Constitutionalism – Concept and Application in the Federal and State Governments of Malaysia

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I. Introduction

This article seeks to briefly explore the meaning of constitutionalism in the constitutional system of Malaysia and how this is applied in both the Federal and State Governments.

II. Current Thoughts on Constitutionalism

Described as being in danger of becoming one of the world's forgotten "isms" that is on its way to obscurity,[1] constitutionalism nevertheless remains one of those concepts that are "evocative and persuasive in its connotations, no matter how cloudy it may be in its analytic and descriptive content".[2] Its modern roots stem from the struggles for personal freedom and escape from arbitrary rule in Western Europeand America which have taken place since the sixteenth century. McIlwain

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[1] De Smith, SA, "Constitutionalism in the Commonwealth Today" (1962) 4 *Malayan Law Review* 205. See also Schochet, GJ, "Introduction: Constitutionalism, Liberty and the Study of Politics" in Pennock, JR & Chapman, JW, (eds), *Constitutionalism* (New York: New York University Press, 1979) I at p 5.

[2] Grey, TC, "Constitutionalism: An Analytic Framework" in Pennock & Chapman, *id* at p 189.

asserts that the concept has always centred upon the reconciliation between law and government, between restrictions on government and the need to govern, right up to the present day.[3] The history of constitutionalism according to Loewenstein, is nothing but the quest of political man for the limitation of the absolute power exercised by the wielders of power, and "the effort to substitute for the blind acceptance of factual social control the moral or ethical legitimation of authority".[4] Historically it has been described as "the halfway house between traditional absolutism of the royal establishment and the classes affiliated with it and the modern era of constitutional democracy".[5]

Professor De Smith offers us a definition which encapsulates its general meaning today:

> ... [C]onstitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. The rules may be at one extreme (as in the United Kingdom) mere conventional norms and at the other directions or prohibitions set down in a basic constitutional instrument, disregard of which may be pronounced ineffectual by a court of law. Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.[6]

Most important and most persistent in this idea is one essential quality: the legal limitation of government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead

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[3] McIlwain, CH, *Constitutionalism Ancient and Modern* (revised edition), (New York: Cornell University Press, 1947) at p 139.

[4] Loewenstein, K, *Political Power and the Government Process* (Chicago: University of Chicago Press, 1957) at p 124.

[5] *Id* at p 71.

[6] De Smith, *supra*, n 1 at p 205.

of law.[7] It is the limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism. An arbitrary government however benevolent would fall outside this meaning.[8] Constitutionalism presupposes the idea of restraints and the idea of restraints grows out of the experience of an order of moral reality symbolised concretely in the west through Greek and Stoic philosophy and through Judeo-Christian religious tradition.[9] It is because of the fact that western constitutionalism is rooted in and to some extent dependent upon those basic philosophical and religious convictions that there is difficulty in applying it universally.[10]

Constitutionalism gives recognition to the necessity for government and in many modern governments a constitution is always present. However, having a constitution does not imply the existence of constitutionalism. This habit of endowing oneself with a written constitution has become the standard practice of both authoritarian regimes and constitutional democracies alike. Therefore the term "constitutional" shall be used differently from "constitutionalism" because even autocracies are "constitutional" and whether the power process conforms in substance to the requirements of constitutionalism depends on the actual arrangements for the exercise of political power.[11]

Constitutionalism is based simply on the proposition that restraints are necessary to ensure that the power which is needed for effective governance is not abused by the people who are exercising that power. The level or amount of governmental activity is not necessarily

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[7] McIlwain, *supra*, n 3 at pp 21-22.

[8] Nwabueze, BO, *Constitutionalism in the Emergent States* (London: Fairleigh Dickonson University Press, 1973) at p 1.

[9] Germino, D, "Carl J Friedrich on Constitutionalism and the 'Great Tradition' of Political Theory" in Pennock & Chapman, *supra*, n 1, 19 at p 24.

[10] Friedrich, CJ, *Constitutional Government and Democracy* (Massachusetts: Blaisdell Publishing Co, 4th ed, 1968) at p 582.

[11] Loewenstein, *supra*, n 4 at p 72. However some constitutional writers have ascribed a deeper meaning to the term "constitutional government" which means a government limited by the terms of a constitution and is opposed to arbitrary government. See for example Wheare, KC, *Modern Constitutions* (Oxford: Oxford University Press, 2nd ed, 1966), especially Ch 9.

incompatible with effective restraints. Friedrich is of the opinion that constitutionalism may even exist in a socialist system as long as there are effective restraints and provided that the concentration of power in one group or one man is guarded against.[12] A government which actively intervenes in the activities of society in the running of the state is not necessarily lacking in constitutionalism especially when it imposes upon itself restraints to manage those activities in a way which prevents abuse of power.

Self-imposed restraint is synonymous with constitutionalism. Its continued existence, whether there are institutions of judicial review or not, depends less upon the institutional checks provided than upon the commonly shared knowledge that there are restraints, and upon willingness of individuals voluntarily to submit to those restraints.[13] Accordingly, constitutionalism will not work unless the key players themselves agree to be restrained and also realise the importance of those restraints. This brings the question as to why would any political unit want to reduce its full sovereignty and set limits on its own future behaviour?[14] The answer to a constitutionalist would be obvious. Politicians, being human beings are inclined to be dictated by passion or other ulterior motives. They may be tempted to milk their positions for private purposes. The expected duration of stability and certainty of political institution which is an important value in itself, will allow for long-term planning that benefits present and future generations alike. There are no rigidities to be feared here as constitutionalism allows for change but change which follows rules. Change is not something to

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[12] Friedrich, *supra*, n 10 at pp 35-36.

[13] Germino, *supra*, n 9 at p 22. He was quoting from Hallowell, JH, *The Moral Foundation of Democracy* (Chicago: University of Chicago Press, 1954) at pp 63-64.

[14] A related question is what right one generation has to limit the freedom of action of its successors, and why the latter should feel bound by constraints laid down by their ancestors. These questions were addressed in Elster, J & Slagstad, R (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) where the analogy of marriage was used: Why for instance, would two individuals want to form a legal marriage instead of simply cohabiting, where their future freedom of action would be limited, and separation would be difficult? The obvious answer offered is that they would want to protect themselves against their own tendency to act rashly in the heat of passion and also to be a motivation for making the partnership work.

be avoided, but is of the very "warp and woof" of modern constitutionalism, according to Friedrich.[15] The question, therefore, he asks is how to turn such change to good account, how to adopt political life to the changing social context in order to secure the greatest satisfaction for the people.[16]

In constitutionalism, its fundamental objective is to achieve the greatest satisfaction for the people and this can be achieved through the proper regulation of government activities expressed mainly along the lines of a constitutional democracy.[17] Murphy argues that democratic theory and constitutionalism need each other.[18] They share the same ideals in protecting human worth and liberty but they may differ on how to achieve that. He says:

> By limiting legitimate governmental action, constitutionalism tries to lower the stakes of politics, to restrict the risks to liberty and dignity of being a member of political society. Democratic theory attempts to limit those risks by protecting the right to share in govermental processes.[19]

To enjoy reasonably effective but still limited government, he says, many countries have adopted a mix of constitutionalism and democratic theory which provides for a wide measure of popular political participation and simultaneously restricts the people's government by a variety of institutional means.[20] According to De Smith, the conditions

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[15] Friedrich, *supra*, n 10 at p 36.

[16] *Id* at p 6.

[17] Nwabueze, *supra*, n 8 at pp 10-11. The term "constitutional democracy" is itself controversial with constitutionalism and democracy always being a subject of intense discussion because there exists between them a deep irreconcilable tension. For a discussion of this disagreement see Holmes, S, "Pre-commitment and the paradox of democracy" in Elster, J & Slagstad R (eds), *supra*, n 14 at pp 195-240. This study supports Holmes' argument that constitutional restraint reinforces democracy and both are mutually supportive.

[18] See Murphy, WF, "Constitutions, Constitutionalism and Democracy" in Greenberg, D, (*et al*) (eds) *Constitutionalism and Democracy – Transitions in the Contemporary Word* (New York: Oxford University Press, 1993).

[19] *Id* at p 6.

[20] *Ibid.*

that must exist for there to be constitutionalism are accountability of government to an entity distinct from itself, frequent freely held elections, freedom for political groups to campaign to provide an alternative government, and effective legal guarantees of basic civil liberties enforced by an independent judiciary.[21] According to McIlwain, in return for the faith the people have in the government's performance of its essential duties, all that is required from that government is the ancient legal restraint of a guarantee of civil liberties enforceable by an independent court working in tandem with the modern concept of the full responsibility of a strong government to all its people at all times.[22] Full responsibility presupposes freedom on the part of the people at all times directly or through their elected representative to question or criticise the action of the government; a duty on the part of the government to explain or justify its conduct; and most of all, the availability of sanctions for wrongful or unjustifiable action by the government.[23]

Following Loewenstein, on a more technical level, constitutionalism today operates with two kinds of control.[24] They are the intra-organ control, if the device operates within the organisation of an individual power holder and the inter-organ control if the control comes from several interacting power holders.[25] Controls should therefore, come from within the institutions of power and from outside it, in order for the controls to be effective.[26] A simple example is a bicameral legislature in a country practising constitutional supremacy where within it an

[21] De Smith, *supra*, n 1 at p 205, and he went on to say that " ... I am not easily persuaded to identify constitutionalism in a country where any of these conditions is lacking". See also Halperin, M, "Limited Constitutional Democracy: Lessons from the American Experience" (1993) Vol 8 *The American University Journal of International Law and Policy* 523.

