

THE EMERGENCE OF A NEW FEDERATION IN MALAYA*

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I

On August 31, 1957, the Federation of Malaya became an independent state. It elected to remain within the British Commonwealth, though with a unique status within that association. The constitution provides for the election of a Supreme Head of the Federation, the Yang-di-Pertuan Agong, who is elected for a five-year period by the Conference of Rulers from among their number. The Conference of Rulers for the purpose consists of the nine native rulers of the Malay States. The Federation therefore is a monarchy, separate from the British Crown which is not an integral part of the government of the Federation any more than it is an integral part of the governments of India and Pakistan, which are republics, and the Commonwealth organisation which has proved sufficiently expansive to accept the membership of republics has not found the novel institution of a separate monarchy too uncomfortable to accommodate within the family.

Constitutional theory has been adjusted to practical needs in other respects. It appears to have been thought desirable to maintain appeals from the Supreme Court of the Federation of Malaya to the Privy Council. The theory of the Privy Council appeal is one of application to the Queen-in-Council; the Judicial Committee which hears the appeal offers a single opinion, without separate concurrences or dissents, lest the monarch be disturbed by the clamour of discordant advices. The Federation constitution provides that the Supreme Head may make arrangements with Her Majesty for the reference of appeals from the Supreme Court of the Federation to the Privy Council, and further declares that until there is legislative provision to the contrary, appeals shall lie to the Privy Council in specified matters. On receipt of the "report or recommendation" of the Judicial Committee on a Malayan appeal, the Supreme Head is to make such order as may be necessary to give effect thereto. The Privy Council serves the Federation as a court of appeal on a new constitutional basis; it is expressly provided that any appeal or application for leave to appeal from the Supreme Court to Her Majesty in

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Council which is pending immediately before Merdeka (Independence) Day shall, on and after Merdeka Day, be treated as an appeal or application for leave to appeal under the new procedure.

The constitution of the Federation of Malaya is unusual in many respects. Not the least was the manner of its drafting. At the conference which met in London early in 1956 and which was attended by representatives of the United Kingdom and Federation governments and the Rulers of the Malay States, at which the plan for the attainment of independence by the Federation in August, 1957, was formulated, it was agreed that an independent constitutional commission should be appointed to make recommendations on the future constitutional structure of independent Malaya. There were no Malayan representatives on this commission, which drew its membership from governmental nominees of the United Kingdom, Canada, Australia, India and Pakistan. Presumably the choice of the national members, apart from the United Kingdom, was controlled by the consideration that these nations had experience in the operation of federal-type constitutions. In the event, Canada did not provide a representative, but the other four governments made nominations. The United Kingdom furnished a chairman, Lord Reid, a Scottish lawyer and a judicial member of the House of Lords. The United Kingdom also nominated Sir Ivor Jennings, a distinguished constitutional lawyer with wide experience in post-war Asia. India appointed a judge, Mr. Justice Malik, and Pakistan nominated Mr. Justice Abdul Hamid. The Australian government's appointee was Sir William McKell, formerly Governor-General of the Commonwealth and before that Premier of the State of New South Wales. The commission received oral and written evidence in Malaya and then, for reasons which are explained in some detail in its report, withdrew to Rome where it formulated its proposals. These were considered by the United Kingdom government, the Malay Rulers and the Federation government, and a number of amendments, on matters of substance and detail, were made. The revised proposals were then submitted to the United Kingdom parliament and to the Legislative Council of the Federation, and in the form in which they were approved, furnish the constitution of the Independent Federation of Malaya.

