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**THE INFLUENCE OF THE AMERICAN CONSTITUTION ON THE
CONSTITUTION OF MALAYSIA**

by

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CONSTITUTION ON THE CONSTITUTION OF MALAYSIA

The influence of the American Constitution on the Malaysian Constitution is at best indirect and not direct. This is because of the historical background to the emergence of the Federation of Malaya and later of Malaysia as a sovereign nation and in particular to the circumstances under which the Federal Constitution was drafted and enacted. Unlike the Constitution of the United States or even that of India the Constitution of Malaysia was not drafted by the people or a Constituent assembly of Malaysia. The Constitution was the fruit of joint Anglo-Malayan efforts and indeed even the Malayan Parliament had no direct hand in its drafting.

As a result of a constitutional conference held in London from January 18 to February 6, 1956, attended by a delegation from the Federation of Malaya consisting of four representatives of Their Highness the Rulers, the Chief Minister and three other Ministers and also by His Excellency the High Commissioner and certain of his advisers, proposals were made for the appointment of an independent Commission to make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the British Commonwealth. These proposals were approved by Her Majesty the Queen and Their Highness the Rulers and in consequence a Constitutional Commission was appointed. This consisted of the Rt. Hon Lord Reid a Lord of Appeal in Ordinary as Chairman and members from the United Kingdom, Australia, India and Pakistan. A representative from Canada was also appointed but he was unable to serve. The terms of reference of the Constitutional Commission were as follows ⁽¹⁾

To examine the present Constitutional arrangements throughout the Federation of Malaya, taking into account the position and dignities of Her Majesty the Queen and of their Highnesses the Rulers; and To make recommendations for a federal form of Constitution for the whole country as a single, independent, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature which would include provision for -

i) the establishment of a strong central government with the States and settlements enjoying a measure of autonomy (the question of residual legislative power to be examined and to be the subject of recommendation by the Commission) and with machinery for consultation between the Central Government and the States and settlements on certain financial matters to be specified in the Constitution;

- ii) the safeguarding of the position and prestige of Their Highnesses as Constitutional Rulers of their respective States;
- iii) a constitutional Yang di Pertuan Besar for the Federation to be chosen from among Their Highnesses the Rulers;
- iv) a common nationality for the whole of the Federation;
- v) the safeguarding of the special position of the Malays and the legitimate interests of the other communities.

The Commission duly submitted its report and the report together with three draft constitutions for the Federation, Malacca and Penang were published on February 21, 1957. A working party was then appointed by the British Government, the Conference of Rulers and the Government of the Federation to make a detailed examination of the Report and to submit recommendations thereon. Upon the basis of these recommendations the new Federal Constitution, together with the Constitution of Malacca and Penang were promulgated upon Merdeka Day, August 31, 1957. The Federation of Malaya consisted of the Malay States - the Federated Malay States of Selangor, Negeri Sembilan, Perak and Pahang; and the Unfederated Malay States of Johore, Kedah, Perlis, Kelantan and Terengganu - and the Colonies of Penang and Malacca. The Malay States were in theory at least independent Malay kingdoms. After the re-occupation of the country from the Japanese in 1946, the British Government tried to make the whole of the country into a colony under the style of the Malayan Union but this was opposed by the Malays through their political organization the United Malays National Organization or UMNO. As a result new agreements were negotiated between His Majesty the King and the Rulers of each of the Malay States and the Federation of Malaya was set up in 1948.

The preamble to the Federation of Malaya Agreement, 1948, had expressed the desire of the United Kingdom Government and Their Highnesses the Rulers that "progress should be made towards eventual self-government". To this end election for 52 seats on the Federal Legislative Council were held in July 1955 and when the legislature with an elected majority was constituted, consideration was then given to the next step towards independence. This led to the holding of the Constitutional Conference in 1956 and the proposal to set up the Constitutional Commission. Thus was independence achieved

by the transfer of power and jurisdiction of Her Majesty the Queen. As stated in the Federation of Malaya Agreement, 1957, as from the 31st day of August 1957, the Malay States and the settlements shall be formed into a new Federation of States by the name of the Federation of Malaya; and thereupon the said settlements shall cease to form part of Her Majesty's dominions and Her Majesty shall cease to exercise any sovereignty over them and all power and jurisdiction of Her Majesty or of the Parliament of the United Kingdom in or in respect of the Settlements or the Malay States or the Federation as a whole shall come to an end.² When subsequently in 1963, Sabah and Sarawak (and for a time Singapore) joined the Federation, Her Majesty again relinquished her jurisdiction in Sarawak and Sabah (and Singapore), which were then British Colonies. The Federation then came to be called Malaysia.

Another historical fact to remember is that the Constitution was the result of compromises reached between the major races in the Federation of Malaya - the Malays, the Chinese, the Indians. Political power was originally in the hands of the Malay Rulers and the Malays but it was agreed that citizenship should be granted to all races who regarded Malaya as their permanent home. In return certain measures were agreed to safeguard the special position of the Malays especially in education, trade and commerce. Under the British rule the rural areas where the Malays predominated had been neglected in favour of the urban areas where the Chinese and Indians predominated and the safeguards were needed in order to improve the conditions in the rural areas and to bring up the educational and economic level of the Malays to be able to compete equally with the other races. Safeguards were also agreed for the religion of the Malays, Islam, and for the Malay Language, as the national language of the Federation. When Sabah and Sarawak joined the Federation, safeguards were also provided for the natives of Sabah and Sarawak.

There are many similarities between the American Constitution and the Malaysian Constitution but even within the similarities there are differences. And apart from that there are important differences between the two Constitutions.