[22] McIlwain, *supra*, n 3 at pp 141-146. The question of a strong efficient government as opposed to an extreme view of political responsibility whereby public opinion determines exclusively government policies, is always an issue in modern constitutionalism.

[23] Nwabueze, *supra*, n 8 at p 11.

[24] For a full explanation of these controls, see part 2 of Loewenstein, *supra*, n 4 at pp 164-261.

[25] *Id* at p 164.

[26] Loewenstein emphasises that an essential characteristic of constitutional government is the "depersonalised" exercise of political power which means power is institutionalised. Power derives not from the individual but from the institution or office whose functions the individual exercises.

upper house checks the lower house, and from without the courts check any laws which are passed *ultra vires* the powers of that legislative body.

Democratic constitutionalism operates with four power holders – the executive, the legislative assembly, the courts and the electorate.[27] Each should have their respective intra-organ controls and each should also act as a control over the other organ of power in an inter-organ fashion.

Thus, the main components that are essential in order for modern democratic constitutionalism to thrive are:

i. an electorate which is free to choose;
ii. a legislative assembly chosen by the electorate which has functional autonomy;[28]
iii. an executive which is accountable to this assembly;[29]
iv. an independent judiciary with powers of judicial review to check on the legality of the decisions of the assembly and the executive; and
v. the protection of basic civil liberties where freedom of expression and information is made a priority.

However, the American experience from which modern democratic constitutionalism has learnt a great deal provides us with a pre-requirement in order for the above processes to work, which is liberty of the people to consent to them in the first place.[30] The components aforementioned, however noble they may be, require approval first from a free people, in order for them to obtain legitimacy and more importantly for them to entrench themselves in the political system of that society for as long as the people need their protection.[31]

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[27] Loewenstein, *supra*, n 4 at p 185.

[28] Which implies the assembly's freedom to manage its legitimate internal affairs free from outside interference.

[29] Thus indirectly accountable to the electorate.

[30] See Pilon, R, "On the First Principles of Constitutionalism: Liberty then Democracy" (1993) 8 *The American University Journal of International Law and Policy* 531.

[31] For example, this approval may be obtained through a written constitution made and approved by a constituent assembly.

Friedrich's contribution to our understanding of constitutionalism unmasked another important characteristic. Constitutionalism is dependent for its initial emergence and continued existence on the ability of constitutional governments to govern effectively.[32] Without effectiveness, the institutions and processes of control, already by themselves a hindrance to the smooth running of government, will find it hard-pressed to continue to exist.[33]

Effective governments in this modern era will also affect the way constitutionalism is perceived and the way it operates. Key questions that may also be asked concern the way modern culture, technology, political organisation, and the media have evolved and affected modern constitutionalism.[34]

III. Sources of Malaysian Constitutionalism

Modern constitutionalism in Malaysia has its roots in the British system. The Westminster model of parliamentary democracy, described by De Smith as "desperately fragile and precariously balanced", however remains the most sought after of Britain's exports to the countries of the Commonwealth.[35] Malaysia is no exception and looking at the dominance of British influence in the composition of the membership of the Constitutional Commission set up to draft the Federal Constitution, and its terms of reference, this comes as no surprise.[36]

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[32] Sigmund, P, "Carl Friedrich's Contribution to the Theory of Constitutionalism – Comparative Government" in Pennock & Chapman, *supra*, n 1, 32 at p 36.

[33] *Id* at p 41.

[34] See Balkin, JM, "What is Postmodern Constitutionalism" (1991-1992) 90 *Michigan Law Review* 1966.

[35] De Smith, SA, "Westminster's Export Model; The Legal Framework of Responsible Government", (1961-1963) 1 *Journal of Commonwealth Political Studies* 2.

[36] For a very brief history of the Malaysian Constitution see Hickling, RH, *Essays in Malaysian Law* (Petaling Jaya: Pelanduk, 1991) at pp 76-96. For a recent study on the history of the Federal Constitutional see Fernando, JM, *The Making of the Malayan Constitution* (Kuala Lumpur: MBRAS, 2002).

The Malaysian Constitution would fall under the category of "post-colonial constitutionalism",[37] and is thus highly derivative as it had borrowed extensively from the constitutional institutions and developed practices of its colonial power. This was inevitable as the process of de-colonisation would never have progressed as quickly as it did if the colonial power was unsatisfied or unfamiliar with the institutions and practices that were to be set up under the new constitution. Constitutionalism in Malaysia as in other Asian countries is a western-derived concept in respect of the way we understand it to mean today.[38]

However, Britain itself is without a higher "constitutional" law proclaimed in a written constitution. The rule of law, its ideas and values which protect important liberties and uphold certain standards of justice and fairness, find expression in the common law and in this regard the unwritten common law is the constitution.[39] Malaysia derives a lot of its constitutional principles from Britain, although practising a more documentary form of constitutionalism. A written constitution was adopted which formalised some of the institutions of control which existed in Westminster. However, this documentary form of constitutionalism lacks the strength of control of its tradition-bound Westminster model. Written constitutions have been criticised as merely identifying a set of formal political institutions rather than an ideology.[40]

Turning momentarily to the United States Constitution, a written constitution which has been known for its ideological influences on

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[37] McWhinney, E, *Constitution-Making*, (Toronto: University of Toronto Press, 1981) at p 4.

[38] Beer, LW, *Constitutionalism in Asia* (Los Angeles: University of California Press, 1974) at p 4, where he says there is no such thing as "Asian Constitutionalism". There is however meaning in "constitutionalism in Islam" of which there will be a brief discussion later in this subheading.

[39] Allan, TRS, *Law, Liberty and Justice – The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) at p 4.

[40] Schochet, GJ, "Introduction: Constitutionalism, Liberalism and the Study of Politics" in Pennock & Chapman, *supra*, n 1 at p 5.

other constitutions,[41] if we look merely at the physical structure of the political institutions, the United States' influence on Malaysian Constitutionalism is quite infinitesimal. The Federation of Malaysia operates under a distinctive system contrasting clearly with the American federal system. A cursory view would of course lead us to the conclusion that the United States Constitution had very little influence on Malaysian constitutionalism.[42] However, a closer look would reveal that there is more to it than meets the eye. For example, the American Bill of Rights derived its inspirations and historical background from English common law principles and tradition of protection of individual rights.[43] Weeramantry has faulted Asian nations for not recognising the influx of American ideas into their constitutions, for example India (which later became a model for Malaysia). He noted that:[44]

> America, the first country in the modern world wherein formulations of human rights and dignity received state recognition without reservation or class distinction, has thus many claims to leadership concerning human rights. It would be ungracious indeed for the third world to discount the importance of this fact, which contributed so signally to the stream of revolutionary thought which coursed through the nineteenth and twentieth centuries into the liberation movements of our age. The links between Thoreau and Gandhi, between the

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[41] For an analysis of this influence, see Beer, LW, "Constitutionalism in Asia and the United States" in Beer, LW (ed), *Constitutionalism in Asia: Asian View of the American Influence* (Berkeley: University of California Press, 1979) and Billias, GW (ed), *American Constitutionalism Abroad* (Connecticut: Greenwood Press, 1990). For further reading, see Henkin, L & Rosenthal, AJ, (eds), *Constitutionalism and Rights – The Influence of the United States Constitution abroad* (New York: Columbia University Press, 1990).

[42] See Mohd Suffian Hashim, "The Malaysian Constitution and the United States Constitution" in Beer, *supra*, n 41.

[43] Nwabueze, BO, *Ideas and Facts in Constitution Making* (Ibadan: Spectrum Books Ltd, 1993) at p 102.

[44] In Weeramantry, CG, *Equality and Freedom: Some Third World Perspectives* (Colombo: Hansa Publishers Ltd, 1976) at pp 67-68, which was quoted in Beer, *supra*, n 41 at p 11.

> American Constitution and the Indian and the host of others patterned on it are too real to pass without due recognition.[45]

Once a written constitution has been adopted (such as in Malaysia), then principles of interpretation, the role of the courts, the powers of the executive, check and balance and also more importantly the constitutional rights of the individual become issues in which there is readily available an abundance of relevant American material.[46] There is unfortunately, a difference between having an abundance of relevant material and being actually influential. The American experience is indeed inspirational, but in the realm of written constitutions there is always the danger of literal interpretation being taken to extremes which results in inspirations being left as just that.[47] Nevertheless, Beer has summarised eight main areas of American constitutionalism which has been most relevant in Asia:[48]

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[45] Iyer (of Singapore) suggests that even where at present American influence is not obvious, western and in particular American domination of the world press and media assures attention to American ideas. He says: "[W]hat accounts for the contemporary influence of American ideals is the extensive coverage American constitutional and legal discussion received in the world press and media, I do think this is a decisive factor. Many people in Asia know more about US constitutional matters than they do about, perhaps [those of] any other foreign nation.": Iyer, TKK, "*A Review of Beer, Constitutionalism*" (1981) 23 *Malaya Law Review* 208 at pp 210-211.

[46] See Beer, *supra*, n 38 at p 19, where he summarised that the American influence in Asian constitutionalism is manifest in the utilisation of American sources, from the Declaration of Independence and the Constitution of the United States to the Gettysburg Address to more recent judicial decisions and in the direct or indirect adaptation of American institution such as legally protected liberty and judicial review.