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 also essential that the States and Settlements should enjoy a measure of autonomy, and that their Highnesses the Rulers should be constitutional rulers of their respective States with appropriate provisions safeguarding their position and prestige. We have made provision for a new constitutional Head of State 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 recognize the need for safeguarding the special position of the Malays in a manner consistent with the legitimate interests of other communities, and we have given particular consideration to this need. We have framed our recommendations on the basis that Malaya will remain within the Commonwealth and we have found general agreement on this matter.”¹

II

The Federation of Malaya comprises eleven States: Johore, Negri Sembilan, Selangor, Perak, Kedah, Kelantan, Perlis, Pahang, Trengganu, Malacca and Penang. Malacca and Penang are the Settlements referred to in the passage quoted from the report of the Reid Commission. These were British colonial possessions; Penang was acquired from the Sultan of Kedah as a trading station in 1786, and Malacca was ceded to the United Kingdom under the terms of the Anglo-Dutch Treaty of 1824. That treaty also acknowledged British rights in Singapore, which had originally been occupied in 1819 by Sir Stamford Raffles by agreement with the Sultan of Johore. Before the Second World War, Singapore, Penang and Malacca were administered as a unit as the Straits Settlements. In the post-war arrangements, Singapore was constituted a separate Crown colony, and the settlements of Penang and Malacca were to become part of the Malayan Union, and were incorporated in the Federation of Malaya under the 1948 constitution. The Federation of Malaya Order-in-Council 1948, as amended, set up Settlement Executive Councils for Penang and Malacca under the presidency of the High Commissioner, or in his absence the Resident Commissioner, and also Settlement Councils presided over by the Resident Commissioner. Penang and Malacca have now been wholly incorporated in the independent Federation of Malaya and have lost the status of British Colonies. New constitutions have been enacted for the two states which provide for the appointment of Governors, who are to be appointed by the Supreme Head after consultation with the state government concerned. It was necessary to make special provision for the first appointments of Governors of Penang and Malacca. These have been appointed for a two-year term by the Supreme Head on the joint nomination of the Queen and the Conference of Rulers after consultation with the Chief Minister of the Federation. The Governors of Penang and Malacca are members of the Conference of Rulers, but they do not participate in its deliberations on matters concerning the election or removal of the Supreme Head or the Deputy Supreme Head, or relating solely to the privileges, position, honours and dignities of the Rulers or to religious acts, observances or ceremonies.

The other nine states have Malay rulers. Negri Sembilan, as its Malay name signifies, is a union of smaller chieftainies under a paramount chief, who was elected as the first Supreme Head of the Federation by the Conference of Rulers in August, 1957. In addition to the paramount

¹ Report of the Federation of Malay Constitutional Commission, 1957, 8-9. (Colonial 330 of 1957).

chief five other native chiefs of Negri Sembilan were parties to the Federation Agreement of 1957. The nine Malay states were not British colonial possessions, although they were under British protection and effective control. Until the last quarter of the nineteenth century, it was not British policy to interfere with the Malay states, but chronic disorder led to intervention in Perak and Selangor in 1874. By agreement with the rulers of those states, British Residents were installed whose advice, in what became an established formula "should be asked and acted upon on all questions other than those touching Malay religion and custom." Similar arrangements were made later with Negri Sembilan and Pahang, and in 1895 these four states became a Federation with a British Resident General and a system of centralized government. Johore entered into a treaty of protection in 1885, and under the terms of a new treaty in 1914, a British General Adviser was appointed. By the Bangkok Treaty 1909, Siam transferred all rights of suzerainty, protection, administration and control over Kelantan, Trengganu, Perlis and Kedah to the United Kingdom. These states, like their southern neighbours, had been subject to disorder and misrule.

Under the terms of the Federation of Malaya Independence Act 1957, the United Kingdom Parliament approved the conclusion of an agreement between the Queen and the Rulers of the Malay States for the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth. The Act also declared that the agreement might make provision for the formation of the Malay states and the two settlements into a new independent Federation in which the settlements should be incorporated as states. It also provided "for the termination of Her Majesty's sovereignty and jurisdiction in respect of the said settlements and all other Her power and jurisdiction in and in respect of the Malay states or the Federation as a whole." Pursuant to this Act, the Federation of Malaya Agreement provided for the establishment of the new Federation of Malaya on August 31, 1957, and for the termination of British authority on that date. The new constitutions of the Federation and of Penang and Malacca were annexed to the agreement as schedules and it was stipulated that the agreement should be conditional upon the approval of the Federal Constitution by Federal ordinance and by enactments of each of the Malay states. The United Kingdom Federation of Malaya (Adaptation and Enactments) Order in Council 1957 formally established the independent Federation of Malaya with effect from August 31, 1957.

