MALAYSIA: CONSTITUTION (AMENDMENT) ACT 1983 AND CONSTITUTION (AMENDMENT) ACT 1984

Between August 1983 and January 1984 an extraordinary constitutional drama was staged in Malaysia. On 1 August 1983 a Constitution (Amendment) Bill was given a first reading; before the bill reached the statute book as an Act of Parliament, a written undertaking was given by the Prime Minister to the Rulers, concerning the Bill, in consequence of which a second amendment Act was enacted: the second Act in fact reversing much of what the first Act set out to achieve.

The issues raised by the two measures are of profound consequence for Malaysia, and will no doubt receive the attention they deserve in other places. In this short note it is proposed simply to deal with the major aspects of these items of legislation, and to explain a little of the background in which they were enacted.

It would appear (and here I must rely on guesswork) that the origin of the amending Act of 1983 lay in the need to amend electoral constitutencies, a need culminating in the requirement that the Constitution be amended by 15 December 1983 in order that the Election Commission should then begin the task of delimiting new constituencies for an increased number of members of the House of Representatives. Be that as it may, the opportunity was then taken — as often it is taken — to incorporate in the amending Bill certain other amendments to the Constitution.

We can now turn for a moment to the matter of the office of Yang Di Pertuan Agong, or King: an office to which the holder (who must be a Ruler) is elected for a term of five years, by the Conference of Rulers. An election to the office of King was due in February 1984. No doubt the end of one tenure of office was considered to be an appropriate occasion on which to tie up loose constitutional threads.

With these few considerations in mind, then, we can turn to a consideration of the events that followed the first reading of the Constitution (Amendment) Bill of 1983. The Bill itself was ultimately assented to without amendment, but it is convenient to look at it as a Bill, in the first instance.

II

The Bill consisted of twenty-two clauses, many of which dealt with comparatively minor matters. The major matters dealt with by the Bill can be summarised under several headings, viz.,

a. an increase in the membership of the House of Representatives
b. the establishment of a Supreme Court, with the consequential abolition of the Federal Court and the residual appellate jurisdiction of the Privy Council

c. the constitutional position of the Yang Di Pertuan Agong and the Malay Rulers in relation to their assent to legislation, and
d. the authority competent to declare an emergency.

Insofar as the increase in the membership of the House of Representatives was concerned *(Clause 5)*, all States (including the Federal Territory, but excluding Sarawak and Perlis) were to enjoy an increased representation, the new total membership of the House rising from one hundred and fifty-four to one hundred and seventy-six elected members. This provision was linked with the activities of the Election Commission, a matter no doubt requiring more careful scrutiny than has yet been accorded to the nature of the electoral process in Malaysia: a subject worthy of a thesis, especially if linked with a study of the population of West Malaysia.

The abolition of the residual appellate jurisdiction of the Privy Council was dealt with in *clauses 15 to 18* — provisions presumably to come into force after consultation with United Kingdom authorities. In this context some controversy was aroused by the proposed conversion of the Federal Court into a Supreme Court, so removing one tier in the appellate structure: a matter of grief to the practitioner, even if one of less consequence to the litigant hot for certainty in this our life. Here there was an element of the expedient in the measure.

In relation to the matter of assent to legislation, a crisis developed. It was proposed *(Clause 12)* that where a Bill was not assented to by the Yang Di Pertuan Agong within fifteen days of its being presented to him, the Bill would automatically become law. Exactly what prompted this particular amendment was obscure, but there had been reports of certain Rulers delaying assent to State legislation for prolonged periods. It seemed strange that in relation to a constitutional ruler such as the Yang Di Pertuan Agong (bound by article 40 of the Constitution) such a provision should have been considered necessary; but the proposed amendment was apparently designed to forestall any possible difficulties that might arise at the Federal level, by re-asserting the sovereignty of Parliament and the executive responsible to that body.

In themselves then, the provisions of *clause 12* were odd, but in themselves apparently inconsequential. However, when it was sought to import parallel provisions into the State Constitutions, by way of amendments to the Eighth Schedule to the Federal Constitution (*clause 21* of the Bill), other considerations arose. As devout readers of the Constitution will know, article 38(4) provides that "no law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers". On the face of it, *clause 21* did indeed affect the position of the Rulers — although the point was not beyond argument.

The final major amendment proposed by the Bill sought to transfer the power to declare an emergency from the Yang Di Pertuan Agong to the Prime Minister. To what extent the Yang Di Pertuan Agong is personally involved in the matter of article 150 is indeed a difficult and obscure ques-

tion, although to those of us who hold to the doctrine of the prerogative it is one that is at least comprehensible. In the case of the missing emergency Ordinance (*M. Madhavan Nair* v. *Government of Malaysia* (1975) 2 MLJ 286), a case cited by Mr. Lim Kit Siang in the debate in the House of Representatives upon the Bill, the then Prime Minister made it clear, in an affidavit submitted to the court, that the approval of the Yang Di Pertuan Agong to the questioned Ordinance was given only after he had satisfied himself of the necessity for action. In the debate referred to, Mr. Lim Kit Siang stated that the Government's interpretation of article 150 of the Constitution ("If the Yang Di Pertuan Agong is satisfied. . .") was that of a subjective satisfaction by the Yang Di Pertuan Agong himself: and that, of course, is what the article itself says.

To invest in one individual the power to declare an emergency under article 150 of the Constitution, with all that this implies in the way of overriding State interests, was indeed a formidable and alarming proposal. It suggested a fear of conflict within the Cabinet, in itself a sufficiently disconcerting notion within a society whose existence, and indeed happiness, is based upon the idea of consensus, upon avoidance of confrontation.

