THE CONSTITUTION AND THE FEDERAL IDEA IN PENINSULA MALAYSIA*

Federalism as a concept seeks to outline a constitutional framework which provides for a system of levels of government within which the Central and State Government are but parts of that system. This paper outlines the constitutional framework of federalism in Peninsula Malaysia and as such the constitutional status of States in relation to each other and to the Centre. Initially discussion centres on the arguments over the federal idea which were presented at the time of constitution-making, the ensuing federal framework provided by the 1957 Constitution and the subsequent political, legislative and judicial processes which have had significant impact on the federal idea.

The movement towards federation in Peninsular Malaysia was gradual and shaped by the forces of centralisation and decentralisation. In 1896 the Federated Malay States (FMS) was established joining together the States of Pahang, Negri Sembilan, Selangor and Perak. This federation effectively centralised political, financial and administrative powers in Kuala Lumpur. This situation prevailed till the Japanese occupation of Malaya despite several ameliorative measures to overcome the State's apprehension regarding such centralisation. After the Japanese occupation and period of rule by the British Military Administration the British Government implemented the Malayan Union Scheme in 1946. For the first time all the nine Malay States and the Straits Settlement States of Penang and Malacca were placed under one government. This Scheme again placed overwhelming, if not complete, powers at the Centre. This Union was successfully opposed by the Malays and it eventually was dissolved. In its place the Federation of Malaya was established on 1 February 1948 by the Federation of Malaya Agreement. This Agreement established a federation comprising the nine Malay States, Penang and Malacca with a strong Central Government. On the whole the experiences of federation and the tradition of rule and government in Peninsula Malaysia emphasised the dominant position of the Centre *vis-a-vis* the States prior to Independence.

*This article is based on the author's "The Federal Factor in the Government and politics of Peninsula Malaysia", unpublished Ph.D. thesis, University of London, 1982, Chapters 1 and 2. Although the article is confined to Peninsula Malaysia frequent reference to Sabah, Sarawak and Singapore is made when necessary. Throughout the paper the terms 'Centre' and 'Central' will be used to refer to the Government whose laws, actions and policies have effect throughout the Federation in contrast to States and their Governments which are constituent units of the Federation. Sometimes Government officials, politicians and even scholars alike have used 'Central' and 'Federal' Government to mean the same thing. This can be confusing. Only when it is unavoidable, as in quotations for example, will the term 'Federal' be retained.

Arguments at the Time of Constitution-Making

The Reid Commission Report[1]

The Reid Commission was given the task of examining the constitutional arrangements throughout the Federation of Malaya. It was authorised to make recommendations for a 'federal' constitution for an independent Federation of Malaya. In doing this the Commission was to provide for

> the establishment of a strong central government with States and Settlements enjoying a measure of autonomy. . . with the machinery for consultation between the Central Government and the States and Settlements on certain financial matters to be specified in the Constitution.[2]

In its work the Commission toured the nine Malay States and the two Settlements of the Federation. It examined the memoranda submitted to it and received oral submissions made by interested groups concerning the form that federalism in the future independent Malaya should take.

Interested groups and political parties were faced with two questions: to support the new federal state or not, and if federation was desirable then what should be the States' constitutional status in relation to each other and to the Centre? The response ranged from secessionist demands to calls for a unitary Malaya.[3] Demands for 'States' Rights' were expressed by several groups, although each group had its own version of what these should be.

Several arguments were presented regarding the position of the former Straits Settlement States, Malacca and the predominantly Chinese Penang. The Pan Malayan Islamic Party or *Parti Islam se Malaya* (PMIP or PAS) proposed to make these States into 'Malay States' so that the system of Malay 'special privileges' would be extended to these States, complete with the selection of Malay Rulers to assure that the 'special position of Malays'

[1] *Report of the Federation of Malaya Constitutional Commission, 1957,* Kuala Lumpur, Govt. Press, 1957. The Federation of Malaya Constitutional Conference — a meeting of the representatives of the British Government, the Malay Rulers and the United Malays National Organisation held between Jan-Feb 1956 in London — recommended the appointment of this Commission. See Federation of Malaya, *Self-Government of the Federation of Malaya: Report of the Constitution Conference, London, Jan.-Feb. 1956.* Kuala Lumpur, Govt. Press, 1956, p. 18. The following were members of the commission: Lord Reid as Chairman, Sir Ivor Jennings of the United Kingdom, Sir William McKell of Australia, Mr. B. Malik of India and Mr. Justice Abdul Hamid of Pakistan. The Commission and its Report will be referred to as the Reid Commission and the Reid Report respectively.

[2] *Reid Report,* p. 6. This was agreed to and recommended by the Federation of Malaya Constitutional Conference. See Fed. of Malaya, *op. cit.*, p. 18. Lord Ogmore advised the Alliance delegation to this Conference that the main point about the form of constitution that it should propose was that the central authority must have powers over the State Governments. The constitution that Malaya needed, he continued, was a cross between those of Ceylon and Canada. See Miller, H., *Prince and Premier: A Biography of Tunku Abdul Rahman Putra Al-Haj, First Prime Minister of Malaya,* London George G. Harrap & Co. Ltd., 1959, p. 137.

[3] The Labour Party's memorandum to the Reid Commission demanded the establishment of a unitary Government for an Independent Malaya. It argued that a federal structure, by retaining the Sultans and States, was essentially feudal in character. See *Straits Echo and Times of Malaya,* 29 September 1956.

would be fully protected.[4] The Penang United Malays National Organization (UMNO) at its 10th annual general assembly in September 1955 discussed the demands that Penang should be returned to its proper owner, Kedah.[5]

The problem of the former Straits Settlement States was one of local Chinese confidence in the future Federation. Already disenchanted by the dismantling of the Straits Settlements in 1946, the loss of its free port status on which much of its economic prosperity depended, and anxious about Chinese rights as British subjects and their future in an independent Malaya, the Penang Straits Chinese British Association (SCBA) responded to the above arguments by declaring that

> The best solution would be for all the nine States and two Settlements to enjoy political autonomy and form a United States of Malaya . . . Failing this, we have no alternative but to agitate for a dominion status for Penang, Malacca and Singapore — in other words, we will return to our former status [as Straits Settlements].[6]

Tunku Abdul Rahman, the leader of the Alliance,[7] responded to this secessionist sentiment[8] by categorically declaring that the inclusion of Penang in the Federation was 'absolutely necessary'.

Koh Sin Hock, a member of the Penang SCBA, expressed another variant of secession in his 'Malta Plan' — Penang as a separate State in political association with the United Kingdom. On 22 January 1957 the secessionists suggested another variant — the recreation of a group of three States distinct from the nine Malay States. They suggested that 'there should be a loose federation between Singapore, Penang and Malacca under their own autonomous Government and the nine Malay States'.[9] This call for a confederation also implied that secession by individual States was no longer a practical alternative.

If Penang and Malacca had necessarily to be in the Federation then their status had to be clearly defined. The Alliance Memorandum stated that Penang and Malacca should have the same status as the nine Malay States in the Federation.[10] The Penang Malayan Chinese Association (MCA) in a separate memorandum demanded that

[4] Means, G.P., *Malaysian Politics*, London, Hodder & Stoughton, second edition, 1976, p. 228.

[5] *Straits Echo and Times Malaya*, 26 September 1955.

[6] *Ibid.*, 19 February 1956 and 20 July 1956.

[7] The Alliance was a coalition of the United Malays National Organization (UMNO), the Malayan Chinese Association (MCA), and the Malayan Indian Congress (MIC).

[8] For further details on the Penang secessionists, see Sopiee, M.N., *From Malayan Union to Singapore Separation*, Kuala Lumpur, Penerbit Universiti Malaya, 1976, pp. 71-80.

[9] *Ibid.*, p. 74.

[10] See *Alliance Memorandum to the Reid Constitutional Commission*, pp. 1-2. This will be referred to later as the Alliance Memorandum. See also *Straits Echo and Times of Malaya*, 25 August 1956.

> The Settlement of Penang should not revert to the State of Kedah as such a move will not be consonant with the changes and progress that have taken place within the Settlement in the last one hundred and fifty years . . . Penang must . . . be allowed to take charge of its own destiny as a separate and equal State with the other members of the Federation . . . Kedah should relinquish its claim on Penang.[11]

It further suggested that a new constitution for the Malayan nation must provide strong safeguards to ensure the ties that bind State to State and State to Federation. Such safeguards should include stringent requirements for any alteration of the Constitution.[12]

The Malay States of Johore and Kelantan also, initially, resisted the federal idea. The Ruler of Johore, Sultan Ibrahim, convinced that the British Adviser system was essential to the smooth running of the State feared that this would be destroyed by independence and federation. In a letter to the 'Sunday Times' he declared that 'I do not care what the other Rulers may say but as for Johore and myself I must have a British Adviser, otherwise, work cannot be carried out smoothly'.[13] The Sultan's declaration was in direct opposition to the Alliance's demands for the speedy achievement of independence and the dismantling of the 'adviser system'.[14] The Sultan's resistance was supported by the *Persatuan Kebangsaan Melayu Johor* (PKMJ, the Johore Malays National Organisation) which was formed on 22 October 1955.[15] The PKMJ declared that it would campaign for Johore's secession from the Federation and for the restoration of Johore's former status as an 'independent' State under British protection.[16]

[11] *Ibid.*, 4 September 1956.

[12] *Ibid.*, Penang MCA suggested that the constitution should only be altered by a 3/4 majority in the Federal Legislature, by a ¾ majority of the States as constituent members of the Federation, and also by a ¾ majority of a popular referendum.

[13] *Sunday Times*, 15 December 1955.

[14] Collectively, the Malay Rulers were apprehensive about the move towards speedy independence because of the fate that befell their Indian counterparts after Indian Independence. To pacify them the UMNO and the Alliance Government pledged to protect the Rulers' rights and privileges by including them in the country's new constitution in return for their full support for rapid advancement towards Independence. See Shaw, W., *Tun Razak: His Life and Times*, London, Longman, 1976, p. 103. UMNO realised that the Rulers' support was vital for the establishment of an independent federation because they would have 'to waive some of their rights over their respective territories in order to establish the Federation'. See *Alliance Memorandum*, p. 1. The Rulers' thus had to be persuaded. Interview with Mohd. Khir Johari, then UMNO Supreme Executive Council member and intimately involved within UMNO and Alliance in the constitutional discussions, 29 September 1980. Eight other Rulers assured Tunku Abdul Rahman, UMNO President and Alliance leader, that they disagreed with the views of the Sultan of Johore. See Simandjuntak, B., *Malayan Federalism, 1945-1963*, Kuala Lumpur, Oxford University Press, 1969, p. 76.

[15] *Straits Echo and Times of Malaya*, 24 October 1955.

[16] *Ibid.* A fuller discussion of the PKMJ's secessionist activities is provided by Sopiee, M.N., *op. cit.*, pp. 80-85.

It would seem natural that those associated with the PKMJ would support the Sultan in his opposition to independence and fetleration. They were the traditional elite whose political position and social eminence depended on their relationship with the Sultan. They were, however, supplanted as the local elite after being heavily defeated by Alliance candidates in Local, State and Federal elections. Only through secession would they be able to redeem their former status.

Secessionist sentiment was also expressed in Kelantan. The Kelantan Malay United Front (KMUF), formed on 28 November 1955, in Kota Bharu, campaigned for secession. The KMUF saw Malayan independence and federation as signalling the loss of Malay rights to the Chinese. Its leader, Nik Mohamad Abdul Majid, argued that since the federal set-up of 1948 the Malays had gradually lost their rights to the Chinese and also the 'Malays have been degraded into accepting, as Ministers Chinese and Indians'.[17] In other words, the KMUF saw the Federation of Malaya as being a sell out to non-Malay interests. The KMUF also wanted to restore the supremacy of the Islamic religion, the Malay language and Malay customs.