III

The Federation of Malaya covers an area of 50,690 square miles; it compares in size with England and is a little smaller than Florida. To the north it borders Thailand, and to the south it is connected by a short causeway to the island of Singapore. To the south-west lies the island of Sumatra, which is part of the Republic of Indonesia. Malaya is in a position of great strategic importance; it lies astride the main sea and air routes to Australia, and across the Pacific to the United States.

Malaya is close to the Equator and has a heavy rainfall and a humid climate. Four-fifths of the country is covered by dense jungle; and the jungle, the unhealthy climate and difficult transportation conditions for a long time retarded population growth. Under British administration, health standards and transport facilities greatly improved, but even at the present day the country is not heavily populated, though there has been a remarkable increase over the last hundred years. The estimated total population of the Federation at mid-year 1955 was 6,058,317, of whom 2,967,233 were Malaysians, 2,286,883 Chinese, 713,810 Indians and Pakistanis, and 90,391 other races. The latest available population figures were 6,250,000 at mid-1956.

The economy of the country is primarily agricultural and half the working population is engaged in agricultural occupations. The Malays are primarily smallholders and fishermen; for the most part they have not been drawn into urban commercial life nor into the labour forces which serve the tin mines and the rubber plantations. The Chinese and Indians have provided most of the regular labour force, and commerce and a good part of industry have for long been in Chinese hands. Indians have furnished the main labour force for rubber estates and government departments, and there are also Indian shopkeepers, clerks and overseers, and, more recently, professional workers.

Rubber and tin are the mainstays of the Malayan economy; in 1955 these commodities earned 85% of the total export receipts of the Federation. Rubber is the principal product. About 3½ million acres are under rubber, of which approximately two million are in European and Asian estates, and 1½ million acres in Asian small holdings. The rubber plant was introduced into Malaya in 1877 from the Royal Botanic Gardens in Kew, England, and total production in 1956 was 626,000 tons, of which 606,000 were exported and earned \$(M) 1,309,000,000. As early as 1900, Malaya produced 54% of the world output of tin, and in 1956 nearly 63,000 tons was produced and earned an export income of \$(M) 400,000,000. In recent years, Malaya has been a most important dollar earner for the sterling area.

The staple food of most Malaysians is rice, but the country is not self-sufficient. It has long been the policy of government to encourage and extend rice cultivation. In 1956, 420,000 tons of milled rice were produced, and in the previous year the net import of rice for Malaya and Singapore was 484,000 tons.

The Japanese invaded Malaya in December, 1941, and with the fall of Singapore in February, 1942, the whole area passed under Japanese control until the surrender in 1945. Before the Japanese invasion, the governmental structure of the area was rather complex, and there were three separate political units. The Straits Settlements were administered as a British colony and included Singapore Island, Penang, and on the adjacent mainland Province Wellesley, Malacca and some small territories outside the Malaya area. Then there were four federated Malay

states and five unfederated states. The Governor of the Straits Settlement was also High Commissioner for Malaya, including the federated and unfederated states. The Straits Settlements were administered by the Governor with a Legislative Council of official and nominated unofficial members. In Malaya proper a policy of decentralisation and transfer of particular departments to state control under the individual Sultans had been pursued for some years before the war so that at the time of the Japanese invasion the position of the federated states had been substantially assimilated to that of the unfederated states. The patterns of government in the unfederated states varied significantly; a state like Trengganu was very much a traditional Malay monarchy while Johore had a constitution, a legislature and a cabinet, and the presence of substantial non-Malay elements in the population modified the original character of the Malay monarchy. At the administrative level, pan-Malayan departments were set up which secured uniform policy by appropriate consultation with the State governments.

