MALAYSIA AS A FEDERATION

The idea of a federation in Malaysia is not entirely new. Negri Sembilan originally consisted of nine States around Malacca who when they broke away from Malacca tutelage constituted a federation. During the nineteenth century there was violent dissension among the rulers of the various states of the federation and the British intervened. By 1889 all the rulers had accepted British protection after which some attempt at amalgamation was made and a federation of only six States was established in 1895. In 1898 they were made into a unitary State for most purposes with its capital at Seremban and the six States (Jelebu, Johol, Rembau, Sri Menanti, Sungai Ujong and Tampin), although they retain their Ruling Chiefs and customs, are headed by one legislature, one executive and a Yang di Pertuan Besar, who is elected by the Ruling Chiefs from among the members of the royal family of Sri Menanti.

The original federation of Negri Sembilan had no written Constitution but was based on the customary law and customary practices. Under the Malay form of federation, the office of Ruler or Yang di Pertuan Besar was a foreign, originally Hindu concept, which had been uneasily absorbed in the Minangkabau tribal system. The Yang di Pertuan Besar had the divine right of one whose ancestors had been the incarnation of Hindu Gods and who under Islam regarded himself the vicegerent of God on earth, but he had no real authority. He could levy no taxes except fees for cock fighting. For his maintenance he lived on land inherited from the tribal wife of the founder of the royal house and he was given formal traditional presents at his installation and on the occasion of marriages and other feasts. He was supreme arbiter and judge, if the territorial chiefs chose to invite him to adjudicate, which they never did. The Yang di Pertuan Besar should have been first in a State Council, but no council ever met, for the four territorial chiefs or *Undangs*, having got themselves absorbed into Minangkabau polity by accepting uterine descent and conforming to matriarchal custom, regarded themselves as petty kings and never collaborated except when threatened by foreign invasion. Below the Undang were the *Lembagas*, the real chiefs of the matrilineal Minangkabau tribes. The Lembaga was elected and under the Malay *adat* he had the power of marking the boundaries of tribal lands and settling the transmission of property on death or divorce and he had jurisdiction in cases of lesser crimes, torts and debts. The Lembaga's subordinates were the elders (*buapa*) elected by the members of the sub-tribes. His function was to deal with disputes among the members of the sub-tribe, and he was the witness for all formal

payments made by or to a member of his sub-tribe and for the declaration of the husband's separate property at marriage and at its return on divorce.

The democracy of Negri Sembilan was an indigenous tribal one which gave votes to women and protected the rights of the humblest. It had however two fundamental weaknesses. It insisted that the election of all its representatives, from the Ruler down to the tribal elder, must be unanimous. They were so intent on the principle of unanimity that they never realized the advantage of accepting a majority vote, so that before the British period minorities were always creating evil strife. Secondly, they were so suspicious of tyranny that they never gave the Yang di Pertuan Besar the power required to federalise their territory. The old nine States were never a homogenous federation. The big territorial chiefs never merged their individual interests in those of the federation and except in the face of foreign aggression each State was self-sufficient. It was the British creation of a Council with the Yang di Pertuan Besar as Chairman and the four Undangs as members and a majority vote which cemented the warring elements of the State.

In 1896 Negri Sembilan joined with the States of Selangor, Perak and Pahang to form the Federated Malay States. One of the principal reasons for the Federation was to have a single administrative unit by which the State of Pahang which was in serious financial difficulties owing to her small revenue and costly rebellions could be financed from the richer States of Perak and Selangor. It was also felt that unity would bring greater efficiency in all departments of public life. Specialist engineers and doctors were badly needed but it was difficult for a State to hire their services alone. A union of States would enable specialists to be employed for development purposes. The export of tin through Singapore demanded an efficient system of transport and in order to develop this, co-operation among the different States was necessary. It is also significant that this was a time when federations were being encouraged in Australia and Africa and it was felt that federation would enable the power of the Residents in the State to be checked. The instructions given to each Resident were to the effect that "the Residents are not to interfere more frequently or to greater extent than is necessary with the minor details of government; but their special objects should be, the maintenance of peace and law, the initiation of a sound system of taxation, with the consequent development of the resources of the country and the supervision of the collection of revenue, so as to ensure the receipt of funds necessary to carry out the principal engagements of the Government and to pay for the cost of the British officers and whatever establishments may be necessary to support them".[1] This was a great responsibility and power for one man; it became

[1] E. Sadka, *The Protected Malay States, 1874-1895* Kuala Lumpur, 1968, p. 102.

necessary to restrain some of them from exceeding their authority.

The Federation Agreement of 1896 created the post of Resident-General, who was to be the agent and representative of the British Government directly under the Governor of the Straits Settlements. The Resident-General's advice was to be followed by the Sultans on all matters except those touching Islam and Malay customs. It was provided that nothing in the Agreement was intended to curtail any of the powers or authority held by the Rulers in their respective State; the State Councils were to retain the power to enact legislation; and the appointment of the Resident-General was not to effect the obligation of the Malay Rulers towards the British residents. Although under the Agreement the States were to retain their legislative and executive powers, in effect federation meant to a great extent centralization at Kuala Lumpur. The federation was advantageous to the States concerned. It brought about co-ordination of work and co-operation among the States and these led to prosperity. The Police Force was reorganised by a Commissioner of Police, the financial system was reorganised by a Financial Commissioner and the work of extending and constructing railways was undertaken by a General Manager. The judicial system was reorganised by appointing a Judicial Commissioner, Public Prosecutor and two assistant Judicial Commissioners. A Land Code and a Mining Code were drawn up and a Conservator of Forests was appointed to look after the forests. With all these however the States were apprehensive of the overcentralisation. The Central Government came to have extensive executive powers. The executive power fell in the hands of the Resident-General, who came to take over nearly all the important functions of the Residents, as he controlled the important departments from Kuala Lumpur. The States were left to attend only to minor details. All the laws were drafted in Kuala Lumpur and sent along to the States which had to adopt them. The State Councils thus became nothing more than rubber stamps. One of the direct results of the Federation was the holding of a Rulers' Conference or Durbar. Two such Conferences were held; one in 1897 at Kuala Lumpur and the other in 1903 at Kuala Lumpur. At the first Conference certain laws were passed on to the State Councils to be approved by the State Governments. Thus the State Governments in effect lost their power to legislate. The power of the Federal Commissioner, the Legal Adviser and the other central offices grew at the expense of the State Governments. The Resident-General became a very powerful man and although the Federation Agreement provided for the Federal Council to meet at least once in every year, no meeting of the Council was called. The agitation of the Rulers and especially that of Perak led to a move for decentralization. In 1909 a Federal Council was set up. It was composed of the High Commissioner, the four Sultans, their four Residents, the Resident-General and four nominated members representing business interests. The