Leaders of the KMUF and PKMJ had two characteristics in common — antagonism towards the Alliance, especially UMNO, and a weak political position. Lacking popular support, opposed by the dominant political party of the time, the Alliance, and faced with an unsympathetic British Administration, the resistance to the federal idea failed. Tunku Abdul Rahman had categorically stated that 'the UMNO-MCA-MIC Alliance will not tolerate attempts from any quarter to partition Malaya on any account'.[18]

The Alliance's conception of a federal state was contained in its memorandum to the Reid Commission.[19] The Alliance argued that an independent Malaya should be a federation of eleven states[20] and that the principles governing the Federal Constitution should be adopted by the States.[21] Further, it argued that the division of legislative and executive powers between the Central and State Governments should be based on the principle that 'there should be a strong Central government with States

[17] *Straits Time*, 24 Nov. 1955. The KMUF was obviously referring to the appointment of non-Malays of the MCA and MIC as Ministers in the Malayan Government under the Member-System prior to Independence.

[18] *Singapore Standard*, 21 October 1955.

[19] Unfortunately, apart from the Alliance Memorandum, evidence regarding the memoranda, especially that of the Rulers, has been sketchy. The Alliance Memorandum was prepared by an Alliance Ad Hoc Political Committee. It was submitted to the Reid Commission on 9 September 1956 by an Alliance delegation led by Tunku Abdul Rahman and comprising, from UMNO, Tun Abdul Razak, Mohd. Khir Johari and Senu Abdul Rahman, and from MCA, Bang Pang Hwa and Eng Ek Tiong, and from MIC, V.T. Sambantham and Ramanathan. See UMNO, *Penyata UMNO, Tahun 1955-1956*, p. 6.

[20] *Alliance Memorandum*, p. 1. See also *Straits Echo and Times of Malaya*, 28 September 1956.

[21] Alliance Memorandum, p. 10. See also Sadka, E., "Constitutional Change in Malaya: A Historical Perspective", *Australian Outlook*, vol. 11, no. 3, 1957, p. 28.

enjoying responsible government and having autonomous powers in certain specified matters'.[22] It also recommended that the legislative and executive powers of the Central and State Governments should be clearly defined.[23] Thus, the legislative powers of the States 'should be stipulated and. . . the residuary powers should be vested in the Federal Government'.[24] Also, the legislative powers of the Central Government should continue to be as in column (1) of the second Schedule to the Federation of Malaya Agreement [1948]. The States should have the legislative powers in remaining matters to be specified'.[25] Surprisingly, it retained the principle of conferring legislative power on the Centre and executive power on the States by recommending that

> The States should have executive authority over matters on which the Federal Government has legislative power as in column (2) to the Second Schedule [Federation of Malaya Agreement, 1948], except in matters relating to education.[26]

Surprisingly because, in view of the Alliance's awareness that different political parties might control the different levels of government,[27] this principle could lead to endemic Centre-State tension. Equally surprising was its argument against the provision of any formal consultative machinery in the exercise of executive powers because it believed that, in a situation where different political parties controlled the Central and State Governments, this mechanism would not be conducive to efficient government.[28] It, however, recognized that from time to time there might be a need for establishing an informal Centre-State arrangement.[29]

In the area of Centre-State finance, the Alliance recommended that the State should be financially autonomous but 'the power to raise revenue and the system of allocation of funds between the State and Federal Governments should be as in the Third Schedule and Part III of the Federation of Malaya Agreement [1948]'.[30] In land matters it recommended that the Central Government should have the power to acquire land anywhere in

[22] *Alliance Memorandum*, p. 7. See also *Straits Echo and Times of Malaya*, 25 August 1956.

[23] *Alliance Memorandum*, p. 8.

[24] *Ibid.*, p. 7. It was considered necessary that the Central Government should have residual powers because of the need for a smooth and efficient administration for the country as a whole, especially in time of crisis. See *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.*

[28] Ibid., pp. 8-9. See also *Straits Echo and Times of Malaya*, 28 September 1956.

[29] *Alliance Memorandum*, p. 9. It could be argued that the informal consultative arrangement might best work when one party controlled both levels of government.

[30] *Ibid.*

the country for any purpose of national importance after consultation with, but not concurrence of, the State Government concerned.[31]

The Alliance further recommended that the Upper House or *Dewan Negara* should comprise forty-five members: two members to be elected from each of the eleven States, twenty-two members and the Speaker to be appointed by the Centre.[32] The *Dewan Negara* would thus comprise twenty-two and twenty-three representatives from the States and Centre respectively. On the amendment process the Alliance recommended that amendments to the Constitution should be made only if approved by at least two-thirds of the Upper and Lower Houses of Parliament.[33] In addition, if these amendments affect the rights of States then these would also have to be approved by two-thirds of the State Legislatures by simple majority vote.[34] The recommended amendment procedure was stringent and within which the States' participation was necessary. Thus, the *Dewan Negara* and the amendment process could provide real safeguards to State interests and to the federal union.

The Reid Commission seems to have relied heavily on the memoranda[35] received from the Malay Rulers and the Alliance. The Commission recommended that independent Malaya should be a federation with a strong Central Government and with the States and Settlements having a measure of autonomy.[36] Regarding the status of the former Straits Settlement States, the Commission urged that

> Our terms of reference not only require us to recommend a measure of autonomy for each of the States and Settlements but also appear to preclude us from recommending any changes in their existing boundaries, and we have therefore not considered certain representations that changes should be made in this respect.[37]

It recommended that any future boundary alterations should depend on the agreement of the States and Settlements concerned.[38] It further recom-

[31] *Ibid.* See also *Straits Echo and Times of Malaya*, 28 September 1956.

[32] *Alliance Memorandum*, p. 3.

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

[34] *Ibid.*

[35] The Reid Report seemed to suggest this. See *Reid Report*, p. 7. This was confirmed by E.O. Laird. Interview with E.O. Laird, formerly Secretary to the Reid Commission, 22 October 1979.

[36] *Reid Report*, p. 8. 'National priorities' shaped the Commission's recommendations. Interview with E.O. Laird.

[37] *Reid Report*, p. 35. 'Secessionists' and other non-federal demands did not represent an important part of the memoranda submitted. Furthermore, many demands were contrary to the commission's frame of reference. Interview with E.O. Laird.

[38] The Reid Commission provided for this in Article 2 of the Draft Constitution of the Reid Report. This provision was probably made in response to several representations concerning several 'disputed' areas. For example, apart from the question of Penang, the 'State Council' of 'Negri Naning' — a Minangkabau Settlement incorporated into Malacca in 1845 — in its memorandum demanded the return of its 'soveriegnty'. See Sopiee, M.N., *op. cit.*, p. 84, n. 100.

mended that 'in spite of the fundamental constitutional differences between the present positions of the States and of the Settlements we think that in future they should have the same degree of autonomy'.[39]

The Commission pointed out that the Federation of Malaya Agreement, 1948, provided a Constitution which placed overwhelming legislative powers with the Centre.[40] It was convinced that this 1948 Constitution was based on the unsound and impracticable principle of conferring legislative power on the Centre and executive power on the States.[41] Thus, where different political parties controlled the Central and State Governments, such a division of powers 'would probably lead to friction and might well have grave consequences'.[42] It therefore recommended that 'in future legislative power and executive responsibility should always go together'.[43] In this respect it did not follow the Alliance's recommendation. Accordingly, three legislative lists were recommended: Federal, State and Concurrent. It also recommended that residual powers should be given to States, convinced that

> The situation of the residual powers makes no difference to the construction of any of the specific powers in the Federal List . . . Moreover, it is unlikely that the residual power will ever come into operation because the Legislative Lists, read in the light of the clauses in article 68, appear to us to cover every possible matter on which there might be legislation. The only real effect of leaving the residual power with the States is that if some unforeseen matter arises which is so peculiar that it cannot be brought within any of the items mentioned in any of the Legislative Lists, then that matter is within the State powers.[44]

Despite the above division of powers, the Commission believed that co-operation between Central and State Governments should be encouraged. To facilitate this it recommended that 'There should be a general power of delegation conferred on both the Federal and State Governments with regard to the performance of any of their executive functions'.[45] It further recommended that

[39] *Reid Report*, p. 36. To ensure this the Reid Commission recommended Article 66 — the 'essential provisions' requirement that each State Constitution must provide for. It further recommended that these provisions should be enforceable by Parliament. Part 1 of the Fifth Schedule of the Draft Constitution contained details of the 'essential provisions'. The Reid Commission's adherence to the principle of equality in terms of autonomy among the States was in response to the fears of Penang and Malacca concerning their status and position in a future independent Federation of Malaya. Interview with E.O. Laird.

[40] *Reid Report*, pp. 11-12.

[41] *Ibid.*, p. 36.

[42] *Ibid.*

[43] *Ibid.* For details see Article 75 and Schedule VL (division of powers) of the Draft Constitution of the Reid Report.

[44] *Ibid.*, p. 53. Means argued that the Commission gave residual powers to the States partly on the assumption that the Federation was a creature of the States from which ultimate authority was derived. See means, *op cit.*, p. 183.

[45] *Reid Report*, p. 36. Article 76 of the Draft Constitution provided for this.

> The Federal Government should be authorised to delegate any particular functions or duties to a State Government or to State officers, and State Governments should be similarly authorised to delegate to the Federal Government or Federal officers or to any other State Government or its officers.[46]

The Commission was convinced that on certain matters a 'uniformity of laws' in the various States was necessary. On such matters Parliament should have the power to pass an Act on any State subject.[47] However, such an Act would come into force only with the concurrence of States as expressed in terms of an Enactment of the State Legislative Assembly. Furthermore, the State Legislative Assembly in adopting such an Act should be entitled to make any necessary modifications. In this way the Commission believed that the supremacy of a State on State subjects would be preserved. In making the 'uniformity of laws' recommendation the Commission had in mind the two most important matters on the State List, land and local government.[48]

The Commission believed that the future prosperity of Malaya depended on the proper use of land and that a planned national policy for this was essential.[49] Land also was (as it remains) a major source of revenue for the States. It recommended that land must remain a State subject because this was the basis of State autonomy and argued that it would neither be practical nor desirable to transfer the general administration of land to the Federation.[50] However, it made clear that to promote national interest projects, like national development and conservation, the Centre ought to have powers to pass laws regarding the use of land.[51] This was further strengthened by the Commission's recommendation that the Centre was to be the sole judge of its requirements for State land and that, after due compensation had been worked out, the Centre should have the power to require the States to make available land which it required for federal purposes.[52] The Alliance Memorandum had indeed recommended that the Central Government should have the power to acquire land anywhere in the country for any purpose of national importance after consulting, but

[46] *Ibid.*, pp. 36-37. Article 148 of the Draft Constitution provided for this.

[47] *Ibid.*, p. 37. Article 70 of the Draft Constitution provided for this.

[48] *Ibid.*, p. 37. The Reid Commission was especially keen on drafting and enacting a National Land Code. See *ibid.*, p. 39.

[49] *Ibid.*, p. 37. The issue of land was especially 'sticky'. Interview with E.O. Laird.

[50] *Reid Report*, p. 39.

[51] *Ibid.*, pp. 48-49. As in the case with land, the Central Government was also empowered to formulate an overall policy on mining, forestry and agriculture (all matters on the State List). Under the Federation of Malaya Constitution of 1948, the Centre had legislative power for compulsory acquisition of land but the States had the executive authority. The Reid Commission believed that the Central Government was both the custodian and the propagator of the 'national interests'. Interview with E.O. Laird.