During the Japanese occupation plans were made for the future constitutional structure of Malaya after the cessation of hostilities. In 1946, two statements of British government policy were published.² It was proposed to establish a Malayan Union comprising the nine native Malay states, Penang and Malacca. There was to be a central government, with a Governor, an executive council and a legislative council. Local councils were to be set up in the states and settlements with such powers as the central government might delegate to them. An important feature of the plan was the proposal to extend citizenship to all persons born in the Union or in Singapore. In the government statement of policy it was argued that the old administrative structure denied adequate opportunity for advance towards responsible self-government, and that the new proposals gave all those who had made Malaya their homeland the opportunity to share in the country's political and cultural institutions. It was also observed that the new constitutional scheme would enable Malaya "to exercise an influence appropriate to her economic and strategic importance." The second policy statement proposed the establishment of a separate colony of Singapore because of its large entrepot trade and its special economic and social interests distinct from those of the mainland. Orders-in-Council constituting the Malayan Union and the Colony of Singapore came into operation in April, 1946.

The Malayan Union proposals were devised on assumptions which were falsified by the course of events. It was assumed that an active military campaign would have to be fought in Malaya before British authority was re-established, that a civil administration would be set up before the war came to an end, and that it would be necessary to devise a framework of government sufficiently broad to attract the support of the various racial elements in the country. The sudden collapse of Japan

² Malayan Union and Singapore. Cmd. 6724 of 1946; Malayan Union and Singapore: Summary of Proposed Constitutional Arrangements. Cmd. 6749 of 1946.

came as a surprise to the planners, whose concern it had been to fashion a constitutional structure which did the best possible for the Malays while recognizing the need to meet the claims of other racial groups. The rapid and unexpected change in the situation left the overworked Colonial Office with no effective alternative plan. A British official, Sir Harold MacMichael, was sent out to Malaya towards the end of 1945 with a set of duplicate treaties for the Malay sultans to sign, virtually under pressure of loss of office for non-compliance. These treaties provided the constitutional basis on which the Malayan Union could be established; the rulers gave up most of the remaining independent functions of the states, even including their control over Malay custom.

These proposals, and the steps by which the agreement of the Malay Sultans was obtained, were severely criticised, particularly by Malay elements who feared that their position in the community would be seriously prejudiced. The main burden of criticism was directed at the transfer of jurisdiction from the state rulers to the Crown and at the citizenship proposals which, the Malays believed, would lead to Chinese domination of the country. In opposition to the Malayan Union proposals, various Malay organisations were formed, of which one of the most important was the United Malay National Organisation (UMNO) which was organised in April, 1946. There was also some criticism of the Malayan Union proposals in the United Kingdom. The Malayan Chinese, who had most to gain from the new political organisation, took no effective steps to support the British Government's proposals. The reasons for this have been well analysed; the majority of Malayan Chinese were wholly uninterested in politics, and the disorder of the Japanese occupation had accentuated what has been described as the almost pathologically concentrated self-interest that was already in pre-war times a feature of Chinese society in Malaya. To have come out in support of the Malayan Union proposals would have been to invite notoriety, and in the prevailing conditions and tensions in Malayan Chinese society, in which the Kuomintang and the Communists were warring for local support, it was obviously undesirable to attract attention by political activity.

The result was that although the Malayan Union was formally inaugurated on the return of the British Civil Administration in April, 1946, and lasted for two years, it was never given real effect. The citizenship proposals were not put into operation and no elections were held. By mid 1946, the Malay Rulers and UMNO had entered into consultations for constitutional revision, and in July, 1946, a working committee with representatives of the Government, the Malay Rulers and UMNO, was set up to furnish new constitutional proposals. The outcome was the constitution of 1948, which was approved after the working party's proposals had been submitted to the British Government and to the non-Malay communities in Malaya.

The Federation of Malaya Agreement of 1948, which was brought into operation in February, 1948, after agreements had been concluded between the crown and each of the rulers severally, and between the Crown

and the rulers jointly, provided a new constitutional structure. So far as the 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. The legislative powers of the states were extremely limited. The Federation Agreement provided for the establishment, under British protection, of a Federation of Malaya, comprising the nine native states and the two settlements with a High Commissioner, a Federal Executive Council and a Federal Legislative Council. The High Commissioner was given various responsibilities, including the protection of the position of the rulers and the safeguarding of the "special position of the Malays" and the "legitimate interests of other communities."