main purpose of the Council was to enable the Sultans to express their opinions on the running of their States; to give the business community a voice in the Federal Council; and lastly to permit better control of finances of the Federated Malay States. The powers of the Resident-General were cut – he lost the control of finance and was required to take into consideration the opinions of the Sultans and the business community in proposing laws for enactment. The next step was taken in 1910 when the Resident-General's office was reduced to that of Chief Secretary to the High Commissioner and the Federal Council was given complete control of the finances of the federation. However it soon became apparent that the establishment of the Federal Council did not in any measurable way benefit the Sultans but instead led to further centralization. The Rulers sat as ordinary members of the Federal Council and had no more authority than the business representatives and therefore could be out-voted on any issue. Unconsicously the administration gradually came to be more and more centralized in the office of the Chief Secretary. Further steps at decentralization were proposed in 1925. The High Commissioner Sir Lawrence Guillemard, suggested the abolition of the post of Chief Secretary, whose powers would be transferred to the Residents. The States were to have control over all Government departments except Railways, Customs and Excise, Post and Telegraphs which would be re-named as federal. The Rulers accepted these proposals but they were opposed by the business community. As a result a compromise was adopted.

In 1927 the Federal Council was reorganized. The Sultans withdrew from the Federal Council and the membership of the Council was increased to twenty-four – thirteen officials, the heads of federal departments and eleven unofficials representing the various communities and interests. The next step at de-centralization was taken in 1933, when a Federal Secretary replaced the Chief Secretary. The State Councils, which had been in decay, were reconstituted and non-Malay interests were given representation on them. The powers of the Chief Secretary were passed to the Residents and many departments, including agriculture, education, medical services and the Public Works Department, were transferred to the individual States. The Japanese Occupation of Malaya retarded all further constitutional progress. However the British Government made plans for the post-war government in Malaya and in 1943 it was announced that "the main aim of the Government as regards the political future of Malaya after its liberation will be the development of its capacity for self-government within the Empire". In 1945 the blue print which had been prepared for the Malayan Union of all the Malay States, Penang and Malacca (but without Singapore) was put into effect. The Union would be headed by a Governor with full powers over the Civil Service. The Sultans who had hitherto been heads of their own States were now to be advisers

only. They would sit in a Council of Rulers, which would give advice to the Governor, when the Governor asked for it. The Legislative Council was to comprise of an equal number of official and unofficial members. The unofficial members appointed were to represent as much of the population as possible. The Governor had the right to veto or to pass any law. Local and State Government were to be conducted through State and Settlement Councils. Citizenship was opened to the immigrant races with a residential qualification of ten out of fifteen years. The proposals for and the institution of the Malayan Union were opposed by the Malays who considered them as an affront to their traditional Rulers and the Malayan Union was eventually dissolved.

The Federation of Malaya was established on 1st February, 1948, by the Federation of Malaya Agreement, 1948, after agreements had been concluded between the British Government and the Rulers jointly. The Agreement established a federation consisting of the Malay States and Malacca and Penang with a strong central government. So far as the Malay States were concerned direct British jurisdiction was restricted to external affairs, defence and appeals to the Privy Council. Under the new Agreement each Ruler was to accept the advice of a British Adviser except in matters of religion and Malay custom and was to govern his State under a written constitution which conformed with the State and Federal Agreements. In form the Federation appeared as a loose one of quasi-sovereign States; but the compulsion of the Rulers to follow the counsel of their British Advisers together with the "reserved power" of the High Commissioner to enact legislation without the approval of the Legislative Council provided the means for an effective centralization of power. Part XII of the Second Schedule to the Agreement provided for the acquisition of Federal citizenship by operation of law and by application.

After the elections of 1955, which returned the Alliance Government to power, discussions took place between the British Government, the Rulers and the new Alliance Malayan Government, on the next steps towards independence. It was agreed that a Commission be set up to review the Constitution. The Commission consisted of Lord Reid and Sir Ivor Jennings from the United Kingdom, Mr. Justice Malik of India, Mr. Justice Abdul Hamid of Pakistan and Sir William McKell of Australia. In the introduction to its report the Constitutional Commission stated the general principles upon which it proceeded in making its recommendations. "We think it essential that there should be a strong Central Government with a common nationality for the whole of the Federation. Moreover we think it essential that the States and Settlements should enjoy a measure of autonomy and that their Highnesses the Rulers should be constitutional Rulers of the respective States with appropriate provisions regarding their position and prestige. We have made provision for a new

Constitutional Head for the Federation and for the Settlements becoming States in the new Federation. We have adopted without substantial change proposals for the acquisition of citizenship of the Federation which have been agreed by the main parties representing all races. We recognise the need for safeguarding the special position of the Malays, in a manner consistent with legitimate interests of other communities and we have given particular consideration to this need. We have framed our recommendation on the basis that Malaya will remain within the Commonwealth and we have found general agreement in this matter".[2]

The Commission duly submitted its report which was published on 21st February, 1957. The British Government, the Conference of Rulers and the Government of the Federation then appointed a Working Party to examine it in detail. On the basis of their recommendations the new Federal constitution, together with constitutions for Malacca and Penang, was promulgated on Merdeka Day, 31st August, 1957, and thus the Federation of Malaya became an independent sovereign country.

The constitutional machinery devised to bring the new constitution into force consisted of:-

(a) in the United Kingdom, the Federation of Malaya Independence Act, 1957, together with Orders in Council made under it;
(b) the Federation of Malaya Agreement, 1957; and
(c) in the Federation, the Federal Constitution Ordinance, 1957, and (in each of the Malay States) state enactments approving and giving the force of law to the federal constitution.

On 31st July, 1957, the Federation of Malaya Independence Act, 1957, passed by the British Parliament gave parliamentary approval to Her Britannic Majesty concluding with the Rulers of the Malay States an agreement for the establishment of the Federation of Malaya as an independent sovereign country. In particular the Act empowered Her Majesty to terminate her sovereignty and jurisdiction in respect of the settlements of Malacca and Penang, and all her other powers and jurisdiction in respect of the Malay States or the Federation as a whole. Also, the Act empowered the conclusion of an agreement to form the Malay States and the Settlements into a new independent Federation of States under a Federal Constitution.

On 5th August, 1957, the Federation of Malaya Agreement, 1957, was concluded between on the one hand the British High Commissioner on behalf of Her Majesty and on the other the Rulers. This agreement established a new federation of states called the Federation of Malaya consisting of the Malay States and the settlements as from 31st August, 1957 (Merdeka Day) and thereupon the settlements ceased to form part of Her Majesty's dominions and Her Majesty ceased to exercise any sovereignty

[2] Federation of Malaya Constitutional Commission Report, para. 15.

over them, and all powers and jurisdiction of Her Majesty or of the British Parliament in respect of the settlements or of the Malay States or the Federation as a whole came to an end. In the agreement were contained the new constitution of the Federation of Malaya and the new constitutions of Penang and Malacca.