Written Constitution

Like the American Constitution, the Malaysian Constitution is written. Although the bulk of the Civil Law in Malaysia is based on the English model, in the matter of the Constitution the Malaysian Constitution does not follow England in having an unwritten Constitution. The Malaysian Constitution exists as a separate written document and this shows the indirect influence of the American Constitution. The American Constitution is the model of a written Constitution and when the British Commonwealth countries began to draft their written Constitution it was to the American Constitution that they looked for guidance and inspiration. Thus we had the Constitution of Australia, Canada and then later India. The Malaysian Constitution itself is to a large extent modelled on the Indian Constitution. The American Constitution is a short one containing only seven articles in the original text with twenty five additional articles inserted by subsequent amendments. It includes only essential and fundamental provisions which are stated in general terms, leaving other provisions to be dealt with by legislation. The Malaysian Constitution on the other hand (like the Indian Constitution) is more elaborate and detailed. The Malaysian Constitution has articles 1 to 181 but the number of articles is more than 181 as many amendments have been introduced and the new articles are numbered for example 15A, 16A, 43A, 43B, 43C and 161A, 161B and so on. There are also 13 Schedules.

Supremacy of the Constitution

The Malaysian Constitution states in its Article 4 that the Constitution is the Supreme law of the Federation. The effect of this is that any law passed after Merdeka Day (that is 31st August 1957) which is inconsistent with the Constitution shall to the extent of the inconsistency be void. In regard to existing law, that is laws made before Merdeka Day, Article 162 of the Constitution provides that they shall continue to be in force, unless repealed or modified, but in applying the provision of any such law the court may apply it with such modifications as may be necessary to bring it into accord with the provisions of the Constitution.

As the Malaysian Constitution is the Supreme law of the land, the Malaysian Government is a limited Government and has to work within the Constitution. Though the Yang di Pertuan Agong enjoys legal authority as the Sovereign,

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he has sworn to uphold the Constitution and if any of official acts is unconstitutional or unlawful the Minister though when he acts may be called to account in the courts.³

Similarly the power of the Government or a Minister or public official is limited by the Constitution. The legislative bodies, Parliament and the State Legislative Assemblies, may make a law only on subjects specified in the Constitution and provided it is not contrary to the Constitution.

The American Constitution states "This Constitution and the Laws of the United States which shall be made in pursuance thereof -- shall be the supreme law of the land; the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state to the contrary notwithstanding". There is thus no express provision stating that laws which conflict with the Constitution are invalid and the basic principle had to be established by the courts.

Judicial Review

In order to adjudicate on the unconstitutionally or invalidity of the acts of the executive and of the legislature, the Malaysian Constitution establishes an independent judiciary whose members may not before the retiring age of 65 be removed from office, except on the recommendation of a committee of not less than five judges; and whose salaries and conditions of service cannot be altered to their disadvantage and who are entitled to a pension.⁴

This power of judicial review again is alien to the English Law, under which Parliament is supreme and again this power may be said to be derived indirectly from the American Constitution.

The power of judicial review is limited by the Constitution itself in Malaysia. Article 4(3) of the Malaysian Constitution provides -

"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 -

- Fundamental Liberties
- 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 that State.

Article 4(4) of the Malaysian Constitution also provides -

"Proceedings for a declaration that a law is invalid on the ground 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 brought for the same purpose under paragraph (a) or (b) of the Clause".

On the other hand proceedings to declare an act of the executive or a law passed by the legislature to be invalid because it is contrary to the Constitution, as for example if it contravenes any of the provisions relating to fundamental liberties, may be brought in any Court although even here restrictions are placed in Article 4(2) of the Malaysian Constitution which provides in effect that the validity of any law shall not be questioned on the ground that -

- a) it imposes restrictions on the right of freedom of movement but does not relate to the matters mentioned therein, that is the security of the Federation or any part of it, public order, public health or the punishment of offenders;
- b) that it imposes such restrictions as are mentioned in Article 102(2) but these restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that article.

Equal Protection

The United States Constitution by contrast does not itself restrict judicial review; any restrictions are those imposed by the courts themselves, for example, by the doctrine of locus standi.

Fundamental Liberties

The United States Constitution enshrined fundamental liberties in general terms and the scope and limits of these rights have been worked out in the courts. The Malaysian Constitution on the other hand expressly provides that certain fundamental liberties are qualified and may be diminished.

Thus Article 9(2) of the Malaysian Constitution provides that every citizen has the right to move freely throughout the Federation and to reside in any part thereof but this is subject to inter alia any law relating to the security of the Federation or any part thereof, public order, public health or the punishment of offenders.

Article 10(2) of the Malaysian Constitution again provides in effect that Parliament may impose -

- a) on the rights of freedom of speech and expression such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any legislative Assembly or to provide against contempt of court, defamation or incitement to any offence;
- b) on the right to assemble peacefully and without arms, such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;
- c) on the right to form associations, such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

Equal Protection

In the American Constitution the concept of equal protection is not elaborated and the courts have to determine the extent and limits of that right. In the Malaysian Constitution on the other hand certain types of discrimination are prohibited but exceptions are allowed. Article 8(1) declares that all persons are equal before the law and entitled to the equal protection of the law. Article 8(2) on the other hand provides -

"Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying of any trade, business, profession, vocation or employment".

This right is then clearly subject to the exceptions authorised by the Constitution. Among them for example is Clause (5) of the Article 8 itself, which provides that the Article does not invalidate or prohibit among other things any provision regulating personal law or any provision or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion. Article 153 of the Constitution provides that it shall be the responsibility of the Yang di Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of the Article. It expressly provides for reservation of quotas in respect of services, permits and education for the Malays and natives of Sabah and Sarawak.

