THE AMENDMENT PROCESS UNDER THE MALAYSIAN CONSTITUTION*

INTRODUCTION

Herman Finer[1] once defined "constitution" in terms of its process of amendment for, in his view, to amend is to "deconstitute and reconstitute". The learned author added that the amending clause is so fundamental to a constitution that he was tempted to call it the constitution itself. The importance of the amendment process is particularly highlighted in respect of the Constitution of Malaysia which has often been characterized as a document "so painstakingly negotiated and agreed upon by the major races in Malaysia".[2]

The Reid Commission[3] which was entrusted with the task of drawing up the draft constitution on which the new Federation of Malaya in 1957 was to regulate itself, adopted many of the recommendations of the Alliance Party. These recommendations were the product of intensive negotiations and bargaining among the components of the Alliance Party, a coalition of three parties representing the three major races in the country.[4] As such it could be asserted that the Constitution embodies the terms fordged by three contracting parties to an agreement. Thus if one were to look upon the Constitution as a "contract" one could see how the original "terms" as initially bargained could be subsequently varied through the employment of the amendment process. From this viewpoint, amendments to the Malaysian Constitution assume fundamental significance.

The Constitution of Malaysia is still comparatively "young" but since

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[1] Herman Finer, The Theory and Practice of Modern Government, p. 127.

[2] As stated by the Prime Minister of Malaysia, Tun Abdul Razak – "Parliamentary Debates on the Constitution Amendment Bill, 1971" , p. 3.

[3] The Commission was headed by the Rt Hon. Lord Reid (U.K.). See ' Report of the Federation of Malaya Constitutional Commission, 1957" hereinafter referred to as the "Reid Commission Report".

[4] The three components of the Alliance Party are: (1) the United Malays National Organisation or UMNO (2) the Malaysian Chinese Association or MCA, and (3) the Malaysian Indian Congress or MIC.

1957 it has been amended on no less than sixteen occasions.[5] This stands in stark contrast to the American Constitution, which in its life-span of one hundred and eighty years, has been amended only twenty-six times.[6] The frequency of amendments gives rise to a query regarding the nature and efficacy of the amendment process under the Malaysian Constitution.

The cornerstone of a constitution lies in its amendment process and a conflict of views will always prevail over how amendable a constitution ought to be and what the model formula for the amendment process should be. It is submitted that the formula should be devised according to the needs and peculiar circumstances of a country. In drawing up the formula as embodied in Article 159 of the Federal Constitution, the Reid Commission stated that the method of amending the Malaysian Constitution should not be too difficult as to produce frustration nor so easy as to weaken seriously the safeguards of the Constitution.[7] In this article, the writer seeks to examine whether these aims of the Reid Commission have been vitiated in the light of various amendments which have been effected to the Malaysian Constitution from 1957 to 1973. Particular emphasis is placed on the Constitution (Amendment) Act, 1971.[8]

ARTICLE 159

Under the Malaysian Constitution, four different modes exist for effecting amendments.[9] They are:

(1) By an Act requiring a simple majority,

(2) By an Act which has been passed by two-thirds majority in each House of Parliament on second and third readings,

(3) By an Act which has commanded the support of a two-thirds majority in each House of Parliament on second and third readings together with the consent of the Conference of Rulers,

[5] The amendments were effected by the following instruments: - (1) Ordinance 42 of 1958; (2) Act 10 of 1960; (3) Act 14 of 1962; (4) Act 25 of 1963; (5) Act 26 of 1963; (6) Act 19 of 1964; (7) Act 31 of 1965; (8) Act 53 of 1965; (9) Act 59 of 1966; (10) Act 68 of 1966; (11) Act 27 of 1968; (12) Act A1 of 1969; (13) Act A30 of 1971; (14) Act A31 of 1971; (15) Act A193 of 1973; (16) Act A206 of 1973.

[6] Tan Sir Mohamed Suffian bin Hashim, An Introduction to the Constitution of Malaysia (1971), p. 291.

[7] *Reid Commission Report*, para. 80 at p. 31.

[8] Act A30 of 1971

[9] See Sheridan, L.A. and Groves, H.E. *The Constitution of Malaysia* (1967), at pp. 14–15; Suffian, *op. cit.*, at pp. 287–291. There is in fact another mode of amending the Malaysian Constitution, i.e., by an Ordinance made by the Yang di Pertuan Agung during an Emergency. See Article 150 of the Malaysian Constitution.

(4) By an Act supported by a two-thirds majority in each House of Parliament on second and third readings together with the concurrence of the Governor of the Borneo State concerned.

In respect of amendments requiring the support of a two-thirds majority in each House of Parliament on second and third readings, this can be said to be the "general" mode affecting the largest number of provisions in the Constitution. It must be noted that a two-thirds majority refers to a two-thirds support of the total number of members of each House and not two-thirds of the members present and voting.

Certain amendments are excepted from the two-thirds majority vote requirement. These exceptions relate to the following matters:

(i) any amendment to Part II of the Second Schedule or to the Sixth or Seventh Schedule. Part II of the Second Schedule deals mainly with the functions of the Minister in respect of matters of citizenship. The Sixth Schedule provides for the forms of oaths and affirmations and the Seventh Schedule provides for the election and retirement of Senators.

