agreed that the right of an arrested person to consult his lawyer did begin from the moment of arrest but he was of the opinion that the right could not be exercised immediately after arrest. A balance had to be struck, he reasoned, between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from a wrongdoer by apprehending them and collecting whatever evidence existed against them. The interest of justice, he said, was as important as the interest of the arrested person and it was well known that criminal elements were deterred most of all by the certainty of detection, arrest and punishment. He agreed with Hashim Yeop Sani J who in the court below had said that the right of an arrested person to consult a legal practitioner ought not to be exercised to the detriment of investigation. One may easily detect here a judicial sympathy, so to speak, for the police at work, but it might

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1*(1975) 2 MLJ 198.*
be considered that there are no adequate reasoning in this case for disallowing immediate access to a lawyer.¹

In Hashim b. Saud v. Yahaya bin Hashim & Anor. ² the attitude and reasoning of the Federal Court in the previous case could again be seen where a different panel sat in the Federal Court.³ Azlan Shah FJ held that the right to consult a lawyer started right from the day of his arrest but that it could not be exercised immediately after arrest if it impeded police investigation or the administration of justice. Having found that the police had given good and sufficient reason why such right could only be exercised after the period of police investigation was completed under s 117 of the Criminal Procedure Code, the court dismissed the appeal. His Lordship pointed out that justice "does not mean only for the accused; it also means the interests of the State, and not enough is paid to the interests of the State".⁴ Are the procedural requirements of Article 5(3) mandatory or directory in nature? It is mandatory because the language of the Article is clear. Even at common law the rules of natural justice are applied when a statute is silent as to the rights of the parties. Lord Guest stated in Wiseman v. Borneman ⁵:

It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the question, the Courts will imply into the statutory provision a rule that the principles of natural justice should be applied.⁶

It is submitted that in dealing with a constitutional provision on personal liberty, the courts should presume that when the exercise of a power is hedged in by procedural prescriptions, the procedure ought to be followed strictly. Judicial sentiments in many

¹For a discussion on the right rights of the accused, see Edgar Joseph Jr., "Rights of Accused - Law and Practice", (1976) 2 MLJ ii.
²(1977) 2 MLJ 116.
³The Federal Court sitting in Ooi Ah Phua consisted of Suffian LP, Lee Hun Hoe CJ and Wan Suleiman FJ. In Hashim's case the panel comprised Gill CJ, M.S. Ong and Raja Azlan Shah FJ.
⁴[1977] 2 MLJ 116 at 118.
cases support this point of view. In *Re P.E. Long @ Jimmy & Ors.* Justice Arulaanandom said "A question of deprivation of liberty requires strict compliance with the law." In *Re Datuk James Wong Kim Min* Chief Justice Lee Hun Hoe (Borneo) stated.

In a matter so fundamental and important as the liberty of the subject...safeguards which the law deliberately provides...must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad...An applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order.

In *Andrew s/o Thamboosamy v. Superintendent of Pudu Prisons* Suffian LP said: "Power given by law to detain must be construed strictly and in cases of doubt or ambiguity the court should lean in favour of the subject." The sentiments in *Andrew* are laudable but they cannot be reconciled with his Lordship's decisions in *Karam Singh* and *Ooi Ah Phua.*

4.7. The Control of the Freedoms of Assembly and Association

The late Tunku Abdul Rahman who served as Malaysia's first prime minister admitted that the country was run along the lines of a police state. In reference to the government's tight control over public meetings he also opined that the leadership was practising dictatorial tactics. These are no doubt personal opinions expressed politically by a man who was the country's first prime minister and leader of his country for 16 years. But the ring of truth could still be discerned from the various powers that are channelled through and executed by the police. Although the government's supporters were quick to deny the Tunku's allegation, the ex-premier

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1. *P.E. Long @ Jimmy & Ors v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors.* (1976) 2 MLJ 133 at 134.
2. *(1975) 2 MLJ 245; (1976) 2 MLJ 245.*
3. *(1976) 2 MLJ 245 at p. 251.*
4. *(1976) 2 MLJ 156 at p. 158.*
5. In a speech at the Second Annual General Assembly of the *Semangat 46 Party* (Spirit of 1946) in Kuala Lumpur on 23 November 1989. See the *Rocket*, vol. 23 No. 3 1990. This news-worthy speech did not even appear in the dailies which are substantially owned by the major political parties in the *Barisan Nasional* government.
7. The Tunku, as Tunku Abdul Rahman was popularly referred to by Malaysians, served as Malaya's Chief Minister in 1955. He was prime minister from 1957 to 1971 when he retired.
asserted the view forcefully in view of an incident in April 1990 when the police had refused to grant him a public assembly permit at one of the public stadiums in Kuala Lumpur. A crowd of about 15,000 later marched to the Tunku's residence where the assembly was finally held without a police permit. Had this been a function organised by UMNO, the ruling party, the former prime minister would have had an uneventful evening of speech-making. While this state of affairs may raise vehement opposition from say, the Indian or British or American public, in Malaysia it hardly caused a ripple. It was just another day in the business of government and since the newspapers did not highlight the incident because to do so would adversely affect the image of the government, the public was not put in the know. This incident serves as a backdrop to the plethora of police powers and the lack of press freedom in the country.

The Police Act 1967, was enacted to replace the Police Ordinance 1952 and with the purpose of providing for the organisation and discipline of the Royal Malaysian Police. It contains provisions relating to the powers and duties of the police in general. Even prior to a set of amendments made in 1987 which led to a further erosion on the rights of assembly, the Police Act was already imposing unreasonable restrictions on the right to assemble peaceably. Section 27(1) of the Police Act provides for a direction to be made by any police officer in respect of "the conduct in public places...of all assemblies, meetings and processions, whether of persons or of vehicles". Section 27 of the Police Act 1967 predicates the "power to regulate assemblies, meetings and processions". The section further provides that any officer in charge of a Police District "may direct, in such manner as he may deem fit, the conduct in public places...of all assemblies, meetings and processions...". The police determine the time, and the route of such assemblies, meetings or processions.

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1The event was the inauguration of the All Malaysian Indian Progressive Front (AMIPF) on 14 April 1990 at 8.30 p.m. to be held at the Stadium Negara in Kuala Lumpur. According to a Police Inspector, Johari Ahmad who was on duty that night, more than 20,000 had come to the stadium entrance. See Watan 16-20 July 1990.
3See the Police (Amendment) Act 1987 A685.
after an application in the prescribed form has been submitted to the Officer in Charge of the Police District (OCPD) who in turn determines whether or not it is proper for him to issue a licence pursuant to the application. If such a police officer "is satisfied that the assembly, meeting or procession is not likely to be prejudicial to the interest of the security of Malaysia...or to excite a disturbance of the peace" then a licence is issued in such form as may be prescribed specifying the name of the licensee and defining the conditions upon which such assembly, meeting or procession is to take place.

With the coming into force of the 1987 amendment\(^1\), it became clear that to hold an assembly or a public function peaceably, especially involving political speeches, was no longer fit to be regarded as a constitutional right. This was so because of the extreme restrictions which may now also be imposed by the police. Under the new subsections 2A, 2B, 2C and 2D introduced by the 1987 amendment\(^2\), the process of applying for a licence to hold an assembly is made even more stringent. An individual is no longer allowed to represent and apply for a permit or licence on behalf of an organisation. He is allowed to apply for a police permit under section 27 only if he is enjoined by two others in pursuance of the intention to hold an assembly, meeting or procession.\(^3\) Individuals cannot apply for such licence if the police officer in the relevant police district "is satisfied that the ...licence is in actual fact " intended for an organisation.\(^4\) The police must be satisfied that the organisation concerned must be registered or "otherwise recognised under any law in force in Malaysia.\(^5\)

The power to arrest without warrant any person "reasonably suspected of committing any offence" under section 27 is given under clause 6 of section 27. Prior to the coming into force of the Police (Amendment) Act 1987 it was permissible for an assembly to be held within a private premises without being caught under section

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\(^1\)See the Police (Amendment) Act 1987, tabled by the Minister of Home Affairs (Dato' Seri Dr. Mahathir Mohamed) in the Dewan Rakyat on 4 December 1987. See also Parliamentary Debates Dewan Rakyat 4 July 1987 Clmn. 1677-78.


\(^3\)Section 2A Police Act 1967 (as amended by section 3 of the Police (Amendment) Act 1987.

\(^4\)Ibid. Sub-section 2B of s. 27.

\(^5\)The term "organisation" here connotes any society formed under the Societies Act 1966.

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27. It has been accepted since merdeka, that it is permissible to hold a meeting or an assembly "on or in any land or premise which do not constitute a public place". However, the new section 27A prohibits this. It is now an offence under the new section if the assembly or meeting or procession is "directed to or is intended to be witnessed or heard or participated in by, persons outside the land or premises..." or if "the activity is likely to be prejudicial to the interest of the security of Malaysia...or to excite the disturbance of the peace."\(^1\) Technically, even the holding of a wedding involving the use of a hailer or a loudspeaker may be trapped by this new proviso as that function, mundane as it is, is certainly witnessed, heard and participated in by persons outside the premises. In a real situation of course village weddings involving the use of such items are excused by the police. But where a meeting is controversial the new section 27A becomes a weapon and the police are empowered to disperse the crowd or otherwise to stop the assembly by the use of force.\(^2\) The only explanation given by the Home Minister in tabling these amendments in the Dewan Rakyat was that by imposing these further restrictions, he maintained that it would be easier for the authorities to determine and identify which organisation or which individuals were to be held responsible in the holding of an assembly, meeting or procession.\(^3\)

The minister also prefaced his tabling of the Police (Amendment) Act 1987 by saying that these amendments were required to "streamline the law and to enable the police to take the necessary actions against those who violate the law pertaining to the holding of assemblies, meetings and processions".\(^4\) Nothing at all was said about the need for such further restrictions in view of the fact that the maintenance of security and public order in Malaysia as a whole had been more than efficient for years past. There is here, it is submitted, an undeclared intent to make it more difficult for individuals, organisations and political parties opposed to the government to secure police permits under section 27. Needless to say this curtails opportunities to speak out at political gatherings. This aspect of the infringement was of course not revealed

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\(^1\) Section 27A(c) of the Police Act 1967 (as amended).
\(^2\) Ibid. Section 27B.
\(^3\) Parliamentary Debates, Dewan Rakyat. 4 December 1987 Clmn. 1677.
\(^4\) Ibid. Clmn. 1678.
in Parliament. Without a police permit or licence issued under section 27(1) no group or organisation is permitted to hold an assembly, meeting or procession. Infringement of section 27 or the new section 27A entails a fine of M$2,000 (minimum) or M$10,000 (maximum) and imprisonment of one year. Infringement may mean holding an assembly, meeting or procession without a police permit or being held in breach of any of the conditions imposed by the police. Under these circumstance it is easy for any politician or leader of an organisation or society to be liable to such hefty fines and imprisonment.

In this connection, it is important to note that if a Member of Parliament, for instance, is convicted of an offence under clause (5) of section 27A and is subject to the minimum fine of M$2000 he is liable to be terminated and disqualified as a member of parliament. In view of this precarious position members of opposition parties in Malaysia, especially since 1987, have been in a state of quandary because it has become much easier for the police to find a political gathering as violating section 27 or 27A notwithstanding that a function is held within the compound of a private premises.

A Member of Parliament complained to the Inspector General of Police that the police had barred him from addressing a normal meet-the-people session in his own parliamentary constituency in 1988 without giving any reason. The letter of complaint was never answered. The presence of police personnel in a political assembly has been a normal sight over the years. Their presence is invariably coupled with photographic as well as recording devices, to serve them as exhibits in evidence in case prosecution is preferred against an individual or organisation.

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1 Section 27(3) Police Act 1967.
2 There are 6 disjunctive grounds for being disqualified as a member of parliament under Article 48. Article 48(e) reads: "...a person is disqualified for being a member of either House of Parliament if - he has been convicted of an offence by a court of law in the Federation...and sentenced for a term not less than one year or to a fine not less than two thousand ringgit and has not received a free pardon;" (italics added).
3 It must also be emphasised that opposition parties are not allowed by the Government to rent public premises such as town halls or balai rakyat (the people's meeting hall) in the villages.
It must be emphasised that the rigmarole involved in the process of applying for a licence prior to a function has always been tedious. Apart from the fact that the application must be submitted in triplicates two weeks in advance, as required by section 27(2), there is always the possibility of a last-minute cancellation at the discretion of the police. Somehow political parties in power, i.e. within the Barisan Nasional coalition, have not encountered any obstacles under s. 27.

By any standard, the police in Malaysia is allowed too much power. It submits reports to no one except the Minister of Home Affairs. Parliament does not compel them to submit annual reports for scrutiny of its members although questions submitted by members of parliament are answered by the Home Minister or by his deputy on a need to know basis. Even so, questions that require detailed written answers in respect of detention without trial under the RRE, the ISA and EPOPCO for example, seldom receive prompt action. In February 1991 an opposition leader requested written answers from the Home Minister in respect of the number of persons detained under the ISA and EPOPCO. The answers never came.1

In Madhavan Nair & Anor. v. Public Prosecutor2 under a police licence issued under section 27 of the Police Act the applicants were not permitted to speak on certain matters two of which were the then controversial Malay Language as the national language of Malaysia and certain policies connected with education. The two topics had been attracting adverse political views and were within the so-called category of 'sensitive issues'. The applicants challenged the imposition of these conditions and maintained that a man should be allowed to determine for himself what he should speak on and he would do so at his peril. If he should transgress the laws of sedition, he ran the risk of being charged in court but he should never be subject to prior restraint by the police. The conditions imposed by the police, counsel argued, were therefore ultra vires Article 10 of the Constitution.3

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1Written questions were submitted by Mr. Lim Kit Siang, leader of the opposition pursuant to Article 21 of the Standing Orders of the Dewan Rakyat.
2(1975) 2 MLJ 264.
3Article 10(1) provides for (a) the right to freedom of speech and expression; (b) the right to assemble peaceably without arms and (c) the right to form associations. These rights are, however, subject to
Chang Min Tat J refuted this submission by concluding that if the condition imposed had contravened Article 10 and the Federal Constitution, it was clear that no such condition could be imposed.¹ He reasoned that since Parliament was empowered under clauses (2), (3) and (4) to qualify the original rights under Article 10(1) there was, therefore, no question of any infringement of the applicant's right under Article 10. He followed the 1941 case of *R. v. Comptroller of Patents-ex parte Bayer Products Ltd.*² in saying that "if a regulation is expressed to have been made because it appeared to the authorities to be necessary to secure, *inter alia*, the public safety, the defence of the realm and the maintenance of public order then the court had no jurisdiction to investigate the reasons which impelled the authorities in question to the conclusion that it was necessary or expedient to effect any of the specified purposes."³ This simplistic approach hardly justifies the spirit of the constitution in assessing a reasonable balance between the right of a citizen to speak and the dictates of security or public order that the authorities were supposed to be so concerned with. The court was more concerned with the latter than the former. The court could also weigh, if it so chose, the intent on the part of the applicant to create a seditious tendency in order to establish his state of mind. This the court did not see as pertinent.

In *Lau Dak Kee v. PP*⁴ the appellant was convicted by the magistrates' court for a violation of section 27 of the Police Act as well as for being seditious when he transgressed the conditions imposed by the OCPD under the licence issued. On appeal to the High Court Azmi J, using the same argument that Parliament was empowered to qualify rights under Article 10(2), ruled that section 27 of the Act was not repugnant to Article 10 of the Constitution. However, he said in *obiter* "I think the impugned condition can only be challenged if it can be shown that it was imposed *mala fide* in the sense that it was not imposed in the interest of security, or to prevent

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² (1941) 2 KB 306.
⁴ (1976) 2 M.L.J. 229.
a disturbance of the peace at the time when the licence was issued." The *obiter dictum* is to be appreciated but *mala fide* has always been tricky and difficult for an accused or applicant to prove. The general rule is that *mala fide* or bad faith vitiates a discretionary decision even though the authority acts within the legal limits of its powers.\(^2\) Abdoolcader J in *Re Tan Boon Liat* \(^3\) used the expression *mala fide* in a broad sense when he said: "An order can be said to have been made *mala fide* where there is a malice in law though there may be no malice in fact and this may be deemed to exist where an order is made contrary to the objects and purposes of the particular preventive detention or when the detaining authority permits itself to be influenced by considerations which are outside the scope of the legislation in question."\(^4\)

While *Madhavan Nair* and *Lau Dak Kee* gave the Police Act the required impetus to be restrictive, almost a decade later, in a Federal Court decision the court gave yet a further boost to the quest to restrict the freedoms of speech and assembly. In the *Cheah Beng Poh v. Pendakwa Raya* \(^5\) the High Court approved in sweeping terms, the power of the police under s. 27 to regulate public assemblies, meetings or processions. Hashim Yeop Sani FJ ruled that any public assembly, meeting or procession even if spontaneous, is unlawful if it takes place without a licence. Intention to hold a meeting, so the court found, is irrelevant. The Federal Court in *Siva Segara v. Public Prosecutor* \(^6\) tried to tone down the effect of this remarkable High Court decision but in the main police power in regulating freedom was further enhanced.

4.8. Freedom of Movement

While under the RRE a person may be restricted to any district by the Minister, the right to international travel is also curtailed. This was established in *Loh Wai Kong*...
v. Government of Malaysia & Others.¹ By way of mandamus, sought under section 44 of the Specific Relief Act, 1950, the plaintiff prayed that the court direct the government to issue him with an international passport for purposes of foreign travel. He relied on Article 5(1) as a measure of fundamental safeguard.² Relying on the majority judgment of Satwant Singh Sawhney v. Ramarathnam, Assistant Passport Officer, New Delhi & Ors,³ Gunn Chit Tuan J stated:

"Article 5(1) of our Constitution is not only applicable to citizens but also guarantees the liberty of any person including non-citizens. The expression "personal liberty" must therefore be liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires. Refusal or withdrawal of one's passport should therefore not be seen so much as affecting the right of a person to travel abroad but should be considered, in my view, in the light of whether there is violation of his right of personal liberty under article 5(1) of our Constitution."⁴

On appeal by the government⁵ the Federal Court disposed of three issues of rights and liberty: (a) there is no such thing as the right to leave the country, (b) there is no right to travel overseas and (c) the right envisaged under Article 5(1) only pertains to the body or person of the individual and does not include the right to travel overseas and to passport. Suffian LP ruled:

"... a citizen has no fundamental right to leave the country and travel abroad... and he does not have a right, not even a qualified right, to a passport, though the citizen does not have a right under our Constitution and our law to a passport, the Government should act fairly and bona fide when considering applications for a new passport or for the renewal of a passport and should, like [the] government of the United Kingdom, rarely refuse to grant them." (emphasis added).⁶

Whilst it was commendable for the court to have suggested that the Government should be fair, the question of fairness itself was not looked into. In 1979 when the above decision was made, Malaysia was 16 years old and Merdeka was 22

¹(1978) 2 M.L.J. 175.
²Article 5(1) provides that "no person shall be deprived of his life or personal liberty save in accordance with law."
³AIR 1967 SC. 1936.
⁵(1979) 2 MLJ 33.
⁶Ibid. at p. 36.
years away. On this particular subject the court could have had resort to decisions from, say England. For instance, in *Re H.K.*\(^1\) the Divisional Court recognised a duty on the part of immigration officers to act fairly even when performing a non-judicial function. There a Commonwealth citizen, allegedly below 16 years of age, sought to enter the United Kingdom with his father who was a UK resident. The statute required that if the infant was below 16 he could be admitted. Believing in third party reports that the applicant was above 16, the immigration officer ordered him to be removed without giving him an opportunity to be heard in regard to other evidence which he later submitted to the court and which he claimed showed that he was an infant below 16. The court recognised a duty to be fair on the part of the immigration officer. In *Schmidt v. Secretary of State for Home Affairs* \(^2\) Lord Denning while specifying that an alien had no right to be in the United Kingdom except by licence of the Crown, did not leave the right of British citizens to travel abroad fettered. He emphasised that the alien had 'no right' and no 'legitimate expectation' of being allowed to stay in the United Kingdom but an administrative body was bound to give a person affected by its decision an opportunity of making representations.\(^3\) In India a citizen's right to his or her passport has been held to be fundamental even in the aftermath of an emergency rule.\(^4\)

The Federal Court's is emphatic statement that "not even a qualified right" exists under the Constitution in terms of getting a passport for the purpose of going overseas must surely be one of the most striking judicial utterances made in favour of the executive. Article 5(1) could have been used to benefit and enhance the citizen's right. By extension, what his Lordship meant was that there was no freedom of movement beyond the shores of the respective constituent states of Malaysia. It has to

\(^1\)(1967) 2 Q.B. 617.

\(^2\)(1969) 2 Ch. 149, per Lord Denning.

\(^3\)In England the right to an international passport has been held to be discretionary on the part of the Sovereign. However, it would appear that the deprivation of such right must satisfy the rules of natural justice. See *R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* (1989) 2 All E.R. 655.

be at the discretion of the government. This is no moot point. The case represents a significant judicial disregard for the right of personal liberty.

It is bewildering to note how the Federal Court is seen here to be too much swayed by the view of Mukherjee J in *A.K. Gopalan v. State of Madras*¹ that "personal liberty means a personal right not to be subjected to imprisonment, arrest or physical coercion in any manner that does not admit legal justification." This greatly restricts the notion of personal liberty. The language of Article 5(1) is wide enough to embrace all the reasonable forms of liberty connected with the physical person. Although Article 9(2) talks in terms of the citizen having "the right to move freely throughout the Federation and to reside in any part thereof" the right to travel abroad is an extension of the right to move according to one's will. To be confined to one's own country without being adjudged an offender under any of its laws is untenable, such a situation makes a mockery of the basic freedom of movement itself notwithstanding that clause 2 of Article 9 goes on to provide for exceptions on ground of public order, public health or the punishment of offenders. It was not proven in court that Loh was subject to any of these exceptions. Moreover, one is perplexed by the enforcement of ss. 65 and 66 of the Immigration Act 1959 the combined effect of which was that even a Malaysian from a state outside of Sarawak or Sabah has not the guaranteed right to enter those two states. Any person may be turned away at any time by the immigration authorities of the state without assigning any reason thereto.²

In *Tai Choi Yu v. The Government of Malaysia*³, a 1993 decision, a lawyer's passport was summarily retained by the Income Tax authorities in the State of Sabah on the ground that certain amounts in taxes were not paid. The applicant submitted that he was in fact in the position to meet the tax instalments, thus the withholding of

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¹ *A.I.R. (1950) SCR. 88.*

² This sort of restriction is quite common in Malaysia. For example, individuals who are themselves Malaysian citizens from the Peninsula may be refused entry into either Sabah or Sarawak. On Sunday, 21 September 1991 an opposition MP from Kuala Terengganu, Datuk Manan Osman, was stopped by the Sarawak State immigration from entering Sarawak at the Kuching Airport. No reasons were given by the State authorities. Executive action of this nature is normally directed against political opposition leaders. See *The Star* 21 September 1991.

³ (1993) 1 AMR 17, 689.
his international passport was unjustified and unfair. The High Court at Kota Kinabalu, following *Loh Wai Kong*, did not accept such a submission and confirmed the retention of the passport by the income tax authorities. In view of the principle that all administrative functions must be seen to be "fair"\(^1\) it is difficult to regard this decision as such. The courts in both *Loh Wai Kong* and *Tai Chai Yu* did not find it necessary to subscribe to such disposition. The court in *Tai's* case could have at least decided on the question of reasonableness in the need to have an international passport in view of the applicant's ability to pay up his remaining taxes. Even recent developments in England, for example, show that while the grant of an international passport is subject to the state's prerogative right, never the less the element of fairness is never lost. In *R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* \(^2\), for example, the claimant who lived abroad, held a British passport. When it expired the Foreign Office, refused to renew it because there was a warrant out for his arrest for a prior criminal act. The Court of Appeal held that although the policy decision not to renew the passport was proper in itself, the Foreign Office should have notified the claimant of the reasons of the refusal.\(^3\) Taylor LJ said that "the grant or refusal of a passport is ...a matter of administrative decision affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases. The ready issue of a passport is a normal expectation of every citizen unless there is good reason for making an exception."\(^4\)

### 4.9. Freedom of Speech and Expression

In the last chapter we have seen that some rights are more restricted than others. The freedoms of movement, speech, assembly and association are the most restricted not only by the language of the Constitution itself but also by the relevant legislation

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\(^2\)(1989) 2 All E.R. 655.

\(^3\)For grounds of refusal to grant a passport, see *Halsbury's Laws of England*, vol. 18 (4th edn.) para 1412.

\(^4\)Ibid. at p. 660.
made further to curtail them. Thus while freedom of speech is guaranteed by Article 10(1) under Clause (2) Parliament may impose "such restrictions as it deems necessary or expedient" on eight specified grounds. These restrictions are in the main represented by the Sedition Act 1948, the Police Act 1967 and the Printing Presses and Publications Act 1984. At the same time the Trade Unions Act 1959, the Societies Act 1966 and the Universities and University and Colleges Act 1975 impose multiple restrictions on the right to form associations and related activities, including political ones. The restriction on freedom of speech and expression under Article 10 is justified in so far as it is declared "necessary or expedient, in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality." In the case of freedom of assembly it is restricted by Clause (b) of Article 10(2) in that it is subject to the dictates of "security of the Federation or any part thereof". Parliament is authorised to make laws restricting this right "as it deems necessary or expedient." And in the case of the freedom of association it is restricted by the same restrictions as are applicable to freedom of assembly with an extra proviso that this freedom is also limited by the dictates of public order or morality.

It may be said that the freedoms of speech and expression, movement, assembly and association make up the core of human rights. In particular reference to certain restrictions on freedom of speech and expression Professor Street said:

The jurisprudential notion of liberty is the same, whether we have the Dicey rule of law or a Bill of Rights. For example, freedom of speech can never be a positive power to do something. Every legal system prescribes that you cannot do this and this: you must not defame another, you must not be seditious, you must not be obscene, and so on. The legal concept of liberty is that there are residual areas of great importance where man is free to act as he likes without being regulated by law.

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1The eight special grounds are enumerated under Clause (2) of Article 10 which reads: "Parliament may by law impose - (a)...such restrictions as it deems necessary or expedient in the interest of security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence."

2Article 10(2).

3Harry Street, Freedom, the Individual and the Law, (5th edn.), London, 1982 at p. 312. See also Lee Kuan Yew v. Chin Vui Khen (1991) 3 MLJ 494 where at pp. 503-5 Siti Norma J outlined the exceptions to free speech under Article 10 of the Constitution.
In India although it has been admitted that "there is no such thing as absolute or unrestricted freedom of speech and expression"\(^1\) in relation to its Article 19 which is in \textit{pari materia} with Malaysia's Article 10(1)(a)\(^2\) and clause(2)\(^3\) the freedom and the interest of the public are only limited by \textit{reasonable} restrictions. The word \textit{reasonable}, as has been pointed earlier, is absent in the Malaysian version. As a result, the Indian provision gives much more scope to the courts to exercise judicial review. Freedom of speech and expression certainly play a key role in bringing about change in any society when one considers the latitude within which one may express oneself or impart knowledge or information through the media. A society may be free to profess any religion, pursue education and have all the rudiments of freedom but without free speech and expression in particular the other freedoms have limited meaning and significance.

One of the most severe curtailment of freedom of speech in Malaysia is contained in the Constitution (Amendment) Act 1971.\(^4\) By this amendment it has become unlawful for anyone, including Members of Parliament during parliamentary debates, to question citizenship matters under Part III of the Constitution, or any matters pertaining to the rulers\(^5\), the national language\(^6\) or the special rights of the Malays.\(^7\) Tied up with this, the Sedition Act 1948\(^8\) superimposes another set of conditions that are deemed seditious.\(^9\) Under section 3(1) of the Sedition Act 1948 it

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\(^1\)Santokh Singh v. Delhi Asministration AIR 1973 SC 109. See also Parshottam Ltd. v. Prem Shariker AIR 1966 All 377 where it was held, \textit{inter alia}, that freedom of speech and expression is subject to the law of civil defamation.

\(^2\)Freedom of speech and expression.

\(^3\)This clause prescribes the power of Parliament to restrict freedom of speech and expression "as it deems necessary or expedient in the interest of the security of the Federation...friendly relations with other countries, public order or morality..."

\(^4\)Act A30/71.

\(^5\)Article 181.

\(^6\)Article 152.

\(^7\)Article 153.

\(^8\)Cap 233 Federation of Malaya (updated 1985).

\(^9\)The background to this amendment was the 13 May 1969 racial riots in Kuala Lumpur in the aftermath of a general election that marked a tremendous inroad by parties opposed to the then \textit{Alliance Party} led by the late Tunku Abdul Rahman. During this period issues on citizenship, the national language (Malay), special position of the Malays and the Rulers were hotly debated during election campaigns. The racial clashes which started as a result of inflammatory speeches by electoral contestants in the general elections in Kuala Lumpur was seen as the main factor which created unrest and divisions in the urban society of Malaysia. Consequently the 1969 Emergency was declared by the Agong (King) on 15 May 1969. The Emergency (Essential Powers) Ordinance 45 of 1970 makes it an offence to question those issues enumerated above.
is a "seditious tendency" by the speech or writing of an individual (a) to bring hatred or contempt to the government of the day or excite disaffection against any ruler or government, (b) to excite the countrymen to revolt, (c) to bring into hatred or contempt or excites disaffection against the administration of justice, (d) raise discontent or disaffection among the countrymen or (e) to promote feelings of ill-will and hostility amongst the inhabitants of the country. In Public Prosecutor v. Ooi Kee Saik & Ors.\(^1\) the charge against one Dr. Ooi was made under section 4(1)(b) of the Sedition Act 1948 with having uttered certain seditious words during a political party dinner while others were charged for having published and printed seditious words. Section 4(1) enacts "Any person who - (b) utters any seditious words; (c) prints, publishes...any seditious publication...shall be guilty of an offence."

In rejecting the plea that the common law should be applied in deciding what was seditious and that the greatest latitude should be given to freedom of speech and expression, Raja Azlan J chose to follow an ancient Indian authority Queen Express v. Balagangadhar Tilak \(^2\) where Stratchey J held that statutory offences of sedition differed from the English counterpart which is merely a common law misdemeanour as elaborated by English judges. On the question of statutory sedition the learned judge preferred to adopt a strict rather than a liberal\(^3\) interpretation. He observed that while it is true that freedom of expression should be given the greatest latitude, it is also true that "free and frank political discussion and criticism of government policies cannot be developed within an atmosphere of surveillance and constraint." Having said that he came to the crux of his judgement:

But as far as I am aware, no constitutional State has attempted to translate the "right" into an absolute right. Restrictions are a necessary part of the right...The dividing line between lawful criticism of Government and sedition is this - if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy of administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably has the tendency of stirring

\(^1\)(1971) 2 MLJ 108 [High Court].  
\(^2\)ILR (1897) Bombay 112.  
\(^3\)As to strict statutory interpretation of seditious acts in India, see Niharendu Majumdar v. King Emperor (1942) FCR 38. Cf. Kedar Nath State of Bihar AIR 1962 SC 955.
up hatred, contempt or disaffection against the Government, then it is caught within the ban of paragraph (a) of section 3(1) of the [Sedition] Act.\(^1\) (italics added)

Further, the learned judge observed that the word "disaffection" in the context of the Sedition Act means more than political criticism. It means disloyalty, absence of affection, enmity and hostility.\(^2\) How he arrived at this conclusion was not elaborated. His view on the premise that "there cannot be any such thing as absolute liberty wholly free from restraint" could be accepted. However, by so specifying he ought also to hinge the principle on the standard of reasonableness which is missing in all the sedition cases arising from freedom of expression cases in Malaysia.\(^3\) The standard of reasonableness is not recognised in this aspect. Instead, the learned judge creates a tautology when he says that "the right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law." This hardly enlightens one's view on Malaysian freedom of speech and expression. It is merely as good as saying that one should look up the Sedition Act 1948 before saying or writing anything. Freedom of expression is thus seen to be heavily restricted by the 1948 Act.

In *Public Prosecutor v. Oh Keng Seng* \(^4\) the Federal Court sets out the guidelines which determine if legitimate criticism transgresses the limits of freedom of speech and constitutes sedition within the ambit of the Sedition Act 1948. In this case Wan Sulaiman J finds that the truth or untruth of a given speech is immaterial in a sedition case. But to say in a speech, for instance, that "the army is composed of 100% of one ethnic group consequent to the government's policy to favour such ethnic group to ensure political hegemony can be expected to bring into hatred or contempt or to excite disaffection against the government."\(^5\) He finds that the utterance is caught by section 3(1) of the Sedition Act. The learned judge goes on to

\(^1\) (1971) 2 MLJ 108 at p. 109.
\(^3\) For example, see *Melan bin Abdullah v. Public Prosecutor* (1971) 2 MLJ 280 where an article (on ethnic politics and social values) in the appellants newspaper were found to be seditious under s.3(1) of the Sedition Act 1948.
\(^4\) (1977) 2 MLJ 206.
admit that it is easy to be seditious under Malaysian law. To illustrate this he says that "words having a tendency to bring about hatred or contempt of any ruler or against any government, or promote feelings of ill-will and hostility among the various ethnic groups can be uttered before a handful of persons and yet be seditious under our law." The strictness with which the courts interpreted provisions of the Sedition Act 1948 as amended in 1970\(^1\) is in retrospect understandable in view of the adverse preceding state of affairs of inter-ethnic group relations in the country but to continue having such strictures in operation at this point in time of the country's history is anachronistic, to say the least.\(^2\)

It may be remembered that when it comes to determining the standard of reasonableness the court, as in *Public Prosecutor v. Ooi Kee Saik & Ors.*\(^3\) refused to be moved by the necessary latitude afforded at common law\(^4\) but when the objective is to restrict freedom of the subject this is given effect faithfully. It is plain that the Government may have the opportunity of hiding behind the 'convenience' afforded by section 3(1) of the Sedition Act 1948 in that the line between 'criticism' and 'sedition' vis-a-vis the government is very thin. *Inter alia*, the section stipulates that it is seditious "to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government"\(^5\) The words "naturally, clearly and dubitably" used by Raja Azlan Shah J in *Public Prosecutor v. Ooi Kee Saik & Ors.* \(^6\) can be directed against the accused person quite conveniently after, say, an election campaign where a candidate criticises the authorities. These are convenient adjectives without any true

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\(^1\) Section 3(1) of the Sedition Act 1948 was amended by the Emergency (Essential Powers) Ordinance No. 45/1970.

\(^2\) There was an announcement made by the Government to the effect that the Sedition Act 1948 might be amended so as to allow free discussion on the affairs of the Rulers, an issue which was politically charged in the early part of 1993. However, it has not materialised. See *Utusan Malaysia*, 14 February 1993.

\(^3\) (1971) 2 MLJ 108 [High Court].

\(^4\) At common law sedition covers three misdemeanours: the publication of a seditious libel, the uttering of seditious words and conspiracy to do an act in furtherance of a seditious intention. In all cases seditious intention has to be proved. See *R. v. Burns* 16 Cox 355. Due to the inadequacy at common law in respect of racial issues, the Race Relations Act 1965 was enacted. See also O. Hood Phillips & Paul Jackson *Constitutional and Administrative Law* (6th Edn), Sweet & Maxwell, London, 1987, pp. 477-479.

\(^5\) Section 3(1)(a) Sedition Act 1948.

\(^6\) (1971) 2 MLJ 108.
measure of an established standard and they could be abused. The cases cited above are directly connected with political speeches. Unlike the common law offence of sedition, which requires the prosecution to establish the ingredient of rousing to rebellion, tumult or rioting to have been committed by the person making the speech, the offence created by the Sedition Act 1948 is committed by a person whose words are spoken with a seditious tendency.

Ong CJ delivering his High Court judgement in Melan bin Abdullah & Anor. Public Prosecutor\(^1\) on whether a journalist was liable for sedition said that by virtue of the 1970 amendment of the Sedition Act, 'sedition' no longer requires the same judicial approval as the misdemeanour at common law. But he admitted that "the amendment was \textit{ad hoc} legislation, passed to meet the special needs and circumstances of the times."\(^2\) Under the circumstances English and Indian authorities are of little assistance, he said.\(^3\) His Lordship's admission that the amendment was only to "meet the special needs and circumstances of the times denotes that the amendment should have been reviewed from time to time since its inception in 1970. This is also true in the case of Article 10(4) which empowers Parliament to pass law that prohibit the questioning of above enumerated 'sensitive issues.' The validity of such law in the context of the freedom of speech and expression provisions in the Constitution is difficult to justify. Perhaps this is the main reason why the courts have frequently taken refuge 'in attractive sounding phrases', an endeavour which, unfortunately, has failed to demarcate the extent of the restrictions permissible. In Mark Koding v. Public Prosecutor\(^4\) on the submission by the accused that free speech was protected under Article 10 and also by virtue of the Houses of Parliament (Privileges and Powers) Ordinance 1952 (PPPO) which provides for the protection of speech in Parliament, Suffian LP, delivering the judgement of the Federal Court, held that free speech in Parliament was not part of the basic features of the Constitution of

\(^{1}\)(1971) 2 M.L.J. 280. This was the first test case to be considered by the court after the coming into force of the 1970 amendment of the Sedition Act 1948.

\(^{2}\)\textit{Ibid.} at p. 282.

\(^{3}\)\textit{Ibid.}

\(^{4}\)(1982) 2 MLJ 120.
Malaysia. He reasoned that in the light of Article 162(6), which allows the courts to "bring into accord" pre-merdeka laws with the Constitution, the PPPO had been impliedly amended.

The above strict application of the law of sedition is still the order of the day despite the normal and harmonious race relations and the stability of the country. With the complete exclusion of common law principles in the area of freedom of speech and expression, assembly and association under Article 10 true democratic practices inevitably suffer, especially the citizen's rights to assemble and to hold political activities and other related functions. Every political talk or function has to be with a police permit, issued under section 27 of the Police Act 1967. The power thereunder being discretionary, applications are not approved as a matter of course.

It is doubtful whether in Malaysia freedom of expression can exist with the above precedents still authoritative despite more than three decades of independence. With the government's severe restriction on press freedom under the Printing Presses and Publications Act 1984 (PPPA), public opinion in Malaysia has been reduced to a one-sided affair in that any publications may not be published unless subject to a licence issued by the Minister of Home Affairs. Press freedom is completely controlled under the PPPA, with the entire authority whether to issue or suspend licences in respect of printing or publishing being reposed in the Minister of Home Affairs. Once he terminates a printing or publishing licence, resultant and based on his own subjective assessment, it purports to be conclusive and not to be subject to any action in any court of law. All things published must have prior approval of the Minister of Home Affairs under special permits.

1(1982) 2 MLJ 120 at p.122.
3See para 4. 7 ante (pp. 163-170).
4Act 301 w.e.f. 1 September 1984 P.U.(B) 364/84.
5See below.
6Section 12 Printing Press and Publications Act 1984 (PPPA). See infra Chapter 7. See also Chapter 3 ante.
7Section 24 PPPA. In this connection, see Persatuan Aiman Kesedaran Negara v. Minister of Home Affairs (1988) 1 MLJ 442 [High Court] where Harun J. quashed the Minister's decision in refusing to grant a permit for Aiman to publish its own publication in Bahasa Malaysia. The judge determined that it was common ground that although the minister's discretion was absolute, it was not unfettered
In *Persatuan Aliran Kesedaran Negara v. Minister of Home Affairs* ¹ Harun J quashed the Minister's decision in refusing to grant a permit for *Aliran*, an influential reform group, to publish its own publication in Malay.² The judge determined that it was common ground that although the minister's discretion was absolute, it was not unfettered and was thus open to judicial review. On appeal by the government³ the Supreme Court reversed the High Court's decision. Ajaib Singh SCJ determined that ministerial power under s. 12(2) of the PPPA could not be reviewed by the courts. In a 1991 unreported case, *Liew Ah Kim v. Menteri Hal Ehwal Dalam Negeri* ⁴ the High Court decided that an annual licence for the Democratic Action Party (DAP) to publish the *Rocket*, its own newspaper, was only good for internal readership and that, as stipulated in the permit, the publication could not be allowed to circulate for public consumption. The court was urged by counsel to vitiate the Minister's stricture in imposing such a condition as the *Rocket* had been in circulation for more than a decade and that therefore, on the principle of legitimate expectation, it was incumbent on the Minister simply to alter the condition in the publication licence.⁵ This contention was not accepted by the court. It reasoned that the power of the Minister to impose such conditions as he deemed necessary in respect of any newspaper or publication was final and conclusive and that the court could not go behind such subjective determination.

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¹(1988) 1 MLJ 442 [High Court].
²*Aliran*, acronym for *Persatuan Aliran Kesedaran Negara* (Association for National Awareness) has been publishing its popular *Aliran Monthly* in English. *Aliran* has been identified as one of the more vocal non-polITICAL societies which stands for unity, democracy and social justice.
³*Minister of Home Affairs v. Aliran* (1990) 1 MLJ 351.
⁴R1 (Rayuan Imula) 24-83-91 Appeal No. 01/92 (unreported). The writer wishes to thank Mr. Karpal Singh, Malaysia's most well-known civil rights advocate, for extending certain details of this case.
⁵The licence known as *Permit Penerbitan* (PP) in Malay (Publication Permit) issued by the Minister of Home Affairs under the PPPA is good for one year. If the Minister is satisfied that a publication has not vitiated any stipulated conditions in the permit its PP is invariably renewed. It needs to be noted that all the major newspapers in Malaysia are co-owned by nominees of the coalition parties within the *Barisan Nasional*. Among these are *Utusan Malaysia*, *Utusan Melayu*, *Nanyang Siang Pau*, *Sin Chew Jit Poh*, *Tamil Nesan*, *Straits Times*, *Sunday Times*, *Malay Mail*, *The Star* and *Watan*. The state-run Radio and Television Malaysia (RTM) exclusively caters for government news.
Under these circumstances it is not at all clear how an enlightened public opinion can exist because the type of newspapers or periodicals that are allowed to be published are those which contain no criticism of policies of the government. This is compounded by the fact that radio and television while being completely under government control allows no voice of dissent. The major newspapers in the country are all owned by proxies of the ruling Barisan Nasional.1

4. 10. Delegated Legislation

It was pointed out earlier that Parliament can restrict fundamental liberties by enacting legislation under the authority of the constitutional provision which confers the liberty itself. This is the case as has been seen in respect of Articles 9 (freedom of movement) 10 (freedom of speech, assembly and association); and by virtue of clause 2 of Article 4 the validity of these restrictive laws cannot be questioned in court. Alternatively, Parliament may restrict or suspend fundamental liberties under the exceptional powers granted under Articles 149 and 150. The query is: In restricting fundamental liberties must Parliament always apply its own mind to the legislation in question or can it authorise a delegate to act on its behalf and enact subsidiary legislation contrary to the provisions of Part II of the Constitution? If the lawmaking power in the area of human rights is delegated by Parliament to a delegate, is such a delegation condemnable on the ground that it amounts to an unconstitutional abdication by Parliament of its "essential legislative function?"

The question arose in 1966 in Eng Keock Cheng v. Public Prosecutor2 where the appellant challenged the validity of the Emergency (Criminal Trials) Regulations 1964 (ECTR 1964) which were promulgated by the Agong pursuant to the Emergency (Essential Powers) Act 1964 (EEPA 1964). Section 2 of the EEPA 1964 authorised the Agong, inter alia to make "essential regulations" for "securing the

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1In January 1993, the New Straits Times (NST) Group of newspapers and TV3 (the only private television in Malaysia) were bought by a certain faction within the UMNO for more than M$870 million. See New Straits Times 27 July 1993 for details of the corporate deal. For an account of UMNO's corporate interests, see E.T. Gomez, Politics in Business: UMNO's Corporate Investments, Forum, Kuala Lumpur, 1990.

2(1966) 1 MLJ 18.
public safety, the defence of the Federation and the maintenance of public order”. Section 2(4) of the 1964 Act went on to state that "an essential regulation...shall have effect notwithstanding anything inconsistent therewith contained in any written law other than this Act". The issue before the Federal Court was whether Parliament could delegate its powers to the executive to such an extent that the executive was allowed to promulgate legislation which was inconsistent with the Constitution. It was argued before the Federal Court that although the EEPA 1964 recited that any regulation made under it "shall have effect" notwithstanding anything inconsistent with the Constitution, such delegated authority was invalid because the said delegated power was excessive and was beyond what the Constitution contemplated. This was because, so it was argued, the words "written law" in the Act could not include the Constitution. Alternatively it was argued that Parliament had exceeded its powers by purporting to delegate to the King powers to enact subsidiary legislation inconsistent with the Constitution. The court rejected both arguments. It took the view that no restriction could be placed on the power of Parliament because of Article 150(6).1 The court also relied on para 97 of the Interpretation and General Clauses Ordinance 1948 which defined the expression "written law" as including the Federal Constitution. On the second issue it held that during times of emergency whatever Parliament can legislate, it can delegate. The Indian and American doctrine of excessive delegation was not accepted as relevant to the case: Wylie CJ (Borneo) observed: "Subject to certain exceptions...Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with Articles of the Constitution...are involved. This necessarily includes authority to delegate part of that power to...some other authority."2 The consequence of Eng Keock Cheng is that not only Parliament but even delegates of Parliament can violate fundamental rights through subsidiary legislation.

1 Article 150(6) provides that subject to clause 6A (i.e. matters pertaining to Islam and custom of the Malays and natives of the Borneo States), 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 void on the ground of inconsistency with any provision of the Constitution.

2 (1966) 1 MLJ 18 at 20.
1975 saw the promulgation of the Essential (Security Cases) Regulations, 1975 (ESCAR), following very closely the Essential (Criminal Trials) Regulations 1964. The significance of the ESCAR has been the drastic variations which it made to the rules of evidence and procedure in security cases. A person, regardless of his or her age (thus including a child) may be charged for a security offence. While there is no trial by jury, there is also no allowance for the normal preliminary inquiry. A security case is tried by a judge sitting alone while the examination of witnesses may be made under 'special circumstances' that is to say "...where any of the witnesses for the prosecution is afraid to have his identity disclosed and therefore wishes to give evidence in such a manner that he could not be seen or heard by both the accused and his counsel" a special procedure may be applied.

Thus by way of these 'special' methods and procedure the ESCAR made the prosecutor's task of securing convictions very much easier. The Attorney General announced, inter alia, that the primary objectives of the ESCAR 1975 were to get more convictions of persons connected with offences against the security of the Federation; to make it easier for judges to arrive at the true facts of such cases coming before them and to "provide justice" for the public at large, not just for the accused.

In a dissenting opinion in *Khong Teng Khen v. Public Prosecutor*, Ong FJ argued that the ESCAR were ultra vires the Emergency (Essential Powers) Act 1969 on the ground of excessive delegation in that the Agong could not sub-delegate to the Attorney General the powers which were exclusively exercisable by the King alone. Ong FJ's view was later approved by the Judicial Committee of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*. The ESCAR which was promulgated by the Agong under section 2 of the Emergency (Essential Powers) Ordinance 1969 was

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1Regulation 3(3) ESCAR 1975. When this provision is invoked, the Juvenile Court Act 1947 becomes inoperable.
2Regulation 6(1) ESCAR 1975.
3Regulation 7 ESCAR 1975.
4Regulation 9 ESCAR 1975.
6New Straits Times 4 October 1975.
7(1976) 2 MLJ 166.
8(1979) 1 MLJ 50 (PC); (1980) AC 458 (PC). See Chapter 5 infra.
found by the Judicial Committee of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*¹ to be *ultra vires* the Constitution on the ground that it was promulgated by the Agong when Parliament was sitting.² Despite this turn of event, the ESCAR and all other emergency instruments responsible for the 1969 emergency were revalidated under the Emergency (Special Powers) Act 1979³ thus nullifying the finding of the Privy Council in *Teh Cheng Poh*.

Public reaction, especially from the Bar Council, brought much embarrassment to the government for having pushed through these Regulations. Even as early as October 1975 when the ESCAR were being enacted members of the legal profession were already calling for their repeal.⁴ Raja Aziz Addruse, President of the Bar Council termed the Regulations as

"...bad, harsh and unconscionable laws should be recognised for what they are; and no pressure should be necessary to effect their repeal and amendment. To allow them to exist, even in the absence of pressure for their repeal or amendment, must give a very bad reflection of our sense of justice and of our regard for the rule of law..."⁵

The government gave in slightly to the public outcry by making a new set of regulations by way of the Essential (Security Cases)(Amendment) Regulations 1975.⁶ Under the amendment the wide definition of "security offences" was narrowed down.

The term 'security offence' was taken to mean an offence (whether committed before or after the commencement of these Regulations) against ss. 57, 58, 59, 60, 61 or 62 of the ISA, or an offence against any other written law the commission of which is certified by the Attorney General to affect the security of the Federation.⁷ Where the commission of any offence against any written law other than those provisions of the ISA which in the opinion of the Attorney General affect the security of the

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¹(1979) 1 MLJ 50 (PC); (1980) AC 458 (PC). See Chapter 5 infra.
⁴This was echoed by the delegates of the 3rd. Malaysian law Conference held in Kuala Lumpur on 13-15 October 1975. See also P. Coomaraswamy, "The Essential (Security Cases) Regulations 1975 - Is the Rule of Law in Jeopardy?", a paper presented at the 3rd Malaysian Law Conference 1975.
⁵Speech at the 4th Malaysian Law Conference held in Kuala Lumpur on 19 October 1977.
⁶PU (A) 362/1975.
Federation, he shall issue a certificate to that effect and the case shall thereupon be
dealt with and tried in association with the amended ESCAR 1975.¹ This power of
the Attorney General was challenged in *Mohamed Nordin bin Johan v. Attorney
General, Malaysia.*² The appellant was charged with the murder of a prominent
politician. The Attorney General issued two certificates one of which certified that the
case in question was a fit and proper one to be classified as a security case and that it
should be tried under the ESCAR. The defence argued convincingly that this was far
from being a security case as the appellant was not a communist terrorist. He further
maintained that murder as an offence under the Penal Code was not a security threat
to the Federation and thus the Attorney General had wrongly used his power under s.
2(2) of the ESCAR. The Federal Court rejected the argument on the ground that "the
language of the Regulations leaves no room for the relevance of a judicial
examination as to the sufficiency of the grounds on which he acted in forming his
opinion."³ The court did, however, share the view that s. 2(2) of the ESCAR is indeed
draconian.⁴ By trying the case under the ESCAR and transferring it to a High Court
the appellant lost his right to a preliminary inquiry and had to be satisfied with a
juryless trial.

4.11. Cases that irked the Executive

Malaysian judges, primarily during the stewardship of Lord President Tun Salleh
Abas⁵ became mildly assertive in their role as custodians of liberty. The courts began
to be more sensitive towards the violation of basic rights of the citizen. Principles
such as 'reasonableness' and 'legitimate expectation' were drawn in to mitigate express
executive power. In the 1986 case of *Chai Choon Hon v. Ketua Polis Daerah Kampar
and Government of Malaysia* ⁶ the applicant had been granted a licence to hold a
solidarity dinner and a lion dance for a political party, subject to certain conditions

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¹ Regulation 2(2).
²(1983) 1 MLJ 68.
³*Ibid.* at p. 70.
⁶(1986) 2 M.L.J. 203 (Supreme Court).
imposed by the police in the licence issued under s. 27 of the Police Act 1967. The conditions were challenged, this time not on constitutional grounds but on the basis of unreasonableness on the part of the police. Abdoolecder SCJ, delivering the judgement of the Supreme Court, held that the condition limiting the number of speakers in the licence to seven was unreasonable as another condition had already limited the time allowed for the function. Since the police had at all times the means to deal with any infringement of the time limit, there was, the court found, no valid reason why there should be a limitation on the number of speakers. This decision was, as it were, a shower after a long drought.

The case that resulted in the parting of ways with the executive was *JP Berthelsen v. Director General of Immigration*. In this case the revocation of a foreign correspondent's employment pass on grounds of national security was quashed because he had not been given a hearing. The court held that the applicant had a legitimate expectation that the term of his pass would be allowed to run. In arriving at this conclusion the court distinguished the decision of the House of Lords in the *CGHQ* case. This decision was remarkable because it extended the scope of natural justice into an area where security considerations might be thought to negative the application of natural justice.

In *Mamat bin Daud v. Public Prosecutor*, decided in 1988, s. 298A of the Penal Code, a federal criminal provision aimed at keeping Muslim radicals in check was struck down, by a three to two majority, on the ground that only the States could enact it. In the Malaysian context, this was a notable assertion of States' rights. In *Dato Yap Peng v. Public Prosecutor* a controversial provision of the Criminal Procedure Code, section 418A, which allowed the prosecution to withdraw a case from the lower courts and send it to the High Court, by-passing a preliminary inquiry,

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was, again by a bare majority, struck down because it trespassed on the judicial power.¹

A statutory provision which confined pension rights for some public servants to those resident in Malaysia was held in *Menon v. Government of Malaysia* ² to be contrary to the constitutional guarantee of equal protection of the law in Article 8 of the constitution, at the instance of a public servant who had retired to his native India. It was held that the provision had no rational nexus with the object of the law.

In *Lim Kit Siang v. United Engineers Malaysia Bhd.* (the UEM case)³ the leader of the opposition, Lim Kit Siang, was granted standing to obtain an injunction preventing the signing of a controversial government highway contract allegedly tainted because UMNO had a financial interest in the company concerned. A different bench of the Supreme Court, on a further application by the government in the same case, later reversed the decision, again by three to two. This case appears to say that public interest litigation of the kind which developed in India will not be allowed in Malaysia.⁴ However, the case was an unusually political one, striking at the very integrity and indeed the survival of the Mahathir government.

In the *Aliran* case discussed above the refusal of a publication licence under the Printing Presses and Publications Act 1984 by the Home Minister to *Aliran Monthly*, the organ of a reform group, was quashed by Harun J on grounds of *Wednesbury* ⁵ unreasonableness. In the *Malaysian Bar* case the same judge struck down a statute which prevented junior lawyers from holding office in Bar Council Committees on the ground that it was contrary to the equal protection provisions of

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¹This matter springs from a series of cases. In *Public Prosecutor v. Su Liang Yu* (1976) 2 MLJ 128, it was held that the impugned section 418A of the CPC was not repugnant to Article 8 of the Constitution. In *Datuk Hj. Harun bin Idris v. Public Prosecutor* (1977) 2 MLJ 255 a similar outcome was reached. The amendment to Art. 121 mentioned above was, it seems, a response to the decision in *Dato Yap Peng* which held that the A-G, being part of the executive, had no power to transfer cases from one jurisdiction to another. Such power was, the court held, purely a judicial one.


