AN INTRODUCTION TO THE CONSTITUTION OF MALAYSIA

Second Edition

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The first edition of the book appeared in 1971. The fact that it was felt necessary to bring out a second edition just after an interval of five years testifies to the great popularity enjoyed by the book. The first edition consisted of 291 pages of text and 30 pages of appendices. The present edition shows an expansion of the text by 50 pages. Three indices – an index of names, an index of place names, and a subject index – which were not to be found in the first edition, have now been added. There is the Table of Federal Constitutional Articles at pp. 389–394 showing which Article of the Constitution has been mentioned on what page of the book. All these additions have increased the utility of the book and have made it much more easy and convenient for the readers to use it.

The number of cases cited has increased from 40 in the first edition to 82 in the present edition. The author has thus brought the law stated in the present edition up to date till December 31, 1975. While the last five years have been quite fruitful from the point of view of constitutional law cases in Malaysia, on the whole, the Constitution does not appear to generate many constitutional controversies, the average being 4 cases per year.

Like most of the modern written constitutions, the text of the Malaysian Constitution is "in legalese." The subject of constitutional law in any country is the most significant area, for the Constitution is the fundamental law of the land and conditions all laws in the country. It is therefore extremely important and desirable that there should be dependable books expounding the principles of Malaysian Constitutional Law. Unfortunately, so far, there has been a genuine dearth of material in this area. Harry E. Groves' *The Constitution of Malaysia* published in 1964, Sheridan and Groves' *The Constitution of Malaysia* published in 1967, and the book entitled *Malaya and Singapore: The Borneo Territories* edited by Sheridan in the series The British Commonwealth: The Development of its Laws and Constitutions, published in 1961, have all now become out of date and need to be updated to be useful and dependable in the contemporary setting. A few articles on the Malaysian

Constitution have appeared from time to time in some legal journals, but they cannot fulfil the felt-need of a coherent, expository book on the Constitution.[1] In this context, a student of Constitutional Law has reason to be thankful to the learned author for bringing out an updated edition of the Introduction to the Constitution of Malaysia.[1a]

In writing this book, the author has kept before him a very limited horizon. He sets out to write a book essentially for the layman, for the wide public outside the University and the courtroom, the ordinary citizen who is curious to know simply what the various constitutional rpovisions are,[2] though he hopes that the book may also be helpful to lawyers "whose constitutional law is rusty and who want a quick reference book for use as a starting point for further research."[3] His limited objective in writing the present book has led the author to give a straightforward account of the constitution in simple language. The author has thus eschewed an in-depth study of any part of the Constitution. As a result of this approach, at most of the places, the book contains a perspicuous outline of the provisions of the Constitution without much expository comment. Needless to say that there are quite a few provisions in the Constitution which deserve an expository treatment, but the author had to avoid the temptation of undertaking such a task as he wanted to avoid a 'scholarly tome.'[4] At some places, however, the author goes outside the confines of the constitutional text and gives some snippets of interesting information as to how some of the institutions under the Constitution function in practice. For example, in the Chapter on the Yang Dipertuan Agung,[5] he narrates how the system of electing him has functioned in practice during the last several elections.[6] Similarly, in Chapter 18, he gives interesting information bearing on the relative economic standing of Malays as compared to non-Malays while considering the justification for Article 153 which confers a few safeguards on Malays to remove their weakness in the economic field.[7]

[1] Reference may also be made here to the admirable case-book: S. Jayakumar, *Constitutional Law Cases from Malaysia and Singapore*, the second edition of which has been released recently. It is an extremely useful book for anyone who wants to study the Malaysian Constitution through judicial pronouncements.

[1a] Hereinafter in the notes below the book under review is referred to by the name of author Tun Suffian.

[2] Author's Preface to the First Edition, ix.

[3] Author's Preface to the Second Edition, v.

[4] Author's Preface to the First Edition, ix.

[5] Tun Suffian, Chapter III.

[6] *Ibid.*, pp. 28–33.

[7] *Ibid.*, pp. 289–303.

The learned author has also imposed one more limitation on himself. Being a sitting judge as the Lord President of the Federal Court, the highest court in the land, he has thought it proper to "refrain from criticizing and speculating".[8] He deems it to be "undesirable for a judge to commit himself in advance on matters that may come up formally for decision by him in court."[9] He even goes on to enter the caveat as a matter of abundant caution that "if opinion has here and there crept in," in the book, "it does not necessarily follow that I shall, after hearing the opposing arguments, adhere to it."[10] This self-imposed limitation by the author may cause disappointment to a serious student of constitutional law who is thus deprived of the benefit of a penetrating analysis and a deep insight into the working of the constitutional provisions and the judicial pronouncements interpreting them, which only a person in his position and of his calibre could have provided.

In Chapter I, the author traces briefly the history of the several States as well as of the formation of the Malaysian Federation in 1963. After the end of the World War II, the Malayan Union came into being on 1st April 1946.[11] Because of the Malay opposition, the Malayan Union Constitution could never become fully operative.[12] A new Constitution was then established with effect from 1st February 1948. This, according to the author, established "a federation consisting of the Malay States and Malacca and Penang with a strong central government."[13] The next step in the evolution of the Malaysian Constitution was the appointment of "an independent commission to devise a constitution for a fully self-governing and independent Federation of Malaya."[14] As a result of the labours of the Reid Commission, the new Federal Constitution came to be promulgated on 31st August, 1957, known as the Merdeka Day and thus, "The Federation of Malaya became an independent sovereign country."[15] The Malayan Federation was then converted into the Malaysian Federation with the joining of Sabah, Sarawak and Singapore. The present Constitution of Malaysia came into force on September 16, 1963, known as the Malaysia Day.[16] Finally, Singapore left the Federation on August 9, 1965, to become a separate independent republic, and the present Malaysian Federation comprising 13 States came into being. The birth of Malaysia

[8] *Ibid.*, p. ix.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*, p.7
[12] *Ibid.*
[13] *Ibid.*, p.10.
[14] *Ibid.*, p. 11.
[15] *Ibid.*
[16] *Ibid.*, pp. 13–15.

was preceded by a legal controversy in the High Court in Kuala Lumpur between the State of Kelantan and the Federation of Malaya in which the State sought to block the entry of Sabah, Sarawak and Singapore into the Federation but the decision went in favour of the Central Government.[17]

Chapter 2 entitled "The Supremacy of the Constitution" is a new addition. There was no such chapter in the previous edition. The discussion in this chapter very much reminds the reader of the Austinian concept of sovereignty. The author propounds the thesis that "In Malaysia only the constitution is supreme."[18] He states that the Malaysian Parliament is not supreme as the British Parliament is as it does not have "unlimited powers", as legislative powers are divided between the States and the Centre. Within its own legislative sphere, however, the Malaysian Parliament is 'supreme' in the sense that it can make or unmake, repeal or amend, any law, subject to the power of the courts to declare a law invalid if it is inconsistent with the Constitution. Outside its legislative sphere, "Parliament is not 'supreme'". In this discussion on Parliament, the word 'supreme' appears to have been used in three different senses. The author then poses the interesting question: If Parliament is not 'supreme' and its laws may be invalidated by the courts, are the courts then supreme? His answer is yes and no. The courts are "supreme in the sense that they have the right — indeed the duty — to invalidate Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the constitution."[19] But courts are "not supreme as regards Acts that are within Parliament's power and are consistent with the constitution." The executive has also to act within the Constitution and the law.[20] He then concludes:

> "In Malaysia no single institution is supreme, corresponding to the British Parliament. What is supreme in Malaysia is the constitution itself."[21]

At another place in the book, the author states:

> "In an earlier edition I said that of the three separate branches of Government, the courts are supreme in a certain sense. Since then I have changed my view and am now of the opinion that in Malaysia, only the constitution is supreme."[22]

[17] *The Government of the State of Kelantan* v. *The Government of the Federation of Malaya*, [1963] MLJ 355. The case is mentioned in the book at pp. 14–15.