(ii) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of the Constitution other than Articles 74 and 76.

(iii) any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modifications made as to the application of the Constitution to a State.

(iv) any amendment consequential on an amendment made under paragraph (i).

Any amendment in respect of the above matters can be effected by a simple majority vote. It is to be noted that the simple majority is not a majority of the total members of each House, but a majority of members voting.[10]

Prior to the Constitution (Amendment) Act, 1971, amendments which required the consent of the Conference of Rulers in addition to a two-thirds majority support of each House of Parliament were those which related to the Conference of Rulers itself,[11] the precedence of Rulers and Governors,[12] the federal guarantee of Rulers,[13] and the special position and privileges of Malays and Natives of Sabah and Sarawak and the legitimate interests of other communities.[14] After the coming into force

[10] See Article 62(3) which says "subject to . . . . . Article 159 (3) . . . . . each House shall, if not unanimous, take its decision by a *simple majority of members voting* . . . . ." (emphasis added).

[11] Article 38.

[12] Article 70.

[13] Article 71(1)

[14] Article 153.

of Act 30 of 1971, the consent of the Conference of Rulers assumed greater importance as the Act has now placed within Article 159(5), various other constitutional provisions. The provisions inserted into Article 159(5) are Article 10(4) and any law made under it, Article 63(4), Article 72(4), Article 152, and Article 159(2) as amended.

The fourth mode of amendment under the Malaysian Constitution is by an Act supported by a two-thirds majority in each House of Parliament on second and third readings together with the concurrence of the Governor of the Borneo State. Such a mode covers matters as listed out in Article 161E, namely:

(a) the right of persons born before Malaysia Day to citizenship by reason of a connection with a State and (except to the extent that different provision is made by the Constitution as in force on Malaysia Day) the equal treatment, as regards their own citizenship and that of others, of persons born or resident in the States of Malaya;

(b) the constitution and jurisdiction of the High Court in Borneo and the appointment, removal and suspension of judges of that court;

(c) the matters with respect to which the Legislature of the State may (or Parliament may not) make laws and the executive authority of the State in those matters, and (so far as related thereto the financial arrangements between the Federation and the State;

(d) religion in the State, the use in the State or Parliament of any language and the special treatment of natives of the State;

(e) the allocation to the State, in any Parliament summoned to meet before the end of August, 1970, of a quota of members of the House of Representatives not less, in proportion to the total allocated to the other States which are members of the Federation on Malaysia Day, than the quota allocated to the State on that day.

In so far as the operation of the amendment process in Malaysia is concerned, the Borneo States have placed themselves on a slightly different plane as to the other States by reserving to themselves these special "safeguards".

STATES AND THE AMENDMENT PROCESS

Different organs feature in the Malaysian amendment process. The most important of these organs is the Federal Parliament but an enhanced role in constitutional changes is also reposed in the Conference of Rulers and the State Governors of the Borneo States. Malaysia is a federation of thirteen States and, naturally, the question will arise as to the role and power of the States in the amendment process. It will be noted later that

the very nature of the original composition of the Senate was conceived by the Reid Commission as a "block" to amendments which do not find support with the majority of the States, and that subsequent constitutional amendments have rendered meaningless this safeguard of the Malaysian Constitution.[15] The query that will be considered is whether there can be circumstances under which either consultation with or consent of the States is required to effect a proper amendment to the Constitution.[16] The powers of the States (or rather their lack of powers) has been lucidly revealed in the case of *The Government of the State of Kelantan* v. *The Government of the Federation of Malaya and Tunku Abdul Rahman Al-haj*.[17]

This case arose just prior to the formation of Malaysia. On 9 July, 1963, the Government of the Federation of Malaya, United Kingdom, Sabah, Sarawak and Singapore signed the Malaysia Agreement whereby Singapore, Sarawak and Sabah would federate with the existing States of the Federation of Malaya. The new Federation would be called "Malaysia" and in order to accommodate these changes, constitutional amendments were needed. The Malaysia Act[18] was therefore passed by the Federal Parliament to amend the Federation of Malaya Constitution, 1957, to provide, *inter alia* for the admission of the three new States and for the alteration of the name of the Federation to that of "Malaysia". The Act, after having received the requisite two-thirds majority, was assented to by the Yang di-Pertuan Agung on 26 August, and was to come into operation on 16 September, 1963. However on 10 September, the Government of the State of Kelantan commenced proceedings against the Federal Government and the then Prime Minister, Tuanku Abdul Rahman Putra Al-haj, in his capacity as Chief Executive Officer of the Government. The Government of the State of Kelantan asked for declarations that the Malaysia Agreement and the subsequent Malaysia Act were null and void, or alternatively were not binding on the State of Kelantan. The Government of the State of Kelantan based their proceedings on the following grounds:

(a) The Malaysia Act would in effect abolish the Federation of Malaya and therefore was contrary to the 1957 Agreement.

(b) The proposed changes required the consent of each of the constituent States, including Kelantan, and this had not been obtained.