The Federal Constitution Ordinance, 1957, was passed by the Federal Legislative Council to give the agreement and the three constitutions contained in it the force of law. Similarly, each of the legislatures of the Malay states also passed state enactments approving and giving the force of law to the Federal Constitution. The new Constitution of the independent Federation of Malaya thus came into operation on August 31st, 1957, and although amended in detail on several occasions it was not subject to any drastic revision until September, 1963, when the Federation was renamed Malaysia; and Singapore, Sabah and Sarawak joined the Federation. The constitutional changes and modifications required were effected by the Malaysia Act, which came into operation on the 15th of September, 1963. On August 9th, 1965, Singapore left the Federation and Malaysia therefore now consists of the States of Malaya and the Borneo States.

The Constitution of Malaysia provides for a parliamentary democracy based on the English model. The Head of State is the Yang di-Pertuan Agung who is elected from among the nine Malay Sultans to serve for a five-year term, and who must normally act on the advice of ministers. The Yang di-Pertuan Agung may act in his discretion in appointing a Prime Minister, in withholding consent to a request for the dissolution of Parliament and in summoning a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of the Rulers and in any action at such meeting. The Prime Minister has to be a member of the House of Representatives commanding the confidence of that House. The Federal Parliament is bicameral, the lower house, the House of Representatives, being wholly elected. The upper house, the Senate, has two Senators elected by each State Legislative Assembly and a number of members nominated by the federal government. Elections are by secret ballot, the electorate being divided on the basis of territorial constituencies consisting of all adult citizens not subject to any special disqualification. The relations between the two Houses are constitutionally regulated following the precedent in the United Kingdom, the effect of which is that the Senate has virtually no power to oppose financial legislation which it may delay for one month only, while it may delay the passage of other legislation for one year.

Islam is the religion of the Federation but while each of the Rulers is the Head of the Muslim religion in his State and provision is made for the Yang di-Pertuan Agung to be conferred the position of Head of the Muslim religion in Penang and Malacca, no such provision is made in regard to the

Borneo States.[3] The function of the Conference of Rulers of agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole does not extend to Sabah or Sarawak.[4] No Act of the Federal Parliament which provides as regards a Borneo State for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion, shall be passed without the consent of the Governor; and where any grant is given for such purposes by any provision of Federal law not having effect in either of the Borneo States, provision must be made for the payment of a proportionate amount for social welfare purposes in that State.[5] In the States of Malaya the State Legislature may enact a law controlling or restricting the propagation of any religious doctrine or belief among persons professing the Muslim religion but in the case of a Borneo State the Constitution may provide that no such law shall be passed unless it is agreed to in the Legislative Assembly on second or third reading or on both by a specified majoirty, not greater than two-thirds of the total number of members of the Assembly.[6]

Again while Malay is accepted as the national language of the Federation, it is provided that no Act of Parliament terminating or restricting the use of the English language in either House of Parliament by a member of or from the Borneo State shall come into operation until ten years from Malaysia Day; and no such Act of Parliament terminating or restricting the use of the English language (a) in proceedings in the High Court in Borneo and in appeals to the Federal Court therefrom; or (b) in the Legislative Assembly or for other official purposes in a Borneo State, shall come into operation until ten years after Malaysia Day and until it has been approved by an enactment of the Legislature of the Borneo States or the Legislature of the Borneo State, as the case may be.[7] Moreover any native language in current use in the Borneo State may oe used in native courts or for any code of native law and in the case of Sarawak, until otherwise provided by enactment of the Legislature, such native language may be used by a member addressing the Legislative Assembly or any Committee thereof.[8]

The Yang di-Pertuan Agung and the Rulers are constitutionally linked

[3] Federal Constitution, Article 3(1).

[4] *Ibid.*, Article 38(7).

[5] Federal Constitution, Article 161C.

[6] *Ibid.*, Article 161D.

[7] *Ibid.*, Article 161.

[8] *Ibid.*, Article 151 (5).

with the Muslim religion and Malay custom and the special position of the Malays in the public service, education, trade and business. Each Sultan is the head of the Muslim religion in his own State; the consent of the Conference of Rulers is needed before any constitutional amendment affecting the special rights of the Malays can be made and the Conference of Rulers must also be consulted on proposed changes in policy affecting such special rights. The dignity, precedence, privileges, rights and immunities of the Rulers are reaffirmed by the Federal Constitution; no Federal law affecting their position can be passed without the consent of the Conference of Rulers; and the State Legislatures have no power to amend constitutional provisions relating to the position of the Rulers and other Malay customary dignitaries.

The States which constituted the Federation of Malaya had on the whole a similarity of social and political institutions, although neither Penang or Malacca had Malay rulers. The Malays constituted the largest group of the native population and are about 55% of the total population. The Chinese constitute about 35% of the population and the balance of the population are made up mainly of the Indians, Europeans and Eurasians. Although the Malays are in a majority in the East Coast States of Kelantan and Trengganu, on the whole, the population structure was similar throughout the Federation of Malaya and the division of the Federation into States did not reflect any differences in social and political structure or communal stratification. With the entry of the Borneo States and still more of Singapore into Malaysia, significant local differences appeared. Singapore had a predominantly Chinese population and had ceased to have any effective Malay Ruler since 1877 if not earlier. The Borneo States cannot be considered as Malay countries in the Malayan sense, as out of a total population of about 2 millions, under half a million of them regard themselves as Malays. The Borneo States too have no Malay Rulers and the Muslim population constitute only 23.4% of all faiths practised in Sarawak and 37.9% in Sabah. In the new Federation therefore State boundaries do demarcate significant local units with significant local interests to defend.

Although four of the Constitutions of the States, namely, Johore, Kelantan, Perak and Trengganu, refer to a status known as "subject of the Rulers" and although the States having Rulers have nationality laws providing for the acquisition and loss of the status of subject of the Ruler, in effect, there was one citizenship law for the whole of the Federation. Under the Federation of Malaya Agreement of 1948 all subjects of the Rulers were given citizenship of the Federation by operation of law. With Malaysia, Federal citizenship was extended to Singapore and the Borneo States. The citizenship of Singapore was however retained; franchise and other rights in Singapore depended on possession of the citizenship of Singapore as distinct from Federal citizenship; and

conversely a citizen of Singapore could not exercise franchise rights in the other parts of Malaysia.