Due process of law

The American Constitution contains the "due process" concept whereby no person shall be deprived of his life, liberty or property without due process of law. This concept has been interpreted by the American courts in such a way that the law must not be arbitrary or capricious and the law itself may have to conform to the rules of natural justice.

In the Malaysian Constitution Article 5(1) provides that no person shall be deprived of his life or personal liberty "save in accordance with law" and Article 13 provides that no person shall be deprived of property 'save in accordance with law". Until recently the Malaysian courts have interpreted "law" in these provisions to mean only enacted law⁵ but this view has been held to be wrong and the position in Malaysia may be said to approximate to the American position, although the term "due process"

itself is not used. This has been the result of two Privy Council decisions on appeals from Singapore, which have been accepted in Malaysia. In Ong Ah Chuan v Public Prosecutor⁶ Lord Diplock said -

"In a constitution founded on the Westminster model and particularly in that part of it which purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like in their Lordship's view refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the members of the Constitution that the "law" to which the citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout these fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery".

The decision of the Privy Council in Ong Ah Chuan's case has been reaffirmed by the Privy Council in Haw Tua Tau v Public Prosecutor⁷ and both these cases have been accepted as authoritative in Malaysia. Thus in the Federal Court case of Che Ani bin Itam v Public Prosecutor⁸ Raja Azlan Shah L.P. said relying on Ong Ah Chuan's case -

"It is now firmly established that "law" in the context of such constitutional provisions as Article 5, 8 and 13 of the Constitution refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution".⁹

We might note that in coming to the decision in Ong Ah Chuan's case, Lord Diplock denied any reliance on the American Constitution or even on the Indian Constitution. He said ¹⁰

"Their Lordships are of opinion that decisions of Indian Courts on Part III of the Indian Constitution should be approached with caution as guides in the interpretation of individual articles in Part IV of the Singapore Constitution, and that decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly two hundred years old, are of little help in construing the provisions of the Constitution of Singapore or other modern commonwealth Constitution which follow the Westminster model".

Right to Counsel

The Malaysian Constitution in Article 5(3) provides that -
 "Where a person has been arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice".

This provision has been interpreted by the courts in Malaysia to mean that although the right to counsel commences from arrest, the right cannot be exercised immediately, as a balance has to be struck between that right on the one hand and on the other the right of the police to protect the public from wrong doers by apprehending them and collecting whatever evidence exists against them, Ooi Ah Phua v Officer-in-charge of Criminal Investigation, Kedah/Perlis.¹¹

In the American Constitution on the other hand the Sixth Amendment provides inter alia "In all criminal prosecutions the accused shall enjoy the right - to have the assistance of Counsel for his defence". This provision has been interpreted by the American Courts to mean that the right to counsel commences from the moment of arrest and that the accused is entitled to counsel from that moment.

Federal principle

The Constitution of the United States established an association of states so organised that the powers are divided between a general government which in certain matters - for example the making of treaties and the coining of money - is independent of the governments of the associated states, and on the other hand state governments which in certain matters are in their turn independent of the government of the general government. This involves that general and regional governments both operate directly upon the people; each citizen is subject to two governments.

As the tenth amendment made clear in 1791" the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people."

The Malaysian Constitution, like the Indian Constitution, provides for a federal list, a state list and a concurrent list which spell out in great detail federal subjects, state subjects and concurrent subjects with respect to which (a) the Federation (b) the states and (c) both the Federation and the states have legislative and executive power. As we have seen the terms of reference for the Constitutional Commission which drafted the Constitution were to establish a strong central government and this is why we find that most of the important powers including those of finance are given to the Federation. Although Article 77 provides that the residual power of legislation shall be with the States, the scope of this power is very limited.

The Senate

Both the United States and Malaysia have bicameral legislatures but the Senate in Malaysia is more like the House of Lords in England than the Senate in the United States. In the United States the members of the Senate are elected directly by the people of the different States. Although there is power in Malaysia¹² for Parliament to provide that the members of the Senate to be elected in such State shall be so elected by the direct vote of the electors of that State this has not been implemented. Instead members of the Senate for the State are elected by the Legislative Assembly of the States. Moreover the appointed members of the Senate at present exceed the numbers elected by the states - 43 members are appointed and 26 are elected.

The Senate in Malaysia has less power than the lower house, the House of Representatives, and can at best delay legislation (except for constitutional amendments)¹³. In contrast the Senate in the United States appears to be powerful and its approval essential.

Courts

Unlike the position in the United States the Civil courts in Malaysia are Federal Courts. The only State Courts are the Shariah Courts and the Native Customary Courts.

Apart from the differences already noticed there are also other significant differences between the constitutions of the United States and of Malaysia.

System of Government

Malaysia does not follow the American presidential system and instead follows the Parliamentary Cabinet System on the Westminster model. The head of State is the Yang di Pertuan Agong, who is a constitutional monarch, much like the British Queen, who normally acts on the advice of the Cabinet or a Minister. In Malaysia the Yang di Pertuan Agong is elected by the Malay Rulers from among themselves and holds office for five years. The Yang di Pertuan Agong is an important component of Parliament; he summonses, prorogues, and dissolves Parliament, he addresses Parliament on important occasions as on the opening of the Parliamentary session and bills passed by the House of Representatives and the Senate only become law when assented to by him. Executive authority is vested in him. He appoints the Prime Minister and the other members of the Cabinet. Civil Servants though appointed by an independent Public Service Commission hold office, subject to certain constitutional safeguards, during the pleasure of the Yang di Pertuan Agong. The Yang di Pertuan Agong also appoints ambassadors and many principal officers such as the Chairman and members of the various Service Commissions established by the Constitution and the Attorney-General and Auditor General. As regards the armed forces he is Commander-in-Chief and officers hold commissions from him, although he cannot issue orders to them.