[15] See "THE *SENATE AND THE AMENDMENT PROCESS*," *infra*.

[16] In Article 2, the Malaysian Constitution requires the consent of a State to be obtained in addition to that of the Conference of Rulers before Parliament can legislate to alter the boundaries of that State.

[17] (1963) M.L.J. 355.

[18] Act 26 of 1963. The Bill form of the Malaysia Act had been annexed to the Malaysian Agreement.s,

(c) The Ruler of the State of Kelantan should have been a party, which he was not, to the Malaysia Agreement.

(d) It was a constitutional convention that the Rulers of the individual States should be consulted regarding any substantial changes in the Constitution.

(e) The Federal Parliament had no power to legislate for the State of Kelantan in respect of any matter regarding which the State has its own legislation.

On 11 September, the Kelantan State Government applied to the court for an order to restrain the implementation of the provisions of the Malaysia Act pending the disposal of the suit. Thomson C.J. in delivering his historic judgment ignored the procedural technicalities and dismissed the whole case on its merits.[19] Instead of dealing with each of the grounds put forth by the Kelantan State Government, the learned judge said:

"To proceed, the two things which are attacked in the present proceedings are the action of Parliament in enacting the Malaysia Act and the action of the Government in concluding the Malaysia Agreement. In each case the gravamen of the charge lies in the admission of the three new States and the change of name without the plaintiff Government having been consulted ..... The real question is not whether any such radical change will in fact result from what has been done by Parliament and the Executive Government but whether Parliament or the Executive Government has trespassed in any way the limits placed on their powers by the Constitution. These powers were given by the signatories to the 1957 Agreement and they have not been taken away. If the steps that have been taken are in all respects lawful the nature of the results they have produced cannot of itself make them unlawful. *Fiat justitia, ruat coelum!*"[20]

The learned judge then proceeded to examine the relevant powers of Parliament and of the Executive as set out in the Constitution. After noting the various modes of amending the Constitution and emphasising the non-requirement of a two-thirds majority in respect of constitutional amendments in connection with the admission of any State, Thomson C.J.

[19] Thomson C.J. said: "Today, however, the Court is sitting in exceptional circumstances. Time is short and the sands are running out. We cannot close our eyes and our ears to the conditions prevailing in the world around us and a clearer expression of opinion than would be customary is clearly required in a matter which relates to the interests of political stability in this part of Asia and the interests of ten million people, about half a million of them being the inhabitants of the State of Kelantan." (1963) M.L.J. 355, 357.

[20] (1963) M.L.J. 355, 358–359.

referred to the amendments of Article 1(1) and (2) and said:

> "In doing these things I cannot see that Parliament went in any way beyond its power or that it did anything *so fundamentally revolutionary* as to require fulfilment of a condition which the Constitution itself does not prescribe, that is to say a condition to the effect that the State of Kelantan or any other State should be consulted. It is true in a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name. But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties. In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the constituent States including the State of Kelantan."[21]

The learned judge also concluded that in respect of the Malaysia Agreement, there was nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State. Thus the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet in signing the Malaysia Agreement on behalf of the Federation of Malaya were lawfully exercising a power conferred by the States in 1957.[22]

Thomson C.J.'s judgment serves to highlight the immense powers that have been reposed in the central government and of the totally negligible voice of the States in the amendment process. As has been said:

> "If the States now . . . . . feel that they have given the centre too much power, it is their own misfortune and their proper course would be to seek amendments to, but not rely on mysterious limitations outside the Constitution."[23]

However it should be noted that not all the States in Malaysia are totally powerless in so far as the amendment process is concerned. Such a description would not hold true in respect of the States of Sabah and Sarawak. In joining the new Federation, these States have reserved certain

[21] *Ibid.*, p. 359. Emphasis added.

[22] By Article 39, the executive authority of the Federation is vested in the Yang di-Pertuan Agung and is exercisable, subject to the provisions of any Federal law and with certain exceptions, by him or by the Cabinet or any Minister authorised by the Cabinet. By Article 80(1) the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, which includes external affairs including treaties and agreements.

[23] Jayakumar, S., "Admission of New States" (1964) *6 Malaya L. Rev.* 181, 188.

powers for themselves. Thus certain amendments cannot be effected which affect these two States without their concurrence.[24]

Thomson C.J.'s judgment contains some perplexing *dicta* in the sense that one is left wondering whether the learned Chief Justice was suggesting that although the Constitution does not prescribe for consultation or consent of the States, yet this is required where the amendment is "so fundamentally revolutionary". Sheridan and Groves have written.

> "[Thomson C.J.] ..... opened up two ideas which, it is submitted, should be quickly closed down again. One is that there might be some Act of Parliament so fundamentally revolutionary that, although done in conformity with the Constitution, it would be invalid unless fulfilling some condition, such as State consultation, not prescribed in the Constitution. The second is that an Act of Parliament changing the name of the Federation and admitting new States, or doing anything that makes the new Federation in a sense somewhat different from the old one, though passed in conformity with the Constitution at the time of its passage, might be challenged if contrary to the Constitution as it originally stood."[25]

It has also been pointed out that the "fundamentally revolutionary" test is too vague and lacks definite criteria for its determination.[26] These *dicta* of Thomson C.J. have been criticized and it has been further asserted that the learned judge's approach was "neither correct nor desirable", and that it created rather than solved, problems.[27]

In the light of the *Kelantan case,* the conclusion that can be drawn is that the States, with the exception of Sabah and Sarawak, have no significant role to play in the amendment process.