[52] *Reid Report*, pp. 41-42. Article 78 of the Draft Constitution provided for this.

not with the concurrence of, the State Government concerned. The Commission, however, alluding to the possibility that such powers might be contrary to the 'federal' concept and could cause Centre-State friction, stated that

> We think that such [national] development ought to be the direct responsibility of the Federation, but we do not think that it is possible to give the Federation a completely free hand without undermining the autonomy of the States and possibly causing friction between the States and the Federation.[53]

Two general limitations[54] on the exercise of such powers were thus recommended. First, before the Centre could initiate any scheme of development or conservation which involved interfering with States' Rights the scheme should first be examined by an 'expert body' and followed by consultation between the Centre and the States in the National Finance Council (NFC). Second, any such scheme should be confined to a specified area or specified areas. The Commission, however, did not specify who were to comprise this 'expert body'.

Of critical importance to the federal idea was the question of States' financial autonomy. Before 1956 the States depended on Central funds and every year there were disputes between the Centre and the States over the amount to be granted. The Commission argued that these disputes could become more acute as democratic control replaced official control in the States. Furthermore,

> the States have no assurance as to the total amount of their incomes from grants in future years. They can hardly have any real financial autonomy and they have little direct incentive to economy, if their deficits are to be met every year by the Federation, and it is difficult for them to plan ahead without a firmer assurance of their future financial resources.[55]

The Commission, nevertheless, candidly stated that the federal system must continue to rely upon federal funds for the substantial support of all levels of Government.[56] It also pointed out that to maintain a given balance between State and Central authority, the economic and financial relations might require careful planning if the State was not to come under direct Central supervision in fields which were constitutionally subjects of State Legislation.[57] To achieve this States must have independent sources of in-

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

[54] Article 84 of the Draft Constitution provided for this.

[55] *Ibid.*, p. 60.

[56] *Ibid.*, p. 61.

[57] *Ibid.*, p. 60.

come not subject to the discretion of the Central Government if federalism was to work.

The Commission faced this problem: how to guarantee States' financial independence commensurate with 'the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy'. It recommended the transfer of certain State responsibilities — education, medical and health (in the State List of the 1948 Constitution) — to the Federal List.[58] In short, shrinking the areas of State responsibility and competence. State expenditure could thus be reduced by narrowing the list of State subjects with which it could constitutionally deal. Ironically, it believed that the reduction in State responsibilities would strengthen the States *vis-a-vis* the Central Government by their having to rely less on Central funds.[59] However, the continual transfer of State subjects to the Centre to match States' financial capabilities would allow States' that 'measure of autonomy' but would in time reduce them to mere formal units of the Federation without real powers.

States' financial independence could also be strengthened if States were provided with wide taxing powers. This was considered and rejected. The Commission recommended by a majority that States should not have wider taxing powers than those which they already had. Mr. Justice Abdul Hamid opposed this recommendation. He argued that States should be entitled to levy taxation in respect of all matters on the State List and that the Centre should not be entitled to levy taxation in respect of these matters.[60] The Commission recommended that States must continue to receive large grants from the Centre as a right and not 'as subsidies depending on the favour of the Federation'.[61] It was convinced that an equalisation policy could best be achieved by the Centre rather than by giving each State wider taxing powers. It stated that

> we would expect that national policy will endeavour so far as possible to promote equally the prosperity of all parts of the Federation, and if the States were entitled to raise additional revenue directly this objective would be difficult to achieve.[62]

The Commission viewed grants-in-aid as the key to the problem of State finance. Grants-in-aid, on past experience, were not only relatively large but also the subject of Centre-State friction. In anticipation, the Commission recommended three steps. First, the establishment of the National Finance

[58]Further, the Commission felt that the subjects transferred to the Centre were essentially national in scope and character and thus should properly be within the jurisdiction of the Centre. Interview with E.O. Laird.

[59]*Reid Report*, p. 60.

[60]*Ibid.*

[61]*Ibid.*, p. 61.

[62]*Ibid.*,

Council (NFC)[63] as the consultative machinery which would deal with questions of grants. Second, grants should be given for an extended period of five years. Finally, development should be the Centre's responsibility.[64] The time stretch of five years would give State authorities the real leeway for financial autonomy, tempered with the knowledge that a new grant would be required in five years. The Commission recommended that 'since every State must spend federal money the State Constitutions must contain appropriate provisions for financial control, not differing in essentials from those which apply to the Federal Government itself'.[65] It made the adoption of these provisions by State Constitutions a condition precedent to the establishment of the new grant system in each State. Apart from this, the State was free to do what it liked with the grants provided that the relevant legislation was not *ultra vires*.

With regard to States' right to borrow or contract loans, the Commission stated that 'in view of the degree of future autonomy which we recommend for the States, there ought in addition to be more general provisions authorising the States to contract loans'.[66] However, it recommended that States' right to borrow or contract loans should be one of specified financial matters to be referred to the NFC for consultation between the Central and State Governments.[67] It further argued that

> since the State and the Local authorities have such limited independent revenue and since it is undesirable that such small borrowing authorities should compete against each other for narrowly limited savings, it seems essential that all loans should be raised by the Federal Government.[68]

The Commission accepted the allegation of State financial officers that in the past the practice was that States and Local authorities were 'last in the queue' for moneys raised by loans. To avoid this the Commission recommended that all loans raised by the Central Government should be made only after considering the needs of the States as well as those of the Federation as a whole.

The protection given to the federal idea can also be provided by the provisions for amending the Constitution. This raises the question of how amendable ought a constitution to be and how should it be amended? On this the Commission stated that

[63] Ibid., pp. 61 & 64. The NFC was to be a purely consultative and advisory body. Its members comprised the Prime Minister, a Federal Minister, the eleven Mentri Besars or Chief Ministers of the States. It was to meet at least once a year to discuss and deal with questions relating to Centre-State financial relations.

[64] *Ibid.*, p. 48.

[65] *Ibid.*, p. 65. These provisons were contained in the Fifth Schedule of the Draft Constitution.

[66] *Ibid.*, p. 63.

[67] *Ibid.*, pp. 63-64. Article 102 of Draft Constitution provided for this.

[68] *Ibid.*, p. 64.

> 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.[69]

The Commission envisaged the Senate as a major safeguard for States in matters concerning amendments to the Constitution. It recommended that in the Senate each State should have two representatives elected by the State Legislative Assembly and the Central Government should have eleven representatives appointed by the *Yang Di-Pertuan Agong*. Thus, the State and Central Governments would have twenty-two and eleven representatives respectively in the Senate.[70] It further recommended that

> Amendments should be made by Act of Parliament provided that an Act to amend the Constitution must be passed in each House by a majority of at least two-thirds of the members voting. *In this matter the House of Representatives should not have the power to overrule the Senate.* We think that this is sufficient safeguard for the States *because the majority of* members of the Senate will represent the States.[71]

The composition of the Senate was thus viewed by the Commission as a 'block' to amendments which the majority of States opposed.

Sir William McKell and Mr. Justice Abdul Hamid dissented from the Commission's recommendations. They argued that a Senate truly representative of the States, and one in keeping with modern democratic constitutions and with the terms of reference, should have no Central nominees and should 'consist of an equal number of members from each State, to be elected on the same franchise as that on which members will be elected to the House of Representatives'[72] They were also opposed to the principle of indirect election whereby State legislatures were to elect twenty-two Senators. They submitted three reasons for their opposition. First, it would make Senators responsible to the State legislatures and not directly responsible to the people of each State. Second, the State legislatures' duties relate to domestic powers vested in them under the Constitution and thus

> it should not be part of their function to choose for the people their representatives in the national parliament whose functions it is to exercise powers national in character untrammelled by considerations of local concern.[73]

This was a surprising reason for if the senate was to be a truly States' body then Senators ought to reflect and defend considerations of local (State)

[69] *Ibid.*, p. 33.

[70] *Ibid.*, p. 26.

[71] *Ibid.*, p. 33. My emphasis.

[72] *Ibid.*, p. 34.

[73] *Ibid.*, p. 35.

concern. Third, the American experience before 1913 had shown that indirect election by the State Legislatures had resulted in the most grave abuses.

The Commission's recommendations on emergency powers opened the way for Central infringements of States' Rights. Such infringements would be justified, it argued, in situations of danger which threatened the nation. However, 'the occasions on which, and so far as possible the extent to which, such powers can be used should be limited and defined'.[74] It recommended that 'It must be for Parliament to determine whether the situation is such that special provisions are required',[75] Except that Parliament includes the Commission's States-dominated Senate and thus States' Rights could conceivably still be protected. In making these recommendations it was very much aware of the violence and potential danger to Malaya of the still-existing Emergency.[76] Mr. Justice Abdul Hamid pointed out, however, that

> no request has been made from any quarter for inserting a part relating to Emergency provisions of this nature in the Constitution and no Constitution of the Commonwealth countries excepting India and Pakistan has a chapter of this kind.[77]

He was particularly critical of the recommendation that Parliament was to be the sole judge of whether special provisions were required or not. He argued that the use of Emergency provisions would make it necessary not only to suspend constitutional guarantees for States but also for the Central Government to take over legislative and executive authority from the States. He believed that if Emergency powers were at all necessary then

> it is necessary that such extraordinary power should be available *only on the occurance of an emergency of an extremely dangerous character and not when Parliament without the existence of an emergency of any serious kind makes use of these extraordinary powers by making a statement that a situation has arisen which calls for the exercise of those powers. . .* It is in my opinion unsafe to leave in the hands of Parliament power to suspend constitutional guarantees only by making a recital in the Preamble that conditions in the country are beyond the reach of ordinary laws.[78]

[74] *Ibid.*, p. 74.

[75] *Ibid.*, p. 75.

[76] The Emergency was declared in 1948 when the Malayan Communist Party begun an armed campaign for Malayan Independence.

[77] *Reid Report*, p. 104.

[78] *Ibid.* My emphasis.

The implication of this argument was that a Declaration of Emergency could be contested in Court by a plaintiff State as to its validty. In short, a Declaration of Emergency could be made justiciable.[79]

The Reid Report recommended a federal state with a strong Central bias. It emphasised the principle of equality in constitutional status of States in their relation with one another and to the Centre. The power of the States, which seemed to be all inclusive in certain key areas, cannot, it appeared, interfere with national planning. While the States appeared to have power over those matters that were traditionally State affairs, it seemed that the Centre was in a position to control all essential matters. The onus would seem to be with the Centre to make federalism work and States' Rights meaningful. The Senate was intended to be a States' Rights body by the Reid Commission, especially in matters concerning amendments to the Constitution. However, its effectiveness as a States' Rights body would be reduced by several factors. First, its composition and the method of selecting its members would make it only partly as a States' Rights body. Second, there was no Constitutional provision requiring State Senators to vote as instructed by the State legislature concerned. Third, it would be very difficult for States' representatives in the Senate, because of party politics, to form a 'united front' against the political authority of the House of Representatives. This ability to form a 'united front' would in turn determine their ability in the Senate to block constitutional amendments that were considered damaging to States' Rights.

The 1957 Constitution

The Constitution of 1957, a revised version of the Reid Report Draft Constitution,[80] created a Federation of eleven States-Perlis, Kedah, Penang, Selangor, Perak, Trengganu, Negri Sembilan, Malacca, Johore, Pahang and Kelantan. These States, with certain exceptions,[81] were equal

[79] A similar argument was presented by Sarawak (the plaintiff State) when it contested the validity of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. This case is examined later.