As regard the Judiciary, until recently the Yang di Pertuan Agong was the final court of appeal, appeals being referred for advice to the Privy Council in England, but appeals to the Yang di Pertuan Agong have now been abolished. The Yang di Pertuan Agong appoints the Lord President of the Supreme Court, the Chief Justices and the Judges, writs issue from the High Court in his name and he has power to grant pardons, reprieves and respites in regard to the Federal Territory and in certain emergency cases.

Although the Yang di Pertuan Agong appears to be invested with a lot of power he normally acts on advice. Article 40(1) of the Malaysian Constitution provides that in the exercise of his functions under the Constitution or federal law the Yang di Pertuan Agong shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except as otherwise provided under the Constitution. Article 40(2) then provides that the Yang di Pertuan Agong may act in his discretion in the performance of the following functions -

- a) the appointment of a Prime Minister;
- b) the withholding of consent to a request for the dissolution of Parliament;
- c) the requisition of a meeting of the Conference of Rulers concerned solely with the proceedings, position, honours and dignities of the Malay Rulers;
- d) in any other case mentioned in the Constitution.

The Conference of Rulers is a body established by the Constitution consisting of the nine Rulers and the four Yang di Pertuan Negeri (of Penang, Malacca, Sabah and Sarawak). It has no direct legislative, executive or financial power but it is the most prestigious body in the country. Its main function is to exchange views with the Federal Government on matters of national importance.

In the Conference the Yang di Pertuan Agong acts on the advice of the Prime Minister and each Ruler and Yang di Pertuan Negeri acts on the advice of the Chief Minister. The Conference of Rulers has an important advisory function in the appointment of certain officials like the Judges, the Chairman of the Public Services Commission and the Auditor-General. Some amendments to the Constitution, especially those relating to sensitive issues and the Conference of Rulers itself requires the consent of the Conference of rulers.

The Head of Government in Malaysia is the Prime Minister. The Malaysian Constitution provides that the Yang di Pertuan Agong shall appoint as Prime Minister to preside over the Cabinet a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House. Other Ministers and Deputy Ministers are appointed by the Yang di Pertuan Agong from among the members of either House of Parliament on the advice of the Prime Minister. Thus the Prime Minister must be a member of the House of Representatives and the Ministers must be members of either House; the choice of the Prime Minister is therefore more limited and unless the person has been elected as a Member of the House of Representatives he must be appointed a Senator before he can be a Minister or Deputy Minister. The Prime Minister's party or

coalition of parties must have majority in the House of Representatives, they are responsible to the people not directly but through their elected representatives, and if the Prime Minister's party or coalition of parties loses the confidence of the majority in the legislature, they have to give up office, unless the Prime Minister is able to persuade the Yang di Pertuan Agong to dissolve Parliament. If there is a fresh election, then the party in power will only continue to hold power, if it succeeds in obtaining the majority of seats in the House of Representatives. Thus unlike the position in the United States there is no separation of powers between the Executive and the Legislature. The members of the Executive are also members of the Legislature and they can only continue to hold office, if they command the confidence of the Legislature. As the Executive has a majority of votes in the Legislature it can to a certain extent control the proceedings of the legislature. There is therefore mutual co-operation rather than separation of powers.

Parliament unless sooner dissolved shall continue for five years from the date of its first meeting and shall then stand dissolved. Elections will then be held to decide which party or parties will secure a majority in the House of Representatives and therefore will be invited to constitute the Government.

The Malay Rulers and the State Constitutions

Royalty has survived in Malaysia and there are nine Malay rulers whose sovereignty, prerogatives, powers and jurisdiction are safeguarded by the Constitution. The Rulers are Constitutional monarchs and generally act on the advice of the State Executive Council or member thereof, except where the State Constitution provides that the Ruler may act in his discretion. Each State has its Constitution and these have to follow the essential provisions set out in the Eighth Schedule to the Federal Constitution.

The States which do not have Rulers have Yang di Pertuan Negeri who are appointed by the Yang di Pertuan Agong in accordance with the State Constitution. The Yang di Pertuan Negeri also generally acts on the advice of the Executive Council or a member thereof, except where the State Constitution provides that he may act in his discretion. Each of the States has a unicameral legislative Assembly and the system of Government follows

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The Malaysian Constitution provides that Malay shall be the national language. The Malaysian Constitution provides that the Parliamentary - Cabinet system. The Menteri Besar or Chief Minister is appointed by the Ruler or Yang di Pertuan Negeri as he commands the confidence of the Assembly and he and the members of the Executive Council will only continue to hold office so long as he commands the confidence of the Assembly.

The Legislative Assembly, like Parliament unless sooner dissolved shall continue for five years from the date of its first sitting and shall then stand dissolved.

Malays and Natives of Sabah and Sarawak

Owing to the neglect of the rural areas during the British occupation, the majority races in Malaysia - the Malays and the Natives of Sabah and Sarawak - have been left behind in education, commerce and industry. In order to redress the balance and make the Malays and natives better able to compete with the other immigrant races who live mainly in the urban areas special provision is made in the Malaysian Constitution for the reservation of quotas in respect of services, permits, the public service and education for the Malays and natives of Sabah and Sarawak. Article 153 of the Constitution makes it the responsibility of the Yang di Pertuan Agong to safeguard the special position of the Malays and the natives of Sabah and Sarawak and at the same time to safeguard the legitimate interests of the other communities in Malaysia. It is provided that in exercising his functions under the Constitution and federal law in accordance with Article 153 the Yang di Pertuan Agong shall not deprive any person of any public office held by him or the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

Thus the Constitution tries to achieve not only equality before the law but also economic and social equality. The Government in Malaysia has therefore striven to achieve social justice for all and under the New Economic Policy the Government has endeavoured to eradicate poverty in the urban and rural areas and to restructure society so as to achieve economic equality and social justice.