The conditions for the acquisition of Malayan citizenship were of great importance. This had been one of the critical issues in the debate on the Malayan Union Scheme, and the working party appointed to submit revised constitutional proposals had provoked strong opposition among the non-Malays by their recommendations on the matter of citizenship. These discriminations against non-Malays were in effect maintained in the citizenship regulations issued under the Federation Agreement of 1948. Of a population of approximately five million in 1948, 3.1 million qualified automatically for federal citizenship. Of these 78% were Malays, 12% Chinese and 7% Indians. Continued dissatisfaction with the citizenship regulations led to a reference of the question to the Communities Liaison Committee, an unofficial body representing all racial communities. The Committee recommended a liberalization of the citizenship laws and this led, after much debate, to the passage of new legislation in 1952 by the federal and state governments under which the conditions of acquisition of Malayan citizenship were eased. At the end of 1953 it was estimated that there were 4,173,000 citizens by operation of law, of whom 2,745,000 were Malaysians, 1,167,000 Chinese, 225,000 Indians and Pakistanis, and 36,000 other races.

In 1951, the "Member" system was introduced, under which nine nominated members of the Legislative Council, most of whom were political and community leaders, were given responsibility for the administration of various governmental departments and functions, and these members were appointed to the Executive Council. A tenth member was added in 1953 with the creation of a portfolio of Local Government, Housing and Town Planning. In 1953 a Speaker was appointed to preside over the Legislative Council. In the same year a committee representing various shades of political opinion was appointed by the High Commissioner to recommend further constitutional changes. The committee did not reach unanimous agreement on all matters, but the United Kingdom Government accepted a proposal for a new constitution providing for an elected majority of six in a Legislative Council of 98, excluding the Speaker. The new constitution was introduced in 1955, and

at the election held in July of that year, the Alliance Party which had been formed as a coalition of UMNO, the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC) and was led by the leader of UMNO, Tunku Abdul Rahman, had an overwhelming victory, winning 51 of the 52 elective seats. The High Commissioner then announced the composition of the new Executive Council which comprised the High Commissioner, ten of the elected members of the Legislative Council, the Chief Secretary, Attorney-General and Financial Secretary of the Federation (three principal officers of the British administration) and two nominated members. The ten elected members were assigned ministries and Tunku Abdul Rahman was appointed Chief Minister.

The Alliance Party had campaigned on a platform of political independence for the Federation, and after the election these pressures grew stronger. In August, 1955, it was agreed by the United Kingdom Government, the Malay rulers and the Alliance Government that a conference should be held early in 1956 in London to discuss plans for further constitutional advance. The conference met from January 18 to February 6, 1956, and was attended by representatives of the three parties principally concerned—the United Kingdom and Alliance Governments and the Malay rulers, and agreement was reached on the grant of Merdeka—independence—and on the steps to be taken in the meantime. August, 1957, was set as the date for independence “if possible,” and the possibility became the actuality. The instruments transferring power and the new constitution of the independent Federation of Malaya came into operation on August 31, 1957.

V

Some of Malaya's most difficult problems arise from the multi-racial character of the society. The three main racial groups are Malaysians, Chinese and Indians. In Penang and Malacca, Chinese settlement goes back many years, and in Malacca there were Chinese traders before the arrival of the Portuguese in the early sixteenth century. Chinese traders and labourers entered the country during the nineteenth century; and many were imported under indenture. The indenture system was abolished in 1914, but large numbers of free labourers continued to enter Malaya. In the 1930's the immigration of Chinese was controlled by ordinance, though women were allowed substantially free entry. In earlier days it does not appear that the mass of Chinese immigrants planned to sever their ties with China or to bind themselves to Malaya, but in recent years various factors, including marriage, economic circumstances and the breaking of links with the homeland, have led very large numbers of Chinese to regard Malaya as their permanent home.

At the outbreak of the Second World War there were approximately three-quarters of a million Indians in Malaya, but the mass of Indian labourers had transient connections with the country. For many years Indian labourers were brought into and exported from Malaya as the market for labour dictated, and the average Indian labourer's stay in

Malaya was only a few years. But there was also a long established Indian middle class in Malaya, which included doctors, lawyers, teachers, clerks, merchants and moneylenders.