[80] The Draft Constitution was reviewed and minor revisions made by the Constitutional Working Committee that met during March-May 1957. The Committee comprised four representatives each from the Malay Rulers and the Alliance Goverment, the High Commissioner, the Chief Secretary to the Government, and the Attorney-General as the representative of the Crown. It was reported that the Committee found it difficult to resolve several issues: the status of Penang and Malacca upon the witdrawal of the sovereignty of the Crown; financial rights of the States; and control of land by the States. See *Straits times*, 2 May 1957, pp. 1 & 9. Tunku Abdul Rahman admitted that the Rulers representatives in this Committee were not initially sympathetic to the recommendation that the Federation ought to have wide powers regarding the use of land. They believed that this could limit the autonomy of States. See Federation of Malaya, *Legislative Council Debates*, 10 July 1957, col. 2854.

[81] For example, Perlis was permitted some variation in the 'essential provisions' of its Constitution. See Article 71 (5) (b). The Menteri Besar of Perlis had argued that because Perlis was backward it was unable to adopt these provisions in its entirety straigthaway. See Federation of Malaya, *op. cit.*, col. 2967.

The implication of this argument was that a Declaration of Emergency could be contested in Court by a plaintiff State as to its validty. In short, a Declaration of Emergency could be made justiciable.[79]

The Reid Report recommended a federal state with a strong Central bias. It emphasised the principle of equality in constitutional status of States in their relation with one another and to the Centre. The power of the States, which seemed to be all inclusive in certain key areas, cannot, it appeared, interfere with national planning. While the States appeared to have power over those matters that were traditionally State affairs, it seemed that the Centre was in a position to control all essential matters. The onus would seem to be with the Centre to make federalism work and States' Rights meaningful. The Senate was intended to be a States' Rights body by the Reid Commission, especially in matters concerning amendments to the Constitution. However, its effectiveness as a States' Rights body would be reduced by several factors. First, its composition and the method of selecting its members would make it only partly as a States' Rights body. Second, there was no Constitutional provision requiring State Senators to vote as instructed by the State legislature concerned. Third, it would be very difficult for States' representatives in the Senate, because of party politics, to form a 'united front' against the political authority of the House of Representatives. This ability to form a 'united front' would in turn determine their ability in the Senate to block constitutional amendments that were considered damaging to States' Rights.

The 1957 Constitution

The Constitution of 1957, a revised version of the Reid Report Draft Constitution,[80] created a Federation of eleven States-Perlis, Kedah, Penang, Selangor, Perak, Trengganu, Negri Sembilan, Malacca, Johore, Pahang and Kelantan. These States, with certain exceptions,[81] were equal

[79]A similar argument was presented by Sarawak (the plaintiff State) when it contested the validity of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. This case is examined later.

[80]The Draft Constitution was reviewed and minor revisions made by the Constitutional Working Committee that met during March-May 1957. The Committee comprised four representatives each from the Malay Rulers and the Alliance Goverment, the High Commissioner, the Chief Secretary to the Government, and the Attorney-General as the representative of the Crown. It was reported that the Committee found it difficult to resolve several issues: the status of Penang and Malacca upon the witdrawal of the sovereignty of the Crown; financial rights of the States; and control of land by the States. See *Straits times*, 2 May 1957, pp. 1 & 9. Tunku Abdul Rahman admitted that the Rulers representatives in this Committee were not initially sympathetic to the recommendation that the Federation ought to have wide powers regarding the use of land. They believed that this could limit the autonomy of States. See Federation of Malaya, *Legislative Council Debates*, 10 July 1957, col. 2854.

[81]For example, Perlis was permitted some variation in the 'essential provisions' of its Constitution. See Article 71 (5) (b). The Mentri Besar of Perlis had argued that because Perlis was backward it was unable to adopt these provisions in its entirety straigthaway. See Federation of Malaya, *op. cit.*, col. 2967.

in their constitutional status and relations to one another. Their relations to the Centre were equal for each State but they were not equal to the Centre except in constitutional recognition. This Constitution eschewed 'special privilege' being accorded to any founder States, rich or poor, of the Federation. The only difference in the status of the member States, conceivably, was dictated by their origins as a Malay State or Crown Colony. But in substance and in fact, all the founder States shared a common status.

During the debate on the Constitutional proposals in the Federal Legislative Council, Tunku Abdul Rahman, the Chief Minister, reemphasised that 'It is a fundamental part of the proposals as a whole that Penang and Malacca should take their places in the new Federation as equal partners with the Malay States'.[82] Haji Ahmad, however, was especially critical of the equal status accorded to Penang. He asked,

> Why should the Island be made a separate State when, we all know, it was part of Kedah. The British Government gained possession of the Island by lease and if the British administration of the Island is to come to end, it should revert to the State of Kedah.[83]

Legislative powers were divided into Federal, State, and Concurrent Lists; with residual powers remaining with the States.[84] These lists also defined the extent of Central and State executive powers. Whether each State Government was, within defined legislative and executive powers, autonomous appeared problematic since there were a number of other constitutional provisions which permitted the Federal Parliament to legislate on State matters. For example, Article 76 accorded to the Central Parliament with such powers 'to provide uniformity of law and policy', particularly on land and local government matters. This power, as pointed out by the British White Paper presented to the British parliament, was meant

> only for the purpose of ensuring uniformity of law and policy, and if any such law makes provision for conferring executive authority on the Federation it will not operate in any State unless approved by resolution of the Legislative Assembly of that State.[85]

Tunku Abdul Rahman assured the Federal Legislature that the application and administration of policy passed under this clause would be the sole concern of the States.[86] Furthermore State Governments would find

[82] *Ibid.*, col. 2849.

[83] *Ibid.*, col. 2909.

[84] Article 74 and the Ninth Schedule of the Constitution.

[85] Colonial Office, *Constitutional Proposals for the Federation of Malaya*, London, Cmnd. 210, June 1957, p. 11.

[86] Federation of Malaya, *op cit.*, col. 2854.

that these arrangements would not operate to their detriment. Centre-State controversy over the constitutional interpretation of Article 76 could emerge if this clause was used to justify Central legislation on any topic.

Tun Abdul Razak, the Deputy Chief Minister, admitted that Article 76 was an exception to the Reid Commission's general rule that legislative and executive powers should go together. He argued that although land was a State subject, this article would provide Parliament with the power to legislate for the purpose of uniformity and that 'We have in mind, as explained in the Reid Constitutional proposals, the formulation of a National Land Code for the whole country at some future date'.[87] This article, especially its Section 4, contained a threat to the federal principle. It could provide the basis for an uncheckable Central legislative interference since consent of the State or States was not required.[88] If the Central Government insisted on exercising this power to the fullest, the States would be powerless and the federal principle would then disintegrate.

Central Government power was further enhanced by Article 92. This article concerned Central Government's power to aquire State land for national development and national interest projects. The Reid Commission had recommended that the Central Government should have the power, subject to certain limitations, to pass any legislation required to carry into effect any development and conservation scheme declared in such legislation to be in the national interest. The British White Paper noted that 'This important recommendation has been welcomed by both the Federal and the State Governments'.[89] However, it warned that

> it would be neither practicable nor desirable for the Federal Government to use this power for the purpose of formulating and implementing national policies covering all aspects of the use of land, and it was clearly not the intention of the Commission that the power should be used in this way.[90]

Abdul Aziz Ishak, a Central Minister, gave an assurance that in the implementation of national development schemes under this article 'the closest personal and direct liaison and understanding of the point of view of State Governments and officials is now and will continue to be maintained.''[91]

[87] *Ibid.*, col. 2978. The National Land Code Bill was introduced in Parliament in August 1965. The then Minister of Lands and Mines, Abdul Rahman Yakub, stated that this Bill 'is presented with the unanimous support of the Governments of the States', and it has been fully discussed and debated in the National Land Council. See Federation of Malaysia, *Malaysian Parliamentary Debates*, Dewan Raayat, vol. II, no. 8, 9 August 1965, col. 1581.

[88] However, where a law, passed under these Articles, provides for the conferment of executive authority upon the Federation, it cannot operate in any State unless approved by the legislature of the State.

[89] Colonial Office, *op. cit.*, p. 12.

[90] *Ibid.* The Rulers would not have signed the Agreement establishing the Independent Federation of Malaya if land had not been placed within the State List. Only for the national interest were they willing to cede States' exclusive control over land. Interview with Mohd. Khir Johari.

[91] Federation of Malaya, op. cit., col. 2924. Article 92 could provide the impetus for a centripetal tendency. The continuance of this tendency would, however, *inter alia*, depend upon the success of the Central Government in tackling the vital problems like economic expansion and rural development.

Most damaging of all, Article 150 provided, after a declaration of emergency, the Central Parliament with wide powers to make laws on almost all State matters. Furthermore, through several constitutional provisions the Central Government could exercise some control over the States. For example, Article 94 required that the agricultural and forestry officers of the States accept the professional advice of the Central government in respect of their duties.

The financial provision of the Constitution further enhanced Central Government power.[92] The Central Government controlled the major sources of revenue through being the main taxing authority.[93] Tunku Abdul Rahman justified this provision in terms of the need to equalise the levels of wealth among the States. He argued that if States were to be given important taxing powers wealthy States could become even wealthier while poor States could become even poorer. He believed that only the Central Government, with such powers, could accomplish this equalisation of wealth among the States.[94] The States, except for revenue from land and forests, had no significant sources of revenue. Furthermore, the Central Government controlled the borrowing powers of the States.[95] States would have to depend on Central Government allocations and grants to cover the deficits in expenditure.[96] States, in the main, would thus be financially dependent on the Central Government.

Tunku Abdul Rahman claimed that he was aware of the need to achieve a level of financial independence for States. He pointed out that the Constitutional Working Committee, when examining the Reid Commission's recommendations on Centre-State finance, felt that the Constitution itself should include provisions safeguarding the financial positions of the States and that

> Such safeguards will be particularly important in years to come because we must expect that sooner or later the Government of a State will be formed by a political party which is in opposition to the party in power in the Federal Parliament.[97]

However, the safeguarding of States' financial position was to be achieved not by the granting of wide taxing and borrowing powers but by continuing the practice whereby the Centre would make large grants to the States and by writing 'into the Constitution that the State Governments will be entitled as of right to receive certain grants and other sources of

[92]See Part IV of the Constitution.

[93]Article 96 of the Constitution.

[94]Federation of Malaya, *op. cit.*, cols. 2854-2857.

[95]Article 111 of the Constitution.

[96]Article 109(3), (5) and (6) of the Constitution.

[97]Federation of Malaya, *op. cit.*, col. 2854.

revenue'.[98] He viewed the NFC as 'a most useful forum of debate' within which Centre-State financial relations could be discussed.[99] He was nevertheless confident that under the new proposals the States would achieve 'complete financial autonomy'.[100]

Centre-State co-operation was ensured in several ways. For example, Article 81 provided that the executive authority of every State should be so exercised so (a) as to ensure compliance with any Federal law applying to that States, and (b) as not to impede or prejudice the exercise of executive authority. The onus for co-operation, it seemed, had been placed on the States. As such, the provision ensuring co-operation may be viewed by the States as not being much different from Central control. State powers over land and local government were somewhat reduced by the establishment of the National Land Council (NLC) and the National Council for Local Government (NCLG). Both the Centre and the States were represented in these bodies and the policy decisions of the NLC and NCLG concerning land and local government respectively were binding on both the Central and State Governments.[101] There was thus joint Centre-State responsibility for land and local government. In view of the composition[102] of the NLC and NCLG, however, the Central Government needed only the concurring votes of two States in the NLC, and the concurring vote of one State in the NCLG, to affect a policy on land and local government respectively which would bind all State Governments.