⁵*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223.
the Constitution under Article 8. Although this decision was reversed on appeal\(^1\) it left a scathing mark on the government.

An ISA detainee, Karpal Singh, the deputy leader of the opposition and a prominent lawyer was released on a habeas corpus application. Peh Swee Chin J held that the detention order was made in bad faith because one of its six factual grounds for the order was conceded by the government to be invalid.\(^2\) Karpal Singh was, however, rearrested after a few hours of his release by the court and the government was subsequently able to appeal successfully to the Supreme Court.\(^3\) Although the Supreme Court released some other detainees under the ISA on habeas corpus applications, the court chose to reaffirm the pre-1985 doctrine in *Theresa Lim Chin Chin v. Minister of Home Affairs* \(^4\) that the courts would review a detention order only on grounds of *mala fide*. A similar result occurred in another case involving Karpal Singh; he obtained an order of the High Court procuring his presence in court to argue his own habeas corpus application, but it was set aside on appeal.\(^5\) This case finalised and anchored the subjective authority and determination of the Minister as per the principle established in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*\(^6\) It must be noted at this point that in 1988 Parliament amended the ISA, EPOPCO and SPMA whereby judicial review of the Minister’s acts or omissions thereunder was disallowed.\(^7\)

Sedition charges against the Chairman of the Bar Council, based on his having made a public appeal to the Pardons Board not to discriminate between different classes of citizens in the exercise of their functions, were thrown out by the High

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\(^4\) (1988) 1 MLJ 294.
\(^6\) (1969) 2 MLJ 129. In this case the applicant argued that although the order for his ISA detention stated three grounds, only one ground was supplied to him and that ground was vague and insufficient. The Federal Court held that the defect (if any) was a “defect of form and not of substance”. This case will be discussed fully in Chapter 6 infra.
\(^7\) The denial of judicial review over all ministerial acts or omissions under the ISA was effected by way of the Internal Security (Amendment) Act 1989 (A739) and under the Emergency (Public Order and Prevention of Crime)(Amendment) Act 1989 (A740).
A number of other administrative decisions were also struck down by the courts. In the first quarter of 1988 devastating changes took effect in the wake of the judiciary crisis. The Lord President was removed and three Supreme Court judges were suspended. Under the Constitution (Amendment) Act 1988 the 'judicial power of the Federation' which the High Court had had was taken away; the speech of the Prime Minister in proposing the amendment at the Dewan Rakyat clearly showed the wrath of the executive.

4.12. Conclusion

The anti-human rights statutes enacted by Parliament since merdeka have taken their toll. They have severely mauled freedom. As has been seen, severe infractions of freedom have occurred with in-built constitutional consent and exceptions. Malaysia would have had a sea-change in its approach to freedom if not for this status quo. The fundamental rights set out in the Constitution were not given a generous interpretation, though the judges were at times prepared to strike down administrative acts at the non-political level. One could not say that, up to 1986, it was an activist judiciary in the way which the American or Indian judges are activists. The Salleh court tried to redeem the judiciary's past restrictive approach in cases involving liberty of the person but he was too late as he was cut short by his own dismissal. In a way the judiciary had been sandwiched between statutory dictates and judicial conscience. In 1987 a former Lord President said that "Judges do not take orders from Parliament, nor do they from the Prime Minister..." Generally this may be so but when the 'order' takes the form of statutes or amendments to the Constitution at

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1 Public Prosecutor v. Cumaraswamy (No. 2) (1986) 1 MLJ 518.
3 See Chapter 7 infra.
4 See Chapter 3 ante.
5 See Chapter 7 infra.
the instance of the Prime Minister and his Cabinet, the judges have no choice but to adhere to the letter.
CHAPTER 5

The Acquisition and Exercise of Executive Supremacy through Emergency Laws

"It would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes." - Devlin J. in Wilcock v. Muckle (1951) 2 K.B. 844 at 853.

5.1. Introduction

This chapter focuses on the current emergency powers in Malaysia in relation to the rule of law. The invocation of emergency powers under Article 150 on various occasions within the short life-span of the Malaysian Constitution poses profound constitutional issues which still reverberate today. Having regard to the limited number of cases\(^1\) decided by the courts, the following issues are relevant for consideration, namely, the constitutionality of emergency powers passed by parliament; whether the Yang Di Pertuan Agong may act on his own accord in being subjectively satisfied that there exists a state of emergency; and the question whether the Agong's delegated power to promulgate ordinances is valid when Parliament is not in session. Further questions also arise: does it suffice merely for the Agong to legislate on the strength of delegated legislative power?; can an emergency be said to exist when there is no actual situation that threatens security and public order?; can there be an emergency when as a matter of fact the ingredients or the basic features of an emergency have disappeared?; what is the basis of the courts' reluctance to part with the subjective test in determining a state of emergency and in allowing the

\(^1\)For the period 1964-1979 there have been 7 major cases that challenged the constitutionality of emergency rule in Malaysia. These are Eng Keock Cheng v. Public Prosecutor (1966) 1 MLJ 18; Mohamed Sidin v. Public Prosecutor (1967) 1 MLJ 106; Osman & Anor. v. Public Prosecutor (1968) 2 MLJ 137; Stephen Kalong Ningkan v. Government of Malaysia (1968) 1 MLJ 119 [Privy Council]; Public Prosecutor v. Ooi Kee Saik & Ors. (1971) 2 MLJ 108; Public Prosecutor v. Khong Teng Khen (1976) 2 MLJ 164 and Teh Cheng Poh v. Public Prosecutor (1979) 2 MLJ 23; (1980) A.C. 58 [PC]. With the exception of Teh Cheng Poh, all the cases ended up in giving legitimacy to the acts of the executive. Ningkan and Teh Cheng Poh are regarded as milestone cases in the area of public law in Malaysia.
executive prerogative in this respect? These issues will now be further analysed having regard to the statutes and case law.

5.2. Constitutional Provisions for Crisis Management

Every State experiences one form of emergency or another in the course of its history. An emergency, be it caused by war or by acts of violence within a state is in reality a crisis calling for a peculiar approach to management. History has shown many crisis-management modalities in this respect. A state has to exercise its emergency power either within the scope and provisions of its constitution or without it. Junta regimes and coup d'état are usually the product of the latter. Some states have more emergencies than others, depending on their security, political and social factors. In each case politics play a vital role in determining the duration of each emergency. During these periods raw executive power in the form of emergency rule takes over the function of maintaining law and order and this in turn invariably overrides the rule of law as far as many aspects of the administration of the country are concerned.

During Roman times a dictator was specially appointed by the Consul on the proposal of the Senate with the specific task of quelling the relevant catalysts of emergency or when it was considered that a grave emergency existed and ordinary

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1 In the last two decades India experienced two major states of emergency. The first was declared in 1971 and the second in 1975. Both pertained to the India-China border dispute and the Indira Gandhi social policies respectively: see V. K. Dewan, Laws Relating to Terrorists, Capital law House, Delhi, 1991, pp. 5-6; Union of India Gazette of 26 June 1975. Section 7 of the Sri Lanka Public Security Ordinance 1979 states that even if there has been no express amendment, modification or suspension of any law when regulations are made under the delegated power, the regulations shall take precedence over any law with which they are inconsistent. The present Sri Lanka Constitution expressly sanctions the grant of the power to enact subsidiary legislation to the executive organ. The struggle of the Liberation of Tamil Tigers Eelam (L.T.T.E.) to establish a separate state in Jaffna, north of Sri Lanka has been subjected to above laws. In Malaysia there have been 5 Declarations of Emergency since 1948: In 1948, pursuant to communist terrorism (The Emergency 1948-1960); in 1964 pursuant to Indonesia's political and military Confrontation; in 1966 in response to a political upheaval in the State of Sarawak; in 1969 occasioned by racial riots in Kuala Lumpur and in 1977 consequent to political commotion in the State of Kelantan on the east coast of Peninsula Malaysia. The 1948 Emergency came to an end in 1960 while the remaining declarations, with the exception of the 1977 Kelantan Emergency, have not been terminated. In Fiji a state of emergency was declared in May 1987 at the advent of a new junta headed by S. Rabuka who viewed dimly the increasing role of the Indian community in Fiji: see Amnesty International Report, London 1987; Asiaweek 1-7 May 1987. Among developed countries, Britain may be singled out as still having major problems in relation to acts of terrorism in Northern Ireland.
methods would not be able to secure the safety of the Republic. The might of the state or that of the sovereign, normally administered militarily, prevailed under such a calamitous situation. On the other hand, if the opponent is equally strong, and receives support from the local population, the engagement can be prolonged as a political struggle. A case in point is the Northern Ireland problem faced by the United Kingdom Government. The Ireland Republican Army (IRA) which has been described as "the greatest contributor to tension over terrorism", has maintained its role in administering terror.

However, in situations where the government is too strong as a result of the breadth of executive power allowed by parliament, a previously declared state of emergency can be made to exist continuously even though the subject matter of the original state of emergency has long disappeared from the realities of the daily life of the people. In an emergency of this nature, markedly exemplified by the Malaysian experience, the rule of law is beset by a host of problems one of which is the dwindling role it is made to play within and outside the function of the courts. In the name of security, peace and law and order, the bounds of power and statecraft are permitted to extend beyond reasonable bounds.

In one sense, the term *emergency* is "a sudden state of danger that needs immediate treatment"; in another, emergency means "conditions approximating to that of war." On the other hand, the expression *public emergency* embraces the central concept of a variety of terms in different legal systems. Lord Dunedin on behalf of the Board of the Privy Council in *Bhagat Singh & Ors. v. The King*

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4C. Gearty, "Political Violence and Civil Liberties", op. cit. p.4.
Emperor\(^1\) admitted that "[a] state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action..."\(^2\)

Through the deliberations of the International Law Association (ILA) in its 61st Paris Conference in 1984 a larger scope in the field of handling public emergencies by national governments, *inter alia*, was given.\(^3\) There a public emergency was defined as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed."\(^4\) In this context wars are essentially states of emergency in themselves during which period human rights conventions grant the state the right to defend itself but at the same time demand that certain human rights standards be observed.\(^5\) As each case develops, the meaning of "emergency" takes on different dimensions. For example, Lord MacDermott said in *Stephen Kalong Ningkan v. Government of Malaysia*\(^6\):

> Although an "emergency" to be within Article 150 of the Constitution must be not only grave but such as to threaten the security or economic life of the Federation or any part of it the natural meaning of the word itself is capable of covering a vary wide range of situations and currencies, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government.\(^7\)

The modern state faces and reacts to an emergency in a variety of ways. Invariably, it is a nation's constitutional provisions that provide the mechanism for crisis management mentioned above. States that are democratically constituted abide by these constitutional laws. The United States of America for example, under Article I, Section 9 of its Constitution is empowered to suspend the writ of *habeas corpus*

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\(^1\)AIR 1931 PC.111. [an appeal from India]
\(^2\)Ibid. at 116. This definition was approved in *Stephen Kalong Ningkan v. Government of Malaysia* (1968) 2 MLJ 238.
\(^5\)Ibid. at pp. 11-80.
\(^6\)(1968) 1 MLJ 238 at 240.
\(^7\)(1968) 2 MLJ (PC). 238 at 241.
"when in cases of Rebellion or Invasion the public safety may require it." Section 8 empowers Congress to declare war, raise armies, and provide militia to suppress insurrections. By virtue of section 3 of Article II the President is duty-bound to faithfully execute the laws. The constitutional preamble indicates that the Union is to secure a common defence and domestic tranquillity.

The Irish Constitution of 1937 is another important document that anticipates the need for crisis management. Its Article 28(3)(3) provides, "Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion."1 As for Germany, Article 115 of its Constitution (the Basic Law) provides comprehensive procedures that must be followed in times of public emergency. Article 101 of the Basic Law for instance, prohibits the creation of extraordinary courts in all cases. The framers of the German Constitution, fearing that extraordinary courts with special procedures might be set up, thereby endangering the normal courts, specifically disallows this sort of possibility under Article 115g.2 On the contrary, the French Constitution of the Fifth Republic offers fewer details in respect of its crisis management during states of emergency. Article 16 gives the President of the Republic of France wide powers to cope with emergencies. The one overriding proviso seems to be that during the currency of an emergency the president may not dissolve the National Assembly.3 In the Australian context, Section 51(6) of the Constitution of the Commonwealth of Australia provides in a general way for an emergency occasioned by war.4 Although that constitutional provision has been admitted to be general and rather vague, it

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2Article 115g of the Basic Law states that "the constitutional status and the exercise of the constitutional functions of the court must not be impaired." See John E. Finn, Constitutions in Crisis: Political Violence and the Rule of Law, op cit. p.11.
4Collin Howard, Australian Federal Constitutional Law, Law Book Company, Melbourne, (3rd edn.) 1985, pp. 472-78. Section 51 of the Australian Constitution provides "The Parliament shall...have power to make laws for the peace, order and good government of the Commonwealth with respect to: (vi) the naval and military defence of the Commonwealth and the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."
would appear that it suits the Australian situation well in times of need. However, the Australian court has been vigilant in specifying that parliament cannot legislate the outlawing of societies and organisations even though the particular organisation appears to be in direct conflict with the interests of certain elements in the Commonwealth.

In Sri Lanka, under Article 76(1) of its Constitution the power of the President to make emergency regulations includes the power to make regulations having the legal effect of overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution. In other words the country's constitution may not be suspended on account of a public emergency. Section 7 of the Sri Lankan Public Security Ordinance 1975 states that even if there has been no express amendment, modification or suspension of any law when regulations are made under the delegated power, the regulations shall take precedence over any law with which they are inconsistent. In so doing the Regulations made thereunder may be unconstitutional to the extent that the law delegates the power to override existing statutes. In regard to subordinate legislation, the Sri Lankan Constitution expressly sanctions the grant of the power to enact subsidiary legislation to the executive organ. Provisions of this nature facilitate the establishment of immense and derogable powers especially during a state of emergency. Finally, in India the President of the Union may declare a state of emergency under Article 352 of the Indian Constitution if he is "satisfied that a grave emergency exists whereby the security of India is threatened." The emergency has to be declared throughout the whole of India.

2 Australian Communist Party v. The Commonwealth (1951) 83 C.L.R. 1. For a discussion of this important constitutional case that concerns, inter alia, the "defence power" of Australia, see H.P. Lee, Emergency Powers, Law Book Company, Melbourne, 1984, pp. 9-11.
5.3. Emergency Experience in Malaysia

A state of emergency or *darurat* in Malay is a well-known term in Malaysia for it has been known to exist several times since the turn of the 19th century. The earliest record of the Malay States being subjected to public order was in 1888 when the first Public Order instrument was made by way of an Order in Council. This instrument, an enactment "to confer power to make regulations on an emergency of public danger", empowered the British authorities then to surmount problems related to security and public order arising mainly from the activities of secret societies of the Gee Hin and the Hai San, local rivalries in the tin mines, rubber estates and shanty towns of the states of Perak, Selangor, Negeri Sembilan and Pahang all of which in 1895 were to become the Federated Malay States under four British Advisors.

In 1914 the first formal emergency legislation was introduced and styled The Emergency Enactment 1914. It was tailored to suit the situation of emergency that arose during the First World War. That instrument contained all the characteristics of unbridled executive powers that are required during times of war. The High Commissioner's powers included that of arrest and detention without trial, the curtailment and rationing of foodstuffs, and the control of printed matter and "

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2 The Ghee Hin was mostly membered by Cantonese while the Hai San comprised of Hakkas from mainland China. For a general treatment of Chinese Secret Societies in Malaya, see L. Comber, *Chinese Secret Societies in Malaya*, Donald Moore, Singapore, 1959. The Secret Societies Order-in-Council was passed in 1888 and again in 1892.

3 See Chapter 1 ante.

4 See *Proceedings of the Federal Council* Tuesday, 11 August 1914 (Microfilm: National Library, Singapore) Its preamble reads: "An Enactment to vest in the High Commissioner Exceptional Powers in times of Public Emergency" Mr. F. Belfield, Legal Advisor, Federated Malay States gave the following explanation in regard to the wide powers of the High Commissioner in the Public Emergency Enactment 1914: "The powers conferred on the High Commissioner may seem wide, but they are not wider than necessary in the exceptional circumstances of which this measure, like that Order in Council, is intended to take effect. The present Bill follows very closely the provisions of that Order in Council, omitting the parts which relates to the operation of the Army Act (of the UK) and omitting also the provisions which empower the Governor to require any person to quit the colony - a power which appears unnecessary here (the Federated Malay States).

5 Public Emergency Enactment 1914: section 3.

publications.¹

Even during those war years the Federal Legislative Council in Kuala Lumpur was not without critical members who saw that the immense powers exercised by the High Commissioner were even then unwarranted.² The 1914 Enactment was amended in 1915³ by the introduction of part of the United Kingdom's Defence of the Realm Act 1914.⁴ All publications in the form of books and pamphlets were subject to censorship. All publications including books were required to be registered in 1915 after the coming into force of the Printing And Books Enactment.⁵

By 1930 the British authorities had enacted the Public Emergency Enactment⁶ which gave wide discretionary powers to the High Commissioner in making regulations in respect of emergencies of public danger. The 1930 Enactment repealed all the earlier Public Emergency Enactments.⁷ By 1941 all the states in the Malay Peninsula had already enacted uniform legislation pertaining to emergency or public danger.⁸ However, they were operational only on a month-to-month basis as the local situation required. The Emergency Enactments of the Malay States and in the Straits Settlements were based largely on the formula provided in the UK Emergency Powers

¹Public Emergency Enactment 1914: section 6(2).
²See speech by F.C. Skinner, appointed member of the Federal Council in regard to the High Commissioner's immense power under the Public Emergency Enactment No. 1 of 1914: To such criticism R.J. Wilkinson, the High Commissioner replied: "It is essential in times of great emergency that almost dictatorial powers should be placed in the hands of one man. It is not so much a question of practice... as far as the wording of the Bill is concerned, when it comes to responsibility for the action, that responsibility is vested in the High Commissioner. That responsibility is vested in me, and I do not propose to evade it nor divide it or deputise it to anybody." See Proceedings of the Federal Council 15 August 1914, Microfilm, National Library, Singapore.
³No.5 of 1915.
⁴5 Geo 5 c.63.
⁶No.10 of 1930/FMS Cap 41.
⁷The Public Emergency Enactment 1917 (No.5 of 1917) and The Continuance of Powers Enactment 1919 (No. 15 of 1919).
⁸The Emergency Regulations Enactment. (FMS Cap 41) 1930; Straits Settlements, Emergency Regulations Ordinance Cap. 98 of 1926; Johore, Emergency regulations Enactment, 1930. Kedah, Emergency Regulations Enactment 1939; Perlis Emergency Regulations Enactment 1941; Kelantan, Emergency Regulations Enactment 1931; Terenggano Emergency Regulations Enactment 1930.) The State of Perlis (northern-most part of the Peninsula) was the last State to have officially enacted its own Emergency Enactment in 1941. These individual yet uniform enactments served the States on a month-to-month basis.
Act, 1920. In the Malay States uniform provisions to administer emergencies were to be found under s.3(1) of the Emergency Enactment 1930 which read:

3.(1) Where a proclamation of emergency has been made, and so long as the proclamation is in force, it shall be lawful for the High Commissioner to make any regulations whatsoever which he considers desirable in the public interest and to prescribe penalties which may be imposed for any offence against such regulations and to provide for the trial, by courts of summary jurisdiction, of persons guilty of such offences. Provided that no such regulation shall alter any existing procedure in criminal cases or confer any right to punish by fine or imprisonment without trial.

The High Commissioner, under section 2(I) of the 1930 enactment had the power to proclaim a state of emergency "whenever it appear[ed] to him that an occasion of emergency or public emergency or public danger ha[d] arisen, or that any action ha[d] been taken or [was] immediately threatened by any persons or a body of persons of such a nature and on so extensive a scale as to be calculated... to deprive the community, or any substantial portion of the community of the essentials of life...." Under sub-section (II) it was mandated that no such proclamation was to be in force for more than one month, "without prejudice to the issue of another such proclamation at or before the end of that period. Under section 3 "the High Commissioner may make any regulations whatsoever..." which he considered desirable in the public interest and to prescribe penalties which could be imposed for any offence against such regulation and to provide for the trial by courts of summary jurisdiction of persons guilty of such offences. However, such regulations did not have the effect of altering any existing procedures in criminal cases or of conferring any right "to punish by fine or imprisonment without trial." Arrest, detention, exclusion and deportation were among the nine matters which were under direct regulation. Censorship, control and suppression of publications which included writing, maps, plans, photographs and means of communication were similarly categorised.

11 Geo5, c.55.
2No.10 of 1930/FMS Cap. 41.
3The other matters were suppression of publication, trading, harbours, transportation, distribution and supply of food and ancillaries.
4Section 3, Public Emergency Enactment 1930.
In the 1930s the influx of foreign labour, mainly Chinese and Indians, caused considerable social, political as well as security problems for the Malayan authorities. In Singapore, Penang, Perak, Selangor and Negeri Sembilan the Malays were already outnumbered. For the first time the Malays began to feel uneasy as plantations, mining and commerce were largely in the hands of the "new Malayans" from China. In 1933 the Restricted Residence Enactment (Cap. 39) was introduced and enforced, its objective being to isolate the bad elements of society in towns and districts that were far away from their base of operations.

The British Military Administration (BMA) came into force on 1 November 1945 and continued until 27 March 1946 when the Malayan Union Order in Council was issued. However, actual military rule ceased to be implemented after six months of the coming into force of the BMA Proclamation. After the events of the Malayan Union the communist terrorists became a security threat to the new Federation of Malaya which as we have seen was formed in 1948 under the Federation of Malaya Agreement. The insurrection of the Malayan Communist Party (MCP) in 1948 itself was an event that needed a new set of executive powers in order to surmount it. Thus

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3C. i. f. 16 June 1933. PU(A) 264/80. For details of the coming into force (c.i.f.) of the other statutes in Malaysia, see S. Sivasamy & R. Ramasamy, *Federal Statute Referencer & Index To State Laws*, Kuala Lumpur 1989.

4See Chapter 4 ante.

5See *British Military Administration Gazette of the Malay Peninsula* No.1 Vol. 1/ 1 November 1945.

6See *BMA (British Military Administration) Gazette* of the Malay Peninsula No.1 Vol. 1; 1 November 1945.

7The Proclamation to establish a Military Administration in Malaya (Proclamation No. 1) reads: "Preamble: Whereas by reason of Military necessity and for the prevention and suppression of disorder and the maintenance of public safety the Straits Settlements and the Malay States (Malaya) are placed under the British Military Administration." Under article 1 The BMA was established under the control of Lord Louis Mountbatten, Admiral Supreme Allied Forces, South East Asia. The right to property (article 5(1)(b) was respected provided the property concerned was not acquired during the Japanese Occupation and under article 6 "All Courts and tribunals other than Military courts established under the Admiral's authority are hereby suspended and deprived of all authority and jurisdiction until authorised" by Mountbatten to reopen: The *BMA Gazette op. cit.*.

8See Chapter 2 ante.

9Chapter 2 ante.
on 7 July 1948 the Emergency Ordinance 1948 came into being. On 12 July 1948 the High Commissioner declared emergency rule for the whole of Malaya consequent to acts of terrorism by the MCP. As required by section 3(3) of the Emergency Ordinance 1948 the Legislative Council passed a resolution to adopt the Proclamation on 27 July, 1948.\(^1\) Section 3(3) says "...every proclamation...shall cease to have effect at the date of expiration of a period of 60 days from the date on which it was made unless it has been adopted by resolution of the legislative council within such period."

Section 9 of the Emergency Ordinance 1948 repealed the various emergency enactments of the Malay States and the Straits Settlements referred to earlier. Besides conferring a general power to make regulations, s. 4(i) provided that:

\[
\text{no such regulation shall confer any right to punish by death, fine or imprisonment without trial, and that, except in so far as such procedure may be modified by any such regulation, the existing procedure in criminal cases shall apply in respect of any breach of any such regulation or of any offence created by any such regulation in respect of which breach or offence it is sought to make the offender liable to fine or imprisonment.}
\]

Unlike the previous emergency enactments which preserved the Criminal Procedure Code, the 1948 Ordinance allowed the High Commissioner to make regulations which had the effect of altering the normal procedure of criminal cases. A wide power was given to the executive to modify, amend, supersede or suspend any provisions in any written law. Under s.4(2)(p) the High Commissioner was empowered to make laws pertaining to "the maintenance of public order and preservation of life of the community."\(^2\) The Ordinance preserves the pre-eminence of the regulations by providing that they shall have effect notwithstanding anything inconsistent with any other written law\(^3\). The Rule-making power conferred by

\(^{1}\)Ordinance No.10 of 1948.

\(^{2}\)Cf. the language used in the Emergency Power (Defence) Act 1939 (EDPA). Under sub-section (1) of section 1 of the EPDA 1939 His Majesty was empowered by Order in council "to make such regulations as appear to him to be necessary or expedient for securing public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the community." (emphasis added).

\(^{3}\)Emergency Ordinance 1948, s. 5(1).
Ordinance 10 of 1948 was exercised by the High Commissioner a few days later in the Emergency Regulations 1948. These Regulations made certain acts as offences under the Regulations, for example, possession of firearms and consorting with persons in possession of firearms or explosives. The High Commissioner was also empowered to order arbitrary arrest and detention.

Under the Regulations trials could be in camera "if the court [was] satisfied that it [was] expedient in the interest of justice or of public safety or security" to do so. The court also had the discretion not to publish the witness' name or any evidence likely to lead to any witness. Also within the Regulations were special provisions relating to procedure (including the hearing of proceedings in camera) in civil and criminal cases. The power to make regulations relating to the procedure of trials conferred by section 4 of the Emergency Regulations Ordinance 1948 was exercised with the enforcement of the Emergency (Criminal Trials) Regulations, 1948. This was the origin of the Emergency (Criminal Trials) Regulations 1964 (ECTR 1964) and the Essential (Special Cases) Regulations 1975 (ESCAR 1975).

5.4. Emergency Powers after Merdeka.

The 12-year Malayan Emergency cost both the then Federation of Malaya as well as the British Governments some £180 million. An estimate of 6,710 terrorists had been killed. The security forces lost a total of 1,865 men with 2,500 wounded.

1 Regulation 5.
2 Regulation 20.
3 Regulation 34.
4 Regulation 35.
5 Regulation 12(2(q).
6 ESCAR 1975 was revalidated in 1979 as the Essential (Emergency Cases) Regulations 1979 after being adjudged unconstitutional by the Privy Council in Teh Cheng Poh op. cit.
8 Ibid.
9 Ibid. The security forces, mainly represented by Malayan and British contingents (inclusive of the Gurkhas), were led by Sir Gerald Templer who succeeded Sir Henry Gurney as Commander in Chief and High Commissioner in January 1952. Sir Henry Gurney who was killed by communist terrorists heightened British offensive militarily. Templer brought much success to the guerrilla warfare that was in 1952 dubbed as "the war of hearts and minds". See Richard Cuttlebuck, The Long Long War: The Emergency in Malaya 1948-1960 op. cit. pp. 80-85; Richard Stubbs, Hearts and Minds in Guerrilla Warfare: The Malayan Emergency 1948-1960, op.cit. pp. 143-147; Harry Miller, Jungle
impact of the Emergency years was nothing less than overwhelming and far reaching both in terms of its physical dimension as well as the mental mode of the people. After a 12-year confinement to emergency rule, punctuated by gunfire, food rationing, curfews and a controlled media, a nation somehow gets used to authoritarianism. When Tunku Abdul Rahman proclaimed the end of the Emergency in 1960\(^1\), there was much happiness. But the Emergency Regulations 1948 did not meet with their demise. Instead they found a new form of expression in the Internal Security Act 1960 (ISA). The ISA was enacted after merdeka and was made under Article 149 which means that unless it is at some point in time revoked by Parliament, it has effectively a permanent existence. The ISA, described by a former minister for home affairs as an "effective and complimentary device..."\(^2\), was enforced indiscriminately ever since its coming into force in 1960.

Beginning in 1960 with the enactment of the ISA which was intended to replace the Emergency Regulations 1948, emergency rule has been seen to gain momentum while communist insurgence (recognised as the spinal security threat to the country) has been in decline. In fact by as early as June 1960 there were only 583 armed terrorists in the northern part of the Peninsular.\(^3\) In this context it is difficult to discern the real reason as to why the Emergency Regulations 1948 had to be succeeded by the ISA if the justification of the latter is pivotally based on the numerical strength of terrorists. After all the prime minister had declared that the emergency had come to an end in July 1960.

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3. Parliamentary Debates: Dewan Rakyat (House of Representatives) 21 June 1960 as per Tun Abdul Razak, Deputy Prime Minister; The states involved were Perlis, Kedah and western part of Kelantan and areas across the Malaysian Thai border.
Between 1960 and 1977 there were several other *ad hoc* pieces of legislation passed by the Malaysian Parliament that were aimed at tackling various incidents which posed as threats to political stability.\(^1\) During the same period Article 150 has been invoked on four occasions by the Malaysian Federal Government as a way of countering these crisis. Article 150, the most amended provisions of the Constitution allows the government to exercise a wide range of extraordinary executive and legislative powers.\(^2\) Before an emergency is proclaimed the Agong must be satisfied that "a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened."\(^3\)

The launching of an intensive political as well as military 'confrontation' by Indonesia during the Sukarno era, as part of that country's opposition to the formation of Malaysia\(^4\) caused the first state of emergency to be proclaimed by the Agong on 3 September 1964.\(^5\) Consequently, the Malaysian Parliament enacted the Emergency (Essential Powers) Act 1964. (EEPA 1964). This Act delegated to the Agong powers to make laws during the emergency. It must be noted that Parliament which gave that power has not expressly revoked it. Pursuant to s. 2 of the EEPA 1964 the Agong promulgated the ECTR 1964, a criminal procedure code of sorts but minus the "fair trial" elements found in a normal court of law. This *ad hoc* instrument, very much like the criminal procedure adopted by the authorities in Northern Ireland in the late 70's and 80's provides for trials without jury where the judge sits alone and short-circuits normal procedures of evidence with the main objective of procuring easier

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\(^1\)See Chapter 4 *ante*.

\(^2\)For amendments made to Article 150, see Chapter 3.

\(^3\)The prime minister tried to take this power for himself in the 1983 constitutional crisis but ensuing political ramifications forced the effort to be aborted. See Chapter 3 *ante*.

\(^4\)The late President Sukarno of Indonesia, the prime mover of the "Konfrantasi" (confrontation) opposed the formation of Malaysia purely on political grounds one of which was that it went against his own former plan to form "Melayu Raya" (Pan-Malay World) embracing Indonesia, Malaya-Singapore, Borneo and islands within the South China Sea. Secondly, with parallel views from Aidit, the then Secretary General of Parti Komunis Indonesia (Indonesian Communist Parti-PKI), he thought that the formation of Malaysia was a "neo-colonisation" tactic of the British Government. Despite some actual physical infiltration by members of ABRI (Indonesian army) in parts of Johor State, Konfrantasi failed chiefly because it lacked support from the rank and file of the Indonesian ruling elite two of whom were Adam Malik (former Indonesia's Foreign Minister and Vice President and General Suharto who was then chief of the Indonesian army. See *New Straits Times* 23 January, 1965 (Singapore).


\(^6\)Legal Notification (LN) No. 286/64.
convictions of the accused. Regulation 3 of the ECTR 1964 provides that the Regulations "shall have effect notwithstanding anything to the contrary contained in any written law".2

In emergency procedure cases, the ordinary procedure or practice of the courts would apply, except in so far as it was varied by the ECTR 1964 or by any other Regulations made under the EEPA 1964.3 A case becomes an emergency procedure case when the Public Prosecutor certifies in writing that the case is a fit and proper one for trial under the Regulations.4 Such a case is then tried by a Judge without the aid of assessors and disposed of in accordance with the provisions of the Regulations.5 Preliminary Inquiry is done away with before committing the case to the High Court.6 The ECTR 1964 have been upheld by the court because Article 150(6) of the Federal Constitution allows derogation from the provisions of the Constitution.7

On 14 September 1966 as a result of political agitation in the state of Sarawak which culminated in the dismissal of Stephen Kalong Ningkan, its chief minister, by the Governor at the instance of federal power, the Agong again proclaimed an emergency under Article 150. However, in this instance the Proclamation of Emergency extended only to the State of Sarawak.8 This incident developed into the

1The UK Emergency Provisions Act 1978, 1987 and 1991 provide for juryless tribunals for the trial of terrorist offences, a procedure proposed by the Diplock Committee Report. The Committee did find that the technical common law rules on arrest and detention, as well as those governing admission of inculpatory statements had "resulted in a substantial number of cases based on confession obtained during prolonged interrogations being lost or withdrawn," See Kevin Boyle, Tom Hadden, Paddy Hillyard, Ten Years On In Northern Ireland, The Golden Trust, London 1980, p. 57. The Northern Ireland (Emergency Provisions) Act, amended in 1987 is applicable only in N. Ireland while The Prevention of Terrorism (Temporary Provisions) Act 1984 and 1989 applies both to Great Britain and Northern Ireland.


3Reg. 3 Emergency (Criminal Trials) Regulations 1964 (ECTR 1964).

4Reg. 4 ECTR 1964.

5Reg. 4 & schedule ECTR 1964.

6Regulation 5(1) ECTR 1964.

7See view of Wylie CJ. in Eng Keock Cheng v. Public Prosecutor (1966) 1 MLJ 18. This case was discussed in Chapter 4 ante under the relevance of delegated legislation: para 4. 10 ante.

8Act 68/1966 section 3. This ad hoc instrument, the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, was in force from 20 September 1966 and terminated six months later. See authorisation index P.U. 399A/1966. As to the background to this amendment, see Chapter 3 ante.
celebrated Stephen Kalong Ningkan case\(^1\) and became a landmark in local as well as Commonwealth constitutional jurisprudence.

Racial riots broke out on 13 May 1969 in Kuala Lumpur in the midst of a general election whose interim results showed that some states were already being won by the oppositions. The root causes of the racial riot are many and varied, extending to various political issues that confronted the Malays and other ethnic Malaysians especially the Chinese who largely controlled the nation’s free enterprise.\(^2\) The present prime minister, writing in 1970, suggested that the riots were caused by the failure of the Tunku Abdul Rahman Government in fulfilling the Malays’ economic aspirations.\(^3\) The Agong proclaimed an emergency on 15 May 1969. Parliament was suspended and did not resume sitting until 20 February 1971. On 15 May 1969 The Agong proclaimed the third state of emergency under Article 150.\(^4\) The Emergency (Essential Powers) Ordinance 1969\(^5\) was promulgated under Article 152(2). In the meantime there was no Dewan Rakyat as the elections were not completed in Sabah and Sarawak. Section 7 of the Ordinance suspended all elections to the Dewan Rakyat and state legislative assemblies in the states which were not yet completed. Acting under Article 150(4) of the Constitution, which extends the application of an emergency law to any matter within the legislative authority of a State, the Prime Minister issued a directive to all states that the Legislative Assembly

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\(^1\)The four phases of the Ningkan case are: Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (1966) 2 MLJ 187 [High Court]; Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli [No.2] (1967) 1 MLJ 46; Stephen Kalong Ningkan v. Government of Malaysia (1968) 1 MLJ 112 [Federal Court]; Stephen Kalong Ningkan v. Government of Malaysia (1968) 2 MLJ 238 [Privy Council].


\(^5\)PU(A) 146/69.
was not to be summoned to meet until such a date as was to be determined by the Agong.¹

The 1969 racial riots were the catalyst that led to the government's creation of a new economic order called the New Economic Policy (NEP).² It was formulated in 1970 with a view to giving a more equitable share of the national wealth to the Malays, hitherto much left behind in the overall economic performance of the country.³ The overall economic backwardness of the Malays underscores the inherent reason for the racial riot and hence the continued pursuit of a national policy to appease racial dissension with economic redress and social engineering. The NEP could not have been implemented without the backing of emergency rule.⁴ Indeed its avowed objectives of eradicating poverty and restructuring society were commendable but its implementation has been fraught with racial overtones. It has been remarked that the real benefactors of the NEP are the elite Malays.⁵

Under the Emergency (Essential Powers) Ordinance No. 1 of 1969⁶ the Agong was given wide powers to make any regulations whatsoever for ensuring the public safety, the defence of Malaysia, the maintenance of public order and supplies and essential service essential to the life of the community.⁷ Essential Regulations may provide for the delegating of power to any authority to make orders rules and by-laws.⁸ Section 4 of the Ordinance provided that the Regulations were to have effect

¹PU(A) 147/1969.
²Its official term in Malay is Dasar Ekonomi Baru (DEB). This economic policy which inter alia, determines resource-sharing of at least 30% for the Malays and other Bumiputra or indigenous people, extends from 1970 to 1990. The term New Economic Policy (NEP) is now generally in disuse as it is thought that the term attracts much political misunderstanding especially from the non-Malay communities. In 1991 the NEP was replaced by the National Development Policy (NDP) which to some extent sheds off some of the former NEP's racial overtone.
³The Malays and other native community began to be called Bumiputra after 1970. The term is to be distinguished from the Chinese and Indians who are economically better off. Indeed, economic imbalance was one of the chief causes of Malaysia's social instability in the late 1960s. See Malaysia First Five-Year Plan (1970-1975), Government Printer, Kuala Lumpur, 1970 pp. 12-20. See also Tun Abdul Razak, Strategy For Action, Kuala Lumpur, 1975.
⁴This portion of the government's effort has been termed in Parliament as a "time bomb." See Lim Kit Siang, Time Bomb in Malaysia, Democratic Action Party, Petaling Jaya, 1978, p. 140.
⁶PU(A) 146/1969.
⁷Ordinance No. 1 of 1969 s.2.
⁸Ordinance No. 1 of 1969 s. 2(3).
notwithstanding anything inconsistent with the provisions of the Constitution or any other written law. The executive operated through a mechanism spelled out under the directives of the National Operations Council (NOC).¹ In 1975 the Agong, following the 1964 experience in handling security cases under the Emergency (Criminal Trials Regulations 1964 (ECTR 1964), promulgated the Essential (Special Cases) Regulations 1975 (ESCAR 1975). The government explained that the ESCAR was necessary in view of "the grave threats posed by subversive and anti-national elements to public safety and order in the country."² Whilst reasoning of this nature may be acceptable during the actual occurrences of the 'anti-national element', the continued use of such a drastic instrument is very questionable.

On 17 May 1969 the Emergency (Essential Powers) Ordinance No. 2 1969³ was promulgated. A Director of Operations was appointed who was made responsible for exercising the executive authority of the Federation. This wide power was subject to the following matters:

1. The Director had to comply with the Prime Minister's advice;
2. The Director was to be assisted by a National Operations Council consisting of persons appointed by himself.⁴

Finally, in 1977, the Federal Government invoked emergency powers to deal with a political crisis in the State of Kelantan which was then under the administration of an opposition party, the Pan Malaysian Islamic Party (PAS).⁵ The Emergency Powers (Kelantan) Act 1977 was enacted by the Federal Parliament whereby Federal executive authority was extended to Kelantan. Further, legislative

¹Ordinance No. 1 of 1969 ss 2 & 4. The late Tun Abdul Razak, Deputy Prime Minister was appointed chief executive of the NOC having unlimited powers in all matters relevant in a state of emergency. Minutes of the NOC are still classified as state secrets under the Official Secrets Act 1972.
²See speech of the Minister of Law and Attorney General, Datuk Abu Samah Hamzah in introducing the Emergency (Essential Powers) Act 1979 on 17 January 1979: (1979) 1 MLJ lxx at lxxi. In his speech the minister also linked terrorist activities on the East West Highway in Peninsular Malaysia and the need for the ESCAR.
³PU (A) 149/1969.
⁵See Tun Mohd. Suffian, Malaysia and India -Shared Experiences In the Law: V. V. Chitaley Memorial Lectures, Nagpur, All India Reporter Ltd. (1980), at pp. 80-3.
authority of the State of Kelantan in respect of all matters which were then within the legislative authority of that state was conferred upon the state Ruler, to the exclusion of the Legislative Assembly. The sweeping nature of the Emergency Powers (Kelantan) Act, 1977 was explained by Tun Suffian, Malaysia's former Lord President as follows:

It provided for the complete centralisation of all executive and legislative powers in the State in the hands of the Prime Minister. All the executive authority and all the functions of the Chief Minister and the State Cabinet were transferred to a Director of Government, who was responsible only to the Prime Minister and who was to carry out all his directives. All legislative powers of the Assembly were transferred to the Regent who was to act on the advice of the Director. The Act was to prevail over the State constitution and any other written law. A State Advisory Council was set up to advise the Director. The State Assembly and Cabinet continued to exist, but their functions were suspended.2

5.5 Article 150 - An Analysis

The policy to equip the executive with emergency powers started with the birth of the nation. The Reid Commission recognised the need to have emergency powers for the purpose of countering organised violence. These were provided for under Part XI of the Reid Draft. Article 137 of the draft provided against subversion and organised violence; Article 138 catered for emergency powers while Article 139 provided for preventive detention. The Commission reasoned that "the Federation must have adequate power in the last resort to protect ...essential national interests. But in our opinion infringement of fundamental rights or of State rights is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation."

It is to be noted that in recommending emergency powers for the executive, the Commission took cognisance of the then existing state of emergency and on this it hoped that "it may have come to an end before the new Constitution comes into force." But it made the necessary recommendations on the footing that the emergency was still then on-going.5

1 Ibid. at p. 81.
2 Tun Mohd. Suffian, op. cit. at p. 81.
3 See Part XI of the Reid Draft (Articles 137-39).
4 Reid Commission Report, op. cit. para 172 at p. 75.
5 Ibid. para 173.
Article 138(1) in the Reid Draft provided that "if the Federal Government was satisfied that a grave emergency existed whereby the security or economic life of the Federation or any part thereof was threatened whether by war or external aggression or internal disturbance, the Yang Di Pertuan Besar (Agong) may issue a proclamation of emergency...". In the Merdeka Constitution the equivalent provision under Article 150(1) was as follows:

If the Yang Di Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part thereof is threatened whether by war or external aggression or internal disturbance, he may issue a proclamation of emergency.

As may be seen, in the Reid Draft the subjective satisfaction that there was a "grave emergency" in existence was left to the 'Federal Government', a loose term that certainly meant the Cabinet. Once the Federal Government was so satisfied the matter was transmitted to the Agong who was to proclaim the emergency. In the Merdeka Constitution this arrangement was changed. This time it was the Agong who had to be so satisfied before an emergency could be proclaimed. However, in practice this arrangement made no difference because the Agong at any rate functions under the Merdeka Constitution according to the advice of the Cabinet.

Although the Commission recommended that an emergency declaration should be in force for only one year at one given time without prejudice to Parliament's power to renew it by resolution, under clause (3) of Article 138 in the Reid Draft a proclamation was to expire at the end of two months from the date of its issue "unless before the expiration of that period, it has been approved by resolutions in both Houses of Parliament." This was imported into clause (3) of Article 150 in the Merdeka Constitution. However, under this Article there was a distinction made between a 'proclamation' of an emergency and an 'ordinance' made thereunder. The

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1 There was no definition of 'Federal Government' either under the Reid Draft or the Merdeka Constitution.
2 See Article 35 in the Reid Draft and Article 40 in the Merdeka Constitution respectively.
3 Ibid. Cf. Article 138(3) in the Reid Draft which varied the original recommendation in that under the said Clause (3) a proclamation of emergency ceased to operate at the expiration of two months from the date of its issue "unless, before the expiration of that period, it has been approved by resolutions in both Houses of Parliament."
former, under the said clause, was to have a lifespan of two months from the date of issue whereas the latter only had a lifespan of fifteen days. In a way this reflected the more cautious attitude of the Merdeka Constitution with respect to emergency power.

Clause (4) of Article 138 in the Reid Draft provided three separate powers. Clause (4)(a) stipulated that during the currency of an emergency proclamation the executive authority of the Federation extended to matters within the legislative authority of a State and the legislative authority of Parliament "shall extend to any matter within the exclusive legislative authority of the State".1 Clause (4)(b) provided that the legislative authority of Parliament extended to any matter within the exclusive authority of the State.2 Parliament was even authorised to limit the duration of a State Legislature, the suspension of any election and "the making of any provision consequential upon or incidental thereto".3 Furthermore, the King was given power, for so long as Parliament was not sitting and the Federal Government was satisfied that existing circumstances require immediate action, to promulgate ordinances having the force of law.4

The provisions of Clause (4) of Article 138 in the Reid Draft were rehashed into Clauses (4) and (5) of Article 150 in the Merdeka Constitution. Clause (5) in the Reid Draft stipulated that a proclamation of emergency "shall be valid notwithstanding that it is repugnant to any provisions of Part II (fundamental liberties)". This was imported into Clause (6) of the Merdeka Constitution which at the same time was enlarged so as to override Article 79 which provided for the exercise of concurrent legislative powers between the Federation and the States. Clause (6) of Article 138 in the Reid Draft provided that any law made by Parliament while an emergency was in force was to cease to operate after a period of six months "except as to things done or omitted to be done before the expiration of such period."

This was incorporated into Clause (7) of Article 150 of the Merdeka Constitution. On

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1Article 138(4)(b) in the Reid Draft.
2Ibid. Article 138(4)(b)(i).
3Ibid. Article 138(4)(b)(ii).
the other hand, an ordinance promulgated by the King under Article 138 (7) in the Reid Draft was to have the same effect as an Act of Parliament but every such ordinance was required to be laid before both Houses of Parliament and "shall cease to operate at the expiration of fifteen days" after the endorsement by Parliament.¹ No importation of this provision was made into the Merdeka Constitution.² In summary, it may be said that emergency powers, which permeated state jurisdictions, were already more than adequate and at the ready in the Merdeka Constitution.

It is proper now to summarise the original Article 150 of the Merdeka Constitution. Clause (1) allowed the Agong to issue a Proclamation of Emergency if His Majesty was satisfied that "a grave emergency exists whereby the security or the economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance." Then under Clause (2) there was a duty to summon Parliament "as soon as may be practicable" if Parliament was not sitting when the Proclamation was issued. Until both Houses of Parliament sat, the Agong could promulgate ordinances having the force of law if satisfied that immediate action was required. Clause (3) specified that a Proclamation and any ordinance had to be laid before both Houses of Parliament and, if not sooner revoked, ceased to be in force after the following periods: (a) in the case of a Proclamation, at the expiration of two months from the date of its issue, and (b) in the case of an ordinance, at the expiration of fifteen days from the date when both Houses first sat. However, where resolutions were passed by each House of Parliament, before the expiration of these respective periods, approving them, the Proclamation or any ordinance could continue in force. During an emergency, Parliament could make laws with respect to any matter in the State List (other than Muslim law or Malay custom), and could extend the duration of Parliament or State Legislature as well as suspend any election.³ The executive authority of the Federation could also extend to any matter within the legislative authority of a State which included the giving of directions to a State

¹Ibid. Clause (7)(a) of the Reid Draft.
²See below.
³Clause (5) of Article 150 of the Merdeka Constitution.
government. Under Clause (6) it was provided that any law or ordinance passed under Article 150 were to be regarded as valid in spite of any inconsistency with Part II of the Constitution (fundamental freedom).

The ardour of the executive to stock formidable emergency powers has been unabated. Since *merdeka* Article 150 has been amended six times, making it the most amended provision of the Constitution. This also reflects the fondness of the executive in tinkering with emergency power at the expense of fundamental liberties.

In 1960 the time limit of two months (for a Proclamation) and fifteen days (for an ordinance) were deleted from clause (3). A new clause (3) was added to provide that a proclamation of emergency and any ordinance promulgated under Article 150 should be laid before Parliament and continued to be in force "if not sooner revoked" by the issuing authority i.e. the Agong. Only by way of resolutions in Parliament will the proclamation be annulled in each case. In 1963, three years after the emergency was officially proclaimed as having come to an end, the words "whether by war or external aggression or internal disturbance" after the words "is threatened" under clause (1) in the Merdeka Constitution were deleted by the Constitution (Amendment) Act 1963. The 1963 Act also expanded Parliament's power "to make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency." In place of the original clauses (5) and (6), new clauses (5), (6) and (6A) were substituted. Under the amended clause (5) the legislative power of Parliament to make laws with respect to any matter, if it appeared to Parliament to be required by reason of the emergency, was enlarged. Likewise, under the amended clauses (6) and (6A), a provision of any ordinance passed under Article 150 or any like Act of Parliament which declared that the law appeared to Parliament to be

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1Clause (4) of Article 150 of the Merdeka Constitution.
3Section 29 of the Constitution (Amendment) Act 1960.
5Inserted by s. 39 of Act 26/1963.
required by reason of the emergency, could not be rendered invalid on the ground of inconsistency with any provision of the Constitution. However, the powers of Parliament did not extend to Muslim law, Malay custom, native law or custom in a Borneo State, religion, citizenship and language. It would appear that this subsequent amendment allowed a more all-embracing inconsistency, namely with 'any provision' of the Constitution except for the seven matters stated above.

Subsequent to certain political developments in the State of Sarawak in 1966 which went against the interests of the Federal Government, the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 was enacted. Under this Act, Parliament was enabled to amend the Constitution of the State of Sarawak with respect to any matter if by reason of the emergency this was required. Evidently this was intended to give the central Parliament power, while a proclamation of emergency was in force, to amend the State Constitution of Sarawak without following the procedure laid down by Article 41 of the State Constitution, which provided that any amendment to the State Constitution must be by an Ordinance enacted by the legislature of Sarawak and by no other means. This amendment attracted heated arguments in the Dewan Rakyat. Edmund Langgu, one of the members from Sarawak, directly did not mince his words when he asked, "Why can't the Federal Government let our State Government and the people settle our State differences without the stupid blundering interference from Kuala Lumpur?"

Whist the amendments made to Article 150 in 1976 were not significant, those made in 1981 introduced far-reaching changes. They greatly enlarged the powers exercisable by the executive during a state of emergency and may be regarded

1 Section 23 of the Constitution (Amendment) Act 1963.
2 Section 39(1) of the Constitution (Amendment) Act 1963.
6 The term "Muslim" was substituted with "Islamic" whenever the former appeared in the Constitution.
7 Constitution (Amendment) Act 1981.
as having entirely deviated from the original philosophy of having emergency powers within a democratic government.¹

It is now necessary to state the present law. Article 150(1) reads:

If the Yang Di Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.²

It is clear that before the Agong proclaims a state of emergency under Article 150 he must be satisfied that the emergency is grave in the context of security or economic life or public order.³ Since by virtue of Article 40 the Agong acts on advice of the Cabinet or a Minister who represents the Cabinet (i.e. the Prime Minister) there is no question of the monarch acting on his own volition. Under clause (2) of Article 150 there is no necessity for the proclamation to be made upon the actual happening of an emergency. An emergency may be proclaimed "before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof..." This provision practically allows the executive to declare an emergency at any time and in any part of the country without having to satisfy the conditions set out under clause (1). The language of Clause (2) also allows for multiple Proclamations.

The Agong's power to promulgate an ordinance while a Proclamation of Emergency is in operation is quite absolute. All that is required is for him to be satisfied that certain circumstances exist whereby it is necessary for him to take immediate action.⁴ Any ordinance promulgated by this method "shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as

¹This will be treated further after our discussion on the cases. See below.
²See s. 15(a) of the Constitution (Amendment) 1981 [A514]. A threat to "public order" was not included prior to the 1981 amendments. However, the Emergency Regulations Ordinance 1948 mentioned "public danger".
³Article 150(1). The words "whether by war or external aggression or internal disturbance" which appeared after "is threatened" were deleted by Act 26/1963. The original provisions of clause (1) of Article 150 reads: "If the Yang Di Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation is threatened, whether by war or external aggression or internal disturbance, he may issue a proclamation of emergency.
⁴Clause (2B) of Article 159. This was also introduced by the Constitution (Amendment) Act 1981 s. 15 of A514.
if it is an Act of Parliament" until it is revoked or annulled by Parliament.¹ Thus this is the most convenient way for the executive to usurp the power of Parliament. To date, there has been no annulment or revocation made by Parliament in respect of any of the ordinances promulgated by the Agong in past emergencies.²

Although the proclamation of an emergency whenever the genuine need arises was accepted by the Reid Commission, it did not recommend emergency rule without specific constraints and limitations.³ Clause (3) provides that any Proclamation of Emergency and any ordinance promulgated under Clause 2B shall be laid before both Houses of Parliament. This gives the idea that at least Parliament is allowed to have a supervisory power. In reality this is an illusion because since the executive clearly predominates in Parliament, it invariably amounts to "supervision of the executive by the executive."⁴

The proclamation or promulgation may be revoked by the Agong at any time or terminated by both Houses of Parliament by resolution. Another way by which a proclamation may be terminated is contained under clause (7) of Article 150 which states that "at the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force [such proclamation]... shall cease to have effect".⁵ The problem is that the authorities did not and have never specified "the date on which a Proclamation of Emergency ceases to be in force". That being the case an emergency instrument may be in force indefinitely.