[47] See Halperin, M, "Limited Constitutional Democracy: Lessons from the American Experience" (1993) 8 *American University Journal of International Law and Policy* 523, which discusses the experience of the USA in what is termed as a limited constitutional democracy. The writer lists down four essential elements in order for the American experience to work *ie* free election, legitimacy of political opposition, limits on arbitrary arrest, detention and punishment, and protection of minority rights. The independence of the judiciary and the independence of private organisations which protect rights are also added to the list as essential institutional safeguards in order to make the four elements mentioned earlier to work.

[48] Beer, LW, "The Influence of American Constitutionalism in Asia" in Billias, *supra*, n 41 at pp 113-117.

i. a division of governmental power;
ii. an independent judicial system;
iii. periodic democratic elections through a secret ballot;
iv. governmental authority in ensuring peace and security within limits defined by the human rights of citizens;
v. governmental involvement in socio-economic problem solving in order to meet basic needs of citizens;
vi. freedom of peaceful expression;
vii. procedural rights in criminal and civil justice given in equality to all; and
viii. establishment of supremacy of the constitution.

Like other Asian nations, Malaysia has found fault with American notions of absolute freedom of expression, property rights and separation of religion and the state, but has found some inspiration in the right of self-government and the pursuit of economic justice.[49] Former Lord President of the Federal Court of Malaysia, Mohammad Suffian Hashim, in comparing the Malaysian Constitution with the United States Constitution, found one important common thread which is pivotal towards the reasons behind the extent of constitutionalism practised in Malaysia. He said:[50]

> During our limited experience we have found that the contents of a constitution are important, but more important is the spirit of the men at the top whose duty is to carry out its provisions. Do they believe in the system? Were they honest when they swore to uphold the constitution and to uphold the rule of law? Do they believe in the independence of the judiciary and the value of a strong bar, incorruptible and fearless? If they do, then the constitution is viable and there is hope and a future for the country. But if they are rogues or charlatans, determined only to satisfy their own personal and family ambitions, regardless of the wider interests of the nation, then the

[49] See opinions of Asian writers on this in Beer, *supra*, n 41. See also Myint Zan, "'Western' Human Rights, Democracy and 'Asian' Culture: Is There Such a Conceptual Barrier?" (1999) XXVIII No 4 *INSAF* 35 and Davis, MC, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) II *Harvard Human Rights Journal* 109.

[50] Mohd Suffian Hashim, *supra*, n 42 at p 139.

> country will head toward the abyss – no matter how long and hard its founding fathers laboured to write the most nearly perfect constitution in the world.

Written constitutions also need to have behind them people in power who believe in the principles contained either expressly or impliedly in the words of the constitution. Without this conviction, no amount of fanciful words or inspiration from other model constitutional systems will serve to create for them the level of constitutionalism that is desired in a constitutional democracy.

Some aspects of constitutionalism practised in the United States find place in Malaysia through their similarity with British constitutionalism. Although British and American institutions and structures contrast starkly with each other, the ultimate congruence between the two systems lies in the systems of liberty and the culture of a free society.[51] It shows that although there are striking differences between the structure of authority and the distribution of power between the Parliamentary system on one hand and a Presidential system on the other, both systems can achieve the same environment of liberty and responsible government. Malaysia in adopting the Westminster style of government is, therefore, not at all precluded from receiving American style constitutionalism.[52]

Unlike written constitutions where individual rights are deductions drawn from the principles of the constitution, British constitutionalism is based on common law whereby the principles of the constitution are induction or generalisations based upon particular decisions on rights of given individuals pronounced by the courts.[53] The tendency in Britain has always been to perceive the constitution as a legal order subject to, and dominated by, an unrestrained and all-powerful sovereign Parliament, through which an overwhelming authority can be achieved

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[51] See Starr, KW, "Here and There: A Brief Reflection on US and Britsh Constitutionalism" (1992-1993) 23 *Cumberland Law Review* 193.

[52] Judicial review of legislation is one example, which is provided for by the Federal Constitution via Article 128(1).

[53] Allan, *supra*, n 39 at p 4.

by a government with a majority of seats in its lower house. This viewpoint, which would make it difficult to speak of the British polity as a constitutional state grounded in law, is quickly corrected by the existence of the ideological basis of the British Constitution which is that political sovereignty rests with the people and that Parliament exercises its legal sovereignty in recognition of this political authority by being composed in part of the representatives of the people chosen in an independent election.[54] An independent judiciary is instrumental in interpreting the law and acting as a guardian for justice, liberty and fairness which is deeply rooted in the common law.[55]

A legal order constructed on British constitutional lines necessitates a division of institutional competence between the main organs of government. It also requires an allegiance to a political philosophy which is grounded in existing British constitutional tradition linked with certain basic institutional arrangements such as the notion of equality and an equal voice for all adult citizens in the legislative process through universal suffrage. Certainly all of them are British notions of the rule of law.[56]

No discussion of present day Malaysia would be complete without reference to Islamic influences as the country is in a constant grapple with Islamic resurgence and as more and more institutions are "islamicised".[57] Hence, a possible third source for Malaysian constitutionalism conceivably for the future would be Islam. For the purpose of this study, a brief insight into Islamic constitutionalism will

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[54] Allan, TRS, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44(1) *Cambridge Law Journal* 111 at p 129.

[55] For an interesting analysis of current British Constitutionalism, see Allan, *supra*, n 39, especially Ch 1 which deals with a more ideal look at the courts and common law in relation to constitutionalism.

[56] Allan, *supra*, n 39 at pp 21-22. For further readings on this, see Raz, J, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195; MacCormick, N, "Jurisprudence and the Constitution" (1983) *Current Legal Problems* 13; Allan, *supra*, n 39 at Ch 2. For an in-depth study as to what extent Malaysia has followed the lead of the British in the rule of law, see Rais Yatim, *Freedom under Executive Power in Malaysia* (Kuala Lumpur: Endowment Publication, 1995).

[57] For an excellent insight into the Islamisation of Malaysia in this context, see Harding, A, "The *Keris*, The Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia" (2002) 6 *Sing JICL* 154.

only be done in respect of its adaptability and similarity to the meaning of constitutionalism.[58] The Islamic system of government is by itself sufficiently flexible as to admit the most democratic structures.[59]

Al-Hibri propounds in her article that the Islamic system of governance that was left to the Muslims to develop in accordance with:

i. the dictates of their own epoch, customs and needs, and
ii. the few basic but flexible and democratic divine rules,

was never really fully developed especially with the 'closing of the door' of *ijtihad* (opinion) in the tenth century.[60] Thus, attempts by Muslims to improve the democratic character of the Muslim state, which includes limiting the powers of the rulers in accordance with the needs of its people, need not run foul of the rule of Islamic law, but may in fact enhance it.[61]

Fadlalla summarised the essential features of constitutionalism in Islam.[62] They are the objective of the state, its limited sovereignty, the concept of *shura* (consultation), the right to disobedience, the role of public opinion, the independence of the judiciary and the protection of human rights.

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[58] See Al-Hibri, AY, "Islamic Constitutionalism and the Concept of Democracy" (1992) 24(1) *Case Western Reserve Journal of International Law*, 10; Fadlalla, AS, "Constitutionalism and the Islamic Theory of the Constitution" in Doi, ARI, (ed), *Constitutionalism in Islamic Law* (Zaria: Centre for Islamic Legal Studies, 1977) 1; Doi, ARI, "The Principle of Democracy and Consultation (*shura*) in the 'Earliest Constitution'" in Doi, (ed), *Constitutionalism in Islamic Law* (Zaria: Centre for Islamic Legal Studies, 1977) 7, Shad Faruqi, "Democratic Constitutionalism in Islam and the Modern State of Malaysia" (1999) *Jurnal Fikrah* 1.

[59] Al-Hibri, *id* at p 20.

[60] *Id* at p 25. This, according to the writer, misled Muslims to utilise older and sometimes outdated forms of political institutions for their system of government.

[61] *Id* at p 27.

[62] Fadlalla, *supra*, n 58 at p 5.

The concept of *shura* which underlies the Islamic system of government has five principles:[63]

i. There is a right of expression and information, and protest for parties involved in any dispute.
ii. The person managing the affairs of the State should be appointed by express approval of the people without coercion, intimidation, bribery, trickery or deceit.
iii. The advisers or counsellors of the Head of Government should have full confidence of the people and should prove worthy of it.
iv. The counsellors should give opinion based on their knowledge and conscience in total freedom.
v. The advice or decision by the counsellors, once unanimous or in majority should be accepted by all without reservation.

These principles of *shura* may fit quite comfortably into a democratic parliamentary system of government, and, together with an independent judiciary resemble quite closely, in principle, a modern constitutional democracy. The difference of course, lies in where the sovereignty rests, which is with God under Islamic law. Another major difference is the substance of human rights protected under Islamic law, where the approach is a more community-oriented one whereby a balance is always struck between the rights of the individual and the rights of the community with the underlying concern being always the protection of the faith.[64]

The Islamic State is not a theocracy but a civilian State.[65] Therefore it is not divinely ordained. Islamic Constitutionalism is thus an area open to initiative and *ijtihad*. As discussed earlier, the pattern of Islamic Constitutionalism is one of implementation of the *Shariah* through a limited government whose powers are defined by the Constitution. The government is a consultative one which is committed

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[63] Doi, *supra*, n 58, at p 26.

[64] See Shad Faruqi, *supra*, n 58.