THE SENATE AND THE AMENDMENT PROCESS

It is pertinent to note that the Legislature in Malaysia is of a bicameral nature, comprising the House of Representatives (Dewan *Rakyat*) and the Senate (Dewan Negara). It is the latter 'Upper' House which was originally envisaged by the Reid Commission as a major safeguard of the Constitution, in matters concerning amendments to the Constitution. The query which will now be examined is whether this safeguard has any effectiveness at all.

What powers does the Senate wield in the legislative process, *vis-a-vis* money bills, bills other than money bills[28] and bills amending the

[24] See Article 161 E.

[25] Sheridan and Groves, *op. cit. n. 9, at p. 4.*

[26] See Jayakumar, S., "Admission of New States" (1964) 6 Malaya L. Rev. 181.

[27] *Ibid.*, at p. 187.

[28] For definition of "money bill", see Article 68(6) of the Malaysian Constitution.

Constitution? The mechanics of enacting a law by Parliament are prescribed in Chapter 5 of Part IV of the Constitution. A bill (other than a money bill or a bill making amendments to a money bill) may originate in either House.[29] When a bill has been passed by the House in which it originated it is sent to the other House. Once it has been passed by the other House and agreement has been reached between the two Houses on any amendments made in it, it is presented to the Yang di-Pertuan Agung for his assent. The assent of the Yang di-Pertuan Agung is signified by the affixing of the Public Seal to the bill. Once assent is signified, the bill is published and normally then comes into force.[30]

In respect of a bill other than a bill amending the Constitution, the Senate has only 'delaying' powers. If the bill is other than a money bill or a bill amending the Constitution, the Senate has delaying power of only one year. Thus if the Senate does not approve a bill which has been passed by the House of Representatives, the same bill can be passed by the House of Representatives a year later and if the Senate still witholds its approval the bill can then be presented to the Yang di-Pertuan Agung for his assent. The same applies where the Senate passes a bill with amendments which are not acceptable to the House of Representatives. If the bill is a money bill, it can only originate in the House of Representatives. If such a bill is not passed by the Senate without amendments within a month it may be presented to the Yang di-Pertuan Agong for his assent. In other words, in respect of a money bill, the Senate has delaying power of only one month.

In regard to the third kind of bill, namely a bill amending the Constitution, the Senate assumes power greater than mere delaying power. If the bill is one which seeks to amend the Constitution other than an amendment which is exempted from the provisions of Article 159(3), the power of the Senate assumes the nature of a full-fledged veto. In addition to the requirement of a two-thirds majority vote in the House of Representatives, such a bill must also obtain the approval of a two-thirds vote in the Senate.[31] As the Reid Commission said:

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

[29] Article 66(2), Malaysian Constitution.

[30] Parliament however has the power to postpone the operation of any law or to make law with retrospective effect. See Article 66(5) and Article 7(1), Federal Constitution. The latter Article provides for protection against retrospective criminal laws.

[31] Article 68(5), Federal Constitution.

the States *because the majority of members of the Senate will represent the States* . . . . . "[32]

But as one analyses the amendments which have been made to the composition of the Senate, one is drawn to the conclusion that this safeguard is no longer an effective one.

Under the original terms of the constitution, each State was to elect two senators (hereinafter referred to as "State Senators") whilst the Yang di-Pertuan Agung was empowered to appoint sixteen other senators (hereinafter referred to as "Appointed Senators"). As there were eleven states under the 1957 Federation of Malaya Constitution, the State Senators would outnumber the Appointed Senators by twenty-two to sixteen. This proportion would give some semblance of a restraining safeguard against constitutional amendments should the State Senators decide to "block" any such amendments. This proportion however was altered twice with the ultimate consequence of rendering the vesting of an absolute veto in the Senate virtually meaningless. By Act No. 26 of 1963[33] the number of Appointed Senators was raised to twenty-two. With the formation of Malaysia, the proportion of State Senators to Appointed Senators stood at twenty-eight to twenty-two. By Act No. 19 of 1964[34] the number of Appointed Senators was further increased to thirty-two. The consequence of the second amendment was that for the first time the Apppointed Senators outnumbered the State Senators by thirty-two to twenty-eight. This increase of Appointed Senators was further enhanced by the fact that after the "separation" of Singapore on 9 August, 1965, the number of State Senators was reduced to twenty-six. It is obvious therefore that the safeguard as envisaged by the Reid Commission to act as a restraint upon the legislative power of amendment has been deprived of its effectiveness. "In these circumstances, it is extremely difficult for the State Senators to 'block' any amendment. Further, the appointed Senators need the support of only a handful of State Senators to successfully approve or disallow any amendment."[35]

It can be queried whether the amendments are contrary to the recommendations of the Reid Commission, which stated:

"We think that there should be a substantial majority of elected members even though the powers of the Senate are to be considerably less than the powers of the House of Representatives; and

[32] *Reid Commission Report* para. 80, p. 31. Emphasis added.