[18] Tun Suffian, p. 17.

[19] *Ibid.*, p. 18.

[20] *Ibid.*, p. 20.

[21] *Ibid.*, pp. 19, 20.

[22] *Ibid.*, p. 98.

These observations raise some interesting questions. Is the search for an institution having 'unlimited' powers in a written constitution in any way a meaningful exercise? A written constitution seeks to control the powers of the various organs of government and thus promote constitutionalism in the country. The philosophy underlying a written constitution is that every organ and institution of government in the country functions within the limits of its powers and subject to the restraints imposed by the constitution. Therefore, the concept of "supremacy' in the sense of an organ having 'unlimited power' and the concept of 'written constitution' become the antithesis of each other. However, in the view of this reviewer, an indepth study of the various constitutional provisions in Malaysia would show that to say that the Malaysian Parliament is not 'supreme' as it functions under several constitutional restraints is merely to state the formal position. The truth appears to be that constitutional limitations on Parliament are more 'notional' in nature than real or effective and, in any case, the restraints are only 'minimal'. This is borne out by the fact that during the last 20 years of the functioning of the Constitution, no law of Parliament has been declared to be unconstitutional by the courts. In the area of federalism, the powers of Parliament, as compared to those of the State Legislatures, are vast and, in certain circumstances, it has the capacity to legislate in the State sphere as well.[23] The constitutional provisions guaranteeing 'fundamental liberties' have been so drafted as to impose, if at all, only nominal restraints on Parliament.[24] During an emergency, Parliament can make laws which can even be inconsistent with any constitutional provision.[25] In effect, therefore, the Malaysian Parliament comes very near to having as plenary a competence as that of the British Parliament. Reference may be made in this connection to *Eng Keock Cheng* v. *Public Prosecutor*[26] where the Federal Court refused to read any implied limitation by way of the doctrine of "excessive delegation" into the powers of Parliament during an emergency under Art.150(6) and characterised the Parliament as the "supreme legislative body under the Malaysian Constitution."[27] To this reviewer, this appears to be a very satisfactory way of characterising the Parliament as it conveys the idea that, within the limits imposed by the Constitution, Parliament can make or unmake any law and its powers are plenary. Further, as regards the Executive, it may be worthwhile to mention that a large number of

[23] See Tun Suffian, Chapter 12, pp. 159–164.

[24] *Ibid.*, Chapter 12, pp. 205–220.

[25] *Ibid.*, Chapter 15, pp. 223–232.

[26] (1966) 1 M.L.J. 18.

[27] For a discussion on "excessive delegation", see M.P. Jain, *Indian Constitutional Law*, p. 92 (1970).

statutes confer vast discretionary powers on the Executive; that during the emergency, it can promulgate ordinances which can override any constitutional provision; and that under the Emergency (Essential Powers) Ordinance, the Executive can make regulations to override any constitutional provision. And, finally, the functioning of the modern parliamentary system is such that a government in majority in the legislature can always get automatically the majority support in the legislature for implementation of its policies and programmes and enactment of its legislative proposals into laws. As de Smith observes in relation to British Government:

> "... the Government in office is normally able to command parliamentary support for the implementation of almost any policy that it is in practice likely to adopt."[28]

Thus, in a way, it may be correct to say that the broader the powers of Parliament, the broader the powers of the Executive as both are co-extensive.

It is well that the author does not now ascribe supremacy to the courts. The Judiciary constitutes perhaps the weakest branch of the government as compared to the legislature and the Executive. The institution of "judicial review" comes under attack quite frequently.[28a] The courts can take cognisance only of such cases as are brought to them by parties competent to file cases. Judicial review is negative in character as it comes into play only when a constitutional question is actually raised before the courts by someone. If such questions are not raised, the courts' powers remain dormant. In practice, therefore, much of the functioning of the Executive or the legislature thus never comes under any judicial scrutiny as regards its constitutionality or legality. The courts have evolved a number of techniques to make declaration of a parliamentary law as unconstitutional extremely difficult. As for example, the presumption is in favour of the constitutionality of the legislation in question.[28b] The courts thus function under many practical restrictions. And, in the ultimate analysis, there is always the possibility of the constitution being amended by the constituent power if the courts were to adopt an interpretation of a provision in the constitution which is unpalatable to the government of the day.[29]

[28] deSmith, *Constitutional and Administrative Law*, 38 (1971).

[28a] For various issues debated and discussed in the U.S.A. in relation to Judicial Review see, Dowling, *Constitutional Law: Cases & Materials*, 1–67 (1970).

[28b] Jain, *op. cit.*, 755–776.

[29] Sidgwick, *Elements of Politics*, 616 (1896). Also Dicey, *An Introduction to the Study of the Constitution*, 175 *n.* (1965).

In the opinion of the present reviewer, the formulation that, in Malaysia no organ is 'supreme' but the Constitution is 'supreme' needs some clarification and elaboration, for here the word 'supreme' has been used in two different senses. One, in relation to an organ of the government as having 'unlimited' power: two, in relation to the Constitution, in the sense of its being the supreme law of the land conferring powers and imposing restraints on various governmental organs, and every organ – executive, legislative or judicial—being subordinate to, and controlled by, the constitution. These two shades of meaning of the term 'supreme' have different implication. Lastly, the maxim that the 'constitution is Supreme' appears to have its own limitations and contradictions. No written constitution is immutable; it is amendable by following a special procedure laid down in the constitution. Some constitutions are amended too frequently and with great ease because the ruling party has an over-whelming majority in Parliament. In such a context, the concept of 'supremacy' of the constitution wears thin. It is quite difficult to regard the constitution as 'supreme' if it is amended whenever the government is faced with the least constitutional obstruction in doing what it wants to do. There is the perennial dilemma before the constitutional lawyers: whether the written constitution is supreme, or the 'constituent power' which can amend the constitution. Divey advocated the idea that legal sovereignty was vested in the 'constituent' power.[30] When all is said, the present reviewer feels that it is more satisfactory to characterise the constitution as the 'supreme law of the land' [as Art. 4(1) of the Malaysian Constitution seeks to do] rather than to call it just 'supreme'.

Malaysia has a parliamentary form of government of the Westminster type with a constitutional monarchy. The system of government is described in Chapters 3 and 6. The Head of the State is known as the Yang diPertuan Agung. He is elected for five years by the Conference of Rulers from amongst the Rulers of the States in Peninsular Malaysia. He acts on the advice of the Council of Ministers except in some matters,[31] the two important such matters being the appointment of the Prime Minister and the dissolution of Parliament.[32] As regards appointment of the Prime Minister, the discretion of the Yang diPertuan Agung is conditioned by two norms: (i) A person belonging to the House of Representatives is to be appointed to this office; and (ii) in the Yang diPertuan Agung's

[30] Dicey, *op. cit.*, 149, xxxviii, lxxxii. Dicey expressed this view in the context of the U.S. Constitution, but the same view is applicable to any written constitution. Also, G.F. Sawer, *Modern Federalism*, 106–116.

[31] Art. 40(1).