[65] Mohammad Hashim Kamali, "The Islamic State and its Constitution", in Noraini Othman (ed), *Shari'a Law and the Modern Nation-State* (Kuala Lumpur: SIS Forum Malaysia Berhad, 1994) at pp 45-46.

to the ideals of justice and equality.[66] This flexibility of constitutionalism in Islam is to be found under the doctrine of *al-Siyasah al-Shariah* or *Shariah* – oriented policy which allows the government to use its discretion to take measures in the interest of a good government and the public good.[67]

Mohammed Hashim Kamali summarises the concept of a limited government in Islam excellently where he finds all the basic ingredients found in "western" constitutionalism.[68] He explains that although sovereignty lies with God, the government has been given a trust under a trusteeship to protect the faith and to regulate the affairs of its citizens in accordance with the *Shariah*. The *Shariah* lays down the terms of this trust which emphasises "justice, consultation in public affairs, fulfillment of rights and obligations, and protection of the five values of life, faith, intellect, lineage and property".[69] The *Shariah* is administered with justice as its objective by an independent judiciary which upholds and protects the rule of law. The Islamic Constitutional theory, says Kamali is "explicit on the principle of limitation of power".[70] Arbitrary rule has no place in an Islamic State as the basis of all decisions and actions in an Islamic polity should not be at the whims and caprices of an individual but the *Shariah*.[71]

The similarities in principles and ideals between Islamic constitutionalism and Western constitutionalism make it a more attractive and acceptable source for constitutionalism in Malaysia. Already some of the mechanisms found in the Islamic model are practised in some of the States of the Federation.[72] This indicates an important future role for it.

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[66] *Id* at p 53.

[67] Mohammad Hashim Kamali, "The Limits of Power in an Islamic State" *Islamic Studies* (1989) 28:4 323 at p 346.

[68] *Supra*, n 67.

[69] *Id* at p 327.

[70] *Id* at p 332.

[71] Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982) at p 128.

[72] See the experiences of the states of Kelantan and Terengganu.

This insight into the sources of the Malaysian constitutionalism illustrates its receptivity to foreign ideas. This however, should not detract the value of the view that a constitutional system should evolve out of the political genius of a particular society. Harding emphasised the plural nature of Malaysian constitutionalism, a mix of both foreign and local experience.[73] He also pointed out that maturity has not been achieved therein and thereupon a great deal has to be done to identify the direction Malaysian constitutionalism is heading.[74] Constitutionalism, in the final analysis, has to fit into the political, legal, economic, cultural, technological and social objectives of a particular nation.[75] Thus, Malaysian constitutionalism is still in the process of defining itself.

IV. The Provisions of the State Constitutions[76]

The purpose of this part of the article is to outline the salient provisions of the State Constitutions which have a bearing on the present discussion on constitutionalism.

The concept of the supremacy of the constitution, practised at the federal level through Article 4(1) of the Federal Constitution, is a vital element of constitutionalism in written constitutions. Without a supremacy clause, the constitution lacks command especially if it provides for and is the source of authority for the vital organs and institutions of government. Unfortunately, only four of the State Constitutions have supremacy clauses *ie*, Melaka, Pulau Pinang, Sabah and Sarawak, each provided for under Article 27 of their respective constitutions:[77]

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[73] Harding, A, *Law, Government and the Constitution in Malaysia* (London: Kluwer Law International, 1996) vii.

[74] *Ibid.*

[75] *Ibid.*

[76] As the State Constitutions are substantively similar to each other with regards to the machinery of government, all references to the provisions of the Constitutions shall mean to include all the State Constitutions unless stated otherwise. Reference to a particular Article number of the State Constitutions whether in the text or footnotes shall only be made when it is relevant to do so and certain State Constitutions will be used as examples for brevity.

[77] All four States were given almost identical constitutions to facilitate their entrance into the Federation as they did not have their own constitutions.

> Any enactment passed on or after Malaysia Day which is inconsistent with this Constitution shall to the extent of the inconsistency, be void.

Although the heading of Article 27 of these constitutions is styled "Supremacy of the Constitution", the provision is slightly different from Article 4(1) of the Federal Constitution[78] which declares the Federal Constitution to be the supreme law while Article 27 does not and added to this is the fact that the other nine States do not have such a provision. This indicates the insignificance of Article 27 ideologically, and that it was intended merely to nullify inconsistent enactments of the State Legislature.[79]

The State Constitutions establish an elected State Legislature and the procedures thereof, for each State called a State Legislative Assembly.[80] The provisions in all the State Constitutions are similar. An independent election in accordance with the provisions of the Federal Constitution will determine the composition of the single chamber assembly.[81] The qualification and disqualification of members follow largely the mould of the Federal Constitution and is detailed out in an identical fashion in all of the State Constitutions.[82]

The position of the Speaker in the State Constitutions is now similar to the Federal position. The States have now adopted the provision that

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[78] Which provides that, "This Constitution is the supreme law of the Federation and any law passed after Merdeka day which is inconsistent with this Constitution shall to the extent of the inconsistency, be void".

[79] A further discussion on supremacy can be found in the next subheading.

[80] Johor: Articles 14-35 (Second Part), Kedah: Articles 44-63, Kelantan: Articles 28-51, Melaka: Articles 10-27, Negeri Sembilan: Articles 47-68, Pahang: Articles 17-39 (Part II), Pulau Pinang: Articles 10-27, Perak: Articles 28-51, Perlis: Articles 44-63, Sabah: Articles 13-27, Sarawak: Articles 13-27, Selangor: Articles 61-83 and Terengganu: Articles 26-49 (First Part).

[81] Following the provisions of the State Constitutions with respect to Part VIII of the Federal Constitution.

[82] See Article 48 of the Federal Constitution.

the Speaker need not be elected from amongst the members of the Assembly provided that he is a person who is qualified to be a member.[83] This provision is ostensibly to ensure impartiality and fairness in the running of the proceedings of the chamber. However, none of the State Assemblies have elected an outsider to be a Speaker. The reason behind this provision[84] is apparently to strengthen the government of the day by having all of its members on the floor debating and voting, functions which a Speaker is restricted from performing.[85]

The State Constitutions of Johor, Kelantan, Pahang, Selangor and Terengganu contain a schedule which outlines the privileges and powers of the Legislative Assembly.[86] It sets out, most importantly, the freedom of speech and debate:

> There shall be freedom of speech and debate or proceedings in the Assembly and such freedom of speech and debate or proceedings shall not be liable to be impeached or questioned in any court or tribunal out of the Assembly.[87]

Thus, the immunity of members from criminal or civil proceedings for anything done or said before the Assembly although guaranteed, however, is subject to the provisions of the Sedition Act 1948 or any

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[83] In 1995 and 1996, the States which did not have this provision have amended their constitutions to allow for this.

[84] Which was provided by the Speaker of the Penang State Legislative Assembly in an interview with him on the 11 September 1996.

[85] A Speaker may not take part in debates and will only be allowed a casting vote to avoid an equality of votes.

[86] Entitled "Privileges and Powers of the Legislative Assembly". Kedah, Melaka, Negeri Sembilan, Pulau Pinang, Perak, Perlis, Sabah and Sarawak do not have such a schedule to their constitutions. Generally these powers and privileges can be regulated by the Assembly but may not in substance exceed those of the Federal House of Representatives. See for *eg* Article 25 of the Sabah State Constitution.

[87] This follows in the line of the provisions of Article 63 of the Federal Constitution and is subject to the Sedition Act 1948 or any law passed under Article 10(4) of the Federal Constitution.

law passed under Article 10(4) of the Federal Constitution and this restricts to a certain extent the freedom of speech given to members.[88] The schedule also contains the powers of the Assembly to order attendance of witnesses and production of documents before the Assembly or the Committees of the Assembly.

The summoning, prorogation and dissolution of the Legislative Assembly is crucial in determining that a democratically elected government is in place all the time. The Legislative Assembly shall, unless sooner dissolved, continue for five years from the date of its first sitting and at the expiry of this period, will automatically dissolve. Upon the dissolution, the Constitutions prescribe that a general election be held within sixty days from the date of the dissolution and the new Assembly will be summoned to meet not later than one hundred and twenty days from the date of dissolution. Six months is the maximum time allowed between the last sitting in one session and the date appointed for the first sitting of the Assembly in the next session.

The provision of the State Constitutions that gives the Legislative Assembly the most authority in terms of a supervisory role over the Executive which is the most powerful arm of the government, is the one that provides that the State Executive Council or the State Cabinet is collectively responsible to the Legislative Assembly. The fusion of the Executive and the Legislature through the former being members of the latter facilitates in theory this process of responsibility,[89] as members of the Executive are subject to questions from the members of the Legislative Assembly.

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[88] The Sedition Act 1948 makes it an offence for anyone including members of the Legislative Assemblies who utter any seditious words having a seditious tendency which is defined in s 3(1) of the Act. These wide provisions include bringing hatred to the government or the administration of justice in Malaysia, promoting feelings of hostility between races or classes of the population and questioning any matter which is regarded as sensitive or protected under the Constitution. See the case of *PP v Mark Koding* [1983] 1 MLJ 111.

[89] The State Constitutions provide that the Chief Minister and his Executive Council or Cabinet be appointed from amongst the members of the Legislative Assembly.