National Language

The Malaysian Constitution provides that Malay shall be the national language and so the Malay language has to be used for all official purposes.¹⁴ However no person is prohibited or prevented from using (otherwise than for official purposes) any other language or from teaching or learning any other language. Although Malay is the national language, English is still extensively used and in fact efforts had been made to improve the standard of English, which has declined somewhat since independence.

Islam

The Malaysian Constitution provides that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.¹⁵

In his oath of office, the Yang di Pertuan Agong declares that he shall at all times protect the religion of Islam and uphold the rule of law and order in the country. In each of the Malay States which has a Ruler, the Ruler is the Head of the Islamic Religion in his State. In the Federal Territory, Penang, Malacca, Sabah and Sarawak, the Yang di Pertuan Agong is the head of the Islamic Religion. Freedom of religion is also guaranteed in the Constitution and it is provided that every person has the right to profess and practise his religion, and subject to limitations which may be imposed on propagation of any religious doctrine or belief among Muslims, to propagate it.¹⁶ This power has in fact been used largely to control deviant teachings in Islamic theory and practice.

Citizenship

The Malaysian Constitution provides for four categories of citizenship (a) by operation of law (b) by registration (c) by naturalization and (d) by incorporation of territory. A person born in Malaysia is a citizen only (a) if he was born or after Merdeka Day (August 31, 1957) and before October 1962 (b) if he was born after September 1962 but before September 16, 1963, if one of his parents was at the time of his birth either a citizen or a permanent resident or he was not born in any other country and (c) if he was born on or after September 16, 1963 if one of his parents was at the time of the birth either a citizen or a permanent resident.¹⁷

The United States Constitution on the other hand provides that "all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside".

Emergency

In order to meet the dangers of subversion and communist insurrection power is given under the Malaysian Constitution for Parliament and the Government to act against subversion and emergency situations.¹⁸ Legislation against subversion has been enacted in the form of the Internal Security Act, which enables orders of preventive detention to be made under it. Moreover if the Yang di Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part of it is threatened, he may issue a Proclamation of Emergency. If a proclamation of emergency is issued when Parliament is not sitting, the Yang di Pertuan Agong shall summon Parliament as soon as may be practicable. Until both Houses of Parliament are sitting, the Yang di Pertuan Agong may promulgate ordinances having the force of law, if satisfied that immediate action is required. A proclamation of emergency and any ordinance promulgated under it must be laid before both Houses of Parliament and, if not sooner revoked shall cease to have effect if resolutions are passed by both Houses of Parliament annulling such Proclamation or Ordinance. A resolution annulling such Proclamation or ordinance does not affect the legality of anything done by virtue thereof nor does it affect the power of the Yang di Pertuan Agong to issue a new Proclamation or promulgate an Ordinance under the new proclamation.¹⁹

While a proclamation of emergency is in force, the executive authority of the Federation shall, notwithstanding the Constitution, extend to any matter within the legislative authority of a State. It also extends to the giving of directions to a State Government or to any of its officers or authorities. While a proclamation of emergency is in force, Parliament may notwithstanding anything in the Constitution, make laws in regard to any matter, if it appears to Parliament that the law is required by reason of the emergency. Article 79 (relating to the exercise of concurrent legislative powers) does not apply to such a law, so that the State government does not have to be consulted. Nor shall any provision of the Constitution apply which requires any consent or concurrence to the passing of a law or any consultation with respect thereto or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di Pertuan Agong for his assent. Parliament has however no power under the clause to pass any law relating to any matter of Islamic Law or with respect to any matter of native law and custom in Sabah and

Sarawak. No provision of any Ordinance promulgated under the Article and no provision of any Act of Parliament which is passed while a Proclamation of emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency shall be invalid on the ground of inconsistency with any provision of the Constitution but this provision does not validate any provision inconsistent with the provision of the Constitution relating to any matter of Islamic Law or with respect to any matter of native law or custom in the State of Sabah or Sarawak or relating to citizenship or language.²⁰

At the expiration of a period of six months beginning with the date on which a proclamation of emergency ceases to be in force, any Ordinance promulgated in pursuance of the proclamation and to the extent that it could not have been validly made but for Article 150 (relating to the proclamation of emergency), any law made while the proclamation was in force ceases to be effective, except as to things done or omitted to be done before the expiration of the period.²¹

Proclamations of emergency have been promulgated in Malaysia in May 1969 after the outbreak of communal riots in Kuala Lumpur and to deal with constitutional crises in the States of Sarawak in 1966 and in Kelantan in 1977. The emergency promulgated in 1969 has not yet been lifted and Malaysia is therefore still in a State of emergency mainly because of the threat of communist insurgency in the country.