States were not given a direct role in the amendment process, except that any amendment to alter the boundaries of any State required the consent of that State, expressed in a law passed in the State's legislature.[103] The

[98] *Ibid.*

[99] *Ibid.*, col. 2858.

[100] *Ibid.*

[101] Articles 91 and 95A. The NCLG was established by Clause 12 of the Constitution (Amendment) Bill, 1960. Tun Razak justified its establishment for the sake of uniformity and co-ordination of local government affairs. He pointed out that as a result of discussion with the Mentri Besars and Chief Ministers of the States on this matter, 'it has been agreed with the State Governments that there should be established a National Council for Local Government on the same lines as the National Land Council. It is hoped that with the establishment of this NCLG there will be continuous consultation between Federal and State Governments on matters of policy and legislation affecting local government'. See Federation of Malaya, *Malayan Parliamentary Debates*, Dewan Raayat, vol. II, no. 3, 22 April 1960, col. 307.

[102] The NLC comprised a Central Minister as Chairman (without the casting vote), one representative from each State appointed by the Ruler or Governor of the State, and a maximum of ten representatives appointed by the Central Government. The NCLG comprised similar representatives with the exception that the Chairman had the casting vote. The proportion of Centre to State representatives in both bodies was eleven to eleven. The NLC and NCLG together with the NFC were (as they remain) the formal Centre-State bodies within which Centre-State issues could be tackled and co-operative federalism could take root.

[103] Article 2(b). R.H. Hickling suggested that some clauses which concern Centre-State relations, such as Articles 71 (3), 74, 76 (4) and 80, should be capable of amendment only with the approval of the States. See his "The First Five Years of the Federation of Malaya Constitution", *Malaya Law Review*, vol. IV, no. 2, p. 202.

Federal Parliament was and remains the only body, in general, concerned with the amending process. The only strict constitutional safeguard for the States was provided by Article 159 which required that any major constitutional amendment should be passed by a two-thirds majority of the full membership of both Houses of Parliament.[104] It was in the composition of the Senate that States could at least hope to be able to block any amendment prejudicial to their interests. The Reid Commission had envisaged the Senate, with twenty-two State elected and eleven Central appointed Senators, as the body most able to defend States' interests during the amendment process. The 1957 Constitution, however, increased the number of Central appointed Senators to sixteen while the number of State elected Senators remained at twenty-two. If the Commission's recommendation had been accepted then there would be some semblance of a restraining safeguard against constitutional amendments should the State-elected Senators decide to 'block' any such amendment.

The 1957 Constitution established a Federation with a clearly strong Centre and central bias. The functioning federal system would, however, largely depend on Centre-State harmony and co-operation, especially on finance, land and local government. The failure of the NFC, NLC and NCLG to achieve substantial agreement between the States and the Centre could aggravate controversies on such issues because of the competing and overlapping delineation of Centre-State responsibilities. In such controversies the self-restraint of the Central Parliament is important for the maintenance of the federal system.

Amendments and Interpretations

Conflicts over the interpretation of constitutional provisions regarding federalism and Centre-State powers have been frequent. Such conflicts emerged especially during debates concerning certain amendments to the Constitution and the Centre's use of Emergency provisions. On two occasions such conflicts necessitated the adjudication of the Courts.

In just nineteen years of Independence the Constitution was amended no less then seventeen times.[105] The Constitution embodied the formal elements of the 'federal bargain'. Constitutional amendments of Centre-State provisions concerned, essentially, the process of unmaking and remaking a formely agreed federal relationship. The amendment process has been crucially affected by changes in the composition of the Senate. The provisions for amendment were also exceedingly liberal.

At Malayan Independence in 1957 the proportion of State-elected to

[104]Article 159 was amended in 1962 and this, as will be seen later, significantly affected the federal idea.

[105]Tun Mohamad Suffian bin Hashim, *An Introduction to the Constitution of Malaysia*, Kuala Lumpur, Government Printer, 1976, p. 34.

Centre-appointed Senators was twenty-two to sixteen. With the formation of Malaysia in 1963, the proportion was twenty-eight to twenty-two. In 1964 the Constitution was amended[106] to provide for Centre-appointed Senators to be in the majority for the first time. The proportion now was twenty-eight to thirty-two. Dr. Ismail argued that the increase of Centre-appointed Senators was

> desirable in order to get wider representations in the Senate consequent on the formation of Malaysia. This will enable His Majesty to appoint more persons of wider experience and ability to take an active part in the government of this country.[107]

With Singapore's separation from Malaysia on August 9, 1965, the number of State-elected Senators was reduced to twenty-six but the number of Centre-appointed Senators was not similarly reduced. These changes seemed to deny the safeguard envisaged by the Reid Commission and they essentially went against the spirit of the Commission's recommendations that

> We think that there should be a substantial majority of elected members even though the powers of the Senate are to be considerably less than the powers of the House of Representatives; and we recommend that Parliament should have power to reduce the number of nominated members or abolish them if a time should come when that is thought desirable.[108]

The above changes would make it difficult for the Senate to be the repository of States' Rights and for State-elected Senators to 'block' any amendment. Constitutionally the federal system was left unprotected since the Central Parliament could unilaterally amend the Constitution as long as the Central majorities approved.

The Constitutional Amendment Act of 1962: No. 14/62: This Act amended, *inter alia*, the amendment procedure of Article 159(4) by inserting paragraph (bb) to it. Through this amendment, only a simple majority, instead of the two-thirds majority, in both Houses of Parliament was now required for the passing of

> an amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of the Constitution to a State previously so admitted or associated.[109]

[106] Act 19/64, Section 6. See Federation of Malaysia, *Acts of Parliament, 1964*, Kuala Lumpur, Government Press, 1964, p. 88.

[107] *Malaysian Parliamentary Debates*, vol. 1, no. 8, 9 July 1964, cols. 1109-1110.

[108] *Reid Report*, p. 23.

[109] Clause 24 of Constitution (Amendment) Act, 1962. See Federation of Malaysia, *Acts of Parliament*, Kuala Lumpur, Government Press, 1963, p. 206.

The scope of the 'modification', however, was not clear.

On the one hand, if the amendment had dealt only with the admission of new States, it might have been seen simply as a device by the party currently in power to guarantee its control over the admission of new States should it lose the two-thirds majority in both Houses which it commanded to secure this amendment. On the other hand, that Parliament by a simple majority should be given the power to effect 'any modification made as to the application of the Constitution to a State previously so admitted or associated' appeared to have removed the possibility of the Constitution serving to protect the federal principle. With regard to the States of Malaya, this opened the door to all manner of modifications without the tedious necessity of obtaining the two-thirds majority of the total members in each House.[110] The Malayan States' lack of power in the amending process was highlighted in the case, examined later, of *The Government of Kelantan* v. *The Government of Malaya and Tunku Abdul Rahman Al-haj*.[111]

The 1962 amendment had retrospective application from Independence Day, August 31, 1957. This choice for the effective date of the applicability of the amendment, as Groves argued, could only be for the purpose of making it applicable to the existing States.[112] No State, however, had been 'previously so admitted' to the Federation because the Federation of Malaya Independence Act, 1957, which established the Federation was clearly a compact between Great Britian and the Rulers of the Malay States. This compact created a new entity, the Federation of Malaya. Before this there was no entity to which a State was admitted and upon the formation of the Federation not one of the original States could be spoken of as being previously 'associated' with the Federation. States were 'associated' only with one another and with Great Britain to form the Federation. As Groves argued, this amendment made it

> possible for a simple majority in the House of Representatives to vary at any time, as a purely unilateral action, any agreement which any State now joining the Federation may make with the Government of the Federation of Malaya as to its admission and association.[113]

[110] Watts claimed that the Central Government considered it prudent to consult State Assemblies and party organization before the passage of the 1962 amendment Bill. See Watts, R.L. *New Federations: Experiments in the Commonwealth*, Oxford, Oxford University Press, 1966, p. 323.

[111] [1963] M.L.J. 335. Watts argued, citing the 1962 amendment as an example, that because of conventions and the pressures of political forces, it had become customary for the Central Government before the introduction of important constitutional amendments, even in those instances where the States possessed no formal powers of ratification. See Watts, R.L., *op. cit.*, pp. 300-302.

[112] Groves, H.E., 'Constitutional (Amendment) Act, 1962', *Malaya Law Review*, vol. iv, no. 2, 1962, p. 329.

[113] *Ibid.*

Later Sheridan and Groves argued somewhat differently. Since all the States of the Federation had at any time been 'previously so admitted' all amendments to the application in any respect of the Constitution to any State (except for what Article 161E entrenched for the Borneo States) seemed to be outside the requirement of a two-thirds majority.[114] However, no Court has yet had to consider what an application of the Constitution 'to a State' means.

The 1963 Constitutional Amendment: The Malaysia Act, No. 26/63:[115]

The Constitution clearly provided that the Federal Parliament may by law admit other States to the Federation.[116] However, this could be done only by an amendment to the Constitution in view of Article 1 which enumerated the States comprising the Federation. The Malaysia Act, apart from providing for other amendments, provided this necessary amendment.

By virtue of this Act three new States — Singapore, Sarawak and North Borneo (Sabah) — were admitted into the Federation. The Act made several amendments to the Federal Constitution to reflect the terms of agreement between the Federation Government, the British Government, and each of the three new States.[117] These amendments converted the Federation of Malaya Constitution into the Federation of Malaysia Constitution. They also emphasised the different constitutional status and power enjoyed by the new States.[118] The new States were thus admitted on terms substantially at variance with those applicable to the original eleven States. Also, with regard to amendments, some constitutional limitations were introduced by the 1963 Malaysia Act in respect of the Borneo States. Article 161E provided safeguards for the constitutional position of Borneo States.[119] These safeguards meant that any modification made to the application of the Constitution to a Borneo State required a two-thirds vote in both Houses of Parliament. This requirement could be waived only if the modification was such as to equate or assimilate the position of that State under the Constitution to the position of the States of Malaya.[120] The Borneo States

[114]Sheridan, L.A., and Groves, H.E., *The Constitution of Malaysia*, New York, Oceana Publication, 1967, p. 15.

[115]See Federation of Malaysia, *Acts of Parliament, 1963*, Kuala Lumpur, Government Press, 1963, pp. 243-326.

[116]Article 2(a) of the Constitution.

[117]For terms of the Agreement, see Office of Commonwealth Relations, *Malaysia: Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore*, Cmnd. 2094, London, July 1963. See also Federation of Malaya, *Report of the Inter-Governmental Committee, 1962*, Kuala Lumpur, Government Press, 1963.

[118]See Item 3, Part IV and First Schedule of the Malaysia Act, 1963.

[119]Article 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 specified cases would require the concurrence of the Governor of the Borneo States or each of the Borneo States concerned.

[120]Article 161E(1) of the Constitution.

thus had secured for themselves some safeguards against amendments adverse to their special interests or incompatible with the basic objectives for which they entered the Federation. However, as Jayakumar stated,

> in respect to the other eleven States, and in respect of the Borneo States in matters outside article 161E, Parliament has tremendous amending powers in the exercise of which the States do not have the slightest say.[121]

The debate over the Malaysia Bill in the *Dewan Rakyat* (House of Representative) provided the opportunity for re-examining the constitutional status of States in relation to one another and to the Central Government. An Opposition Member of Parliament (MP), V. Veerapan, argued that

> This Bill. . . really mutilates our Constitution and kills the Federation of Malaya. . . the Federation Government should not only have discussed this matter here but it should also have consulted the States.[122]

He pointed out that the Federation of Malaya Agreement, 1957, establishing the Federation, was a compact between the Queen of Great Britain and the Rulers of the Malay States. This compact took effect only after it had been approved by the former Federal Legislative Council and by an Enactment in each of the eleven States. Equally, the same legal procedure should also be followed before the establishment of the Federation of Malaysia. Thus,

> the States not only have a moral right to be consulted but also the States may have a legal right. . . If the Federation Government runs rough-shod over this moral obligation, then I should say that it is a breach of faith on the part of the Central Government. I hope the States would wake up, because if they do not the present amendment and those amendments that have taken place — like, I think, Article 159(4) (bb) — would further erode away the rights of the States. . .[123]

A similar opposition was expressed by Wan Mustapha Haji Ali, a PAS Opposition MP. He reiterated that

> . . .the individual States in the Federation of Malaya have not been consulted, and neither were the Rulers or Sultans of the States, though the Bill would change the whole constitutional set-up of this country.[124]

[121] Jayakumar, S., "Constitutional Limitations on Legislative Powers in Malaysia", *Malaya Law Review*, vol. v, no. 11, July 1967, p. 110.