Clause (4) provides that while a proclamation of emergency is in force the executive authority of the Federation extends "to any matter within the legislative authority of a State..." It was under this authority that the Federal Government extended its emergency powers to the State of Sarawak in 1966 and to the State of Kelantan in 1977. At the same time, while a Proclamation of Emergency is in force

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¹Article 150(2C).
²There are two major ordinances made under s. 2 of the Emergency (Essential Powers) Ordinance 1969 which have been in use since 1969: the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the ESCAR 1975 which repealed the Emergency (Criminal Trials) Regulations 1964 (ECTR 1964).
³See Chapter 3 ante.
⁵Clause (7) of Article 150.
Parliament may, "notwithstanding anything in this Constitution", make laws on any matter including those on the Concurrent List or State List.\(^1\) There are only two matters which are outside the jurisdiction of this power - i.e. "with respect to any matter of Islamic law or the custom of the Malays or with respect to any matter of native law or custom in the State of Sabah or Sarawak".\(^2\)

It was never the intention of the framers of the Constitution that acts and things done during an emergency pursuant to the Agong's proclamation under clause (1) of Article 150 were to be totally non-justiciable. The 1981 amendments, inter alia, provided that no court shall have the power to question matters in relation to a Proclamation of Emergency\(^3\), the continued operation of such proclamation\(^4\), any ordinance promulgated under clause (2B) and the continuation in force of any such ordinance.\(^5\)

5.6. **Interpretation of Emergency Power by the Courts**

Generally, judicial performance is not seen at its best during times of emergency. This is for reasons associated with public policy. For instance, common law cases in this respect display clearly a reluctance to interfere with executive as well as legislative judgements during times of war. In *R v. Halliday*\(^6\) Lord Atkinson observed:

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in ... war or escape from national plunder or enslavement.\(^7\)

A year earlier, in the same vein Lord Parker in *The Zamora*\(^8\) said, "Those responsible for national security must be the sole judges of national security. It would be obviously undesirable that such matter should be made the subject of evidence in a

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\(^1\)Clause (5) of Article 150.
\(^2\)Clause 6A) of Article 150. This was inserted by way of s. 39(2) of the Constitution (Amendment) Act 1963 [Act 26/63].
\(^3\)Article 8(b)(1)
\(^4\)Article 8(b)(ii)
\(^5\)Clauses (b)(iii) and (b)(iv) of Article 150(8).
\(^6\)(1917) A.C. 260.
\(^7\)Ibid. 271.
\(^8\)(1916) A.C. 77.
court of law or otherwise discussed in public." Even Lord Denning some sixty years later defended this approach in *R. v. Secretary of State ex parte Hosenball*:

> There is a conflict between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law.3

As these cases typify, when faced with emergency powers, the courts generally resort to ritualistic incantations on the importance of the rule of law and judicial review, but in effect tend to hold in favour of upholding the exercise of emergency powers.4 In this respect, the safeguards expected of the courts during times of emergency tends to be illusory and Malaysian decisions do not seem to veer from this view. It is realistic therefore, when appraising emergency powers in Malaysia, not to overestimate the potential of the judiciary as a bulwark against excessive encroachment into freedom.

Although case law in respect of Article 150 is not as many and varied as say, in India *vis-a-vis* Article 132 of the Indian constitution which caters for emergency powers in India, the limited number of cases decided by the courts do offer some illumination. In *Eng Keock Cheng v. Public Prosecutor*5 the appellant had been convicted of the unlawful possession of firearms in a proclaimed security area and sentenced to death under s. 57(1) of the ISA. Section 57(1) prescribes the death penalty for the offence of unlawful possession of a firearm or ammunition in a security area which the Agong may proclaim under s. 47, Part III of the ISA. The appellant argued that Parliament had exceeded its powers by purporting to delegate to the Agong power to enact regulations such as the Emergency (Criminal Trials) Regulations 1964 (ECTR 1964) which were inconsistent with the Constitution. The court was referred to a number of Indian authorities dealing with the question of excessive delegation of the legislative function under a written constitution.

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1 (1916) A.C. 77 at 107.
2 (1977) 1 WLR 766.
5 (1966) 1 MLJ 18.
Wylie CJ (Borneo) held that the true effect of Article 150 of the Constitution was that, subject to certain exceptions set out therein, Parliament had, during an emergency, the power to legislate on any subject and to any effect even if inconsistent with the Constitution, and that this power extended to the provisions on fundamental liberties. His Lordship was of the opinion that the constitutional power of Parliament to enact laws inconsistent with the constitution during an emergency, in this case the ECTR 1964, included the authority to delegate part of that power to legislate to some other authority notwithstanding the existence of the written constitution. He rejected the Indian authorities on the ground that the legislation that was challenged in the Indian courts cited had not been enacted pursuant to a power such as that conferred by Article 150(6):

(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.\(^1\)

However, it could be argued that the words in Article 76(a) which specifically authorise Parliament to delegate legislative functions on federal matters to state legislatures rebut the assumption that the Malaysian Parliament has an inherent and unlimited right to delegate its legislative functions.\(^2\) In *Mohamed Sidin v. Public Prosecutor* \(^3\) the ECTR 1964 were once again challenged by an appellant who had been convicted under s. 57(1) of the ISA. The only ground argued in the appeal was that Regulations 4 and 5 of the ECTR 1964 were ultra vires the Emergency (Essential Powers) Act 1964 (EEPA 1964) as the Agong had no power thereunder to make regulations such as Regulation 4 which provided for trial before a judge sitting alone and Regulation 5 which provided for committal for trial before a judge without the process of a preliminary inquiry. This mode of trial, it was contended, empowered the

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\(^1\)The exceptions under Clause (6A) are Islamic law and custom of the Malays and natives of the Borneo States.


\(^3\)(1967) 1 MLJ 106.
Agong's delegate, i.e. the public prosecutor, to determine by an arbitrary act which persons should be tried under the ECTR 1964 and which persons should be tried under the ordinary criminal procedure. Therefore, the appellant submitted, such regulations were discriminatory and ultra vires the EEPA 1964. Barakbah LP, delivering the judgment of the Federal Court, found that the ECTR 1964 did not confer any arbitrary power on the public prosecutor. There was, he maintained, in the EEPA 1964 and the ECTR 1964 a nexus between the criminal trial or classification of criminal trials to be tried under the special procedure provided in the ECTR 1964 and the object of the EEPA 1964.1

The important case of Stephen Kalong Ningkan v. Government of Malaysia2 revolved around the political affairs the State of Sarawak in 1966 and that of Ningkan himself who was then Chief Minister. A state of emergency was declared by the Agong on 14 September 1966 with the specific objective of quelling what was declared to be political unrest in Sarawak centring on the leadership of Ningkan, its Chief Minister. Under the newly amended clauses (5) and (6) of Article 150 of the Constitution3 it was provided that any emergency law would be valid notwithstanding that it was inconsistent with the Constitution of the State of Sarawak. Ningkan was subsequently dismissed by the first defendant who was then the Governor of the State on 23 September 1966 after a group of 21 members of the State Legislative Assembly4 recorded their non-confidence by a letter addressed to the Governor. The second defendant, Penghulu Tawi Sli was immediately appointed as Ningkan's successor. In the local politics of Sarawak it was common knowledge that Ningkan

1 The same arguments were raised in Osman & Anor. v. Public Prosecutor (1968) 2 MLJ 137. The appellants who were Indonesians were convicted of the murder of three civilians by planting explosives in a building in Singapore during the Indonesian "Confrontation" against Malaysia. In appealing to the Privy Council, they argued, inter alia, that the ECTR 1964 conflicted with Article 8 of the Constitution and the EEPA 1964, did not authorise the making of regulations inconsistent with the Constitution. Viscount Dilhorne on behalf of the Judicial Committee of the Privy Council held that the phrase "notwithstanding anything inconsistent with any written law" in the EEPA 1964 included the Constitution of Malaysia. The validity of the Regulations, therefore, could not be impeached.

2 (1968) 1 MLJ 119 [Federal Court]; (1968) 2 MLJ 238 (PC).

3 The present Article 150(5) and Clause (6) were temporarily amended by Act 68/1966. The words "or in the Constitution of the State of Sarawak" were inserted immediately after the word "Constitution in Clauses (5) and (6) of article 150. These amendments were given life of six months after the proclamation of emergency on 14 September 1966.

4 Under the Constitution of Sarawak the State Legislative Assembly is styled as Council Negeri.
had fallen out of favour with the leadership of the Federal Government on account of federal-state issues largely related to the newly established Malaysia, then hardly 3 years old. In the typical fashion of Malaysian politics, a leader who is no longer favoured by the central government goes about his daily duties at his own peril. The plaintiff contended, *inter alia*, that the proclamation of a state of emergency made by the Agong on the advice of the Federal Cabinet on 14 September 1966 was null and void and of no effect by reason that it was not made *bona fide* but was made in *fraudem legis*; and that the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 enacted by the Federal Parliament was null, void and of no effect. The defendants, on the other hand, applied for the writ to be struck out because it involved matters beyond the jurisdiction of the court.

At the High Court in Borneo Pike CJ (Borneo) held that Article 32(1) of the Constitution only protected the Agong personally from proceedings in a court of law but could not be construed to protect the Federal Government from action in the courts in respect of its acts committed in the name of the Agong. He reasoned that when the Agong acts on the advice of the Federal Cabinet his act must be deemed to be the act of the Federal Government:

"...since under Article 40 of the Constitution the Agong is required to act upon the advice of the Cabinet in making a proclamation under Article 150 (and indeed under all matters except those mentioned in clauses (2) and (3) of Article 40), it cannot, I think be argued that the power conferred by Article 150 is a prerogative power analogous to certain powers of the British sovereign." ²

1 Apart from *Stephen Kalong Ningkan*, there have been two other significant cases that involve state leaders who suddenly became disfavoured by the Federal leadership. In 1976 Datuk Hj. Harun Idris, the then Chief Minister of the State of Selangor and a formidable youth leader in the ruling UMNO, was indicted for corruption when he defied a federal political decision asking him to step down. See *Datuk Hj. Harun Idris v. Public Prosecutor* [1976] 2 MLJ 116. The second case involves Datuk Joseph Pairin Kitingan, Chief Minister of the State of Sabah who after taking his *Parti Bersatu Sabah* (PBS) out of the *Barisan Nasional* coalition, thereby opposing the present leadership in the 1990 general elections suddenly found himself indicted on several counts of corruption. His brother, Datuk Jeffrey Kitingan, was earlier on arrested and detained under the *Internal Security Act 1960* (ISA) in October 1991 on the allegation that he pursued a plan to take the State of Sabah out of Malaysia. This was announced by the police as "prejudicial to the security of the country." See The Star 23 October, 1991. It has been the practice in Malaysia that before indictment is preferred against a suspect under the *Prevention of Corruption Act 1966* it has to be endorsed by the Public Prosecutor who is also the Attorney General and very much under the control of the Prime Minister. When a State Government such as that of Sabah becomes critical of the federal leadership the normal solution is to voice change in the leadership of the state government. This 'solution' is currently championed by the controlled media. For example, see the Editorial of *Utusan Malaysia* 19 September 1992.

²(1967) 1 MLJ. at p. 46.
On the defendants' prayer that the writ be struck out the Chief Justice reasoned that since the *bona fide* of the making of the proclamation of emergency was challenged there was a cause of action within the jurisdiction of the court since *mala fide* had been pleaded. Consequently, he observed that to strike out the writ would mean usurping the functions of the trial judge. Following *Goodson v. Grierson*¹ he said the applicant who wanted his opponent's writ to be struck out it must be shown that the matter before the court was an abuse of the process of the court or was frivolous or vexatious.² Finally, on the plaintiff's contention of *fraudem legis* and the question of the validity of the emergency proclamation made by the Agong, His Lordship, following *Bhagat Singh & Ors. v. The King Emperor* ³ and other authority⁴, added that it was not open to the court to enquire into the sufficiency of the reasons for a declaration of emergency provided it was made bona fide. "If, therefore, the declaration appears *ex facie* to have been made in the manner required by the statute and the *bona fide* of the making of the declaration is not impugned, it is not open to the court to enquire into it."⁵ On the other hand if *mala fide* is the core contention then justiciability could lie but His Lordship warned that the contender would be faced with "great difficulties of proof".⁶

On appeal at the Federal Court⁷ the judges split two to one on the same issue. The majority favoured the view that an emergency proclamation was not justiciable.⁸ The majority view, still binding in Malaysia, is particularly strong since the judges even rejected the possibility of questioning an emergency proclamation under Article 150(2) on the ground that it was issued *mala fide*:

In my view the question is whether a court of law could make it an issue for the purpose of a trial by calling in evidence to show whether or not His Majesty the Yang Di Pertuan Agong was acting in bad faith in having proclaimed the emergency. In an act of the nature of a

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¹(1908) 1 K.B. 761.
²(1967) 1 MLJ 46 at 47.
³(1931) L.R. 58 I.A. 169.
⁵(1967) 1 MLJ 46 at 47.
⁶*ibid.* at p.48.
⁷(1968) 1 MLJ 119.
⁸Barakbah LP, Azmi C.J. (Malaya), Ong Hock Thye FJ. dissented.

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Proclamation of Emergency, issued in accordance with the Constitution, in my opinion, it is incumbent on the court to assume that the government is acting in the best interest of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non-justiciable.\footnote{(1968) 1 MLJ 119 at p.122, per Barakbah LP}

Azmi CJ., following the above reasoning, regarded the Agong as the "sole judge" on the same issue, even when a question of \textit{bona fide} was in issue.\footnote{(1968) 1 MLJ 119 at p.124.} The wording of Article 150(1) as it stood at the time of the Ningkan case was as follows:

\begin{quote}
If the Yang Di Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency.
\end{quote}

On its language, the Agong's "satisfaction" must be in respect of a "grave emergency" which threatened the "security" or economic life" of the Federation, or any part of it. In the opinion of the majority these qualifying words concerned matters which were within the sole discretion of His Majesty. On this reasoning the Lord President refused to allow even the calling of evidence to show that \textit{mala fide} was in existence in the Agong's act of proclaiming an emergency. He simply assumed good faith on the part of the Agong, a judicial pre-supposition that was both prejudiced and effectively precluded judicial review.

Although the Constitution does prescribe specific matters and functions in which the Agong "may act in his discretion"\footnote{The Agong under Article 40(2) may use his discretion in performing the following functions: "(a) the appointment of a Prime Minister; (b) the withholding of consent to a request for the dissolution of Parliament; (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of their Royal Highnesses... and any other case mentioned in this Constitution."} the proclaiming of an emergency appears not to be one of them. He must necessarily, in this particular respect, act on advice. Despite there being a contrary view on this subject,\footnote{See R.H. Hickling, "The Prerogative in Malaysia" (1975) Mal. L.R. 207. Hickling's contention that there is some residual prerogative on the part of the Agong in exercising his constitutional powers has been challenged by S. Jayakumar in "Emergency Powers in Malaysia: Can the Yang Di Pertuan Agong Act in His Personal Discretion and Capacity?" (1976) 18 Mal. L. R. 147. See also the dissent of Ong Hock Thye FJ. in \textit{Stephen Kalong Ningkan v. Government of Malaysia} (1968) 1 MLJ 119.} the courts have been clearly supportive of the view that he must act on the advice of the Cabinet, although in interpreting the subjective nature of the executive's function some judges have
referred to the Agong as being "the sole judge"\(^1\) in determining the gravity and necessity of the emergency. The language of Article 40, it is submitted, rules out the exercise of personal discretion of the Agong in the business of proclaiming an emergency. A public law scholar tried to eke out a general concept of prerogative power which he thought the Agong has under the Constitution and various legislation.\(^2\) However, his views on the power of the Malaysian sovereign have not gained support in view of the clear position of the Cabinet in giving compulsory advice under Article 40 of the Constitution.

Barakbah LP and Azmi CJ (Malaya) described the Agong as being the "sole judge" in determining whether there was an emergency. By saying that the Agong is the "sole judge" some vagueness does arise and it could be argued from this that the paramount ruler of Malaysia does indeed have a subjective power when it comes to determining the existence of a "grave emergency" as envisaged under Article 150(1). The majority's view may, however, demonstrate a degree of naiveté as regards the mechanics involved in the constitutional relationship between the Agong and the Cabinet.\(^3\) The Agong must act on advice of the Cabinet under Article 40(1), whether or not there was a grave emergency was subjectively known to the Cabinet.

Ong Hock Thye FJ, the third member of the court who delivered a dissenting judgement, found that the facts were sufficiently within the purview of \textit{fraudem legis}. Although he did concede that the appellant needed adequately to substantiate his allegation of \textit{fraudem legis}, he was of the view that the whole purpose of the emergency, based on the facts in the statement of claim, was more towards getting

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\(^1\) Per Barakbah LP. and Azmi C.J. (Malaya) in \textit{Stephen Kalong Ningkan v. Government of Malaysia} (1968) 1 MLJ 119. See also \textit{Public Prosecutor v. Ooi Kee Saik & Ors.} (1971) 2 MLJ 108 (per Raja Azlan Shah J. at p.113).

\(^2\) Hickling reasoned that the Agong has "a battery of prerogative powers; that these exist under the cover of the Malaysian Constitution and the Acts and Ordinances passed thereunder..." See R.H. Hickling, "The Prerogative in Malaysia" \textit{op. cit.} at p. 232.

Ningkan out of his job as Chief Minister than any other outcome.¹ There has been no other judge in Malaysia that had taken the tenacity to assess the Agong's proclamation of an emergency as an act of the executive. He asserts:

"...I am unable to share their view that under Art. 150 of the Federal Constitution, His majesty the Yang Di Pertuan Agong in the "sole judge" whether or not a situation calls for a Proclamation of Emergency. His Majestic is not an autocratic Ruler since Art 40(1) provides that "In exercise of his function under this Constitution of federal law the Yang Di Pertuan Agong shall act in accordance with the advice of the Cabinet..." In this petition therefore, when it was alleged by the petitioner that the said proclamation was in fraudem legis in that it was made, not to deal with a grave emergency whereby the security or economic life of Sarawak was threatened, but it was for the purpose of removing the petitioner from his lawful position as CM of Sarawak there never was even a ghost of a suggestion that His Majesty had descended into the arena of Malaysian politics by taking sides against the Sarawak's legitimate Chief Minister. With the greatest respect, it is unthinkable that His Majesty, as a constitutional ruler, would take on a role in politics different from that of the Queen of England."²

If it was misuse or abuse of power on the part of the Cabinet that the court was looking for, according to Ong Hock Thye FJ it was unmistakable: "The allegation of fraud" he said "was unmistakably made against the Cabinet as it was supported by particulars set out at length in the seven pages of the petition. It was repeatedly and publicly stated that the Agong proclaimed the emergency. With all respect therefore, I will not join in what I consider a repudiation of the Rule of Law, for I do not

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¹In Ong Hock Thye's dissenting judgement the following facts were established (to show how earnestly the Federal Government wanted the removal of Ningkan as Chief Minister): 14 June 1966 - The Governor of Sarawak received a letter from the Minister for Sarawak Affairs in Kuala Lumpur containing the signatures of 21 members of the Sarawak Council Negeri (total membership 42 excluding the Speaker) stating that they no longer had confidence in the petitioner/appellant as their leader and Chief Minister; 17 June 1966 - the appellant requested that the no-confidence move be put to the test at the Council Negeri (State Legislature) to which in the same afternoon the Governor replied that the appellant and four others were deemed to be no longer holding office. These dismissals were duly published in the Gazette and one Tawi Sli was appointed as Chief Minister; 14 Sept. 1966: a week after the appellant successfully obtained an injunction against the Governor by which action he was reinstated as Chief Minister (following an interim judgement of Harley Ag. CJ, the Yang Di Pertuan Agong declared an emergency for the State of Sarawak. 19 September 1966 - the "wrath" of the Federal Government at Harley's judgement was made known through the parliamentary speech of the then Deputy Prime Minister, Tun Abdul Razak. The Emergency (Constitution of Sarawak) Act 1966 that facilitated the power to amend the Constitution of Sarawak and dismiss the Chief Minister was promptly passed; 23 Sept. 1966 - the Council Negeri (State Legislative Council) convened and passed a vote of no confidence in the appellant; 24 September 1966: The Governor purporting to act on the Council's deliberation and the newly-acquired power to dismiss the appellant from his position as Chief Minister and appointed the said Penghulu Tawi Sli in his place; 1 December 1966 - the Federal Court dismissed the appellant's petition.

²(1968) 1 MLJ 119. at 125 [FC].
imagine, for a moment that the Cabinet has ever claimed to be above the law and the Constitution."¹

Ong Hock Thye, who also opined against "made up" emergencies through constitutional device² was to be a lone and isolated voice in the Malaysian judiciary. The simplistic reasoning of the majority remains: since the King has made the proclamation, he is the sole judge and the courts should not go behind it. As a scholar has pointed out, "All efforts have failed to have the courts review the validity of a Proclamation of Emergency by enquiring whether... a state of emergency exist. The courts have consistently taken the view that the determination of the government that an emergency exists, and the issuance of the Proclamation of Emergency, are non-justiciable."³

The Privy Council, responding to the issue of whether a proclamation of emergency could be challenged in judicial proceedings, referred to the said issue as one "of far reaching importance which, on the present state of the authorities, remained unsettled and debatable."⁴ The Privy Council also rejected Ningkan's contention of fraudem legis and affirmed Pike CJ's judgement, particularly in respect of the Agong's role in proclaiming an emergency based on the finding of a "grave" situation. In fact the Board seemed to equate the Agong's actions with those of the Government. In referring to the Emergency Proclamation of 14 September 1966 it stated that the Agong acted "... it may be presumed, on the advice of the Federal Cabinet as required by Article 40(1) of the Federal Constitution, proclaimed a state of emergency..."⁵ Further, the Privy Council held that Ningkan had not discharged the onus on him to show that the Proclamation of Emergency was in fraudem legis. Lord MacDermott on behalf of the Board said:

¹(1968) 1 MLJ 119, at 125.
²See Ong Hock Thye, "Is the 1969 State of Emergency Still an Existing Fact?" INSAS (Journal of the Malaysian Bar) Vol. IX (1976) 3. Here Ong maintained that it was illogical as well as a mockery to continue to regard there being an emergency when all semblance of its existence was physically non-existent.
⁴(1968) 2 MLJ 238 (PC) at p.242, per Lord MacDermott.
⁵Ibid.
"Their Lordships can entertain no doubt that the onus was on the appellant to prove the allegations on which his first submission depended. In circumstance such as those with which this appeal is concerned, the onus of proof on anyone challenging a proclamation of emergency may well be heavy and difficult to discharge since the policies followed and the steps taken by the responsible government may be founded on information and apprehensions which are not known to those who seek to impugn what has been done...The sole question on this branch of the argument was whether he had established his assertions...In the opinion of their Lordships the appellant failed to do so." \(^1\)

Subsequent cases appeared to fall into line with *Ningkan*. Raja Azlan Shah J in *Public Prosecutor v. Ooi Kee Saik & Ors.* \(^2\) on the authority of *Bhagat Singh v. King Emperor* \(^3\) again emphasised "Indeed the proclamation is not justiciable." \(^4\) On appeal at the Federal Court it was found that the trial below was a nullity but Raja Azlan Shah J's finding on the question of non-justiciability was not disturbed.

In *Johnson Tan Han Seng v. Public Prosecutor* \(^5\) the issue was whether a valid Proclamation could lose its validity by "affluxion of time" or "change of circumstances". The impugned Proclamation was issued on 15 May 1969 under which a number of emergency ordinances were promulgated. Acting under the Emergency (Essential Powers) Ordinance No. 1 of 1969 the Agong promulgated the ESCAR 1975. It was argued that there was no state of emergency in existence in 1975 - the year the ESCAR was promulgated. Since a lapse of nearly seven years had passed and the circumstances which warranted the proclamation in 1969 had disappeared, it was argued that the Proclamation was thus to be regarded as inoperative. It was further argued that the Proclamation had lost its relevance and was of no effect and that the trial of the accused under the ESCAR 1975 therefore could not be sustained. The Federal Court unanimously rejected the argument. \(^6\) Suffian LP while accepting that the question was "political" approved the following statement of Krishna Iyer J. in *Bhutnath v. State of West Bengal* \(^7\):

> It was argued that there was no real emergency and yet the Proclamation remained unretracted with consequential peril to fundamental rights. *In our view this is a political, not justiciable*

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2 *(1971) 2 MLJ 108.* This case, was discussed in Chapter 4 in connection with sedition.
3 *(1931) L.R. 58 I.A. 169.*
4 *(1971) 2 MLJ 108 at 113.*
5 *(1977) 2 MLJ 66.*
6 *Suffian LP, Wan Sulaiman FJ and Raja Azlan FJ.*
7 *AIR. 1974 SC. 807.*
issue and the appeal should be to the polls and not to the courts. The traditional view that political question fall outside the area of judicial review, is not a constitutional taboo but a pragmatic response of the court to the reality of its inadequacy to decide such issues and to the scheme of the Constitution which has assigned to each branch of the government in the larger sense a certain jurisdiction. The rule is one of self-restraint and of subject matter, political sense and respect for other branches of government like the legislature and executive.  

Extending the argument in this case, with particular reference to the position of the Proclamation as being political, the reality is that all legislation invariably has something to do with politics. To simply group all matters under the purview of emergency proclamations as being political and therefore non-justiciable is as much as saying that what the executive wants the executive gets; that the courts gets to decide what is allocated to them and nothing more; that it is Parliament after all that is supreme and not the Constitution as provided under Article 4. This case therefore would only appear to stand for the proposition that whatever political considerations are translated into Acts of Parliament, even if they have the effect of curtailing the courts' jurisdiction or the elementary rights of individuals, the courts would simply have to accept it as being political decisions, and therefore not interfere in any way. It is clear from Johnson Tan that a Proclamation could not lose its force by a mere judicial pronouncement on the matter. Only where in accordance with the wording of Article 150, a Proclamation was revoked (by the executive) or annulled (by parliamentary resolution) could it lose its validity.

In N. Mahadhavan Nair v. The Government of Malaysia, the applicant challenged the validity of the Emergency (Essential Powers) Ordinance 1969 and the Essential (Community Self-Reliance) Regulations 1975 which were promulgated by the Agong thereunder. Chang Min Tat J. in the High Court accepted the fact that the

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1At p. 807.
2Cf. Cheah Soon Hoong v. Public Prosecutor (1976) Criminal Appeal No. 43/76 (unreported). In this case Harun J was of the view that the 1969 emergency proclamation in 1976 had lapsed and was no longer in force. This view appears to be sustainable in the light of Lord Reid's dictum in Re Earl of Antrim and Eleven Other Irish Peers (1966) 3 WLR 1141: "A statutory provision becomes obsolete if the state of things on which its existence depended has ceased to exist so that its object is no longer attainable." However, the Federal Court (per Suffian LP and Raja Azlan FJ) ignored the dictum.
3In this respect see Public Prosecutor v. Khong Teng Khen & Anor. (1976) 2 MLJ per Wan Suleiman F.J.: "The ultimate right to decide if an emergency exists or has ceased to exist...remains with Parliament, and it is not the function of any court to debate on that issue." at p. 177.
4(1975) 2 MLJ 286.
Agong was subject to the advice of the Cabinet. Again justiciability was side-stepped when his Lordship said that the court should not usurp the role of the Cabinet.

In *Public Prosecutor v. Khong Teng Khen & Anor*¹ the accused had been charged for possession of firearms and ammunition in a proclaimed security area contrary to s. 57(1) of the ISA. They were committed for trial in the High Court after a preliminary inquiry. Subsequently the attorney general under s. 2(2) of the Essential (Special Cases) Regulations 1975 (ESCAR) certified that the accused were fit and proper persons to be tried under the ESCAR in accordance with the special rules of evidence and procedure enacted thereunder. Counsel for the accused submitted that the trial should be held under the ordinary provisions of the Criminal Procedure Code and not under the ESCAR on the ground that the 1975 Regulations were unconstitutional and void because the Agong's power to promulgate had lapse in view of the fact that Parliament had already sat. The learned trial judge stopped the proceedings and referred the question of the validity of the ESCAR to the Federal Court. The Federal Court (Suffian LP and Wan Suleiman FJ; Ong Hock Sim FJ dissenting) upheld the validity of the ESCAR on the basis that the ESCAR had been made not under Article 150(2) of the Malaysian Constitution but under section 2 of the Emergency (Essential Powers) Ordinance 1969². In consequence, Suffian LP further said: "...in my judgment the fact whether or not at the time they were made Parliament was in existence or was sitting is irrelevant. His Majesty has power to make Ordinances under clause (2) of Article 150 only when Parliament is not sitting.

In the case of regulations under Section 2 of the Ordinance they may be made by His Majesty whether or not Parliament is sitting."³ Wan Suleiman FJ in refusing to allow the court to have a say in the termination of an ordinance promulgated by the Agong under clause (2) of Article 150 stated that "The ultimate right to decide if an emergency exists or has ceased to exist...remains with Parliament, and it is not the function of any court to debate on that issue."⁴ At this stage it appears that the judges

¹ [1976] 2 MLJ 166.
² No. 1 of 1969. PU(A) 149/69.
⁴ *Public Prosecutor v. Khong Teng Khen & Anor.* (1976) 2 MLJ 164 at p. 177.
were more prepared to analyse and justify emergency powers under Article 150 rather than be critical of them for the sake of freedom of the subject. Ong Hock Sim FJ, dissenting, had this to say:

The 1975 Regulations, in my view, are a denial of Parliamentary rule. They are an abrogation of the Rule of Law. If these regulations are held valid, there appears no control as to the regulations the Executive may issue under the guise of an Emergency which had ceased to exist when Parliament was reconvened on February 20, 1971.¹

Ong Hock Thye's dissent appears to be the more sound judgment. The provision of Article 150(2) in 1976 was clear in that the Agong had the authority to promulgate ordinances having the force of law "until both Houses of Parliament are sitting". No doubt under s. 2 of the 1969 Ordinance he was authorised to make regulations whatsoever, but when Parliament resat on 20 February 1971 for the first time since the May 1969 disturbances, his ordinance-making power ceased by virtue of clause (2) of Article 150 as it stood in 1976. Ong Hock Sim FJ must have been fortified when the Privy Council in Teh Cheng Poh v. Public Prosecutor ² overruled the majority judgement in Khong Teng Khen.

5.7. Teh Cheng Poh's case

It is useful to set out in perspective the background of the Teh Cheng Poh's case ³ in regard to the events preceding his arrest and trial in 1976. On 15 May 1969, a state of emergency was proclaimed by the Agong under Article 150(1)⁴ as a result of racial riots which flared up in Kuala Lumpur on 13 May 1969. On 20 May 1969, on account of the emergency, Parliament was dissolved by the Agong. In pursuance of the power conferred on him by Article 150(2), His Majesty promulgated the Emergency

¹Ibid. at p 175. The Privy Council in Teh Cheng Poh overruled Khong Teng Khen - see (1980) AC 459.

²(1979)1 MLJ 50; (1980) AC 458.

³Teh Cheng Poh v. Public Prosecutor (1977) 2 MLJ 66 (HC); (1978) 1 MLJ 68 (FC); (1979 1 MLJ 50 (FC); (1979) 2 MLJ 238 (FC)

⁴In 1976 the provision of Article 150(1) was as follows: "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; clause (2) of Article 150 stipulated that if a Proclamation of Emergency was issued when Parliament was not sitting, the Agong should summon Parliament as soon as may be practicable. However, he was only authorised to promulgate ordinances having the force of law until both Houses of Parliament resat.
(Essential Powers) Ordinance 1969. Section 2(2) of the 1969 Ordinance authorised the Agong to “make any regulations whatsoever which he [considered] desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community.”

Under s. 2(3) of the 1969 ordinance it was further provided that:

Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes for which such regulations are authorised by this Ordinance to be made, and may contain such incidental and supplementary provisions as appear to the Yang Di Pertuan Agong to be necessary or expedient for the purposes of the regulations. (emphasis added)

From 15 May 1969 onwards the whole of Malaysia was declared a security area by means of a security area proclamation made under section 47 of the ISA.¹ On 20 February 1971, the Malaysian Parliament was reconvened.

In 1975, the Agong, purporting to act under section 2 of the 1969 Ordinance, made the Essential (Security Cases) Regulations 1975 (ESCAR) which provided for a special procedure to be adopted in trials for security offences. A person charged with a security offence would be tried by a judge alone, without a jury. Furthermore, the preliminary inquiry before a magistrate was dispensed with.⁶

The circumstances surrounding Teh Cheng Poh’s arrest and prosecution were somewhat similar to Khong Teng Khen cited above. On 13 January 1976, he was found in possession of a revolver and ammunition in Penang which, in common with all other areas in Malaysia, had been declared to be a security area under s. 47 of the ISA, purportedly to be effective since 1969. He was subsequently charged under section 57(1) of the ISA with having in his possession in a security area a firearm and ammunition without lawful authority which attracted the death penalty. In November

¹Section 47(1) of the ISA provides that if in the opinion of the Agong public security in any area in Malaysia is seriously disturbed or threatened "by reason of any action taken or threatened by any substantial body of persons...to cause...a substantial number of citizens to fear organised violence against persons or property, he may...proclaim that area as a security area..." Clause (2) stipulates that every proclamation made under Clause (1) shall apply only to such area as is therein specified. It is to remain in force until revoked by the Agong or is annulled by resolutions passed by both Houses of Parliament.

1976, Teh was tried under the special procedure established by the ESCAR in the Penang High Court by a judge sitting alone.

The accused marshalled two main grounds of defence at the High Court: Firstly, that by charging the accused under s. 57 of the ISA had led to an infringement of Article 8 of the Constitution which guarantees equal protection under the law. Counsel submitted that there were three laws under which a person could be charged when found with unlawful possession of a firearm, namely, the Penal Code, the Arms Act 1960 and the ISA. As the different Acts carried different punishments, so it was argued, there was no equal protection. Secondly, that there had been no effective promulgation as to security areas made by the Agong under s. 47 of the ISA as the one made in 1969 had lapsed when the ISA was revised in 1972.1 Arulanandom J in rejecting both grounds and other subsidiary objections raised by the accused, held that when a person was charged under the ISA on a security offence there was no violation of Article 8 of the Constitution as the Attorney General had all the necessary discretionary power under Article 145(3) of the Constitution "to institute, conduct or discontinue any proceedings for an offence..." The judge, relying on Suffian LP's judgment in Long bin Samat & Ors. v. Public Prosecutor 2 that anyone dissatisfied with the Attorney General's discretionary power in prosecution work "should seek his remedy elsewhere but not in the courts"3, convicted the accused by imposing the death penalty prescribed under s. 57 of the ISA.

On appeal at the Federal Court4 the appellant based his appeal on three main grounds: firstly, that the trial was a nullity and of no effect on the ground that the ESCAR under which he was tried was void because the Emergency (Essential Powers) Ordinance 1969 (promulgated under Article 150(2) of the Constitution)
under which the ESCAR was made, had lapsed and ceased to be law by effluxion of time and by the force of changed circumstances; secondly, that there was no evidence to show that there were "security areas" by virtue of s. 47 of the ISA and that reference should have been made in the charges; and thirdly that the power given to the Attorney General to discriminate as between persons alleged to be in possession of firearms or ammunition and charging them with different offences contravened Article 8 of the Constitution and was therefore void. On the first ground, the Federal Court, following its earlier decision in *Khong Teng Khen* 1 dismissed the appeal. It reasoned that since the promulgation of the ESCAR was not made under the authority of Article 150(2) but under s. 2 of the Emergency (Essential Powers) Ordinance 1969 the ESCAR was intact and that the trial was lawful. Suffian LP said that the 1969 proclamation had not been revoked under Article 150(3) by the Agong nor annulled by Parliament and therefore they were still in force.2 The appellant's second submission was also rejected by both Suffian LP and Raja Azlan FJ. By the Security Area Proclamation made by the Agong in 1968 the Agong had in fact proclaimed all areas in the Federation to be 'security areas' as contemplated under s. 47 Part II of the ISA and by virtue of s. 12 of the Revision of Laws Act 1968, under which the ISA had been revised, references to Part II should be read as references to Part III of the revised Act. On the third submission the court held that the Attorney General had power to discriminate between persons alleged to be in possession of firearms or ammunition and to charge them differently. By authority of the Attorney General's constitutional discretionary power to 'institute, conduct or discontinue' proceedings under Article 145, the court found that the equal protection provision of Article 8 was not infringed.

At the Privy Council the appellant also marshalled three grounds of appeal: that the ESCAR was invalid on the ground that at the time of its promulgation in 1975 Parliament had already sat and therefore the Agong had lost his power by virtue of Article 150(2); that the security area proclamation had lapsed since at the material

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2 (1977) 2 MLJ 66 at p. 68.
time when the security area proclamation was made by the Agong there was no state of emergency; and that the Attorney General’s decision to prosecute under the ISA instead of the Arms Act 1960 was contrary to Article 8 of the Constitution which provides for equal protection before the law.

On the first issue, Lord Diplock, on behalf of the Board, pointed out that the ESCAR 1975 had been rendered invalid as once Parliament had sat on 20 February 1971 the Agong no longer had power to make Essential Regulations having the force of law. Thus the ESCAR and its amendments were ultra vires the Constitution and for that reason void. He said:

The power to promulgate Ordinances having the force of law is expressed to be exercisable only until both Houses of Parliament are sitting. It lapses as soon as Parliament sits. Thereafter while the Proclamation of Emergency remains in force any further laws required by reason of the emergency are to be made by Parliament...¹

The Board recognised that to uphold the validity of the ESCAR 1975 would be tantamount to 'the Cabinet's lifting itself up by its own boot straps'² because the Agong performs his constitutional duty on advice of the Cabinet. The only source from which the Agong could derive powers to make 'Essential Regulations' other than the constitutional source of Article 150(2) would be an Act of Parliament delegating such powers to him. This avenue, His Lordship maintained, was exemplified by the experience of the 1964 Emergency when Parliament delegated to the Agong emergency powers, inclusive of the power to promulgate ordinances by way of the Emergency (Essential Powers) Act 1964 (EEPA 1964).³ The Board further observed:

To the extent, however, that the Emergency (Essential Powers) Ordinance 1969 purports to authorise the Yang Di Pertuan Agong to continue to make instruments having the force of law notwithstanding that Parliament has sat, it suffers from the fatal constitutional flaw that such

¹ (1979) 1 MLJ 50, at p.52.
²(1979) MLJ 50, at p. 53.
³The emergency had been proclaimed on 3 September 1964 and a fortnight later the Malaysian Parliament passed the Emergency (Essential Powers) Act 1964. Section 2 of this Act was to a large extent in para materia with sections 1-3 of the Emergency (Essential Powers) Ordinance 1969. In Osman & Anor. v. Public Prosecutor [1968] 2 MLJ. 137 the Privy Council held that the Yang Di-Pertuan Agong continued to have powers to make regulations having the force of law notwithstanding that Parliament had previously sat as the conferment of such powers was effectively delegated to the Yang Di-Pertuan Agong by an Act of Parliament.

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exercise of legislative power by the Ruler after Parliament has sat, is not authorised by the Constitution itself nor has it been delegated to him by Parliament in whom the legislative authority of the Federation is vested.1

The above observation suggests that section 2 of the Emergency (Essential Powers) Ordinance 1969 had to be embodied in an Act of Parliament if it was to be valid during the period that Parliament has been sitting. However, the Board, somewhat repeating its style in the Ningkan case, refused to come to grips with one important issue: Can a Proclamation of Emergency be considered to have ceased to be in force because the facts which provided the justification for its issuance no longer exist? Is it justiciable? On this fundamental issue their Lordships said:2

Since [their Lordships] have held the Essential (Security Cases) (Amendment) Regulations, 1975, to be invalid upon the ground that they were made after the Yang di-Pertuan Agong's power to make them had expired, it is unnecessary to decide whether or not they were invalid on the alternative and more far-reaching ground advanced by the appellant: namely, that by the time the Regulation was made the emergency proclaimed on May 15, 1969 was over and the Emergency Proclamation of that date had ceased to be in force.

Coincidentally, during the course of their Lordships' deliberation on this case the curtailment of appeals from Malaysia to the Privy Council in constitutional matters from 1 January 1978 was about to be effective. In relation to appeals pending on that date the Privy Council said it would not be appropriate to express opinions on constitutional issues unless they were essential for decision of an appeal. The issue of justiciability was essential but the Board, perhaps in line with its not unknown disposition as a diplomatic judicial entity, let the issue to future developments.3

In relation to the validity of the ESCAR the Board's decision also touched upon some other significant issues. Why could not the Agong derive authority to make the ESCAR from the Emergency (Essential Powers) Act 1964 (EEPA 1964) since it was never formally terminated? It should be recalled that the Proclamation of Emergency of 3 September 1964 had never been expressly revoked nor had it been

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1(1979) MLJ 50, at p. 53.
2(1979) 1 MLJ 50, at p. 54.
3Ibid.
annulled by resolutions passed by both Houses of Parliament under Article 150(3) of the Constitution. Having examined the EEPA 1964 the Board concluded that the powers conferred on the Agong under that Act were intended to be exercisable only for the duration of the 1964 emergency. Lord Diplock further emphasised:

The power to revoke, however, like the power to issue a proclamation of emergency, vests in the Yang Di Pertuan Agong, and the Constitution does not require it to be exercised by any formal instrument. In their Lordships' view, a proclamation of a new emergency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force.¹

This supports the "implied revocation" doctrine. However for this doctrine to apply, it would be necessary for the new proclamation to cover the whole Federation. In other words the 'necessary implication' cannot be drawn in relation to a later but localised state of emergency, i.e. a state of emergency confined to a part or parts of the Federation.²

The decision finally resolved the debate over whether a personal discretion resides in the Agong in relation to the issuance of a Proclamation of Emergency. The debate stemmed, it may be recalled, from the reference by Barakbah LP and Azmi CJ in Ningkan referring to the Agong as 'the sole judge'. It was also suggested that the words 'if the Agong is satisfied' in Article 150 compel the vesting of a personal discretion in the Agong. On this Lord Diplock clarified:

... The Yang Di Pertuan Agong's functions are those of a constitutional monarch and except on certain matters that do not concern the instant appeal, he does not exercise any of his functions under the Constitution on his own initiative but is required by Article 40(1) to act in accordance with the advice of the Cabinet. So when one finds in the Constitution itself or in a Federal law powers conferred upon the Yang Di Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular state of affairs exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the Cabinet, or the opinion or satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question.³

¹(1979) 1 MLJ 50, at p. 53.
³(1979) 1 MLJ 50, at p. 52.
On the second ground of appeal it was contended that the Security Area Proclamation had lapsed. This Proclamation was made by the Agong pursuant to section 47 of the ISA which reads as follows:

(I) If in the opinion of the Yang Di Pertuan Agong public security in any area in the Federation is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim such area as a security area for the purposes of this Part.

(2) Every proclamation made under sub-section (1) shall apply only to such area as is therein specified and shall remain in force until it is revoked by the Yang Di Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament: Provided that such revocation or annulment shall be without prejudice to anything previously done by virtue of the proclamation.1

The appellant argued that the Proclamation had lapsed because it was 'a matter of common knowledge' that long before 13 January 1976, i.e. the date of the arrest, there had ceased to be any organised violence of the kind described existing or threatened in Penang. In consequence, it was argued, there was none to be suppressed by treating Penang as a security area. The Board did not accept this contention. It held that the Proclamation was still in force as it had not been revoked. As Penang was in a security area possession of firearms or ammunition in Penang was caught by section 47 of the ISA which deem such possession as a capital offence and attracts the death penalty. This part of the judgment concurred with the finding of the Federal Court.

In relation to the revocation of a Security Area Proclamation, a discretion is similarly vested in the Agong acting in accordance with the advice of the Cabinet. The Privy Council said:

... The discretion whether and when to revoke a security area Proclamation is not entirely unfettered. The Proclamation is lawful because it is considered by the Yang Di Pertuan Agong

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1The effect of proclaiming an area in Malaysia as a security area, as the Privy Council succinctly explained, 'is (1) to confer upon the Minister additional powers to restrict the freedom of movement of persons within that area; (2) to create additional offences and to impose higher penalties for existing offences if committed in that area; and (3) to confer on the Yang Di-Pertuan Agong very wide powers to make regulations in respect of that area which are inconsistent with Article 5, 9, or 10 [which deal with Liberty of the Person, Freedom of Movement and Freedom of Speech, Assembly and Association respectively], and are additional to the powers exercisable in areas which are not security areas which are conferred upon Ministers directly by the Act itself.' (1979) 1 MLJ 50, at p. 54.
to be necessary to make an area a security area for the purpose, not of suppressing violence by
individuals generally but of suppressing existing or threatened organised violence of the kind
described in the section. Once he no longer considers it necessary for that particular purpose it
would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain
the Proclamation in force for some different purpose.\(^1\)

The Board was not prepared to look into the objectivity of proclaiming the
security area in the first place. However, the Board stressed that the proclamation of a
security area could either be annulled by resolutions of both Houses of Parliament or
by revocation by the Agong. It went on to say that where a failure to exercise the
power of revocation would amount to an abuse of the Agong’s discretion, relief could
be provided in the form of a mandamus. As the Agong is constitutionally immune
from any proceedings whatsoever in any Court,\(^2\) mandamus could "be sought against
the members of the Cabinet requiring them to advise the Agong to revoke the
Proclamation".\(^3\) This was essentially what the Board felt in regard to the option left
open to the appellant in Ningkan’s case. However, to prove bad faith on the part of the
Cabinet could well be an impossible task as the business of proof involves in the main
acts and things done by or on behalf of the executive. In Malaysia then, more so now,
documents in possession of the government have not been known to be easily
obtained through court order.\(^4\)

The appellant’s contention that he was constitutionally discriminated against
when the Attorney General chose to prosecute him under section 57(1) of the ISA
instead of under the Arms Act 1960\(^5\) was not accepted by the Board. Under the ISA
possession of firearm and ammunition is a capital offence that attracts the mandatory
dead penalty. Under the Arms Act 1960 the penalty in respect of similar offence is a

\(^1\) (1979) 1 M.L.J. 50, at p. 55.

\(^2\) Article 32(1) of the Constitution provides: "There shall be a Supreme Head of the Federation, to be
called the Yang Di-Pertuan Agong, who shall take precedence over all persons in the Federation and
shall not be liable to any proceedings whatsoever in any court."

\(^3\) (1979) 1 M.L.J. 50, at p. 55.

\(^4\) Public Prosecutor v. Datuk Pairin Joseph Kitingan -(High Court - Sabah), New Straits Times 7

\(^5\) The Arms Act 1960 is generally read together with the Firearms (Increased Penalties) Act 1971 (Act
37) under which Section 3 attracts the death sentence for discharging a firearm in the commission of
a scheduled offence (i.e. extortion, robbery, escaping from lawful custody, abduction or kidnapping
under section 363 to 367 of the Penal Code and section 3 of the Kidnapping Act 1961; and house-
breaking under section 454 to 460 of the Penal Code; the preventing or resisting of arrest by a police
officer.
maximum term of seven years' imprisonment or to a fine not exceeding ten thousand ringgit or to both.\(^1\) Having regard to Article 145 of the Constitution\(^2\) and applying the principle in *Bishop of Gloucester v. Cunnington* \(^3\) the Privy Council concluded that the appellant was correctly charged but that his trial upon that charge was a nullity.


The ramifications of the decision in *Teh Cheng Poh* were serious. There were several other trials held under the ESCAR 1975. In the light of the decision in *Teh Cheng Poh* they too were a nullity. In some of these cases persons had been sentenced to imprisonment or even death, though fortunately at that point in time nobody had yet been executed.\(^4\) To overcome the sweeping ramifications of the decision, the Government took heed of the hint by Lord Diplock in the following passage:

> "If it be thought expedient that after Parliament had first sat the Yang Di Pertuan Agong should continue to exercise a power to make written laws equivalent to that to which he was entitled during the previous period to exercise under Article 150(2) of the Constitution, the only source from which he could derive such powers would be an Act of Parliament delegating them to him."\(^5\)

Taking that passage as a pointer, the government reacted. The Emergency (Essential Powers) Act 1979\(^6\) in its impugned 1969 format was enacted *in toto*. Its preamble recites: "An Act under Clause (5) of Article 150 of the Federal Constitution to enact as an Act of Parliament the Emergency (Essential Powers) Act 1969 and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after the 20th February 1971, and for the validation of

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\(^1\) See s. 8 of the Arms Act 1960.

\(^2\) Clause (3) of Article 145 provides that the Attorney General has power "exercisable in his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah [Islamic] court, a native court or a court-martial."

\(^3\) (1943) K.B. 101.


\(^5\) (1979) 1 MLJ 50 at p. 54.

all acts and things done under the said Ordinance or any subsidiary legislation, made thereunder and to provide for matters connected therewith."

Section 2 re-authorises all matters covered under the former section 2 of the Emergency (Essential Powers) Ordinance 1969 and Clause (4) of section 2 guarantees the Agong's power to promulgate Essential Regulations, any order, rule or by-law notwithstanding they are inconsistent with any written law, including the Constitution. Section 6 provides for the continued operation of the regulations made under the Emergency (Essential Powers) Act 1964 (EEPA 1964). Such regulations shall have effect as if they have been made under the Act. Thus the EEPA 1964 has been incorporated into and made permanent under the EEPA 1979. Under section 9(1) of the EEPA 1979, all subsidiary legislation made or purported to have been made under the Emergency (Essential Powers) Ordinance 1969 on or after 20 February 1971 are to have effect as if made under the EEPA 1979 and shall be deemed to have come into force from the date on which it came into force or purported to have come into force under the Ordinance. The subsidiary legislation referred to in section 9(1) of the EEPA 1979 may, according to section 9(2), be amended, modified or repealed as if it has been made under the EEPA 1979. Section 9(3) provides as follows:

9(3). Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court, or any other proceedings whatsoever had, or any other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidiary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated.

All Essential Regulations made thereunder, especially the ESCAR 1975 were given a blanket approval by Parliament.

Section 10 empowers the Federal Court to review any case in which a person has been charged for any offence under the Internal Security Act 1960 and tried in

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1 Act 216/1979.
2 It may be recalled that the 1964 Proclamation of Emergency, upon which the Emergency (Essential Powers) Act 1964 had based its existence, had according to the Privy Council been impliedly revoked by the 1969 Proclamation of Emergency.
accordance with the Essential (Security Cases) Regulations 1975. Section 11 reinforces
the discretionary power of the Public Prosecutor to elect to charge any person for any
offence, notwithstanding that the area within which such offence was committed is an
area proclaimed as a security area under section 47 of the ISA. Section 12 provides
that no Court shall have jurisdiction to entertain or determine any application or
question in whatever form, on any ground, regarding the validity or the continued
operation of any proclamation issued by the Agong in exercise of any power vested in
him under any Ordinance promulgated, or Act of Parliament enacted, under Part XI of
the Federal Constitution. On this a local scholar observed:

It seems strange that while a Proclamation of Emergency issued under Article
150 of the Federal Constitution is open to question or challenge, a Proclamation under an Ordinance or
Act made by virtue of such Proclamation, is not open to challenge. It remains to be seen how
far the Courts will allow its jurisdiction to be affected by such an ouster clause.¹

The above concern soon became academic because the passing of the
Constitution (Amendment) Act 1981 prohibits altogether any future challenge in
court. The amendment also prohibits "any application, question or proceeding, in
whatever form, on any ground," in respect of all acts and things done in connection
with a proclamation of emergency.²

Three months after receiving the royal assent³, on the new authority of the
EEPA 1979⁴, the Federal Court was reconvened to determine the issue whether a
retrial of Teh Cheng Poh⁵ was proper. Counsel argued that the Federal Court should
not, in view of the Privy Council's judgement that the appellant's trial was a nullity,
order a retrial. The court rejected the argument. Suffian LP, delivering a unanimous
decision of the Federal Court, said, "In our judgement, the regulations [ESCAR
1975] have now been validated and with effect from when they purported to have

¹See Ahmad Ibrahim, "Interpreting the Constitution: Some General Principles", in Tun Suffian, H.P.
Lee, Trindade The Constitution of Malaysia, Further Perspectives, Oxford University Press Kuala
Lumpur, 1985, p. 25.
²Article 150(8)(b)(i).
⁴Deemed to have come into force on 20 February 1971, i.e. the date when Parliament re-sat after being
dissolved in May 1969.
⁵Teh Cheng Poh v. Public Prosecutor (1979) 2 MLJ 238.
come into force." Since the ESCAR was then no longer an impugned law, a retrial was ordered. Teh was convicted and subsequently executed by hanging.

The government did not stop at the EEPA 1979. In 1981 Article 150, as discussed above, received a set of drastic amendments. The Constitution (Amendment) Act 1981 brought about major alterations to Article 150. Firstly, under clause (1) the words "or public order" were inserted after the words "or the economic life". This makes clause (1) bear three disjunctive ingredients in order to justify the existence of a 'grave emergency'. These are the security or economic life or public order in the Federation. In practice, however, this matters little because none of these ingredients may be brought into question in any court of law. Secondly, a new clause (2) was inserted whereby the Agong may proclaim an emergency even before "the occurrence of the event which threatens the security or the economic life or public order in the Federation". It is submitted that this exceedingly wide power may entail in an imaginary or made-up state of emergency under which pursuant to the new Article 150(8) all acts and things done in an emergency rule are rendered non-justiciable. Thirdly, clause (2A), gives the Agong the power to "to issue different proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued" under Clause (1). This empowers the Agong to declare and effect emergency rule in different parts of the country at different times.² Fourthly, Clause (2B) recognises an ordinance promulgation by the Agong "as an Act of Parliament".³ Thus the Agong acts as the Malaysian Parliament "except when both Houses of Parliament are sitting concurrently". Fifthly, clause (8) denies judicial review in respect of the Agong's satisfaction in proclaiming an emergency under clauses (1) and (2B). Under Clause (8)(b) no court is to have jurisdiction "to entertain or determine any application, question, or proceeding, in whatever form, on any ground"⁴ in respect of a proclamation of emergency under Clause (1), the continued operation of such proclamation, any Ordinance promulgated

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1 (1979) 2 MLJ 238 at p. 239.
3 Act A514/1981.
4 Clause (8) of Article 150. Inserted by s.15 Constitution (Amendment) Act 1981 [Act A514/81].

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under Clause (2B) or the continuation in force of any such Ordinance. With these powers emergency rule has effectively been made perpetual. As if these powers are not enough, the prime minister staged another set of amendments in 1983 whereby wherever the words "Yang Di Pertuan Agong" appeared under Article 150 the words "Prime Minister" were to be inserted. Although this endeavour failed, for reasons explained earlier, the fact remains that emergency powers are highly covetous.

In summary it may be concluded that after 1979 there were nothing left for the subject to bring into question or challenge in a court of law as far as emergency powers are exercised and enforced by the executive. With the ending of the Teh Cheng Poh saga, and the coming into force of the EEPA 1979 and the 1981 constitutional amendments any form or mechanism to check the supremacy of executive power in administering emergency rule becomes futile.

5.9. Conclusion

Although it is evident that the rule of law is subjugated to the pervasive role of emergency law in Malaysia, it is nevertheless instructive to view those emergency powers against internationally recognised legal standards. It is instructive to see whether the Malaysian position satisfies, say, Article 4 of the International Covenant on Civil and Political Rights 1966 (ICCPR) provides:

1. In the time of public emergency which threatens the life of the nation and the existence of which is publicly proclaimed, the state parties to the present covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Similar provisions are found in regional human rights treaties such as the European Convention of Human Rights, American Convention on Human Rights and

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1Section 20 Constitution (Amendment) Act 1983 [A566].
2See Chapter 3 under para 3.8 ante.
3On 12 June 1991 Parliamentary Opposition Leader, Lim Kit Siang gave notice to the Speaker of Dewan Rakyat, Tan Sri Mohamed Zahir, of a motion to ratify the 1966 International Covenant of Civil and Political Rights, which Malaysia had voted in support in the United Nations General Assembly but had failed to ratify in the last 25 years. He called on the Prime Minister, Dr. Mahathir Mohamed, to agree to allow this motion to be debated and adopted in the Dewan Rakyat. The motion never saw the light of day. See The Rocket Vol. 24/4 1991 p.9. See also the Parliamentary Debates, Dewan Rakyat 13 June 1991.