[32] Art. 40(2). Tun Suffian, pp. 19, 21, 22. Other Articles conferring discretionary powers on the Yang diPertuan Agung are 139(4), 141(2), 143(1)(a).

judgment, he is 'likely to command the confidence of the majority' in that House.[33] In accordance with his 'straightforward' treatment of the subject, the author has not delved into some of the questions which these constitutional provisions leave unanswered. For example, a question has been raised recently by Hickling whether the Yang diPertuan Agung has any discretionary powers over and above what have been specifically mentioned in the Constitution. Hickling's query is specifically with reference to Article 150.[34] Jayakumar counters Hickling's views.[35] The question appears to need some deeper probing. Another very interesting as well as crucial question which arises is: what norms should the Yang diPertuan Agung follow in exercising his discretionary functions? For example, the dissolution of Parliament has been left to his discretion, but obviously he must follow some norms in exercising this function. At times, this may become a critical question. In England, there appears to be a fairly well established convention that, barring some extremely exceptional situation, the Crown does not refuse dissolution to the Prime Minister,[36] and that it is a matter solely for the Prime Minister, and not his cabinet, to decide when the House of Commons is to be dissolved. Is this convention to be followed in Malaysia? A literal reading of the Constitution may lead to the conclusion that in this matter the Yang diPertuan Agung does not even have to consult his Prime Minister for it can be plausibly argued that in other Articles whenever the Yang diPertuan Agung is required, in the exercise of his discretionary powers, to consult the Prime Minister, it is expressly so mentioned.[37] But such a literal interpretation of the Constitution hardly appears to be tenable, and conventions cannot be ignored in this or any other area. One of the conditions of appointment of the Prime Minister is that he should be a person who in the "judgment" of the Yang diPertuan Agung is likely to command the confidence of the majority of the members in the Dewan Rakyat. How is the Yang diPertuan Agung to judge as to who is likely to command the confidence of the majority? This and several other such questions in reality underline the need for the evolution of viable conventions in Malaysia. Even though some of the conventions of the British Constitution have been expressly incorporated in the text of the Malaysian Constitution, the need for further evolution of convention has not been completely

[33] Art. 43(2)(a).

[34] R.H. Hickling, The Prerogative in Malaysia, (1975) *M.L.R.* 207.

[35] S. Jayakumar, Emergency Powers in Malaysia: Can the Yang diPertuan Agung Act In His Personal Discretion and Capacity, (1976) *M.L.R.* 149.

[36] Wade and Phillips, *Constitutional Law*, 118; Jennings, *Cabinet Govt.*, 427; Mackintosh, *The British Cabinet*, 357 (1962); M.P. Jain, *Indian Constitutional Law*, 35–7 (1971).

[37] For example Arts. 139(a), 141(2) or 143(1)(a).

obviated. In no written constitution, can the need for conventions be avoided. The author omits any reference to the role of conventions in the working of the Malaysian Constitution. Although in the present context, questions mentioned above may appear to be merely speculative or hypothetical, yet there is no knowing the fact as to when any such question may arise. The recent episode of the dismissal of the Whitlam Government in Australia by Governor-General Sir David Kerr exemplifies the suddenness with which constitutional questions are apt to come to the fore without any anticipation.

The author has observed with reference to Art. 43(4) that if the Prime Minister loses the confidence of the majority, and the Prime Minister advises dissolution of Parliament, "the Yang diPertuan Agung may decide not to dissolve Parliament, but instead to invite another member of the House of Representatives, who in his judgment is likely to command the confidence of the majority of the members of the House, to form a government."[38] This appears to be purely a 'literal' view of the Constitution. Of course, no such question has arisen so far in Malaysia and, therefore, any opinion on this matter may be characterised as only academic or even speculative. Nevertheless, it may be worthwhile to consider the question whether in such a situation the Yang diPertuan Agung should exercise any discretion to grant or not to grant dissolution? Is the Yang diPertuan Agung free to reject the advice of the Prime Minister who has just been defeated in the House to dissolve the House? On a deeper reflection on the issues involved, it appears to the present reviewer that, perhaps, a negative view may be the better one. The Yang diPertuan Agung is expected to play a neutral, non-political, role. Further the relevant constitutional provision makes it obligatory for the Prime Minister, after losing confidence in the House, either to resign or to request for dissolution of the House. Thus, the right to ask for dissolution is an alternative to resignation, and this can be interpreted to mean that the Prime Minister has a right to get a dissolution of the House. This view can be supported with reference to conventions in England on this matter. There, it is regarded as well established that the Prime Minister who had a majority once, but who is then defeated on the floor of the House of Commons, has a right to ask for dissolution of the House and seek fresh elections, and the Crown will not refuse it.[39] The danger in treating the matter as purely discretionary with the Yang diPertuan Agung is that he may be sucked

[38] Tun Suffian, p. 54.

[39] For discussion on this point see, Jain, *Indian Constitutional Law*, 36 (1971). Also, deSmith, *Constitutional Law and Administrative Law*, 104–8 (1971).

into partisan political controversies, as happened in Canada in 1926 with Lord Byng.[40] If he refuses to grant dissolution to the defeated Prime Minister and asks some other person to form the government, and later it is found that the new Prime Minister cannot mobilise majority support in the House, then dissolution will become inevitable. Having refused it to the former Prime Minister, but then granting it to the second Prime Minister, will amount to inviting the charge of political partisanship. Similarly, the question arises under Art. 43(4): How is the Yang diPertuan Agung to judge whether the Prime Minister has lost the confidence of the House or not? Is an open vote of no confidence on the floor of the House necessary for the purpose, or can the Yang diPertuan Agung judge this matter otherwise, say on the basis of a letter signed by a majority of the members of the House withdrawing support from the Ministry. Such a question arose in Malaysia in the context of the State Government in the *Ningkan* case.[41] The High Court insisted in that case that want of confidence must be expressed on the floor of the House and not outside the House. This principle appears to be in the best of democratic traditions. But the question cannot be said to have been resolved conclusively. The phraseology of the Malaysian Constitution and that of the Sarawak Constitution considered in *Ningkan* appear to be similar. Whether the High Court view will prevail in the Central sphere as well cannot be said to be definite. Perhaps the safest course of action for the Yang diPertuan Agung may be to take cognisance of only what happens on the floor of the house and to ignore what transpires outside the House. Then there arises the question, which also arose in *Ningkan*, whether the Yang diPertuan Agung can dismiss the Prime Minister who after losing confidence of the House neither resigns nor seeks dissolution. The High Court in *Ningkan* was reluctant to accept the view that the Chief Minister could be dismissed in such circumstance, but the government put forward the view that the Chief Minister could be dismissed if he neither resigns nor seeks dissolution of the House. The question thus is whether the government argument in *Ningkan* will apply to an interpretation of Articles 43(4) and (5).

The author has not touched upon the concept of 'collective responsibility' of the Cabinet to the Dewan Rakyat, or the principle of a Minister's individual responsibility or the principle of a minister's responsibility for the acts of commission or omission of the subordinates in the departments in his charge.[42] These are matters of some consequence for the proper

[40] Jain, *ibid.*

[41] *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg*, (1966) 2 MLJ 187.

[42] Jain, *op. cit.*, 121, 123. Also Wade and Phillips, *Constitutional Law*, 87, 191.

working of the ministerial form of government and thus need to be investigated.

What has been said here only points to the great importance of conventions in the Malaysian Constitution. Conventions are bound to play a significant role in regulating the relationship between the Yang diPertuan Agung and the Council of Ministers, between the Ministers *inter se* and between the Ministers and Parliament. A mere literal reading of the Constitution may not present a real picture of the working of the Constitution in actual practice. In England, as Dicey has emphasised, one of the prerogatives of the Crown.[43] To the extent the Yang diPertuan Agung has discretionary functions, perhaps, conventions may be as important in Malaysia as in England. There is also the significant question as to how far conventions of the British Constitution are relevant to Malaysia or whether here some *sui generis* conventions have been evolved, or are in the process evolution.[44] All this underlines the need to study in depth the conventions operating in the Malaysian Constitutional process. A complete picture of the working of the Constitution can emerge only when reference is made to constitutional conventions, practices and usages.

Chapter 4 titled "Rulers and Governors" contains useful information about the office of the Head of the State Government. The Malaysian Constitution lays down in Articles 70, 71, 72 and in Schedule VIII only a few rules with respect to the State Governments. For the rest, they can carry on under their own constitutions. Further information regarding the constitutional provisions concerning the States is to be found in Chapter 11 of book. Chapter 5 deals with the Conference of Rulers. It is a unique institution and perhaps the most significant role played by it is the election of the Yang diPertuan Agung after every five years. The Conference also has a veto power on certain types of constitutional amendments.[45] According to the author, the Conference of Rulers provides an intimate link between the Federal Government and the State Governments at the highest level," and, further, that in it the "Prime Minister has a valuable forum at which to explain federal policies already decided and policies as yet to be decided."[46] From this point of view, the Conference of Rulers may be regarded as an instrumentality to promote co-operative federalism in Malaysia. This result is achieved because each ruler is to be accompanied

[43] Dicey, *An Introduction to the Study of the Law of the Constitution*, 422, (1965).