Financially, the legislature controls all taxes, as no taxes or rates can be levied for the State except by or under the authority of law. An annual financial statement shall be laid before the Assembly every year showing all financial transactions entered into by the State. All State Legislative Assemblies also have a Public Accounts Committee which is the financial watchdog of the Assembly, in charge of examining the accounts in respect of the financial year.[90]

The executive branch of the government is headed by the Chief Minister who is appointed by the Ruler or Governor of the State in the latter's discretion, and is a member of the Legislative Assembly who can command the confidence of a majority of the members of the Assembly. In order to be absolutely clear the Sabah State Constitution goes further by guiding the discretion of the Yang diPertua Negeri (Governor) through the identifying of the likely person to be appointed.[91]

Westminster practices are followed when the Chief Minister ceases to command the confidence of the majority. Unless at his request the Ruler or Governor dissolves the Assembly, he must tender his and his Executive Council's or Cabinet's resignation. The Chief Minister is assisted in the executive branch by the State Executive Council and for the states of Sabah and Sarawak, by a State Cabinet. The members of the State Executive Council (hereinafter referred to as the Exco) and the State Cabinet are appointed by the respective Rulers or Governors from amongst the members of the State Legislative

[90] Sabah is the only state whose constitution specifically provides for the Public Accounts Committee. All of the other states create this committee through the Standing Orders of the respective Assemblies.

[91] It states through Article 6(7) that: "For the purpose of clause 3 of this Article [the appointment provision], where a political party has won a majority of the elected seats of the Legislative Assembly in a general election, the leader of such political party, who is a member of the Legislative Assembly shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the Assembly." This provision is governed by convention in the other State Constitutions and even in the Federal Constitution.

Assembly in accordance with the advice of the Chief Minister which must be followed.[92] As the appointment of Exco members is a prerogative of the Chief Minister, so too is their dismissal, although there is no specific provision for this.[93] A Chief Minister may dismiss any of the members of the Exco or Cabinet, or he may tender the resignation of the entire Exco/Cabinet.

Below the Exco/Cabinet runs the Public Service which effects the day to day running of the government machinery. In order to ensure impartiality, the Public Service is governed by the Public Service Commission of the State. Only the Constitutions of Sabah and Sarawak have provisions relating to the function and procedure of the Commission.[94]

The Constitutions of Sabah and Sarawak also have provisions protecting and safeguarding the position of their natives.[95] This is an example of State Constitutions providing for protection of fundamental rights. These provisions not only provide for affirmative action for the natives but also protect the legitimate interests of other communities by ensuring that nobody is deprived of their interests as a result of the affirmative action.[96]

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[92] The State Constitutions provide that the Rulers and the Yang Dipertua Negeri (Governor) must act on advice in all matters except matters specified as within their discretion. This provision has been fortified by recent amendments which specifically stipulate that it is mandatory to follow that advice. Another discretionary function of the Rulers/Governors is to withhold consent to a request for the dissolution of the Legislative Assembly.

[93] See s 94 of the Interpretation Acts 1948 and 1967 which provides that when a written law confers a power to appoint, it is to be construed to include a power to dismiss. Some State Constitutions, for example, Selangor provide in Article 53(7) that the Exco members hold office at the pleasure of the Head of State.

[94] Sabah: Articles 36-40 and Sarawak: Articles 35-38.

[95] "Native" has the same meaning as it has in the Federal Constitution for the purposes of the application of Article 153 thereof to natives of the state. The Sabah Constitution defines native under Article 41(10) while the Sarawak Constitution does not do so.

[96] See Article 41 (Sabah) and Article 39 (Sarawak).

The provisions mentioned in this part of the article shows the context for the discussion of constitutionalism in the Federal and State Governments of Malaysia.

V. The Federal Experience *vis-à-vis* the States Experience

A. *Supremacy of the Constitution*

In placing the status of supremacy upon a constitution, what Wheare said is of great significance:

> The moral authority which a constitution claims and can claim is related very closely, therefore, to the structure of the community for which it purports to provide the foundations of law and order. It must embody forms of government in which a community believes; it must be adapted to their capacity for government. The mere fact that words have been inscribed upon paper can give no special claim upon the obedience of the citizens or of the government.[97]

A federal-structured nation would appear to require a supremacy clause because without such a crucial statement the federation is likely to collapse, especially when there is a conflict between state and federal matters. However, in order for the supremacy clause to work, it must exist in a situation where the community supports and favours the structure of government. Malaysia's constitutional history has always shown that the States would never come together outside of a federal system because of the deep historical ties with the Rulers, the communal character of the States favouring regionalism and the individual State's incapacity of sustaining the main burdens of modern government both financially and physically.[98]

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[97] Wheare, KC, *Modern Constitutions* (Oxford: Oxford University Press, 2nd ed, 1966) at p 66.

[98] See Watts, RL, *New Federation – Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966) at pp 23-27.

Article 4(1) of the Federal Constitution is known as the supremacy clause, although the legislative effect of a constitution declaring itself to be supreme law is regarded as non-existent.[99] The argument goes that if the constitution is indeed supreme, it would not require a supremacy clause to invalidate unconstitutional laws or behaviour, as they will be unconstitutional irrespective of whether there is such a clause or not. However, the nature of the federal structure of the State and the constitutional legacy received from the British model which practises legislative supremacy, would necessitate the presence of a supremacy clause if only in order to avoid confusion.[100] It was to clear this confusion that as late as 1976, Mohammad Suffian Hashim LP had to reiterate in the case of *Ah Thian v Government of Malaysia* that:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures is limited by the Constitution and they cannot make any laws they please.[101]

The supremacy provision in the State Constitutions on the other hand is alluded to with indifference rather than confusion. The Johor State Constitution started promisingly when it declared in 1895 in its preamble that the Constitution:

> ... shall become and form the law of our State, Country and people, and shall be an inheritance which cannot be altered, varied, changed, annulled or infringed or in any way or by any act whatsoever be repealed or destroyed.

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[99] Sheridan, LA and Groves, HE, *The Constitution of Malaysia* (Singapore: Malayan Law Journal, 3rd ed 1979) at p 39.

[100] Even with the supremacy clause in the Federal Constitution, some judicial decisions have leaned strongly towards the principle of Parliamentary supremacy. See for example *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, and *Phang Chin Hock v PP* [1980] 1 MLJ 70.

[101] [1976] 2 MLJ 112 at p 113.

Since a substantive proportion of that constitution was to protect the position and status of the Sultan of Johor at that time and his descendants, it was not all surprising that such strong language used in the preamble. However, even with such an assertive preamble the Johor Court of Appeal was not at all moved to accord the Constitution the position it so emphatically claims, in the case of *Anchom v Public Prosecutor*.[102] Here the court declared that it is the legislature which is the sole authority to determine whether certain laws are *intra vires* or not, and the Constitution is to be interpreted by that superior sole authority.[103]

Jayakumar explains that although the terms of reference for the Reid Constitutional Commission had not indicated whether the doctrine of legislative supremacy or constitutional supremacy should prevail, the written Constitution presented by the Commission made it abundantly clear that the entire philosophy of the constitutional arrangement was the doctrine of constitutional supremacy.[104] The State Constitutions fall under this arrangement as well, and even though only four of the State Constitutions (Melaka, Pulau Pinang, Sabah and Sarawak) have a supremacy clause, constitutional supremacy is implicit in all the other State Constitutions.

As observed earlier, the significance of such a doctrine in shaping constitutionalism at the state level would not depend too much on the words of the constitution whether it be written or implied but will only achieve true meaning when the restrictions which the constitution seek to impose are real and effective limitations. The Federal Constitution has had the privilege of being interpreted on this point in the oft-quoted case of *Loh Kooi Choon v Government of Malaysia*,[105] where Raja Azlan FJ said:

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[102] [1940] 9 MLJ 22.

[103] *Id* at p 26.

[104] Jayakumar, S, "Constitutional Limitations on Legislative Power in Malaysia" (1967) 9 *Malaya Law Review* 96 at p 96.

[105] [1977] 2 MLJ 187 at p 188.

> The Constitution ... is the supreme law of the land embodying three basic concepts: one of them is that the individual has certain fundamental rights upon which not even the power of the state may encroach. The second is the distribution of sovereign power between the states and the Federation, that the 13 states shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government ...

Raja Azlan again in an article on the supremacy of law,[106] then quite rightly pointed out that such pronouncements as in the aforesaid case were inadequate without regard to a few other factors, which include the manner in which the various principal actors in the governmental process view and implement it. He went further to point out quite lucidly that:

> [The Constitution] needs constant nourishment and a continuing commitment, lest it transforms into a mere façade – an elegant frontage which may conceal practices which are democratically questionable. It is thus of the utmost importance that a strong political tradition supportive of these values be inculcated. Where such political tradition lies deeply embedded in a particular society, perhaps nurtured through centuries of political development, the principle of supremacy of law received its due accolade in actuality.[107]

Unfortunately, the Federal Government and State Governments do not have a strong political tradition of constitutional supremacy having evolved out of a centrally-strong authoritarian tradition. The experience of these governments, more so at the state level, and the lack of a pronouncement as to the effect of the doctrine of constitutional supremacy, creates a worrying doubt as to the strength of the State Constitutions in upholding constitutionalism in the states.

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[106] Raja Azlan M Shah, "Supremacy of Law in Malaysia" (1984) 11 *JMCL* 1.

[107] *Id* at p 6.

B. *Rule of Law*

The intention here, is not to propound the virtues and pitfalls of the celebrated doctrine of the rule of law, but only to highlight the major principles that apply (or otherwise) in the Malaysian context with a special emphasis on the States.

The doctrine's most obvious application to constitutional theory, according to Allan, is the requirement that the actions of the executive and those of every other civil authority or government official should be justified in law.[108] A narrow interpretation of this requirement leads us to the principle of legality which appears only to require a formal authorisation of the powers of government without imposing limits on the nature of those powers be they good or bad.[109] Such a legalistic approach is favoured in some authoritarian regimes which may want to uphold an image of law and order for the world to see, and yet maintain an unjust stranglehold on its citizens through oppressive laws.