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the African Charter on Human Rights and Peoples' Rights. These covenants are complemented by the efforts of many international groups and efforts. At the 61st Conference of the International Law Association held in Paris in August 1984 a set of Minimum Standards of Human Rights Norms in a state of emergency was approved. The instruments include 16 articles which are non-derogable rights and freedoms to which individuals remain entitled even during a state of emergency. Among the 16 articles, 12 are found in the ICCPR and the European and American Convention.\textsuperscript{1}

The basic premise of these standards allow justiciability, bars prolonged and continuous administration of emergency rule, assures legislative supervision and in general favours the operation of the rule of law in ensuring that the rights of individuals are not abrogated by executive or authoritarian rule. The Malaysian situation as prescribed by Article 150 fails miserably when examined against international covenants such as the ICCPR as none of its provisions passes the international minimum standards.

Emergency powers were already formidable at the inception of the Constitution in 1957. Over the years these powers have grown by leaps and bounds, far exceeding the necessities of any emergency and by 1981 the courts have been totally barred from reviewing the subjective finding of the Agong as well as all things done by him on behalf of the executive under Article 150. The amendments introduced leave neither residual routes nor opportunities through which to test in a court of law acts of the executive during an emergency rule.

CHAPTER 6

Detention Without Trial
Under the Internal Security Act 1960:
An Executive Legacy to Perpetrate Freedom
and A Weapon to Rule

"Whenever one of the King's judges takes his seat, there is one application which by long tradition has priority over all others. Counsel has but to say, "My Lord, I have an application which concerns the liberty of the subject" and forthwith the judge will put all matters aside and hear it first. Lord Denning: Freedom under the Law p.3, quoted in Edmund Heward, Lord Denning A Biography, 1990.

6.1. Introduction:
This chapter highlights the executive's supremacy in maintaining power by way of detention without trial under the Internal Security Act 1960 (ISA). More than 20,000 people had been arrested under the ISA since it came into force in 1960 when it replaced the Emergency Regulations 1948. Due to its wide discretionary powers of arrest and detention, not to mention its range of other attendant powers, the ISA has become the most feared piece of legislation in the country. The major arguments advanced here mainly concern the denial of the basic rights of the individual during the exercise of the powers of arrest and detention. The executive's unbridled power to detain a person and the overall lack of remedies available to the detainee are the main issues involved. The restricted role of the courts as regards the the control through judicial review of the subjective findings of the executive is also of primary concern. It is also proposed to determine whether in the light of contemporary democratic principles there is any justification for the enforcement of the ISA to be enforced in a manner more drastic and draconian than was the case when it was originally enacted.

2Estimated figure given by the Ministry of Home Affairs, Kuala Lumpur for the period 1960-1990. This does not include those arrested and released by the police under s.73 of the ISA. The Government does not publish data or reports on arrested and detained persons. For the number of detained persons for the period 1980-1990 under the ISA and Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO), see Tables I and II, at pp.303 & 304 infra. The writer wishes to thank Abdul Aziz bin Idris, former Deputy Superintendent, Prisons Department, Kuala Lumpur for his help in securing data on detention under the ISA and the Emergency (Public Order and Prevention of Crime) 1969 (EPOPCO).
in 1960. Does preventive detention really serve its objective of preventing security-related offences against the state or is it an anachronistic and draconian device for the imposition of executive power? Our discussion leads to analysis of the significance of detention in the relationship between political decision-making and judicial responsibility. To what extent is it true that within the so called "subjective satisfaction" of the executive there lie many administrative areas which are political in nature and which the courts are markedly inadequate to counter in the discharge of their duty to uphold liberty? Is the ISA still necessary at this stage of Malaysia's nation-building? This chapter contends that through the power of detention the authorities are in fact effecting political supervision over persons alleged to have committed offences against the state.

6.2. Operation Lalang

On 27 October 1987 the police arrested 106 people, most of them prominent opposition leaders and academics, under an internal security operation called Operation Lalang.\(^1\) The exercise was carried out under the authority of sections 8 and 73 of the Internal Security Act 1960 (ISA) operating in tandem.\(^2\) Among those arrested and detained were Lim Kit Siang, Leader of the Opposition, Dr. Chandra Muzaffar, a prominent human rights activist, university lecturers, businessmen and some members of the United Malays National Organisation (UMNO) who were also critical of the government. They were alleged to have been involved in activities "prejudicial to the security of Malaysia", a general term often announced as the basis of an arrest and detention without trial in Malaysia. In an interview published in London, Tunku Abdul Rahman, the former prime Minister said, "This is becoming more or less a police State...I never dreamt they would resort to those methods of

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\(^1\) See New Straits Times 28 October 1987. All the country's controlled press published reports on the Operation Lalang. Utusan Malaysia, one of UMNO-owned newspapers complimented the government for what it termed as a "timely" act for the security of the country.

\(^2\) Although under s. 81 of the Internal Security Act 1960 (ISA) the authorities in Malaysia may publicise arrest and detention (but not to be published in the Warta Kerajaan (Government Gazette), the details of Operation Lalang detention were only published in the government's White Paper, tabled at the Dewan Rakyat in 23 March 1988. This report, prepared and presented by the government, alleged the normal catch phrase 'prejudicial to the security of the Federation...'.

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dealing with our citizens. The opposition has the right to talk against the Government, now he (Mahathir) has arrested all of them."

There was a political background to this drastic executive action. There was to be a huge political rally organised by the UMNO, the backbone of the Barisan Nasional coalition government in Kuala Lumpur in November 1987. This massive rally was essentially a political offensive by the UMNO against critics of the government in areas relating to the special status of the Malays and other indigenous natives. Lee Kim Sai, deputy president of the Malaysian Chinese Association (MCA) and a member of the Malaysian Cabinet had earlier raised the question of the particular status and special rights of the Malays who have been distinguished from the Chinese, Indians and other Malaysian communities as Bumiputra or "sons of the soil". Prior to the UMNO-orchestrated rally, some prominent UMNO leaders took exception to Lee's suggestion that the term Bumiputra should be reviewed in view of Malaysia's multi-racial society. Meanwhile a rally at the TPCA Stadium in Kuala Lumpur was allowed by the police where Lee was severely criticised for his assertions and accused of being "anti-Bumiputra and the Malays". Lee, after being

2Article 153 of the Constitution guarantees a special position for the Malays in regard to certain educational, trade or business quotas. This entrenched provision is a carry-over from the 1895 Federated Malay States Agreement.
3Bumiputra (sons of the soil) is not a constitutional term but a political one, coined by the late Tun Abdul Razak, Malaysia's second prime minister (1971-1976) in connection with the New Economic Policy (NEP). The Malays and natives of Sabah and Sarawak enjoy special rights under Article 153 of the Constitution. Non-Malay Malaysians had on various occasions tried to politicise the Bumiputra status but failed to effect change for an equal status for all Malaysians. As to why this cannot be a political reality, see Utusan Malaysia 6 November 1986, "Bangsa Melayu Tuan Di Negara Ini - Tunku" ("The Malays are the Masters of this Nation - Tunku"). Although this sort of political interjection has been asserted on many occasions, the Malays' special privileges have survived although it has somewhat been an aberration of racial harmony. See Government of Malaysia, Towards Preserving National Security, Command Paper No.14/1988, pp.6-17.
4The UMNO Youth movement demanded his resignation. See New Straits Times, Kuala Lumpur 18 October 1987; Utusan Malaysia 20 October 1987. Najib Tun Razak, the minister in charge of youth and sports and Mohamed Taib, the Chief Minister of Selangor State were the main speakers at the TPCA rally. Technically they and Lee Kim Sai were the ones who aroused communal feelings. But the two UMNO leaders were not subjected to arrest under the ISA.
5All public meetings, processions and political assemblies require police permits under s. 27 of the Police Act 1967 at least two weeks in advance of the scheduled event. In the event the police refuse to issue a permit, an appeal may be had but the appeal process is time-consuming. Many functions, mostly political ones organised by opposition parties, were jeopardised in this way. However, permits for political functions for the UMNO may be held as a matter of course.
6The Star 17 & 18 October 1987. Communal sentiments have always been the mainstay of Malaysian politics: The UMNO, the MCA and the MIC, being the three major power holders in the present Barisan Nasional coalition only accept Malays, Chinese and Indians respectively as members. The
urged to resign as a cabinet Minister by his UMNO critics, had to leave the country for a short duration to escape political harassment while the UMNO prepared itself for one of its biggest rallies. Tension was high and for a moment race relations again appeared as a looming threat to the country. The police warned against such a gathering fearing that large-scale rioting might occur. The advice of the police was heeded only days before 1 November 1987, the scheduled date for the rally. What followed were the arrest and detention for interrogation of the 106 people. Over the next few months the police released a number of those detained. Lim Kit Siang and a number of his party faithful continued to be detained by the Minister of Home Affairs under section 8 of the ISA for almost two years, and they were finally released only in 1989. As will be seen below, Operation Lalang is the event on which the government built up its case to deny judicial review of acts done ministerially under the ISA.

It is interesting to note that in Singapore, 16 people had been arrested under the Singaporean ISA in May 1987. Four of them applied to the High Court for a writ of habeas corpus. Their applications were dismissed and they appealed to the Court of Appeal. This case, popularly known as Chng's case, led to the making of

1 The last big-scale racial riots was on 13 May 1969. This triggered the 1969 Emergency rule.
4 Chapter 143 (Revised 1985). In 1963 when Singapore joined Malaysia the ISA [except for ss. 8(1) and 8(2)] was made applicable to the island state by virtue of the Malaysia Act 1963. The provisions relating to preventive detention under s.3(1) of the Preservation of Public Security Ordinance 1955 (POPSO) were still applied after being reworded after s.8(1) of the Malaysian ISA (MISA). From 1963 to 1965 several subsidiary legislation were enacted to further amend the preventive detention provisions, the most significant of them being LN 271/63, LN 334/64 and LN 335/64. LN 271/63 repealed s.3 of the PPSO and substituted it with ss. 8(1) and s 8(2) of the MISA. Section 73 of the MISA was made applicable to Singapore by LN 334/64 which also repealed the corresponding s. 17 of the PPSO. When Singapore was expelled from Malaysia and became independent in August 1965 the MISA remained applicable in Singapore by virtue of s.13(1) of the Republic of Singapore Independence Act 1965 (Act 9 of 1965). The MISA as was applicable in Singapore was reprinted as the Internal Security Act (ISA) Cap. 115 in the 1970 Revised Edition of the Singapore Statutes. In the 1985 Revised Edition of the Singapore statutes the ISA was printed as Cap. 143 and several sections were renumbered.
6 Ibid.
an important decision on the principle of judicial review of the executive's action under the ISA. Wee Chong Jin CJ, delivering judgement on behalf of the court, ruled that the so-called 'subjective test' of judicial review of executive discretion under the ISA should no longer be followed: the court observed that an 'objective test' which gave the court more extensive control over executive decisions to arrest and detain on grounds of national security was to be preferred.

Barely two months elapsed when the Singapore Parliament passed amendments to the Constitution of Singapore and the ISA in an attempt to restore the law to its former position i.e. to give the executive the power of determine whether to arrest and detain. The Amendment Bills were read for the second and third times and passed all in one day. The Malaysian Government followed this arrangement in 1989.¹

6.3. The Origins of Detention Without Trial in Malaysia

Preventive or executive detention as it is known today in Malaysia was originally an administrative practice aimed at individuals or groups of persons who were deemed by the colonial authorities to be potentially dangerous to the State. It was a political as well as an administrative measure exercised by the government in power and sanctioned under a specific law with a view to maintaining state security as well as law and order.

The earliest known provision relating to detention without trial practised in Malaysia was section 3(2)(b) of the Emergency Enactment 1930² although as early as 1914 under the then Emergency Enactment the High Commissioner had also been equipped with the power to arrest and detain persons in pursuance of emergency administration during the war. Through the mechanism of colonial government countries like Malaysia, India and Sri Lanka have been left with this ad-hoc political

¹See new s.8(6) of the Singapore ISA (Cap. 143). It was after this amendment in Singapore that Malaysia took similar position vis-a-vis the ousting of judicial review in matters concerning the minister's power to detain any person under the ISA. See Internal Security (Amendment) Act 1989 [A739].
²FMS Gazette 1930 Vol.XXII, p. 77.
measure which during the post-colonial period has proved itself to be of a peculiar political and administrative advantage to the inheritors of government or power.

Just as in the fields of criminal law and evidence, Malaysia received its experience of detention without trial from British rule via the Indian experience. On this Abdoolcader J said:

"Our Constitution and the laws providing for preventive detention have been primarily drawn from Indian sources and accordingly decisions of the highest tribunal in India, the Supreme Court of India, and indeed also of the high Courts of her several states are of great persuasive authority here."  

The ISA has been shaped by political developments in Malaya and Singapore since the first quarter of the century. The British authorities had been confronted by communist subversion as early as 1928 in Singapore when the South Seas Communist Party (SSCP) was formed in the island colony. The Malayan Communist Party (MCP) was formed in 1930 in Malaya followed by heightened communist-related disorders in the early 1930's. Although the enacting of the Restricted Residence Enactment 1933 (RRE) was partly to fulfil the need to overcome the activities of secret societies in Malaya the instrument was also used to counter the security problems caused by members of the MCP. Due to the armed struggle of the MCP in 1948 a state of emergency was declared that year by the then High Commissioner, Sir Edward Gent. The MCP has been declared illegal since then.  

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2 Yeap Hock Seng v. Minister of Home Affairs, Malaysia (1975) 2 MLJ 279 at 281.
4 See FMS Gazette 13 January 1933 (Gazette no. 16).
5 Federation of Malaya Gazette 12 January 1949. There had been a few initiatives on the part of the Federation to appease the communists since 1948 but none prevailed. The Baling Talks, held in 1956 in the Baling District of the State of Kedah between Tunku Abdul Rahman (representing the Federation of Malaya), David Marshall (representing Singapore) and British officers on the one side and Chin Peng, representing the MCP on the other, did not materialise into peace: For an account of this parley, see Wan Hamzah Awang, Detik Sejarah Rundingan Baling, (Historic Moments in the Baling Talks), Utusan Publications Sdn. Bhd. Kuala Lumpur, 1985. The final tri-partite talks, held in December 1989 in Bangkok, Thailand between the Malaysian Government, the Royal Thai Government and the MCP resulted in the final accord that spelt the end of militant communism in Malaysia. See New Straits Times 25 December 1989; Utusan Malaysia 24 December 1989.
With the coming into force of the Emergency Regulations Ordinance 1948 all earlier emergency instruments applicable to Malaya were repealed. On 12 August 1948 the High Commissioner proclaimed a state of emergency. Section 3 of the Ordinance gave the High Commissioner the authority to declare a state of Emergency in the Federation. His power to make regulations in a state of emergency was provided by section 4(1). These included regulations for the detention of persons. Regulation 17 empowered the Chief Secretary of the Federation to direct the detention of any person named by way of an order for any period not exceeding one year. Preventive detention was thus introduced, at the outset, primarily to counter communist-sparked violence occurring in the Federation of Malaya and which was then also becoming an increased threat to the safety and peace in the Colony of Singapore. By the end of 1948 the number of persons being held on detention was 5,110. In 1949 this figure went up to 8,500. Under Emergency Regulation 17C the government was empowered to deport non-citizens to their countries of origin. In 1950, 3,773 were deported. Another batch of 3,324 were also deported to China and 73 to India. Malaysia's experience in successfully overcoming guerrilla communism during British rule helped to develop its own distinctive strain of preventive detention laws. Although India never faced guerrilla communism on the scale experienced by Malaysia, nevertheless its early administration demanded this incarceration without trial - also on the avowed premise of the need of public order and security.

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1Federation of Malaya Ordinance No. 10 of 1948 w.e.f. 7 July 1948.
3Regulation 4(2)(b).
4On 21 July 1948 Singapore's Emergency Regulations Ordinance (Ordinance 17 of 1948) was proclaimed. Similar powers as those provided in the Federation's Emergency Regulations 1948 were accorded to the Governor-In-Council. Preventive detention was also extended under s. 20 of the Singapore Emergency Regulations (No. S220 of 1948).
6Ibid.
The term *preventive detention* has its origin in the language used by judges in Britain when explaining the nature of detention under Regulation 14(B) of the Defence of the Realm Consolidation Act 1914, an instrument passed at the outbreak of the First World War with the objective of, *inter alia*, (a) to prevent persons communicating with the enemy and (b) otherwise to prevent assistance being given to the enemy. Generally the Act empowered the government to frame regulations in pursuance of the purposes laid down, namely "public safety and the "defence of the realm". Lord Finlay L.C. in *Rex v. Halliday* ¹ said that preventive detention was "not punitive but precautionary".² Lord Atkinson, in the same case, defined preventive detention as "restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done".³ The object was not to punish a man for having done something but to intercept him before he did it and to prevent him from doing it. No offence needed to be proved, nor any charge formulated; and the justification for such detention was the mere suspicion on reasonable probability. Lord Finlay, however, qualified the use of preventive detention by saying:

> It appears to me...that it may be necessary in time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.⁴

This trusting disposition may be well understood in times of war when the executive is willingly given all the necessary power and encouragement to handle the emergency situations - just as was the case during Malaya's battle against communist terrorism during the period 1948-1960. In *Liversidge v. Anderson* ⁵, the majority of the Lords expressed the same confidence in the wisdom and moderation of executive

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¹(1917) AC 260 at p. 268.
²Ibid. at p. 269.
³Ibid. at 273.
⁴Ibid. pp. 268-269. See also *R. v. Home Secretary, Ex parte Greene* (1941) 3 All E.R. 104 at p. 108 (per Scott LJ).
⁵(1942) AC. 206.
officials. However, during peacetime the sentiments expressed by Herbert Morrison in specific reference to the Defence Regulations, are surely to be preferred:

"I am not going to use the argument usually put forward as a matter of courtesy that we do not believe the present Minister would be wicked but that we are afraid his successors might be. I think that any Minister is capable of being wicked when he has a body of regulations like this to administer."

The Indian Supreme Court referred to preventive detention as an "anticipating measure" to prevent the commission of an act. An Indian scholar has defined preventive detention as "the detention of a person under the law with a view to preventing him from acting in a manner prejudicial to the purposes such law purports to protect." In Malaysia preventive detention has been regarded as a counter distinction to the word "punitive". Detention without trial or preventive detention or executive detention amounts to the same thing: It is a process of arrest and imprisonment without formal charge against the individual who is thought by the authorities of a given state to be a threat to security or public order "or other specified objects of public interest." Detention without trial is easily the most draconian and controversial of executive powers available to a government vis-a-vis the basic rights of individuals. The atrocities and afflictions against the individual detainee brought about by arbitrary detention speak louder than words. Nevertheless words are still needed, even by the United Nations and freedom-fighting non-governmental organisations like Amnesty International. Words such as "draconian", "inhuman", "inhuman", ...

1Viscount Maughan, Lord Macmillan, Lord Wright and Lord Romer (Lord Atkin dissenting).
5In Public Prosecutor v. Musa (1970) 1 MLJ 101, Othman J held that the act of the Minister in detaining a person was not to be construed as a punishment but purely as an exercise of an administrative function. In the Singapore case of Lim Hock Siew & Ors. v. The Minister of the Interior and Defence (1968) 2 MLJ 219, Wee Chong Jin CJ ruled that an extension order of detention must be authorised by the authority which issued the original detention order.

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"dictatorial", have been used by many quarters to describe what in reality is "detention without trial" or "executive detention" or "preventive detention".1

In Malaysia2, Singapore3, India4, Sri Lanka5 and South Africa6 the term preventive detention is constitutionally recognised and administratively used to denote the act of detaining a person who is deemed by the authority to be a threat "to security and or public order." As the term implies, it is a preventive measure executed before the occurrence or happening of the anticipated act by elements suspected of being security risks. The terms "security risk" or "prejudicial to the security of Malaysia" mean different things to different people but the courts have come to accept the fact that they are not in the position to know the security risks involved in every given case.7 Preventive detention has been a constitutional term in Malaysia since merdeka.8 Once the government determines that a subject has become a security risk and as long as the government can show that it has "a valid legal power" to detain, it is the end of the matter and the courts willingly abstain from making any further inquiry.9

6. 4. The Internal Security Act 1960 (ISA)

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2Article 149 of the Constitution; The Internal Security Act 1960.
3By L.N. 231/63 the Malaysian ISA was extended to Singapore on its entry into Malaysia in 1963. On Singapore's departure from Malaysia (w.e.f 15 October 1965) the ISA continued to be applied to Singapore by operation of the Modification of Laws (Internal Security Act 1960 (Amendment) Order 1965). Since 1965 Singapore has been having its own ISA which is in pari materia with the Malaysian counterpart.
4Article 22 of the Constitution of India.
5Article 56 of the Constitution of Sri Lanka.
7See R. v. Secretary of State ex parte Hosenball (1977) 1 W.L.R. 766, per Lord Denning.
8See Articles 149 and 151 of the Constitution. The column heading of Article 151 reads: "Restrictions on preventive detention". The term preventive detention, though not defined, is also used under Article 151(1) of the Constitution.
The ISA was enacted with the main aim of countering militia communism and subversion. The Emergency Regulations 1948 had served their purpose and the Emergency ended on 30 July 1960. The Emergency Regulations Ordinance 1948 was repealed but its Regulation 17 i.e. the provision that provides for detention without trial found its way into Part II of the ISA. As to the temporary nature of the ISA, Hickling, its original draftsman, commented in 1962:

...I must hope that the practice of imprisonment without trial, charge or conviction admitted by the Act 1960 will not be regarded as a permanent feature of the legal and political landscape of Malaya or for that matter of Asia generally.1

The decision to continue to administer the country under draconian law while the emergency was officially at an end must be looked at from the point of view of the executive who made this political decision. The fear of recurring terrorism must have occupied the thinking of government leaders then. In this connection, on 21 June 1960 the late Tun Abdul Razak Hussein2, Deputy Prime Minister who was also Home Minister informed the Dewan Rakyat that there were still 583 armed terrorists in Perlis, Kedah and Northern Perlis and Western part of Kelantan and across the Malaysian Thai border. He told Parliament that the security of the Federation was still very much in issue on the basis that there was still a need for the people "to be protected from communist subversion."3 He also gave the assurance that the ISA would be used with the utmost care so as to avoid abuse.4 However, communist terrorism, which was the basis of the ISA's enactment in 1960, lost its relevance, at least since the 1970s and even more so after the 1989 Bangkok Accord following which terrorism from the communists ceased altogether.5 Hence the need to continue

2He was also then the deputy prime minister. Razak's objective in enacting the ISA has not been modified over the years. The legislation was to facilitate certain extraordinary powers to combat terrorism and organised violence prejudicial to national security. It was never intended to be used as a political tool.
3Parliamentary Debates, Dewan Rakyat 21 June 1960, Clmn. 562
4Ibid.
5The Bangkok accord of 24 December 1989 was entered into by Malaysia, the CPM and the Thai Government concerning the remaining communist terrorists within the Malaysia-Thai border. See below under para 6. 8.
with an emergency-like administration has been even more questionable in view of the total absence of the ISA's original premise.

The ISA was enacted under the general authority of Article 149 which has been designated as the constitutional canopy for "legislation against subversion and action prejudicial to public order".\(^1\) Article 149\(^2\) stipulates that for an Act such as the ISA to be valid all that Parliament has to do is to recite that "action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation" in respect of three main situations falling under its ambit: organised violence against person or property\(^3\); the excitement of disaffection against the Yang Di Pertuan Agong or any government in Malaysia\(^4\); and the promotion of feelings of ill-will and hostility between different races or classes of the population\(^5\). The words "to excite disaffection against the Agong or any government in Malaysia" connote that even normal political criticisms against the government in power could be construed as being violative of article 149 and if the Home Minister was satisfied that such action was "prejudicial to the security of the Federation" then he was empowered to detain such persons under section 8(1) of the ISA. The ISA is also applied to any attempt to alter "anything that is established by law."\(^6\) This appears to be so wide a power that almost anything done by legal instrument by the government, albeit draconian, may be taken action against and deemed valid. Action taken by virtue of any law passed under the recital of Article 149 also covers public supply and services\(^7\) and finally, anything done or about to be done that is considered "prejudicial to public order or security of the Federation" may be acted against.\(^8\)

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1See heading of Article 149. The ISA, like the Emergency (Public Order and Prevention of Crime) 1969 (EPOPCO), is also facilitated by a set of rules and regulations that cater for a variety of matters pertaining to persons under detention. Two of these Rules are the Internal Security (Detained Persons) Rules 1960 and Internal Security (Advisory Board Procedure) Rules 1972.

2The merdeka version of Article 149 was under Act 10/1960, w.e.f. 31 May 1960. The article has been amended twice since then: Act A442/1978 and Act A514/1981.

3Article 149(1)(a).

4Article 149(1)(b).

5Article 149(1)(c).

6Article 149(1)(d).

7Article 149(1)(e): w.e.f. 31 December 1978 inserted under s. 5 A442/1978.

within any or all of the above provisions are valid notwithstanding that they are inconsistent with the fundamental liberty provisions under Articles 5, 9, 10 or 13 of the Constitution. The ISA overrides fundamental liberties.

The ISA\(^1\) contains three parts and is divided into six chapters, 86 sections and three schedules. Part I is devoted to provisions relating to internal security, Part II relates to security areas and Part III pertains to miscellaneous matters. The entire Act is administered by the police with the Minister at the apex of it. In the words of the International Commission of Jurists (ICJ) the ISA is "a comprehensive and exhaustive legislation for the executive".\(^2\) A local MP had declared that "This infernal and heinous instrument has been enacted by the Alliance Government at a time when the Emergency was supposed to be over. Then it promptly proceeds to embody all the provisions of the Emergency Regulations which during the Emergency had to be reenacted every year, but now it is written into the statute book *ad infinitum*..."\(^3\) Even Dr. Mahathir Mohamed, the present prime Minister while being a government backbencher in 1966 admitted that "no one in his right senses like the ISA. It is in fact a negation of all the principles of democracy."\(^4\)

Sections 8, 22, 57 and 73 have been the most controversial because of the powers they give to the Minister and the police respectively to effect arrest and detention as well as to allow other acts that are normally invoked during an emergency. Section 8, echoing the words under Article 149((1)(f) of the Constitution, empowers the Minister in charge of internal security\(^5\) to detain any person if he is "satisfied that the detention is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the

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\(^{1}\) Act 18 of 1960: Received Royal assent on 17 July 1960.
\(^{4}\) The statement was made in the course of debating the Internal Security (Amendment) Bill 1966 which Dr. Mahathir supported. See *Parliamentary Debates, Dewan Rakyat*, 22 March 1966 Clmn. 6882.
\(^{5}\) The minister in charge of internal security in Malaysia is officially called the Minister of Home Affairs or *Menteri Hal Ehwal Dalam Negeri* in Malay. It has been the practice that this portfolio be held by a senior member of the Cabinet. Since 1986 the portfolio has been held by the Prime Minister, Dr. Mahathir Muhamed who entrusts much of his day-to-day duty to his trusted aide, Datuk Megat Junid, Deputy Home Minister.
maintenance of essential services\(^1\) therein or to the economic life hereof. . ."; and if he is so satisfied, he may "make an order\(^2\) directing that person be detained for any period not exceeding two years." The original provision of section 8(1) gave the power to detain to the Agong and not to the Minister. This was changed in 1966\(^3\) when the King's power was taken over directly by the Minister, a position which even Singapore does not emulate today.\(^4\) There was no clear rationale for this "take over" of detention power by the Minister. In effect, by virtue of Article 40 of the Constitution, the Agong essentially acts on advice of the cabinet or anyone acting on its behalf. In this regard, any detention order signed by the King was really the executive order of the Minister. The only plausible reason to the change, as elucidated by a former attorney general,\(^5\) was that with hundreds of detention orders to be signed it was highly inefficacious for the King to be signing so many orders every year.

Section 73 gives the police wide powers of arrest without warrant with a view to detaining a suspect under section 8. All that is required is for a police officer to have "reason to believe that [a person] acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof."\(^6\) Offences under the Act are punishable with imprisonment for a term exceeding three years and are non-bailable.\(^7\) Section 22 empowers the Minister to ban the printing and

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\(^1\) Essential services as defined under s. 8(2) of the ISA means "any service, business, trade, undertaking, manufacture or occupation included in the Third Schedule."

\(^2\) The detention order made by the minister is administratively known as the D.O. which stands for detention order. The D.O. is normally submitted in triplicate to the Minister for signing. In 1991, as a result of an oversight, the Minister signed only the first copy of the respective D.Os for some 200 detainees. The respective second and third copies of the D.Os, meant for the detainee and the superintending officer in the Prisons Department, were not signed. This caused the release of the 200 detainees. See The Star 14 May 1992.


\(^4\) From Malaysia Day in 1963 until Singapore's exclusion from Malaysia in 1965, the ISA 1960 was part of the laws of Singapore. Since 1965 Singapore has been having its own version of the ISA but still largely in pari materia with the Malaysian version. The opening words of s. 8(1) of the Singapore ISA say "If the President is satisfied. . ." However, the words "economic life" as found under the Malaysian proviso have not been imported into the Singapore version.

\(^5\) Discussion with the late Tan Sri Abdul Kadir Yusof on 18 May 1976. See Notes in File: TMU (Timbalan Menteri Undang-Undang/Deputy Minister for Law) 025/76 "Akta Keselamatan Dalam Negeri ."

\(^6\) Internal Security Act 1960 s. 73(1)(b).

\(^7\) Ibid. s. 72(2).
circulation of publications that are deemed prejudicial to the security and public order of Malaysia.¹ Section 57 under Chapter III, prescribes the death penalty for offences relating to unlawful possession of firearms, ammunition and explosives within a given security area. Conviction under this section carries the death penalty. The Attorney General is given a wide discretion as to whether to prosecute an offender under section 57 of the ISA or under section 8 of the Arms Act 1960² which upon conviction carries a lesser penalty.³ There have been cases challenging his wide and arbitrary power in prosecuting persons under various instruments. However, none of these cases has found favour with those who allege that the Attorney General wields discriminatory powers of prosecution, a state of affairs which has been alleged to contravene Article 8(1) of the Constitution on the ground of discrimination.⁴ Amendments to the Internal Security Act, totalling 19 in all since its enactment in 1960, contain an array of enhanced powers for the Minister as well as for the police.⁵

¹Since the coming into force of the ISA in 1960 there have been thousands of publications proscribed by order of the minister under s. 22. These were contained in the various Internal Security (Prohibition of Publications) Order for each given period. The Malay Dilema, written by the present prime minister in the aftermath of the 1969 racial riots and containing criticisms against the then government’s handling of the crisis was banned from circulation in 1970. The ban was only lifted when Dr. Mahathir Mohamed became Prime Minister in 1981. See Internal Security (Prohibition of Publications) Order 24/1970.

²Act 206 of 1960.

³Under s. 8 of the Arms Act 1960 conviction of the offence of unlawful possession of arms carries a maximum penalty of 7 years or a M$10,000 fine or both. The Attorney General may also exercise his discretion, in relation to a scheduled offence, whether to prosecute an offender under the Firearms (Increased Penalties) Act 1971 of which s. 3 thereof prescribes the death penalty for the discharging of a firearm with intent to cause death.


In all these amendments the trend has not been to strengthen the rule of law but to add to the already formidable array of executive powers.

In Malaysia, apart from detention under the ISA, there are several other types of executive detention among which are those connected with public order and the prevention of crime\(^1\), restricted residence\(^2\), dangerous drugs\(^3\), immigration\(^4\), and police administration\(^5\) over the civil rights of the individual. In fact powers of arrest and detention within these instruments are so varied that one finds areas of overlap and duplication.\(^6\) The Public Order (Preservation) Act 1958 (POPA)\(^7\) for instance, empowers the police to arrest and detain a suspect for 24 hours without warrant.\(^8\) Under the Criminal Procedure Code a suspect may also be arrested and detained by the police for up to 15 days with the authority of the magistrate.\(^9\) Although the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) is an emergency instrument created by ordinance by the Agong under section 2 of the Emergency Ordinance 1969\(^10\) it has at its disposal powers of arrest and detention that are similar to those under the purview of the ISA. The EPOPCO is an equally draconian instrument in that police and ministerial powers are similar to those enforced under the ISA. The only difference is in its target group: the ISA is in the main activated against offences related to security while the EPOPCO is mainly concerned with hard-core crimes which do not have sufficient evidence for the purpose of prosecution in a court of law. However, legally, these target groups are not defined and thus the authorities may indeed swap the political group with the criminal

\(^1\)The Public Order (Preservation) Act 1958 (Act 296), Prevention of Crime Ordinance 1959, and Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) as revalidated in 1979. These three instruments are indeed confusing in that their titles, just as their contents, bear many similarities inter se.

\(^2\)The Restricted Residence Enactment 1933 (Cap. 39).

\(^3\)See The Dangerous Drugs Act, 1952 (Act 234); The Dangerous Drugs (Forfeiture of Property) Act 1988; The Dangerous Drugs (Regulations) 1989 and The Dangerous Drugs (Special Preventive Measures) Act 1985. See also The Dangerous Drugs (Rules) 1987.


\(^5\)The Police Act 1967: s. 27.

\(^6\)See Chapter 4 infra.

\(^7\)Act 296/1958.

\(^8\)Section 17 Public Order (Preservation) Act 1958 (POPA).

\(^9\)Section 117 Criminal Procedure Code (Cap. 6 FMS).

\(^10\)P.U.(A) 187/1969.
one if the whim so exists. As has been pointed out earlier, the EPOPCO has been made into a normal peace-time legislation after the Enactment of the Emergency (Essential Powers) Act 1979 when it was 'converted' into a normal Act of Parliament.\(^1\) Having reached this status, it is on par with the ISA so far as arbitrary arrest and detention are concerned.

The ISA, however, remains the most controversial and repressive of these laws in terms of the unbridled powers accorded to the Minister concerned\(^2\). Indeed the severity of the ISA is such that it could easily pass as a wartime legislation, comparable to the infamous Regulation 18B of Defence of the Realm Act 1939 in the United Kingdom that made *Liversidge v. Anderson*\(^3\) the cornerstone of the subjective determination of executive power in cases involving the security of the State.

### 6.5. The Mechanics of Detention

There are two types of detention under the ISA: Police arrest and detention, executed under s. 73 and Ministerial detention under s. 8. Arrests are normally made "in the quiet of the night, during the pre-dawn hours" when the subject or subjects are thought to be "less volatile and less resisting".\(^4\) Police detention under section 73 may be effected up to 60 days. Whilst there have been few reported cases involving torture during Ministerial detention under s. 8, "tales of torture" while undergoing police detention under s. 73 have been quite rampant.\(^5\) which period police brutality has been alleged to have taken place.\(^6\) The following account may be regarded as being typical:

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1. See Chapter 5 *ante*.
2. The ISA empowers the Minister of Home Affairs to act in accordance with wide powers therein: among others, see sections 8, 73, 52.
3. (1941) A.C 206.
4. Interview: Inspector Salleh bin Bujang (retired), Johore Bahru 12 March 1990. The writer, while serving as Deputy Home Minister 1976-1978, also made periodic observations on the reports submitted by the police on ISA-related cases.
Interrogation techniques were alternated to humiliate and frighten the detainees and to identify their weaknesses. Verbal abuse were common. Some were threatened with physical harm to themselves or to their spouses. Others were stripped naked during interrogation, or forced to crawl on the floor, collecting cigarette butts purposely scattered there. One was repeatedly made to walk blindfolded so that he would bump into walls.  

Accounts of the sufferings and ordeal of detainees are many and varied. One detainee, a convert to Christianity, recalled, "Various attempts were made...to coerce or induce me to renounce Christianity and to convert back to Islam against my will." Another detainee described the long hours of interrogation as "almost non-stop for 24 hours in the first four days of [his] arrest with hardly any rest". Sitting on a stool, he was forced to write for more than 80 hours [in four days] on events in his life, some of which occurred more than 13 years previously. A university professor, detained for six years under section 8, described his arrest as involving the police "kicking" his front door in when he did not hurry enough in opening it. He was spitted upon and received inhuman treatment purely on account of his involvement in a political party that opposed the government. Two trade unionists were detained under section 8 for almost 12 years for alleged pro-communist activities. A noted academic and political leader was denied legal representation during the first two weeks of his arrest. The

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1 Suhaini Aznam, op. cit.
2 Ibid.
3 Ibid.
4 This was the case of Dr. Syed Husin Ali who was an ISA detainee for six years (1974-1980). He was reinterrogated after being sent to Kamunting detention camp in a police lock up in Kuala Lumpur. This second interrogation process was even more humiliating than the initial one. His room, 10 ft. by 10 ft., was without a mattress or planks. He had to sleep on the cement floor of the lock up. The light was switched on continuously. He did not know whether it was day or night. He said, "There were no window just little vents... 5 Police officers took turns to interrogate me for 50 hours." He claimed to have been slapped, kicked, pushed and his face spitted upon. Obscene words (dicarut) were used. At one point he was confined to a dark room for 4 days. He was taken out for further questioning from 9.00am to 10.00pm for two weeks: This account was given by Dr. Syed Husin to the writer in an interview in Kuala Lumpur on 4 August 1992. See also Ismail Sabri Yaacob, "Layanan Terhadap Tahanan Politik Di Malaysia" ("Servicing the Political Detainees in Malaysia"), LL.B. academic exercise, University of Malaya, 1982.
5 Re R. Gunaratnam: He was detained for 11 years 8 months beginning 14 November 1970 at the age of 24 and released in 1982 on the allegation that he was involved in communist activities. He was, prior to detention, an ordinary member of Parti Rakyat Malaya, (The People's Party), an influential political party in the 1960's. In Re S.N. Rajah, executive secretary to the United Malayan Estate Workers (UMEW ) was detained for 11 years two months (16 Nov 1970 - 18 January 1981) for behaviour "prejudicial to the security of the Federation".
authorities also took away his Quran and prayer mat.1 The general conditions of a police lock-up, used in the course of police interrogations has been described as "dirty, congested and degrading."2 Indeed description of the general conditions in a Malaysian police cell have never been complimentary.

A former cabinet Minister who was detained in 1970 described his sojourn in a Kuala Lumpur lock-up prior to detention proper as "most appalling" in that he was made to sleep on a bed hardened by coconut husks with no blanket.3 There is a considerable literature consisting of personal accounts of detention in the past decade by ex-detainees. The collegiate of notable ex-detainees in Malaysia is an ever-enlarging circle. Students, lecturers, writers, lawyers, trade unionists and even Ministers have either written personal accounts of their experiences under detention or alternatively related them to others.4

Generally, in executing power under sections 73 and 8, the following pattern of events take place: The police, represented by the Special Branch or S.B.5 put the subject under surveillance for a certain duration of time. For instance, in the case of a politician or a trade unionist who is deemed to be "prejudicial to security", his speeches are tape-recorded and his movements, contacts and overall activities too are

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1Ismail Sabri Yaacob op. cit. at p. 24. See also Kassim Ahmad, Universiti Kedua, Kuala Lumpur, 1984, p. 5.
3Abdul Aziz Ishak, Special Guest: The Detention in Malaysia of an Ex-Cabinet Minister. Oxford University Press, Singapore, 1977, pp. 60 & 70. Abdul Aziz, Agriculture Minister during the premiership of Tunku Abdul Rahman, is the only ex-cabinet minister in Malaysia to have been detained under the ISA while holding office. Abdul Aziz was detained in 1965 on alleged involvements in the Indonesian "Confrontation" against Malaysia in 1964. This allegation, denied by him in Special Guest, was never proved. Released in 1967, he was restricted in his movements until 1971. The present finance minister, Anwar Ibrahim was also detained under the ISA in 1975 while being active as a student activist at the University of Malaya. There had been two deputy ministers, Abdullah Ahmad and Abdullah Majid, detained under the ISA in 1978 on alleged communist involvements).
5The Malaysian Special Branch (S.B.) was developed from the British experience in Singapore after the First World War. The Special Branch Straits Settlements was formed in 1933, the year the Restricted Residence Enactment came into being in the Federates Malay States. The Malays had had a thorough knowledge of internal security mechanisms from the British by the time the Emergency was over in 1960. See Alun Jones, Internal Security in British Malaya (1895-1941), University of Yale, 1970 (PhD).
jotted down in a special file. All materials collated by the Special Branch at district level are studied by a preliminary committee called the Contingent Assessment Committee (CAC). For this the police operates under section 73 of the ISA. Under s.73 no authorisation is necessary for detaining a person for 24 hours. A Police inspector of the rank of Inspector and above may authorise detention for another 24 hours. Beyond this, up to 28 days, the authorisation of an Assistant Superintendent of Police (ASP) is required. If the 28 days are still insufficient then a District Superintendent of Police or his superiors may authorise an 'interim interrogatory confinement' for another 30 days. If this is approved, the Director of Internal Security at the police headquarters will be informed and he will inform the Minister. At this stage the Contingent Assessment Committee (CAC) makes further findings in respect of the case. The CAC now bases its findings on the interrogation reports. After making its findings the file goes to the Federal Assessment Committee (FAC) which makes its decision. The FAC is chaired by the Deputy Director of Special Branch II. If the FAC decides to recommend continued detention, the case file is sent to the appropriate section of the S.B which then prepares a DO (Detention Order) for the Minister of Home Affairs together with the case file. Having seen this the Minister determines whether to confirm the detention or set the subject free. Normally the police utilise about 40 to 50 days out of the 60 days allowed for an initial arrest and detention under s. 73. The Minister very seldom disturbs the finding of the police when they recommend detention. Even the length and the place of detention are

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1 In 1991 there were 270 police districts in Malaysia (including Sabah and Sarawak). Largely, a police district conforms to the normal administrative district.
2 s. 73(3)(a) ISA & s.3(3)(a) EPOPCO.
3 s.73(3)(c) & s.3(3)(c). EPOPCO.
4 In Malay styled as Pengarah Hal Ehwal Keselamatan Daalam Negeri.
5 S.B. Form 30 & EPOPCO Form 12.
6 Contents of the case file invariably include the following:
   (i) Form POL. 169 - containing details of person arrested and ground for requesting detention. Details of activities of subject and recommendations of the police.
   (ii) Attached to Form POL. 169 is an allegation of facts prepared by the Contingent Committee. All activities of the subject are put in chronological order.
   (iii) Statement as required under s.11(2)(b) ISA. (But this statement is normally withheld by Police on ground of 'national security'. This is the statement that the courts are precluded from viewing and assessing. While the writer was Deputy Home Minister in 1977 this statement was often missing from the case file. On many occasions it had to be asked for.)
recommended by the police in the case file submitted to the Minister. If the Minister commits a subject to say, a two year detention under section 8, the initial detention period under section 73 is not taken into account. Thus when a person is committed by the Minister to two years of detention, invariably he or she would have served about two months already in advance.

A person detained "pending enquiries" under section 73 of the ISA is deemed to be in lawful custody. The section empowers a police officer not below the rank of inspector to arrest without warrant and detain pending enquiries any person in respect of whom he has reason to believe (a) that there are grounds which would justify his detention under s. 8; and (b) that the person in question has acted or is about to act or is likely to act in any manner "prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof." As we have seen, the period of "detention pending enquiries may be from 24 hours up to 60 days. In a number of cases even this maximum 60-day initial detention has been exceeded, a matter that has in the past drawn international concern. Be that as it may, domestic as well as international concern over such matters is of little avail. The executive has been continually practising this "interrogatory" tactics without any compunction. Although the number of persons detained under the ISA has been somewhat reduced to 151 by 1990 the fact remains

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1ISA s. 73(7).
2Section 73(3) ISA. Cf. s. 74(3) of the Singapore ISA: The initial detention in Singapore is for 24 hours. With the authority of a police officer of or above the rank of Assistant Superintendent this initial period may be extended to 48 hours. However this period may be extended for a further period of 28 days if a police officer of or above the rank of Superintendent is satisfied that the necessary enquiries cannot be completed within 48 hours.
4Jabatan Penjara, Kuala Lumpur (Prisons Department, Kuala Lumpur): See Letters of (a) Penguasa Tempat Perlindungan Taiping (Superintendent of Place of Detention, Taiping), (b) Superintendent of Place of Detention, Batu Gajah (c) Superintendent of Place of Detention, Muar and (d) Superintendent of Place of Detention, Pulau Jerjak, Penang to the Director of Prisons Department Kuala Lumpur respectively bearing reference (81) Dlm. TTP.TPG (O/T) 134/87-3 dated 19 September 1991, (108)Dlm.PP.BG.5/85 dated 8 October 1991, (24) Dlm. PPAM.02-012 dated 24 September 1991 and (155) Dlm.PPA.216-3 dated 17 October 1991. The authorities concerned with preventative detention in Malaysia, unlike the practice observed prior to merdeka, are not compelled by law to publish or report on the number of persons detained from time to time at the various detention centres although under s. 21 of the ISA the Police may inform by notification some details on a particular arrest. See Tables 1 & 2 at pp. 303-304 infra.
that the powers conferred upon the executive to detain subjects indeterminably continues to exist unchecked. A leader of the Malaysian opposition in the Dewan Rakyat who was twice detained under the ISA, refers to the "detention pending enquires" period as a "most trying and soul-searching experience."¹

There are three basics on which the executive exercises its discretion under s. 8 in determining whether or not to detain a person. Section 8(1) provides:

If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereafter referred to as a detention order) directing that person be detained for any period not exceeding two years.²

It should be noted at this juncture that there has been no definition of the words "prejudicial to", "security", "essential services" or "economic life" by the courts or in any of the enabling provisions of the relevant legislation pertaining to detention without trial.

It is clear that the Minister is not duty-bound to detain a person once he is satisfied that he is prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life of the country. The word "may" in section 8(1) gives him a discretion.³ But as we have already made clear, the invariable practice is to follow police advice. The cabinet is not normally involved in determining whether or not to detain a subject.⁴ At best, the Minister need only inform his cabinet colleagues that the detention of a specific subject involves national security. There the matter ends unless of course the Prime Minister himself

¹Interview with Mr. Lim Kit Siang, Secretary General of the Democratic Action Party (DAP) : 30 December 1991, Kuala Lumpur.
²Section 8(1) of the Singapore ISA (Chapter 139) which originates from the Malaysian version, is substantially similar to s. 8(1) of its Malaysian counterpart. There are, however, a few points of difference. In the case of Singapore, the President has to be "satisfied" while under the Malaysian ISA the Minister's satisfaction is primary. The Singapore subjective satisfaction of the President has been interpreted in Lee Mau Seng v. Minister for Home Affairs, Singapore (1971) 2 M.L.J. 137 as meaning "constitutional satisfaction" i.e. on the advice of the Minister concerned with internal security. In Malaysia the "satisfaction" is as per the minister's own subjective finding.
³In Singapore the position is that once the President's satisfaction under s. 8(1) is fulfilled, detention "shall" follow suit. In Malaysia, after the Internal Security (Amendment) Act 1965, the 'satisfaction' has been no longer at the instance of the Agong but at the instance of the Minister of Home Affairs.
⁴See H.F. Rawlings, op. cit. at p. 178.
(if he is not the Minister in charge of internal security) on political or extraneous reasons, directs the Home Minister to consider releasing a particular subject.

Article 151 of the Constitution deals with the rights of the detainee under detention and is reproduced under sections 9, 11 and 12 of the ISA. Similar provisions are also contained under the EPOPCO.¹ These rights of the detainee under Article 151 have been regarded by a scholar as 'constitutional safeguards'². These rights include the right to be informed of the grounds of his detention as soon as may be; the right to be informed of the allegations of fact on which the detention order is based;³ to be served with a copy of the detention order as soon as possible after it is made;⁴ to be entitled to make representations against the order to an advisory board;⁵ to be furnished in writing with the grounds and allegations of fact on which the order is made, and any other particulars, which in the opinion of the Minister, the detainee may reasonably require in order to make his representations against the order to the advisory board.⁶ All these do appear to be somewhat helpful to the detainee in securing his freedom in the event the authorities violate any of the above provisions. However, they are rather illusory because under Clause (3) of Article 151 no authority is to disclose facts "whose disclosure would in its opinion be against national interest". This serves as a wide shield protecting the executive from perusal. Moreover, what is 'national interest' is not defined. It may easily include political considerations by the Minister.

The detention order made by the Minister may direct the detainee to be detained for up to 2 years.⁷ As pointed above, the subject would already have served his 60-day preliminary detention in a police lockup. The Minister may direct that the

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³Art 151(1)(a) and article 151(3).
⁴ISA s. 11(1).
⁵Art 151(1)(b) & ISA s. 11(1).
⁶ISA s. 11 (2)(b).
⁷ISA : s. 8(1).
period of any such order be extended for further periods not exceeding two years at a time.\textsuperscript{1} The Minister is vested with discretion to suspend the detention order after subjecting the detainee to certain restrictions. However he may at any time revoke any such direction, thus bringing the detention order into force once again. He may also release the subject conditionally or unconditionally as he pleases.\textsuperscript{2}

Detention orders are reviewed at regular intervals of not more than every six months by an advisory board that will on the completion of each review make the necessary recommendations to the Agong.\textsuperscript{3} The detainee, within three months of his detention, may submit his appeal or representation to the Agong. Every petition to the King must be accompanied by an assessment report of the advisory board.\textsuperscript{4} The advisory board, chaired by a person with a judicial qualification and composed of two other members appointed by the Agong on the advice of the Minister and empowered to summon witnesses and call for documents, is not a judicial body. The board has many of the powers of a court but its decision on the fate of a detainee is not final and conclusive. Nor does it bind the government. Ultimately the decision whether or not to continue to detain a subject rests with the Minister. The power and function of the advisory board constituted under article 151(2) have also been downgraded since 1957. The original three-month period within which the board must submit its findings to the Agong has been vaguely expanded so as to include the clause "or within such longer period as the Yang Di Pertuan Agong may allow."\textsuperscript{5} Thus a detainee may languish in jail for up to two years before his appeal to the King gets an opportunity of being heard. This change was the result of \textit{Re Tan Boon Liat} \textsuperscript{6}, a case in which an application for a writ of habeas corpus was granted by the Federal Court when it was established that the authorities continued to detain the applicant-detainee

\begin{itemize}
\item \textsuperscript{1}ISA: s. 8.
\item \textsuperscript{2}ISA: s. 10.
\item \textsuperscript{3}ISA: s. 13. For the purpose of such review suspended orders are deemed to be still in force and thus reviewable by the Board.
\item \textsuperscript{4}Article 151(2) of the Constitution read with s. 12 of the ISA.
\item \textsuperscript{5}See Constitution (Amendment) Act 1976 Act A354. For an explanation by the government on this amendment, see Mohamed Salleh Abas, "Amendment of the Malaysian Constitution", (1977) 2 MLJ xxxiv at xi.
\item \textsuperscript{6}(1976) 2 MLJ 83.
\end{itemize}
beyond the three-month period within which period the advisory board was bound (according to Article 151(1)(b) in its original form) to consider the detainee's representation and forward recommendations to the Agong. Article 151(1)(b) stipulates that it is the detainee who has to take the initiative in making the representation to the Agong.

Generally detainees do not find the facility of making representations to the advisory board useful because they know that the board's recommendations do not bind the government. The record shows that in 1990 alone, there were only 12 representations by detainees for the review of the advisory board, an indication that the appeal process is not being taken seriously. An ex-detainee describes the advisory board as a "mere sounding board for the executive without any original power to determine on the freedom of the detainee."3


The classic case of Liversidge v. Anderson 4 underpins present day detention laws in Malaysia and Singapore. While many countries in the Commonwealth including the Caribbean have drawn inspiration from Lord Atkin's dissent5, Malaysia and Singapore have chosen to have more regard to the majority view of the subjective test.6 In Singapore Liversidge crept into precedent in 1966 with the decision of Re Ong Yew Teck 7 and in Malaysia the same end-result was achieved chiefly through Stephen Kalong Ningkan v. The Government of Malaysia 8 and Karam Singh v.

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3 Interview: Cikgu Musa Salleh, a former teacher and a member of the Pan Malaysian Islamic Party (PAS) who was detained under the ISA for the period 1963-1968 (Interview on 18 December 1991 at Kota Bahru, Kelantan.) See also Public Prosecutor v. Musa (1970) 1 MLJ 101.
4 (1942) AC. 206; (1941) 3 All E. R. 338.
6 Viscount Maugham, Lord Macmillan, Lord Wright and Lord Romer (Lord Atkin dissenting).
7 (1960) 26 MLJ 67.
8 (1968) 1 MLJ 119.
Menteri Hal Ehwal Dalam Negeri. 1 Liversidge is the case that the courts in Malaysia as well as in Singapore have been following faithfully as if the entire development of the law relating to personal liberty and freedom were still predicated on it. The essential principle of Liversidge is that where a subjective power is entrusted to the executive by statute then a court, at least in a time of war, has no alternative but to give effect to that power.2 The appellant Robert Liversidge initiated an action for false imprisonment against Sir John Anderson, the former Secretary of State, and his successor Morrison. The appellant was detained in Brixton prison under a detention order issued by Anderson pursuant to Regulation 18B of the Defence (General) Regulations 1939.

The UK was then in the midst of the Second World War. These Regulations were made pursuant to the Emergency Powers (Defence) Act 1939 which authorised the making of regulations providing for the detention of persons in the interest of public safety or the defence of the realm. The House of Lords decided against the appellant by a majority of four to one (Lord Atkin dissenting). The majority held that a subjective approach was to be applied when reviewing the legality of a detention order issued under Regulation 18B which provided that if the Secretary of State had reasonable cause to believe any person to be of hostile origin or association or to have been concerned in acts prejudicial to the public safety or the defence of the realm, he may make an order against that person directing that he be detained.3 Lord Macmillan reasoned that the executive’s belief was not to be measured against the objective standard of any ordinary reasonable man but against that of the Secretary of State’s personal standard.4 He said that if the secretary of state acted in good faith and considered that sufficient grounds existed which appeared reasonable to him to support his belief, he did not have to disclose to anyone the facts and circumstances which had induced his belief or to satisfy anyone but himself that these facts and

1(1969) 2 M.L.J. 129 (per Suffian FJ.)
2For a critique of Liversidge, in particular in support of Lord Atkin’s dissent, see R.F.V. Heuston, "Liversidge v. Anderson in Retrospect" 86 L.Q.R. at p. 66.
circumstances constituted a reasonable cause for that belief. Thus the appellant could not attack the validity of the Secretary's decision on the ground that he was not justified in being 'satisfied.' So long as the Secretary of State was satisfied that certain facts existed to warrant the detention, and so long as he acted in good faith the court permitted him so to act. The subjective approach dictates that where the language of a statute conferring discretionary powers is subjective, the court should not question the Minister's decision if the Minister represents himself as having reasonable grounds for his belief. Nor should a court in the same circumstances compel a Minister to reveal the facts on which his belief is based.