[122] *Malayan Parliamentary Debates*, vol. v, no. 11, 17 August 1963, cols. 1155-1156.

[123] *Ibid.*, cols. 1156-1157. Article 159(4)(bb) referred to the 1962 amendment discussed earlier.

[124] *Ibid.*, cols. 1164-1165.

He argued further, refering to the Reid Report,[125] that even if the Constitution did not provide for consultation in this matter, convention required that any major change of policy (like this Malaysia Bill) must be based on prior consultation with States.[126] Consultation with the Rulers was also necessary, he stated, because the Malaysia Bill provided no provision which would safeguard the constitutional position of the States of Malaya. As an example, he pointed out that

> under clause 69 Singapore before joining Malaysia has safeguarded her constitutional position, whereas the Malay States have none at all through the constitutional documents of the States, and there is nothing stated here in the Bill for those States as prescribed for Singapore.[127]

To these critisms, Dr. Ismail, the Minister for Home Affairs, maintained 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.[128]

However, the Constitution required that the Conference of Rulers should be consulted and this, according to Tun Razak, the Deputy Prime Minister, had been fulfilled. He informed the House that 'The Conference of Rulers had been consulted on more than five occasions on the question of Malaysia'.[129] He argued that the present case was different from the constitutional reform years of 1948 and 1957 when consultation with the individual Rulers and States occured. Furthermore, he rightly emphasised, the Constitution which had been agreed to previously by all the States provided the Central Parliament with the power under Article 2 to admit new States. It did not, however, provide for any consultation provision with regard to the exercise of this article.[130]

The admission of three new States with substantially more States' Rights also led to criticisms since it violated the principle of equality of rights and status of States in relation to one another and to the Central Government. Tan Phock Kin, an Oppositon MP, warned that this violation would lead to the destruction of the new Federation because inequality would breed dissatisfaction among the States.[131] The Bill, as Lim Kean Siew, another

[125] *Reid Report*, pp. 14-15, noted that convention required consultation between the Central and States governments before any major change of policy.

[126] Malayan Parliamentary Debates, *op. cit.*, col. 1167.

[127] *Ibid.*, col. 1169.

[128] *Ibid.*, vol. v, no. 13, 20 August 1963, col. 1351.

[129] *Ibid.*, vol. v, no. 12, 19 August 1963, col. 1316.

[130] *Ibid.*, vol. v, no. 13, col. 1355.

[131] *Ibid.*, vol. v, no. 6, 12 August 1963, col. 717.

Opposition MP, asserted, entrenched the principle of inequality between the States of Malaysia — the original eleven States on one side and the three new States on the other.[132] The principle of equality was first contained in the Federation of Malaya Agreement of 1948, and this Bill, according to Veerapan, was based on an opposite principle. Although the Constitution provided that any other State can be admitted, Veerapan asked, 'Do you think honestly that the founders would want other people to come in with better rights, with better privileges, than themselves?'[133] Zulkifli Muhammed, another PAS Opposition MP, claimed that the admission of the three new States with different rights and status than those enjoyed by the States in the Federation of Malaya was unconstitutional.[134]

Collectively, opponents agreed that the Bill would weaken the Central Government and would eventually lead to disaster. They concluded that the Bill contained the seeds of disunity within and the destruction of the Federation.

Dr. Ismail admitted that the special rights and status given to the new States were concessions for enticing these States to federate. Without these concessions it would not have been possible to establish the Federation. He informed the House that

> In the case of Singapore, . . .she is given autonomy in education and labour and a certain degree of autonomy consistent with the concept of a strong central government. Singapore would like its own citizenship in addition to the Malaysian citizenship with the safeguard that Singapore citizens should have corresponding rights with those of the Malayan citizens who are not Singapore citizens. In the case of the territories of Sarawak and North Borneo, they are to be federated on the same lines as other States in the existing Federation with certain safeguards. It is in the light of these two different ways in which Singapore and the Borneo territories have agreed to be federated with the federation of Malaya that the provisions of this Bill have to be reviewed.[135]

Additional financial guarantees for the new States also constituted part of the price of Federation. Thus, Centre-State financial relations for the new States were different from those for the original eleven States. According to Tan Siew Sin, the Finance Minister, these financial provisions were necessary so as to overcome the financial and economic backwardness of the new States, particularly Sarawak and Sabah.[136] But who, Tan Phock

[132] *Ibid.*, vol. v, no. 10, 16 August 1963, cols. 1058-1071.

[133] *Ibid.*, vol. v, no. 11, 17 August 1963, col. 1157.

[134] *Ibid.*, vol. v, no. 12, col. 1248. He also criticised the fact that the new States, unlike the original eleven States, were not governed by the powers given to the National Land Council (NLC) and the National Council of Local Government (NCLG). See *ibid.*, col. 1269.

[135] *Ibid.*, Cols. 1284-1285.

[136] *Ibid.*, col. 1301.

Kin asked, was going to bear the burden of financing development in Sarawak and Sabah?[137]

Singapore, however, was 'rewarded' for being financially and economically more developed than the original eleven States and the other two new States. It was jealous of its wealth and fearful of the possibility that this 'New York' would become the future paymaster of the new Federation. The tenacity with which Singapore defended its financial interests could be seen in the fact that Centre-Singapore financial arrangements were to be negotiated on a yearly basis.[138] These arrangements were thus subject to bargaining and, possibly, change annually unlike those governing Centre-State financial relations for the other States which had been spelled out, even to the last dollar, in the Constitution.

Despite specific constitutional safeguards available to the new States, opponents of the Bill warned of the danger of Clause 39 of the Bill. Clause 39(1) and (2) amended Article 150 of the Contitution[139] by deleting the words 'whether by war or external agression or by internal disturbance' and adding 'in any part of the Federation'. Thus, it would be possible, Veerapan concluded, for a state of emergency to be proclaimed irrespective of whether there was war, external agression or internal disturbance in any part of the Federation.[140] He warned that the Central Government through the proclamation of a state of emergency would have the powers over the States, the constitutional safeguards enjoyed by new States notwithstanding. The proclamation of a state of emergency, he warned 'could be in Sarawak, it could be in Borneo, it could be in Singapore, it could be in Johore or Kelantan — and what happens?'[141] He chided the new States for their lack of foresight and remarked that 'I hope that the people who were so eager, so careful, so clever, much cleverer and more careful than the people of the eleven States of Malaya, would also consider the implication of this little amendment'.[142] In support, Lim Kean Siew remarked that Clause 39(1) and (2) would destroy all the rights reserved or any rights reserved for the various States under this constitutional arrangement.[143] Furthermore, as stated by Wan Mustapha Haji Ali, this amendment would alter drastically the original position as provided in the present Constitution.[144] To these criticisms the Central Government was,

[137] *Ibid.*, vol. v, no. 13, col. 1451.

[138] Article 112E of the Constitution.

[139] This article governed the use of emergency powers.

[140] *Malayan Parliamentary Debates*, vol. v, no. 11, col. 1158.

[141] *Ibid.*, cols. 1158-59.

[142] *Ibid.*,

[143] *Ibid.*, vol. v, no. 13, col. 1416.

[144] *Ibid.*, col. 1422.

characteristically, silent. As it turned out and as examined later, such powers were used to proclaim a state of emergency in Sarawak and Kelantan in 1966 and 1977 respectively. The Malaysia Bill, as the critics saw it, was an attempt by the Central Government to change the Malayan federal structure. The admission of three new States with substantially more power over States' Rights and enjoying certain constitutional safeguards placed the original eleven States in an inferior constitutional position compared to that of the three new States. This violated the principle of equality of States in terms of their relations to one another and to the Central Government, the principle advocated by the Reid Commission and subsequently provided for by the 1957 Constitution.

In criticising Tun Razak's assertion that the Bill did not change the 'substance' of the present Constitution, Tan Phock Kin commented that 'He must realise that with the introduction of the new States, the position of the present States with regard to the new States are entirely different, though their position among themselves are somewhat the same'.[145] Critics of the Bill asserted that such a change in the federal structure should necessarily be based on prior consultation with the original eleven States of the Federation. Did the Central Parliament have the power to unmake and remake, through the Malaysia Act, the present federal arrangement? This the Court, as examined later, would have to decide.

The 1965 Constitutional Amendment: The Government of Malaysia (Amendment) Act, 1965, No. 31/1965:[146] This was an amendment to Article 95C(1) of the Constitution. By virtue of this amendment the *Yang DiPertuan Agong* (the Supreme Monarch) may by order authorise the Legislatures of the States to make and execute laws in respect of any matter in the Federal list. This power, then restricted to the Borneo States, was to be applicable to all the States of the Federation. This amendment was designed, according to Dr. Ismail, to 'smoothen the administration as between the Centre and the States'.[147]

Dr. Tan Chee Koon, an Opposition MP, commented that this amendment represented a considerable erosion of the powers of the State Governments. State Governments, he continued, should have been consulted and their approval obtained prior to the Bill's introduction to Parliament.[148] The Central Government now had the opportunity to use the 'imperial edict', as it was labelled, to force recalcitrant States into line under the guise of being, as Dr. Ismail justified it, 'mainly designed to smoothen the functioning of the machinery of government both in the States and in the Centre'.[149]

[145] *Ibid.*, col. 1342.

[146] See Federation of Malaysia, *Acts of Parliament, 1965*, Kuala Lumpur, Government Press, 1965.

[147] *Malaysian Parliamentary Debates*, vol. II, no. 5, 3 June 1965, col. 1058.

[148] *Ibid.*, cols. 1038-39.

[149] *Ibid.*, col. 1058.

It seemed that the Bill had been directed at PAS-controlled Kelantan which had since 1959 vigorously pursued its own way. Kelantan was often involved in a political tug-of-war with the Centre.[150] Kelantan became, indeed, the visible defender of States' Rights. Lim Chong Eu, an Opposition MP, while referring to Kelantan's opposition to the Bill, remarked that 'They naturally feel it very much, because they, as a State, have understood the constant struggles between State and Federal powers'.[151] He further argued that a 'Federation of States' must involve the acceptance of the concept of State powers. It necessarily followed that there must always be this constant struggle between State and Central powers. Dr. Ismail insisted, however, that

> it has never been the intention of the Central Government to take the powers from the States as enshrined in the Constitution. . . [and that of] all the amendments. . .in this Bill, some had been done at the request of the States and some after consultation with the States.[152]

Nevertheless, the amendments represented, especially to Kelantan, a further encroachment upon State powers.