The courts in Malaysia just as in Britain refer to the rule of law through acknowledgements of its importance and through attempts to articulate the requirement of the principle, all of which have failed to develop a clear and coherent doctrine.[110] However, for a young democracy such as Malaysia, a statement of political ideal is an essential departing point before it should concern itself with an analysis of the doctrine of the rule of law. That is the reason why the final resolution of the Delhi Congress for the International Commission of Jurists in 1959 is important when it declared that the rule of law is a dynamic concept "which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which [the individual] legitimate aspirations and dignity may be realized."[111] Although couched in broad terms and quite incapable of

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[108] Allan, *supra*, n 54 at p 113.

[109] See Raz, J, "The Rule of Law and Its Virtue" (1977) 93 *LQR* 195, who argues that the law must have certain values of which is capable of guiding the behaviour of its subjects.

[110] Allan, *supra*, n 54 at p 114, attributes this confusion to Dicey's own failure to present his theory in clear juristic terms.

[111] Declaration of Delhi 1959, International Commission of Jurists.

being developed into a juristic principle, the statement offers a very straight-forward and easy to understand perception of the doctrine for the general public to understand. This understanding of the principle is vital in order for the doctrine to have a chance of survival in the political environment of the people who seek its protection. Unfortunately such statements do not appear in the Federal Constitution of Malaysia. Even slightly articulate expressions on the rule of law, found in the draft proposal of the Federal Constitution were not incorporated into the Constitution proper.[112] The real reason behind this is subject to speculation, but from a legal point of view, a philosophy of legal restraint and fairness, which the rule of law is all about, may be difficult to summarise and define in statutory language. However, according to Walker, this problem of definition is in one sense a weakness, since it makes the rule of law vulnerable to criticisms by those who wish to see its scope cut down to allow more room for uncontrolled government action, but it is also a strength in that it makes it more difficult to reduce to a totally formal construct, thus making the philosophy hard to stamp out by overt action.[113]

The statement supporting a philosophy of legal restraint, though absent is nevertheless represented in the Federal Constitution by procedural provisions which are part and parcel of the rule of law such as guaranteeing liberty of the person,[114] protection against retrospective criminal laws and repeated trials,[115] and equality.[116] While a lot has been discussed and written about the unsatisfactory condition of the rule of law in Malaysia,[117] the basic provisions in the Federal Constitution which acknowledge the acceptance of the doctrine into

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[112] Rais Yatim argues this in his thesis and states that had the original recommendations been accepted *in toto*, Malaysia would now be more formally rooted in the rule of law then it is at present. See Rais Yatim, *supra*, n 56, especially pp 63-74.

[113] Walker, G de Q, *The Rule of Law: Foundation of Constitutional Democracy* (Victoria, 1988) 1.

[114] Article 5 of the Federal Constitution.

[115] Article 7 of the Federal Constitution.

[116] Article 8 of the Federal Constitution.

[117] See for example Kehma, *The Rule of Law and Human Rights in Malaysia and Singapore* (Belgium: KEHMA-S, 1990); Rais Yatim, *supra*, n 56; Nijar, GS, Rule of Law in (1987) *Aliran* 200, Khoo, Boo Teong, "Rule of Law in the Merdeka Constitution" (2000) 27 *JMCL* 59.

framework could still be developed into a more articulate principle by an independent, enlightened and pro-active judiciary.

The position in the states is comparable if not worse as the State Constitutions do not at all provide for any sort of formal acceptance of the principle. This is because, unlike the federal authorities, the State authorities do not have jurisdiction over penal matters as the former.[118] Furthermore, the State authorities are always bound by the provisions of the Federal Constitution in relation to the fundamental liberty of a person and State authorities may not legislate or act in contravention of federal laws.[119] Thus the absence of such provisions in the State Constitutions does not at all mean that the State authorities can act outside the scope of the rule of law as understood and practised at the federal level. Nevertheless this does not detract from the value of arguing that State Constitutions should also contain the rule of law and human rights provisions to improve its ability to protect, which is an argument that even more developed and liberal federal democracies such as the United States of America are entertaining.[120]

It is fundamental in the rule of law in constitutional provisions that the activities of the executive are authorised by, and reviewed against, statutory powers which are conferred in advance.[121] This means that citizens are bound by, and entitled to rely upon, the law as it exists and not as the government might wish it to be. This is, according to Allan, the essence of the distinction between the rule of law and rule by the will of holders of political power.[122]

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[118] Under the Ninth Schedule of the Federal Constitution, the Federal List includes defence of the Federation, internal security, civil and criminal law, and procedure and the administration of justice.

[119] Article 75 of the Federal Constitution.

[120] See for example, Kaye, JS, "Dual Constitutionalism in Practice and Principle" (1986) 61 *St John's Law Review* 399.

[121] Allan, *supra*, n 54 at p 125.

[122] *Id* at p 126.

C. *Separation of Powers*

The separation of powers is a doctrine that has withstood numerous criticisms as to its workability in providing an effective and stable political system. However, according to Vile, it has emerged through time to combine with other political ideas such as the concept of checks and balance, to form the complex constitutional theories that provide the basis of modern western political systems.[123]

It is not the pure doctrine that we are concerned with in this study. The unadulterated system whereby each branch of the government, (*ie* legislative, executive and judiciary) must be confined to the exercise of its own function and not allowed to encroach upon the function of the other branches does not and will not operate strictly in that manner in the United Kingdom, let alone young democracies which emulate the Westminster system such as Malaysia.[124] The separation of powers, according to Barendt, should not be explained in terms of strict distribution of functions between the three branches of government, but in terms of a network of rules and principles which ensure that power is not concentrated in the hands of one branch.[125] It is the diffusion of authority among different centres of decision making which is the antithesis of totalitarianism or absolutism.[126] It is not merely to organise state powers and control accumulation of excessive powers but, more importantly argues Barendt, is the teeth that can be given by constitutional courts to reinforce the protection conferred by the Constitution on individual rights.[127]

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[123] See Vile, MJC, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) at p 2.

[124] For the operation of the separation of powers principle in the construction of written constitutions of former British colonies, see *Liyanage v The Queen* [1967] 1 AC 259 and *Hinds v The Queen* [1976] 1 All ER 353.

[125] Barendt, E, "Separation of Powers and Constitutional Government" (1955) *Public Law* 599 at p 608. He also cited Madison in the Federalist Papers No 51 who argued that it was necessary to oblige government to control itself and this was done by dividing it into branches which could check each other rather than placing total reliance on democratic control.

[126] Vile, *supra*, n 123 at p 15.

[127] Barendt, *supra*, n 125 at p 613.

What is clear from any discourse on the separation of powers is the paramount importance placed in the objective for distributing the powers, which is the avoidance of injustice through concentration of powers in any branch or agency of government. The allocation of functions between the three main branches or even more, is only a means to achieve that end and it does not matter, therefore, whether powers are always allocated precisely to the most appropriate institution – although an insensitive allocation would result in incompetence in that government.[128]

Therefore in the Westminster model of government, the absence of an effective separation of powers between the legislature and executive that is caused by the existence of a mass political party system,[129] does not necessarily mean there is totalitarianism as has been clearly exemplified by British constitutionalism. Parliamentary government in Britain has always struggled to balance the exercise of powers between the executive and legislature, without adhering to a strict separation of powers. The objective has always been to provide efficiency in government while allowing the greatest possible exercise of personal freedom.[130] The Federal and State Governments of Malaysia which follow this pattern of fusion of roles between the Executive and the Legislative arm are in the correct position to follow the path and example of British Parliamentary government in terms of this balance of powers between these two arms.

The Federal Constitution and the State Constitutions provide the structure for the working of the doctrine of the separation of powers in Malaysia. At the Federal level, the powers are neatly set out in Articles 39, 44 and 121 of the Federal Constitution without actually spelling out the objectives and purpose behind the distribution of powers.[131]

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[128] *Id* at p 606.

[129] *Id* at p 614.

[130] Vile, *supra*, n 123 at p 238. For a history of the balance of powers in parliamentary government in the United Kingdom, see especially Ch VIII.

[131] Article 39 reads, "The executive authority of the Federation shall be vested in the Yang diPertuan Agong (King) and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any minister authorised

From these provisions it can be said that the Federal Constitution subscribes to the idea of separation of powers between the judicial powers and the other two branches of government.[132] Between the Executive and Legislative branches there can only be what is called a "separation of functions" as the members of the Executive are taken from the Legislative branch.[133] This is similar in the State Governments where all the provisions in the State Constitutions relating to the Executive Council or State Cabinets provide for the same practice of appointing the Executive from the Legislative branch.[134]

The advantage of having such a Westminster style fusion between the Executive and Legislative branch is that there can be effective check and balance since the members of the Executive are alsomembers of the Legislature and they would be subject to questions and scrutiny by the other members of the Legislative Assembly. However, a political party system dominates the Assembly and together with a weak representation by the opposition party, this method of checks and balance is illusory. Without a system whereby members of the Legislature feel free to criticise the front-benchers, and with laws which curtail a free

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by the Cabinet, but Parliament may by law confer executive functions or other persons." Article 44 reads, "The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang diPertuan Agong and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives)." Article 121(1) reads, *inter alia* "There shall be two High Courts of coordinate jurisdiction and status namely [the High Court in Malaya and the High Court in Sabah and Sarawak]." While Articles 39 and 44 mention executive and legislative powers, Article 121(1), after the amendment in 1988 no longer contains the term "judicial power" which was mentioned in the original provision.

[132] The powers of the judiciary to review legislative and executive actions will be discussed in a subsequent heading.