[44] Reference may be made in this connection to the observations of the Judicial Committee in *Adegbenro* v. *Akintola*, (1963) 3 All E.R. 544, concerning the difficulties of observing conventions of the British Constitution in other Commonwealth countries following parliamentary system.

[45] Tun Suffian, pp. 44, 47.

[46] *Ibid.*, p. 45.

with his Chief Minister, and the Yang diPertuan Agung is to be accompanied with the Prime Minister while participating in the meetings of the Conference when it deliberates on matters of national policy. Moreover, in such deliberations, the Yang diPertuan Agung, the Rulers and Governors are to be guided by the advice of the Prime Minister and the Chief Ministers'.[47]

Chapter 7 is devoted to a description of the constitution of Parliament. A notable feature of the Malaysian Parliament is that the upper House, known as the Senate or *Dewan Negara*, has 32 members appointed by the Yang diPertuan Agung as against 26 members elected by the State Legislatures. It may be interesting to study the role the Senate plays in substance in the parliamentary system. Doubts have been expressed at times regarding the efficacy of the Senate as a legislative chamber.[48] A brief description of the procedure followed in Parliament to make laws has been given in this chapter.[49] Perhaps, a brief description of the committee system in Parliament may have been useful and instructive to the readers.

Chapter 8 deals with the Election Commission. Fair elections are fundamental to the working of a democratic system and the Election Commission has been set up to achieve this purpose. While describing the principles for delimitation of the constituencies for election to *Dewan Rakyat* and State Legislatures, the author points out that weightage is given to rural voters, even to the extent that a rural constituency may contain less than one half of the electors of any urban constituency.[50] Weightage to rural voters is given in a few other countries like Ceylon or Australia. No such weightage is given in India and the Constitution specifically lays down that there shall be, as far as possible, the same number of people in each parliamentary constituency, rural or urban, throughout the country.[51] However, because of the vast rural population as compared with the urban population, a majority of seats both in Parliament and State Legislatures in India automatically go to the rural constituencies. In

[47] Art. 38(3).

[48] Sheridan & Groves, *The Constitution of Malaysia*, 93. Also Groves, The Constitution of Malaysia – The Malaysia Act, (1963) *Mal. L.R.* 245, 255.

[49] Tun Suffian, pp. 78–9.

[50] *Ibid.*, p. 88.

[51] Art. 81(2) of the Indian Constitution. Similarly, in a State, constituencies for State Legislature are to be demarcated in such a manner that each constituency has, as far as possible, same population: Art. 170(2).

Malaysia, constituencies are delimited by the Election Commission itself.[52] In India, on the other hand, for this purpose a separate body known as the Delimitation Commission is appointed after each census. The procedure for reviewing the demarcation of constituencies in Malaysia has been briefly described in the book.[53]

Chapter 9 is devoted to a description of the Judicial system in Malaysia. A notable feature of the Malaysian higher judiciary is that a large number of judicial appointments are made from amongst the members of the "Judicial and Legal service." Out of 26 Federal and High Court Judges in Malaysia, 21 Judges have been appointed from the Service and five from the bar. One of the reasons for this, according to the author, is "the modest salary of Judges as compared with earnings in practice", and, therefore, professional lawyers are reluctant to accept judicial office.[54] In India, as the author rightly points out, the tradition so far has been mainly to appoint Judges of the High Court from amongst the members of the Bar. The Judges of the Supreme Court are appointed from amongst the High Court Judges. However, in India also, it is difficult to attract leading lawyers to judicial offices. Perhaps it may be necessary to make judicial appointments in Malaysia more remunerative so that the better lawyers are attracted to them. In view of the present reviewer, the whole of the judicial system stands to gain a great deal if practising lawyers can be persuaded to accept higher judicial appointments. An interesting provision to be found in India, which is not to be found in Malaysia, is that it is possible to appoint a 'distinguished jurist' to the Supreme Court. No such appointment has however been made so far under this provision in India. A similar provision has recently been made for the High Courts. For a constitutional lawyer, the brief discussion on the court's power to declare written laws and executive action invalid is of the most direct relevance and interest.[55] A serious student of constitutional law would have very much liked the book to contain an analysis of some of the leading judicial pronouncements bringing out the policies and norms adopted by the courts in interpreting some of the constitutional provisions. But such a sophisticated treatment lies beyond the scope of the present work. Nevertheless, a short account of the writ system might have been very useful even to an ordinary reader, as the writs play a significant role in the area of judicial review of administrative action in modern times, and there does not appear to be any place where one can conveniently find the necessary information about the writ system as it operates in Malaysia.

In Chapter 10, in a brief compass, relevant information about the various aspects of the Public Service has been given. It is one of the few areas

[52] Tun Suffian, p. 88.

[53] *Id.*, pp. 88–90.

[54] *Id.*, p. 103.

[55] *Id.*, 105–110.

where some case-law has been generated, especially on the question of "reasonable opportunity of being heard" by a civil servant before his dismissal or reduction in rank. Some of the important cases in this area have been noted in this chapter.[56] The reader will also find in this chapter a very adequate description of the various service commissions which have been established in the country under various constitutional provisions to ensure impartial and fair treatment of public servants.[57]

Chapter 12 titled "Relations between the Federation and the States" describes briefly, and in a simple manner, the main features of the scheme of distribution of legislative powers[58] and executive powers[59] between the Centre and the States. Several notable characteristics of the Malaysian Federal System become apparent from this discussion. First, the scope of the State powers is extremely limited. Secondly, Malaysia has a substantially unified federal system having orientation towards the Centre. Wheare has characterised such a system as 'quasi-federal' rather than as 'federal',[60] while Sawer calls it "organic federalism" meaning thereby a system "in which the Centre has such extensive powers, and gives such a strong lead to regions in the most important areas of their individual as well as their co-operative activities that the political taxonomist may hesitate to describe the results as federal at all."[61] Thirdly, during the last 18 years of the working of the Constitution, there has been only one case in 1967 which can in some way be related to the question of distribution of powers between the Centre and the States and, there, too, the State law was declared invalid by the Federal Court without any discussion because the point was conceded by the State counsel.[62] Therefore, the principles of interpretation of, and the interrelationship between the several entries in the three legislative lists remain obscure. Perhaps some of the experiences of India (as well as of Canada) may be relevant in this regard as India also has a three list system, there has been a good deal of case-law in this area and the courts have had opportunities to evolve some

[56] *Id.*, pp. 126–7.
[57] *Id.*, pp. 128–142.
[58] *Id.*, pp. 159–64.
[59] *Id.*, pp. 164–5.
[60] Wheare, *Federal Government*, 1–34 (1964).
[61] Sawer, *Modern Federalism*, 125 (1968).
[62] *City Council of George Town v. Government of the State of Penang*, [1967] M.L.J. 170

norms of interpretation.[63] Fourthly, a unique feature of the Malaysian federal system is that under Art. 76A, Parliament can empower a State Legislature to make a law with respect to a matter enumerated in the federal list. As far as the present reviewer is aware, no other federal constitution has such a provision, and in Canada such an attempt was frustrated by the Supreme Court. A straight delegation of legislative power by the Centre to the Province or *vice versa* was held unconstitutional in Canada on the ground that such a delegation would constitute a breach of the "watertight compartments" between the Centre and the Province as envisaged in the British North America Act, 1867, and would permit the Centre or the Province to enlarge or contract each other's powers at will.[64] Fifthly, another interesting provision in the Malaysian Constitution is Art. 76(1)(b) under which Parliament has power to legislate on a State matter for the purpose of promoting uniformity of the State laws. Of course, such a central law does not come into operation in the States unless the Legislature adopts the same. But under Art. 76(4), Parliament can enforce, without State consent, a uniform land law and a law for local government although both these matters fall within the exclusive State jurisdiction.[65] No such provision to promote uniformity is to be found in any other federal constitution. Sixthly, another interesting provision is Art. 92 which confers power on the Centre to give effect to a national development plan, notwithstanding that the plan relates to State subjects.[66] These various provisions reduce the ambit of the legislative powers of the States.