[33] i.e. the Malaysia Act.

[34] i.e. the Constitution (Amendment) Act, 1964.

[35] Jayakumar, S., "Constitutional Limitations on Legislative Powers in Malaysia" (1967) 9 *Malaya L. Rev.* 109.

we recommend that Parliament should have power to reduce the number of nominated members (i.e. Appointed Senators) or abolish them if a time should come when that is thought desirable."[36]

It is perhaps possible to find some grounds for justifying the amendment effected by Act No. 26 of 1963. A constitution cannot be expected to remain static forever. It must be adapted to meet inevitable changing circumstances. It could be asserted therefore that in raising the number of Appointed Senators from sixteen to twenty-two the Legislature was trying to bring Article 45(1) in accord with changing circumstances, namely, the formation of Malaysia. As a result of such a momentous event, the number of State Senators was increased by six.[37] The Legislature in increasing the Appointed Senators by another six was trying to maintain the status quo as laid down in Article 45(1).

In respect of the amendment effected by Act No. 19 of 1964 which raised the number of Appointed Senators to thirty-two, one can find no grounds of justification whatsoever. Instead it would be expected that the number of Appointed Senators would be *decreased* by two, an expectation which would naturally accompany the "separation" of Singapore from Malaysia.[38] Perhaps the time has come to consider the relevance of the Senate in the legislative process. In 1963, Professor H.E. Groves said: "During the life of the Federation of Malaya the Senate was not noted for taking legislative initiative nor departing from the legislative programme of the party in control of the House of Representatives."[39] This indictment of the Senate in 1963 still holds true after a lapse of nearly a decade. Though this "Upper" House has been frequently looked upon as a "rubber-stamping" institution, it can be a formidable force to be confronted with should the reins of government pass to a different party. The term of office of a Senator is six years and it is not to be affected by a

[36] "Reid Commission Report" para. 62 at p. 23.

Sir William McKell and Mr. Justice Abdul Hamid did not agree with the majority's recommendations. Both these members of the Reid Commission were of the opinion that the Senate should consist of members elected directly by the people of the States – pp. 31–33.

[37] i.e. two State Senators from each of the new States of Sabah, Sarawak and Singapore.

[38] Instead, the then Minister of Home Affairs and Minister of Justice, Dato' Dr. Ismail, as he then was, in commenting on the amendment said: ". . . . . In order to get wider representations in the Senate consequent on the formation of Malaysia this will enable His Majesty to appoint more persons of wider experience and ability to take an active part in the government of this country." "Parliamentary Debates" (Dewan Ra'ayat), 9 July, 1964, col. 1109–1110.

[39] Professor H.E. Groves, "The Constitution of Malaysia – The Malaysia Act", (1963), *Malaya L. Rev.* 245, 255.

dissolution of Parliament.[40] As the Appointed Senators are now in the majority, the Senate can delay and even "obstruct" the legislative programmes of the different party in power. This can be a sobering thought as Appointed Senators owe no responsibility whatever to the people.

AMENDMENT OF THE AMENDMENT PROCESS

The amendment process as originally embodied in Article 159 was a formula devised by the Reid Commission with the aim of ensuring that the amendment process in Malaysia was neither too difficult as to produce frustration nor too easy as to weaken the constitutional safeguards. We have noted that two successive amendments to the composition of the Senate have resulted in the weakening of a major safeguard of the amendment process. The question now arises as to whether the amendment effected to Article 159 by the Constitution (Amendment) Act, 1971[41] has resulted in the amendment process being rendered too difficult to employ in respect of certain provisions of the Constitution as to produce "frustration".

THE CONSTITUTION (AMENDMENT) ACT, 1971

Coming in the wake of the May 13 racial violence,[42] the amending Act or Act A30 of 1971[43] amended Article 10 of the Federal Constitution to empower Parliament to pass laws to impose restrictions on the right to freedom of speech. The restrictions aimed at restricting public discussion on four "sensitive" issues – citizenship, the National Language and the languages of other communities, the special position and privileges of the Malays and the natives of Sabah and Sarawak and the legitimate interests of other communities in Malaysia and the sovereignty of the Rulers. These restrictions extend right up to members of Parliament who are no longer able to seek protection behind the shield of parliamentary privilege.

[40] Article 45(3), Federal Constitution.

[41] Act A30 of 1971.

[42] The racial riots were precipitated in the midst of the General Election which was being held on 10 May, 1969. No independent Commission of Inquiry was held to determine the causes of the racial riots and to trace the sequence of events. The Government's version of what took place is contained in "The May 13 Tragedy", a Report of the National Operations Council (1969). See also Tunku Abdul Rahman, *May 13, Before and After*, (1969); and Goh Cheng Teik, *The May Thirteenth Incident and Democracy in Malaysia*, Oxford University Press (1971).

[43] For an analysis of this Act, see the Introduction by Professor Ahmad Ibrahim at pp. ix–xvi of *Parliamentary Debates on the Constitution Amendment Bill, 1971* (1972).