The Bill emerged then, as an extraordinary measure, introduced in somewhat extraordinary circumstances: for the local press at first gave scant attention to its provisions. The leader of the opposition, Mr. Lim Kit Siang, was reported in *The Rocket* for October 1983 as saying in the House of Representatives on 2 August 1983 that he understood "that the press had been directed not to report any speeches or debates on the amendments to Article 66 (royal assent) and 150 (power to declare an emergency)." Whether this was in fact so or not, observers of the situation had to rely for a great deal of their information upon reports from journals published outside Malaysia and, much worse, upon local gossip. This is not the manner in which critical constitutional amendments should be made. As Mr. Lim Kit Siang observed in Parliament on 2 August 1983 (in a speech not reported by the daily newspapers) "we seem to be staging a *wayang kulit* where we see the shadows but not the substance, as nobody seems to be brave enough to deal with the real substance of the amendments."

In spite of efforts to minimize the importance of the Bill, its provisions seem to have come vividly to the attention of the Rulers; the King's assent to the measure was not forthcoming; and on 20 November 1983 an UMNO delegation (UMNO being the senior partner in the political alliance constituting the government) met the Rulers and presented proposals for the amendment of the amending Bill. This came in the midst of a whirlwind campaign organised by UMNO, in which the Prime Minister travelled throughout the peninsula, to address public meetings and explain the nature of the basic amendments in the amending bill.

Whether or not the amendments proposed on 20 November were those finally agreed to by the Rulers (if indeed all the Rulers did so agree) is not known: but on the date the Bill received the assent of the Timbalan Yang Di Pertuan Agong a statement was issued by the Istana Tetamu, seat of the Yang Di Pertuan Agong. According to this statement, the royal assent

to the Bill was given in return for a written undertaking from the Prime Minister that a new Constitution (Amendment) Bill would be presented in a special session of both Houses of Parliament —

a. to restore article 150 to what it was before it was amended by the 1983 Bill
b. to repeal the amendment made to the Eighth Schedule by the 1983 Bill, and
c. to amend the amended article 66.

It appears, then that the assent of the King was given to a measure of doubtful constitutional propriety, on condition that its unconstitutional features were remedied as soon as possible. This was perhaps an attractive political solution to the deadlock, but one unlikely to commend itself to any constitutional lawyer.

The Constitution (Amendment) Act 1984 was therefore enacted in pursuance of the written undertaking given by the Prime Minister to the Rulers. The Act-

a. amended article 66 once more
b. restored article 150 to the condition it was in before the amending Act of 1983, and
c. repealed the amendment made to the Eighth Schedule by the earlier Act.

The essential part of the Act, from the federal point of view, lies in the provisions of section 2, designed to implement the undertaking "to amend the amended article 66". Under the new amendment a Bill presented to the King for his assent must be assented to within thirty days after presentation: in default of which, the Bill thereupon becomes law. However, in the case of a Bill other than a money Bill (presumably a Bill certified as such by the Speaker: article 68(6)) the King may send the Bill back to the House in which it originated, with a statement of his objections; each House then re-considers the Bill and, if it is passed by a simple majority (or, in the case of a Bill amending the constitution, by two-thirds of the total membership of each House) the King has another thirty days in which to assent: in default of which, the Bill becomes law. The Prime Minister observed that the provision was "not something strange, but was also part of the constitutions of several countries, including India and Kuwait, a republic and an absolute monarchy respectively" (*The Star*, 10 January 1984).

It will be seen, therefore, that the powers of the King have in one area been curtailed, in another enlarged. Much debate seems to have taken place outside Parliament on the question whether the Prime Minister or the Rulers gained from the exercise. To an admirer of the principles set out in article 40 of the constitution, the question has an element of the absurd. We can say with the Dodo in *Alice in Wonderland* that "*Everybody* has won, and

all must have prizes''. The position of the State Rulers has been left intact, although there has been talk of yet another undertaking (given by no one knows whom) to the effect that State Rulers will not withhold assent to State legislation.

III

All in all, the political consequences of the two Acts are likely to be considerable, the more so, it seems, in the long term. The aspirations of a rising, increasing middle class are likely to be opposed to a continuance of the present powers of the Rulers: but the situation is made more complex (and hazardous) by reason of the law on sedition, which makes it an offence to question "any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of. . . Article 181" (the saving for the Rulers' sovereignty). Indeed, one of the mysteries of the whole affair lies in the question how the matter of the position of the Rulers ever fell into the arena of parliamentary debate, given the provisions of article 63(4) and the Sedition Act (as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970): still less, that public meetings should have been held on the matter. It is not only Alice who finds herself in Wonderland.

There are indeed many curious aspects to this unique matter. That a Bill passed by both Houses of Parliament should be the subject of negotiation between the Rulers and one political party (UMNO) has not escaped critical observation. On the face of it, the procedure was in the nature of a contempt of Parliament; and the event has brought into sharp prominence the question exactly where political power in the country does actually reside.

Another unhappy aspect of the matter has been the rift in society itself. The Government, with a monopoly of the media, presented its own case all too vociferously; the case for the Rulers — and the interests of the Rulers and their States are here concurrent — was never at any time presented, in spite of the fact that many believe that the Rulers, with all their faults, are able to act as a check on politicians. All in all, it is unfortunate that so much political heat was generated over an issue which should have been resolved in a moderate manner; and as its outcome confirms, this could have been done.

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