The Constitution follows the ordinary federal method of dividing powers so that the Federal and State governments are each within their own spheres co-ordinate and independent. The division of legislative powers between the Federation and the States is set out in three lists, the Federal List, the State List and the Concurrent List and all residuary powers not listed are placed within the competence of the States.[9] The distribution of powers in the Federation of Malaya reflected a very strong central emphasis. The exclusive powers of the Federal Parliament are very extensive; they include elaborately defined external affairs and defence powers; wide authority over internal security, including the police; very general powers over the criminal and civil law and the administration of justice, citizenship and aliens; extensive financial powers, including tax powers, broad control over loans and borrowing including borrowing by the States and general fiscal control of the economy, including power over foreign exchange, banking, currency and capital issues. The Federal Legislature was also given legislative powers with respect to the production, supply and distribution of goods; price control, and food control; corporations; industries and factories; exports; industrial property and insurance; shipping, navigation, fisheries, communications and transport; education, medicine and health; labour and social security, including trade unions, industrial and labour disputes and labour welfare; newspapers and other publications; and wireless, broadcasting and television. In contrast the legislative powers of the States were meagre; they include powers over the Muslim religion and the personal and family law of Muslims, various matters touching land tenure, local government and various works and services of a local character. The Concurrent List was short and included social welfare, town and country planning, public health, sanitation and disease prevention, drainage and irrigation. It is provided that if any State law is inconsistent with a Federal law, the Federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.[10]

Not only were the powers of the States circumscribed but the Federal Parliament had power to legislate on State matters. Thus under Article 76 Parliament had power to make laws with respect to any matter enumerated in the State list for the purpose of implementing any treaty, agreement or convention between the Federation and any other country or any decision of an international organization of which the Federation is a member; or for the purpose of promoting uniformity of the laws, or if so requested by the legislature of a State. It was provided however that no

[9] Federal Constitution, 9th Schedule.

[10] Federal Constitution, Article 75.

such law with respect to any matters of Muslim law or the customs of the Malays shall be made until the government of any State concerned had been consulted and no such law made for the purpose of promoting uniformity or at the request of any State shall come into operation in any State until it had been adopted by a law made by the legislature of that State, in which case it will become a State law. Parliament was also authorized to make laws for the purpose of ensuring uniformity of law and policy with respect to various matters of land law, including land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, covenants and other rights and interests in land, compulsory acquisition of land, rating and valuation of land and local government. This exercise of the federal legislative authority is not subject to State approval except in so far as such law makes provision for conferring executive authority on the Federation, in which case it must be approved by a resolution of the Legislative Assembly of the State it it is to operate there. Land utilization policy was formulated by a federally controlled National Land Council; the federal authorities were entitled to prepare and give legislative effect to national development plans, conduct inquiries and research in any field, inspect State activities and give advice to State governments and officers. Moreover in times of emergency, after a proclamation of emergency has been issued by the Yang di Pertuan Agung, the Federal Parliament may make laws with respect to any matter if it appears to the Parliament that the law is required by reason of the emergency; but this power again did not extend the powers of Parliament with respect to any matter of Muslim law or the custom of Malays nor could it validate any provision inconsistent with the provisions of the Constitution relating to any such matter or relating to religion, citizenship or language.[11]

The division of executive powers followed that of the legislative powers. The executive authority of the Federation extends to all matters with respect to which the Federal Parliament may make laws and the executive authority of a State to all matters with respect to which the legislature of that State may make laws. It is provided that the executive authority of a State shall be so exercised as to ensure compliance with any federal law applying to that State and as not to impede or prejudice the exercise of the executive authority of the Federation.[12] In an emergency, the exeeutive authority of the Federation extends to any matter within the legislative authority of a State and to the giving of directions to the government of a State or to any officer or authority thereof.[13]

[11] Federal Constitution, Article 150.

[12] Federal Constitution, Article 81.

[13] *Ibid.*, Article 150 (4).

The Federal Parliament is also given power where the Constitution of any State does not contain the essential provisions set out in Part I of the Eighth Schedule to the Constitution, or provisions substantially to the same effect or contains provisions inconsistent with the essential pro-provisions, to make provision by law for giving effect in that State to the essential provisions or for removing the inconsistent provisions. Moreover where it appears to the Federal Parliament that in any State any provision of the Federal Constitution or of the Constitution of the State is being habitually disregarded, Parliament may notwithstanding anything in the Federal Constitution, by law make provision for securing compliance with those provisions.[14]

The legislative power of the States was further restricted by the fact that it had no power to legislate to create offences in respect of the matters included in the State List and even in respect of the Muslim law, the Muslim courts constituted by the State enactments were not to have jurisdiction in respect of offences except as conferred by Federal law.[15]

This division of powers between the Federation and the States remained substantively unchanged in respect of the original eleven States of the Federation but the State and concurrent powers of Sabah and Sarawak are much wider. The State list for the Borneo States includes Native law and custom, the incorporation of authorities and other bodies set up by the State law, the regulation and winding-up of corporations created by State law, ports and harbours (other than federal ports and harbour), the regulation of traffic in ports and harbours, cadastral land surveys, libraries, museums and ancient and historical monuments (other than those declared to be federal) and in Sabah, the Sabah Railway. The Supplementary Concurrent List for the Borneo States includes:-

(1) Personal law relating to marriage, divorce, guardship, maintenance, adoption, family law, gifts or succession, testate and intestate;
(2) Adulteration of foodstuffs and other goods;
(3) Shipping under 15 registered tons, maritime and estuarine fishing and fisheries;
(4) The production, distribution and supply of water power and of electricity generated by water power;
(5) Agricultural and forestry research, control of agricultural pests and protection against such pests; prevention of plant diseases;
(6) Charities and charitable trusts;
(7) Theatres, cinemas, cinematograph films; and places of public amusement;

[14] *Ibid.*, Article 71.

[15] *Ibid.*, 9th Schedule List II Item 1.

(8) Elections to the State Assembly during the period of indirect elections;

(9) (In Sabah only till 1970) Medicine and health.[16]

The variations of the State List and Concurrent List in respect of the Borneo States do not (as they did in the case of Singapore) affect subjects of the first level of governmental importance but under the terms of the Malaysia Agreement, as implemented in the Immigration Act, 1963, the Borneo States retained wide powers of control of entry into and residence in the States, including power, with certain specified exceptions, to treat Federal citizens seeking entry to or residence in the State as if they were non-citizens.

The Malaysia Act did extend the powers of the States generally by giving them legislative power to create offences in respect of matters included in the State List and by giving power to Parliament to extend the legislative powers of the States. It was provided that the power of Parliament to make laws with respect to a matter enumerated in the Federal List included power to authorize the Legislatures of the States or any of them, subject to any conditions or restrictions that Parliament may impose, to make laws with respect to the whole or any part of that matter.[17] In respect of the Borneo States power was given to the Yang di Pertuan Agung to extend the legislative powers of the State and to extend the executive authority of the State.[18] The power of the Federal Parliament to pass uniform laws with respect to land or local government was made inapplicable to the Borneo States and the Borneo States were also excluded from national plans for land nationalization and local government development, unless and until they desired their application.[19]

The original draft Constitution of the Federation of Malaya included a clause in the Article relating to the distribution of legislative powers between the Federation and the States that nothing in the Article should "render invalid any provision of a federal law if in pith and substance it relates to any of the matters enumerated in the Federal List or the Concurrent List or render invalid any provision of a State law if in pith and substance it relates to any of the matters enumerated in the State List or the Concurrent List". This clause has not been included in the Constitution but it has been suggested that as it expresses a principle of interpretation it may still be adopted for the construction of the provision for distribution of powers in the Constitution.