The States in Malaysia appear to have better administrative powers than legislative powers. Ordinarily, State administrative power extends to matters in the State and Concurrent Lists. The Centre can use State machinery for discharging its functions. Land for federal purposes is to be acquired by the States and the Centre cannot by itself acquire land for its purposes. The Constitution makes elaborate provisions in this regard which the author duly describes in the book under review.[67] The Centre has, however, under Art. 93, power to conduct research and enquiries even in the State sphere.[68] Another interesting provision is Art. 95 under which

[63] Jain, *Ind. Const. Law*, 272–309, 321–324.

[64] *Att. Gen. of Nova Scotia v. Att. Gen. of Canada*, (1951) SCR 31.

[65] Tun Suffian, pp. 162.

[66] *Id.*, pp. 176–7.

[67] *Id.*, pp. 168–73.

[68] *Id.*, pp. 177–8.

the Centre can inspect the work of a State Government in areas other than those falling under exclusive state legislative sphere.[69] The idea underlying this provision perhaps is that the Centre can inspect State functioning in concurrent matters and when a State discharges an administrative function in a central matter. Two important instrumentalities of intergovernmental administrative co-ordination are created by the Constitution. The National Land Council formulates plans for utilisation of land for mining, agriculture, forestry or for any other purpose.[70] The Federal and State Governments are obligated to follow the policy formulated by the Council. The author expresses the view that if a State Government does not follow the policy formulated by the Council, any other members of the Council "can seek a declaration from the courts unless they prefer to apply political pressure."[71] The composition of the Council is heavily weighted in favour of the Centre as a Central Minister is its Chairman and there are 10 Central nominees as against one from each State. Another intergovernmental instrumentality is the National Council for Local Government which co-ordinates local government throughout the country. Its composition is similar to the Land Council and its decisions are binding on governments except the Borneo States.[72] Through these two bodies, the Central Government can control the administration of the States in two significant areas of land and local government.

Chapter 13, describes the intergovernmental financial relationship. The author lays emphasis on the great importance of these constitutional provisions. This strikes a very responsive chord in the heart of the present reviewer who has devoted himself to a comparative study of the financial relationship between the Centre and the States in the federations of U.S.A., Canada, Australia and India.[73] The present reviewer has always believed that the inter-governmental financial relationship touches the very heart of federalism in any country.[74] The author rightly points out that in Malaysia, in the area of finance, "the scales are heavily weighted in favour of the Federal Government,"[75] and that the States (except for Sabah and Sarawak) "have very limited sources of revenue and therefore limited capacity to expand their activities and programmes."[76] The scheme of

[69] *Id.*, p. 178.
[70] *Id.*, p. 175.
[71] *Id.*, p. 176.
[72] *Id.*, p. 179.
[73] Jain, *Indian Constitutional Law*, 329–381.
[74] Jain, *op. cit.*, 329.
[75] Tun Suffian, p. 181.
[76] *Ibid.* For a detailed study of the Centre-State Financial Relationship in Malaysia reference may be made to W. Holzhausen, *Federal Finance in Malaysia* (1974).

Intergovernmental financial relationship in the Malaysian Constitution gives a clear indication that the States were intended to play a very subordinate role in the administration of the country. The States have no significant powers of taxation.[77] A number of States have been in deficit for years and cannot meet their normal current expenditure from their own resources and have to depend heavily on transfer of revenue to them by the Centre in the form of grants. The Constitution provides for only two obligatory grants – capitation grant and state road grant.[78] In course of time, the Centre has started giving a few more grants to the States for such purposes as "state roads, agriculture, forestry and drainage and irrigation projects."[79] The author characterises these grants as "extra-constitutional."[80] The significance of the term "extra-constitutional" in this context is not clear. Perhaps, by the term 'extra-constitutional' the author seeks to convey the idea that these grants are not obligatory on the Centre under the Constitution and that it is optional for the Centre to give or not to give such grants to the States. Theoretically, this may be so. It is also correct that the Constitution specifically mentions only two grants. But the other grants are not 'extra-constitutional' in the sense that there is no constitutional authority or sanction for making these grants. In fact, the extremely limited financial resources of the States make it incumbent on the Centre to make grants to the States so as to enable them to carry out their powers and functions. That this transfer of revenue by the Centre to the States is envisaged by the Constitution is made clear by Art. 109(3) which authorises Parliament to make grants for specific purposes to any of the States on such terms and conditions as may be provided by any law. In reality, Art. 109(6) is more explicit in this connection. It obligates the Centre to set aside every year such sums of money as it may decide (after consulting the National Finance Council) for the State Reserve Fund and from this Fund, the Centre is to make grants, in consultation with the National Financial Council, to a State for the purposes of development or generally to supplement its revenues.[81] Art. 109(6) makes it obligatory on the Centre to create such a fund, pay money into it and give grants to the States out of it. This shows that the Constitution contemplates grants being made by the Centre to the States and from this point of view no grant is "extra-constitutional" or is outside the Constitution. It is also to be noted that Art. 109(6) envisages central grants in support of State revenues. This brings in the concept of fiscal need grant which has been very much developed in Australia and India.[82] Basically, Malaysia lacks

[77] Tun Suffian, p. 189.
[78] *Id.*, 184, 185.
[79] *Id.*, 183.
[80] *Id.*
[81] *Id.*, 195.
[82] Jain, *op. cit.*, 369, 375.

institutional set-up for regulating the fiscal relations between the Centre and the States. In the present scheme of things, it lies purely within the discretion of the Centre as to what to give, when to give, and for what purpose to give to the States. The States in Malaysia have no financial leeway. There is no autonomous machinery here for assessing the financial needs of the States. In some other countries, some institutional arrangements have been developed to reduce the discretionary element from this sphere. For example, in India, a Finance Commission is appointed every five years for this purpose and there is also the Planning Commission which assesses planning grants every year for the States.[83] Nor is it clear whether any, and if so what, principles are followed by the Centre in this country in giving grants to the States. The concept of fiscal need grants to the States although mentioned in Art. 109(6) does not appear to have become articulated in Malaysia. These are matters which may assume critical significance in a federal system if the complexion of political parties at the Centre and the States is different. For a viable federal system, it is very essential that proper institutions be developed and the discretionary element in Central grants be minimised. The only institution in Malaysia at present in the fiscal area is the National Financial Council,[84] but as the author points out: "In practice the council is not as important as it looks, as can be seen from the fact that it finds it necessary to meet only about once a year. Usually financial problems affecting the Federation and a particular state are threshed out at official level and then a mutually satisfactory agreement is arrived at between the Finance Minister and the State Chief Minister going through the council."[85] In his final summation on the inter-governmental financial relations, the author observes:

> "It must be remembered that a constitution can only work if operated by men of goodwill and common sense, and notwithstanding that the constitution is silent about federal-state consultation in many fields, there is continuous consultation going on all the time at many levels, official and political, for every government in Malaysia is anxious to reach decisions that have general support and thus avoid public controversy."[86]

The author is right in observing that no constitution can function properly without good-will and common sense, but it is the experience of other federations that federal-State relationship can generate acute controversies at times, and, accordingly, proper institutional framework to contain and solve such controversies help in the emergence of a viable federal system.