Even during the emergency there are restrictions on preventive detention. The person detained has to be told of the grounds of his detention and no citizen shall continued to be detained unless an advisory board has considered any representations made by him and made recommendations to the Yang di Pertuan Agong within three months of receiving such representations or within such longer period as the Yang di Pertuan Agong may allow.²²

Sensitive issues

One result of the communal riots in 1969 is that restrictions have been placed on the questioning of certain sensitive issues. In imposing restrictions in the interest of security of the Federation or any part of it or public order on the freedom of speech and expression, the right

to assemble and the right to form associations under Article 10 of the Malaysian Constitution, Parliament may pass any law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III (relating to citizenship), Article 152 (National Language), Article 153 (Special position of Malays and natives of Sabah and Sarawak and legitimate interests of other communities), or 181 (saving of the sovereignty of the Rulers), otherwise than in relation to the implementation thereof as may be specified in such law.²³ The restrictions apply even to members of Parliament and members of the Legislative Assemblies and the immunity of members of Parliament and of members of the Legislative Assembly from proceedings in court shall not apply to any person charged with an offence under the law passed by Parliament under Article 10(4) or with an offence under the Sedition Ordinance, which makes it an offence to question any of the sensitive issues.²⁴

Moreover it is provided that a law making an amendment to Clause 4 of Article 10 and any law passed thereunder, the provisions of Part III (citizenship), Article 38 (the Conference of Rulers), Article 63(4) (Restriction of immunity of members of Parliament), Article 70 (Precedence of Rulers⁵⁾, Article 71(1) (Federal Guarantee of State Constitutions) Article 72(4) (Restrictions of immunity of members of Legislative Assembly), Article 152 (National language) and Article 153 (Special privileges of Malays and natives of Sabah and Sarawak and the legitimate interests of the other communities⁶⁾ can only be passed with the consent of the Conference of Rulers.²⁵

Amendment of the Constitution

Unlike the American Constitution, the Malaysian Constitution can and has been amended a number of times. In the United States the amendment of the Constitution must be ratified by three fourths of all the States concerned or by the Constitutional Conventions held in three fourths of the States (Article V). In Malaysia the Constitution is generally amendable by Parliament if two thirds of the total members of each House of Parliament approve. No ratification by the States is necessary. The need for amendment has arisen because the Malaysian Constitution is long and detailed, and contains many matters which could have been left to ordinary legislation.

As the Alliance party - composed of parties representing the various races in Malaysia - which has been in power since Merdeka Day has been able to command a two-thirds majority in Parliament, there have been a large number of amendments to the Malaysian Constitution, the general effect of which seems to be to strengthen the central government.

Interpreting the Constitution

In interpreting the Constitution the Courts in Malaysia have tended to refer to English decisions and, to a lesser extent, to Indian decisions. Counsel have sometimes argued on general principles and referred to such doctrines as due process, the basic structure of the Constitution and the rule of harmonious construction but the Judges have preferred to take a practical view and looked to the terms of the Constitution itself. In the case of Loh Kooi Choon v Public Prosecutor²⁶ Raja Azlan Shah F.J. (as he then was) referred to Thomas Paine and Frankfurter J. He said "A Constitution has to work not only in the environment in which it was drafted but also centuries later. "The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation any property in the generations which are to follow -- It is the living and not the dead that are to be accommodated (Thomas Paine, Rights of Man)". Later in his judgment he quotes Frankfurter J -

"The ultimate touchstone of any constitutionality is the Constitution itself and not any general principle outside it".

His conclusion is -

"Whatever may be said of other Constitutions they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of the Constitution itself that has to be interpreted and applied and this wording "can never be overridden by the extraneous principles of other Constitutions" - see Adegbenro v Akintola & Anor.²⁷ Each country forms its Constitution according to its genius and for the good of its society. We look at other Constitutions to learn from their experiences and from a desire to see how their progress and well-being is ensured by their fundamental law."²⁸

In recent years, especially with the establishment of the Supreme Court as the successor to the Federal Court, judges in Malaysia have been more ready to refer to decisions from American courts. Thus in Malaysian Bar v Government of Malaysia²⁹ the question at issue was the constitutionality

of subsection 1(a) of Section 46A of the Legal Profession Act, 1976, which restricts membership of the Bar Council, State Bar Committee, and any Committee of the Bar Council or Bar Committee to advocates and solicitors of not less than seven years' standing. The appellants argued that the requirement violates the equal protection clause of Article 8 of the Federal Constitution. Mohammed Azmi S.C.J., in giving the majority judgment of the Supreme Court that the provision did not violate the equal protection clause as it was based on reasonable and permissible criteria, said :

"The concept of equal protection is not universal. At one end of the spectrum are countries like Australia which have no equal protection clause in their Constitutions (see Australian Federal System by Lane, Second Edition, page 856 n.). At the other end is the United States of America which by its Fourteenth Amendment provides that "No State shall ...; nor deny to any person within its jurisdiction the equal protection of the laws." Although there is no equal protection clause that governs the action of the Federal Government the courts in the United States have through judicial determination, employed the due process clause of the Fifth Amendment to achieve the same result, if the Federal Government classified individuals in a way which would violate the equal protection clause. It should be noted that the Fifth Amendment contains no equal protection clause, but it does forbid discrimination that is so unjustifiable as to be violative of due process (ss Shapiro v Thompson³⁰ and Boiling v Sharpe³¹). The courts also set the same standards for validity under the Fifth Amendment due process and the Fourteenth Amendment equal protection clauses, which are both jointly referred to as the equal protection guarantee. To be valid under either clause, the United States Supreme Court has used a stricter standard of review in the area of fundamental rights or suspect classification than in the area of economics or social welfare. In particular, a legislative classification must not be based upon impermissible criteria or used arbitrarily to burden a group of individuals. To attain constitutional validity, the courts must be satisfied that the State has a legitimate governmental interest as opposed to mere governmental purpose in creating the burden or restriction when dealing with fundamental rights guaranteed by the Constitution. (See Handbook on Constitutional Law by Nowak, Rotunda, and Young at pages 517 - 535.) In this country, the equal protection guarantee can be found in Article 8 of the Federal Constitution, [especially] ... '8(1).