[16] Federal Constitution, 9th Schedule.

[17] Federal Constitution, Article 76A.

[18] *Ibid.*, Article 95C.

[19] *Ibid.*, Article 95D and 95E.

The Constitution provides that the judicial powers of the Federation shall be vested in a Federal Court, in the two High Courts of the States of Malaya and the Borneo States and in such courts as may be provided by federal law.[20] All the courts apart from the Shariah Court, which deal with Muslim law, and Native Customary Courts are federal courts. The High Courts have unlimited original jurisdiction in civil and criminal cases. Appeals go to the Federal Court, which has also an original jurisdiction on constitutional matters referred to it by the Head of State. There is an appeal from the Federal Court to the Yang di-Pertuan Agung, who under the present arrangements refers such appeals to the Judicial Committee of the Privy Council. Judges of the Federal Court and the High Court are appointed from legally qualified persons by the Yang di-Pertuan Agung acting on the recommendation of the Prime Minister who is required to consult the Lord President of the Federal Court (except when selecting a Lord President), the Chief Justices of the High Courts (when appointing a Federal Court Judge or a Chief Justice) and the Chief Ministers of the Borneo States (when appointing a Chief Justice for the Borneo States) or the Chief Justice concerned (when appointing a Judge to the High Court). The Constitution provides for the security of tenure and remuneration of the Judges and restricts discussion of judicial conduct in the legislatures. The removal of a Judge of the Federal Court or of a High Court is placed outside the competence of the executive and legislature and entrusted to a tribunal of Judges and ex-Judges. Among the functions of the judiciary is that of considering the validity or otherwise of Acts of Parliament and enactments and ordinances of the State legislatures. Disputes between the Federal and State authorities as to the application of the division of powers are therefore referred to the courts and in the last resort to the Judicial Committee of the Privy Council, as the final court of appeal.

Under the Constitution the Federation is in effect the main taxing authority. Apart from rents on State property, interest on State funds, receipts from land sales of State property and the revenue of local authorities, the only sources of State revenue are revenue from toddy shops, lands, mines and forests and from licences, entertainment duties and receipts in respect of specific State services. The financial needs of the States are met by annual capitation and road grants by the Federal Government. Provision is made for a State Reserve Fund, out of which grants may be made to the States. The States are also guaranteed a minimum of 10% of the export duty on tin produced in the State and Parliament may provide in the case of the States of Malaya that each State shall receive such proportion as may be prescribed of the export duty on minerals (other than tin) produced in the State. The Borneo

[20] Federal Constitution, Part IX.

States are empowered to make laws for imposing sales tax and they are assigned import and excise duty on petroleum produces and export duty on timber and other forest products. They are also assigned the revenue from fees and dues from port and harbours other than federal ports and harbours. The States are therefore to a greater or less extent financially dependent for grants-in-aid from the Federal Government. They are also subject to federal control in raising loans; a State may not borrow on the open market but only from the Federation or for a period not exceeding twelve months, from a bank approved for that purpose by the Federal Government.[21]

The appointment and disciplinary control of public servants in the Federation are vested in the Public Service Commission and a number of specialist Service Commissions, including a judicial and legal service commission. Some of the States have their own State Public Service Commissions; in those which have not, the State Public Services come under the Federal Public Services Commission. The Public Service Commission has branches in the Borneo States. The States are restricted in making alterations in their public service establishments by the provision that no State shall, without the approval of the Federation, make any addition to its establishment or the establishment of any of its departments or alter the rates of established salaries and emoluments if the effect of doing so would be to increase the liability of the Federation in respect of pension, gratuities or other like allowances.[22]

The Constitution provides for a number of organizations which provide consultation and co-operation between the governments in the Federation. The Conference of Rulers which stands outside the Federal and State legislative and executive organs has a variety of functions and compositions. It is composed of the Malay Rulers and the Governors of Malacca, Penang, Sabah and Sarawak but the four Governors take no part in the election of the Yang di Pertuan Agung or in discussions of the privileges, position, honours and dignities of the Rulers. The Conference of Rulers can block certain bills, has to be consulted on certain appointments, including that of the Lord President of the Federal Court, the Chief Justices and Judges of the High Courts, can take decisions as to religious acts and observances, chooses and can remove the Yang di Pertuan Agung and can deliberate on questions of national policy. When deliberating on matters of national policy the Yang di Pertuan Agung shall be accompanied by the Prime Minister and the other Rulers and Governors by their Mentri Besar or Chief Mentris. The National Finance Council is a consultative body on matters of finance, especially in relation to the making of grants and

[21] Federal Constitution Part VII.

[22] *Ibid.*, Article 112.

loans to the States. The National Land Council has the function and control of the utilization of land in the Federation; while the National Council for Local Government has the duty of formulating a national policy for the promotion, development and control of local government throughout the Federation.

The Constitution of Malaysia is contained in a written document and so are the Constitutions of the various component States in Malaysia. The Federal Constitution is declared to be the supreme law of the Federation. The provisions for amendment of the Federal Constitution are contained in Article 159 of the Constitution. Amendments to certain Articles namely Articles 38 (Conference of Rulers), 70 (Precedence of Rulers and Governors), 71(1) (Rights of Rulers) and 153 (Reservation of quotas in respect of scholarships and permits for Malays) may only be passed with the consent of the Conference of Rulers. Recently it has been provided that amendments relating to certain sensitive issues would also require the consent of the Conference of Rulers. These include amendments to the provisions of Article III (Citizenship), Article 152 (The National Language), Clause (4) of Article 10 (Legislation to forbid discussion of sensitive issues) and any law passed under that provision and the entrenchment clause, Article 159(5) itself. The Federal Constitution may be amended by Federal law and the only requirement is that it must generally be supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of the House of Representatives and of the Senate. Certain amendments do not even require this two-thirds majority; they are –

a) any amendment to Part III of the Second Schedule (Supplementary Provisions relating to Citizenship) or to the Sixth Schedule (Forms of Oaths, and Affirmations) or Seventh Schedule (Election and appointment of Senators);
b) 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 (which relate to the general legislative powers of the Parliament and of the Legislatures of the States);
c) 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 the Constitution to a State previously so admitted or associated;
d) any amendment incidental to or consequential on the repeal of any transitional law made under the former Clause (2) of Article 159 or consequential on an amendment made to paragraph III of the Second or the Sixth or Seventh Schedule.