Chapter 14 deals with Fundamental Liberties. This chapter stands expanded from 8 pages in the first edition to 18 pages in the present

[83] *Ibid.*, 371, 420.
[84] Tun Suffian, pp. 202–3.
[85] *Id.*, p. 204.
[86] *Ibid.*

edition. One reason contributing to this expansion is that there have been a few judicial pronouncements in this area since the last edition which the author has duly taken note of. The area of fundamental liberties is of interest to all – practising lawyers, academic lawyers, and even the ordinary citizen who needs to know something about his rights. The topic has in fact assumed international dimensions with the emphasis being placed on human rights by some international organisations. Fundamental rights can rightly be regarded as the essence of democracy. Because of these reasons, it is the feeling of the present reviewer that the topic of 'fundamental liberties' deserves a much more extensive discussion than what the book contains at present.

This chapter opens with the statement: "Rights of the individual called fundamental liberties are guaranteed by the constitution in part II."[87] The Reid Commission used the expression "Fundamental Rights as the heading of Chapter IX of the Report,[88] but used the expression "Fundamental Liberties" as the heading of Part II of the Draft Constitution. The commission did not explain why this change from 'right' to 'liberty' was being made. It is thus not clear as to why the "rights" have been called "Fundamental Liberties" and not "Fundamental Rights" as has been done in other constitutions, e.g., the Indian Constitution. Is the use of the term "liberty" meant to convey the idea that although these "rights" may be regarded as "Fundamental", yet they are held only to the extent law allows them, i.e. these are the residue of the rights allowed by law. If so, then the "rights" can hardly be called "fundamental", for the very notion of such rights is that they control and restrict the legislative as well as executive power. The author laments the absence of "duties of the individual, especially the citizen" in the Constitution. He thinks that this encourages some people "to think of what the state and others should do for him, rather than what they should do for the state and for others." In this respect, he cites the example of several constitutions, e.g., the new Constitution of the Philippines imposes several duties on the citizens, such as, the duty to be loyal, to honour the flag and so on.[89] It is possible that in his next edition, the author may be able to cite India also as an example in this respect where at present there is a move to incorporate some basic duties for the citizens in the Constitution. To some extent, perhaps, this gap is filled in Malaysia by the *Rukunegara*. But, the main question is whether it is really necessary, or does it serve any useful purpose, to mention these duties in the constitution? These duties are already well established and well ingrained in the municipal law which already takes

[87] *Id.*, p. 205.

[88] *Report of the Reid Commission*, 69.

[89] Tun Suffian, p. 205.

care of these. Further, the citizen is already so much overburdened with duties and "don'ts" under various laws that his freedom of action is very much circumscribed. Practically, every aspect of his existence is controlled or regulated directly or indirectly by the state and this is true more or less of every democratic country. Even the so-called "fundamental rights" or "fundamental liberties", whatever one may choose to call them, are subjected to so many "ifs", "buts" and "provisos", that much of their content and efficacy as restraints on government becomes eroded in practice. Unfortunately, the concept of fundamental rights has largely been battered beyond recognition in many developing countries. The pity is that on the threshold of their independence, many of these countries were imbibed with a great deal of ideological fervour for the rights and freedoms for the common man, but all this appears to have evaporated in thin air in course of time under various stresses and strains. So much so, that questions are raised to-day whether enumeration of fundamental rights in a constitution serves any real purpose, and experiences of developing countries are cited against stating any fundamental rights of the people in the constitution.[90]

In the Malaysian Constitution, according to the author, some liberties are 'absolute' in the sense that the Constitution does not impose any restriction on it. Some other liberties are 'qualified' in the sense that the provisions of the Constitution themselves authorise restrictions on these rights; certain other liberties are subject to the law in which case "the right guaranteed by the constitution may be abridged or even abolished altogether by a law passed by a simple majority in the legislature.[91] In the last case, it appears to be a misnomer to call the 'liberty' as a "fundamental right," for the basic characteristic of such a right is that there is a minimum of the right which the legislature cannot take away. Lastly, there are Arts. 149 and 150 under which the fundamental liberty "may be abridged or suspended by a simple majority in Parliament." During an emergency, the 'fundamental liberties' cease to restrain the legislative power.[92] It is the common-experience of the democracies that emergency has a debilitating effect on the fundamental rights of the people.[93] While emergency is limited in point of time, a law made to fight subversion under Art. 149 may be permanent and it cannot be held invalid even if it infringes some of the fundamental liberties. On the whole, therefore, the scope of 'fundamental liberties' appears to be extremely restrictive.

[90] See Yardley, Book Review (1976) 39 *Mod. L.R.* 366. Also see Do Ahie, New Nigerian Human Rights in Zambia: A Comparative Study with some Countries in Africa and West Indies, (1970) 12 *JILI* 609, 632.

[91] Tun Suffian, p. 206–7. [92] Art. 150.

[93] Jain, *op. cit.*, 662, for a dicussion on Emergency and Fundamental Rights in India.

Malaysia, like India, guarantees the right to personal liberty in Art. 5. But what is this right? The right simply is that life and personal liberty cannot be taken away save "in accordance with law." Thus, it means that life and personal liberty can be taken away under a law. There is thus no restraint on Parliament to pass any law it likes to control personal liberty. Art. 5[94] (like its counterpart Art. 21 in India)[95] only constitutes a restraint on administrative power but not on legislative power. This has been held so in many judicial pronouncements in India, especially the famous *Gopalan* case.[96] The present reviewer feels that such constitutional provisions ill-serve the cause of personal liberty. In reality, it ceases to be a fundamental right if one is to understand the concept of fundamental right as a restraint on legislative power. Further, besides the inherent limitations of the constitutional provision, the right to personal liberty has been further diluted by some of the court decisions, particularly, in the area of preventive detention. The Singapore case of *Wee Toon Ling*,[97] appears to have gone to the other extreme by holding that *"bad faith* is not a justiciable issue in the context" of the Internal Security Act.[98] This appears to negative the entire basis of administrative law.[99] In the opinion of this reviewer, the real position on this question has been very neatly summed by by Abdoolcader, J., recently in *Re Tan Boon Liat*:[100]

> "Where the detention under the relevant preventive detention law is not *bona fide*, the detention is illegal. An order can be said to have been made *mala fide* where there is malice in law though there may be no malice in fact . . ."

Another ruling of doubtful nature is the recent holding by some of the High Courts in Malaysia that *habeas corpus* is not available in cases of preventive detention even if some of the elements of procedure laid down in the statute are not strictly followed on the ground of the same being regarded as 'directory.' In these cases, the main question has been whether

[94] Tun Suffian, 207.

[95] Jain, *op. cit.*,

[96] *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC27.

[97] *Wee Toon Lip* v. *The Minister for Home Affairs* (1972) 2 MLJ 47. See Tun Suffian, p. 243.

[98] Also see, *Lee Mau Seng* v. *Minister of Home Affairs, Singapore*, [1971] 2 M.L.J. 137.

[99] Jain & Jain, *Principles of Administrative Law*, 378–418 (1973).