to the equal protection of the law. 8(2). Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law".--

"Following the principle laid down in Lindsley v National Carbonic Gas Co.³² and Datuk Haji Harun bin Haji Idris v Public Prosecutor,³³ if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provisions are constitutional and valid. In his argument, Raja Abdul Aziz, counsel for the appellants, has referred extensively to two American essays, one published in 1949 in the California Law Review entitled 'The Equal Protection of the Laws' and the other published in 1969 in the Harvard Law Review on "Development in the law - equal protection. I have considered the two essays in the light of current development of the law on equal protection in the United States, including the U.S. Supreme Court decision in In re Griffiths³⁴

"The durational experience requirements only delays the opportunity of new lawyers to become candidates or be appointed to the governing bodies, and as such it is valid provided the length of the delay is not patently unreasonable. In the United States, although the constitutionality of a durational residency requirement in election is still an open question, the U.S. Supreme Court affirmed the decision in Chimento v Stark³⁵ ... that the state has a legitimate interest in creating a seven-year durational residency requirement in an election for governorship, and the delayed opportunity to become a candidate was also held to be valid in terms of the equal protection guarantee In the same way, the seven-year requirement helps to ensure that lawyers would have sufficient professional experience and would also familiarise themselves with the various problems of the Bar before they serve in the governing bodies of the legal profession. The seven-year period ... has not been shown to be patently unreasonable in terms of professional experience. I am therefore of the opinion that the classification in sub-section (1)(a) of section 46a is based on reasonable and permissible criteria ... No fundamental rights guaranteed by the Federal Constitution have been violated by the impugned subsection, and on the basis of suspect classification, it has passed the 'intelligible differentia and nexus' test. Indeed, (it) ... satisfied even the 'legitimate or compelling state or governmental interest' test, required in the United States.

In his dissenting judgment, Salleh Abas L.P., also analysed the history of equality jurisprudence in Malaysia, the United States and India. He said inter alia -

Counsel for the appellants, whilst accepting that the doctrine of classification laid down by Suffian L.P in Datuk Haji Harun bin Idris v Public Prosecutor³⁶ is still good law, nevertheless urged us to attempt a new approach and treat the impugned provision as a suspect classification and thus against the equal protection clause. He relied very extensively on two academic article published in the California Law Review, "The Equal Protection of the Laws" by Joseph Tussman and Jacobus tenBroek: 37 Cal. L.R. 341; and in Harvard Law Review "Development - Equal protection": 82 Harv. L.R. 1067, 1170. He also relied on the U.S. Supreme Court decision in In re Griffiths.³⁷

I shall perhaps in deference to his submission examine this suggested new approach by looking at the jurisprudential development of this clause in the United States.

The clause was introduced by section 1 of the 14th Amendment to the American Constitution which was adopted in 1868. Its wording is as follows :

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Initially, the intended beneficiaries were the Negroes. As they has just then been emancipated a great need was felt for their protection against arbitrary treatment by the States which would thus enable them to enjoy full freedom. However, later development shows that the equal protection clause was made available against all kinds of discrimination extending far beyond the original encompassed objective. This development was at first slow because of the prominence given to the concept of due process which is also part of section 1 of the 14th Amendment. It was not until the famous Slaughter House³⁸ cases and Yick Wo v Hopkins³⁹ that the concept of equal protection began to take shape in American jurisprudence which later influenced the Indian and our Constitutions.

The other standard, that the law must be such that the court will
 In the meantime decisions of the American Courts on equal protection clause became the subject of meticulous studies by American legal scholars. They all seem to agree that there are two standards used by American courts in interpreting this clause. These are the "traditional" and "new" standards reflecting judicial attitude of the United States Supreme Court Judges at different periods of time described by critics as being 'conservative' and 'restrained' as opposed to 'liberal' and 'active'.

The traditional standard according to American legal scholars is one by which the court presumes the constitutionality of the impugned legislation unless the challenger can show that there is no reasonable basis for the classification having regard to the object of the legislation. When employing this standard the court is in effect very cautious and adopts a restrained posture in its examination of the impugned legislation. The passage I have quoted in Lindsley (supra) represents this standard. This is the standard which has been accepted by the Indian Supreme Court and our Federal Court in Datuk Harun's case (supra). Fazl Ali J. in State of Bombay v F.N. Balsara⁴⁰ quoted with approval the following extract from Professor Willis' Constitutional Law, 1st ed. at 568 :

"The guaranty of the equal protection of the laws means the protection of equal law. It forbids class legislation, but does not forbid classification with rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. "It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred and in the liabilities imposed." The inhibition of the amendment ... was designed to prevent any person or class or persons from being singled out as a special subject for discriminating & hostile legislation." It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion & nullifies what they do only when it is without any reasonable basis. Mathematical nicety & perfect quality are not required. Similarly, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis.