In the first two elections to the House of Representatives the Alliance party obtained such a clear majority that there has been no difficulty in

obtaining the two-thirds majority required for amendments. The States can reasonably look to the Senate to exercise a delaying influence in their interests. The Senate originally consisted of two elected members for each of the States (making a total of 22 for the States of Malaya and 26 for the States and Malaya and the Borneo States) and twenty members appointed by the Yang di Pertuan Agung. Thus the States did have a strong representation in the Senate but here again the State elections gave the Alliance party the majority in nearly all the States and here again it was not difficult for the Alliance Government to obtain the two-thirds majority it required. The influence of the Senate has nevertheless been further weakened by the Constitution (Amendment) Act, 1964, which increased the number of members of the Senate to be appointed by the Yang di Pertuan Agung to thirty-two, thus causing the nominated Senators to outnumber the elected Senators. The Constitution (Amendment) Act of 1962 reserved from the requirement of a two-thirds majority (with retrospective effect from 31st August, 1957, that is the date when the Constitution first began to operate) "any amendment made for or in connection with the admission of any State to the Federation or its association with the States or any modification made as to the application of the Constitution to a State previously so admitted or associated". This provision appears to give very wide powers of amendment by the ordinary process of a federal law to the Federal Government and the only limitation is that contained in Article 161E which relates to the safeguards for the constitutional position of the Borneo States. In regard to the States of Malaya, however, the amendment seems to give power to the Federal Parliament to amend the Constitution in its application to the States without the requirement of a two-thirds majority.

In regard to the application of the Constitution to the Borneo States it would appear that an amendment of the Constitution requires a two-thirds majority in both Houses of Parliament and also in a number of specified cases the concurrence of the Governor of the Borneo States or each of the Borneo States concerned.[23]

The Malaysia Act provided that as from the passing of that Act no amendment to the Constitution made in connection with the admission to the Federation of a Borneo State shall be excepted from the requirement of the two-thirds vote of both Houses of Parliament, nor shall any modification made as to the application of the Constitution to a Borneo State be so excepted unless the modification is such as to equate or assimilate the position of that State under the Constitution to the position of the States of Malaya.[24]

[23] *Ibid.* Article 161E.

[24] *Ibid.* Article 161E (1).

No amendment shall be made to the Constitution without the concurrence of the Governor of the Borneo State or each of the Borneo States concerned, if the amendment is such as to effect the operation of the Constitution as regards any of the following matters:

a) the right of persons born before Malaysia Day to citizenship by reason of a connection with the 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 State and 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 in 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.[25]

Moreover, in relation to any rights and powers conferred by federal law on the government of a Borneo State as regards entry into the State and residence in the State and matters connected therewith (whether or not the law is passed before Malaysia Day), such a law, except in so far as it provides to the contrary, is treated as if it had been embodied in the Constitution for the purpose of requiring the concurrence of the Governor of an affected Borneo State for any subsequent change in that law.[26] The Immigration Act, 1963, which came into effect on Malaysia Day, has given to the Borneo States the control of immigration into those States, not only over aliens, but also over most categories of federal citizens from other States. By virtue of Article 161E these powers in the Borneo States have now become embedded in the Constitution and will require the concurrence of those States for amendment.

The Federal Parliament is given the power by law to admit other States to the Federation and to alter the boundaries of any State; but it is provided that a law altering the boundaries of a State shall not be passed without the consent of that State, expressed by a law made by the

[25] *Ibid.* Article 161E (2).

[26] *Ibid.* Article 161E (4)

Legislature of that State, and of the Conference of Rulers. There is no provision in the Constitution for the secession of any State but the example of Singapore shows that this can be done by agreement between the Federal Government and the State and by an Act of the Federal Parliament.[27]

There have not been many cases in Malaysia on the interpretation of the Constitution and fewer still dealing with the federal aspect of the Constitution, and the relationship between the Federation and the States. One of them is the case of the *Government of the State of Kelantan* v. *the Government of the Federation of Malaya and Tunku Abdul Rahman Putra al-Haj*[28] in which 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 not binding on the State of Kelantan. The grounds on which these declarations were asked were that the Agreement of 1957, to which the State of Kelantan was a party established a federation of eleven States and as the proposed changes in effect abolished that federation contrary to the 1957 Agreement, they required the consent of each of the Constituent States including Kelantan. It was maintained that the Sultan of Kelantan should have been a party to the 1963 Agreement, that the Rulers of the States should by Convention be consulted regarding any substantial changes in the Constitution and that the Federal Parliament had no power to legislate for Kelantan on a matter covered by State legislation. The question whether there could be interlocutory relief in a suit against the Federal Government was put aside and the application considered on its merits. Thomson C.J. (as he then was) held (a) that in enacting the Malaysia Act, so as to amend *inter alia* Article 1(1) and (2) of the Constitution Parliament had acted within the powers granted to it by Article 159 of the Federal Constitution and the exercise of such power did not require consultation with any State as a condition to be fulfilled; (b) that the Malaysia Agreement was validly signed by the Federal Government in exercise of its executive powers and the exercise of these powers did not require consultation with any State Government or the Ruler of any State. The learned Chief Justice said:-

"It has not even been suggested that the Malaysia Act was not passed strictly in accordance with the provisions of the Constitution relating to Acts amending the Constitution. It amended Article 1(1) which provides that 'the Federation shall be known by the name of Persekutuan Tanah Melayu (in English the Federation of Malaya)' by providing [section 4(1)] that 'the Federation shall be known, in Malay and in English, by the name 'Malaysia'". It amended Article 1(2) by adding [section 4(2)] the States

[27] *Ibid.*, Article 2.

[28] [1963] M.L.J. 355

of Sabah, Sarawak and Singapore to the States originally enumerated in Article 1(2). In doing these things I cannot see that Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require fulfilment of a 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.

"Turning now to the Malaysia Agreement, 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, as has been seen, includes external affairs including treaties and agreements. The Malaysia Agreement is signed "for the Federation of Malaya" by the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet. There is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State. Again a power has been lawfully exercised by the body to which that power was given by the States in 1957."[29]

In the case of *Stephen Kalong Ningkan* v. *Government of Malaysia*[30] the facts were as follows:- on July 22, 1963 the appellant was appointed Chief Minister of Sarawak and so acted as leader of the majority party in the Council Negeri. On June 16, 1966 the Governor acting on representations said to be made to him by the majority in the Council that they had lost confidence in their Chief Minister, requested the appellant to resign. Upon his non-compliance the Governor on June 17, 1966, purported to dismiss him together with other members of the Supreme Council, and appointed Penghulu Tawi Sli as Chief Minister. Action being brought in the High Court at Kuching, Harley Ag. C.J. on September 7, 1966, declared the dismissal of the appellant void. On September 14, 1966 the Yang di Pertuan Agung proclaimed a state of emergency in Sarawak. On September

[29] *Ibid.*, p. 359.

[30] [1968] 2 M.L.J. 238.