[133] See Article 43(2) of the Federal Constitution which provides that the Yang di-Pertuan Agong shall appoint the Prime Minister from the Lower House and the rest of the Cabinet from either the lower or the upper house. The Article also states that the Cabinet shall be collectively responsible to Parliament.

[134] See provisions in all State Constitutions entitled "The Executive Council" whereby the State Ruler must appoint the Chief Minister and the Executive Council/Cabinet members from amongst the State Legislative Assembly. The State Constitutions also provide that the Executive Council/Cabinet shall be collectively responsible to the Legislative Assembly.

press and freedom of information, the objective of the doctrine of the separation of powers alluded to earlier is unattainable. The Federal and State Constitutions, the role of the Legislative branch and the courts have to be examined in order for those objectives to be made clear and hence achievable.[135]

D. *Independence of the Judiciary and Constitutional Litigation*

The subject of the independence of the judiciary is a federal matter as the State Governments do not have their own judiciary except for the *Shariah* Courts which govern *Shariah* matters.[136] The matter of the independence of the judiciary and the decline of it has been extensively dealt with by writers in various publications.[137] What will be dealt with under this heading is the state of the judiciary's willingness to exercise its independence in charting a path of constitutionalism through judicial review and what is generally called constitutional litigation. It is through this that we are able to gauge whether one of the most important methods of preserving constitutionalism is in operation. The independence of the judiciary is a vital tool in ensuring that constitutionalism is upheld in both the Federal and the State Governments.

The path the Malaysian judiciary has chosen to follow for the past four decades has been criticised by Shad Faruqi. In his paper "Promoting Constitutionalism: The function of Constitutional litigation",[138] he listed

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[135] See discussion of this problem in Abdul Aziz Bari & Hickling, RH, "The Doctrine of Separation of Powers and the Ghost of Karam Singh" [2001] 1 MLJ xxi.

[136] The State Governments have their own *Shariah* Courts as Islamic Law is a state matter. However as most matters of government and civil and criminal cases are dealt with by the ordinary civil courts, this discussion will be confined to them.

[137] The main problem is the perceived interference or influence by the Executive over the Judiciary in matters where they have an interest either politically or economically. The lack of independence in the appointment of judges under Article 122B of the Federal Constitution, whereby the Prime Minister has a dominant role on who is to be appointed, is regarded as the root cause of the negative perception mentioned earlier. See "Justice in Jeopardy: Malaysia 2000" *INSAF* (special issue), Sidhu, GTS "Judicial Independence -- How it has been affected by Constitutional Amendments" (1990) XXI No 2 *INSAF* 92.

[138] Paper presented at the Malaysian Bar 50th Anniversary Commemorative Conference 15-16 August 1997.

some negative trends of the Malaysian judiciary in constitutional litigation. These are *inter alia*:[139]

i. A general reluctance exhibited by most Malaysian judges to deal with constitutional issues. Ahmad Ibrahim explained that perhaps it was difficult for the judges brought up in the English tradition in which the sovereignty of Parliament is a paramount consideration, to adjust themselves to the new power of constitutional review given to them.[140]
ii. The courts have adopted a narrow and literal interpretation to fundamental rights enshrined in Part II of the Federal Constitution.[141]
iii. The courts tend to rely on principles of administrative law to exercise the legality of executive action instead of relying on the test of constitutionality.[142]
iv. The courts tend to look at and use the principles of the English "unwritten" Constitution rather than on their experiences and development from the jurisdictions of written and supreme constitutions like India, USA, Australia and Canada. There is great judicial reluctance to review the substantive content of parliamentary legislation as if the English idea of the Supremacy of Parliament had a legal basis in Malaysia.[143]

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[139] *Id* at pp 3-27.

[140] Ahmad Ibrahim, "Interpreting the Constitution: Some General Principles" in Trindade, FA, & Lee, HP, *The Constitution of Malaysia, Further Perspectives and Developments* (Singapore: Oxford University Press, 1986) 20.

[141] See for example, the classic examples in the cases of *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129, *Ooi Ah Phua v OCCI Kedah/Perlis* [1975] 2 MLJ 198, *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293 and *Halimatussaadiah bte Hj Kamaruddin v PSC* [1992] 1 MLJ 513.

[142] See for example, the cases of *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs* [1988] 1 MLJ 442 and *Chai Choon Hon v Ketua Polis Kampar* [1986] 2 MLJ 203.

[143] See *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Phang Chin Hock v PP* [1980] 1 MLJ 70 and *AG v Chiow Thiam Guan* [1983] 1 MLJ 50. See also the reminder of Suffian LP that the doctrine of supremacy of Parliament does not apply in Malaysia in the case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113.

v. There is a large number of non-justiciable executive powers which intrude on liberties that are held by the courts to be non-reviewable through the judicial process.[144]
vi. The courts have rejected public interest litigation and have adopted an extremely narrow approach towards *locus standi*. Civic minded citizens who do not have an interest are treated as busybodies and the Attorney General alone is regarded as the guardian of public interest.[145]

The effects of these negative trends have only been buffered by the role of the Court of Appeal in redefining current trends in Malaysian public law by advocating a remarkable constitutional slant in their decisions, under the guidance of Mr Justice Gopal Sri Ram.[146] In two cases, the Court of Appeal held that access to justice as opposed to ouster-clauses was a constitutional right using Article 5(1) (life and personal liberty) and Article 8(1) (equality and equal protection of the law) of the Federal Constitution.[147] In *Sugumar Balakrishnan v Director of Immigration Sabah*,[148] the judge proclaimed this fundamental rule:

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[144] See the cases of *Mohd b Hussain v Hashim Said* [1968] 1 MLJ 127, *Karam Singh* [1977] 2 MLJ 108, *Athappen a/l Arumugam v Menteri* [1984] 1 MLJ 67, *Mohamed Nordin Johan v AG* [1983] 1 MLJ 68, *Balakrishnan v Ketua Pengarah Perkhidmatan Awam* [1981] 2 MLJ 259 and *Sim Kie Chon v Superintendent of Pudu Prison* [1985] 2 MLJ 385.145 See the decline in *locus standi* in the cases of *Lim Kit Siang v UEM* [1988] 2 MLJ 24, *Abdul Razak Ahmad v Kerajaan Negeri Johor* [1994] 2 MLJ 297.

[145] See the decline in *locus standi* in the cases of *Lim Kit Siang v UEM* [1988] 2 MLJ 24, *Abdul Razak Ahmad v Kerajaan Negeri Johor* [1994] 2 MLJ 297.

[146] For an excellent discussion on this see Gopal Sri Ram, "Current Trends in Malaysian Public Law", Inaugural Lecture Tun Abdul Hamid Omar Lecture given on the 20th August 2003. See also Gopal Sri Ram, "Human Rights: Incorporating International Law into the Present System", Paper given in Seminar on "Constitutionalism, Human Rights and Good Governance" on 1st October 2003, Shad Faruqi, "Human Rights Violations: Role of Courts in Providing Access to Justice" (2001) XXX No 4 *INSAF* 21, Gopal Sri Ram, "The Role of Judges and Lawyers in Evolving a Human Rights Jurisprudence" January 2003, *Infoline* 17.

[147] See the cases of *Sugumar Balakrishnan v Director of Immigration Sabah* [1998] 3 MLJ 289 and *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1.

[148] *Ibid.*

> The fundamental theory of free access to an independent judiciary to obtain redress is apparently inconsistent with a provision in a statute that seeks to preclude that right by ousting the power of judicial review. This apparent inconsistency is resolved by permitting an ouster clause in a statute to immunise from judicial review only those administrative acts and decisions that are not infected by an error of law. Such an approach is in accordance with the well established principle of legislative interpretation known as the rule of harmonious construction whereby the court, instead of striking down a statutory provision altogether as being unconstitutional, prefers to permit the impugned provision to operate in harmony with the Constitution.[149]

The courts in this situation and several others have exercised their power of review despite the existence of ouster and finality clauses. It is admirable that the courts have recognised that on issues of constitutionality, such clauses should not be allowed to exclude their power to enforce the rule of law.

The Court of Appeal has also valiantly declared that the meaning of life under Article 5(1) of the Federal Constitution,[150] has a much wider meaning and includes all elements that constitute the quality of life, and thus does not mean mere animal existence.[151] However, this approach did not find favour with the Federal Court when it decided, that neither "life" nor "personal liberty" in Article 5(1) had any wider meaning,[152] an approach which is lacking in vision and authorities, and is a retrogression to the positive trend set by the Court of Appeal.[153]

Nevertheless, this cannot detract from the admirable constitutional stance the Court of Appeal has maintained in some of its decisions.

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[149] *Sugumar Balakrishnan v Pengarah Imigresen Sabah* [1998] 3 MLJ 289 at p 308.

[150] Article 5(1) states that, "No person shall be deprived of his life or personal liberty save in accordance with law."

[151] *Tan Tek Seng v Suruhanjaya Perkhidmatann Pendidikan & Anor* [1996] 1 MLJ 261.

[152] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.

[153] See Gopal Sri Ram, *supra*, n 146 at pp 18-19 and the case of *Tan Tek Seng*, *supra*, n 151.

For example the court has linked procedural fairness with the concept of "law" in Article 5(1) and with the doctrine of equality in Article 8(1) of the Federal Constitution,[154] giving the doctrine of natural justice a constitutional basis. This will strengthen the court's role in protecting procedural fairness, a role which is vital in preserving constitutionalism.[155]

This trend by the Court of Appeal is an important indicator as to where the courts are heading in terms of constitutionalism. The members of the Court of Appeal would normally be elevated to the apex Federal Court and this would have a significant effect to where the judiciary is heading in preserving constitutionalism through constitutional litigation.