In relation to the National Language, Article 152 expressly declares the Malay language to be the national language, but this declaration is subject to the proviso that no one can be prohibited or prevented from using any other languages except for "official purposes." Originally there was no definition of official purposes. To clear doubts arising from the absence of a definition, a new clause has been added to Article 152 which defined official purposes as meaning "any purpose of the Government, whether Federal or State, and includes any purpose of a public authority". The ambit of the usage of the National Language for official purposes can now be visualised as "public authority" means the Yang di-Pertuan Agung, the Ruler or Governor of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by federal or state law, any court or tribunal other than the Federal Court and High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities.[44]

The Constitution (Amendment) Act, 1971 also amended Article 153. Article 153 is the provision which places in the Yang di-Pertuan Agung the responsibility to safeguard the special position of the Malays and the legitimate interests of the other communities. Furthermore, the Yang di-Pertuan Agung is empowered to ensure the reservation for Malays of such proportion "as he may deem reasonable" of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then subject to the provisions of that law and Article 153 of such permits and licences.[45]

By virtue of Section 6 of the amending Act, the words "and natives of any of the Borneo States" were inserted immediately after the words "Malays" wherever they appear in Article 153. The intention of such an amendment is, according to the Explanatory Statement of the

[44] See Article 160, Federal Constitution. Also refer to the National Language – Malaysia Act (Revised 1971), No. 32. This amendment did not in any way affect Sabah and Sarawak as Article 161 provides for the use of English in these two Borneo States for a period of ten years after Malaysia Day.

[45] It is however provided in Article 153 that the Yang di-Pertuan Agung in exercising his functions shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him. Neither will Article 153 operate to deprive any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person or any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

Constitution (Amendment) Bill, 1971, to "provide for parity of natives of any of the Borneo States with Malays in West Malaysia".[46] Prior to the amendment the natives of the Borneo States were entitled to reservation of positions in the public service but it was expressly provided that there was to be no reservation of fixed proportion in relation to scholarships, exhibitions and other educational or training privileges and facilities for the natives. The amendment means that the natives of the Borneo States have been given the same status as the Malays.

In addition to elevating the status of the natives of the Borneo States on parity with the Malays, the Act also empowers the Yang di-Pertuan Agung to direct any University, College and other educational institutions providing education after the level of Malayan Certificate of Education or its equivalent where the number of places offered to candidates for any course of study is less than the number of candidates qualified for such places, to reserve such proportion of such places for the Malays and natives of the Borneo States as the Yang di-Pertuan Agung many deem reasonable.

A major impact of the Constitution (Amendment) Act, 1971 is the enhancement of the power and role of the Conference of Rulers in the amendment process. Originally the consent of the conference was required in respect of any law which sought to amend the following provisions of the Constitution:

(i) Article 38 – which deals with the functions and powers of the Conference of Rulers.

(ii) Article 70 – which deals with the precedence of Rulers and Governors.

(iii) Article 71 (1) – which deals with the guarantee by the Federation of the right of a Ruler to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of a State.

(iv) Article 153 – which deals with special rights and privileges of the Malays and the legitimate interests of other communities.

[46] It is also provided in Section 6(c) of the Constitution (Amendment) Act, 1971 that the expression "natives" in relation to a Borneo State shall have the meaning assigned to it in Article 161A, i.e. in relation to Sarawak, "native" means a person who is a citizen and belongs to one of the following ethnic groups: the Bukitans, Bisayaks, Dusuns, Sea Dayaks, Land Dayaks, Kadazans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagols, Tabuns and Ukits, or is of mixed blood deriving exclusively from these races.

In relation to Sabah the expression refers to a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth. See Article 161A Clauses (6) and (7).

Now as a result of the Constitution (Amendment) Act, 1971, the consent of the Conference is required for the amendment of various other constitutional provisions, namely, Article 10 as amended and any law made thereunder, Article 63, Article 72 and Article 152 as amended. All these articles deal with what have been described as "sensitive" matters. Such a move by Parliament has also been described as an attempt at "entrenchment" of the amended constitutional provisions.

Is there any justification for describing the Constitution (Amendment) Act, 1971 as an attempt at entrenchment? Prior to this Act, these entrenched provisions could be amended by the general mode of amendment, i.e. they required the support of a two-thirds majority in each House of Parliament on second and third readings. Now a further element, the consent of the Conference of Rulers, is required. To effect this, Article 159(5) has been amended to incorporate within its ambit the provisions sought to be entrenched. At this stage, the contention of entrenchment is not thoroughly convincing. For instance, if Parliament feels that parliamentary privilege ought to be restored to its original form, it can achieve this by mustering the support of a two-thirds majority and obtaining the consent of the Conference of Rulers. Even if the conference witholds its consent, Parliament can still achieve the desired objective by simply amending Article 159(5) through a two-thirds majority to remove Article 63 or Article 72 from its ambit. But the Constitution (Amendment) Act, 1971 does not stop at this stage. The suggested solution of circumventing the conference should it withhold its consent has now been blocked by the addition of the words "or to this Clause" to Article 159(5), thus succeeding in effectively entrenching those provisions. Article 159(5) as amended now reads:

> "A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, 38, 64(4), 70, 71(1), 72(4), 152, or 153 *or to this Clause* shall not be passed without the consent of the Conference of Rulers."[47]

Therefore, the amendment of Article 159(5) to do away with the consent of the Conference of Rulers for the amendment of Article 63 or Article 72 must first of all obtain the consent of the Conference itself. Herein lies the justification for describing the Constitution (Amendment) Act, 1971 as an attempt at entrenchment.