[100] [1967] 2 M.L.J. 83, 84.

failure on the part of the advisory board to make its recommendations within the prescribed time limit of three months makes the detention invalid. This was the constitutional requirement prescribed in Art. 151 until the recent amendment.[1] The High Courts have ruled that although there had been a failure of the "statutory direction", yet the writ of *habeas corpus* could not be issued because it was non-compliance of a 'directory provision.'[2] It is humbly submitted that after all, Art. 8 is a fundamental right and guarantees observance of the requirements of the statute and the Constitution for the deprivation of life or liberty. In this view of the matter, it is difficult to appreciate the court's view that this procedure laid down in Art. 151 is 'directory' and hence not enforceable. In a case of preventive detention, the only safeguard provided by the law is a reference to an advisory board, and in view of Art. 8, this procedural element must be observed strictly otherwise the detention should be regarded as having become invalid. The High Court's view cannot be supported even on the wordings of Art. 151(1)(b) which opens with the words "no citizen shall be detained" and the word "shall" thus appeared to place an obligation that the advisory board reported in three months. In quite a few cases in India, the courts have propounded the view that the executive must scrupulously and strictly observe the procedure laid down for depriving personal liberty, and detention orders have been quashed by issuing *habeas corpus* when there was any deviation from the procedure laid down in the law. For example, the relevant preventive detention law in India prescribes a period of ten weeks from the date of detention for the advisory board to make its recommendations. In a case where the advisory board failed to observe this time limit, the detention was declared to have become vitiated.[3]

A significant question debated for some time has been regarding the right of an accused to consult a lawyer of his choice after his arrest. The author discusses this question at some length.[4] The scope of the relevant constitutional provision has now been spelled out by the Federal Court in

[1] Art 151 (1)(b) has now been amended. The advisory board can now submit its recommendations within three months of receiving detainee's representations or "within such longer period as the Yang diPertuan Agung may allow."

[2] Cases of *Tan Boob Liat* (Penang) and *Subramaniam* (Kuala Lumpur).

[3] *Dharam Singh* v. *State of Punjab*, Air 1958 SC 512. Also *Prabhu Dayal* v. *District Magistrate, Kamrup*, Air 1974 SC 183, 199. Refer M.P. Jain, Judicial Creativity and Preventive Detention in India; An Aspect of Indian Constitutional and Administrative Law, (1975) *JMCL* 261, 299.

[4] *Tun Suffian*, pp. 209–10.

the *Ooi Ah Phua* case.[5] The decision in this case was pronounced by the author himself as the Lord President of the Federal Court. The court appears to have spelled out the following restrictions on the right to consult a lawyer by the accused: (1) the right though it begins from the moment of arrest can only be exercised after the completion of the police investigations; (2) *habeas corpus* is not to be issued even if it be found that a person has been denied his right to consult a lawyer within a reasonable time after his arrest. In the words of the Lord President: ". . . it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer."[6] The effect of the decision appears to be to dilute very much the efficacy of Art. 5(3) and make it a 'directory' rather than a 'mandatory' constitutional provision.

Art. 8(1) provides that all persons are equal before the law and are entitled to its equal protection. There has not been much case-law so far around the 'right to equality'. The author discusses this constitutional provision rather briefly.[7] It appears to the present reviewer that the full potentialities of this Article remain to be fully exploited in this country. In India, the parallel constitutional provision (Art. 14) has been used, in a number of cases, to control the conferment of 'absolute' or 'uncontrolled' discretionary power on administrative authorities.[8] This aspect of Art. 8(1) has not been developed so far in Malaysia. Recently, in Malaysia, such a question has arisen before three Benches of the High Court with respect to the validity of S.418A of the Criminal Procedure Code and the Judges have shown a difference of opinion on the point. Mr. Justice Abdoolcader in a very learned judgment has followed the view adopted by the Courts in India that 'uncontrolled' administrative discretion may be a violation of the right to equality in the absence of any policy or guidance being laid down in the law and has declared S.418A unconstitutional.[9] This only goes to show that in future many more such questions may arise before the courts for many laws seek to confer very broad, at times 'absolute', discretion on administrative authorities.

Art. 13 guarantees the right to property and ordains payment of "adequate compensation" for property "compulsorily acquired." The provision

[5] *Ooi Ah Phua* v. *Officer-in-Charge*. [1975] 2 MLJ 198.

[6] *Ibid.*, 201.

[7] *Tun Suffian*, pp. 213–4.

[8] Jain, *Indian Constitutional Law*, 486–507; Jain & Jain, *Administrative Law*, 263–272.

[9] *Public Prosecutor* v. *Datuk Harun bin Haji Idris*, High Court, K.L., August 10, 1976. C.f. *Public Prosecutor* v. *Su Liang Yu,s, High Court, Ipoh, August 20, 1976. Public Prosecutor* v. *Ob Kong Seng*, High Court, Seremban.

has so far figured only in one case, viz., the *Selangor Pilot case*[10] in which it was held by the Federal Court that compensation was payable for the loss of goodwill which was property. For this view, the Federal Court derived support from some pre-1955 judicial pronouncements in India. The most significant Indian decision on this point however is the *Bank Nationalisation* case decided by the Supreme Court in 1970.[11] It is common knowledge that the right to property has raised some acute constitutional controversies in India, and in course of time, this right has been very much diluted by several constitutional amendments, so much so that the word 'compensation' has now been removed from the Constitution and instead the word 'amount' has been substituted.[12] Developing countries are feeling a great difficulty in drawing a balance between private property rights and the concept of public welfare. As the author points out, Singapore has already deleted the right to property from its Constitution.[13] It will be interesting to watch how this right fares in future in Malaysia. For the present, as is apparent from the *Selangor Pilot* case, the Federal Court has shown an inclination to give much better protection to the right of property than to some other rights, as for example the right to personal liberty. The Government has appealed to the Privy Council against the Federal Court decision in the *Selangor Pilot* case, and the Privy Council's decision is awaited keenly as it is bound to have a deep impact on the further growth of law in this country as regards Art. 13.

In a democratic set=up the rights of speech, assembly and association constitute the core rights as democracy thrives on discussion and debate, and political parties can be formed only if there is freedom of association. These rights are guaranteed in the Malaysian Constitution in Art. 10, which has been discussed very briefly in the book under review.[14] As the author points out, these rights are not 'absolute' and can be regulated by the legislature for certain purposes mentioned in Article 10 itself. Parliament can impose such restrictions as it thinks "necessary or expedient" on these rights. There is no qualification that the 'restrictions' should be 'reasonable'. Therefore, the question of 'reasonableness' of the restrictions is beyond judicial purview. In India, on the other hand, the restrictions have to be 'reasonable' under Articles 19(1)(a), (b) and (c).[15]

[10] *Selangor Pilots Association* v. *The Government of Malaysia & Lembaga Pelaboban Kelang*, [1975] 2 MLJ 66.

[11] *R.C. Cooper* v. *Union of India*, A.I.R. 1970 S.C. 564; Jain, *op. cit.*, 653.

[12] For a discussion on this topic refer to Jain, *op. cit.*, 624–656, xlvi–xlix.

[13] Tun Suffian, p. 221.

[14] *Id.*, p. 217–8.

[15] Jain, *op. cit.*, 522–571.

Under Art. 10, *prima facie*, the only question which the courts can assess is whether a particular 'restriction' is 'in the interest of' any of the purposes mentioned in Art. 10. But then the question arises how far this power of judicial review has been restricted by Art. 4(2). The effect of this constitutional provision does not appear to be clear. Does it mean that any restriction is beyond judicial scrutiny on any ground whatsoever, even when the restriction has no *nexus* with any of the purposes mentioned in Art. 10, or whether the only ground on which a restriction cannot be challenged is that it was not deemed "necessary or expedient" by Parliament? If the latter view is adopted, the question whether a restriction is 'in the interest of' a purpose stated in Art. 10 is still open to judicial scrutiny. There has not been any judicial pronouncement on this point. On the whole, judicial protection to these rights appears to be minimal and these rights can be regulated to a very large extent by Parliament. Freedom of religion and rights in respect of education have also been briefly touched upon by the author.[16]

In Chapter 16, the position of Islam has been described.[17] The question of citizenship has been discussed at some length in Chapter 17.[18] The discussion on citizenship is somewhat extensive presumably because of the great popular interest in this matter. In Chapter 18, entitled "Malays and Natives of Borneo," the author describes the delicate balance arrived at between the various racial groups in the country, on the eve of the finalisation of the Constitution.[19] The author emphasizes that the Constitution was the result of "bargaining and discussion" between the representatives of the various groups.[20] In this context, the author examines the safeguards conferred on the Malays through Art. 153 and expresses the view that for every safeguard given to Malays there has been a countervailing concession shown to other racial groups. Chapter 19 is devoted to the question of National Language.[21] On the question of law and language, the learned author makes the following interesting and meaningful observation:

> "In view of the English experience it is more than probable that in centuries to come when bahasa has become the national language *de jure* and *de facto* and our law has become less English-based and more Malaysianised, English will continue to haunt our law schools and our law courts, not, however, only as a mere ghost, but very much as a living technical language, as much as it will be in the field of science and technology.[22]

[16] Tun Suffian, p. 218–9.
[17] *Id.*, 245–249.
[18] *Id.*, 250–283.
[19] *Id.*, 285–321.
[20] *Id.*, 285.
[21] *Id.*, 323–331.
[22] *Id.*, 331.