The majority of their Lordships were much influenced by the fact that the Regulations were concerned with matters of national security. It was thought that it was unsuitable for a court of law objectively to review matters of national security. Only the Secretary of State was equipped with the information and the experience necessary for dealing with matters of national security. At any rate, the regulation provided that the detainee could raise objections against his detention with an advisory committee. The majority considered that the Regulation itself conferred power on the Secretary of State in subjective terms. They thought that the phrase 'has reasonable cause to believe' suggested that the Secretary of State should have personal impression of the relevant matters. Viscount Maugham acknowledged that while the words were capable of giving rise to an objective interpretation the subjective test should be applied. Lord Wright concluded that considering the intended effect of the regulation, the wording indicated that the Secretary of State's choice of action involved personal deliberation. He himself had to be reasonably satisfied before issuing the detention order.

Lord Atkin opposed this view. He advocated an objective determination of the Regulation. He said that there should be a "reasonable cause" for the belief before the Secretary of State could exercise the power conferred by the Regulation and that

\[^1\] (1942) AC. 206 at 209; (1941) 3 All E. R. 338, pp. 363.
\[^2\] (1941) 3 All E.R. 338 at 376.
\[^3\] (1942) AC 206, pp. 232-233.
the tribunal charged with determining a dispute regarding this power could determine the reasonableness of the cause and even whether the cause existed. He considered that where executive authority was conferred without qualification, the words of the statute would omit any reference to a 'reasonable cause'. If such wordings as 'if it appears to the Secretary of State that...' or 'where the Secretary of State is satisfied that..' were used, the Secretary of State would then have been given unlimited discretion. Of executive-minded judges he said, "I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive."1

The subjective approach was later applied in Greene v. Secretary of State for Home Affairs 2 which also dealt with detention under Regulation 18B. However, Liversidge became somewhat stifled when Nakkuda Ali v. Jayaratne 3 was decided. There the Privy Council said: "it would be very unfortunate thing if the decision of Liverside came to be regarded as laying down any general rule as to the construction of such phrases. . ." Judges in later cases preferred to rely on Lord Atkin's dissenting judgment. In Inland Revenue Commissioner v. Rossminster Ltd.4 Lord Diplock suggested:

The time has come to acknowledge openly that the majority of this House in Liversidge v. Anderson were expediently and, at that time, perhaps excusably, wrong and the dissenting speech of Lord Atkin was right.5

Lord Scarman also disagreed with the majority judgement in Liversidge in the same case6 and reiterated in Khawaja v. Secretary of State for the Home Department7 that "the classic dissent of Lord Atkin [in Liversidge]. . . is now accepted...as correct not only on the point of construction of Regulation 18B of the then Emergency

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1(1941) 3 All E. R. 338 at 361.
2(1942) AC.284.
3(1951) AC. 66.
5Ibid. at p. 988.
6Ibid. at p.1002.
Regulations but in its declaration of English legal principle.¹ The effect of the objective test is that although the legislation conferring executive discretion is subjectively worded, the facts which led to the executive's decision may be objectively reviewed by the court. In Nakkuda Ali the legislation in question was Regulation 62 of the Defence (Control of Textile) Regulations 1945 which gave the controller of Textile in what was then Ceylon power to cancel the applicant's textile licence if the Controller "had reasonable grounds to believe" that the appellant was unfit to continue to be a textile dealer. The Privy Council held that the words in the regulations must be read as intending to provide 'a condition limiting the exercise of an otherwise arbitrary power'. The condition was that reasonable grounds must in fact exist which the Controller knew of before he could authorise the cancellation of the licence. The court could not accept as final the Controllers' representation that he had reasonable grounds for his belief. The clear implication was that the grounds had to be objectively reasonable to the court.

In Padfield v. Minister of Agriculture, Fisheries and Food² the Minister had refused to consider a complaint of the appellant milk producers. Section 19 of the Agriculture Marketing Act 1958 provided that any complaint made to the Minister could be directed to an investigation committee for consideration 'if the Minister in any case so directs.' It was held that the discretion of the Minister was not unfettered even though the wording of the statute was subjective. Lord Reid pointed out that Parliament must have intended the Minister to exercise his discretion for the promotion of the 'policy and objectives' of the Act. These objectives could only be ascertained by statutory construction, a primary function of the courts. Thus the limits of the Minister's discretion could theoretically be defined by a court of law. Lord Upjohn even suggested that the reason given by the Minister for refusing to entertain the complaint had to be examined to determine if the Minister had acted unlawfully. This entailed the objective determination of the grounds for the Minister's belief. Padfield thus exemplifies the application of the objective approach. This was again

²(1968) A.C. 997.
demonstrated in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*.¹ This case involved section 68 of the Education Act 1944 which empowered the Minister to give direction to an education authority on matters pertaining to the exercise of their power or performance of their duty if he was satisfied that the authority was acting or proposed to act 'unreasonably'. The House of Lords held that except where the discretion was based on a matter of pure judgement, the court could evaluate the specific conditions which had to be fulfilled before the executive discretion could be exercised. This included a determination as to whether the facts existed and as to whether the relevant facts had been properly considered.

It must be appreciated that *Liversidge* was solely concerned with preventive detention while *Nakkuda, Khawaja* and *Padfield* were non-security cases. Commonwealth decisions involving preventive detention have not, however, followed the majority decision in *Liversidge*. In *A-G of St. Christopher, Nevis and Anguilla v. Reynolds* ² the respondent was detained under an order made pursuant to regulation 3 of the Emergency Powers Regulation 1967. Regulation 3 empowered the governor to authorise the detention of any person if the Governor was satisfied that person was concerned with acts prejudicial to public safety and order. The Privy Council held that despite the subjective wording of Regulation 3 it could not be construed as giving an unlimited discretion to the governor, since to allow such arbitrary detention would be incompatible with the Constitution of St. Christopher, Nevis and Anguilla. Although the governor was not obliged to reveal the source of his information if it was contrary to public interest, his failure to provide particulars of the grounds for detention led to the irresistible inference that the reasonable grounds on which the governor based his satisfaction had to be objectively determined to exist before the detention order could be justified.

¹(1977)AC. 1014.
²(1980) AC. 637.
In *Katofa v. Administrator-General for South West Africa* 1 the appellant was detained under a detention order made pursuant to one Proclamation AG 26 of 1978 which empowered the Administer-General to issue a warrant of arrest and detention if he was 'satisfied that the person in question committed or attempted to commit acts of violence and intimidation'. It was held that the court could objectively determine whether the grounds purporting to be the legal cause of the detention justified the order. The reasoning rested on the fact that the Administer-General was duty-bound to supply written reasons for the detention. This was meant to enable the detainee to ascertain whether there were grounds for his detention. There was no reason to preclude the court from ascertaining the validity of the order if the detainee was entitled to do so.

The issue of justiciability was fully expounded upon in the recent House of Lords case of *Council of Civil Service Unions v. Minister of the Civil Service* 2 (the GCHQ case). In the GCHQ case the Council of Civil service Union applied for judicial review of the Minister's decision not to allow the staff of the Government Communications Headquarters (GCHQ) to continue their membership in a trade union. Although the decision was made in pursuance of a prerogative power derived from the common law and not a statutory power, the exercise of executive discretion was still held to be subject to judicial review by a court of law. It was held that normally executive discretion would be reviewable by a court on three grounds: These Lord Diplock neatly termed as "illegality" "irrationality and "procedural impropriety" 3 The ground of illegality applies if a decision of the executive is made ultra vires or beyond the bounds of the power conferred; the Minister must not be misdirected as to the law which confers the discretion on him and he must give effect to it. "Irrationality" encompasses a decision so outrageous in its defiance of logic or

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1 (1985) 4 SALR 211.
3 (1985) AC 374. The three conditions expounded by Lord Diplock have been popularly referred to as the Diplock formula. See *Council of Civil Service Unions v Minister for the Civil Service* (1985) A.C. 374 at page 410. For comments on this case through the Malaysian perspective, see G. Sri Ram, "Dynamics of the Common Law: The Malaysian Experience", INSAF Vol. XXI No.1 June 1990 pp. 63-75.
of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Procedural impropriety encompasses the failure to observe the rules of natural justice. It is implied that the grounds of the Minister's decision were to be objectively reviewed. GCHQ also decided that the exercise of executive discretion was subject to judicial control except where the executive's decision was based on ground of national security. The onus is on the government to satisfy the court that the exercise of discretion is likely to entail matters of national security. This was affirmed in R. v. Secretary of State for the Home Department, ex parte Ruddock where the court, satisfied that there were matters of security involved, accepted the Minister's opinion unless it could be shown that no reasonable Minister would, under the same circumstances, make the same decision as the one under review. In other words, the reasonable man test was utilised. This exception arises from the fact that the courts are themselves ill-equipped to handle matters of national security, lacking both the machinery and the necessary information. It was also decided in GCHQ that matters of national security were to be decided solely by those responsible for national security namely the government. Although it was established that the Minister violated the rules of natural justice in his failure to consult the parties concerned before issuing the order, the decision was immune from judicial review because the Minister had satisfied the court that the decision was indeed based on matters of national security.

The objective approach was also adopted in the Zimbabwean case of Minister of Home Affairs v. Austin. The respondents in this case were detained by the appellants under section 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1983 which authorised detention 'if it appear[ed] to the Minister that it [was] expedient in the interests of public safety or public order to do so.' The respondents contended that the order signed by the appellants was invalid by virtue of

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1 Ibid. p. 410. Lord Roskill concurred at p. 415.  
2 (1985) AC 374 at pp. 399 and 420.  
3 Ibid. p 402.  
4 (1987) 2 All E. R. 518  
6 (1987) LRC (Const.) 567.
s.17(2) of the 1983 Regulations because the order did not furnish sufficient information or grounds for the detention. Blackie J granted the order and the appellants appealed to the Supreme Court. In dismissing the appeal Dumbutshena CJ ruled that the detention was defective because of insufficient information given by the Minister to the respondents. The Chief Justice, following State of Punjab and Others v. Talwandi\(^1\) said that in drawing the grounds of detention it was incumbent upon the detaining authority to appreciate that the detainee must be furnished with sufficient information or particulars to enable him to prepare his case and to make effective representations before a review tribunal. A bare statement that the detainee was a spy was not good enough. His Lordship also pointed out that the expression "if it appears to the Minister" did not exclude judicial review.\(^2\) In applying the objective test, he said:

> If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of these facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self-direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account.\(^3\)

Turning now to the positions in Singapore and Malaysia, the first case is Re Ong Yew Teck\(^4\). The appellant was arrested by a police corporal under s. 55 of the Singaporean Criminal (Temporary Provisions) Ordinance 1955 (CTPO). The police officer under this provision had the power to arrest and detain pending enquiries any person 'in respect of whom he has reason to believe that there is ground to justify his arrest and detention under section 47' of the CTPO which empowered the Minister to detain persons associated with activities criminal in nature.\(^5\) The appellant argued that the phrase 'has reason to believe' must be taken to have imposed an objective test. The Privy Council case of Nakkuda Ali\(^6\) was relied upon. Chua J. however, decided to

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\(^1\) (1985) LRC (Const.) 600.
\(^2\) In determining this, Dumbutshena CJ followed the decision of Lord Wilberforce in Secretary of State for Education and Science v. Metropolitan Borrough of Tameside (1976) All E.R. 665 (HL).
\(^3\) (1987) LRC (Const.) 567 at p. 587.
\(^4\) (1960)26 MLJ 67.
\(^5\) This provision is similar to ss. 8 and 73 of the ISA.

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follow the majority in *Liversidge* and held that it was "clear law that in every case the degree of discretion conferred by statute or regulation must be determined in reference to the statute or regulation in question". He found that section 55 required only the subjective satisfaction of the police officer that there were grounds which would justify the detention of the applicant.

The majority decision in *Liversidge* is still law in many commonwealth countries. In India, *Gopalan v. State of Madras* ¹ established the principle that the court cannot substitute its own satisfaction for that of the authority charged with responsibility for national security. Decided in 1950, this case established that the court cannot take the position of the executive in determining the inner workings of national security and the judges are therefore therefore not competent to pass judgement on the subjective mind of the executive authorities. Over the years this has been somewhat watered down, and the purely subjective test has been partially modified. The law on this point in India now is that the subjective satisfaction of the executive in finding a person to be prejudicial to national security must in fact be based on some "pertinent material". If there is an absence of that material then the court may interfere. In *Fazal Ghosi v State of Uttar Pradesh* ², the Supreme Court of India was concerned not with the sufficiency of the relevant material that warranted the District Magistrate in issuing a detention order but with the question of the existence of any relevant material. In this case it was held that although the satisfaction of a District Magistrate in making a detention order under s. 3(2) of the National Security Act 1980 ³ was subjective in nature, the decision had been based upon pertinent material. Even if it was accepted that the detainees had addressed an assembly of persons and incited them to lawlessness, there was no evidence on the record to warrant the inference that such conduct would be repeated or that they

¹AIR 1950 SC 27.
³Act No. 65 of 1980. The Indian National Security Act 1980 (NSA) was developed from varied sources since the country's independence in 1947. It succeeded the Maintenance of Internal Security Act 1971 (MISA). For an elaborate discourse on security laws and preventive detention in India, see B.V. Kumar, *Preventive Detention Laws of India*, Konark Publishers Delhi, 1991. In respect of the development of the NSA, see B.V. Kumar, pp. 9-21.
would do anything further which would prejudice the maintenance of public order. It appears that the Supreme Court was concerned with whether the so-called 'prejudicial act' of the detainee would recur in the future so as to adversely affect national security. Having found this in the negative, the court quashed the detention orders. However, as has been shown earlier, local courts in Malaysia and Singapore have been slow to accept the innovativeness of Indian jurisprudence, in particular concerning the freedom of the subject. Local judges would rather first look at how to distinguish a given Indian authority, and would then reason as to why the particular Indian authority should not be followed.

In Malaysia the leading case entrenching the subjective test under the ISA is *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*. This case stands out for two reasons: first, this was the first local case on the judicial review of executive discretion under the ISA to reach the Federal Court. Second, *Karam Singh* is still a binding precedent on Malaysian Courts. It is the *Liversidge* of Malaysia. The appellant was detained under section 8(1) of the ISA. He was subsequently furnished with a written statement spelling out the grounds of the detention and the allegation of facts on which the order was made. The written statement, unlike the detention order, stated only one ground for the detention namely that the appellant had been involved in activities prejudicial to the security of Malaysia. Subsequent affidavits by the Minister and the chairman of the Advisory Board also confirmed that this was the only ground for making the order.

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1B.V. Kumar, *op.cit.* p. 570.
2See Chapters 4 & 5 ante..
3For example, see *Karam Singh v. Public Prosecutor* (1969) 2 MLJ 129: "Perusing both English and Indian authorities has been no small task, but at the end of it all I would sum up by saying that...English courts take a more realistic view of things while Indian judges for whom I have the highest respect, impress me as indefatigable, idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers." per Ong Hock Thye FJ at p. 141.
5(1969) 2 MLJ 129. In respect of restriction of movement and place of residence pursuant to s. 3 of the Restricted Residence Enactment 1933, see *Chia Khin Sze v. Menteri Besar Selangor* (1958) MLJ 105; *Aminah v. Superintendent of Prison, Pegkalan Chepa Kelantan* (1968) 1 MLJ 92; *Assa Singh v. Menteri Besar Johore* (1969) 2 MLJ 30; These decisions were discussed in Chapter 4 infra.
The main issue raised in *Karam Singh* concerned the redundancy of the two other grounds listed in the detention order in the High Court in the light of the disclosure that only one ground was actually relevant. Counsel contended that the redundant grounds on the detention order demonstrated that the authorities had adopted a "casual and cavalier" attitude towards the applicant's detention. As they had not given the matter sufficient consideration, it was argued that the detention was therefore void and unlawful. The court was urged to consider *Jagannath Misra v. State of Orissa* ¹ where the Supreme Court in India had ordered the release of the appellant detainee as the detention order against him prescribed six possible acts, while the Minister had mentioned only two when referring to his subjective satisfaction. The Federal Court rejected this authority by distinguishing it, citing *The King v. Secretary of State for Home Affairs, Ex parte Lees* ². Azmi LP and Suffian FJ held that the defect in the detention order in setting out the grounds for detention in the alternative was an error of form only and not one of substance. Suffian FJ also distinguished *Jagannath* on the basis that Article 21 of the Indian Constitution provided that 'no person shall be deprived of his life or personal liberty except according to procedure established by law while Article 5(1) of the Malaysian Constitution merely reads "No person shall be deprived of his life or personal liberty save in accordance with law." He said in India the power of preventive detention was vested in civil servants, while in Malaysia such powers are vested only in the Minister 'who is answerable politically to Parliament.' His Lordship said that Malaysian judges did not have as strong a reason to subject the power of detention to close scrutiny as did the Indian judges.

The appellant's counsel also submitted that the detention was invalid because the allegations of fact supplied to the appellant were vague, insufficient or irrelevant. This, he contended, suggested that the detention order was made *mala fide* or improperly. The court did not accept this argument. The vagueness or insufficiency of

¹AIR 1966 SC 1140.
²(1941) 2 KB 72.
the allegations of facts supplied to the appellant, the court found, did not go to the root of the detention order or render it unlawful:

...it is not for the court of law to pronounce on the sufficiency, relevancy, or otherwise of the allegation of fact furnished to the appellant. The discretion whether or not the appellant should be detained is placed in the hands of the Yang Di Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of the allegation of fact.1

Thus Karam Singh entrenched the subjective approach in Malaysia. It is still a binding precedent 23 years later and there are no signs yet that the courts will ever be able to assert supervisory role in this area of law. Consequently the view has been expressed that in Malaysia the right to be heard in cases involving preventive detention is being ignored2.

Karam Singh is a clear example of the courts' reluctance to tilt the judicial balance in favour of the subject under detention when there was every opportunity to do so. This is the beginning of a series of decisions that are restrictive of the freedom of the detainee. The decision may be criticised from two points of view. First on the question of the grounds for detention. The court did not pay sufficient attention to the grounds of detention and the allegations of fact which counsel submitted were vital. How can one ground be sufficient to warrant detention when the Minister had satisfied himself that there were 12 allegations of fact? Under Article 151(1)(a) the authorities are required to disclose to the detainee the grounds of detention so that it "shall give him the opportunity of making representations against the order as soon as may be."3 Further, under clauses (2)(a) and (2)(b) of s. 11 of the ISA it is imperative that the grounds, allegation of facts and any other particulars, if any, be made known by the Minister (in writing) so that the detainee may make representations to the advisory board. If the allegations of fact were vague, insufficient or irrelevant as indeed was agreed by the court, how can representation be effective? And if the

1(1969) 2 MLJ 129 at p. 151.
3Article 151(1)(a).
representation is not effective on account of such deficiencies then the detention order surely falls outside the scope of the ISA because the premise on which the Minister had based his order is defective. This is arrived at through a simple analysis of the above article as well the relevant provision of s. 11 of the ISA. It would seem that even if the Minister had based his finding on a non-existent matter, according to Karam Singh the court would still favour the Minister.

The second criticism is that the burden of proof required by the court was based on a wrong assumption of principle. For example, to prove mala fide on the part of the detaining authority the courts require the applicant in a writ of habeas corpus case to produce all the necessary evidence. The court had already warned that such a task was most difficult. In fact not only is it difficult, it is impossible to adduce evidence in this respect because the detaining authority puts the stamp of "state security" on most of the items connected with the arrest and detention. These facts or items cannot be secured by subpoena or direction of the court because the Minister may use Article 151(3) which states that "the authority may not disclose facts whose disclosure would in its opinion be against national interest." The clause "in its opinion" again connotes a subjective decision by the executive while "national interest" has not been defined. This being the case, the detainee is forever under jeopardy for the lack of evidence with which to fulfil his contention of mala fide. In view of this unsatisfactory state of affairs, apart from giving all the allegations of fact and grounds of detention to the detainee in writing, the detaining authority should also be compelled to prove that they have in fact acted legally. With respect, it is not to be regarded as sufficient when the court says merely that all that the executive has to do is show a valid detention order.

Karam Singh is undoubtedly the stumbling block for the detainee in his or her search for liberty through the courts in Malaysia because it has not been overruled

2See Stephen Kalong Ningkan v. Government of Malaysia (1968) 1 MLJ 119 (per Pike CJ); Yeap Hock Seng v. Minister for Home Affairs Malaysia (1975) 3 MLJ 279 (per Abdoolcader J.)
although there have been cases in which judges have chosen not to follow it.\footnote{See Karpal Singh v. Menteri Hal Ehwal Dalam Negeri (1988) 1 MLJ 468.} In a 1975 High Court case, Yeap Hock Seng v. Minister for Home Affairs Malaysia\footnote{(1975) 2 MLJ 279.} concerning an arrest and detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) Aboolcader J. observed: "It is of course settled law that the subjective determination of the Minister is not justiciable. The court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded."\footnote{(1975) 2 MLJ 279 at p.282.}

In more recent cases, however, the Malaysian courts appear to be implicitly moving away from the position adopted in Karam Singh and their judgements show a gradual recognition that the developments in case-law in the Commonwealth, and especially in England, indicate a retreat from the purely subjective approach adopted in Liversidge. In Tan Sri Raja Khalid bin Raja Harun\footnote{(1988) 1 MLJ 182.} a case involving the prosecution of a bank director under the ISA for alleged acts of criminal breach of trust, an offence normally chargeable under section 409 of the Penal Code, Karam and Lee Mau Seng were not followed. The detainee in Tan Sri Khalid was arrested by a police officer under s.73(1) ISA. According to an affidavit produced by the police, the detainee, a bank director had committed a criminal breach of trust, and the police officer concerned had reason to believe that substantial losses suffered by the bank could evoke anger and resentment among members of the armed forces who were depositors at the bank It was contended that this might lead to organised violence by the soldiers. While accepting that the subjective test should continue to apply to s.73 ISA as it was inextricably connected with section 8, the court held that since the facts relating to the detention were fully furnished to the court voluntarily by the authorities, the court should not be precluded from making its own evaluation and assessment of them. A writ of habeas corpus was granted to the detainee. Although the case expressly affirmed the subjective test approach it in fact applied the objective test. If the test was purely subjective the court could not have substituted the decision

\footnote{Karpal Singh v. Menteri Hal Ehwal Dalam Negeri (1988) 1 MLJ 468.}

\footnote{(1975) 2 MLJ 279.}

\footnote{(1975) 2 MLJ 279 at p.282.}

\footnote{(1988) 1 MLJ 182.}
of the police with their own decision once the police had represented that they had 'reason to believe.'

In a recent case, *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri* ¹ the High Court having affirmed *Karam Singh* held that while the grounds of detention stated in the detention order were open to judicial review if they were not within the scope of the ISA, the allegation of fact upon which the subjective satisfaction of the Minister was based was not. Thus by allowing judicial review of the grounds of detention, the court has in fact sanctioned an objective approach. If the approach were entirely subjective, the court would not be allowed to question a decision to issue a detention order once it was shown that the Minister was satisfied as required. This is one of the rare instances when the subjective finding of the Minister was put to test in terms of factual terms. *Karpal Singh* establishes that the Minister's "satisfaction" cannot be based on false allegation of facts. In this case the applicant, a well-known advocate and solicitor who is also an opposition member of Parliament was detained under section 8(1) of the ISA. He applied for a writ of habeas corpus challenging the order.

There were six allegations forming the basis of the detention order. The applicant focussed on the 6th allegation which alleged that the applicant at the place, time and date stated in the detention order participated in a controversial issue concerning the appointment of non-Mandarin qualified headmasters in Malaysia's national type Chinese primary schools with intent to incite racial sentiments of the Chinese community.² The allegation was later admitted by the Minister to be an error as the detainee did not on that date, time and place speak on the issue at all. Peh Swee Chin J in allowing the application outlined three exceptions to the non-justiciability of the Minister's mental satisfaction in cases of this kind. They were (a) mala fide, (b) the stated grounds of detention not being within the scope of the enabling legislation and (c) the failure to comply with a condition precedent. He determined that *mala fide*

¹(1988) 1 MLJ 468.
²Since 1970 it has been an offence to incite racial sentiment. Non-ISA cases of this nature have been prosecuted under s. 3(1) of the Sedition Act 1948. The authorities could have taken step to prosecute Karpal Singh under the said provision. The fact that he was detained under the ISA instead caused the Democratic Action Party to label such action as bearing political motives. See "Karpal Singh's Crucial Case" in *The Real Reason: Operation Lalang ISA Arrests*, Kuala Lumpur 1989, p.94.
does not only mean a malicious intent. It normally covered a situation where a power was exercised for a collateral or ulterior purpose, i.e. for a purpose other than the purpose for which it is professed to have been exercised.\(^1\) Although the error relating to the sixth allegation was probably made in the course of police enquiries, the court ruled that the Minister could not rid himself of the error of the police because the process starting with the initial arrest of the applicant under s. 73 (pending enquiries under the execution of a detention order made by the Minister) was a continuous process designed to assist the Minister in making up his mind whether to detain or set free the subject concerned. Such being the case, any period or any part of such a process could be looked into to see if care and caution had been exercised with a proper sense of responsibility for the purpose of ascertaining whether the detention order had been properly made.\(^2\) While the court could not question the subjective finding of the authorities because of *Karam Singh* it did not follow from this that the Minister was free from the responsibility for the truth of the alleged facts underpinning the detention order. His Lordship elaborated:

Thus a court cannot inquire into the sufficiency, vagueness and relevancy of any grounds of such detention vide *Karam Singh*'s case. The word "relevancy" requires some fine tuning, in my view, from the cases decided by the courts. Relevancy that the court cannot inquire into does not, however, extend to any case where the grounds of detention stated are not within the scope of the enabling legislation.\(^3\)

*Karpal Singh* establishes that an error in the facts which make up the basis of the detention if pointed out to the court may lead the court to conclude that the detention order is not valid.

The government was quick to react. Upon leaving the High Court on his way home, Karpal Singh was rearrested and detained under a new and separate detention order signed by the Minister. Viewing this incident in the context of judicial review in general and the writ of habeas corpus in particular, the observer cannot but conclude that the executive's disregard for the rule of law was indeed alarming. It shows that

\(^1\) *The Real Reason: Operation Lalang ISA Arrests*, op. cit., at p. 473.
what is found to be lacking in the grounds of detention can easily be substituted by a further exercise of executive power. It is relevant to point out that the applicant’s detention order was signed by the Minister only one day prior to his second arrest and detention. It is not inaccurate to conclude from this account that the Minister only exercised his subjective faculty in respect of the detention within a very limited space of time. The fact that the subject was rearrested after his trial by a court of law presupposes that the executive did not believe in the sufficiency of allegation of facts prior to detention. Anticipating that the decision in this case would adversely affect future detentions, the Government appealed to nullify Karpal Singh v. Menteri Hal Ehwal Dalam Negeri. In Minister of Home Affairs & Anor. v. Karpal Singh the Supreme Court overruled Peh J’s decision in the earlier Karpal Singh case, citing that the sufficiency or insufficiency of the grounds of detention was not a matter for the court to decide. The Supreme Court decision obliterated any hope of the future utilisation of a similar objective test.

For a time, it appeared that Malaysian judicial opinion was gradually moving away from the subjective to the objective approach. But as political events in the country would have it, this positive trend in the courts was short-lived when amendments made in 1988 affecting the Constitution and other laws on preventive detention were passed by Parliament. Two major amendments were made to the ISA in 1988 and 1989. The 1988 amendment which was hotly debated in the Dewan Rakyat in October 1988 was brought about as a result of certain mistakes by the police in connection with the detention of Lim Kit Siang, parliamentary opposition

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1For a personal account of Karpal Singh’s arrest and detention, see The Real Reason op.cit., at pp. 84-92.
3(1988) 3 MLJ 29.
4In two other Malaysian decisions - Merdeka University Bhd v. Government of Malaysia (1981) 2 MLJ 356 and Yit Hon Kit v. Minister of Home Affairs Malaysia & Anor. 1988) 1 MLJ 638 the presiding judges expressly stated their preference for the objective approach.
6One basic premise claimed to be missing in the present structure of the ISA is the absence of its original structure, i.e. in giving the subject the right to challenge acts and things done by the minister under the ISA. In this respect, see the speech by Rais Yatim, Member for Jelebu opposing the amendment in the Dewan Rakyat on 9 July 1988.
leader, pursuant to Operation Lalang referred to earlier. The purpose of the amendment was to validate any place of detention prescribed by the Minister in the detention order. Lim Kit Siang was detained in a detention centre that was different from the one originally specified under the detention order signed by the Minister on 18 December 1987. The detention order was served on Lim on 19 December 1987, the date that he should have been detained in Kamunting Camp, in Batu Gajah in the State of Perak, a designated place of detention for ISA detainees. Lim and others detained with him were only brought to Kamunting on 21 December 1987. Thus for a full three days, Lim contended in a writ of habeas corpus that was then pending in the High Court of Penang, his detention had been illegal. Referring to the ad hoc amendment as "an act of double injustice" a well-known member of parliament summed up the government's action thus:

"Denying them their freedom under the ISA based on trumped-up charges is an act of gross injustice but to now amend the laws to legalise illegalities on their detention is too much to bear and should be strongly condemned and opposed...if these amendments are passed how can we claim that we are a country that upholds the rule of law? What rule of law is there when a person, who is detained unlawfully and without trial, which is already a travesty of justice, is further penalised by denying him any recourse to the courts to challenge an illegality for seeking his liberty as guaranteed under article 5 of the Constitution."

Lim's habeas corpus application was scheduled for hearing on 13 July, 1988. The amendment was passed, despite vehement opposition by opposition members on 9 July 1988. It was rushed through the Senate, the second chamber that is filled entirely by nominated pro-government members, within a day of special session and became law on 14 July 1988. Lim would have succeeded in his habeas corpus application of 13 July 1988 if it had not been for the court's curious decision to allow a postponement which had been ardently requested by the Federal Counsel who was obviously detailed by higher authorities to ask for this adjournment and who cited as his main reason for the request the inability of the Home Minister to file his affidavit on time on account of his busy schedule. The underlying reason for this move was

1See Para 6. 2 ante.
3See Parliamentary Debates : Dewan Rakyat 9 July 1988. See also The Real Reason, op.cit. at p.96.
clear: it was for the purpose of delaying the application until 14 July 1988 i.e. until the coming into force of Act A705.\textsuperscript{1} When the High Court re-sat to hear the application on 14 July 1988, the judge declared:

However, in passing, I wish to state that had it not been for Act A705, the detention of the applicant in Kuala Lumpur before he was formally detained at the detention Centre on 21 December 1987 would have been illegal.\textsuperscript{2}

On the same day the Deputy Home Minister stated that "the amendments have nothing to do with anyone. It is not because we want to victimise Lim Kit Siang or other individuals that we have the amendments. The changes are necessary... that is all."\textsuperscript{3} With that statement the whole country was expected to be satisfied. To similar effect is Tuang Pik King v. Menteri Hal Ehwal Dalam Negeri & Anor.\textsuperscript{4} where the appellant, designated to be detained at a certain detention centre, was instead detained for a few days at another centre. Because of ss. 3 and 5(1) of the Internal Security (Amendment) Act 1988\textsuperscript{5} his appeal was rejected by the court.

By way of the Internal Security (Amendment) Act 1989\textsuperscript{6} judicial review in whatever form was disallowed. The new section 8B(1) of the ISA reads:

"There shall be no judicial review in any court, and no court shall have or exercise any jurisdiction in respect of any act done or decision made by the Yang Di Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision."

Thus from 1989 onwards only matters concerning the rules and procedures related to the ISA could be challenged. But there are, upon perusal, hardly any more

\textsuperscript{1}The Internal Security (Amendment) Act A705/1988 was passed at the Dewan Rakyat on 9 July 1988 and at the Dewan Negara (Senate) on 10 July 1988. It received the Royal assent on 14 July 1988 and gazetted on 15 July 1988 at 12.01 pm.
\textsuperscript{2}Lim Kit Siang & Ors. v. Menteri Hal Ehwal Dalam Negeri Malaysia (1988) 2 MU. 95 at p. 98.
\textsuperscript{3}The Star 14 July 1988.
\textsuperscript{4}(1989) 1 MLJ 301.
\textsuperscript{5}The essence of the amendment provides that "no detention order shall be invalid or inoperative by reason that the person to whom it relates was immediately after the making of the detention order detained in any place other than a place of detention referred to in s.8(3)..." and that "a detention order...made...against any person during the period between the date of the commencement of the principal Act and the commencement of this Act...is hereby declared lawful and valid." See the new s. 8(A) of the ISA as inserted by A705/1988.
\textsuperscript{6}A739/1989.
loopholes left to be challenged. They have all been plugged by the 1988 and 1989 amendments.

As has been seen, the courts in Malaysia have adopted an unduly restrictive approach in their treatment of habeas corpus and judicial review applications and this restrictive approach affected the applicant more than on the detaining authority. The principle which must be re-evaluated concerns the courts' finding that it is the detainee who has to prove that the detaining authority is in *malafide*. This is a fair enough apportionment of responsibility but only up to a point. The cases which put the detainee to strict proof of the illegality of the detention is also reasonable up to a point. What is lacking is the courts' appreciation of the fact that the detainee cannot get all the relevant, sufficient and proper facts underlying his detention. As we have seen, clause (3) of Article 151 itself allows the authorities to withhold facts "whose disclosure would in its opinion be against national interest".

The basis of all detention is that facts are used against the subject with a view to detaining him. In a criminal case, the charge contains all the requisite facts. On those facts the accused person stands trial. Whereas in a habeas corpus case, the detaining authority claims that it has all the facts and grounds for detention but some may not be made known on grounds of national interest. Under the circumstance, what defence is to be advanced by the detainee when the facts which make up the evidence are not available to him? *Karpal Singh* has broken a little tip of the iceberg when the applicant succeeded in convincing the court that one of the allegations of fact was fictitious. Many of those political detainees sought redress in court by way of writs of habeas corpus and introducing fresh arguments but, chiefly due to the 1988 and 1989 amendments of the ISA1, the success rate has been negligible.2

In *Minister for Home Affairs, Malaysia & Anor v. Jamaluddin bin Osman*3 the issue was whether freedom of religion under Article 11 could be restricted by the

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2For example, the detainees failed in their applications in the following cases: *Menteri Hal Ehwal Dalam Negeri & Anor. v. Pato* (1989) 1 MLJ 255; *Menteri Hal Ehwal Dalam Negeri & Anor. v. Lim Guan Eng* (1989) 1 MLJ 420 (SC).
ISA. In this case the respondent was detained with a view to preventing him from acting 'in any manner prejudicial to the security of the Federation' as it was alleged that he was involved in a plan to propagate Christianity among the Malays. The grounds of detention, however, did not state that any action had been taken by the respondent except his participation in meetings and seminars. It was also alleged that the respondent had converted six Malays to Christianity. The High Court took the view that the Minister has no power under the ISA to deprive a person of his right to profess and practice his religion, a right which is guaranteed under Article 11 of the Constitution. Therefore if the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provisions of Article 11. On this ground it was held that the detention was bad. At the Supreme Court, on appeal by the Minister, the decision of the High Court was upheld by maintaining that the respondent's activities could not by themselves be regarded as a threat to the security of the country and therefore the grounds were insufficient to fall within the ISA which was legislation enacted essentially to prevent and combat subversion and actions prejudicial to public order and national security. At any rate, Hashim Yeo Sani CJ stressed that the protection conferred by Article 11 of the Constitution could be a complete umbrella for unlawful acts tending to "prejudice or threaten the security of the country". He said:

The guarantee provided by article 11 of the Federal Constitution, that is, the freedom to profess and practice one's religion, must be given effect to unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion.

6. 7. Preventive Detention as a Mode of Government

Detention without trial is indeed the antithesis to the rule of law but it has come to be endorsed if not accepted in modern government when states are confronted by severe subversion. In fact on the point of executive arrest and detention a political scientist has observed that every government in the world uses at least some form of

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1(1989) 1 M.L.J. 368 (High Court).
3See United Nations, International Covenant on Civil and Political Rights (ICCPR).
political repression; many use a great deal of repression, for it has proved to be an effective tool in shaping the media, interest groups, political parties, and through them the ideas and attitudes of citizens.\(^1\) Almost every country utilises it in one form or another. Ironically, however, democracy does not seem to be a preventive factor in its practice. In fact detention without trial has existed in democratically-chosen governments. In the United States of America, for example, the Internal Security Act 1950\(^2\), more widely known as the McCarren Act was passed in an attempt to outlaw conspiratorial action designed to establish authoritarianism in the United States and to strip the veil of secrecy from communist political activity and to impose certain disabilities on the part of the communists.\(^3\) The Northern Ireland (Emergency Provisions) Act 1991\(^4\) facilitates power of arrest and detention to the British executive.\(^5\) Further, The British Government's declared state of emergency "threatening the life of the nation" was accepted by the European Court as the basis for the imposition of emergency measures in North Ireland.\(^6\) Indeed it may be said generally that the power to arrest and detain are present in the mechanics of modern government. Mostly, the difference is only in degree rather than kind. Although the executive in Britain and other common law countries still has a substantial role in curbing certain rights in the course of maintaining law and order or in the context of

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2. US. Code paras 781-844.
maintaining anti-terrorist sanctions, the courts never really lose their jurisdiction as the final arbiters of liberty.

That there are clear violations of human rights by invoking the ISA and other draconian legislation is an understatement. The misery that these executive laws have brought upon individuals have left a clear message: there is a state of confusion in the real, accepted meaning of the phrase "prejudicial to the security of Malaysia". The meaning of this phrase which is thematic in the ISA as well as under Articles 149 and 150 of the Constitution is systematically left to the discretion of the executive. It is a one-sided meaning to the exclusion of all others and one with which the courts have willingly complied. The courts in so doing have, by their own act of interpretation, divested themselves of the jurisdiction to question the subjective findings of the executive. And for so long as this situation prevails the rule of law is necessarily marginalised in the preservation of fundamental human rights in Malaysia.

Reports on detention under the ISA make evocative reading. Tan Hock Hin, a former Socialist Front legislator for the constituency of Jelutong in Penang was detained for 15 years (1967-1982). Loo Ming Liong, suspected of being a communist, was detained under the ISA for 16 years (1972-1988). In September 1990, three persons were detained simply for opposing the setting up of a toll plaza at a south-bound road section in Kuala Lumpur. On 13 May 1991 Datuk Dr. Jeffrey Kitingan, the brother of Datuk Pairin Kitingan, the present Chief Minister of Sabah who has been opposed politically to the federal leadership, was arrested and subsequently detained for an alleged involvement in an "anti-Federal" activity namely, "for trying to champion the secession of Sabah from the Federation of Malaysia". The Home Minister who is also the Prime Minister signed him into detention for two years, with an option of a further detention period of two years.

1 See Suara Rakyat Malaysia (Suaram: For Human Rights in Malaysia) No.5 January 1992, p.2.
2 Suara Rakyat Malaysia (Suaram: For Human Rights in Malaysia) No.5 op.cit. p. 2.
3 This was the Anti-Toll Demonstration at the Cheras Toll Plaza, about 6 miles from Kuala Lumpur.
4 The Sabah Times 14 May 1991. The Sabah Chief Minister appealed for the release of his brother detained under the ISA in May 1991. He said he had written to Dr. Mahathir for the release of his brother and other detainees: "I openly appeal on behalf of my aged parents and relatives of other ISA detainees for them to be freed ", he said adding that his 88-year old father often asked for his younger son "but I have no answers to his questions." But there has been no response from the Prime Minister.
The detention of the above persons, as was the case in *Operation Lalang*, is clearly linked to their political belief, and not to the prospective harm the relevant persons would bring to the security of the country.

Clearly, the continued practice of denying a man the right to be heard in a court of law is in direct violation of accepted international standards and covenants. Malaysia while being a member of the United Nations, subscribes to none of the human rights conventions. Issues on human rights in Malaysia hardly causes a ripple in the severely controlled local media. While this is so the executive continues to administer detention without trial under various legislation in the country without any compunction or heed towards international sanction on basic human rights. Often those arrested under the ISA or those critical of certain government policies have been branded as "anti national elements".

The ISA has indeed emerged as the most powerful executive instrument in effecting arrest and detention without any judicial control whatsoever. Perhaps this is why the ISA has been described as "white terror." The incidents of *Operation Lalang* and numerous others support this view. There are no legislative committees to oversee the fair implementation of the ISA. There are no statutory provisions that require periodic reports connected with preventive detention to be tabled in Parliament. All acts and things done under detention laws are only subject to the Minister's ultimate discretion. In a sense, powers exercised by the police and the Minister under the ISA are completely unilateral and are subject to no other authority. It is common practice that the Minister of Home Affairs signs detention papers.

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Besides Dr. Kitingan the others arrested on 13 May 1991 and detained at Kamunting are Benedict Topin, Albinus Yudah, Damit Undikai, Abdul Rahman, Vincent Chung and Alfa Hamid. Pairin said that the ISA had outlived its purpose with the ending of the communist insurgency. Malaysia does not need the ISA any more because there were already enough laws to handle security matters: *The Star* 14 May 1992.


4 In 1976 Detention Orders, called *Perintah Tahanan*, were contained in a special proforma of 4 pages. In 1992 the proforma was increased to 9 pages and due to the success in certain habeas corpus
purely basing his findings on the briefs supplied by the police. There have been instances in the past when detention orders were signed by the Minister or his deputy just within hours before the expiration of the respective detention period. In its practical sense and in such a case, the Minister cannot be said to have used his subjective faculties to satisfy himself that the detention ought to have been made because he has not read the police reports in their entirety. It could therefore be said that when a man is sent to a detention camp the Minister is making a political decision about the rights and liberties of the subject solely upon the recommendation of the police.

6. 8. Is the ISA still necessary?

The answer to this question is surely in the negative. There are six main reasons why the ISA must now be revoked. Firstly, there has been no real subversion within or without the country since the 1969 Emergency although normal crimes have occupied the police in their rightful role to maintain law and order. Even when an act of subversion occurs the government's power to proclaim a state of emergency is always at hand by virtue of article 150. The Deputy Prime Minister in explaining the underlying reason as to why the ISA must continue said in a recent interview that the security forces have advised the government to continue with its implementation. He said that he wanted the ISA to subsist so as to "prevent irresponsible people from creating chaos and disorder." The government, he said, "would prefer to end the ISA but because national security is a very serious matter, our forces still want the Act to be enforced." This simplistic reaction is not a rationale for the continued use of the ISA under its present format. Surely a government cannot entirely depend on the opinion of its armed forces with regard to such a debilitating statute as the ISA. It is

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applications in 1991, the whole nine copies of the detention papers were made to be signed by the Deputy Home Minister. Prior to 1992 the Minister only signed two copies of the order. See statement of the Inspector General of Police, Tan Sri Hanif Omar: Utusan Malaysia 11 May 1992.

1See Catatan Timbalan Menteri Dalam Negeri (T.M.HEDN) 12 Oktober 1977 (File).

2Statement by Ghafar Baba, Deputy Prime Minister as to why the ISA must continue to be enforced: The Star, 2 June 1992.

disturbing to note that the ISA has been suggested to be used against the most unlikely target groups. For example, songwriters, composers and singers have even suggested the use of the ISA in cases where their works have been illegally reproduced and marketed.1 The Deputy Prime Minister also announced of the possibility of the ISA being used against certain quarters involved in share frauds in May 1992.2 An UMNO Member of Parliament suggested that the ISA should be used against 'political traitors' in the country.3 This only shows that there is very little understanding of the purpose of the ISA, much less of the significance of the rule of law.

Secondly, there is enough legislation at the disposal of the executive to take care of every conceivable eventuality, including another state of emergency. It was mentioned earlier that other than the ISA there are a number of laws with similar powers of arrest and detention. To begin with, many of the provisions of EPOPCO 1969 are similar to the provisions of the ISA 1960. Even the EPOPCO (Detained Persons) Rules 1972 are similar to the ISA counterpart4. For an act that is deemed by the police as "prejudicial to public order" may also entail detention under section 4(1) of the EPOPCO. In fact, finding these similarities as such, arbitrary arrest and detention have become overlapping and superfluous. There are many provisions in the ISA which are also provided under the other instruments of executive arrest and detention.5 Suffice it to mention here that the authorities do not appear to bother about the difference between public order violations and those pertaining to national security.

Thirdly, it must be appreciated that while it is true that the ISA was a piece of wartime legislation in that communist terrorism had to be faced, that objective is now non-existent. In 1989 there were hardly 200 communist terrorists left in the Malay

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1 Utusan Malaysia, 4 March 1992.  
3 Statement of Shahidan Kassim, MP for Arau, in Utusan Malaysia, 6 November 1992.  
5 The ISA, the EPOPCO, the RRE are the three complimentary as well as superfluous instruments involving arbitrary arrest and detention that need rationalisation in the context of a democratic government in Malaysia.
Peninsula. They have been mainly restricted within the Malaysian-Thai border. On 24 December 1989 the Malaysian Government concluded a treaty with the Communist Party of Malaya in Bangkok that *inter alia* terminated all forms of armed struggle on the part of the communists.¹ Those who originate from Malaysia are now free to rejoin the Malaysian society.² In August 1992 the Deputy Inspector General of Police announced further that 220 former CPM members from across the Malaysian-Thai border had been allowed to "return home to their respective hometowns".³ One would have thought that this development would have signalled a reduction of security legislation. This expectation was not to be as the government had already announced its resolve to continue to use the ISA.

Fourthly, the continued implementation of the ISA has become an excuse for the authorities to administer the country on an emergency basis, announcing at various times that the country is still under severe security threats. Public outcry and abhorrence of the ISA has been more than sufficient in the past as channelled through the Bar Council⁴, the Malaysian Trade Union⁵ and concerned citizens.⁶

Fifthly, it is not unknown for the ISA to be politically used to silence opposition.⁷ Looking at the number of opposition leaders, academicians and activists who have been detained in the past decade, especially under *Operation Lalang*, this

⁴The Malaysian Bar Council has been submitting numerous protest notes and memoranda with regards to violations of human rights and civil liberties to the Malaysian government since the ISA became law in 1960. However as a body representing lawyers in Malaysia it has not taken part in demonstrations. The government has not responded in any significant manner.
⁵See Resolution No. 15 of the 29th Biennial Delegates Conference of the *Malaysian Trades Union Congress* (MTUC) held on 3-4 September 1988.
⁶Mainly channelled by *Aliran* (The Malaysian Association for Justice, Freedom and Solidarity). See *Aliran* Monthly Vol. 9 No.1 p. 20. On 27 October 1987, the date of *Operation Lalang* (massive arrests and detention under the ISA) the New Zealand Groups comprising of Malaysian students in New Zealand staged a protest in Wellington, New Zealand. Prior to 1977, students were active in staging protests for human rights and justice. This was curbed with the coming into force of the College and University College Act 1977 which completely bars students from being involved in activities that are deemed political and non-academic associations.
allegation appears now to be unrebuttable.1 Somehow, perhaps due to the lack of media attention in channelling public opinion, the criticism these laws receive from time to time have not appeared to be significant. The government chooses to ignore even parliamentary views against it.2 As we have seen, the ISA in particular has been strengthened over the years since it succeeded the Emergency Regulations 1948 in 1960. Ironically this has been so since the emergency was proclaimed to be at an end on 30 July 1960.3 Its effectiveness in combating organised crime is highly debatable because the EPOPCO 1969, the Prevention of Crime Act 1959 (PROCA), the Firewarms (Increased Penalty) Act 1971 and other anti-crime laws have been designated to realise this objective. However the ISA's role in supressing political, academic and social activities and above all constructive social pressure groups, is admittedly successful when judged by reference to the 231 leaders in these fields who have been arrested and detained in the past two decades.4

Sixthly, Malaysia has to give due respect and recognition to the demands of human rights as entrenched under the various international covenants. It does not matter if Malaysia has not ratified any of these conventions for it is inherently a member of the international community by being a member of the United Nations. Although in 1990 there were only 151 persons detained under the ISA compared to

1Prominent opposition leaders of political parties have had their share of being detained under the ISA. Lim Kit Siang, leader of the DAP and opposition leader in Parliament was arrested and detained under the ISA on two occasions (1971-1973 & 1987-1989); so were his son Lim Guan Eng and his other prominent colleagues in the party. Kassim Ahmad, former Secretary General of Partai Sosialis Rakyat Malaysia (PSRM) and Syed Husin Ali, the present Chairman of PSRM were detained in 1974 and released conditionally in 1980: See Majlis Persatuan-Persatuan Pelajar Malaysia United Kingdom, "An Interview With Dr. Syed Husin Ali", Winter 1981 p.8. Anwar Ibrahim the present Minister of Finance was also detained in 1976 when he was leading ABIM, the Malaysian Islamic Youth Movement. Cikgu Musa, Mahfuz Omar, Suhaimi Ahmad and 21 others represent detainees from Pan Malaysian Islamic Party (PAS). For an account of how the ISA has been alleged to have been used for political ends, see generally Democratic Action Party, The Real Reason, Kuala Lumpur, 1988.

2For instance, from 1961 to 1990 there have been 126 direct questions from members in the Dewan Rakyat and the Dewan Negara on various aspects of the ISA and national security. In the country's general election in 1990 one of the main thrusts of the opposition was the abolition of the ISA and other "draconian laws." See Kearah Kesejajhteraan dan Perpaduan Ummah, August 1990, Kuala Lumpur. This portion of the overall manifesto was well-received by the urban voters but appeared to be insignificant in the villages, a fact which may be attributed to the media monopoly in Malaysia.

3The Emergency ended on 30 July 1960 by way of Proclamation made by Prime Minister Tunku Abdul Rahman under Article 163 of the Constitution vide L.N. 185/1960. Article 163 which provided, inter alia, how the Emergency Regulations were to be treated upon termination of the Emergency, was repealed by Act A25/1963.

503 in 1980, the ISA is still an anti-human rights legislation that ignores the rule of law. Security threats from acts of terrorism and organised violence can be reduced to normal crimes which the authorities and the courts can handle. Of course, anticipated sabotage, military or economic may happen at any time in the same way as in other countries. Then again Article 150 may be invoked at any time to unleash the full might of emergency rule.

Amnesty International, the International Commission of Jurists, international human rights lawyers and local bodies and organisations have all pointed this out in their reports on Malaysia. In 1982 an International Mission of Lawyers visited Malaysia to investigate the operation of certain aspects of internal security legislation, in particular detention without trial. At the end of its visit which was marred by various incidents of cold treatment by the government, it produced a report which inter alia suggested a number of changes in the legislation and administrative practices connected with detention without trial. The mission, however, did accept the need for a government to effect limited and restricted preventive detention in special circumstances that call for state action over individuals who are de facto security threats. One of its salient recommendations was to provide for adequate judicial review of all administrative acts. Whilst the recommendations of the mission are commendable there are as yet no signs that the Malaysian Government is receptive to any of the Mission's suggestions. It is always a simple matter to suggest to an authority such as the Government of Malaysia which has been actively involved in maintaining internal security since Merdeka what to do with the infamous ISA. The Malaysian government regards that act of good faith as an "interference with Malaysia's internal matter."

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1 See Table I: No of Persons Detained under s. 8(1) of the ISA for the period 1980-1990.
The irony here is that while the British invoked "detention without trial" during the life span of an emergency, the present authority exercises such power in its daily administration. The fact that the government chooses to perpetuate this formidable power under the ISA without any valid basis is purely a political choice. There are ample powers at the disposal of the executive to face any uprising, crime or social commotion without having to utilise the ISA in its present form. In fact this reasoning was offered by the Sabah Chief Minister in May 1992 when appealing for the release of his brother and others from detention "in the name of democracy and justice".1

6.9. Conclusion
The executive has been fully equipped and free to allege, prosecute and incarcerate at will persons ministerially deemed to be "prejudicial to public order or the security of the Federation", a constitutional catch-phrase that has cast a very wide net so as to include political thoughts and activities that may be unsuited to the thinking of the power elite in government.

The national security of a country is admittedly a sensitive area. The secrecy demanded by the executive in safeguarding it, to a certain extent, is understandable. However, it should not be made as a shield to preclude the court from intervening in cases involving the violation of freedom of the subject. The courts have a clear duty to be vigilant in ascertaining liberty but when the legislative and executive powers are united in the same person, or in the same body, there can be no liberty.2 But a court that is only half-concerned with partial freedom cannot be said to uphold the rule of law.3 It is therefore startling when the present Lord President openly supports

1DatuD Joseph Pairin Kitingan, the Chief Minister of Sabah appealed to the Prime Minister in May 1992 for the release of Dr. Jeffrey Kitingan and six others who were, pursuant to an allegation by the authorities to have been involved in a "plot to bring Sabah out of Malaysia", were detained at Kamunting Detention Camp in the State of Perak. The allegation was never proven. Nevertheless, the detention has been effected under s. 8 of the ISA since June 1991. See The Star 14 May 1992.
preventive detention extra-judicially: "Preventive detention," he said, "may be undemocratic but is unavoidable in...cases when people try to subvert a democratically-elected government."¹

However much the executive may assert the need to be the 'sole judge' of the needs of national security, it is important that the courts should be satisfied that powers have been exercised for genuine purposes of national security. The bona fide exercise of this power must be allowed to be seen by the courts. The power of detention without trial remains as an exception to the norms of fair procedures.² Unfortunately in the area of judicial review the courts cannot now on their own effort free the judiciary from the superimposed will of the executive who translate their imposition through instruments like the ISA because its very lifeline is also controlled by the executive by way of parliamentary sanctions. An executive not having to worry about judicial scrutiny over its actions in an Act of Parliament such as the ISA will almost certainly, at least at some stage in the future, want to replace the rule of law completely. In the case of Malaysia this tendency is only a matter of time and the courts may not be an effective barricade to such an eventuality.