The other standard, i.e. the 'new standard' is one by which the court will adopt an active review and hold a rigid scrutiny of the impugned legislation as there can be no presumption of constitutionality in its favour. According to this standard the classification is suspect and can have no reasonable connection at all between its basis and the object of the impugned legislation, and is, therefore, a forbidden classification. Suspect classifications have been held to invalidate laws which discriminate on the basis of race - Korematsu v U.S.⁴¹ and on the basis of nationality or alienage (Graham v. Richardson⁴² and In re Griffiths). All cases of school segregation which were held to be unconstitutional were also based on suspect of forbidden classification (Brown v Board of Education).⁴³ The new standard is also employed to invalidate a law if the classification affects fundamental interest, such as the right to move freely within the United States (Shapira v Thompson).⁴⁴

The general basic principle culled from the authorities and judicially determined, succinctly put, is that article 8(1) permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question (Public Prosecutor v Datuk Harun bin Haji Idris & Ors.)⁴⁵ Under the traditional test a classification is permissible if it is not shown to be arbitrary; there is consistent deference to legislative determinations as to the desirability or adequacy of particular statutory objectives, and discriminations need only be plausibly related to public interests that are not demonstrated to be illegitimate. If however the court determines that the challenged statutory classification affects a fundamental right or is drawn on the basis of suspect criteria, then a mere rational connection between the selected legislative goal and the enacted legislative differentiation will not suffice per se, and in such a case a stricter scrutiny and a higher degree of precision than ordinarily required will be necessary. In reality the treatment of suspect classification does not differ much from the traditional test as both are primarily concerned with the question of whether or not there is a reasonable basis for the classification.

Turning now to a consideration of the matter before us against the background of the principles I have discussed the issue that arises for determination revolves on the question of the basis for classifying advocates and solicitors into those with and without 7 (seven) years' standing and whether the inter-relation of the basis with the object of paragraph (a) of subsection (1) of section 46A is reasonable.

On a considered view of the matter, I find that section 46A(1)(a) which debars any advocate and solicitor of less than an aggregate of 7 years' standing from being a member of the Bar Council or a Bar Committee or of any committee of these two embodies classification without any reasonable basis and which is purely arbitrary and discriminatory with no sufficient nexus with the objective and purpose sought to be achieved by its enactment. If a person admitted as an advocate and solicitor of the High Court is entitled to practise immediately upon his admission, there appears to be no plausible justification for providing for such person as a class or group to be without representation in respect of that class or group on their professional governing and other related bodies until and unless he has attained the status of an advocate and solicitor of not less than 7 years' standing.

1. Office of Director of Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198
2. Federal Constitution, Article 45(4)
3. *Ibid*, Article 68
4. *Ibid*, Article 152. See Mardaka University v Government of Malaysia [1982] 2 MLJ 243
5. *Ibid*, Article 3
6. *Ibid*, Article 11
7. *Ibid* Part III and Second Schedule
8. *Ibid* Part XI
9. *Ibid* Article 150
10. *Ibid* Article 150(4) - (6A)
11. *Ibid* Article 150(7)
12. *Ibid* Article 151
13. *Ibid* Article 10(4)
14. *Ibid*, Article 61(4) and 72(4). See Meik Keding v Public Prosecutor [1982] 2 MLJ 120
15. *Ibid*, Article 159(5)
16. Loh Keng Choon v Public Prosecutor [1972] 2 MLJ 187 at p. 188 - 189
17. Abdullah v Atirrola & Anor [1967] 3 All S.R. 544, 551
- 18.
19. Malaysian Bar v Government of Malaysia [1998] 2 MLJ 163
20. Singh v Thompson
21. Avilling v Shams
22. Leister v National Carbonic Gas Co.

1. See Malayan Constitutional Documents vol 1 2nd Ed. 1962, Preface p. xii
2. Federation of Malaya Agreement, 1957, Clause 3
3. See for example Merdeka University v Government of Malaysia [1982] 2 MLJ 243
4. Federal Constitution, Article 125
5. See Karam Singh v Menteri Hal Ehwal Dalam Negeri [1969] 2 MLJ 129
6. Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64 at p. 71
7. Haw Tua Tau v Public Prosecutor [1981] 2 MLJ 49
8. Che Ani bin Itam v Public Prosecutor [1984] 1 MLJ 113 at p. 115
9. Che Ani bin Itam v Public Prosecutor [1984] 1 MLJ 113 at p. 115
10. Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64 at p. 71
11. Ooi Ah Pua v Officer in Charge of Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198
12. Federal Constitution, Article 45(4)
13. Ibid, Article 68
14. Ibid, Article 152. See Merdeka University v Government of Malaysia [1982] 2 MLJ 243
15. Ibid, Article 3
16. Ibid, Article 11
17. Ibid Part III and Second Schedule
18. Ibid Part XI
19. Ibid Article 150
20. Ibid Article 150(4) - (6A)
21. Ibid Article 150(7)
22. Ibid Article 151
23. Ibid Article 10(4)
24. Ibid, Article 63(4) and 72(4). See Mark Koding v Public Prosecutor [1982] 2 MLJ 120
25. Ibid, Article 159(5)
26. Loh Kooi Choon v Public Prosecutor [1972] 2 MLJ 187 at p. 188 - 189
27. Adegbenro v Akintola & Anor [1963] 3 All E.R. 544, 551
- 28.
29. Malaysian Bar v Government of Malaysia [1989] 2 MLJ 165
30. Shapiro v Thompson
31. Boiling v Sharpe
32. Lindsley v National Carbonic Gas Co.

33. Datuk Haji Harun bin Haji Idris v Public Prosecutor
34. In re Griffiths
35. Chimento v Stark
36. Datuk Haji Harun bin Idris v Public Prosecutor
37. In re Griffiths
38. Slaughter House
39. Yick Wo v Hopkins
40. State of Bombay v F.N. Balsara
41. Korematsu v U.S.
42. Graham v Richardson
43. Brown v Board of Education
44. Shapiro v Thompson
45. Public Prosecutor v Datuk Harun bin Haji Idris & Ors.
- 33 Slaughter House v

U.S. Legal System:
Its Influence on Malaysia and Asia

Section Three: Influence of the American Legal System