VI. Executive Supremacy and the Way Ahead

The strongest threat to constitutionalism in Malaysia is the growth of Executive power and the decline of the institutions which are central in limiting excesses of those executive powers. Even in the United Kingdom the growth of the Prime Ministerial government has been recognised and considered a threat to constitutionalism.[156] The Malaysian practice like all those following the Westminster style government does not escape this predicament.

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[154] See the cases of *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308 and *Tan Tek Seng*, *supra*, n 151.

[155] The Court of Appeal has also insisted on requiring public officials to give reasons for their decisions. See the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481. For a discussion on the role of constitutional provisions namely Article 8, in judicial review, see Choo, Chin Thye, "The Role of Article 8 of the Federal Constitution in the Judicial Review of Public Law in Malaysia" [2002] 3 MLJ civ.

[156] See for example, Benn, T, "The Case for a Constitutional Premiership" *Parliamentary Affairs* 33 (1980) 7, Brazier, R, "Reducing the Power of the Prime Minister" *Parliamentary Affairs* 44 (1991) 453.

Rais Yatim in his study of executive supremacy describes the escalating powers of the executive and that this was done mainly through constitutional change, political repression and suppression of the judiciary.[157] Malaysia has not the same position as in the United Kingdom where there are effective countervailing forces at work between and amongst constitutional institutions.[158] This has contributed to the aforementioned escalating powers of the Executive. According to CT Choo there are six major factors "that prevented the Westminster model from taking root in its pristine form".[159] They are:[160]

i. The Malay tradition of loyalty and obedience to the leader that prevented true party democracy from taking root in UMNO.[161]
ii. The impact of the May 13, 1969 racial riots which formed the legitimate basis for the Executive to strengthen itself and amend the Federal Constitution and laws to prevent any recurrence of the violence.[162]
iii. The dominance of the President of UMNO, who is also the Prime Minister, and UMNO's strength in the Legislature which limits dissent in the Government backbenchers thus failing to check the growth and the actions of the Executive.[163]

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[157] See Rais Yatim, *supra*, n 56. For other readings on escalating executive power in Malaysia see Choo, Chin Thye, "Executive Power in Malaysia – Limiting its growth" (2002) XXXI No 1 *INSAF* 21, Chooi, Mun Sou, "Society & Justice Transparency & Good Governance For A Just Society: Issues & Challenges" (2000) XXIX No 3 *INSAF* 58.

[158] According to Mackintosh, these factors are: the significance of electoral success, consensus amongst the cabinet, possibility of revolt amongst back benchers in Parliament, an effective and strong opposition and a strong and influential Public Service – see generally Mackintosh, JP, *The Government and Politics of Britain* (London: Hutchinson, 4th ed, 1977).

[159] Choo, Chin Thye, *supra*, n 157 at p 28.

[160] *Id* at pp 29-33.

[161] For further reading, see Chandra Muzaffar, *Protector*? (Penang: Aliran, 1979).

[162] For further reading, see Means [1976] and Jayakumar S, "Emergency Powers in Malaysia" in Tun Mohamed Suffian, Lee, HP & Trindade, FA (eds), *The Constitution of Malaysia: Its Development: 1957-1977* (Kuala Lumpur: Oxford University Press, 1978).

[163] For further reading see Milne, RS & Mauzy, DK, *Politics and Government in Malaysia* (Singapore: Federal Publication, 1978) and Musolf & Springer, *Malaysia's Parliamentary System: Representative Politics and Policymaking in a Divided Society* (Boulder: Westview Press, 1979).

iv. The failure of the Public Services to check and guide the Executive "due largely to the UMNO strategy of co-opting political talents from the ranks of the Public Services and appointing civil servants to senior positions within the Public Services on the basis of political and personal loyalties".[164]
v. The long period of uninterrupted rule by the ruling coalition allowing it a great advantage of using various forms of rewards to demand loyalty and obedience.
vi. The dominance of the Prime Minister in the Cabinet resulting in its failure as a forum of collective responsibility.[165]

Hence the growth of Executive supremacy has taken a much enlarged form than the British situation. British constitutionalism presupposes the countervailing forces working to ensure a stronger check on Executive supremacy but the situation in Malaysia as explained has taken a different path. Therefore, a different approach is required to promote constitutionalism in the context of Executive supremacy in Malaysia.

The importance of the Constitution in protecting the life, liberty and property of the individual and securing the proper administration of government against the excesses of executive power has been well documented.[166] Nwabueze has said:

> The dangers ... of arbitrary power, whether of the absolute, total or the merely authoritarian type, amply establish the need for constitutional limitation upon government, for a framework of fundamental principles of humanity and respect for human rights to control and guide the exercise of governmental power. The need is all the greater

[164] Choo, Chin Thye, *supra*, n 157 at p 32. See further Milne, RS and Mauzy, DK, *Malaysian Politics under Mahathir* (London: Routledge, 1999).

[165] See Khoo, Boo Teik, *Paradoxes of Mahathirism – An Intellectual Biography of Mahathir Mohamad*, (Kuala Lumpur: Oxford University Press, 1995) and Milne & Mauzy, *supra*, n 164, and Puthucheary, MC "Ministerial Responsibility in Malaysia" in Suffian Lee & Trindade, *supra*, n 162.

[166] See for example, Basu, DD, *Limited Government and Judicial Review* (Calcutta: SC Sarkor, 1972); especially all the materials found in Cap III: "The Written Constitution as a limitation".

> because of the restricted capacity of the human mind and the natural tendency to sacrifice long-term considerations to immediate purposes being pursued by government.[167]

The role of the Constitution in preserving and promoting constitutionalism is vital. Thus, the nature in which the Constitution is interpreted in Malaysia is essential in ascertaining whether the Constitution would be able to effectively play the role aforementioned. There have been a broad spectrum of judicial decisions that have adopted a narrow approach to constitutional interpretation.[168] However, there are two decisions of the highest Court in the land, one of the Supreme Court and the other, the Federal Court, that mark the high point in constitutional interpretation which must be highlighted in any discussion of constitutionalism in Malaysia. The first case is *Dato Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus*,[169] where Raja Azlan Shah Ag LP said:

> In interpreting a Constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a Constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts" (See *Minister of Home Affairs v Fisher*).[170] A Constitution is *sui generis* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of Law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It

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[167] Nwabueze, BO, *Ideas and Facts in Constitution Making* (Ibadan: Spectrum, 1993) at p 98.

[168] See for example, the cases of *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33; *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 and *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

[169] [1981] 1 MLJ 29.

[170] [1979] 3 All ER 21.

> is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting Constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds*."[171] ... It is in the light of this kind of ambulatory approach that we must construe our Constitution.[172]

In the second case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*,[173] the Lord President in delivering the leading judgment adopted the approach of Lord Wilberforce in *Fisher's* case and held that:

> [I]n testing the validity of state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise "ineffective or illusory".[174]

This broad and liberal approach to constitutional interpretation adopted by the Lord Presidents in both cases is keeping in trend with other jurisdictions.[175] The courts are the guardians of constitutional rights and therefore should confer those rights with the fullness required to ensure that the benefit intended by those rights are given. Any other laws, regulations, policies or procedures which derogate from the scope of the rights contained in the Constitution must be interpreted restrictively. The Constitution always has to be interpreted broadly using what has been called a prismatic method. Gopal Sri Ram subscribes to this view and explains it eloquently:

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[171] [1979] 3 All ER 129 at p 136.

[172] [1981] 1 MLJ 29 at p 32.

[173] [1992] 1 MLJ 697.

[174] *Id* at p 712.

[175] See in India for example, the landmark case of *Maneka Ghandi v Union of India* AIR 1978 SC 597.

> In my view, the prismatic method is the correct approach to the interpretation of a written Constitution such as ours, particularly to those provisions that guarantee fundamental rights. Just as a ray of light when passed through a prism reveals its constituent colours, so too when the provisions of our Constitution are subjected to prismatic treatment, they will reveal the several concepts that are housed within their language.[176]

If this judicial trend in the interpretation of the Constitution is followed then the Constitution is set to be the proper avenue of discussion in the scope for future studies which assess constitutionalism in Malaysia. By identifying the role of the Constitution in the decline of the checks on the Executive, it would also identify ways and means for the Constitution to be used to fortify constitutionalism in Malaysia.

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[176] Gopal Sri Ram, *supra*, n 146 at p 16.

Charges over Book Debts - Implications of *Spectrum Plus*

*Teh Wei Wei**

> *In my opinion, the essential characteristic of a floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime the chargor is left free to use the charged asset and to remove it from the security ... Moreover, recognition that this is the essential characteristic of a floating charge reflects the mischief that the statutory intervention to which I have referred to was intended to meet and should ensure that preferential creditors continue to enjoy the priority that s 175 of the [Insolvency] Act and its statutory predecessors intended them to have.*[1]

The House of Lords in the case of *National Westminster Bank plc v Spectrum Plus Limited and others*[2] had decided in favour of preferential claimants. In doing so, their Law Lords placed a strong attachment to conceptual and public policy grounds. This article examines the characterization of fixed and floating charges over book debts in the light of this decision and whether it is viable to remove such characterization.

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[1] Per Lord Scott of Foscote in *National Westminster Bank plc v Spectrum Plus Limited and others* [2005] 4 All ER 209 at para 111, [2005] UKHL 41 at para 111.

[2] [2005] 4 All ER 209, [2005] UKHL 41. This case will hereafter be referred to as "*Spectrum Plus*".