¹The Lord President, Tun Hamid Omar, gave the above statement in a speech in honour of Lord Mackay of Clashfern Lord High Chancellor of Great Britain in Kuala Lumpur on 3 April 1993. He further said, "We admire the western liberal and democratic approach in jurisprudence, but being a developing nation, it will be too premature for us to adopt all changes blindly without considering the local social ethos."The Sunday Star, 4 April 1993.
Table 1

No. of Persons Detained
under s.8(1) of the Internal Security Act 1960 [ISA]
1980-September1990
at the Batu Gajah Detention Centre, State of Perak, Malaysia

<table>
<thead>
<tr>
<th>Year</th>
<th>No. Detained</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>503</td>
</tr>
<tr>
<td>1981</td>
<td>295</td>
</tr>
<tr>
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<td>77</td>
</tr>
<tr>
<td>1989</td>
<td>68</td>
</tr>
<tr>
<td>1990</td>
<td>151</td>
</tr>
<tr>
<td>Total</td>
<td>1,516</td>
</tr>
</tbody>
</table>

Source: Prisons Department, Kuala Lumpur
Table 2

No. of Persons Detained
under s.4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969
[POPOC] 1980-September 1990
at the Muar, Pulau Jerjak and Batu Gajah
Detention Centres, Malaysia

<table>
<thead>
<tr>
<th>Year</th>
<th>No. Detained @ Muar Detention ctr.</th>
<th>No. Detained @ Pulau Jerjak Detention Ctr.</th>
<th>No. Detained @ Batu Gajah Detention Ctr.</th>
<th>Total POPOC Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>108</td>
<td>403</td>
<td>-</td>
<td>511</td>
</tr>
<tr>
<td>1981</td>
<td>64</td>
<td>563</td>
<td>-</td>
<td>627</td>
</tr>
<tr>
<td>1982</td>
<td>123</td>
<td>613</td>
<td>-</td>
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<tr>
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<td>524</td>
<td>3,549</td>
<td>1,261</td>
<td>5,334</td>
</tr>
</tbody>
</table>

*Source: Prisons Department, Kuala Lumpur.*
CHAPTER 7

The Dictates of Political Supremacy in the 1988 Judiciary Crisis

Every government in the world swears belief in the independence of the judiciary, but some governments work subtly to undermine it - Tun Mohamed Suffian, "The Role of the Judiciary", (1987) 2 MLJ xxiii.

7.1. Introduction

This Chapter retraces and analyses the main events of the 1988 Malaysian judiciary crisis and contends that political efficacy and supremacy prevail over judicial power and the independence of the judiciary. As the chapter unfolds it will be noticed that 'independence of the judiciary' is a limited and fragile concept in a system where executive power permeates and controls all branches of government. It has been said that without independence of the judiciary there can be no judicial power in the real sense of the word; the strength and respect of the Constitution is heavily dependent on the concomitant strength and independence of the judiciary.1 However, where public opinion is stifled through the power of government, the doctrine of separation of powers becomes perfunctory and judicial independence is reduced to being a mere namesake, especially when the will and power to amend the law relating to judicial power is at the instance of the executive.

The judiciary crisis of 1988, which resulted in the removal of Lord President Tun Salleh Abas (hereinafter referred to as "Salleh") and two other Supreme Court judges2, clearly shows how judicial power3 was taken away from the courts. This was done by the executive through the utilisation of Parliament's law-making

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2 Datuk George Seah and Tan Sri Wan Sulaiman. See below.
3 This is the clause that has given the High Courts in Malaysia their inherent jurisdiction to exercise judicial power in all matters including principles of common law and equity. The phrase "judicial power of the Federation", which has been in-built within the provisions of Article 121(1) of the Constitution since Merdeka., reads: "...the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status ..." After the judiciary crisis in 1988 and the Constitution (Amendment) Act 1988 (Act A704) the clause "judicial power of the Federation" was deleted giving the impression that the High Courts now only decides on matters that are prescribed by Federal law. See para 7.6 below.
authority. Moreover, men who were known to be upholders of the rule of law and in particular who committed themselves to the independence of the judiciary were eliminated from the system.

The Malaysian experience, as will be seen, has been that judicial power is only to be allowed in the form that the executive allows. An endeavour is made here to analyse the underlying reason for the executive's action in 1988 in removing Salleh and the two eminent judges of the Supreme Court referred to earlier. To examine this crisis in its proper perspective one cannot look at it in isolation or merely analyse the few relevant cases that were left to the courts to decide during 1986-1988.1 To do that would be to render the study incomplete as case law in this respect is scarce and the few decisions that are relevant to the crisis do not throw much light on material developments outside the court room. Many of the answers that are missing from the cases are provided by certain developments within the Malaysian Parliament as well as within UMNO which in 1987 underwent a massive leadership crisis the likes of which the country had not hitherto experienced.

Factionalism within UMNO at this time between Team A (led by Dr. Mahathir Mohamed - hereinafter referred to as "Dr. Mahathir") and Team B (led by Tengku Razaleigh Hamzah - hereinafter referred to as "Razaleigh") was mounting before and after the party's election in April 1987 in which Dr. Mahathir won by a majority of only 43 votes.2 Team B was pressing for a re-election in view of the many irregularities alleged to have taken place.3

When this political crisis reached the courts4 the Malaysian judiciary suddenly found itself sandwiched in the middle, i.e. between the two competing factions in

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1 For a discussion of these cases, see para 7.3, below.
2 UMNO, the biggest ruling party in the Barisan Nasional coalition (see Chapter 1), elects its leaders once in every three years. Whoever gets to be elected as President of the party also gets to be Prime Minister. The UMNO leadership election which is totally distinct and separate from the country's general elections, held once in five years, is participated by delegates from 177 UMNO Divisions in the country. For a full report of the UMNO leadership election in 1987, see Utusan Malaysia, 25 April 1987.
4 In March 1988 the Prime Minister in his capacity as Home Minister, following the UMNO leadership crisis, introduced an amendment to the Societies Act 1966 which sought to stop altogether any form of judicial review in respect of any internal irregularity found in the conduct of business of a society: See the new sections 18B and 18C Societies Act 1966 as amended by Act A743/1988. The powers of
UMNO. This led eventually to the removal of the Lord President, the highest judicial officer in the land.

7.2. Extra-judicial Statements and Cases that irked the Prime Minister

The build-up of an anti-judiciary sentiment began as early as 1977 but it reached its pinnacle only eleven years later in 1988. Since *merdeka* the judiciary had by and large enjoyed its share of independence and none of the previous three Prime Ministers, who had incidentally received their legal training in England, as much as nudged the judiciary let alone 'assaulted' it in Parliament as did Dr. Mahathir. In 1977, when he was still Deputy Prime Minister, Dr. Mahathir had his first adverse encounter with the judiciary when he said these words:

"... the independence of the judiciary also implies the independence of the legislature from the judiciary. This is a topical and relevant comment because there is a tendency for institutions wishing to be autonomous to believe that while others should not interfere in their affairs, they should be free to intrude in the affairs and usurp the functions of others."^5

The Deputy Prime Minister went on to interpret the term "judiciary" to include lawyers as a whole, a very remarkable slip which he later tried to retract after being criticised by members of the Bar. With the 1977 incident as a starting point, the Prime Minister appears to have faced a continuous "sour relationship with judges and lawyers". In October 1991, the Prime Minister engaged in another series of allegations against the Malaysian Bar: He maintained that the Bar had propagated...
adverse campaigns against the country overseas.\textsuperscript{1} He even alleged, without producing any proof, that the Malaysian Bar had sabotaged the country's economy through lawyers' campaigns overseas.\textsuperscript{2} Of this he said:

If lawyers do not want us to bash them, then they should stop bashing us . . . Lawyers and the Bar Council cannot deny they are not doing this, especially with the action in trying to get the Lord President unconstitutionally removed from office and smear campaigns being conducted overseas.\textsuperscript{3}

Dr. Mahathir's allegation about Malaysian lawyers conducting campaigns against his government overseas has proven conjectural and baseless, a finding that he has not chosen to rebut. The Prime Minister's oblique support for Hamid as the new Lord President was clear while his distaste for the Bar's positive role in the judiciary crisis does not seem to have subsided. It would be unfair perhaps to surmise that he has been having difficulty in appreciating the rule of law and human rights in their normal and universally accepted meanings and significance. But at the same time neither does he appear to have any difficulty in assailing the judiciary in no uncertain terms. As will be seen, his understanding or rather his misunderstanding of the concept of the separation of powers has been quite extraordinary.

There were two things that have in particular irked the Prime Minister: extra-judicial statements made by certain judges at official functions and their judicial pronouncements in a few of the cases that have gone against the executive.\textsuperscript{4} The period 1986-1988 was somehow filled with these.\textsuperscript{5} It was also during this period that the most drastic action against the judiciary was taken including the taking away of

\begin{enumerate}
\item The prime minister even branded the Malaysian Bar Council as economic saboteurs. "Indirectly they have sabotaged the country's economy": The Star 30 October 1990. Curiously the Council did not take steps to sue the prime minister for defamation.
\item The Star, 14 January 1992.
\item The Star, 14 January 1992.
\item For the period 1986-1989 the following are the major cases in which the Supreme Court found against the government: Berthelsen v. Director General of Immigration (1986) 2 MLJ (Re. premature expulsion order by the Immigration Department on ground of national security); Karpal Sing v. Menteri Hal Ehwal Dalam Negeri (1988) 1 MLJ 468, (Detention under the ISA); Theresa Lim v. Menteri Hal Ehwal Dalam Negeri (1988) 1 MLJ 293 (Detention under the ISA); Tan Sri Raja Khalid v. Menteri Hal Ehwal Dalam Negeri (1988) 1 MLJ 182 (Detention under the ISA); Lim Kit Siang v. UEM & Government of Malaysia (1988) 1MLJ 35; Lim Kit Siang v. UEM & Government of Malaysia (1988) 1MLJ 50 (Nq. 2)(Certiorari & restraining order)(Supreme Court); Minister for Home Affairs, Malaysia & Anor. v. Jamaluddin bin Osman (1989) 1 MLJ. 418 (Supreme Court).
\item See Chapter 4.
\end{enumerate}
the courts' judicial power under Article 121.\(^1\) Firstly, the Prime Minister took exception to several extra-judicial statements made by Harun J of the High Court and Salleh Abas LP. Secondly, the few judicial pronouncements made by judges in the course of making judgements in the ordinary judicial process gave him the impression that the judges were 'fiercely independent' for the wrong reason.\(^2\)

In 1986 Harun J, at an academic forum at the University of Malaya in Kuala Lumpur, suggested that the Senate as the second chamber of Parliament would be more effective if its membership was reconstituted. He said one of the functions of the Senate was to protect state interests but the Senators did not understand this.\(^3\) He argued that the present set-up of the Senate's membership was such that "nobody pays attention to them when they stand up to speak. They are listeners, not speakers."\(^4\) The judge suggested that the present set of Senators were ineffective as they were not elected but appointed. Under the circumstances Harun J suggested that the Chief Ministers of state governments and Speakers of the respective State Assemblies ought to be members of the Senate so that the interests of the states themselves could be better served.\(^5\) Contextually, the judge was merely airing his views on the Constitution in a speech to a congregation of academicians and students at the university. He was concerned about future leaders as much as the next Malaysian. The Prime Minister issued a direct warning the next day to the effect that judges should not interfere in the business of government and he charged that "certain judges were not addressing to their role."\(^6\) Although Harun J. was not named in his reference, the aim and direction of his remarks was clear when he said: "Therefore it is important for judges to avoid making their views public. If a judge has a personal

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\(^1\) See section 4 of the Constitution (Amendment) Act 1988 (A704). Prior to Act A704, Article 121(1) reads: "...the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status..."


\(^3\) The Dewan Negara (Senate), Malaysia's second chamber of Parliament presently has 61 members all of whom are appointed by the Agong on advice by the Prime Minister and through State Legislative nominations. Effectively, the Prime Minister has the last say in any appointment to the Senate.

\(^4\) Sunday Star, 6 September 1987: "Revamp the Senate" says Court Judge.


\(^6\) The Prime Minister's own words as reported. The Star, 8 September 1986. See also "Why Judges Must Stay Neutral", New Straits Times, 8 September 1987 (Headline-front page)
stand, then it is his problem. But judges should refrain from publicising it.”¹ However, his most disparaging remark was levelled against "some judges in activities of parties that oppose the Government".² Despite this accusation from the Prime Minister, there was no proof whatsoever that any of the judges were expressing political views much less views 'that oppose the government'.

For judges to express their thoughts on non-judicial matters has long been quite ordinary even in England.³ Lord Scarman was a judge in the Court of Appeal when he gave and published the Hamlyn Lectures in 1974⁴, the content of which was regarded as controversial. The same was true of the Dimbleby lecture given by Lord Denning in 1980. Judge Pickles even wrote in the Daily Telegraph on government pressure on the judiciary to shorten sentences and on the inadequacies of the British prison system.⁵ In 1989 he wrote in The Guardian expressing his critical views on certain aspects of the judicial establishment.⁶ That Harun J's opinion on the composition of the Dewan Negara (Senate) was marked as 'interference' is certainly a very narrow outlook. To give an opinion on an aspect of the Constitution is surely not an automatic breach of duty on the part of a judge. Moreover, the expression of an opinion by a judge to an august academic body such as the University of Malaya Law alumni needs no prior permission from anybody.

Events took a different turn after these statements. Talk of the impeachment of Harun J was floated⁷ and Asiaweek, an Asian regional weekly carried a full report on the clash between politicians and judges.⁸ Amidst all these reports, the Prime

¹New Straits Times. 8 September 1987.
²Ibid.
⁴Leslie Scarman, English Law-The New Dimension, London, 1974. Lord Scarman in this Hamlyn lecture tries to answer one question: Is English Law capable of further growth within the limits of the common law system or has the common law reached the end of the road?
⁵Although the Lord Chancellor told Pickles J. that the article constituted 'judicial misbehaviour' which is a ground for dismissal, the judge continued to write another article for the same newspaper: J.A.G. Griffith, op. cit. at p. 60.
⁸Asiaweek, 16 October 1987, "Of Politicians and Judges".
Minister's wrath was clear. In May 1987, Tun Suffian, a former Lord President who has also been an icon in the development of local and regional legal education, promptly reminded all concerned of the independence of the judiciary. He asserted:

The Judiciary's role is to protect and defend the Constitution and dispense justice in accordance with law. Judicial independence has always been a pillar of the Constitution. While Parliament and the Executive are linked through Cabinet Ministers who are members of both, the Judiciary is entirely separate from and independent of either branch. Judges do not take orders from Parliament. Nor do they from the Prime Minister or from anybody in Government. Judges are not civil servants who quite properly take orders from Ministers and their seniors in the service.¹

The parliamentary impeachment² of Harun J was shelved, perhaps due to the immense publicity and the procedural obstacles, not to mention the political risks involved, was shelved.³ Instead, Dr. Mahathir chose the state-controlled media⁴ to further his campaign against the judiciary, while the full brunt of his high office through the guidance of the Attorney General missed nothing that would in any way put the executive in a predicament. In early December 1987 during the presentation of the second reading of a bill amending the Printing Presses and Publications Act 1984 (PPPA) at the Dewan Rakyat, he declared, even without any challenge whatsoever from any quarter, that the executive should be allowed the right to govern.⁵

¹ The Star, 5 February, 1987. "The Judiciary Must Remain Free - Suffian LP". This was the topic of a talk organised by the Malaysian Institute of Management in Kuala Lumpur on 4 February 1987.
² Article 127 of the Constitution provides: "The conduct of a judge of the Supreme Court or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State."
³ The Asiaweek article on 16 October 1987 states: "Says a top Barisan (Nasional) official: "We have been left in no doubt that some sort of action is being contemplated". Another says that "several alternatives have been discussed," including the use of section 125 and 127 of the Constitution, which relate to the sacking of judges and parliamentary motions to discuss their conduct and censure them."
⁴ The notion of state-control in respect of the electronic and print media lies under two precepts: firstly, control is effected through ownership and secondly the same is effected through the powers exercised by the Home Minister (since 1986 the post was held by Dr. Mahathir Mohamed) chiefly under the Printing and Publications Act 1984. The Radio Television Malaysia (RTM) is a public station and funded by public funds but used exclusively for the advantage of the government and its ruling coalition parties, especially UMNO Baru. TV 3, incorporated in 1984 is substantially owned by UMNO Baru through its various corporate holdings and has a distinct policy of assisting the government and its party system. The Utusan Malaysia, Utusan Melayu, the Straits Times and its sister publications the Sunday Times and the Malay Mail and The Star, represent the print media in English. Nanyang Siang Pau and Sin Chew Jit Poh represent the Chinese while the Tamil Nesan, the Indians respectively. All are owned by nominee companies of the ruling political parties. For an account of corporate ownership by political parties in Malaysia, See Edmund Terence Gomez, Politics in Business: UMNO's Corporate Investments, Forum, Kuala Lumpur, 1990.
⁵ New Straits Times, 4 December 1987, "Ensuring the Right to Govern", the title of the PM's speech was reproduced in full by the NST at p. 6.
amendments to the PPPA the Minister of Home Affairs was being given yet another en-bloc power to determine as he pleased the giving or withdrawing of a press or printing licence. In respect of the right to be heard, which hitherto had not been barred under s. 13 of the PPPA but which was now to be abolished under the new s.13B, the Minister had this to say:

Section 13B of the Act clarifies that the opportunity to be heard will not be given to whosoever with regard to his application for a licence or permit or relating to the revocation or suspension of a licence or a permit which has been issued to him under this Act. With this section 13B, the opportunity to be heard under section 13 needs to be removed. . . The amendments are made because of the need to define Government powers in written laws. These amendments become more important because of the inclination of certain sectors to use unwritten laws to obstruct the function of the Government. It is difficult for the Government to recognise unwritten laws because the government may not know what it can do and what it cannot.1 (italics supplied).

Under s.12 ministerial decisions under the Act are not to be brought into question in any court. Such harshness in a law that is supposed to regulate and facilitate freedom of speech through press rights truly supersedes previous legislation on the matter. The Prime Minister was clearly agonising against judges who were still free to hand down rulings based on the rules of natural justice even in instances where the Minister was sure to have the last say. It may be recalled here that in Persatuan Aliran Kesedaran Negara (Aliran) v. Minister of Home Affairs2, a major case with respect to the right to print and publish, the Government was told by the court in December 1987 to accept the applicability of the rules of natural justice.3 What especially displeased the executive was the fact that Harun J in Aliran disregarded the ouster clause under s. 12 of the PPPA.4

On New Year's Day 1988, the Prime Minister directly chided judges who were known 'to be fiercely independent'.5 Dr. Mahathir admitted that the term 'fiercely

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1 New Straits Times, 4 December 1987.
2 (1988) 1 MLJ 442 [High Court]. See Chapter 4 ante.
3 See below.
4 On appeal by the government in Minister of Home Affairs v. Aliran (1990) 1 MLJ 351 the Supreme Court reversed the High Court's decision, following the principle in Council of Civil Service Unions & Ors. v. Minister for the Civil Service (1985) AC 374. Ajaib Singh SC determined that ministerial power under s. 12(2) of the Printing Presses and Publications Act 1984 was not justiciable. See also Liew Ah Kim v. Menteri Hal Ehwal Dalam Negeri RI (Rayuan Imula) 24/83/91 Appeal No. 01/92 (unreported).
5 Malaysian Business, Kuala Lumpur, 1 January 1988. For the Government's role in severing ties with the Privy Council, see Asiaweek, 16 October 1987, p. 20.
'independent' with special reference to the judiciary, was a term used by the press but not by any of the judges. At any rate, he said that he did not believe in the applicability of this phrase to the Malaysian judges on the simple ground that "When you want to be fiercely independent, you are implying that you'd forget your duty to be just and fair. You're only interested in being very independent and in order to do that, you have to stretch things a bit, you have to prove that you can hammer the government, for example."¹ Eleven days later, on 12 January 1988 Lord President Salleh, no doubt feeling wary of the executive-judiciary bouts, gave vent to what he thought was then an 'exasperating situation'. He told a congregation of lawyers and judges in Kuala Lumpur:

[T]he problem of maintaining judicial independence is further complicated by the fact that the judiciary is the weakest of all the three branches of the Government. It has no say in the allocation of funds - not even in determining the number of staff needed for the running of its own system.²

Earlier in the speech, Salleh made it known that the judiciary's role as guardian of the Constitution "has been made an issue and our very independence appear to be under some kind of threat."³ By this time the executive-judiciary cleavage had widened. Pergerakan Pemuda UMNO, the ruling party's youth wing and various leaders of UMNO had begun their open attacks on the judiciary.⁴ The line of attack was generally associated with the assertion that every segment of government in the country must tow the line determined by the rakyat (people).⁵

While the Prime Minister had begun to have his contorted view of the judiciary as early as his deputy premiership in 1977 it is clear that his view became even narrower during the period 1986-1988. Cases such as Berthelsen ⁶, UEM

³Ibid. p. 144
case\(^1\) \textit{Aliran} \(^2\) and \textit{UMNO II} case\(^3\) had visibly irked the Prime Minister to the extent that he subsequently reacted officially to judicial pronouncements.\(^4\) Although he did not so much as mention the name of the cases concerned, nevertheless, his broadsides were unmistakably aimed at the judiciary and he ridiculed the legal concepts formed within the common law and the rules of natural justice.\(^5\) In \textit{Berthelsen}, the plaintiff, an American staff correspondent of the \textit{Asian Wall Street Journal} at its Kuala Lumpur bureau was ordered to leave the country, some two months before the expiration of his employment pass issued under the Immigration Act 1963.\(^6\) The plaintiff’s employment pass in question was valid until 2 November 1986. However, on 26 September 1986 he was served with a notice of cancellation of the said pass under the Immigration Regulations 1963. The notice of cancellation cited that the Director General of Immigration was satisfied that Berthelsen had contravened or failed to comply with the conditions imposed in respect of that pass and the instructions endorsed thereon. It was specified further that his presence in the country was or would be prejudicial to the security of Malaysia.\(^7\) Berthelsen sought leave from the High Court to apply for an order of \textit{certiorari} to quash the cancellation of his employment pass and for an order of prohibition against his premature removal from the country. He appealed to the Supreme Court when his application for leave was refused by the High Court.

The Supreme Court nullified the order of the Home Minister on the ground of non-compliance with the rules of natural justice.\(^8\) Abdoolecader SCJ, delivering

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\(^1\) \textit{Government of Malaysia v. Lim Kit Siang} (1988) 2 MLJ 12 (Supreme Court)
\(^4\) See Chapter 4, para 4. 11 \textit{ante}: "Cases that irked the Prime Minister".
\(^6\) Berthelsen received the order of expulsion from the country together with another fellow journalist from the \textit{Asian Wall Street Journal} (AWSJ) following a ban of the AWSJ.
\(^7\) The phrase "prejudicial to the security of Malaysia" or "prejudicial to the security of the country" or "prejudicial to the security of the Federation" or "prejudicial to the security of Malaysia or any part thereof" has been in vogue in all instruments that curtail freedoms in Malaysia. See Chapters 5 & 6 \textit{ante}.
\(^8\) For an analysis of this case see Chapter 4 \textit{ante}.
judgement of the Supreme Court, pointed out that Berthelsen had a 'legitimate expectation' to be in the country at least for the unexpired portion of the period originally specified in the employment pass. He emphasised:

> Any action to curtail that expectation would in law attract the application of the rules of natural justice requiring that he be given an opportunity of making whatever representations he thought necessary in the circumstances.¹

The circumstances indeed attracted the application of the rules of natural justice as Berthelsen was not given the opportunity to be heard when his pass was summarily cancelled by the authorities. Accordingly the Court ordered that certiorari be issued to quash the cancellation.

The Prime Minister was quick to take up issue with this bold decision of the Supreme Court. In a *Time* magazine interview in November 1986, he expressed his view on the courts' function in the following words:

> The judiciary says to us, 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation'. If we disagree, the Courts will say, 'We will interpret your disagreement'. If we go along, we are going to lose our power of legislation, we know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to interpret it our way. If we find out that a Court always throws us out on its interpretation, if it interprets contrary to why we make the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.² (italics supplied)

The above statement, especially the last sentence "...we will have to find a way of producing a law that will have to be interpreted according to our wish" clearly depicts the state of mind of the speaker. The Prime Minister entertained strong doubts in the interpretative function of the courts. At the same time he manifestly feared the possibility of losing the power to legislate. He wanted his own way of interpretation of a statute so that the exact results as envisaged by the executive could be guaranteed. Needless to say, this is a dangerous suggestion. It tends to make the executive its own judge via its dictation through the supremacy of parliament. It

¹(1987) 1 MLJ 134 at 137.
²Time Magazine 24 November 1986 p. 18. Hereinafter this statement is referred to as the "Time statement".
nullifies the notion of independent arbitration. In extension, the necessity for the
courts to function within the precincts of the rule of law is thereby diminished.

The *Time* statement resulted in a contempt of court action instituted by Mr.
Lim Kit Siang, the Leader of the Opposition against the Prime Minister.¹ Harun J. (as
he then was) in dismissing the application said:

The Prime Minister’s real complaint is that laws are not being made foolproof, so to speak.
The statement is an expression of Dr. Mahathir’s dilemma that the courts are not able to
express the intention of the Government in their decision because of faulty or slipshod laws
made by Parliament.²

Lim’s appeal to the Supreme Court was dismissed by Salleh Abas LP, Hamid CJ
(Malaya) and Abdooldacer SCJ who regarded the statement as "a misconception of
the role of the courts".³ In concluding that the *Time* statement did not amount to
contempt, the Supreme Court concluded that when viewed ‘objectively and
dispassionately and in proper perspective’ it was simply an articulation of the
executive’s frustration in not being able to achieve its objectives in those areas where
the intervention of the courts have been sought to some avail. As it turned out, the
Prime Minister’s misconception of the interpretative role of the courts did not end
there.

In March 1988, Dr. Mahathir, in an unmistakable reference to *Berthelsen*
voiced the view that the law was clear as to how long a foreigner could stay in the
country and that the minister’s decision was final. However he lamented:

But the judge overruled this. That was a well-known case. The person was allowed to stay
here and the Minister could not do anything.⁴

He also gave his own ruling in respect of what judges could do when interpreting
legislation made by parliament:

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² Harun J’s finding was reported under the caption "Mahathir’s Dilemma" reported by *The Star*, 29
November 1986.
³ *The Star* 29 November 1986 *op. cit.*
We have no wish to be judges. Judges apply the laws made by Parliament and not make their own laws as is happening now.\(^1\)

It is hardly in keeping with the tradition and the principle of separation of powers for the executive to rally against the judiciary just because a few of its decisions go against the executive's wishes. Once a matter is submitted to the courts for adjudication under a valid power of jurisdiction, it requires both parties to respect and abide by the decision reached by the court concerned. In this connection, Dr. Mahathir was clearly misconstruing the thrust of *Berthelsen*. The Supreme Court did not say that 'the Minister could not do anything.' On the contrary, it merely said that Berthelsen's employment pass could be cancelled but that such cancellation should be in accordance with certain established principles of natural justice. These principles, which have been developed by eminent courts of the common law world essentially reflects a mature and civilised society.\(^2\) All that the Minister was required to do in consonance with the principles of natural justice was to provide an opportunity for the aggrieved applicant to tell his side of the story. The court distinctly said:

> If having done all this the Director General of Immigration then gives consideration to Berthelsen's representation, the requirements of natural justice will have been satisfied and it would be for the Director General of Immigration to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him...\(^3\)

Indeed the courts in Malaysia have been sensitive towards the rules of natural justice previously even in cases where the interests of the Malaysian Government have been adversely affected. This was the first time that a Malaysian Prime Minister took it upon himself to chide the judges publicly on account of their steadfastness in applying the *audi partem* rule.\(^4\)

The period 1986-1989 could perhaps be summarised to be the finest hour of the Malaysian Judiciary for it was during this short period that it handed down those

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\(^3\)(1987) 1 MLJ 134 at 138.

\(^4\) For further analysis of the prime minister's criticism of the common law's applicability in Malaysia, see para 9.5 below.
few judgements that gave freedom a boost.¹ These judgements did not go down well with the Prime Minister.² His dissatisfaction with the judiciary came into sharp focus when he was clearly stung by the various decisions of the court which we have discussed in Chapter 4.³

7.3. The UMNO 11 Case

It has not been customary for an incumbent UMNO President (who is also the Prime Minister) to be challenged politically. However, this trend changed in 1987 when Dr. Mahathir was directly challenged by Tengku Razaleigh, one of the three vice presidents in the party who was also the Trade and Industry Minister in the Mahathir Government.⁴ In their jostling for political supremacy, some members of UMNO in Team B alleged certain malpractices and irregularities with respect to the handling of the UMNO leadership election in April 1987. They brought their grievance to the courts. On 3 February 1988 the UMNO 11 case⁵ was heard by the High Court in Kuala Lumpur. The case involved the question of UMNO's legality as a society when eleven members of UMNO, opposed to Dr. Mahathir, petitioned the High Court alleging that certain members of some unregistered UMNO branches participated at divisional meetings in nominating candidates to the April 1987 leadership elections thereby rendering the April 1987 party elections null and void. Under s. 12(3) of the Societies Act 1966 a society that establishes a branch without being registered or without the prior approval of the Registrar of Societies renders the branch so established unlawful. On the authority of the said provision, Harun J decided that UMNO was an unlawful political party by virtue of the fact that some 30 branches of UMNO branches in several states were not registered, thus violating s. 12(3) of the

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¹See Chapter 4 ante.
³See para 4. 11 ante: "Decisions that irked the Prime Minister" in Chapter 4.
⁴Tengku Razaleigh, a member of the Kelantan Royal family, was also a former Finance Minister during the Hussein Onn administration (1976-1981).
1966 Act.\(^1\) However, the eleven petitioners had only wanted that the 1987 leadership election to be treated as null and void. They did not want the court to 'kill' the party. Harun J delivered a judgement that has been referred to as creating 'great confusion'.\(^2\) He did not accede to the plaintiffs' prayer that the court should order a fresh election in view of the non-registration of the UMNO branches which contravened the 1966 Act. Instead he determined that UMNO by virtue of the existence of unregistered branches had become an unlawful society under sections 12(3) and 41(c) of the Societies Act. He said:

That being so, the plaintiffs being members of UMNO cannot acquire any right which is founded upon that which is unlawful. The court will not, therefore, lend its aid to the relief sought by the plaintiffs.\(^3\)

His Lordship could have avoided the ensuing difficulty into which the Supreme Court and the executive later got entangled. He chose to accept the contention of counsel for UMNO, who urged the court to find that UMNO as a whole should be deemed an unlawful society for having violated section 12(3) read with section 41(c) of the Societies Act 1966\(^4\). The court equated the failure on the part of party officials to register those impugned UMNO branches at grassroots level with the total unlawfulness of UMNO as a society. His Lordship did not accept the plaintiffs' contention that even though the branches had violated section 12(3) the whole party ought not to be declared unlawful. Reading the provisions of sections 12(2) and 41(c) of the Act does not conclusively lead to such a finding because non-registration of a party branch should not necessarily cause the illegality or

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\(^1\) The 30 unregistered branches of UMNO were in the States of Kelantan, Penang, Pahang, Perak and Negeri Sembilan.


\(^4\) Section 12(3) of the Societies Act 1966 stipulates: "Where a registered society establishes a branch without the prior approval of the Registrar the branch so established shall be an unlawful society." Under s. 70 of the Act, however, the Minister of Home Affairs has the power to "exempt any society registered under this Act from all or any of the provisions of this Act." After the judgement of Harun J. appeals were made to the Minister requesting him to use his good office in exempting UMNO from the subjection of s. 12 of the Societies Act. Dr. Mahathir as Home Minister refused to utilise this power of his. See for e.g. letter of appeal from Datuk Harun Hj. Idris to Dr. Mahathir Mohamed, Minister of Home Affairs, 12 January 1989. Section 41(c) determines the extent of an unlawful branch of a society envisaged under section 12(3).
unlawfulness of the party concerned. The court could have applied the 'severance' principle as was done before in Vethanayagam v. Karuppiah 1 where an unapproved branch of the Malaysian Indian Congress (MIC) was subject to an interim injunction on account of non-registration. The court considered s. 12(3) of the Societies Act 1966 and held that the unapproved branch was an unlawful society but did not declare the MIC as a whole as an unlawful society. Harun J refused to follow this authority on his assumption that the facts in Veythayagam could be distinguished.

This approach would appear to be clearly wrong for to follow this to its logical conclusion would put the whole party to jeopardy purely on account of a few non-registered branches participating in party elections. The whole philosophy of the Societies Act is to facilitate freedom of association in a manner that gives credence to Article 10 of the Constitution. Needless to say, the judgement goes directly against the higher right of association that is guaranteed, albeit limited as it is, under Article 10. There was nothing to stop the court from adopting the reasoning that in view of the limited number of branches not registered2 the non-compliance required under section 12(3) of the Act could be deemed as a mere irregularity that could be corrected by administrative arrangement. Ironically, his Lordship went on to suggest that the previous party election of 1984 was considered good and therefore the UMNO office bearers elected then could function. This is the part which Salleh later referred to as a 'great confusion'. Confusing as it might be, this gave hope to Team B in UMNO that a fresh party election could still be held on the strength of the pre-1987 position of the party which the court held was untainted3. This was not to be in view of the intervening political and administrative processes which took place.

1(1969) 1 MLJ 146.
2There were 30 UMNO branches in the States of Kelantan, Penang, Pahang and Negeri Sembilan that were not registered or 'getting prior approval' of the Registrar of Societies up to 24 April 1987, i.e. the date of the UMNO General Assembly in question. In 1987 there were 8,750 UMNO Branches within 131 Divisions in the whole of Peninsula Malaysia. See Laporan UMNO 1988, Kuala Lumpur, 1988.
3UMNO holds its leadership election once in every three years. Therefore, since the 1987 election was found to be unlawful, the High Court deemed that the party was lawful for 1984, 1985 and1986. When a newly constituted Supreme Court heard the appeal in August 1988, this dichotomy by Harun J was found 'not to be based on law.' See below.
The eleven petitioners appealed to the Supreme Court. Salleh, the Lord President fixed the hearing of the *UMNO 11* appeal on 13 June 1988. It announced that the entire nine-member panel of the Supreme Court was to deliberate on the matter. This unprecedented arrangement took the government of Dr. Mahathir by surprise and its fear that the case might be decided in favour of the eleven petitioners, thereby putting in jeopardy both the party and government, caused the executive to take the lead in the chain of events that then followed. The *UMNO 11* was the one case that could aptly be labelled as the 'king-pin' of the judiciary-executive crisis because the future of the party's president who was also the prime minister depended on its outcome.

It was obvious that Dr. Mahathir and Team A did not welcome the possibility of a re-election for public opinion was clearly against them and if the election of UMNO's leaders were to be held again their chances of victory were seen as slim. Thus the fear of losing loomed and in this context the *UMNO 11* appeal was not a welcome development as far as Team A was concerned. It was at this juncture that 'scrutiny' was put on Salleh Abas, the Lord President. The executive's suspicion that the Supreme Court might allow the *UMNO 11* appeal and thereby open the venue for a fresh election in place of the one held on 24 April 1987 appeared to be the main impetus behind the executive's onslaught on the judiciary.

7.4. The Letter

On 26 March 1988 Salleh wrote a letter to Sultan Iskandar of Johor who was then the sixth Agong. The letter was also addressed to all the Malay rulers. In essence the letter, written on behalf of "all the judges of the country" informed the King of the

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1 This case is further discussed below.
3 See below.
4 The letter written by Tun Salleh on behalf of his brother judges was in Malay and reproduced as Annexure 2 in the *First Tribunal Report*, Vol. 1.
recent "developments in the relationship between the Executive and the Judiciary".1

The letter, couched in Malay, further says:

All of us are disappointed with the various comments and accusations made by the Right Honourable Prime Minister against the judiciary, not only inside but outside Parliament. . . all of us are patient and do not like to reply to the accusations publicly because such action is not compatible with our position as judges under the Constitution. Furthermore such action is not in keeping with Malay custom and tradition. . . the accusations and comments have brought shame to all of us and left us mentally disturbed to the extent of being unable to discharge our functions orderly and properly.

The letter, referring to the Prime Minister's attack on the judiciary, ended "with the hope that all the unfounded accusations will be stopped." 2 This letter by Salleh to their Royal Highnesses3, written after a special meeting of 20 judges a few days earlier, concerned the Prime Minister's attacks on the judiciary, including a formal speech delivered by him in the Dewan Rakyat. which underlined his mistrust of the judges and their interpretation of the laws4. Salleh admitted that one of his brother judges was getting impatient with the premier's "accusations and comments" levelled against the judiciary and had told Salleh in a letter that he might go public if the criticisms continued.5 It was this particular incident that caused Salleh to convene the special meeting of 20 judges in Kuala Lumpur on 23 March 1992. The idea of writing the letter to the King and to all the Rulers was discussed and approved unanimously although one Supreme Court judge did initially express some

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1Ibid. Para 3. Tun Salleh Abas said later that he expected the King to be sympathetic over the interference by the executive but was shocked to learn that the King sympathised with the Prime Minister more: Interview, 12 April 1989.


3This letter, in Malay, was written on 26 March 1988 by Tun Salleh to the Agong and all the Malay Rulers on account of the then constant barrage by the Prime Minister against the Judiciary. It was written after a meeting of 20 judges who collectively agreed that Tun Salleh as Lord President was the proper person to voice to the King on their behalf. See Tun Salleh Abas, The Role of Independent Judiciary, op. cit. pp. 152-153.

4This formal attack on the judiciary was made on 17 March 1988 in the course of the PM's speech at the second reading of the Constitution (Amendment) Bill 1988. It was this constitutional amendment that saw the taking away of the 'judicial power' of the courts. See Parliamentary Debates, Dewan Rakyat, 17 March 1988 Clmn. 1353-1364.

reservations regarding the idea.\(^1\) As it turned out later, a number of those judges who agreed to the letter being written by Salleh on their behalf had changed course and adopted positions which facilitated the removal of Salleh as Lord President. The main actors in this respect were Hamid CJ (as he then was) and Hashim Yeop Sani SCJ. The former was appointed Acting Lord President and the latter Acting Chief Justice after Salleh was suspended as Lord President pending the outcome of the First Tribunal set up under Article 125(3) of the Constitution. The latter became the Chief Justice when Hamid was elevated to the Lord Presidency. Both featured prominently in the two tribunals formed under Article 125(4) following the decision to remove Salleh as Lord President and two other Supreme Court Judges (George Seah and Wan Sulaiman).

7. 5.  **Formation of UMNO Baru (New UMNO)**

The Prime Minister as UMNO's president did not wait for the outcome of the *UMNO 11* case to be finalised at the Supreme Court before taking the next offensive. Equipped with the *UMNO 11* judgement by Harun J on 4 February 1988 that declared UMNO an unlawful society, Dr. Mahathir quickly set to form a new political party called *UMNO Baru* (New UMNO). The speed with which UMNO Baru was approved for registration sparked a controversy of administrative bias.\(^2\) Application for registration of *UMNO Baru* was made by Dr. Mahathir's supporters on 10 February 1988 and the same was approved for registration on 13 February 1988. Earlier, on 8 February Tunku Abdul Rahman and Tun Hussein, both former Prime Ministers, in an effort to resuscitate the deregistered UMNO submitted an application to register *UMNO Malaysia*, using the entire constitution of the old UMNO as its own constitution with the aim that in the event the existing appeal by the UMNO 11 failed in the Supreme Court the Malays at least could go about their normal political

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\(^1\) Salleh Abas & K. Das, *op. cit.*, p. 67. The judge who entertained reservations on the plan to write the letter to the King was Hashim Yeop Sani SCJ.

business under UMNO albeit with a new suffix - "Malaysia". According to the late Tunku this was done purely to relaunch UMNO, the party that he and his colleagues had regarded as the platform for Malaya's independence. The application was rejected by the Registrar of Societies on the ground that the word "UMNO" could not be used a second time.

Mahathir's new political party, UMNO Baru was registered within three days by the Registrar of Societies whose department is directly under the departmental control of Dr. Mahathir as Minister of Home Affairs. What was overlooked by the Registrar was that by registering the new UMNO she was in fact disregarding the pending appeal which was then before the Supreme Court. She ought to have postponed the registration of UMNO Baru until after the decision of the Supreme Court. The Registrar can hardly escape the criticism that in allowing the registration of UMNO Baru despite the pending appeal to the Supreme Court, she was not made sufficiently aware of the abuse of process that appear to have been involved. Hundreds of senior members of the old UMNO brought up the matter officially with the Minister by petitioning him to use his power under s. 70 of the Societies Act with a view to excluding the old UMNO from the operation of the Societies Act and thereby exculpating UMNO from the predicament of having to face de-registration. Dr. Mahathir refused to accede to this request. The various objections against abuse of judicial process did not amount to much and an application for mandamus by some members of the old UMNO turned out to be a futile exercise of legal process.

In Tunku Abdul Rahman Putra Al-Haj v. Dato Seri Dr. Mahathir Mohamed & Anor. before Ajaib Singh J at the High Court on 12 April 1988, the late Tunku

1Interview: 8 February 1989.
2Zakiah binti Hashim.
4Puan (Madam) Zakiah.
5Section 70 of the Societies Act 1966 provides that the "Minister may at his discretion in writing exempt any society registered under the Act from all or any of the provision of this Act." See also letter from Datuk Harun Hj. Idris to Dr. Mahathir Mohamed, Minister of Home Affairs dated 12 May, 1988.
6Datuk Abdul Malek bin Ahmad v. Registrar of Societies (1988) 1 MLJ 124.
7(1988) 2 MLJ 532.
Abdul Rahman and Tun Hussein Onn who were acting as the interim President and Deputy President of *UMNO Malaysia* whose registration was pending at the time, sought an interim injunction against *UMNO Baru* and Dr. Mahathir from, *inter alia*, recruiting new members as this would prejudice the rights of *UMNO Malaysia*. The court rejected the application on the ground that the new UMNO was already a validly registered political party under the Societies Act 1966 whereas the status of UMNO Malaysia, so the judge reasoned, was "shrouded in uncertainty." The court did not take cognisance of the rights of a political party that was awaiting registration. As we have seen, the Registrar of Societies rejected the registration of *UMNO Malaysia* on the ground that the word "UMNO" could not be used. Resort to court would not have occurred if Dr. Mahathir as Minister of Home Affairs had exempted UMNO from the operation of the 1966 Act as allowed under s. 70. However, if he did that he risked reopening the floodgate of direct challenges to his leadership. In particular he would have faced the prospect of having to confront his arch rival Razaleigh again in the same party. Having formed the new UMNO, Dr. Mahathir was free to dismember and ostracise Razaleigh's faction in the original UMNO which included two former prime ministers, a former deputy prime minister and several cabinet ministers as well as deputy ministers.

7.6. Resort to Parliamentary Power

By March 1988 the Salleh saga was starting to ripen into a full scandal. Datuk Musa Hitam, a former Deputy Prime Minister who left the Mahathir Cabinet in 1986 because of policy differences with the Prime Minister, openly attacked Dr. Mahathir on various occasions. The way the latter handled the judiciary remains one of the

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3 The two former prime ministers were Tunku Abdul Rahman Putra and Tun Hussein Onn. By 15 May 1987 there were already 14 leaders from the B Team who were sacked by Mahathir from ministerial as well as deputy ministerial posts.
4 See Rais Yatim, *op. cit.* pp. 275-278.
lasting criticisms against the Mahathir government. In March 1988 the Prime Minister initiated and tabled the Constitution (Amendment) Act 1988 (the "1988 Act") in Parliament. This was hardly four months after passing the Printing Presses and Publications (Amendment) Act 1987. The 1988 Act was primarily aimed at reducing the power of the courts although there were other matters as well that were intended to "smoothen the process of administration in Government".

It was in the Prime Minister's speech at the second reading of the Bill that his philosophy on the judiciary was spelt out most succinctly. The speech attacked the interpretative powers of the courts, ridiculed the rules of natural justice, and along with the common law and its connection with the Malaysian legal system. Although no specific mention of cases was made by Dr. Mahathir in his speech it was obvious that the decisions in cases like Bertheisen, Karpal Singh, Aliran and the UMNO were the obvious targets of the Prime Minister's onslaughts. The Prime Minister's reference to the judiciary were vitriolic. Apart from reminding the House that "Malaysia is not Britain", the Prime Minister also reasoned that "we have our own culture and our own values...in our democracy, the rakyat is in power...because of that, laws which are made by the people's representatives must be observed. Whoever ignores laws made by the Government elected by the rakyat he is tantamount to

1 See Harakah, 23 August 1992. Musa Hitam criticised Mahathir's action on the judiciary effectively during the Johor Bahru parliamentary by-election in August 1988 through a series of ceramah (talks) and press statements overseas.
4 See Chapter 4 ante. The Constitution (Amendment) Act 1988 also boosted the Attorney General's power in transferring cases from a lower court to any High Court without having to undergo the normal preliminary inquiry (PI) as required under the Criminal Procedure Code, truly reflects the potency of the executive. The power to transfer a criminal case from a lower court to any High Court at the instance of the Attorney General was regarded as an executive act that violated article 8 of the Constitution as being a discriminatory and usurping judicial function. It was therefore held unconstitutional: Datuk Yap Peng v. Public Prosecutor (1987) 2 MLJ 311 (per Eusoffe Abdoolcader SCJ at p. 313). Datuk Yap Peng overruled Datuk Haji Harun Idris v. Public Prosecutor (1977) 2 MLJ 155. Section 8 of The Constitution (Amendment) Act 1988 (A704) negates Datuk Yap Peng and constitutionalised the A-G's power to transfer such cases at will under the new article 145(3A).
5 (1987) 1 MLJ 134
6 (1988) 2 MLJ 468. See Chapter 6 ante for a discussion of the case, especially the judgement of Teh J.
7 (1988) 1 MLJ 442.
denying democracy." To regard the Malaysian Parliament as supreme, which was what the Prime Minister was contending here, is erroneous because Article 4 is explicit in its provision that it is the Constitution that is supreme. The speech, which also alleged that "certain members of the judiciary were involved in politics", clearly bared the inner thoughts of the prime minister against the judges. He failed to substantiate his allegation. He had also failed to appreciate the nature of the judicial function. His inability, perhaps in this case more his refusal, to understand and accept the rule of law, was purely a manifestation of his political assertion as to how judges ought to carry out their judicial responsibility.

An earnest desire for change, especially if expressed by a prime minister who is still searching for a standard local value for his country's legal system is understandable. But this involves a process that can only be practical and acceptable if it is brought about by an evolutionary process. To suddenly terminate judicial power merely because of the wishes of a Prime Minister whose political future was at the material time questionable, is hardly in keeping with democratic values. Democracy and the rule of law are indeed integral in a modern system of government.

The 1988 Act brought an end to 'judicial power of the Federation' a hitherto intrinsic power provided under Article 121(1) of the Constitution. Judicial power, in its universal interpretation, invariably includes the power to interpret laws according to the precepts of common law which over the years have become part and parcel of the Malaysian common law. In fact the Prime Minister's unwillingness to abide by the totality of the common law's principles is to the extent that no sovereign country ought to be categorically tied down by the common law of England. However, his misunderstanding and apprehension stem from the wrong assumption that all judges would arbitrarily apply common law principles and the rules of natural justice to the detriment of the government's interests in a multiplicity of cases. This fear and misunderstanding are certainly misplaced because although there are common law

1 Ibid. clmn. 1358
2 Ibid. clmn. 1359
3 See Chapter 3, para 4. 11, ante.
4 Act 704.
principles resident in case law decided by the judges, these have been Malaysianised as part of the general Malaysian common law. In fact this is settled as far as Malaysia is concerned. In 1989 Raja Azlan Shah, in a specific reference to English common law and its application in Malaysia said:

English law was not applied in toto. English law was relevant only to the extent that it was made subject to modifications and adoption to suit local conditions. Once applied through this process, it became Malaysian law. Therefore, over the past hundred years or so, through the judicial process, almost every branch of the law in Malaysia was developed. In some areas, legislation was introduced. (emphasis added)

The real consequence to the judiciary of losing 'judicial power' cannot be exactly ascertained as yet. It may be years before the courts get the opportunity to rule on this particular issue. Does it now mean that without such express constitutional phrase the courts are really without judicial power? To answer this in the negative would mean that Parliament has taken away the judicial function of the judiciary, an act that may be legally recognised as usurping judicial function which has been opined to be unlawful in the context of the doctrine of separation of powers.

It is clear that after the 1988 constitutional amendment the judiciary is now more timid in asserting its judicial independence. No doubt, there have been a few cases since the 1988 crisis where the government has lost but invariably these cases, though touching upon the personal freedom of the subject, do not alter the already precarious position of the judiciary. In sum, the general nature of judicial attitude has been one of docility and a general atmosphere of timidity is in the air.

The 1988 Act was enacted at a time when the UMNO 11 case was hotly debated and when almost every political speech sought to touch upon it as a national issue. The action taken to strip the judiciary of its judicial power was consistent with the Prime Minister's speech in introducing the PPPA amendment at the Dewan Rakyat

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4 See Lyanage v. Regina (1966) 1 All E. R. 650
5 The relevant cases have been identified in Chapter 4 ante.
four months earlier.\(^1\) It was also in line with his statement in October 1987 in wanting to have a clear demarcation of powers. He said then, "We do not want the chaos that could result from a branch usurping the role of the other."\(^2\) However, to the Prime Minister the taking away of judicial power from the courts did not seem to come within his definition of "usurping the role of the other". Thus it would appear that it was perfectly acceptable for the executive to use Parliament to take away the judicial power of the courts.

To demarcate the powers and functions of the judiciary is in itself not necessarily a bad idea. What is objectionable is that in the process of bringing about a tighter demarcation, a reduction of the original power and function of the courts should be achieved. Judicial power is after all "the power to determine and arbitrate disputes of a legal nature in which parties are concerned with the protection of their legal interest as opposed to any other interest".\(^3\) Judicial power being vested in the judges is thus an original function and a responsibility of the judiciary. The taking away of this power means having a lame judiciary whose 'independence' now may largely depend on how the executive wishes to treat it.

7.7. **Suspension of the Lord President**

Events occurred at a frenzied pace after the formation of the new UMNO. On 27 May 1988 Dr. Mahathir summoned Salleh, the Lord President to his office in Kuala Lumpur.\(^4\) Though this summon in itself put Salleh in a predicament because the head of the judiciary simply does not 'come running' at the beck and call of the chief executive of the government, he did at any rate conform and paid the Prime Minister a visit. According to Salleh he met the Prime Minister "out of ordinary politeness"\(^5\) a

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1 See Chapter 4 ante.
2 *New Straits Times*, 3 October 1987, "Government Will Ensure Separation of Powers, says PM".
3 *Public Prosecutor v. Dato' Yap Peng* (1987) 2 MLJ 311 at 325 per Tun Salleh Abas L.P.
4 Tun Salleh describes the summon as "acceding to his invitation". See Tun Salleh Abas, *The Role of the Independent Judiciary*, op. cit., p. 16.
5 Tun Salleh admitted later that he was criticised for his act of meeting the Prime Minister at his office. Of this he explains, "Of course I did not know that what the Prime Minister wanted to see me about... If I had known, I suppose, I might not have gone to see him in the way I did, armed with nothing more than my politeness." See Tun Salleh Abas & K. Das, *op. cit.* p. xxiv.
disposition that no doubt fits very well with his upbringing in *adat Melayu* or Malay custom. Also present were Ghafar Baba, the Deputy Prime Minister and Sallehuddin Muhamad, the then Chief Secretary to the Government who took notes of the meeting. At the meeting, so Salleh relates, the Prime Minister told him that the Yang Di Pertuan Agong (The King) wanted him to relinquish his post and step down as Lord President. The Prime Minister also made a reference, at the meeting, to Salleh’s letter to the King written on 26 March 1988. He told Salleh that in this connection His Majesty was displeased with him. The Prime Minister, according to Salleh, briefly told him that as Lord President he had shown bias in cases involving UMNO. Salleh claimed afterwards that he denied the allegation vehemently. He told the meeting that he would not resign "and was prepared to face any consequences." Later on, the same day, a letter from the Prime Minister was delivered to Salleh informing him that the King had suspended him from office with effect from 26 May 1988. No definite grounds or reasons for the suspension were given other than the allegation of "bias in the UMNO cases" which had been made verbally by the Prime Minister at his office. Under Article 125(3) of the Constitution, before removal of a judge is in order there must be, first, a representation from the Prime Minister to the King on the need to remove a judge from office. Salleh alleged, and this was borne out by later events, that there was no such representation as required under the aforesaid provision.

The same day the Chief Justice Tan Sri Abdul Hamid Omar, (hereinafter referred to as "Hamid") was appointed Acting Lord President. His first task was to postpone the hearing of one particular appeal - *The UMNO* case. As to why Hamid took the case off the schedule list with such promptness after he was elevated to Acting Lord President was not known at the time. No official statement was given.

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1This ambit of the facts, however, was denied to exist later in the statement of the Chief Secretary to the First Tribunal. See below.


3On 27 May 1988 Tun Salleh, still under shock, wrote his resignation letter to the Prime Minister but on reflecting that this might give credence to the allegation maintained by the executive that he was bias and in misconduct, quickly thereafter withdrew the resignation letter. Interview: Tun Salleh Abas, 23 August 1988.

4See below.

The executive appeared to be entertaining a very real fear that despite the empanelling of the entire nine judges of the Supreme Court, the fear that the Supreme Court might nonetheless overturn Harun J's judgement. If a re-election was ordered, the results might not be in the interests of the ruling faction (Team A) in UMNO.\(^1\)

In the meantime, the suspension letter from the Prime Minister itself did not contain the full allegations against Salleh. Neither was there any statement to the effect that the Prime Minister had submitted to the Agong any representation of 'misbehaviour' so as to warrant the invocation of Article 125. A statement issued by the Prime Minister's Department on 31 May 1988 specified only one ground: that Salleh had committed a "misconduct" by his earlier act of letter-writing to the King and the Malay Rulers in March 1988.

It was only on 14 June 1988 that Salleh received written allegations from the Attorney General who "carved out five charges of misconduct" against him,\(^2\) inclusive of the initial charge contained in the Prime Minister's statement. The final allegations comprised of a lengthy 1700-word document spread over twelve pages.\(^3\)

In brief, it was alleged: (1) that Salleh had made criticism of the government in a speech at the University of Malaya; (2) that he had also 'discredited' the government in a book-launching speech; (3) that he had adjourned \textit{sine die} a case involving the issue of a minor's choice of religion; (4) that his letter to the King on 26 March 1988 was to be regarded as an intention to influence the Agong and the other Rulers to take some form of action against the Prime Minister and (5) that various public statements made by Salleh after his suspension had been calculated to publicise the issues and discredit the Government.\(^4\)

7.8. **Article 125 of the Constitution and Removal of the Lord President**

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\(^1\) Interview: Tan Sri Abdul Kadir Yusof, former Attorney General/Law Minister, Kuala Lumpur 22 March 1989. See Appendix 4 infra.