In pre-war years there was little coherent nationalism in Malaya. Pandit Nehru, on his first visit to the country in 1937, spoke of it as a "political backwater." Among some Malay groups there were stirrings. The rise of Arab and Indonesian nationalism had some effect as did the pan-Asianism preached by Japanese businessmen. More important perhaps was the fear of the growing size and economic power of the non-Malay communities. But Malay nationalism was at best inchoate, bewildered and undeveloped; it was not politically significant. Nationalism was more developed among the Chinese, though this was *Chinese* nationalism largely activated by the Kuomintang government in China. Indian nationalism had little impact on the Indian population of Malaya until the years immediately preceding the outbreak of war.

The rapid Japanese conquest of Malaya profoundly changed the situation. A major effect was to stir up anti-European feeling and to bring to the Malays an awareness that they were a distinctive Asian people. In the early days of the Japanese occupation, Malays were given offices and appointments to which they had never aspired in the days of colonial administration. The racial group most profoundly affected by the Japanese occupation were the Indians, for it was Japanese policy to foster Indian aspirations to independence, and the Japanese administration encouraged the growth of the Indian Independence League, provided facilities for recruitment into the Indian National Army, and set up the Azad Hind government in Singapore. Among the Chinese there were some who joined guerilla units and fought the Japanese in the jungle; others collaborated, but the mass of the Chinese population in these years of occupation remained politically neutral and devoted themselves to the conduct of their personal affairs. Collaboration with the Japanese was not confined to any single racial group—there were Malay collaborators—and in this context it is unwise to make clear-cut condemnatory judgments. Whatever the character of a colonial administration, it has been aptly remarked that a colonial government cannot reasonably expect from its subjects the attitude that a free government expects from its citizens.

Although the Japanese were driven out of Malaya and the co-prosperity sphere crumbled in the dust, the occupation left its impact and for the colonial administration it was never glad confident morning again. In the post-war years, as we have seen, citizenship became a major political issue, first in the context of the Malayan Union proposals, and then in the dispute over the citizenship regulations made under the 1948 constitution. In 1949 the Malayan Chinese Association was formed as a parallel organisation to UMNO, not to foster communal rivalries, but more positively to provide an organised voice for the Chinese community. Its first President was Tan Cheng Lock and the association's policies were essentially moderate. It was much concerned to secure a broader, less discriminatory base for citizenship, but its attitude to the Malay community was co-operative; it agreed in principle to the teaching of Malay

as well as English in all schools, and in such matters as the award of scholarships for higher education it was prepared to accept the principle of Malay preference.

In all three major racial groups there are more extreme elements, but the formation of the Alliance Party in 1955 revealed a disposition on the part of the majority and moderate leadership in the three major communities to work a co-operative passage to independence, rather than a desire to delay it by fostering communal rivalry and suspicion. This combined effort is one of the most helpful portents for the future stability of independent Malaya. On the critical issue of citizenship the Reid Commission acknowledged the value of this co-operation:

"Many different proposals have been submitted to us in memoranda and in evidence with regard to qualification for citizenship of the Federation. We have carefully considered them all and we have come to the conclusion that the best proposals for dealing fairly with the present situation are those put forward by the Alliance. The parties of the Alliance have given full consideration to this matter and apart from a few minor points they have reached agreement. We are satisfied that this agreement is a reasonable and proper compromise between the views of the parties, each of which has the most widespread support from the race which it represents."³

Part III of the constitution deals with the acquisition and loss of citizenship. In some respects the Commission's recommendations were modified, but the major principles of the report which embodied the proposals in the Alliance memorandum were adopted. Of basic importance was the acceptance of the *ius soli*; all persons born in the Federation on or after Merdeka Day become citizens by operation of law. This removes one of the major grievances of the non-Malay communities. Other clauses safeguard the citizenship rights of those who were citizens before Merdeka Day; and there is provision for the acquisition of citizenship by registration or naturalization on a showing of compliance with residential and character requirements and proof of adequate knowledge of the Malay language.