The Constitution and Malaysia (Singapore Amendment) Act, 1965, No. 53/1965:[153] The Constitution did not provide for secession. Groves believed, however, that Sabah, Sarawak and Singapore or any other new States that might subsequently be admitted, could be dissociated from the Federation by an Act of Parliament repealing the constitutional amendments by which they were admitted.[154]

This Act was preceded by the Singapore Separation Agreement, 1965, entered into by the Central Government. Lim Chong Eu rightly pointed out that

> neither the State Government of Singapore, nor indeed the Central Government, under the Constitution, which has not yet been amended, has the right to provide for the severance of a State from Malaysia.[155]

Ong Kee Hui, a Sarawak MP, was particularly apprehensive about the future of Sarawak.[156] He asked whether, if at some future date the

[150] Kelantan-Centre conflict over the rural development plan was an example. See Shafruddin, *op. cit.*, Chapter 11.

[151] *Malaysian Parliamentary Debates*, vol. 11, no. 5, col. 1045.

[152] *Ibid.*, col. 1058.

[153] See Federation of Malaysia, *Acts of Parliament*, 1965, pp. 277-279.

[154] Groves, H.E., *The Constitution of Malaysia*, Singapore, Malayan Publ., p. 152.

[155] *Malaysian Parliamentary Debates*, vol. 111, no. 8, 9 August 1965, col. 1508.

[156] *Ibid.*

Government of the Borneo States were to be less amenable to Alliance direction, the same reason would then be advanced for further partition of Malaysia? He warned that this would be the beginning of the disintegration of Malaysia.[157] Abu Bakar Hamzah, a Kelantan PAS Opposition MP, feared that the Central Government would on the same basis take similar action with regard to Kelantan. Without being specific, he warned of the consequences of Singapore's separation on the operation of the Malayisan Federation.[158]

Despite the questionable cosntitutional basis for separation, the amendment was passed in each House without any opposing vote. This case suggested that separation or secession must be effected through Centre-State arrangement rather than by unilateral action.

The Constitution (Amendment) Act, 1971, No. A30/1971: This Act provided the basis for the return of party politics and parliamentary rule after a period of Emergency rule through the National Operations Council (NOC) which was imposed in May 1969. Major amendments were made to the Constitution.[159] Three amendments especially affected the federal aspects of the Constitution. First, Articles 63 and 72 were amended and thus depriving MPs and Members of States' Legislative Assemblies of the protection they previously enjoyed under these Articles if they were charged with an offence under any law passed by virtue of the amended Article 10.[160] Second, the amended Article 10, *inter alia*, provided Parliament with the power to pass laws prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by Article 181 concerning the sovereignty of the States' Rulers.[161] But before Parliament passed such a law the Sedition Act would apply and this made such questioning a 'seditious tendency'.[162] Finally, changes were made to Article 159(5) which was thereby entrenched; it now cannot be amended without the consent of the Conference of Rulers.[163]

Intentionally or not, perhaps ironically for UMNO, the impact of the constitutional restructuring was to reinforce the institution of States' Rulers by placing it beyond and above public debate. Further, they now, through the Conference of Rulers as a Central institution and with the entrenched

[157] *Ibid.*, col. 1509.

[158] *Ibid.*, col. 1511.

[159] For a full discussion see Federation of Malaysia, *Parliamentary Debates on the Constitution Amendment Bill 1971*, Kuala Lumpur, Government Press, 1972. See also Milne, R.S. and Mauzy, K.D., *Politics and Government in Malaysia*, Vancouver, University of British Columbia Press, 1978, pp. 94-99.

[160] See Article 10(4) of the Constitution. This was part of the 1971 amendments.

[161] See Articles 10(4) and 181 of the Constitution.

[162] See Milney and Mauzy, *op. cit.*, pp. 96-97.

[163] See Article 159(5) of the Constitution.

veto, had become crucially relevant to the amendment process. Ironically, States' Rulers emerged with enhanced powers and the Centre would have to tread cautiously into the as yet uncharted waters of Centre-State Rulers' relations.

The Centre's use of Emergency Provisions

The Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, No. 68/1966:[164] Following a leadership crisis in Sarawak, a state of emergency was declared in Sarawak in September 1966. This crisis, according to Means,[165] was largely precipitated by Central involvement in Sarawak's politics in which several political parties were jostling one another to arrive at certain political alliances. As a result, the then Chief Minister of Sarawak, Stephen Kalong Ningkan, lost the support of the majority of Council Negri (the State Legislative Assembly) members. The Governor, acting on representation from this majority group, requested the Chief Minister to resign since he no longer had the confidence of the majority in the Council. The Chief Minister refused and was subsequently 'dismissed' by the Governor. Penghulu Tawi Sli was then appointed as Chief Minister.[166]

Stephen Kalong Ningkan challenged his dismissal in the High Court of Kuching; Chief Justice Harley declared the dismissal of the petitioner void on the ground, *inter alia*, that the private representation made to the Governor by Council members did not show a lack of confidence in the petitioner which could only be assessed by a formal vote in the legislature.[167] Penghulu Tawi Sli then requested the Speaker to convene the Council Negri so that a proper vote of no confidence might be taken against the petitioner. The Speaker refused and Sarawak politics became tense and serious. This was the background to the proclamation of a state of emergency in Sarawak.

The Emergency legislation provided for the amendment of both the Federal and Sarawak State Constitutions. The main aim of these amendments — especially Sections 3, 4 and 5 of the Emergency legislation — was to make good the lack of powers on the part of the Governor on which Chief Justice Harley had based his judgement. As Tun Abdul Razak explained, the Emergency legislation was aimed at amending Sarawak's Constitution and providing the Governor with

> the powers to convene a meeting of the Council Negri in order that the question of confidence in the present Government of Sarawak may be put to the test

[164] See Federation of Malaysia, *Acts of Parliament, 1966*, Kuala Lumpur, Government Press, 1966, pp. 545-547.

[165] Means, G.P., *op. cit.*, pp. 381-87.

[166] *Ibid.* Penghulu Tawi Sli was a Malaysian National Alliance Council appointee rather than of the Sarawak Alliance Council.

[167] *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli.* [1966] II, M.L.J. 187.

> and also the power to dismiss the Chief Minister or the Government from office if that Government or that Chief Minister refuses to resign after he has received a vote of no confidence in the Council Negri.[168]

The most important sections of the Emergency legislation were Sections 3, 4 and 5. Section 3 amended Clauses (5) and (6) of Article 150[169] by inserting after 'this Constitution' the words 'or in the Constitution of Sarawak' and after 'Constitution' the words 'or of the Constitution of the State of Sarawak' respectively. These were 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. This article provided that any amendment to the State Constitution must be by an ordinance enacted by the legislature of Sarawak and by no other means. Section 4 drastically enlarged the powers of the Governor of Sarawak by providing that, notwithstanding anything in the State Constitution, the Governor might summon the Council Negri, suspend standing orders and issue directions binding on the Speaker. Section 5 provided that the Governor might, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council if (a) at any meeting of the Council Negeri a resolution of no confidence on the Government was passed by a majority of the members present voting, and (b) the Chief Minister after the passing of such a resolution failed to resign and to tender the resignation of members of the Supreme Council.

This legislation was not without its opponents. D.R. Seenivasagam, an Opposition MP, criticised it as unconstitutional and undemocratic and argued that this unlawful intereference in Sarawak affairs would be the quickest way in which to break up Malaysia.[170] He remarked that the Federal parliament's

> power to pass a Bill of this nature, to amend the Constitution of Sarawak, whether you have the power will be a matter which, I hope, will be tested and, I hope again, as the Prime Minister says, an independent judiciary will interpret whether the power is there or not.[171]

[168] *Malaysian Parliamentary Debates*, vo., III, no. 12, 19 September 1966, col. 2061.

[169] See Article 150(5) and (6) of the Constitution. Clauses (5) and (6) referred only to inconsistencies with the Federal Constitution and not with the Constitution of a State. Perhaps prompted by this doubt, the Central Government, when enacting the Emergency legislation to modify certain provisions of the Sarawak Constitution, made the amendments to these clauses. These amendments were to lapse six months after the Proclamation of Emergency ceased to be in force. See Section 3(2), The Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, in Federation of Malaysia, *op cit.*, p. 546.

[170] *Malaysian Parliamentary Debates*, vol. III, no. 12, 19 September 1966, col. 2081.

[171] *Ibid.*

Tan Chee Koon, another Opposition MP, felt that the House of Representatives did not have the power to amend the Constitution of Sarawak and that this 'power rests solely with the State of Sarawak, with its Council Negri and with its Supreme Council'.[172] Stephen Yong Kuet Tze, a Sarawak MP, argued that this legislation violated one of the conditions — that of the inviolability of the State Constitution — precedent to Sarawak's entry into Malaysia.[173] He pointed out that

> The Honourable Minister for Sarawak Affairs knows this because during the Cobbold Commission, his people, or the majority of his people, strongly put forward that the Sarawak Constitution could not be interfered with or amended without the consent of the State.[174]

He warned that this legislation signalled the beginning of the end for the safeguards negotiated and granted to Sarawak.[175] To this Central interference, Edmund Langgu anak Saga, another Sarawak MP, poignantly asked, 'Why can't the Federal Government let our State Government and the people to settle our State differences without the stupid blundering interference from Kuala Lumpur?'[176]

The criticisms aside, the important question remained whether the Central Parliament, during an emergency, could amend the Constitution of a State. The Federal Court and, subsequently, the Privy Council were given the task of answering this question in a suit, examined later, brought by Stephen Kalong Ningkan against the Government of Malaysia.

The Emergency Powers (Kelantan) Act 1977, No. 192/1977:[177]Following the political crisis in Kelantan[178] Central rule was imposed through a Proclamation of Emergency. With this the Kelantan State Constitution, but not the prerogatives of the Sultan, was suspended. The powers of the Menteri Besar (MB), State Executive Council (Exco) and the State Legislative Assembly (SLA) were assumed by a Director of Government, appointed by and responsible to the PM.

Dato Hussein Onn, the PM, argued that the imposition of Central rule was both unavoidable and necessary because of the deteriorating security situation caused by public disorder, demonstrations and rioting.[179] He

[172] *Ibid.*, col. 2097.

[173] *Ibid.*, col. 2088.

[174] *Ibid.*,

[175] *Ibid.*, col. 2092.

[176] *Ibid.*, col. 2114.

[177] See *Laws of Malaysia, Act 192*, Kuala Lumpur, Percetakan Kerajaan, 9 November 1977, pp. 5-9.

[178] See Shafruddin, B.H., *op. cit.*, Chapter II.

[179] *Malaysian Parliamentary Debates*, vol. III, no. 37, 8 November 1977, col. 4120.

asserted that these resulted out of the debilitating and unresolved political crisis that started with the no-confidence vote against the MB in the SLA and thus, 'unavoidably, the Central Government had to intervene'.[180] He continued that the deteriorating security situation could be exploited by communists, extremists, anti-national and subversive elements and thus could endanger the security and stability of the nation as a whole.[181]

PAS President, Dato Asri, calling this Central intervention the 'Emergency of Convenience', alleged that the deteriorating security situation was stage-managed and implied that this had the foreknowledge, even backing, of those at the State and Centre.[182] This allegation was supported by Lim Kit Siang,[183] an Opposition MP, who also reminded the Central Government that parliamentary democracy and the system of Centre-State Government should not be sacrificed just for the sake of party political advantage.[184] Another PAS MP, Abu Bakar Umar, argued that the political crisis could and should be solved through politcal means rather than through the imposition of Central rule.[185] This was supported by Lee Lam Thye, another Opposition MP, who also warned that in future Central rule would be imposed in States where UMNO is not satisfied with the majority party or parties in the SLA or the security threat could be used to justify a proclamation of emergency.[186]

The governing party at the Centre was provided with the constitutional power and, through its control of the necessary central majority in Parliament, was able to impose Central rule on a State through a declaration of emergency. The governing party at the Centre saw fit to resort to this *vis-a-vis* Kelantan and consequently another threshold in the Centre-State relations in Peninsular Malaysia was crossed.