\(^4\) See below for an evaluation of these charges which are set out in greater detail.
We now need to focus on Article 125 of the Constitution which deals with, *inter alia*, the procedure for the removal of a judge. The article pertains to the 'tenure of office and remuneration of judges of the Supreme Court'. Clause (1) of Article 125 provides that a judge of the Supreme Court holds office until he attains the age of sixty five.\(^1\)

The Lord President, the Chief Justices of the High Courts and other judges of the Supreme Courts and of the High Courts are appointed by the Agong 'acting on the advise of the Prime Minister and after consulting the Conference of Rulers'.\(^2\)

In the appointment of the Chief Justices of the High Courts and other judges of the Supreme Court and of the High Courts the Prime Minister 'shall consult the Lord President'\(^3\) and further, in the appointment of judges of the High Courts in the Borneo States the Prime Minister 'shall consult the Chief Justices of those States and their respective Chief Ministers'.\(^4\)

There is no specific provision for the removal of the Lord President under the Constitution. Article 125(3), in so far as it pertains to 'removal' concerns only judges of the Supreme Court and not a Lord President. But of course it may be futile to suggest that a Lord President cannot, therefore, be removed on grounds that are provided under the article. The framers of the Constitution obviously did not contemplate the future removal of a Lord President. Thus before a Lord President as a Supreme Court judge is removed from office the following pre-conditions must be satisfied: (a) there must be a representation from the Prime Minister to the Agong that the judge 'ought to be removed on ground of misbehaviour or of inability from infirmity of body or of mind or (b) on account of 'any other cause' which prevents him from properly discharging the functions of his office. Having received such representation, the King 'shall (c) appoint a tribunal in accordance with Clause (4) of Article 125 and refer the representation to it and may on the recommendation of the

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\(^1\) Under this clause an extra period of six months may be considered with approval of the Agong. It is significant to note that before a Lord President is appointed he 'takes and subscribes the oath of office and allegiance as set out in the Sixth Schedule of the Constitution' which binds him to preserve, protect and defend the Constitution.

\(^2\) Article 122B of the Constitution.

\(^3\) Article 122B(2)

\(^4\) Article 122B(3)
tribunal so formed remove the Supreme Court or High Court judge as the case may be from office. Thus it would appear that a judge must first face his suspension by the Agong even before the requisite tribunal is formed to deliberate on his case.

Clause (4) of Article 125 specifies that the tribunal is to consist of not less than five persons who hold or have held office as judge of the Supreme Court or a High Court or ... persons who hold or have held equivalent office in any other part of the Commonwealth. The tribunal is to be chaired by the Lord President of the Supreme Court. The Chief Justices and the other members fill in the membership of the tribunal according to 'their precedence among themselves' and 'the order of their appointment'. Thus pursuant to Clause (4) of Article 125 of the Constitution a tribunal of six members was constituted.

On 13 June 1988 the composition of the Tribunal was made public but its proceedings were held in camera. It was chaired by Hamid, the newly appointed Acting Lord President and membered by Tan Sri Lee Hun Hoe, Chief Justice (Borneo), Ranasinghe CJ (Chief Justice Sri Lanka), Sinnthurai J. (Judge of the Singapore High Court); Tan Sri Abdul Aziz (a retired judge of the former Federal Court and a close associate of the Prime Minister); and Tan Sri Mohd. Zahir Ismail (Speaker of the Dewan Rakyat who was a former judge). Earlier, Salleh, the suspended Lord President asked for the Tribunal to hold its session in public. He also requested that members of the Tribunal ought to be persons who were at least of similar standing as he was and free from all possible bias. These requests were denied. Salleh highlighted these requests when he held a press conference on 14 June 1988, mainly to inform the then tensed public as to why he had decided not to attend the proceedings of the Tribunal. This press conference was subsequently deemed

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1The constitutional proviso is 'presided over': Article 125(4).
2These are the Chief Justices of Malaya (Peninsula Malaysia) and Borneo (Sabah and Sarawak).
3The formation of the Tribunal was announced by the Prime Minister Department on 13 June 1988. It was called The Tribunal Established Under Article 125(3) & (4) of the Federal Constitution Re. Yang Amat Arif Tun Dato' Hj. Mohamed Salleh Abas. See The Star 14 June 1988.
'misbehaviour' and was used in the charges levelled against him. The Malaysian Bar pointed this out on 17 June 1988 when the following press release was made:

The Bar Council is gravely concerned at the damage done to the impartial administration of justice and to public confidence in the administration of justice as a result of the steps taken to remove the head of the judiciary following upon a series of attacks on the judiciary by the Prime Minister after the delivery of judgements displeasing to the Executive.

But like all of its objections, this concern was not acceded by the government. It was clear then that the Lord President was no longer acceptable in the eyes of the leadership in government. This was evidenced by the speed of things done in the background, outside the knowledge of the public. A speedy removal of Salleh as Lord President was very much desired. It is significant to point out that the Attorney General, Abu Talib Osman, who was completely relied upon by the Prime Minister during the crisis, played an outstanding role in the removal of Salleh. Subsequently, he also played similar role in the removal of two other Supreme Court Judges in his capacity as "assistant" to the Tribunal.

On 17 June 1988 the Bar Council vigorously attacked the Tribunal's constitution and pleaded for its re-constitution. The Bar particularly opposed the appointment of Hamid, the new Acting Lord President as Chairman of the Tribunal on the ground that he had a vested interest to succeed Salleh in the event that the Tribunal sought to recommend the latter's removal. The problem of possible bias and prejudice was also highlighted by the Bar on the appointment of Tan Sri Lee Hun Hoe the Chief Justice of Borneo, Tan Sri Mohamed Zahir Ismail, Speaker of the Dewan Rakyat and Tan Sri Abdul Aziz Zain, an ex-judge of the former Federal Court who

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3Tan Sri Wan Sulaiman and Datuk George Seah. These two judges were removed pursuant to the findings of the Second Tribunal Report. See below.
4The Attorney General was highly active for the whole period of the crisis until Salleh was debunked as Lord President on 8 August 1988. See below.
5The Star 18 June 1987.
had extensive business and commercial interests. The Bar also objected to the fact the Tribunal's proceedings were not to be held in public. Hamid later defended his acceptance of the chairmanship by saying that as he was under "royal command", he could not flinch from his duty. It is ironical for a judge of his stature and experience not to have appreciated the fact that this was not a prerogative command. His appointment by the Agong was in reality an appointment effected through the Prime Minister who constitutionally advises the King. Hamid should have declined the appointment as requested by the Bar Council on account of the fact that his involvement violate one of the rules of natural justice.

With Hamid in the chair, the Tribunal had its first sitting at Parliament House on 29 June 1988. The venue was itself objectionable in so far as it was not proper for a tribunal constituted under Article 125(4) of the Constitution to conduct its proceedings under the roof of Parliament. The Tribunal was not an extension of Parliament. The fact that the Speaker of the Dewan Rakyat was a member of the Tribunal still did not offer justification for such an arrangement. However, the Bar Council's objection on this point was simply regarded as trivial and no material reactions to it was forthcoming from the government. Salleh's solicitors were

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1. Tan Sri Aziz's appointment as a member of the Tribunal attracted criticism from the Bar Council: "With regard to the appointment of Tan Sri Abdul Aziz Zain he resigned as a Judge seventeen years ago and has been holding a Practising Certificate as a Lawyer. He also has extensive business interests. Further a suit is pending in the High Court of Penang against 2 companies in which he and his wife are said to be involved and there is an allegation of fraudulent dealing between the 2 companies." The objective of this disclosure was not clear but it did, however, create the impression that Aziz did not possess the requisite attributes as a Tribunal member that was about consider the removal of a Lord President. The issue that Aziz was also a close friend of the Prime Minister was not made material in the objection of the Bar. See also Resolutions 2-5 of the Malaysian Bar, 18 June 1988. With the exception of Watan, no other newspapers in the country were prepared to publish the Bar's full resolution despite pre-payment arrangement. The other newspapers which refused to carry the Bar Council's Resolutions were The New Straits Times, Utusan Malaysia, The Star and Berita Harian.

2. See Hamid's letter to the ICJ 20 March 1989 addressed to Mr Niall Mac Dermot Secretary General of the ICJ. See also The First Tribunal Report Annexure 15.

3. Hamid joined the Legal & Judicial service in 1956 as a magistrate. His elevation as a High Court judge was in 1968. After serving in various capacities he was appointed by the Agong as Chief Justice (Malaya) on 3 February 1984. See (1984) 2 MLJ. For biodata resume of the other members of the Tribunal, see Tun Salleb Abas, The Role of the Independent Judiciary, op. cit. pp. 22-23.


5. Consequent to Tun Salleh's press statement on 3 June 1988 the Prime Minister did, however, make a press statement to the effect that one cannot choose one's own judges - meaning that Tun Salleh was in no position to demand who should sit as members of the Tribunal. The Star, 4 & 14 June 1988.

6. Seven lawyers represented Tun Salleh at various sessions in the course of the crisis. At the First Tribunal session at Parliament House, Raja Aziz Addruse and Cyrus Das led the defence. In the
present at the Tribunal's proceedings without Salleh who decided not to be present since he was of the view that the Tribunal was wrongly constituted; that it was not a hearing in public and that its members were not of sufficient seniority. Salleh's counsel immediately filed an *ex parte* application at the High Court for leave to apply for an order of prohibition, challenging the competence of the Tribunal, chiefly on the ground that there had been no representation made to the King by the Prime Minister as required under Article 125(3). Meanwhile the judge who was designated by the Acting Lord President to hear the application was "suddenly taken ill". Ajaib Singh J took his place but when the court was convened to hear the application on 1 July 1988 the judge postponed the hearing of the ex-parte application to 4 July 1988. This itself was curious enough: the application being of such importance, the excuse given by the judge "in order to enable the Attorney General to assist the Court" was hardly in order, bearing in mind that counsel had submitted a plea of urgency. At any rate, the Attorney General was served with the relevant papers the day earlier and if it was his pressing schedule at the Tribunal that caused his difficulty in attending, a representative from the his chambers would have done just as well.

At this time Salleh's solicitors "no doubt despairing of securing any relief for his client" asked the most senior Supreme Court judge, Wan Sulaiman SCJ to hear the application for a limited prohibition. Wan Sulaiman, the most senior available Supreme Court judge cancelled his sitting in Kota Bahru, some 350 miles away on the east coast of the Peninsula and with four other Supreme Court judges heard Salleh's application. At 12.30 p.m. on 2 July 1988 the Supreme Court was convened with a panel of five judges. Events leading to and surrounding this particular sitting of the Supreme Court were not without their share of the extraordinary. The Chief Registrar

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1 'limited prohibition' application before Justice Ajaib Singh on 2 July 1988 seven lawyers made available their services for Tun Salleh, again led by Raja Aziz. The others were Cyrus Das, Porres Royan, George Verguese, Tommy Thomas, Daryl Goon and Zainur Zakaria (Secretary of the Bar Council). Manjit Singh, the President of the Bar and Jagjit Singh were present, holding a watching brief for the Bar Council.
3 Originating Motion (OM) No.R8-32-79-88.
4 Wan Sulaiman, George Seah, Azmi Kamaruddin, Eusoffe Abdoolcader and Wan Hamzah.
of the Supreme Court, relying on a directive from the Acting Lord President, refused to sign the Court Order. Wan Sulaiman signed the order himself. The seal of the Supreme Court was reported to have suddenly gone 'missing or been 'misplaced'. There was a claim also that earlier, there was a directive had been issued not to make available the courtroom and other facilities for use of the special session of the five-member Supreme Court.1 This fact was borne out by a letter written by the Chief Registrar of the Supreme Court himself to the Acting Lord President explaining his actions taken prior to and during the 2 July extraordinary session of the Supreme Court presided over by Wan Sulaiman.2 The letter which first appeared as Exhibit P.151 in the Second Tribunal Report was somehow missing from the published volume issued to the public on 8 August 1988.3 Nevertheless, the special session managed to execute its business and granted, as prayed, a limited order restraining the Tribunal from submitting any recommendation to the King until the Tribunal was properly reconstituted.

The next difficulty was in serving the Supreme Court Order. The Tribunal locked itself within the parliament building and entry for Salleh's lawyers was refused. After having sent telegrams earlier to each and every member of the Tribunal, Wan Sulaiman called the police headquarters at Bukit Aman and demanded that entry be allowed to the lawyers in order to serve the order. This order was then served on the Tribunal at Parliament House.4 This collective act on the part of the five

1Tun Salleh Abas & K. Das, op. cit. pp. 230-231. These set of circumstances led to the suit of Hamid as Lord President for contempt of court. In Malaysian Bar v. Tan Sri Abdul Hamid Omar (1989) 2 MLJ 281 the Malaysian Bar alleged that by denying the facilities of the court in the circumstances described above the Acting Lord President had committed contempt of court. On 29 April 1989 Hashim Yeop Sani SCJ on behalf of the Supreme Court ruled that only the Lord President or any person acting as Lord President was empowered under ss. 38 and 39 of the Court of Judicature Act 1964 to "convene and to empanel judges to constitute the Supreme Court for any sitting, whether scheduled or unscheduled." (1989) 2 MLJ 281 at p. 282. The court, however, failed to consider the bias disposition of Hamid as Acting Lord President then. Neither did it consider s.9(1) of the Act which allows another person other than than the LP to act in "any other cause".

2The letter, written by Haidar Mohamed Noor as Chief Registrar appeared to incriminate Hamid, the Acting Lord President as having instructed the Chief Registrar "that if any applications or appeals in connection with the case of Tun Salleh Abas the Registry of the Supreme Court was not to take any action..." and further "not to get involved in any action taken by the Supreme Court" i.e. the special sitting of the Court presided over by Wan Sulaiman SCJ on 2 July 1988.


4Even the business of serving the order on members of the First Tribunal by Tun Salleh’s lawyers was faced by a problem. The entrance to Parliament House where the Tribunal was holding session was
Supreme Court judges invoked the wrath of the Prime Minister who, no doubt acting upon advice by the Acting Lord President and the Attorney General, advised the King to suspend the said five judges. On 5 July 1988 the King ordered the five judges who decided on the *ex parte* application to be suspended. The Tribunal then had a short recess.

On 14 July 1988 the Attorney General, in the knowledge that the limited prohibition order issued by the Supreme Court was still good and if not soon set aside the work and deliberations of the Tribunal would be in jeopardy, applied to the Supreme Court to set aside the previous prohibition order. In *Tun Mohamed Salleh bin Abas v. Tan Sri Dato Abdul Hamid bin Omar* Hashim Yeop Sani SCJ, delivering the unanimous judgment of the Supreme Court, ruled that the tribunal, constituted under Article 125(3), should not be restrained from performing its constitutional function, i.e. submitting its report to the Agong. Their Lordships did not even consider Salleh's reliance on various authorities that the supervisory powers of the courts could be extended even to royal commissions. The Attorney General's application was allowed. Thus the restraining order of 2 July 1988 was set aside. The Tribunal was then free to submit its report to the King.

On 6 August 1988 after this set of bizarre incidents involving high politics and *ad hoc* legal process that truly befit the plot of a novel, the Tribunal finally submitted its findings to the King with the recommendation that Salleh Abas be removed as Lord President for "misbehaviour and or other cause". Two days later, the government published the *Report of the Tribunal Established Under Article 125(3) & (4) of the Federal Constitution: Re Tun Mohamed Salleh Abas.* This closed and the members of the Tribunal were locked in. Tan Sri Wan Sulaiman had to telephone a high-ranking police personnel at Bukit Aman in Kuala Lumpur before the gates were opened for the lawyers to effect service: Tun Salleh Abas & K. Das, *op. cit.* p. 233.

1 Undoubtedly decisions and acts of the Prime Minister pertaining to the removal of the Lord President emanate with advice from the Attorney General.
3 (1989) 3 MLJ 149.
4 Raja Aziz, counsel for Salleh relied *inter alia* on *Re Royal Commission on Thomas* (1980) 1 NZLR 602. He also relied on Order 92 Rule 4 of the Rules of the Supreme Court 1980 which confers jurisdiction to prevent injustice.
6 Government Printer, Kuala Lumpur, 1988 (hereinafter referred to as the *First Tribunal Report.*)
document, despite its controversial contents and conclusions was treated by the local press as an ordinary news item without so much as a critical editorial being imposed by it.\footnote{The only local newspaper that came out with some semblance of criticism was Watan which included some misgivings in its coverage.} To England, however, the First Tribunal Report was described by a Queen's Council as being "among the most despicable documents in modern legal history."\footnote{Geoffrey Robertson, "Justice on the Balance", The Observer, London, 28 August 1988.} As rightly pointed out by the QC in London, the First Tribunal Report records no evidence of corruption or incompetence or any conduct making a judge unfit for office in a democratic society.

Meanwhile, the \textit{UMNO II} appeal\footnote{Mohd. Noor bin Othinan \& Ors. v. MoM Yusof Jaafar (1988) 2 MLJ. 129.} now under the control of Hamid as the Acting Lord President, came up for hearing before a reconstituted panel of 5 judges at the Supreme Court on 8 August 1988.\footnote{Supreme Court Civil No. 51/1988; (1988)2 Supreme Court Report, 219.} In a brief unanimous judgment delivered by Hashim Yeop Sani SCJ, the High Court's finding that UMNO was an unlawful party on the ground explained earlier, was sustained. However, the second part of the High Court's finding that the 1984 party election was intact was rejected on the ground that it was not well founded in law.

The fate of the five suspended judges was decided by a second Tribunal.\footnote{Its report is hereinafter referred to as \textit{The Second Tribunal Report}.} The Attorney general re-entered the scene and worked on the formation of this body. The King, again acting on the advice of the Prime Minister, appointed a six-member Tribunal consisting of the Acting Chief Justice, Hashim Yeop Sani as Chairman, three members from the local High Court\footnote{Datuk Edgar Joseph J., Datuk Mohd Yusof Chin J. and Datuk Mohd Lamin J.}, and a judge each from the Singapore High Court\footnote{T. Coomaraswamy J (High Court, Singapore).} and the Sri Lanka Supreme Court\footnote{Mark Damian H. Fernando J. (Supreme Court Sri Lanka).} respectively. The chairman's appointment was objected to by the Bar Council on the ground that his position violated the principles of natural justice in that he, (like Hamid, the Acting Lord President in the first Tribunal), stood to gain, at least in seniority and the prospect of promotion, fr should the Tribunal decide to recommend the removal of any of the Supreme Court

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4. Its report is hereinafter referred to as The Second Tribunal Report.
5. Datuk Edgar Joseph J., Datuk Mohd Yusof Chin J. and Datuk Mohd Lamin J.
6. T. Coomaraswamy J (High Court, Singapore).
7. Mark Damian H. Fernando J. (Supreme Court Sri Lanka).
judges. Hashim Yeop Sani CJ., acceding to this objection, subsequently withdrew from his position, with Edgar Joseph Jr. J taking over in his place. Having received *The Second Tribunal Report* on 26 September 1988, the King dismissed Wan Sulaiman and George Seah as Supreme Court judges. The remaining three, Azmi Kamaruddin SCJ Eusoffe Abdoollcader SCJ and Wan Hamzah SCJ who were involved in the hearing of Salleh's *ex parte* application were reinstated as Supreme Court judges. On 28 November 1988 Hamid was confirmed in his position as substantive Lord President.

In this context it was perhaps fitting that Salleh, the main victim of these manipulative developments, should have called his memoirs *May Day For Justice* 2. A considerable amount of attention has been focused on this dark episode. 3 A scholar, familiar with Malaysia's 1983 constitutional crisis concluded that, "...the events of 1988 were a shattering blow to the Judiciary and Constitution, and some permanent damage may have been done." 4 An Australian academician has described the Malaysian judiciary crisis as a "convulsion" and the courts as a "fragile bastion under siege" 5. More recently, in England, Lord Taylor of Gosforth, not long after being sworn in as Lord Chief Justice had this to say about the rule of law in Malaysia:

"Look at Malaysia, for example, where judges were sacked by the government because their decisions proved unpopular with politicians. Horrendous." 6

Lord Taylor's words are perhaps the final capping to the anguish of the Malaysian judiciary that is now still grappling with its domestic deficiencies and dissipated honour, from both a local as well as an international perspective. The judiciary crisis

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2 The dismissed Lord President, Tun Salleh Abas has written about his dismissal from a personal point of view. See Salleh Abas & K. Das, *May Day for Justice*, op. cit.
5 H.P. Lee, *op. cit.*, p. 16.
6 Brian Masters, "Into the Open", *The Sunday Telegraph* (London), 31 May 1992. This interview was reprinted in Malaysia in the June/July issue of *Infoline*, Bulletin of the Malaysian Bar at p.16.
of 1988 is a telling episode in respect of the Malaysian government itself and its disregard for the judiciary's independence. Malaysia has never before encountered antagonism between the judiciary and the executive let alone a clash that entailed the dismissal of its Lord President. Neither had the executive taken on the Judiciary as a result of any case that it had lost in the courts. Losing cases in the courts had not caused turmoil on the part of the executive before. In fact, Tun Suffian, a former Lord Presidents had proudly reminisced shortly before the 1988 crisis that, "We have dealt the Government (the executive) a number of blows."1

7.9. Report of the First Tribunal

As we have seen, the Malaysian judiciary crisis involved two instances of suspension and removal. The first concerned Salleh Abas, the Lord President and the second involved the suspension of five Supreme Court judges which resulted in the dismissal of Wan Sulaiman and George Seah SCJJ. The First Tribunal Report concerned Salleh's suspension and dismissal while the Second Tribunal Report 2 covered the suspension and dismissal of the other Supreme Court judges respectively. The first irony to be noted is that despite the fact that the proceedings of both tribunals were not held in public, the government deemed it fit to publish their findings. The holding of the hearing in camera was a substantially serious matter that Salleh vehemently objected to but on which the Tribunal refused to budge. The Malaysian Bar's objection of 17 June 1988 regarding this issue was also not considered. The Tribunal stated:

The majority of the Tribunal were of the view that as several of the allegations to be enquired into involved issues of a sensitive nature, the hearing should not be held in public."3

This decision runs counter to broad principles of justice and human rights. What could be more sensitive than the wish of the executive to put the Lord President to the

2See infra: para 9.4
3First Tribunal Report, 18.
scrutiny of a seemingly biased Tribunal? One needs only to turn to the United Nations Basic Principles of the Independence of the Judiciary\(^1\) for guidance. The 1985 United Nations Basic Principles clearly disallow such a practice. As to what these 'issues of sensitive nature' were no one was told. In a way, both the First and Second Tribunal's proceedings could be equated with the proceeding of the respective Advisory Boards constituted under the ISA discussed earlier in Chapter 6 in relation to cases involving preventive detention. At least under those instruments 'the security of the Federation' was cited as being the primary reason for detaining a subject. In Salleh's case there were no State secrets involved so as to give rise to prejudicial circumstances for the security of the nation. It is particularly devastating that none of the eminent members of the tribunal, especially those from Sri Lanka and Singapore, appeared concerned by this or by the so-called 'secrecy' and the disallowing of public hearing of the proceedings. The published reports merely revealed the travesty of justice levelled at Salleh and the other two judges of the Supreme Court. The First Tribunal Report contains unsatisfactory 'Notes on Proceedings'. Take the questioning of Tan Sri Sallehuddin Mohamed, Chief Secretary to the Government, for example. He was present on that fateful day, 27 May 1988 at the office of the Prime Minister when Salleh was summoned by the Prime Minister. The Notes of Proceedings of the First Tribunal contained the following exchange:

**Tan Sri Abu Talib Othman (Attorney General):** Can you tell the Tribunal whether or not the Prime Minister said that this action was taken because of the fact that he [the Lord President] is bias[ed] in respect of UMNO cases then pending in court?

**Tan Sri Sallehuddin Mohamed (Chief Secretary to the Government):** I do not recall what the Prime Minister said, [or] that UMNO cases [was] the reason for the Agong asking the Lord President to relinquish his post.\(^2\)

This answer was vital because, in the opinion of the First Tribunal, it negatived the claim by Salleh that the Prime Minister had indeed alleged at the material meeting

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\(^1\)Formulated in Milan 26 August-6 September 1985 and endorsed by the UN General Assembly under Resolution 40/32 of 29 November 1985.

that he was biased against the UMNO cases. Reacting to a question by a member of the First Tribunal, Mohamed Zahir Ismail (Speaker of the Dewan Rakyat) on whether the UMNO cases were mentioned, the Chief Secretary simply answered that he could not recall. But the Speaker's question had been a leading one, viz.: "Nothing was mentioned about the UMNO cases?" While admitting that he took the trouble to take down notes "as they were speaking" the Chief Secretary chose to say that he did not remember anything about bias in the UMNO cases being mentioned by the Prime Minister as the basis of 'misbehaviour' on the part of the Lord President. He said "My note book only mentions two things...I cannot recall him saying anything about UMNO." In the same question and answer session Hamid (Acting Lord President) asked whether Sallehuddin, the Chief Secretary to the government had the note book, to which the latter answered in the affirmative. The Acting Lord President abruptly ended the session by saying "That will do."

The shocking part of the above episode is that the Tribunal did not even ask for the Chief Secretary's notebook to be produced. Surely this was a material piece of evidence that required corroboration. It may be appreciated that the Malaysian Chief Secretary to the Government is for all intents and purposes working directly under the Prime Minister, just as was the Deputy Prime Minister, Ghafar Baba who also attended the 27 May 1988 meeting at the Prime Minister's office. For this reason alone whatever corroborative pieces that could be examined, such as the note book in question, should have been so done. Salleh admitted subsequently in his Sir Gallaway Lecture that the charge of bias in the UMNO cases had been one of the elements in the case put to him by the Prime Minister at the said meeting. The other allegation had been the 'misconduct' of having written a letter to the King. As it stands, the

1On this point, Tun Salleh Abas says, "In the name of the Almighty Allah...I did not lie about UMNO. When all else is forgotten, this question alone may remain to haunt us: Did I lie when I said the Prime Minister of Malaysia accused me of being biased in cases involving the political party, UMNO?...The Prime Minister denies it. So who was telling the truth. The Prime Minister or the Lord President?" See Tun Salleh & K. Das, op. cit. p. xi
2Tun Salleh & K. Das, op. cit. p. 18
3Ibid.
5Ibid.
Tribunal appeared to have taken the words of the Chief Secretary as conclusive evidence that Salleh did not tell the truth. In this context we should note the submission of the Attorney General who was designated as 'assisting the Tribunal', on the burden of proof to be applied by the Tribunal:

It must be appreciated that this enquiry is different from a criminal trial. It is a special proceeding. As such, it is not necessary for the allegations to be proved beyond reasonable doubt. Suffice for the judge's guilt to be established by a fair preponderance of the evidence.\(^1\)

The participation of Hamid, the Acting Lord President, as Chairman of the First Tribunal completes the mockery of the First Tribunal Proceedings. How could a man who had just been made Acting Lord President take on the primary role as Chairman of a tribunal charged with the responsibility of determining the culpability through misbehaviour of the suspended Lord President when he had already practically taken over the latter's job? In the event of the latter's dismissal, Hamid was to be in line to succeed. Thus the most deficient aspect of the First Tribunal was the infringement of one of the cardinals of natural justice, i.e. the rule against bias. In much of the Commonwealth where the common law still speaks justice though through different tongues, Lord Hewart CJ's words uttered in 1924 evoke principles of fairness:

\[\ldots\text{it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.}\] \(^2\)

Put another way, Lord Denning said, "Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'\(^3\) On this score alone the First Tribunal ought to have been vitiated. Yet of all the justifications for his position, the most interesting is that of Hamid himself:

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\(^2\) *R. Sussex Justices ex parte McCarthy* (1924) 1 KB 256 at 259.

\(^3\) *Metropolitan Properties v. Lannan* (1969) 1 QB. 577 at 599.
Hamid saw himself, perhaps, as being *prima facie* disqualified but obliged to adjudicate. In reality he was *de facto* and *de jure* disqualified, not so much by the exactness of the written law, but by the larger consensus of the rule of law in which the twin pillars of the two principles of natural justice play their decisive role. The Malaysian Bar at its Annual General Meeting on 14 March 1992 re-adopted its June 1988 no-confidence stand against the new Lord President with 809 lawyers voting in favour of maintaining the 1988 no-confidence stand and only 52 voting against.2 The Malaysian Bar's steadfastness in fighting for a lofty cause such as this no doubt precipitates a series of harassment from the authorities who tend to view that august body as a hindrance to so-called 'Malaysian values.' Hamid had even been called upon, 'in the higher interest of the judicial system and the country' to retire from the judiciary.3

As we have seen, the Lord President, could legitimately be removed from his position on account of his status as a Supreme Court judge so long as the Tribunal constituted under article 125(3) was valid and that there was found to be 'misbehaviour or inability, from infirmity of body or mind or any other cause'4 on his part. The next question arises as to whether, in the case of Salleh, 'misbehaviour or of inability, from infirmity of body or mind or any other cause' was established by the First Tribunal. It would appear from the language of Article 125(3) that the ground of 'misbehaviour' alone, if established, is sufficient to warrant removal or dismissal. The word "or" after 'misbehaviour' supports this contention. Further the ground "or any other cause" while being a grey area in that it covers a very wide scope also gives considerable ammunition to the impeaching authority to make out a case for the removal of a Supreme Court judge. Since tSalleh was the first case of its kind in

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1Letter to the ICJ dated 20 March 1989, written after four months being in the substantive post as Lord President. See (1989) 1 *Current Law Journal*; See also *May Day For Justice*, op. cit. p. 358.
4Article 125(3)
Malaysia and indeed in the Commonwealth, there was hardly any precedent to fall back. Article 160 which deals with the interpretation of the Constitution contains no definition of the term 'misbehaviour.' That being so, the First Tribunal contented itself with the following definition of 'misbehaviour':

...unlawful conduct, or immoral conduct such as bribery and corruption, and acts done with improper motives relating to the office of a judge or which would shake the confidence of the public in a judge.¹

The following five main allegations, made against Salleh, were construed by the executive as constituting "misbehaviour and or inability from other causes"²:

i. That on the occasion of the conferment of the Honorary of Doctor of Letters at the University of Malaya on 1 August 1987 Salleh was alleged to have criticised the government on account of him having expressed opinion in respect of the importance of the rule of law and that without the courts the Government could not function; that there was imputation on his part to suggest that the government interfered with the Judiciary;

ii. That at the launching of the book Malaysian Law, Justice and the Judiciary: Transitional Trends, on 12 January 1988 Salleh was alleged to have discredited the Government by his remarks that the independence of the Judiciary was at stake by virtue of the then recent issues floating in the country; his view that the Judiciary was the weakest of the three branches of Government and that it had no say in the allocation of funds were to be construed as undermining the Government. His speech was also alleged to impute that the Government had no trust in the judges. His reference to Islamic law as a legal system that also binds the Executive, Parliament and the Judiciary in terms of justice as a whole was highlighted as violating "established principles of judicial interpretation".

iii. That the adjournment by Salleh in respect of Teoh Eng Huat v. Kadhi Pasir Mas, Kelantan & Anor.³, a case involving a Chinese girl who was converted to Islam was construed as showing bias against a minor's right in the choice of religion.

iv. That Salleh's letter to the King and the other Malay Rulers on 23 March 1988 pointing out that the Prime Minister interfered with the Judiciary was construed as harbouing bad relations between the Rulers and the Prime Minister and that it was intended for the King and the Rulers to take some form of action against the Prime Minister.

v. That Salleh's press statements to the media after his suspension on 26 May 1988 "contained untruths and which were calculated to politicise the issue...and further discredit the Government.

The above allegations, made out by the Attorney General on 14 July 1988 were preceded by a preamble that said:

¹First Tribunal Report, 50.
²The phrase was contained in the Attorney General's written submission to the Tribunal formed to deliberate on the case of Tun Salleh. See Report of the First Tribunal, Annexure 23 Volume 2.
³Civil Appeal No. 220 of 1986.
"Whereas it has been represented to His Majesty the Yang Di Pertuan Agong under article 125(3) of the Federal Constitution that on ground of misbehaviour or for other causes which clearly show that you no longer able to discharge the functions of the Lord President properly and orderly, you ought to be removed as Lord President. His Majesty has been pleased to establish a Tribunal to investigate and obtain its report under Article 125 of the federal Constitution."1

These various charges have been noted by Salleh as baseless and as containing "nothing in them"2 to warrant 'misbehaviour' and hence dismissal. He has since said that as head of the judiciary he was "concerned with defending the Malaysian Judiciary against the severe threat from the executive - to this very day."3

 Allegations (i) and (ii) of 'prejudice and bias against the Government' were claimed to have been committed by Salleh in the course of his public speeches. Further, the claim was made that at his book-launching speech he had 'discredited the Government' and had thereby 'sought to undermine public confidence in the administration of the country in accordance with law'. Reading those speeches referred to does not, however, bear out such claims. To defend the judiciary and the rule of law through a well written speech which was requested to be made by a university is expected of a Lord President as head of the judiciary. That a government cannot exist without the existence of a judiciary of repute is also universally accepted and no one need be penalised for uttering such a statement. That the judiciary is the weakest of the three branches of the government as was stressed by Salleh in his book-launching speech is another universal truth. As to how the Attorney General could make it implicit in charge (ii) that Salleh was advocating Islamic Law as a legal system of general application in Civil Law is also difficult to understand. All that he said was that no legal system, including the Islamic Legal system, could

3Tun Salleh & K. Das op. cit. 179. In an interview the writer had with the former Agong (the present Tuanku Iskandar, the Sultan of Johor) on 16 December 1992, it was clarified by his Royal Highness that the sheaf of papers signed by him purporting to be 'representation' under article 125(3) was in fact signed after Tun Salleh's suspension, not before as it was made out to be. Asked why His Royal Highness did not highlight this gross constitutional violation, he said he did not know the constitutional ramifications then.
escape from the need for interpretation (the very thing that the Prime Minister is opposed to, judging from his parliamentary statement.)

In regard to allegation (iii) the case *Teoh Eng Huat v. Kadhi Pasir Mas, Kelantan & Anor.* concerned a father who alleged that he had not consented to his daughter's conversion to Islam, the Tribunal easily accepted the Attorney General's submission that by adjourning the case *sine die* Salleh had meted out a 'discriminatory treatment'. To this grossly mischievous treatment by the Tribunal, Salleh responded that "[t]his finding of the Tribunal [was] capricious and judicially outrageous. In coming to this finding Salleh alleged that the Tribunal had disregarded all the evidence before it." What was the evidence that Salleh referred to? The Tribunal had deliberately ignored, *inter alia,* (a) that the application for adjournment had been made by the appellant himself; (b) that the other parties to the action had not objected to the appellant's request for adjournment. It is difficult to understand why the Tribunal simply accepted the Attorney General's finding without giving due attention to these clearly established facts.

Turning now to the fourth charge, the letter by Salleh to the King and the other Rulers dated 26 March 1988 was not a personal letter. It was written from the King's appointee being the highest judicial officer in the land and dealt with the latest severe criticisms meted out by the Prime Minister to the judiciary, both within and without Parliament. It was written on behalf of the judges who after a special meeting on 23 March 1988 had collectively requested him, as head of the Malaysian Judiciary, to write that letter. The consensus then was that there was in fact a problem with the Prime Minister who was too free with his adverse comments on the judiciary. There was no mention of the wish that the King ought to take 'some form of action against

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1See his *Time* magazine statement *op. cit.* and his *Dewan Rakyat* speech 17 March 1988 *op. cit.*
2Civil Appeal No. 220 of 1986.
3*First Tribunal Report*, p. 43.
6*First Tribunal Report*, Annexure C.
the Prime Minister’ as alleged by the Attorney General. This strange twist caused an
observer to comment:

How Hamid, the Chairman of the Tribunal, managed to get through this part of the proceedings
without choking is hard to understand, since he was himself one of the judges at the meeting
where the letter was discussed and agreed upon and he made no objection to it or any other part
of the business.¹

In relation to allegation (v) it would appear to suggest that a man who has
been condemned under suspicion and suspension cannot tell the world that he is
being unjustly treated. He is not expected to indicate his anguish and vindicate his
rights when his world crumbles under executive power and surveillance. What about
the Prime Minister who had discredited the judiciary by imputing many adverse
things in parliament and outside parliament? In the Malaysian Parliament a member
is barred from criticising a judge without a substantive motion², yet the Prime
Minister while trying to justify the obliteration of 'judicial power' from Article 121 of
the Constitution in March 1988 had impute that certain judges were involved in
politics. The Speaker never once cautioned the Premier on this illegal parliamentary
practice. Apart from the offence of seditious tendency under section 3(1) of the
Sedition Act 1948, there is no law in the country that bars criticisms levelled at the
government. Therefore, there ought to be no question of an act to 'discredit the
Government'.

It is clear that the letter-writing was the one and only pretext originally
chosen to oust Salleh from his job. The other four charges appear to be mere
'afterthoughts to reinforce the action against the Lord President'.³ Surprisingly, the
Tribunal found that all five charges against Salleh were established. Its conclusion in
the following words is poignant enough:

We very much regret that the respondent chose not to appear before us, even though every
reasonable opportunity was afforded to him by us. We have...come to the finding which we
have arrived at only upon the unchallenged and uncontradicled material placed before us.
Needless to say that had we the benefit of a plausible explanation from the respondent in

²Article 127. See also Standing Order 36(8) of the Dewan Rakyat.
³H.P. Lee op. cit. 34.
regard to the several issues which were presented to us for our consideration, our decision may well have been different.¹

By the above sombre words the business and duty of the First Tribunal cannot be said to have been satisfactorily discharged. It was overly dependent upon what the Attorney General produced as the so-called evidence. It lacked the rigour and meticulous examination of the materials that were put before it. In the first place, the Attorney General who is at all material times the legal advisor to the Prime Minister and thus an officer of the executive, should not have been involved in the Tribunal's work at all. At the outset of the crisis, it should have been have proposed, ideally by the Tribunal's Chairman or the eminent foreign judges, that an independent presenter or inquisitor be selected from amongst qualified, able and independent persons in the legal fraternity. The Attorney General could of course be a resource person. The fact that the Attorney General 'facilitates and advises' singularly before and during the proceedings of the Tribunal negates the non-arbitrary nature of the business of a Tribunal. He was not technically speaking 'an interested party' but he was certainly in a position professionally connected with the Prime Minister. Lord Denning's words to the effect that one goes away from the proceedings with a feeling of bias certainly applies here.

7.11. **Report of the Second Tribunal**

Turning now to the Second Tribunal, as we have seen, it was formed pursuant to the suspension of the five Supreme Court judges consequent upon their role in adjudicating and granting the Salleh application of 2 July 1988 in respect of the prohibition order. All the five judges, contrary to what Salleh had done, decided to appear before the Tribunal. The charge against the judges (excepting Wan Sulaiman) was for 'intentionally' attending the Supreme Court sitting without the permission of the Acting Lord President.² It was further alleged that this act of theirs was in

¹ *First Tribunal Report*, Vol. 1, p.51
² *Second Tribunal Report*, p.71
violation of sections 38(1) and 39(1) of the Courts of Judicature Act 1964\(^1\) and that such conduct reflected 'an irresponsible and improper attitude' which tarnished the image of the judiciary and which was unbecoming of a person holding the office of a Supreme Court judge. The allegation against Wan Sulaiman was for 'intentionally convening and being present' at the 2 July 1988 sitting of the Supreme Court.\(^2\)

The Second Tribunal also had to be content with a somewhat broad approach to the definition of 'misbehaviour'. It finally adopted the broad test formulated by Sir Richard Blackburn in the Australian Parliamentary Commission of Inquiry which was set up to determine the 1985 'Justice Murphy Affair' in Australia. There 'misbehaviour' was adopted as meaning ". . . such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question."\(^3\) Somewhat more emphatic, the Second Tribunal sought to establish 'improper motive' as a requirement to constitute 'misbehaviour'.\(^4\) It also had resort to the work of Cowen and Derham\(^5\) on matters concerning the independence of judges. Both Tribunals thought, rightly so, that Article 125(3) opens to only one recommendation: either to recommend for removal or to recommend for reinstatement.\(^6\)

Strangely, the Tribunal this time decided to use the burden of proof of 'beyond reasonable doubt' and not 'on the balance of probabilities' as was the case with Salleh. No explanations are offered in regard to the discriminate application of the standard

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\(^1\)Sections 38 and 39 of the Courts of Judicature Act 1964 stipulate:

38(1) Subject as hereinafter provided, every proceeding in the Supreme Court shall be heard and disposed of by three judges or such greater uneven number of judges as the Lord President may in any particular case determine.

(2) In the absence of the Lord President the senior member of the Court shall preside.

39(1) The Court shall sit on such dates and at such places as the Lord President may from time to time appoint. Provided that the Lord President may cancel or postpone any sitting of the Court which has been appointed under subsection (1)

\(^2\)Second Tribunal Report, p.71

\(^3\)(1986) 2 Australian Bar Review 203, at 223.

\(^4\)Second Tribunal Report, 37.


\(^6\)Second Tribunal Report, 40.
of proof.\(^1\) Thus, the Tribunal found that these allegations against the judges were insufficient to establish proof of improper motive. The allegation that the judges were involved in a 'conspiracy' was also not sustained. The probable reason for this was that the original word for 'conspiracy' used in the representation first tendered to the Tribunal was queried as to its accuracy.\(^2\) The Tribunal failed to agree to a finding of 'conspiracy' when they came to consider the 2 July 1988 hearing of the Salleh application. The Tribunal did not find that the hearing of an *ex parte* application was wrong even under such a short notice.\(^3\)

The second charge levelled against the five judges hinged on their 'intentionally hearing' the prohibition order application at the Supreme Court sitting on 2 July 1988 when the matter was then still pending at the High Court under the adjudication of Ajaib Singh J.\(^4\) It was alleged that this showed lack of impartiality and was unbecoming of a person holding the office of a judge. However this allegation was considered by the Tribunal as 'clearly unsustainable'.\(^5\) The Tribunal also found that there was no prior agreement by the five judges to help Salleh to obtain his temporary prohibition order against the First Tribunal.\(^6\) The fact that this was an arrangement made on the spur of the moment, bearing in mind the urgency of the matter at hand on 2 July 1988, was well expressed by the Tribunal to the advantage of the judges.

Two other allegations were levelled at Wan Sulaiman and one further charge was made against George Seah. Wan Sulaiman was alleged to have stayed away from a Supreme Court sitting in Kota Bahru on 2 July 1988 without 'reasonable cause' and to have directed George Seah and Harun Hashim to 'stay away' from the same Supreme Court sitting without proper and reasonable cause.\(^7\) The additional charge

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\(^1\)Two members of the Tribunal were of the view that should the standard of proof of 'on the balance of probabilities' be used, they would have found against Tan Sri Eusoffe Abdoolcader and Tan Sri Azmi.

\(^2\)This was contained in paragraph 6 of the English translation of the representation. See *Second Tribunal Report*, p. 55.

\(^3\)*The Second Tribunal Report*, 70

\(^4\)*The Second Tribunal Report*, p. 62

\(^5\)*The Second Tribunal Report*, p. 70

\(^6\)*Second Tribunal Report*, p. 60.

\(^7\)*Ibid.* 77-78
against George Seah was also based on the same sequence of events in that he had failed to attend the Supreme Court sitting at Kota Bahru on the same date despite being scheduled to do so. In respect of the extra charges against Wan Sulaiman the Tribunal, by majority decision, found that 'misbehaviour' had been established.\(^1\) However he was recommended full pension rights on account of his 'long and hitherto untarnished service as a judge of the Supreme Court'.\(^2\) George Seah received similar treatment.

In arriving at these decisions it should be noted that no individual Tribunal member was mentioned by name. For example, in the case of Wan Sulaiman, the Second Tribunal Report says that it was a 'majority decision'. No reasoning or submission was given by each tribunal member by name. Perhaps it was intended that the Tribunal should speak out as one voice. The result is that one cannot identify from the Report who said what in respect of the final decision to remove the two judges. The issue to be looked at more deeply surrounds the Kota Bahru Supreme Court sitting which Wan Sulaiman and George Seah did not attend. It was the 'failure', so it was alleged, of both judges in not attending that sitting as scheduled by the Acting Lord President under section 39(1) of the Courts of Judicature Act 1964 that was found by the Tribunal to be fatal. The question is: Were Wan Sulaiman, the next most senior Supreme Court judge, and George Seah justified in not attending the scheduled sitting in Kota Bahru when there was at hand a plea from counsel of Salleh to convene the Supreme Court and hear his application? Of course, counsel could have gone to see the Acting Lord President for similar consideration. Needless to say, Hamid as Acting Lord President and Chairman of the Tribunal was an interested party and to request him to put together a Supreme Court sitting just then would not have been proper or have been in the best interest of the impugned Lord President under the circumstances. Worse, Hamid was named as one of the Respondents in Salleh's

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\(^1\) Second Tribunal Report, p. 120.

\(^2\) Ibid., p. 122.
application. This fact was not even considered by the Tribunal. The doubt persisting and surrounding the demeanour of the Acting Lord President at that point in time must have been paramount in the mind of Salleh's counsel hence, it could be considered that Wan Sulaiman's reluctance to involve Hamid in the affairs of the 2 July sitting was both relevant and reasonable.

The non-attendance of Wan Sulaiman and George Seah at the Kota Bahru sitting could be further rationalised. What would rational, responsible and reasonable judges of the Supreme Court do when confronted by the seemingly bizarre treatment received by the Lord President? It is not difficult to reason that this was no ordinary matter that warranted ordinary action. The image, integrity and credibility of the Lord President and the judiciary as a whole were at stake. No other issue in the country at that time was bigger or more important than the proposed removal of the Lord President. Knowing by then that Datuk Ajaib Singh had already refused to proceed with the hearing on 1 July 1988 because the Attorney General was not present 'to advise the court', what Wan Sulaiman did was nothing short of rising to the occasion in the name of justice. To allow the Tribunal to submit its recommendation in the interim, without the proper representation by the Prime Minister would have been a grave injustice. It was the motive of saving the judiciary that essentially prompted the two judges to act the way they did. This should have vitiated the standard of proof of 'beyond reasonable doubt'. There was no adverse intention involved, much less any other sinister motive on the part of Wan Sulaiman and George Seah. But the Second Tribunal still found that 'misbehaviour' had been established.

At this stage it may be wondered, how effectively used and applied was the standard of proof 'beyond reasonable doubt'? On the basis of the proceedings alone, this is not an easy question to answer. The Tribunal advanced six broad charges against Wan Sulaiman and George Seah. The first was the presumption that Wan Sulaiman had 'stuck his neck out' for Salleh. This was deduced from the fact that

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1The rest being Tan Sri Lee Hun Hoe and other members of the First Tribunal. See also INSAF, "A Report by the Bar Council on the Report of the Tribunal Established in Respect of Tun Salleh Abas", *op.cit.* pp. 30-37.

Sulaiman had attended several meetings that had discussed Salleh's suspension. However, this failed to convince the Tribunal that an improper motive was established. The second charge referred to his motive in cancelling his flight from Kuala Lumpur to Kota Bahru on 1 July 1988, the day Ajaib Singh J heard counsel's preliminary submission of the Salleh's application for a stay. The third charge was the query as to why he had sent his secretary and other members of the court staff to 'monitor' Ajaib Singh's court session on 1 July. The fourth strand related to his conduct in cancelling the Kota Bahru sitting. The fifth was his eagerness in empanelling a seven-member Supreme Court to hear a matter that was then not even pending in the Supreme Court. The sixth charge was having to do with 'events of 2 July 1988 prior to the sitting of the Supreme Court...when Wan Sulaiman sent for the Chief Registrar Haidar and said that he was aware of the consequences of his action and was willing to be suspended from office.' The Tribunal was of the view that the fifth and sixth strands were of a 'slender' kind and therefore of 'negligible' value. The surprising part of the finding was that having disposed of the first charge as unsustainable and the fifth and sixth charges as slender and negligible respectively, the Tribunal still chose to maintain that Wan Sulaiman's 'misbehaviour' had been made out. On the second charge the Tribunal said:

In these circumstances, [the cancellation of the flight from Kuala Lumpur to Kota Bahru] it was impossible to give the slightest credence to this Respondent's explanation that because the sitting at Kuala Lumpur concerned an urgent matter of grave national importance, he gave it priority over the Kota Bahru sitting and not to do so would have amounted to a serious dereliction of his duty and be making a mockery of his oath of office...The alleged belief that he had the power to postpone or adjourn the sitting before the commencement of the sitting as presiding judge is clearly wrong. He claimed to have had such an honest belief, based on law, convention of practice.

To go on rebutting the Tribunal's finding after this point is, it submitted, futile. It is further submitted that, under the circumstances, the Tribunal had failed to establish the burden of proof that it has set for itself.

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1 The dates given were 25 March and 27 May 1988: Second Tribunal Report, p 113
2 Second Tribunal Report, 112
3 Ibid. 113
4 Ibid., 115-116
5 See the Attorney General's view on the sufficiency of the evidence in proving the Lord President's guilt:
George Seah was made to suffer purely on the ground that he had, 'without reasonable cause', chosen to return to Kuala Lumpur at the request of Wan Sulaiman, contrary to the instruction of the Acting Lord President who had wanted him to attend the Kota Bahru sitting. Although insubordination by Seah vis-a-vis the directive of the Acting Lord President who allegedly fixed the Kota Bahru sitting was not categorical in the language of the Tribunal, this is what in reality lay behind the allegation against him. Surely s. 41 of the 1964 Act should have been of some help. The section stipulates: "Proceedings shall be decided in accordance with opinion of the majority of the judges comprising the Court." The term 'proceedings' as defined under s. 3 of the Act means "any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding." The words 'at any stage of the proceeding' are vital as it would seem to include a request or instruction from Wan Sulaiman to the other two judges. The three members of the Kota Bahru sitting were Wan Sulaiman, Harun Hashim and George Seah. There was no evidence adduced to show any disagreement on their part to Wan Sulaiman's intimation that the sitting should not take precedence over the Salleh application. It must, therefore, of necessity be a defence that the three judges had agreed or in the language of section 41, "decided in accordance with the opinion of the majority" to postpone the proceeding.

There would be no question of going against the directive of the Acting Lord President because it has been routine enough for thousands of cases to be adjourned annually or postponed according to the peculiar circumstances of the parties involved. Another aspect of the defence which was not adequately advanced was the utilisation of s. 9(1) of the Courts of Judicature Act 1964, which provides three instances where the Lord President could be deputised by another Supreme Court Judge. The three instances are: (a) illness, (b) absence from Malaysia or (c) any other cause. The provision relating to "any other cause" should have been considered in greater depth so that the benefit of the doubt could have been given to both judges. The fact was that Hamid was holding both the substantive post as Chief Justice of Malaya and also
that of Acting Lord President-cum-Chairman of the Tribunal after 27 May 1988 when the suspension of Salleh became effective. This meant that he was doing the job of three men, no doubt a feat by any standard. When Hamid was functioning as Chairman of the Tribunal (from 7 May to the final day of the Tribunal session), technically this was the "other cause" that gave the opportunity for the next senior judge (in this case, Wan Sulaiman) to take the liberty to decide whether to postpone or proceed with a 'proceeding' contemplated under the Act. In every high office some form of magnanimity ought to exist where the law is less than certain. In this case canons of interpretation could have played a germane role. Unfortunately, this line of reasoning was not taken up at the proceedings of the Tribunal. Nor were the decisions of the Tribunal made as the basis of judicial review. The general impression at the time was that there was little to be gained from any recourse to the courts considering the newly reconstituted judiciary in the aftermath of the scandal. What the Tribunal chartered to do and accomplish seemed to supersede all other evidence and reasoning. Again, one cannot but feel that the decision was biased.

7. 12. The Control of Political Parties

The *UMNO 11* case besides dividing the Malays\(^1\) also caused the government to take drastic steps in restricting the rights of political parties to bring their disputes to the courts. So bitter was this experience for the leaders of UMNO that Parliament was made to pass the Societies (Amendment) Act 1989 by inserting a new provision that completely disallowed judicial review in respect of irregularities such as the one experienced in the UMNO 11 case. The essence of the amendment was to disallow the courts from adjudicating on the internal matters of a political party.\(^2\) The Prime Minister explained in the Second Reading of the 1989 Bill:

> The amendment introduced is aimed at giving power to political parties to overcome their own internal problems without resort to the courts.\(^3\)

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\(^2\)See the new s.18C of the Societies Act 1966.

\(^3\)Parliamentary Debates, *Dewan Rakyat*, 3 December 1989 Clmn. 46. See the new s.18C of the Societies Act 1966.
He elaborated in the Dewan Rakyat that by barring future judicial review from applicants dissatisfied with internal party matters the courts need not be further burdened by a large backlog of cases which in 1989 stood at about 500,000. Clearly, the Prime Minister was more concerned with administrative efficacy rather than the legal rights of members of political parties. The real objective behind this move was not explained but it was abundantly clear that once the courts could not arbitrate on the rights of members of a political party on account of complaints of bias or unfair treatment, the holders of power in the party could well do what they liked. For example, there could be a situation in future where powerful party despots might reign with unchallengeable power to cause ill treatment to or suppress certain minority interests within the party. In such a situation it would appear that the courts could not be of any help to them on account of the denial of judicial review.

While this move was declared to be 'for all political parties', in reality the saving device was specifically meant to benefit the new UMNO so that the top leadership of the party could control the party in a straight-jacket manner. True enough, at its 1989 Annual General Meeting in Kuala Lumpur UMNO Baru introduced a new provision in its constitution which gave its president and deputy president an unprecedented boost of political power: For every nomination that the incumbent president or his deputy get from any of the 142 party divisions in the country, that candidate automatically receives 10 votes. Thus when the incumbent president of UMNO Baru gets say 100 nominations out of the 142 nominations from the 142 divisions, he automatically receives 1000 votes - even before the actual business of voting commences at the party assembly.