19, 1966, the Federal Parliament passed the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, amending Clauses (5) and (6) in Article 150 of the Federal Constitution by giving the Federal Government power to amend the Constitution of Sarawak and providing further that, notwithstanding anything in the State Constitution, the Governor may summon the Council Negeri, suspend standing orders and issue directions binding on the Speaker. Pursuant thereto, the Governor on September 23, 1966 summoned a meeting of the Council Negeri, which passed a vote of no confidence in the appellant. He was then dismissed the following day. In his second action in the High Court at Kuching, the appellant claimed (a) the proclamation of a state of emergency being made on the advice of the Federal Cabinet was null and void in that it was not made *bona fide* but in *fraudem legis* and (b) the Emergency (Federal Constitution and the Constitution of Sarawak) Act 1966 was on that account null and void. It was submitted on behalf on the appellant (a) that the proclamation of emergency was *ultra vires* and invalid, and that the Emergency (Federal Constitution and the Constitution of Sarawak) Act, 1966 which was based on it, accordingly fell with it in its entirety; (b) even if the Proclamation of Emergency was valid, sections 3, 4 and 5 of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 purported to amend the Constitution of Sarawak in a manner which had been committed by Article 41 of the Constitution of Sarawak to the Legislature of Sarawak and was therefore beyond the powers of the Federal Parliament to enact. The Federal Court dismissed the petition for the declarations and the appellant appealed to the Privy Council.

It was held by the Privy Council (1) the onus was on the appellant to show that the proclamation of emergency was in *fraudem legis* as alleged by him or otherwise unauthorized by the relevant legislation and in this case the appellant had failed to discharge the onus on him; (2) Article 150 of the Federal Constitution gave power to the Federal Parliament to amend or modify the Constitution of Sarawak temporarily if Parliament thought that such a step was required by reason of the Emergency. In the circumstances the Federal Parliament had power to enact the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 and therefore the appeal must be dismissed. On the second submission made by the appellant, Lord MacDermott in giving the opinion of the Privy Council said;

"With the Proclamation valid and Article 150(5) of the Federal Constitution in consequence effectual, were sections 3, 4 and 5 of the impugned Act *ultra vires* the Federal Parliament as amending or providing for amendment of the Constitution of Sarawak? That these sections do seek to amend that Constitution may... be accepted and the question therefore turns on the extent of the Federal Parliament's powers. The Federal Constitution provides for the distribution of legislative power

between the Federation and the States and contains certain provisions enabling the Federal Parliament to legislate in certain events with respect to state affairs. These provisions however do not bear immediately on the question in hand which falls to be decided on the true meaning of two of the documents annexed to the Agreement relating to Malaysia made on the 9th July 1963 between the United Kingdom, North Borneo, Sarawak and Singapore. These documents are the draft. . . of the Malaysian Federal Constitution and the draft. . . of the 1963 Constitution of the State of Sarawak.

"By article 41(1) of that Constitution it was enacted that – 'Subject to the following provisions of this article, the provisions of this Constitution may be amended by an Ordinance enacted by the Legislature but may not be amended by any other means'. Taken by itself this enactment is in plain terms, but it has to be read in conjunction with the Federal Constitution, for it no less than the 1963 Constitution of Sarawak, was agreed to by the contracting parties and the Federation, and the question accordingly becomes whether the Legislative powers of the Federal Parliament, as enlarged by article 150(5) during the operation of an Emergency Proclamation, was intended to include a power to modify the Sarawak Constitution and thus to override Article 41(1) thereof. "The Federal Court held that the Sarawak Constitution could be modified in this way and their Lordships share that view. The Federal Constitution must have been accepted by the contracting parties as the supreme law of the Federation in view of article 4 thereof, but this in itself does not appear to their Lordships to be conclusive. More to the point are the terms of article 150 (as modified pursuant to clause 39 of the draft Bill) for they go to show that the parties to that agreement must have realised that the powers of the Federal Parliament conferred by that article during the currency of a Proclamation of emergency, might be used to amend, for the time being, the provisions of the Sarawak Constitution of 1963. On its face, Clause (1) of article 150 is capable of applying to a grave emergency threatening the security of economic life of any of the States of the Federation, and it could hardly have failed to be within the contemplation of the parties to the Malaysia Agreement that the powers needed to meet such a situation might include power to modify, at any rate, temporarily, the Constitution of the part of the Federation which was principally affected. Again clause (4) of article 150 states in plain terms that while a Proclamation of Emergency is in force the executive authority of the Federation is to extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or any officer or authority thereof. This provision is plainly capable of conflict with the 1963 Constitution of Sarawak, particularly article 5 thereof, and in itself indicates that a Proclamation of Emergency under article 150 was intended to have

consequences which might be contrary to the provisions of a State Constitution. Clause (5) of article 150 points in the same direction. The legislative power which it confers on the Federal Parliament is expressed to be subject to clause (6A) and that clause provides that clause (5) is not to extend the powers of the Federal Parliament with respect to any matter of Muslim law or the custom of the Malays or with respect to any matter of native law or custom in a Borneo State. These subject-matters, however, are placed by the Federal Constitution in the State list, that is to say, in the list setting out the legislative powers of the States. The limiting provisions of Clause (6A), therefore, indicate that the legislative power conferred by article 150(5) was intended to extend to matters which normally were within the legislative competence of the States. But perhaps, most significant of all, is the width of the language of clause (5) of article 150. Subject to clause (6A), while a Proclamation of Emergency is in force, the power conferred upon the Federal Parliament is a power to make law "with respect to any matter" if it appears to Parliament that the law is required by reason of the emergency. These words could scarcely be more comprehensive. In the view of the Board they reflect the fact that a grave emergency can assume many forms and may make demands upon the Federal Government which could only be met if the widest powers were available.

"The terms of article 41(1) of the 1963 Constitution of Sarawak are sufficiently explicit to make it difficult as a matter of implication to construe the Federal Constitution as empowering the Federal Parliament to amend the Constitution of Sarawak permanently and at its pleasure. But a temporary amendment on exceptional grounds stands on a different footing and the considerations mentioned lead their Lordships to the conclusion that article 150(5) was intended to arm the Federal Parliament with power to amend or modify the 1963 Constitution of Sarawak temporarily if that Parliament thought such a step was required by reason of the Emergency, and further that such an intention must be imputed to the parties to the Malaysia Agreement of 9th July 1963. Their Lordships accordingly held against the appellant on his second submission and are of opinion that in so far as the impugned Act had the effect of modifying or amending the 1963 Constitution of Sarawak it was *intra vires* and valid."[31]

There has been only one reported case where a State law has been declared to be void because of inconsistency with a federal law. In the case of *City Council of George Town and another* v. *Government of the State of Penang and another*[32] the facts were that on July 1, 1966 the Chief Minister of Penang took over the functions of the Mayor of George Town,

[31] *Ibid.*, p. 242-244.