AMENDMENT OF A LAW PASSED UNDER ARTICLE 10

Of all the Acts which have effected amendments to the "Amendment Process", i.e. to Article 159, the Act which has brought about the most profound changes is the Constitution (Amendment) Act, 1971. One of the

[47] Emphasis added.

declared objectives behind the Act is the removal of certain "sensitive" issues from the realm of the public discussion. To achieve this objective, Article 10 was amended whereby Parliament was empowered to pass laws prohibiting the questioning of the sensitive matters.

The normal legislative procedure is that an ordinary Act of Parliament or an amendment to such an Act need only be passed by a simple majority vote. In respect of a Constitutional (Amendment) Act, the provisions of Article 159 must be complied with. One of the curious implications arising from the amendments to Article 159 effected by the Act is that an exception has been made to the normal legislative procedure for an ordinary Act of Parliament. Since Article 10 has been amended it would mean that a law which prohibits the questioning of the sensitive matters may be passed by a simple majority as it would not amount to infringing or amending the Constitution. It would be expected therefore that if Parliament deems that the proper time has now come to repeal such a law, such a repeal will also be brought about only by a simple majority vote. However this is no longer the case for a law which is passed under the amended Article 10. Section 7 of the Constitution (Amendment) Act, 1971 now provides that "a Bill for making any amendment to a law passed under Clause (4) of Article 10" cannot be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total members of that House. In addition, the consent of the Conference of Rulers is needed. As was observed by Professor Ahmad Ibrahim:

> ". . . . .Thus we have another example of the fact that Parliament in Malaysia is not supreme for under the new provisions not only certain provisions of the Constitution but certain laws passed by Parliament under Article 10 of the Constitution cannot be amended by Parliament, but require for such amendment the further consent of the Conference of Rulers."[48]

So far, no law has been passed under the amended Article 10 but effective prohibition on the discussion of sensitive matters has been brought about by the amendment of the Sedition Act, 1948. It is important to note that the amendment to the Sedition Act, 1948 was not effected by a law passed under Article 10 but effected by the emergency Ordinance No. 45 of 1970 promulgated by the Yang di-Pertuan Agung. As such, the curbs on public discussion can be removed if the emergency Ordinance is revoked by the Yang di-Pertuang Agung before Parliament sits or once Parliament is summoned, if it is annulled by resolutions passed by both Houses of Parliament.[49] If the Ordinance is neither revoked nor

[48] See the Introduction to "Parliamentary Debates on the Constitution Amendment Bill, 1971" (1972), p. xv.

[49] Article 150(3), Federal Constitution.

annulled, the Ordinance promulgated in pursuance of the Proclamation of Emergency automatically ceases to have effect at the expiration of a period of six months from the date the Proclamation of Emergency ceased to be in force.[50] However for the Proclamation to cease to be in force it must again either be revoked by the Yang di-Pertuan Agung or annulled by resolutions passed by both Houses of Parliament, once Parliament is summoned.

Parliament may deem it necessary to prolong the prohibition on the discussion of sensitive matters even after the revocation of the Proclamation of Emergency. In such an event, the amendment to the Sedition Act which was effected by Ordinance No. 45 of 1970 will have to be embodied in an Act of Parliament. Once such an Act is passed under Article 10, the provisions relating to sensitive matters will be firmly entrenched for the repeal of such a law requires a two-thirds majority vote and the consent of the Conference of Rulers. Such a move is not purely speculative but in the offing as was hinted by the Attorney-General of Malaysia, Tan Sri Abdul Kadir bin Yusof when he said:

> "Under the Sedition Act, or *later the new Act under Article 10 of the Constitution*, the power to charge a person for committing an offence relating to sensitive issues is with the Public Prosecutor and with his written consent."[51]

If such a move is translated into action, it will put into true light the magnified role of the Conference of Rulers. When circumstances justify the repeal of the new Act (assuming it is passed), Parliament will find that its ability to legislate on an ordinary law will be subject to the overriding consent of the Conference of Rulers.

MISCELLANEOUS AMENDMENTS TO THE AMENDMENT PROCESS

There have been a few other amendments to Article 159 of the Federal Constitution but these are of minor importance. For instance, Clause (2) of Article 159 was repealed by Act No. 25 of 1963 with effect from 29 August, 1963. This clause reads as follows:—

> "(2) No amendments to this Constitution shall be made before Parliament is constituted in accordance with Part IV, except such as the Legislative Council may deem necessary to remove any difficulties in the transition from the constitutional arrangements in operation immediately before Merdeka Day to those provided for by the Constitution; but any law made in pursuance of this Clause shall, unless sooner repealed, cease to have effect at the expiration of a period of

[50] *Ibid.*, Article 150(7).