Court Cases

The Government of the State of Kelantan v. the Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-haj:[187] The PAS-controlled Government of Kelantan, on 10 September 1963, instituted an action in the High Court seeking, *inter alia,* a declaration that the Malaysia Act was null and void or, alternatively, that it was not binding on Kelantan. The State argued that the Act would abolish the 'Federation of Malaya'

[180] *Ibid.,*

[181] *Ibid.,* cols. 4122-4123.

[182] *Ibid.,* cols. 4132-4237.

[183] *Ibid.,* cols. 4156 and 4164.

[184] *Ibid.,* col. 4154.

[185] *Ibid.,* col. 4215.

[186] *Ibid.,* col. 4228.

[187] [1963] M.L.J. 355.

thereby violating the Federation of Malaya Agreement, 1957; that the proposed changes needed the consent of each of the constituent States, including Kelantan; that the Ruler of Kelantan should have been a party to the Malaysia Agreement; that constitutional convention called for consultation with Rulers of individual States if substantial changes were to be made to the Constitution; and that the Federal Parliament had no power to legislate for Kelantan in respect of any matter regarding which the State's legislature had competence. This last argument was perplexing. What, in the Act, could be considered as being within the competence of Kelantan's legislature?

On 11 September 1963, the plaintiff government gave notice of a motion that pending the disposal of its suit, the Court should by order restrain the defendents from carrying into effect any of the provisions of the Act. However, the Court did not answer the above question. Surprisingly, the Kelantan Government had not even suggested that the Act was not passed strictly in accordance with constitutional provisions relating to Acts amending the Constitution. Undeniably, the Act established a Federation with many new alterations but the crucial question was not whether these alterations were desirable but whether they were properly effected.

In a rather swift judgement, Chief Justice Thomson held that: 1) Parliament in enacting the Malaysia Act so as the amend *inter alia* Article 1(1) and (2) acted within the powers granted by Article 159 of the Constitution. The Constitution which formed an integral part of the Federation of Malaya Agreement, 1957, to which Kelantan was a party, did not require consultation with any State as a condition to be fulfilled; 2) the Malaysia Agreement was signed for the 'Federation of Malaya' by the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet. This was in compliance with Articles 39 and 80(1) of the Constitution and there was nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State.

In his reasoning, Chief Justice Thomson admitted that the Act did bring about a new state of affairs. He continued,

> But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties. In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the constituent States including the State of Kelantan.[188]

However, he introduced an interesting idea with his remark:

> I cannot see that Parliament went in any way beyond its powers or that it did anything *so fundamentally revolutionary as to require fulfilment of a condi-*

[188] *Ibid.*, 359.

> *tion which the Constitution itself does not prescribe* [such as consultation with the States].[189]

Thus, if the amendments, even if they complied with the Constitution, attempted to effect 'so fundamentally revolutionary' a change then certain extra-constitutional conditions (like consent of or consultation with States) would also need to be fulfilled if the amendments were to be effective. Jayakumar suggested that Kelantan seemed to have had this in mind when it argued that there was a constitutional convention which called for consultation with States regarding substantial changes to be made to the Constitution.[190]

What, however, determined that a change was 'so fundamentally revolutionary'? The Chief Justice did not provide any clue to this. However, the documents of federation (1957) clearly showed that the states had consented to the Constitution being an exclusive declaration of rights, liabilities and obligations of the States and the Federation. If the States wanted any fundamental limitations of federal power, they should have included them in the 1957 Constitution. This was clearly the intention of the three new States that joined the Federation to form the Federation of Malaysia. They agreed to federate only after certain terms and conditions were included in the Constitution. Furthermore, these new States had secured provisions in the Constitution restricting the Centre's power, with the exception of Article 150, to amend the above terms and conditions by requiring the concurrence of the States to such amendments. The original eleven States cannot now say that there were other limitations (not in the Constitution) which ought to apply. The appeal and adherence to 'other limitations' would undermine the very purpose of the Constitution. Jayakumar commented:

> If the States now, after seven years, feel that they have given the Centre too much power, it is their own misfortune and the proper course would be to seek amendments to, but not rely on mysterious limitations outside the Constitution.[191]

The changes brought about by the Act were properly effected. Kelantan did not doubt the gravity of the changes effected by the Act but this in itself could not render the Act invalid. In this case it was asserting, as Hickling puts it, 'that a Constitution is more than mere words, and that custom and convention can often supply the spirit which the letter may lack'.[192]

[189] *Ibid.* My emphasis.

[190] Jayakumar, S., "Admission of New States", *Malaya Law Review*, vol. vi, no. 1, July 1964, p. 187, n. 31.

[191] *Ibid.*

[192] Hickling, R.H., "An Overview of Constitutional Changes in Malaysia: 1957-1977", in Tun Mohamed Suffian, et. al. eds., *The Constitution of Malaysia, Its Development: 1957-1977*, Kuala Lumpur, Oxford University Press, 1978, p. 10.

Stephen Kalong Ningkan v. Government of Malaysia:[193] Stephen Kalong Ningkan, in taking legal action against the Central Government in the Federal Court, submitted that (a) the Proclamation of Emergency was *ultra vires* and invalid, and that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, which was founded on it, accordingly fell within it in its entirety; (b) even if the Proclamation of Emergency was valid, Sections 3, 4 and 5 of the Act purported to amend the Constitution of Sarawak in a manner which had been committed by Article 41 of the Constitution of Sarawak to the legislature of Sarawak and was therefore beyond the powers of the Federal Parliament to enact.

The petitioner's first submission would depend on whether the Court could review the validity of a Proclamation of Emergency; was the Proclamation of Emergency justiciable? Article 150, clause (1), clearly provided that,

> If the Yang DiPertuan 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.

Barakbah, the Lord President, felt that, in a Proclamation of Emergency which had been issued according to the Constitution,

> 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.[194]

He further emphasised that

> the Yang DiPertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists it is not for the Court to inquire as to whether or not he should have been satisfied.[195]

Azmi, the Chief Justice, argued similarly.[196] The declaration of non-justiciability suggested that the qualifying words 'whereby the security or economic life of the Federation or of any part thereof is threatened' could not be expected to provide the expected safeguard against abuse of the use of emergency power by the Central Government.

Ong Hock Thye, the Federal Judge, argued differently. He stated that the *Yang DiPertuan Agong*, under Article 41 of the Federal Constitution, must always act on Cabinet advice. Similarly, it was on Cabinet advice

[193] [1969] 1 M.L.J. 119.

[194] *Ibid.*, 122.

[195] *Ibid.*

[196] *Ibid.*, 124.

that His Majesty proclaimed a state of emergency. The Cabinet never denied responsibility of its role in this. It was this Cabinet role, and not that of the *Yang DiPertuan Agong*, he submitted, which the petitioner alleged as a case of fraud in that the proclamation was made, not to deal with a grave emergency whereby the security or economic life of Sarawak was threatened, but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak.[197] He reminded the Court that

> the inbuilt safeguards against indiscriminate or frivolous recourse to emergency legislation contained in article 150 specifically provide that the emergency must be one 'whereby the security or economic life of the Federation or of any part thereof is threatened'. If those words of limitation are not meaningless verbiage, they must be taken to mean exactly what they say, no more and no less, for article 150 does not confer on the Cabinet an untramelled discretion to cause an emergency to be declared at their whim and fancy. According to the view of my learned brethren, however, it would seem that the Cabinet have *carte blanche* to do as they please — a strange role for the judiciary who are commonly supposed to be bulwarks of individual liberty and the Rule of Law and guardians of the Constitution.[198]

While asserting that acts of the executive, especially a Proclamation of Emergency, should be justiciable, he felt that in this case the petitioner had failed to make out a good case that the Proclamation of Emergency was invalid.[199]

To the question of justiciability the Privy Council[200] stated that 'the onus was on the appellant to prove the allegations on which his first submission depended'.[201] Their Lordships felt, however, that the appellant had failed to prove his allegations.

The petitioner's second submission referred to the question of whether, during an emergency, the Federal Parliament could amend the Constitution of a State. Barakhbah, L.P., felt that Clause (5) of Article 150 authorised the Federal Parliament to make amendments to the Sarawak Constitution during an emergency.[202] Azmi, C.J., was of the same opinion, Article 41(1) of the Sarawak Constitution notwithstanding.[203] Ong Hock Thye, F.J., argued that 'the overriding consideration of an emergency which justifies an amendment of the Federal Constitution itself must no less justify

[197] *Ibid.*, 125.

[198] *Ibid.*, 126.

[199] *Ibid.*, 128.

[200] On appeal to the Privy Council. See *Stephen Kalong Ningkan* v. *Government of Malaysia*, [1968] II M.L.J. 238.

[201] *Ibid.*, 241.

[202] [1968] I M.L.J. 122.

[203] *Ibid.*, 124.

an amendment of the State Constitution, so far as may be strictly necessary'.[204]

In the Privy Council, their Lordships felt that the Sarawak Constitution, Article 41(1) notwithstanding, could be amended by Article 150(5) during an emergency.[205] They noted that the agreement and instruments relative to Sarawak's entry into Malaysia showed that

> the parties to that Agreement must have realised that the powers of the Federal Parliament conferred by that article, during the currency of a Proclamation of Emergency, might be used to amend, for the time being, the provisions of the Sarawak Constitution of 1963.[206]

They also commented on the 'width' of Clause (5) of Article 150 which, subject to Clause (6A), authorised the Federal Parliament to make laws 'with respect to any matter' and observed that 'These words could scarely be more comprehensive'.[207] However, in view of the terms of Article 41(1) of the Constitution of Sarawak, they felt that any amendment to Sarawak's Constitution during an emergency should only be temporary.[208]

This case suggested that the Central Government, armed with emergency powers, could significantly affect Centre-State relations. The non-justiciability of the declaration of emergency could indeed lead to abuses in the use of emergency powers by the Central Government.

Conclusion

The Reid Commission and the Federation of Malaya Constitution provided for a Federation of eleven States which were made constitutionally equal in their relations to one another and to the Centre. However, by virtue of the 'special concessions' granted to the three new States, the Federation of Malaysia Constitution created a Federation within which the three new States were made more equal than the original eleven States. What emerged was a two-tier federation system: the Federation of Malaya which federated the original eleven States and the Federation of Malaysia which federated the Federation of Malaya, as a unit, with the three new States. The conferring of 'special concessions' violated the principle, emphasised by the Reid Commission and enshrined in the 1957 Constitution, that all the States under the Constitution should enjoy the same status and rights in their relations to one another and to the Centre.

[204] *Ibid.*, 128.

[205] *Ibid.*, 125.

[206] [1968] II M.L.J. 243.

[207] *Ibid.*,

[208] *Ibid.*

A clearly strong Centre and Central bias had been recommended by the Reid Commission and provided for by the 1957 Constitution. The Central Government had, on several occasions, shown a liberal willingness, despite opposition, to use the powers, especially those within the amendment and emergency provisions, vested by the Constitution. These, together with the decisions by the Courts on the use of such powers, only served to emphasise the overwhelming legislative and, sometimes, executive dominance of the Central Government. In a situation where constitutionally the Central Government is dominant, the 'federalness' of the Malaysian nation will be significantly determined by the self-restraint (or the lack of it) of the Centre in the use of those vast powers, particularly ammending powers, that it commands while conducting its affairs with the States. Since Malayan Independence the complex and interlinking political, legislative and judicial processes have all cast their shadows on the federal idea.

Shafruddin Hashim*

*Associate Professor,
School of Social Sciences,
Science University of Malaysia,
Penang.