2i.e. Dr. Mahathir Mohamed and Ghafar Baba respectively. (The Prime Minister replaced Ghafar with Anwar Ibrahim as Deputy Prime Minister in November 1993.)
3UMNO Baru or New UMNO, except for the above scheme of 10 free presidential votes, follows for all intents and purposes the pre-1987 UMNO Constitution. UMNO Baru, like the de registered UMNO of old holds its leadership election once in three years: See article 12 of Perlembagaan UMNO (The Constitution of UMNO). In 1991, in an ambitious party expansion programme, UMNO Baru established 14 new Divisions in the State of Sabah, currently controlled by the Party Bersatu Sabah (PBS) which has been opposing Mahathir's Barisan Nasional government since the last general election in October 1990. Each Division of UMNO Baru conforms to one parliamentary constituency. Thus for the UMNO Baru Member of Parliament his parliamentary and party
It would be logical to assume that the denial of judicial review of matters arising out of political parties' internal conflicts, besides being undemocratic, is also a by-product of the judiciary crisis that taught the political leaders to be suspicious of the power of the courts that may go against their interests at any time. Although it was the high stakes of Malaysian politics that both caused and determined the outcome of the judiciary crisis and hence the removal of Salleh and the other two Supreme Court judges, this was a fact that was never owned up by the Prime Minister.

7. 13. Conclusion

The decision to remove Salleh and his two colleagues was a political one although the modus operandi might seem to have followed constitutional arrangement. The removal of the Lord President, unprecedented as it was in the free democratic world, stands out as the biggest scandal that Malaysia has thus far faced. The whole episode of removing the Lord President was based on the desire of the executive to have an untrammelled say in the direction the judiciary should take in future. The message is clear: Judges are only allowed to interpret the law in the way that the executive had determined through Parliament that it should be interpreted. From this angle it is clear that judicial power is not after all an inherent attribute of the judiciary that has been developed through an evolution of more than a hundred years. Needless to say that with this scenario at hand the independence of the judiciary may only be illusory. Indeed the Malaysian legal set up will soon find common law principles to be relics of the past to be regarded as incongruent with the "Malaysian values" that the Prime Minister has so extensively canvassed in Parliament since March 1988.

After the Salleh saga no judges in Malaysia have been seen or willing to be involved in a truly independent discourse on what the rule ought to be in the aftermath of the crisis and the absolvement of judicial power under Article 121. On the contrary, academic dons were more inclined to focus their attention to the newly commitments are very much fused and in this respect it is not always easy to demarcate the end of a parliamentary duty or the beginning of a party activity.
floated idea of a Malaysian Common law based on Malaysian values or as Dr. Mahathir put it, "our own values."

Whatever argument is marshalled subsequently, including the one by lawyers in Kuala Lumpur that even though 'judicial power of the Federation' has been taken out, the judiciary still has its original jurisdiction, the fact remains that the Malaysian judiciary with its reduced original power will never be the same again. Firstly it must be admitted that the Malaysian Parliament, though not as omnipotent as its British counterpart where the Queen in Parliament as sovereign law-maker has no legal limit, may in fact legislate more freely. With the concurrence of the Conference of Rulers, on the other hand, it can legislate on anything at all. Thus the power to strip the judiciary of its inherent judicial power by way of the Constitution (Amendment) Act 1988 was in the eyes of the executive a matter of course judging from the attitude of the Prime Minister his government would not want to be subjected by the principles of natural justice or the pertinence of the common law. The taking away of such power of the courts might have been 'regressive and deviating from the practice of a civil society based on the rule of law'. But that per se is seen as a small price to pay by the executive, if in so doing their power exercise becomes untrammelled and free from future encumbrance of the courts.

Thus a century of calm and tradition was suddenly convoluted by the 1988 crisis. The crisis has not ended even though the main sequence of events have

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1The topical interest on the need to have a Malaysian common law, though originally floated out of political decision in 1988 after the Salleh dismissal, has been capitalised by many sectors with a view to popularising Mahathir's view of "our own values" which he expressed in his March 1988 parliamentary speech. Support for this sort of development has been considerable. See Sunday Mail, 20 October 1991; The Star 21 January, 1992. A seminar on the Malaysian Common law was organised by the Islamic Centre of the Prime Minister's Department in March 1992. Islamic law appears to be gaining momentum and a greater role in the plan to forge for a Malaysian type of common law. See also Parliamentary Debates, Dewan Rakyat, 17 March 1988 Clmn. 1353-1364.

2The Malaysian Bar condemned the taking away of the judicial power of the courts. See New Straits Times, 19 March 1988. Justice Tan Sri Azmi Kamaruddin, Supreme Court Judge, told the writer that notwithstanding the taking away of the "judicial power of the Federation" effected under the Constitution (Amendment) Act 1988, the superior courts, he maintained, shall always have judicial power because a court can never be separated from what is inherently its basic function. Discussion, 21 December 1992.


4See para 4. 3 Chapter 4 , ante.

5Made in a speech by the Prime Minister during the second reading of the Constitution (Amendment) Act 1988 at the Dewan Rakyat.
become history. For now the executive has achieved its objective of determining the extent and limit of judicial power.\(^1\) It is highly unlikely that the remaining judiciary will dare to claim and assert its true independence in the manner that was experienced in 1988.

\(^1\)The removal of Tun Salleh and his two brother judges, Tan Sri Wan Sulaiman and Datuk George Seah has continued to be persisting issues in the country. Opposition parties, the Bar Council, and Aliran have not ceased to bring up the dismissal of Salleh as potent issues in their forum. See *Media Malaysia*, official publication of the Semangat 46, September 1992, p. 32. However, newspapers under the control of the Barisan Nasional government have long ceased to highlight stories connected with the judiciary crisis. In the 1991 Bar Council Annual General Meeting held in Kuala Lumpur, the 1988 Resolution was resoundingly re-affirmed, an outcome that no doubt speaks well for the legal fraternity which represents about 4000 practising lawyers in the country.
CHAPTER 8

The Future of the Rule of Law and Human Rights: Conclusions and Suggestions

"It is an old adage but still true that each people get the government they deserve." - Kanwar Lal, Emergency, Its Need and Gains, New Delhi, 1976.

8.1. Introduction

This chapter delivers the final thrust of the thesis that the supremacy of the executive in Malaysia is complete and comprehensively self-sustaining. There does not seem to be any sign of a major fissure in its propulsion to stay that way for some time to come. It has come to occupy a truly supreme position that renders the other segments of government - Parliament and the judiciary - subservient to it. We have arrived at the above conclusion after examining the constitution and its changes over the years, the relevant statutes and the case law. A culture of sorts has been developed through the acquisition and dispensation of power. The executive has always been depicted by the state-controlled media as being right in all its decisions and dealings. As a result, the executive has exuded an image that it is benevolent and superior compared to the other two segments of government - the legislative and the judiciary. This state of affairs, which has been justified by the needs of political efficacy, has come about mainly through the politics of majoritism in Parliament since merdeka. This is to say, the same party has been enjoying more than two-thirds majority in Parliament since independence in 1957.

We have also seen that the executive is supreme by way of emergency rule, detention without trial and various arbitrary powers under many statutes while the judiciary crisis of 1988 also contributed towards the disadvantaged position of the rule of law. Accountability in the form of checks and balances, the ingredients of the rule of law in a democratic system, are somehow not present in the Malaysian scheme of government. This is because laws have been passed without considering the need
for accountability and the separation of power. On the contrary, laws have been passed largely to enhance the power of executive government. So extensive and entrenched are executive powers in the Constitution that the document may aptly be described as the executive's bill of rights rather than that of the citizen.

8.2. Power Escalation

Basic rights and freedoms under Part II of the Constitution are limited and very much qualified. These limitations and qualifications are so constricted that it would be correct to say that they render Malaysian rights and freedoms almost meaningless. This is further compounded by the courts which, as we have seen, did little to safeguard freedom when presented with the opportunity to guarantee rights. This trend has turned for the worse since the 1980s. On the question of general freedom from arbitrary arrest the wide scope and language of Article 5 has not been seized by the courts to tilt the balance in favour of the subject when he faces the arbitrary actions of the executive. Progressive judgements in other commonwealth jurisdictions have also not been adequately utilised for persuasive purposes. It would appear that although Malaysian courts are prepared to interfere in normal civil and non-liberty cases, they are unwilling to do so in cases involving the liberty of the person. To enable them to justify this approach, they have resurrected the ghost of Liversidge v Anderson.\footnote{(1942) AC 206.} It would also appear to be the case that when they show a propensity to bring about conviction, Indian authorities are used quite freely. On the other hand when freedom and rights are at stake, the Indian authorities are not thought to be even persuasive. They have failed to appreciate the vast changes that have taken place in the area of administrative law and the need to advance human rights. In sum, they have not appreciated that basic freedoms (apart from situations of real criminality or national security) must remain outside the reach of the legislators. Malaysian rights are confined only to whatever Parliament dictates.

To be ruled by the same party continuously for more than three decades inevitably casts a long shadow of influence, ingrained values, and breeds executive
intolerance and arrogance whenever criticism is levelled against the ruling power. Indeed it has been observed that leadership in government in the third world has always been a personal matter and that once the leadership is achieved, the government in such a country quickly becomes personalised.\(^1\) This is consonant with what Lee Kuan Yew, former Prime Minister of Singapore said in regard to the individual's rights in an Asian society:

> Whether in periods of golden prosperity or in the depths of disorder, Asia has never valued the individual over society. The society has always been more important than the individual. I think that is what has saved Asia from greatest misery.\(^2\)

Furthermore, it has also been remarked that in Asia the public does not tolerate a weak government;\(^3\) and, as if in an endeavour to justify arbitrariness in government, a local political scientist said, "Those that govern best are those that govern most."\(^4\) Such views no doubt provide an excuse to perpetuate arbitrariness in government but they do not necessarily offer a fair deal in the context of the rule of law in a modern Asian society. The East-West compartmentalisation of the notion of freedom is erroneous if its only objective is to legitimise executive supremacy.

### 8.3. Deterioration of Freedom

The deterioration of freedom over the years may be summarised thus:

(a) In the exuberance on the part of the government to create new legal powers there may develop a considerable body of laws that are superfluous and duplicative in functions and objectives. The ISA, the emergency provisions of Article 150, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and the Restricted Residence Ordinance 1933 (RRE) among others serve as redundant powers in the hands of the executive. These laws, having outlived their original objectives, are still very much in force while ministerial powers of detention under them are not subject to judicial review.

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\(^3\)James Walsh, "Asia's Different Drum", *Time*, 14 June 1993, p. 16.

\(^4\)Ibid. at p. 17.
(b) Parliament, the facilitator of democracy, has been abused to cut across constitutional safeguards in order to create new laws and to establish the *status quo* desired by the majority. In each case, as has been borne out in this study, the familiar pattern of power-garnering has always been the result of the government's reaction and over-reaction to the initiatives of pressure groups or influential critics in years past; and

(c) In their ardour to create new laws, either in response to actual administrative demands or in the course of the government's fervour to overcome pressure groups, specific arms of the government have been over-equipped with administrative powers, the exercise of which impinges upon the liberty of the subject. No doubt, this is also caused by the fact that some of the constitutional provisions themselves, like Articles 149 and 150 in the Constitution, as amended, contribute towards the overall tilt of the executive in the delicate balance between the rights of the subject and the ruling powers of the executive. It must be emphasised that the RRE, the ISA, the EPOPCO and the Universities and University Colleges Act 1971 (UUCA) were all brought into force prior to 1981 but that the amendments made in respect of the ISA, the EPOPCO and the Constitution are demonstrably more damaging in terms of human rights during the Mahathir administration (1981 to the present). Rights under the Constitution, to begin with, have been limited enough since *merdeka*. With the constant changes made to the law these rights have indeed been chiselled away but the chiselling took on a frenzied pace after 1981. The only rebuttal that may be offered in terms of justification is that during the pre-Mahathir stewardship of the country (1957-1981) the causal elements of public order and security were much more challenging given the formative situations that typically attend most emerging nations. The courts during the period 1957-1988, unlike now, were not precluded from exercising judicial review and to this extent executive powers were generally tolerable. Thus the right of redress in a court of law, even in the context of the ISA, was never completely curtailed during those years. As there is now no longer any basis for
caution and restrictiveness in the areas of security and public order, the present set
of restrictive laws only remain in order to serve political objectives - a state of
affairs that of course is never admitted but nevertheless remains relevant.

In reality, most of the draconian laws or amendments enacted by Parliament
in the past were in response to pressure exerted by groups, organisations or societies
that were seeking some accountability on the part of the government. These pressure
groups, be they students, lawyers, trade unionists or other social justice activists gave
rise to anxiety and fear on the part of the government - not so much that security or
public order might be at stake but that power might be lost if some of the rationale
advanced by the pressure groups were to lead to a decrease in the power of
government. In this respect, what Aung San Suu Kyi said in Rangoon, Burma in her
quest for freedom and justice is true:

It is not power that corrupts but fear. The fear of losing power corrupts those who wield it and
fear of the scourge of power corrupts those subject to it.1

Statutes such as the Trade Union Act 1959, Universities and University Colleges
Act 1971, the ISA, the EPOPCO, the Official Secrets Act 1972, the Sedition Act
1948, the Societies Act 1966 and the Printing Presses and Publications Act 1984
contain provisions that lead to the conclusion that rights and freedoms mean little
when the power of government is challenged through concerted democratic means
by certain segments of society. Compounded by the slow, reluctant and
conservative attitude of the courts in coming to the aid of freedom, what little that
remains in the constitution and the safeguards afforded by the rules of natural
justice has been lost. In some cases the Constitution has been amended purely to
accommodate and justify the existence of a particular law.2 In others the creation of
a specific law fulfils what was thought by the executive to be the ad hoc need of

1 Far Eastern Economic Review 18 July 1991. See also generally Aung San Suu Kyi, Cry Freedom,
London 1990.
2 See Chia Khin Sze v. Menteri Besar Selangor (1958) MLJ 105. See also Aminah v. Superintendent of
Prison Pengkalan Chepa (1968) 1 MLJ 92; and Loh Kooi Choon v. Government of Malaysia (1977)
2 MLJ 187.
society. What the Malaysian executive has done is to assert its supremacy before the rights of the people firm up and take the form of concrete challenges to their influence and authority through the democratic process. It has been proven that when public opinion is relatively free there will be a people-directed government. On the other hand, when public opinion is stifled, as it is now, the executive will always have its way of doing things. Coupled with the absence of accountability the picture of travesty is complete.

8.4. Emergency Rule

The decision in *Teh Cheng Poh*\(^1\) temporarily shattered the confidence of the government in its continued fervour to administer emergency rule through emergency laws. This was the first time since *merdeka* that the government lost in a case concerned with emergency rule. And to be told that they had contravened the Constitution not by the Federal Court but by the Privy Council was in itself a significant development. The decision speaks well for justice but perhaps not in direct relation to Malaysia's courts. In this respect Malaysia's pulling away from the jurisdiction of the Privy Council\(^2\) was a political measure, and was not totally disconnected with *Teh's* case. But this was not so from the point of view of appellate justice. Despite criticism against the Privy Council from certain quarters especially in regard to its position as a court of last appeal\(^3\), for Malaysia the Board did play its part, though in a limited sort of way.

*Teh Cheng Poh* was a temporary success for the rule of law. But it was the beginning of a permanent success for the rule by law imposed by the government. It also brought about the subsequent and permanent closure of the gate to justiciability for all matters connected with the proclamation of an emergency. The courts have been reluctant to review acts of the executive during the currency of an emergency

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\(^1\)(1979) 2 MLJ 23; (1980) AC 58 (PC).
\(^2\)See Chapter 1

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except on ground of *mala fide*\(^1\) which, as proven in *Ningkan* and *Ng Keock Cheng*, could not be easily proved for the simple reason that information in the hands of the executive may suddenly be kept secret on grounds of 'national interest'. It has been good only in legal theory, not in practice, because the evidence-gathering process on the part of the petitioner is next to being impossible to carry out in full. The main reason for this is the existence of administrative barricades cordonning the Malaysian officialdom. It is easy to suggest, as indeed the Privy Council did in *Teh Cheng Poh*, that the Cabinet may be made to answer for an action of *mandamus* since the Agong is immune from legal process.\(^2\) But how is *mandamus* to be achieved if every step of evidence-gathering is blocked by administrative prohibition? It is now clear that the ever-increasing powers of the executive in peacetime Malaysia became even further enhanced after *Teh Cheng Poh*. With the enacting of the Emergency (Essential Powers) Act 1979 and the Constitution (Amendment) Act 1981 the executive achieved their supreme disposition. The government created a permanent state of emergency and overwhelmingly strengthened emergency rule. It also created a permanent legislative-cum executive power in the Agong (i.e. the Cabinet) because he is empowered under Article 150(2) to proclaim an emergency as and when he likes and under clause (8) the courts are precluded from reviewing such a proclamation. Having done that he can then promulgate laws "as if it is an Act of Parliament."\(^3\) With the ousting of judicial review the executive completes its tri-partite power as legislator, prosecutor and arbiter. The fact that Malaysia is non-signatory to any of the human rights convention renders the exercise of subscription to international standards of human rights futile and fruitless. There being no referral facility in respect of human rights violations in areas such as detention without trial, and there being a total lack of legislative as well as judicial

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\(^1\)For example, section 3 of the Constitution (Amendment) Act A514/1981 completely rules out justiciability during or after an emergency.

\(^2\)Article 32 of the Constitution.

\(^3\)Section 6 Emergency (Essential Powers) Act 1979. Under section 12 it is provided: "No courts shall have jurisdiction to entertain or determine any question in whatever form, on any ground regarding the validity of... of any proclamation issued by the Yang Di Pertuan Agong... " This provision is similarly worded under article (2C) introduced by Act A514 with effect from 15 May 1981.
supervision, the need to subject the authorities to review by a body other than the appellate courts of the country is very real although the executive may view this as mere academic.

8.5. Executive Detention

Most governments in the world use at least one form of political repression or another. Some are more subtle and are refined while others are more brutal. Often the authorities do not even try to hide this fact in their fervour if not their arrogance in showing off their power. Many governments use a great deal of repression, for it has proved to be an effective tool in shaming the media, interest groups, political parties, and through them the attitude of the citizenry. In this regard it has been suggested that a state that ignores the rule of law and goes on to impose its own sanction against its own conceived enemy should be called a terrorist state.\(^1\) In the case of Malaysia it is easy to accede to this finding. Controversial as it appears, this proposition attracts logic: If a State incarcerates its citizens without establishing the accepted norms of criminality or wrong-doing then the citizens too may regard the state as being engaged in a terrorising act. In extension, *quid pro quo*, this means that the state too may be termed as a terrorist.

The ISA as Malaysia's primary political as well as legal mechanism in this regard has been sharpened through the process of law and Malaysia's type of 'parliamentary democracy'. It was not the creation of a normal democratic process for the simple reason that a normal democratic process does not alienate itself from the norms established by the rule of law. At the same time, however, there is nothing within the present Malaysian parliamentary system that has the power to change this *status quo* because of the rule of political majoritism that has been so ingrained in favour of the ruling elite. Any party that has been in power that long in its political psyche can afford to be utilitarian if not totalitarian in its business of government despite the practice of having periodic general elections. The prospect of being

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arrested and detained without trial is sufficient deterrence against the creation of a responsive public within a society supposedly informed by the principles of democracy. Moreover, the prospect of being detained up to two years for each segment of the sentence handed down by a minister of the government is truly disturbing in any system. To be taken away from one's career and family without any available legal recourse or economic resources conjures frightening mental images in the minds of the citizenry. Such is the image formed in the minds of those who have the inclination to assert their political and democratic rights or to carry out activities connected with arousing public opinion.

The ISA does not speak well for the future of the rule of law in Malaysia. In fact the ISA is the main adversary of the rule of law. The abolition of the ISA is imperative. At least we should allow judicial review as per the position prior to 1989 so that arbitrary ministerial power can be checked by the courts. The deceptive lack of public opinion in the local media perhaps gives the equally deceptive outlook that the authorities have succeeded in making the majority accept the ISA as a way of the Malaysian life. Of course, this is far from the truth although there have been a few exceptions where certain sections of the public have thought that the ISA could be used to cure certain inadequacies. In March 1992, for example, the ISA was urged by composers, singers and songwriters to be used in cases where the copyright works of artists was violated by others. This only shows that certain segments of Malaysian society misconstrue the true purpose of the ISA.1 In another instance, the Deputy Prime Minister even toyed with the idea that the ISA might be used to fight share frauds.2 Although human rights advocates have awakened those who would listen to the human tragedy involving civil and political liberties, social scientists have, by and large, continued to ignore political repression.3 Atrocities that warrant the existence

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1 *Utusan Malaysia* 4 March 1992

2 *New Straits Times* 11 September 1992. An MP from Perlis (Shahidan Kassim, Member for Arau) suggested in the *Dewan Rakyat* that the ISA be used against “penderhaka” (traitors). Who these “traitors” are he did not elaborate: *Utusan Malaysia* 6 September 1992.

of a police state such as those experienced in Burma or Thailand in the last decade through the excesses of the armed forces are not as yet rampant in Malaysia. However, as we have seen, there are enough signs to show that the ambit of the rule of law has been effectively done away with. The inclination towards a well-maintained totalitarianism is unmistakable.

It may be asked: why must the ISA enhance executive power by way of denying judicial review in respect of ministerial acts? There are no ready answers to this query apart from the obvious trend surrounding Operation Lalang in November 1987. The authorities did not wish to be answerable or accountable in a court of law. The number of detainees did not dramatically decrease within the decade 1980-1990. During that period the authorities detained a total of 1,516 under the ISA and 5,334 under the EPOPCO. For the period 1970-1980 there were 1,650 persons detained under the ISA; for the same period the figure for the for the EPOPCO was 3,139. This means there was a decrease of 134 detentions for the latter decade in respect of the ISA detention while there was an increase of 2,195 in respect of the EPOPCO. In real terms, the decrease of 134 in ISA detentions for the latter decade is not conclusive proof that the ISA is the solution for acts of subversion and organised crime considered to be prejudicial to the security of the country. Neither can it be said that the figure points to a situation of lesser political dissent within Malaysia, bearing in mind that the ISA has been used to thwart political ideologies and activities adverse to the ruling elite although this is not the statutory objective of the ISA. There is no distinction, therefore, between peacetime public order legislation and that which is specifically created for an emergency. One also cannot escape the conclusion that the detention of persons under section 8(1) of the ISA by the minister

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1 See Chapter 6, para 6. 2 ante.
2 Jabatan Penjara (Prison Department) Malaysia 1991: through data supplied by Deputy Superintendent Hj. Aziz Harun. ISA detainees are confined in the Batu Gajah Detention Camp (acronymed "rehabilitation centres" by the authorities) while the EPOPCO detainees are mainly detained at Pulau Jerjak in the island State of Penang and at Muar in the State of Johore. Some of the EPOPCO detainees are also detained in Batu Gajah but in separate sections from the political detainees. For data on ISA and EPOPCO detention for the period 1971-1979 and 1980-1990, see Tables 1 & II at pp. 303-304, ante.
3 Kementerian Hal Ehwal Dalam Negeri (Ministry of Home Affairs), Kuala Lumpur.
is in many respects affected by political considerations that are conveniently hidden behind the facade of 'national interest, security or public order'.

The executive has been fully equipped and free to incarcerate at will persons ministerially deemed to be "prejudicial to public order or the security of the Federation", a constitutional catch-phrase that has cast a very wide net so as to include political thoughts and activities that may be unsuited to the executive government. Despite the myriad adverse metaphors used to describe the ISA since its inception over thirty years ago it has survived as the most comprehensive executive instrument in utilising executive powers without the supervision of the courts or any other authorities.

The national security of a country is admittedly a sensitive area. The secrecy demanded by the executive in safeguarding it is, to a certain extent, understandable. However, it should not be made a blanket excuse precluding the courts from intervening in cases involving the violation of freedom of the subject.

The courts have a clear duty to be vigilant in ascertaining liberty but when the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty. A court that is only half-concerned with partial freedom as willed by the executive cannot be said to uphold the rule of law. However much the executive may assert itself to be the 'sole judge' of the needs of national security, it is important that the courts should be satisfied that powers have been exercised for genuine purposes of national security. The bona fide exercise of this power must be allowed to be seen by the courts. The power of detention without trial remains an exception to the norms of fair procedure. Unfortunately in the area of judicial review the courts cannot now on their own volition free the judiciary from the superimposed will of the executive who translate their imposition through

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instruments like the ISA because the courts have not been innovative enough in utilising and applying the myriad legal concepts of freedom and justice to the written law.

8.6. The Judiciary

The judiciary has lost its tussle with the executive in controlling arbitrary executive power. The executive that directly alters the affairs and status quo of the judiciary in a manner that the Malaysian executive has done is indeed a rarity and its mode of attack on the Malaysian judiciary in 1988 is not known to be practised in the liberal democratic world. But again one must understand, Malaysia is not a liberal democratic country. It is a country pegged on the might of the executive, emerging through twelve years of de facto emergency rule followed by 32 years of 'emergency in peacetime'. Thus it is not difficult to understand why the rule of law has been understood as mere public order and democracy as rule by the majority.

Also not declared is the executive's unlimited power which perennially enjoys a majority in Parliament through a system of built-in political advantages. The reaction of the Prime Minister against the judges who decided Karpal Singh, Aliran and Berthelsen cases is glaring illustration of this point. Common law principles such as the rules of natural justice and judicial review, as we have seen, have already become the exception rather than the rule in various statutes that assert executive power. Indeed the Malaysian legal set up will soon find these rules and principles to be relics of the past which are incongruent with the "Malaysian values" that the prime minister had so extensively canvassed in Parliament in March 1988.

The dismissal of the three Malaysian judges was the culmination of a series of executive manipulations which were never directly denied by the Malaysian executive

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3John Peter Berthelsen v. Director General of Immigration & 2 Ors (1986) 2 CLJ 409.
4See Chapters 4 & 7 infra.
despite the 'defence' undertaken through the proxy writing of a New Zealand lawyer.\footnote{1} It is indeed a dark episode in Malaysia's legal history in particular and in man's quest for an impartial judiciary in general. But as usual, in matters of this nature ultimately it is the resilience of the Malaysian public that is put to the test while opinion on the demeanour of the Malaysian executive has been well assessed as being totally inconsistent with the rule of law and the tenets of democratic life.\footnote{2}

In specific reference to the executive's treatment of the judiciary, the founding father of the Malaysian nation has lamented: "I do not know how any honourable government can stay in power..." He concluded that the unprecedented act of the Malaysian executive "constitutes a denunciation which cannot be answered without confessing to the most dishonourable conduct in public life."\footnote{3} Although other scathing remarks have been made by reputable personalities and institutions as regards the government's interference in the independence of the judiciary\footnote{4} it appears that the Malaysian executive is not too perturbed by the condemnations it has received\footnote{5}. This obvious arrogance perhaps stems from the knowledge that there are no forces, political or otherwise from within the country that are in the position to challenge the government's overall control and power.

The removal of Salleh Abas, and the two other judges of the Supreme Court - Wan Sulaiman and George Seah were the result of a titanic clash between politics and

\begin{itemize}
\item \footnote{1}After the publication of \textit{May Day for Justice} op. cit. in 1989, Peter Aldridge Williams Q.C., a New Zealand lawyer wrote \textit{Judicial Misconduct}, a sequel obviously with the primary objective to validate and give vent to the "legitimate action taken by the government" as well as to counter the views of the writers of \textit{May Day For Justice}.
\item \footnote{3}Tunku Abdul Rahman in his Foreword in \textit{May day for Justice}, op. cit. p. xii
\item \footnote{5}On 22 September 1988 the General Assembly of Commonwealth Magistrates' and Judges' Association passed a resolution which condemned "...the apparent interference with the rights and duties of certain members of the judiciary in Malaysia" and hoped that the "...the strong and proud traditions of the country in upholding the rule of law will soon return." The International Commission of Jurists (ICJ) in its triennial meeting in Caracas on 20 January 1989, also condemned the dismissal of the Malaysian judges in an elaborate recitation. See INSAF the \textit{Journal of the Malaysian Bar} October 1989, pp. 53-54.
\end{itemize}
the judiciary. In essence, the judiciary tried to ward off executive interference in its core affairs while the executive wanted the judiciary to be subservient to its wishes through the written word supplied by Parliament. That the principles of common law have been interwoven into the fabric of Malaysian law for the past century suddenly appears to be irrelevant. Although the Deputy Prime Minister now says that the system "will always respect and let the judiciary do its work"¹ this is hardly credible because the damage has already been done. How can the judiciary 'do its work' when it is not even allowed to interpret the laws according to universal values of justice and freedom?

Under the present circumstances, however, the Malaysian people by way of a consistently controlled media are being led to accept the view that there has been no demise of the doctrine of separation of powers and that the judiciary is as such unscathed in all respects. But the legal fraternity in particular knows the horrendous reality that the crisis has brought upon the rule of law in Malaysia.

Whilst the exact involvement of the politicians and the judicial officers may never be known due to the immense secrecy involved and due also to the Official Secrets Act 1972, this rare episode does portray a fearsome future for the rule of law in a country that constitutionally vouches to observe and safeguard fundamental liberties albeit in a watered-down version. But even more fearsome is the extent to which the executive was willing to pawn and render dispensable the independence of the judiciary in a quest to stand victorious over events which the judiciary was neither free nor competent to determine.

We have also noticed that the judiciary is quite helpless when confronted by the might of the executive. In the first place, there has been no Malaysian experience of this nature to fall back on. Whilst the judiciary crisis of 1988 fomented hot political debate among members of the opposition², the event was seen to be a winning issue for the government as there was hardly any press view against it. Tun Suffian, another

²For example see The Rocket (November 1988), Harakah, 12 November 1988; Semangat 46, 100 Isu, Kuala Lumpur, 1989.
former Lord President plainly said, "Malaysians have only heard the official reasons for the recent assault on our judiciary, as the Malaysian press has been muzzled and publishes only what pleases the government."\(^1\)

It cannot be overstated that Malaysia's public opinion is subject to an elaborately controlled mass media, subservient to the stringent provisions of the Printing Presses and Publications Act 1984\(^2\) (PPPA). Because of the PPPA there is a total lack of press rights, primarily because of ministerial control over all things printed and published in the country. Our discussion on *Aliran's case* and the PPPA above has borne this out.\(^3\) If there were free press within the realm of practical freedom of speech and the other attendant fundamental liberties, albeit within reasonable bounds and limitations, the story of the judiciary crisis in 1988 and the general state of affairs of the rule of law and human rights would have been told differently. However, the crisis has not ended even though the main train of events have become history. For now the executive has achieved its objective of determining the extent and limit of judicial power.\(^4\)

8. 7. *The rule of law in a Competing Environment*

The Government has already announced its plan to create what has been termed Malaysia's own common law. What this means is not yet clear because the announcement was made with political rather than legal motives. A safe guess as to what the government wants in this direction is a marked decrease on the reliance on the English common law system as Malaysia's own brand of a legal system emerges. With the increasing influence that the *syariah* (Islamic law) has over the Malays who

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\(^2\)Act 301. See Chapter 4, *ante*.

\(^3\)Chapters 3 & 4, *ante*.

\(^4\)The removal of Tun Salleh and his two brother judges, Tan Sri wan Sulaiman and Datuk George Seah has continued to be persisting issues in the country. All of the opposition parties, the Bar Council, and *Aliran* have not ceased to bring up the dismissal as potent issues in their forum. See *Media Malaysia*, official publication of the *Semangat 46*, September 1992, p. 32. However, newspapers under the control of the *Barisan Nasional* government have long ceased to highlight stories connected with the judiciary crisis. In the 1991 Bar Council Annual General Meeting held in Kuala Lumpur, the 1988 Resolution was resoundingly re-affirmed, an outcome that no doubt speaks well for the legal fraternity which represents about 4000 practising lawyers in the country.

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comprise about 50% of the population, the importance of Islamic law speaks for itself and it is logical to conclude that various aspects of Islamic law will find their way into the declared Malaysian common law. With Islam as the official religion of the Federation as provided under Article 3 of the Constitution, and the current fervour to instill an Islamic way of life, there is hardly any sector of government and social activity that is not influenced by it.

The policy to implement Islamic values within the administration of government has been on-going since the early 1980's. Syariah has gained much ground in the personal law of the Malays who are Muslims. Article 5(4) was amended in 1988 to accommodate the jurisdictional demands of Islamic law.¹ There is now an Islamic banking system supported by an Islamic system of insurance. At least three local universities offer Syariah in their legal curriculum leading to initial and tertiary degrees.² Every State has been implementing Islamic law in respect of Muslims in all the 13 States in the country. An entrenched Islamic legal system, inclusive of its own judiciary has been in practice for more than thirty years in the country and now there is a strong voice for Syariah to be further upgraded so that it becomes a totally independent legal system.³ For now the Syariah has been confined to family law as it affects Muslims. However, there have been repeated calls by Islamic fundamentalists, especially from the PAS-led state government of Kelantan that the creation of an Islamic state should be the aspiration of every Muslim and that the hudud, Islam's own version of criminal law, should be implemented for all.⁴

At this stage one must not jump to the conclusion that Islamic law is devoid of fairness. In fact its law of evidence leans more to the accused as it demands four reliable witnesses to an alleged crime. So long as fairness and accountability are

²Islamic law is the mainstay of the International Islamic University, the University of Malaya and the National University.
³See Abdul Munir Hj. Yaacob, "Syariah Sebagai Satu Sumber Undang-Undang Malaysia" (Syariah as a Source of Law in Malaysia) a paper presented at the Syariah and Common Law Seminar in Malaysia held at the Pusat Islam, Kuala Lumpur 16-17 Mei 1992.
⁴This call has been consistently made by PAS (Pan Malaysian Islamic Party) which now controls the State of Kelantan. Its official organ, Harakah, has been propagating the creation of an Islamic State in its bi-weekly issues.
achieved it really matters little what a system of law is called and so long as arbitrary power is kept to the minimum and supervised by the courts the title of a country's legal system is not all that important. To what extent Syariah is capable of handling these end-results is yet to be seen although it is supposed to be a complete way of life.\(^1\)

In the meantime, Syariah-trained lawyers, especially those trained by the International Islamic University in Kuala Lumpur and the Al-Azhar University in Cairo, are gaining grounds and slowly but surely replacing the London-trained lawyers. Of this a scholar has remarked: "A new generation of locally trained lawyers is appearing, many of them from the International Islamic University. In a decade the western-trained lawyer may be in a diminishing minority."\(^2\) In time judges, magistrates and other judicial and legal officers will take up their respective places in the judicial and legal hierarchy. Western-trained lawyers are even now a minority. How then is the rule of law to be inculcated further let alone be made entrenched? It is in this scenario that western-trained lawyers are seen to be competing against the trend to Malaysianise the legal system. At the same time Malay is in the process of replacing English in the courts.\(^3\) Senior lawyers who felt at home conducting cases in English now shy away from the courts due to this new policy. Of course, there is nothing adverse about wanting to re-launch one's own legal system. This should fit well within national aspirations. But what is of immediate concern is the repercussion that this fervour is causing for the existing judiciary and the legal system in the absence of a well thought-out plan and a systematic schedule of implementation. At least there has to be a national steering committee of sorts that oversees and guides this political aspiration into practical reality.

Before serious efforts are undertaken to create a formal Malaysian Common Law, the question must be asked: What is wrong with the present system? Where are the faults that must be remedied or, if necessary, changed? How will arbitrary rule, \(^{1}\)See generally Abdur Rahman Doi, *Shariah: The Islamic Law*, Taha Publishers, London, 1984. 
\(^{2}\)H.R. Hickling, "The Malaysian Judiciary In Crisis" Public Law 1989, 20 at p. 27. 
\(^{3}\)This policy became law with the National Language (Amendment) Act 1990 (A765/1990).
accountability, separation of powers, judicial review, fairness in trial and related matters be approached and placed in the new Malaysian common law? These questions are perhaps best answered by a national-level committee comprising of representatives from the government, lawyers, Syariah experts and other relevant persons. Much of what has been said about wanting to create a Malaysian common law so far is based more on political sentiments than on an immediate need. It has to be realised that for a new legal system to emerge satisfactorily it has to have an evolutionary process. It cannot be forced into effect over the lives of a citizenry that is represented by multiracialism.

The first suggestion that merits consideration is this: the Government, which may be later handicapped by the increasing threats from Islamic fundamentalism - this includes the demands to create an Islamic State in which the hudud is to be implemented in full - will enjoy an advantage if the democratic process and the rule of law are jealously guarded. The first process is to introduce the essence of the rule of law and human rights within the educational system so as to endear the young to the concept. At least at university level there is a dire need for the students to learn about the rule of law as a concept of justice. Of course, if this course of action is acceptable the Universities and University Colleges Act 1971 has to be toned down in terms of the freedoms of speech and association it drastically restricts. Arbitrariness in government must not be equated with what is thought to constitute the Malaysian system. In fact, to begin with, freedoms of speech and expression under Articles 9 and 10 respectively must immediately undergo a 'toning-down' process so that Malaysians may at least offer contra views to official pronouncements by the government. The other 'freedoms' may follow suit.

The second course of action is to reduce the climate of fear by allowing the courts to retain their inherent powers including judicial review in all cases involving preventive detention and administrative actions. Once the rakyat (people) realise that the courts are the bastion against arbitrary rule, the advance of other disciplines.

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1Tan Sri Harun Hashim, former Supreme Court Judge suggested that there ought to be a law reform committee on Islamic law. See his statement as reported in the New Straits Times, 4 September 1993.
that breed arbitrary action may be seen as unattractive and repugnant. In the absence of the above elements in the proposed Malaysian common law, the exercise will be futile and meaningless. The rule of law and human rights must co-exist with whatever changes are envisaged by those in power.

8. Lack of Infrastructure for Democracy and the Rule of Law

The decline of the rule of law and human rights in Malaysia can be traced to the corrupted notion of democracy which the executive holds. In this respect the Prime Minister had told the West that since democracy is not a religion, it can be made to suit local conditions as in his opinion it is merely a mode of majority rule. True to this opinion, the executive government has been able to operate almost independently of parliamentary control. The executive only uses the authoritative function of Parliament when it wants the latter to validate whatever it considers necessary in the course of governing. Laws that apportion powers heavily on the executive have been made without any mechanism of checks and balances. Parliament's singular value has been to legitimate the wishes of the ruling majority. There are no supervising or watch-dog committees and as such majoritism has a field day in getting whatever is fancied in the vast field of government. So prevalent has been the executive's show of power that even the Speaker of the Dewan Rakyat jumped on the bandwagon by suggesting that the two-thirds majority required in constitutional amendments be reduced to a mere simple majority as "this would make procedure in the Dewan Rakyat easier". It is far from being proper for the Speaker to do so as he is expected to be neutral. But the executive has been seen to be so overflowing with political patronage that even such a highly esteemed official fell prey to the executive's trend of thinking.


2The Speaker of the Dewan Rakyat, Tan Sri Mohamed Zahir Ismail suggested that a simple majority, instead of two-thirds majority, would be enough for Parliament to pass an amendment to the Constitution. "This would make procedure in the Dewan Rakyat easier", he said. See The Star, 15 June 1993.
Under these circumstances, the objective of law-making appears to be more bent on the desire to control freedom \textit{per se} rather than to underpin the necessity to be guided by the rule of law.\footnote{An amendment to a law is always dependent on specific needs which in the case of Malaysia invariably arise out of the executive's desire. Thus, having satisfied itself that there is a need, for example, to amend an existing law or create an entirely new one, the Attorney General's chambers get busy with the drafting. The Minister concerned takes it to the Cabinet for internal approval before tabling it in the Dewan Rakyat (House of Representatives) and the Dewan Negara (Senate). Given the Royal Assent under article 66 of the Constitution, the instrument becomes law after being published in the \textit{Gazette}. See sections 3 and 18(3) of the Interpretation Acts 1948 and 1967 (Act 388). However, after 1983, by way of the Constitution (Amendment) Act 1983 the traditional saving power of the Rulers in rejecting a Bill from becoming law under Article 66 of the Constitution was curtailed.} There are no parliamentary committees involved from the time a Bill is tabled to the final stage when the Senate passes it. The dangers in having the same party rule the country with more than two thirds majority for the past 36 years needs no further elaboration. But when the Senate too is being monopolised by appointments made at the behest of the Prime Minister democracy becomes a grand affair of patronage. As a result, the \textit{Dewan Negara} does not in any way function as an Upper House that customarily checks the failures and excesses of the \textit{Dewan Rakyat}. In this respect, Benedict Stephens, former President of the \textit{Dewan Negara} (Senate) admitted that the Senate should be a revisionary body for Parliament as it should be but that "it is not really that now."\footnote{\textit{Asiaweek}, 8 February 1987 p.66} It may be said that the bi-cameral arrangement of the Malaysian Parliament has been of no avail as far as the needs of accountability are concerned. Naturally, the immediate suggestion to be made is to turn the \textit{Dewan Negara} into a truly effective Upper House chamber. To do this its membership must be sourced, not by nomination only but by direct election, from a multi-disciplinary admixture of Malaysians that cuts across party politics. The setting up of an \textit{ombudsman} that is truly independent and answerable only to Parliament is in dire need so as to overcome stagnant and patronising government departments. The parliamentary committee system should have its debut in Malaysia. These ought to have members drawn from all parties and must have all the powers akin to congressional committees in the United States or at least function along the lines adopted by the Select Committee of the House of Commons in Britain.
Bearing in mind that the Malaysian parliamentary system follows the rudiments of Westminster, it is curious indeed why parliamentary committees such as those under the House of Commons\(^1\) in England are totally absent in Malaysia. One probable explanation may be that with select parliamentary committees at work, scrutiny of "expenditure, administration and policy of the principal government departments" may equip the oppositions with political salvoes. This has been the case despite lip-service incantations that government agencies ought to be accountable and transparent.\(^2\) But how can the government be 'accountable and transparent' when the country's electronic as well as the print media are formally controlled\(^3\) and owned by nominees of the ruling parties to the exclusion of others? Radio and Television Malaysia (RTM) is state-run and broadcasts only news items of the government, with a marked emphasis on speeches of UMNO, MCA and MIC Ministers while TV3, substantially owned by the UMNO, lends support to all the ruling parties within and without election seasons. Statements and speeches of opposition leaders are not covered or treated as news-worthy. A similar situation also occurs in the print media which are also owned through political proxy.\(^4\) Thus all inputs are from the government. There are no conduits for rebuttal or criticism and under such circumstances even the occasional mild criticism from the Barisan Nasional backbenchers themselves go as unheeded.

The Internal Security Act 1960 (ISA), the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO), the Universities and University Colleges Act 1971 (UUCA), the Printing Press and Publications Act 1984 (PPPA) and the Restricted Residence Enactment (RRE) for example, could never survive in a

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3 All publications, irregardless of whether they are newspapers or magazines, are subject to ministerial control under section 3 of the Printing Presses and Publications Act, 1984 (Act 301). The representative dailies in English are the *New Straits Times* (NST), *The Star* and *The Malay Mail*. *Utusan Malaysia* and *Berita Harian* are in Malay. For the Chinese reading public, *Sin Chew Jit Poh* and *Nanyang Siang Pau* are representative while *Tamil Nesan* caters for the Indian community.

democratic system where public opinion prevailed over governmental actions. Apart from the might of draconian public order, internal security and emergency laws, the rights to free speech and expression, assembly and association\(^1\) are in a severe state of want and thus act as immediate stumbling blocks to the development of a free democratic society sensitive to the rule of law and the demands of human rights.\(^2\) One may indeed suggest that the ISA and all the draconian laws should be repealed or at least amended so as to allow judicial review in order for the executive to be held accountable; or that the courts should be more liberal in their attitude towards liberty cases. While these suggestions are timely, the more pressing suggestion is the repeal or at least the liberalising of laws on free speech and expression as well as those pertaining to the freedom of association. Having attained independence for the past 36 years it is about time for laws such as the Sedition Act 1948, the Trade Unions Act 1959, the Societies Act 1966, the Universities and University Colleges Act 1975, and the Printing Presses and Publications Act 1984 to be reviewed in the interests of democracy, the rule of law and human rights. It is untenable for a government elected by the people simply to assert that "Malaysian values" be observed and practised while at the same time it continues to rule the country as if an emergency were still on-going. When a society has the right to express views freely, subject to reasonable restrictions - which means the court can intervene - then there is hope for the coming into play of accountability, the cornerstone of democratic government. Then there is hope for the understanding and appreciation of human rights and the rule of law.

Students and public interest bodies, trade unions, journalists, the Bar and even the Sultans have been adversely affected by \textit{ad hoc} actions of the government. The University and University College Act 1971 (UUCA) curtail student activism; they are not allowed to organise forums, print campus newspapers or otherwise disseminate ideas without the prior approval of the authorities; the amendments to the

\(^1\)There are no separate provisions for press freedom in Malaysia. Press freedom is envisaged to be integral within the general rights to free speech and expression which along with the rights to form associations are substantially restricted under article 10 of the Constitution.

\(^2\)In fact in India, the lack of public opinion facility has been described as the source of the unenlightened public. See G. Mirchandani, \textit{Subverting the Constitution}, New Delhi, 1977 p.131.
Official Secrets Act 1972 (OSA)\(^1\) have clipped investigative reporting on excesses of government. Since no excesses of government could be reported without invoking section 4 of the OSA\(^2\), the executive has in fact a very safe haven under the OSA as any information within government could be labelled by the Minister as "secret" under the Act. Once a document or information is designated "secret" by the Minister under his hand, whoever deals with it does so at the peril of being prosecuted.\(^3\)

The executive has been the victor all the way for the simple reason that it determines what law to legislate or amend and what powers should be apportioned to the judiciary and the other organs of government under the Constitution. The statutes and Constitution in particular may be described as the manifestation of ultimate political expression. Perhaps it was on account of this that Justice Holmes once said that constitutional law was not law at all but politics.\(^4\) With the legislative power at hand, derived from its continuous command of more than two-thirds majority in parliament - a process obtained through realignments of parliamentary and state constituencies all over the country - there appears to be little hope for the emergence of an alternative value system in government. Along these lines, the chances for the judiciary to regain its lost "judicial power", after having lost it in the aftermath of the 1988 judiciary crisis, are slim because the executive have come to the conclusion that the role and functions of the judiciary should be confined only to those aspects that the executive determines. That being the case, democracy in Malaysia walks on a tight rope. Whatever opportunities are available to holders of contrary views in asserting their democratic and political rights are necessarily those allowed by the incumbent government. Hence Malaysian democracy has to contend with the formulae and procedures set by and within an innately lop-sided system of power acquisition.

\(^1\)Act 88 Reprint No. 4 of 1988. For an outline of what constitutes offences under the OSA prior to 1988, see Government of Malaysia v. Lim Kit Siang (1979) 2 MLJ 37, per. Abdul Hamid J.
\(^2\)Broadly similar to section 2(1) of the United Kingdom's Official Secrets Act 1911.
\(^3\)See section 8 of the OSA.
Malaysia is now noted in the international community for its reluctance to accept international standards in human rights. Judging by the stand made by the government, its reluctance to subscribe to these standards will continue. It does not accept foreign aid from developed countries with human rights stipulations; the Prime Minister categorically told the West "not to preach to the East about human rights." In the Dewan Rakyat the Speaker refused to allow debates on the failure of Malaysia to ratify the International Covenant of Civil and Political Rights (ICCPR) 1966. According to the 1993 United Nations Human Development Index compiled by the United Nations Development Programme (UNDP), Malaysia dropped to 57th position from 51st in 1992. This report caused the Prime Minister to accuse the UN authorities as being "biased" and that "those who compiled it have no idea about what human rights are all about." According to the Population Crisis Committee in Washington, one of the world's respectable human rights evaluators, Malaysia - along with Indonesia and Singapore - earns only 3 points out of the maximum 10 in the assessment of political freedom and human rights. In the meantime the infrastructure for the rule of law and democracy has been going from bad to worse. In the process the rule of law and human rights have been marginalised. Why has this been consistently so? The reasons are not difficult to understand when one observes what the rule of law and human rights can do to upset arbitrary rule. Arbitrary rule cannot prosper in an environment that propagates the rule of law and human rights. Even in a less-than-ideal situation, the observance of human rights and the rule of law acts as a catalyst to public opinion, which has proven time and again to be the best censure against arbitrary rule or tyranny.

It has been suggested that in Malaysia human rights and the rule of law are precepts peculiar to the West which it is inappropriate to apply in Malaysia. This is a

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4 Singapore Straits Times, 3 June 1993
5 The Committee awards 2 points each for fair electoral laws, real power for elected representatives, freedom to form parties, self-determination, and freedom of expression. See Far Eastern Economic Review, 22 July 1992 p.12
severe distortion of course because human rights and the rule of law are no longer within the confines of the geo-political parameters of each country. They are now universal rights. Even Islam has manifested its acceptance of human rights under the Universal Islamic Declaration of Human Rights (UIDHR). Its relevance is not confined to the West alone where certain human rights violations have also been committed. In this context the Malaysian Bar has a definite but difficult role to play. Perhaps with the assistance of *Hakam* and *Suaram*, Malaysia's only associations for human rights the Bar ought to embark on periodic nation-wide campaigns to inculcate and instil the significance and usefulness of the rule of law and human rights in thwarting arbitrary rule. Islamic law experts in the country, especially those concerned with the teaching of *syariah* ought to highlight the significance of the UIDHR as well as the relevant tenets of Islam that respect the rights and dignity of man. At the same time the United Nations Commission on Human Rights and the international press should take a particular interest in the affairs of the human rights movement in Malaysia by making available periodic papers and reports of human rights violations committed in Malaysia. At least the good work of Amnesty International should be given a helping hand. Without such initial efforts there will be little change in the attitude towards human rights and the rule of law in Malaysia.

Finally, the Association of South East Asian Nations (ASEAN) must face the reality of human rights violations and take steps to establish an ASEAN Court of human rights, preferably complimented by an ASEAN Commission of Human Rights. With leave of the respective Supreme Court of each member country petitions on human rights violations could be made to the Commission and finally arbitrated by the Court. Of course, this calls for a concerted political commitment besides acceptance of the relevance of human rights. Malaysia, for one, cannot deny that it does not recognise international human rights for the simple reason that Part II of its Constitution has already embraced human rights since 1957, albeit subject to a multiplicity of restrictions.

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Thus it is imperative that the infrastructure for the dissemination of public opinion be on top of the agenda for the Malaysian people if democratic rights are to be even partially meaningful. After all, democracy does not only mean having general elections once in four or five years or having roads, bridges, schools and the creation of an echelon of rich people as a result of rampant political patronage. A society has to have the right to dissent even after the ballot is cast. The executive may be allowed to take a substantial portion of power to rule but it cannot take away all rights to voice an opinion that may not go well with those in power. This is what differentiates a democratic system from a populist regime. As Lord Hailsham has said, "Democracy is not the same as populism, which is and always has been one of its most dangerous enemies."¹

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APPENDIX 1

INTERVIEWS CONDUCTED ON EX-ISA/EPOPCO DETAINEES IN CONJUNCTION WITH THE PREPARATION OF THE DESERTATION:

The Rule of Law and Executive Power in Malaysia:
A Study of Executive Supremacy

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<tr>
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<th>DETENTION PERIOD</th>
<th>OCCUPATION</th>
<th>INTERVIEW DATE</th>
<th>PLACE OF INTERVIEW</th>
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<td>1</td>
<td>Dr. V. Davud (ISA)</td>
<td>1987-1988</td>
<td>M.P./Trade Union</td>
<td>11.10.91</td>
<td>K. Lumpur</td>
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<td>3</td>
<td>Dr. Syed Husin Ali (ISA)</td>
<td>1976-1981</td>
<td>Professor, University of Malaya</td>
<td>4.8.92</td>
<td>K. Lumpur</td>
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<td>4</td>
<td>Hu Se Pang (ISA)</td>
<td>1987-1988</td>
<td>M.P. (DAP)</td>
<td>2.3.92</td>
<td>K. Lumpur</td>
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<tr>
<td>7</td>
<td>Tee Voon Chin (POPOC)</td>
<td>1969-1971</td>
<td>Contractor</td>
<td>14.8.92</td>
<td>K. Lumpur</td>
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<td>8</td>
<td>Abdullah Majid</td>
<td>1976-1981</td>
<td>Deputy Minister (UMNO)</td>
<td>12.3.91</td>
<td>K. Lumpur</td>
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<td>9</td>
<td>P. Patto</td>
<td>1987-1988</td>
<td>M.P. (DAP)</td>
<td>8.9.91</td>
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<td>10</td>
<td>Dr. Kua Kia Soong</td>
<td>1987-1988, (445 days)</td>
<td>Civil rights activist (DAP)</td>
<td>8.9.92</td>
<td>K. Lumpur</td>
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<td>11</td>
<td>Mahfuz Omar</td>
<td>1987-1988</td>
<td>PAS Youth Leader</td>
<td>13.9.91</td>
<td>Penang</td>
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<td>13</td>
<td>Cikgu Musa Salleh</td>
<td>1963-1968</td>
<td>Teacher (PAS)</td>
<td>18.11.91</td>
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<td>14</td>
<td>Nasaruddin Baba</td>
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<td>Civil servant</td>
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<td>Fahami Ibrahim</td>
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<td>State Assemblyman</td>
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<td>16</td>
<td>Abdul Aziz Ishak</td>
<td>1965-1967</td>
<td>Former Cabinet Minister</td>
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<td>17</td>
<td>Kamaruzzaman Yaacub</td>
<td>1974-1976</td>
<td>Youth Leader PSRM</td>
<td>23.7.90</td>
<td>Pahang</td>
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Abbreviations:
- M.P.: Member of Parliament
- ISA: Internal Security Act 1960
- PAS: Parti Islam SeMalaysia (Pan Malaysia Islamic Party)
- DAP: Democratic Action Party
- UMNO: United Malays National Organisation
- PSRM: Parti Sosialis Rakyat Malaysia (Malaysian Socialist Party)
# APPENDIX 2

## INTERVIEWS CONDUCTED ON SELECT PERSONS/OFFICIALS

In respect of their opinions on the rule of law and executive power in conjunction with field work undertaken by the writer for the preparation of the dissertation:

The Rule of Law and Executive Power in Malaysia: A Study of Executive Supremacy

<table>
<thead>
<tr>
<th>No.</th>
<th>Name of Person/Official</th>
<th>Occupation/Position/Designation</th>
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<th>Place of Interview</th>
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<td>4</td>
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<td>5</td>
<td>Abdul Aziz Hj. Idris</td>
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<td>12.9.91</td>
<td>Kuala Lumpur</td>
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<td>6</td>
<td>Dr. V. Samuel</td>
<td>Medical Practitioner</td>
<td>25.5.92</td>
<td>Kuala Lumpur</td>
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<td>4.2.92</td>
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