[51] "Parliamentary Debates on the Constitution Amendment Bill, 1971" (Government Printers, Kuala Lumpur, 1972) at p. 189. Emphasis added.

twelve months beginning with the day on which Parliament first meets."

It was under this provision that the first amendment to the Constitution was effected by Ordinance 42 of 1958.[52]

Another amendment consisted of the addition of a new paragraph to Clause (4) of Article 159. This new paragraph provided another addition to the list of amendments that are excepted from the requirement of a two-thirds majority vote, namely, "any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated." By virtue of Section 33(1) of Act 24 of 1962, the amendment to Article 159 was deemed "to have come into operation on Merdeka Day." In other words, the new paragraph was inserted with retrospective effect from 31 August, 1957. Thus all States would come within the ambit of the phrase "previously so admitted".

The new paragraph comprises two limbs: (a) any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, (b) any modification made as to the application of the Constitution to a State previously so admitted or associated. Limb (a) does not pose much difficulty as it must have been enacted in contemplation of an enlargement of the then existing Federation of Malaya. Under the Constitution as it originally stood before the formation of Malaysia, Article 2 enables new States to be brought into the Federation by an ordinary law, that is, a law passed by a simple majority in the House of Representatives. The admission of new States requires an amendment to Article 1 to incorporate the names of these new States into the Constitution. Such an amendment being an amendment "consequential upon the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76" falls within the ambit of Article 159(4)(b) and thus the same simple majority suffices. However the Government had contemplated making other modifications to the Constitution in connection with the admission of the new States which could not be covered by Article 159(4)(b). This would mean that some provisions of the amending Act would require a simple majority whilst other provisions would require a two-thirds majority. Therefore Limb (a) of Article 159(4)(bb) was necessary.

The ambiguities arise from Limb (b). As Sheridan and Groves queried:

"No court has yet had to consider what can be described as an

[52]The Ordinance inserted a new clause, Clause (8), into Article 34 of the Malaysian Constitution.

application of the constitution "to a state" and what is an application of the constitution *not to a state*. What for example would be the status of an Act of Parliament, passed by a simple majority, purporting to amend Article 74(1) and the Ninth Schedule by conferring upon itself power to legislate on boarding houses in Perlis".[53]

After Malaysia Day, Article 159(4)(bb) does not cover amendments made in connection with the admission of the Borneo States (i.e. a simple majority is not sufficient) unless the amendment is such as to "equate or assimilate" the position of that State under the Constitution to the position of the States of Malaya. This provision has also not yet been considered by the courts but it can spell potential power for the Federal Government to legislate across State lines for the words "equate or assimilate" can present ambiguities.

CONCLUSION

From the above discussion, it can be observed that:— (1) the States have a negligible voice in the amendment process, (2) the Senate has been reduced to a "toothless" organ in the Malaysian Parliament, and (3) the Conference of Rulers has had its power and role in the amendment process highly magnified. The overall viewpoint that can be asserted is that the amendment process under the Malaysian Constitution has metamorphosed through various constitutional amendments to a form which is tangential to the aims of the Reid Commission.

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[53] Sheridan and Groves, *op. cit.*, n. 9, p. 15.

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THE INTERNAL APPLICATION OF INTERNATIONAL LAW IN MALAYSIA: A MODEL OF THE RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW

There is no lack of scholarly inquiry into the international legal practices and perspectives of newly independent states[1]. Most of these studies however have focused on the performance of new states in arenas of interaction external to their own territory and the claims put forward for changes in the structures and substance of the international law creating processes. It is the purpose of this contribution to eludicate the procedures in Malaysia facilitating the application of international law in internal arenas.

In addition to describing the mechanisms of incorporation, such a study involves a consideration of the continuing impact of English law concepts in Malaysia, the manner in which the constitution attempts to defuse federal-state conflicts endemic in this area of the law and the nature of the complex relationship between municipal law and international law. The lack of comprehensive Malaysian practice and the fact that many Malaysian techniques for incorporation have foreign models mean that the methods of the comparatist have been freely adopted.

I. THE APPLICATION OF CUSTOMARY INTERNATIONAL LAW

A. *The Role of Section 3 of the Civil Law Act 1956 (Revised-1972)*

Section 3(1) of the Civil Law Act purports to state comprehensively the sources of law from which the courts in Malaya can draw. Apart from statutes, these are "the common law of England and the rules of equity as administered in England on the 7th day of April, 1956". The provisions for Sabah and Sarawak do not differ materially, at least for present purposes. The primary problem arising from this formulation can be stated simply: unless customary international law can be regarded as part of the common law of England there would appear to be no room for its application by the courts in Malaysia. Common law, on the one hand, is founded upon a body of principles developed from the judicial precedents of the common law courts. These tribunals were the first centrally organized judicial

[1] See, for example, Anand, *New States and International Law* (1972) and *Asian States and the Development of Universal International Law* (1972); Lissitzyn, *International Law in a Divided World* (1963); Falk, 'The New States and International Legal Order" 118 *Hague Recueil* 7 (1966).