[32] [1967] 1 M.L.J. 169.

whereupon the State Government proceeded to administer the municipal affairs of the city. This was done pursuant to an order termed the City Council of George Town (Transfer of Functions) Order, 1966 made under subsection (1) of section 398B of the Municipal Ordinance, which section was inserted by the Municipal (Amendment) (Penang) Enactment, 1966, an enactment of the State Legislature. The petitioners applied to the Federal Court for a declaration that the said City Council of George Town (Transfer of Functions) Order, 1966 and the Municipal (Amendment) (Penang) Enactment, 1966 were void by virtue of article 75 of the Federal Constitution on the ground that they were inconsistent with the Local Government Elections Act, 1960 of the Federation. It was held that the State enactment and the order made thereunder were clearly inconsistent with the Federal legislation and were therefore invalid and the Federal Court had jurisdiction to make an order so declaring.

The case of *Government of Malaysia* v. *the Government of Kelantan*[33] was a case considered by the Federal Court on a reference by the Yang di Pertuan Agung under article 130 of the Federal Constitution. In that case the Kelantan Government on the 20th February 1964 granted a mining and forest concession to the Timbermine Industrial Corporation Ltd. The Corporation had to pay royalty for timber extracted and minerals won. It agreed however to make advance payments of royalty to the State Government. When the Corporation extracted timber and won minerals on which royalty was due, it had to pay only 50%, retaining the other 50% until the whole of the amount prepaid was refunded. In certain circumstances the amount advanced could be forfeited. The Federal Government argued that this transaction amounted to borrowing in violation of article 112(2) of the Federal Constitution, as it was not authorised by State Law. The Federal Court held that it did not amount to borrowing as there was no legal relationship of lender and borrower between the State Government and the Corporation and the State Government would not be obliged to repay if the advance payments were forfeited for breach of conditions. The law established by this decision has since been negatived by the Constitution (Amendment) (No. 2) Act, 1971 (Act 31). Section 8 of the Act now provides that "borrowing" includes the raising of money by entering into any arrangement requiring the payment before the due date of any taxes, rates, royalties, fees, or any other payments or by entering into any agreement whereby the Government has to repay or refund any benefits that it has enjoyed under the agreement.

The power of judicial review is dealt with in articles 4 and 128 of the Federal Constitution. Article 4(3) and (4) read as follows:-

[33] [1968] 1 M.L.J. 129.

"(3) The validity of any law made by Parliament or the legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or –

a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

b) if the law was made by the Legislature of a State, in proceedings between the Federation and the State.

(4) Proceedings for a declaration that a law is invalid on the grounds mentioned in clause (3) (not being proceedings falling within paragraphs (a) or (b) of the clause) shall not be commenced without the leave of a Judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the clause.

Article 128 reads as follows:-

"(1) The Federal Court shall to the exclusion of any other court have jurisdiction to determine –

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another Court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with that determination."

Section 48(1) of the Courts of Judicature Act, 1964, originally provided that where in any proceedings in any High Court a question arose as to the effect of any provision of the Constitution the judge, hearing such proceedings, shall stay the same on such terms as may be just to await the decision of such question by the Federal Court. This provision has been amended by the substitution of the word "may" for the word "shall" so that the Act no longer obliges the High Court to stay the proceedings and the High Court may itself dispose of the question.

In the case of *City Council of George Town and another* v. *Government*

[34] [1967] 1 M.L.J. 170.

of the State of Penang and another,[34] it was argued on behalf of the State Government that the Federal Court had no jurisdiction to make the declaration asked for. The argument was that article 128(1) (a) of the Federal Constitution gave the Federal Court jurisdiction only to determine on the ground that the State has no power to make laws; in other words the Federal Court only has jurisdiction to determine on the competency of the State or Parliament to make laws. Therefore since the State has the power to make the laws in question this was conclusive as far as the Federal Court was concerned. The Federal Court however held that it had jurisdiction to declare a State law to be inconsistent with the Federal Constitution and therefore void. It was admitted that a High Court has jurisdiction to do so and the Federal Court held that in view of section 49(1) of the Courts of Judicature Act, 1964, a Federal Court also could exercise jurisdiction. On this point the present Chief Justice, Malaya has expressed the extra-judicial view that probably the Federal Court might have come to a different conclusion if the case had been fully argued.[35]

In *Ghazali* v. *Public Prosecutor*[36] Ong J. (as he then was) held that under article 128 of the Federal Constitution he had no jurisdiction to pronounce any decision as to the effect of any provision of the Constitution. However in *Gerald Fernandez* v. *Attorney-General Malaysia*[37] where Ong C.J. had held that he was not competent to decide whether the Commonwealth Fugitive Criminals (Amendment) Act, 1969 was ultra-vires the provisions of article 7(1) of the Federal Constitution, Suffian F.J. in the Federal Court said, "With respect I think the learned Chief Justice was in error in thinking he had no jurisdiction. This is not a proceeding for a declaration that the Commonwealth Fugitive Criminals (Amendment) Act 1969 is invalid on the ground mentioned in clause (3) (of article 4 of the Constitution) namely because Parliament was not competent to enact but on the ground that it was inconsistent with article 7(1) of the Constitution – It was competent of the High Court to give a ruling on this question."[38] Suffian F.J. thought the learned Chief Justice was misled by being referred to an unamended copy of section 48(1) of the Courts of Judicature Act, 1948.

If we refer to the orthodox definition of federalism it may be difficult to regard Malaysia as a true federation. The powers of the Central Government in Malaysia are very great and as has been shown by recent events are

[35] Mohamed Suffian Hashim, *Introduction to the Constitution of Malaysia*, Kuala Lumpur, (1972) p. 96.

[36] [1964] M.L.J. 156.

[37] [1970] 1 M.L.J. 262. See also *Hasbim* v. *Yahaya* [1973] 2 M.L.J. 85 and *Yeoh Tat Thong* v. *Government of Malaysia* [1973] 2 M.L.J. 86.

[38] *Ibid.* p. 264.

all pervading in an emergency. The fundamental principle of federalism according to Wheare is that general and regional governments are co-ordinate. He says "What is necessary for the federal principle is not merely that the general government like the regional governments should operate directly from the people, but further that each government should be limited to its own sphere and, within that sphere, should be independent of the other".[39] Wheare's definition was based on the earlier experience of federalism in the United States, Canada and Australia. The newer federations do not easily fall within his definition and it may be the definition needs to be considered in the light of the experience of these new attempts at federation. Malaysia like India claims to be a federation and has a federal system of government in which there is a division of powers between one government and several regional authorities, each of which, in its own sphere, is coordinate with the others, and each of which acts directly on the people through its own administrative agencies.[40]

Ahmad Ibrahim*

[39] K.C. Wheare *Federal Government*, Oxford, 1963, p. 14.

[40] A.H. Birch, *Federalism, Finance and Social Legislature in Canada, Australia and the United States*, Oxford, 1955, p. 306.

*Professor of Malaysian Law, University of Malaya.