It is indeed a stupendous task to produce dependable law books and law reports in Bahasa Malaysia. But sooner or later this task will have to be undertaken by academic and professional lawyers in the country.

The process of constitutional amendment is described in Chapter 21.[23] From the point of view of constitutional theory, the Malaysian Constitution is an example of 'rigid' constitution for to amend most of the provisions therein, a special procedure has to be followed which is more difficult and elaborate than the ordinary legislative process. Barring a few provisions which can be changed by an ordinary law, other provisions in the Constitution can be amended only by a federal law passed by votes of not less than 2/3 of the total number of members of each House of Parliament. In addition, amendments to some provisions need the consent of the Conference of Rulers, and some need the consent of the Governors of Sarawak and Sabah.[24] However, in practice, the Malaysian Constitution has proved to be quite flexible, and, amendments in the Constitution have been achieved rather easily so far. The main reason for this situation is that the ruling alliance has commanded the requisite 2/3 majority in each House of Parliament needed for constitutional amendment, and, therefore, when once the government makes up its mind that certain amendments in the Constitution are called for, it has not been difficult for it to get the parliamentary *imprimatur* to formalise and effectuate those amendments.[25] Till the publication of the present book, the Constitution had been amended 17 times.[26] Immediately after the book was released, a major Constitution Amendment Act was enacted. Some of the amending Acts modify the Constitution in more than one place. For example, the latest amendment Act, 1976, contains 48 clauses and amends nearly 50 provisions of the Constitution. Therefore, how many Constitution Amendment Acts have been enacted up-to-date does not really give a correct idea of how pervasive and fundamental the amendments have been in the Constitution since it came into force in 1957. In an article recently, Lee concludes that many provisions of the Malaysian Constitution have been fundamentally altered over time.[27]

The question of amendment of the written constitutions poses some very ticklish problems. On the one hand, the constitution is a symbol, and respect for it can be promoted and fostered in the public mind only when

[23] *Id.*, 337–343.

[24] *Id.*, 337. These Articles are 159 & 161E.

[25] Tun Suffian, 343.

[26] *Id.*, p. 341.

[27] Lee, Constitutional Amendments in Malaysia, (1976) 18 *Mal. L.R.* 59–124, 120. See also, Lee, The Amendment Process under the Malaysian Constitution,(1974) 1 *JMCL*, 185.

due deference is shown to it by every one including the government. That means that the constitution should not be amended too frequently and lightly otherwise it may lose its symbolic value and people may come to look upon it merely as a tool in the hands of the ruling party. On the other hand, a constitution cannot remain stratified for all time to come and it has to respond to the needs of the society. The author rightly suggests that amendment of the constitution is a matter of balancing the two values: (1) the provisions found to be unsatisfactory or inappropriate should be changed; (ii) the provisions of the constitution should be considered as somewhat immutable.[28] If amendment of the constitution is difficult, then the government will be constrained to find ways and means to implement its programmes in a manner that the constitution is respected. That may demand a higher degree of legal ingenuity on the part of the government legal advisers, and draftsmanship of laws of a high order. It will instill discipline in the working of the government and promote constitutionalism in the country.

In the chapter on amendment of the constitution, the author has described only the formal method of amending the constitution. He has not made any reference to such well recognised informal agencies of adapting the constitution as growth of conventions, judicial interpretation etc.[29] Some of the world's most rigid constitutions have been adapted to the needs of the times through these agencies. The best example of this process is to be found in the American Constitution. Of course, the value of these agencies of constitutional change is directly inverse to the flexibility constitution formally, the scope for judicial interpretation and conventions as instrumentalities of adapting the constitution becomes relatively less significant.

Two significant elements of the formal amending process of the constitution in Malaysia need to be underlined here. First, while in the area of ordinary legislation, the Senate has only a power to delay the passage of the law, in the area of constitutional amendment, its powers are co-extensive with the House of Representatives. But does it make any significant difference in view of the majority of appointed members in that House? Secondly, the States have no role to play in the amending process except the States of Sabah and Sarawak. This is very different from other federal constitutions where the States also have to ratify constitutional amendments.[30] This procedure is based on the principle that in a federation, amendment of the constitution should be effectuated not unilaterally by

[28] Tun Suffian, 343.

[29] Jain, *op. cit.*, 777.

[30] Jain, *op. cit.*, 780, for a discussion of constitutional amending process in the U.S.A., Canada and Australia.

the Centre alone, but jointly by the Centre and the States so that the federal balance is not unduly disturbed by the Centre in its own favour. Even in the case of Borneo States, only the consent of the Governors has been stipulated but not that of the State Legislatures. This is indicative of the subordinate position occupied by the States in the scheme of Malaysian Constitutional process.

Chapter 20 describes briefly the scheme of administration of Kuala Lumpur – the Federal capital.[31] In Chapter 22, the concluding chapter, the author marshals briefly the advantages and disadvantages of the parliamentary system[30] and concludes, and in the opinion of this reviewer very rightly, that on balance the advantages of parliamentary democracy far outweigh its disadvantages.[33] For a diverse, multi-racial society, parliamentary democracy appears to be the best suited as it has the capacity to balance the conflicting interests far better than any other system; it gives a share in the decision making process to major diverse interest groups, and it can better absorb the shocks generated at times by diverse and conflicting socio-economic interests. The author shares the view expressed by many others that "the chances of parliamentary democracy surviving and flourishing in Malaysia are excellent."[34] This reviewer heartily reciprocates this sentiment.

To conclude, the book is an excellent introduction to the constitutional law of Malaysia. It seeks to touch briefly upon practically every relevant topic falling under constitutional law. It has been written in an extremely readable and lucid style and although written with the common citizen in view, it is thought-provoking and would whet the appetite of serious students of law for a more sophisticated analysis of the Malaysian Constitution from the pen of the author. The author admirably achieves the object he has in view in writing the book. The book is attractively produced and is very moderately priced. The comments made above are meant not to detract in any way from the value and usefulness of the book but just to underline that there is great need for a scholarly tome on Malaysian Constitutional Law. There are a number of interesting aspects of the Constitution which remain obscure at present and which await exploration at some depth. This reviewer hopes that in the near future the author will undertake a more sophisticated study of the Malaysian Constitutional Law in a comparative frame of reference. No constitution to-day is entirely *sui generis* and self-sufficient and a constitutional lawyer has to draw upon the experiences of foreign constitutions to develop proper perspectives for studying and analysing his own constitution. Needless to say, that such a

[31] Tun Suffian, 333–335.
[32] *Id.*, 348.
[33] *Id.*, 349.
[34] *Id.*, 349.

work is a *desideratum* and will be of immense benefit to the law students, judges and professional and academic lawyers not only in Malaysia but all over the world. There appears to be no one better qualified to undertake such an ambitious project than the present author who has the unique distinction of being closely associated with the constitutional development in this country right from the stage of the framing of the Constitution, and, as the occupant of the highest judicial office in the country, has to authoritatively interpret the Constitution and thus mould and shape its future growth and development.

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Diterbitkan oleh Fakulti Undang-Undang, Universiti Malaya, Lembah Pantai, Kuala Lumpur.
Dicetak oleh Penerbit Universiti Malaya, Universiti Malaya, Lembah Pantai, Kuala Lumpur.