Three other matters dealt with in the constitution bear on the relations between the communities. Sec. 3 declares that Islam, the religion of the Malays, is the state religion, but that other religions may be practised in peace and harmony in any part of the Federation. The emphasis is on religious freedom and this is reinforced by a more elaborate declaration of the right to religious freedom in Sec. 11. The proclamation of a state religion seems therefore to be not much more than a sonority, and the Alliance memorandum to the Commission accepted Islam as the religion of the country, though the Commission itself, by a majority, did not recommend the declaration of a state religion.

Rather more touchy were the questions of language and the special status of the Malays. The constitution provides that Malay and, for a

³ Report 16.

minimum ten-year period, English shall be the official languages and shall be used exclusively in the legislatures. The Reid Commission had recommended that there should be a limited right to use Chinese and Indian languages in the legislatures for a ten-year period, but this concession was not adopted in the constitution, and the rejection of the Commission's recommendation evoked protest among non-Malays. In its terms of reference, the Reid Commission was directed to make provision for "safeguarding the special position of the Malays and the legitimate interests of other communities." The original treaties with the Malay rulers recognised the special position of the Malay community, and this was reaffirmed from time to time. The Commission defined the matters in which the special position of the Malays were presently safeguarded as special land rights, preferences in admission to the public service and in the grant of licences and permits to carry on certain occupations, and preferences in the award of scholarships and other forms of aid for educational purposes. The Commissioners doubted the wisdom of preserving special privileges for particular groups, and they pointed to the inconsistency in their terms of reference in so far as they were required to protect the special position of the Malays *and* to establish a democratic society with a common nationality. There is an obvious suggestion in this section of the report that the maintenance of such privileges serves to perpetuate communal suspicions and hostilities. The Commission discovered some justification for the present maintenance of special Malay privileges in the consideration that this allowed time for the Malays to catch up with the other more active and progressive communities, and noted that there was little opposition in any group to the continuance of the privileges for a limited time. The Commission further observed that there was "great opposition" to the increase or prolonged retention of these privileges; and proposed that the existing privileges should be continued for a fifteen-year period, after which the situation should be legislatively reviewed. The Commission's recommendations on this matter were modified in various respects and most significantly by removing the time limit of fifteen years. The protection of the privileges of the Malays and the "legitimate interests of other communities" was made the responsibility of the Supreme Head of the Federation, acting on the advice of the Cabinet. It was said that the removal of the time limit made for greater flexibility and that the Supreme Head could review the situation as occasion demanded. It is a fairer guess that the time limit was struck out as a concession to Malay apprehensions of a threat to their privileged position.

VI

The new federal legislature will be bicameral, and the English names of the two chambers are the House of Representatives and the Senate. The House of Representatives is to be elected by universal suffrage. The structure of the Senate is in some ways unusual; two members are to be elected from each state by the state legislative assemblies following the United States pattern before the passage of the Seventeenth Amendment in 1913,

and sixteen are to be appointed by the Supreme Head from persons "who on his opinion have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representatives of racial minorities or are capable of representing the interests of aborigines." The proposal to constitute the Senate as a part-nominated, partly indirectly elected body, was made by the Reid Commission over the emphatic dissent of its Australian and Pakistani members who were of opinion that the Senate should be a wholly and directly elected House. The majority of the Reid Commission recommended that there should be eleven appointed members; in the constitution this was increased to sixteen. The constitution provides for the possibility of change in the structure of the Senate; Sec. 45 (4) declares that the parliament may abolish or reduce the numbers of appointed members, that it may increase the representation of each state to three, and may provide for direct election.

The relations between the two Houses are constitutionally regulated. The problem of deadlocks between the Houses has been resolved not by taking a federal precedent, such as Sec. 57 of the Australian constitution, but by copying the scheme of the English Parliament Acts 1911 and 1949. This means 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.

The terms of reference of the Commission called for recommendations for the establishment of a strong central government with a measure of autonomy for the states. The distribution of legislative power in the constitution follows the pattern increasingly common in recent federal instruments, of framing three lists, federal, state—both of which are exclusive—and a concurrent list. The residuary power, poor thing though it may be after the elaborate enumeration in the lists, is left with the states. The constitution copies the Australian supremacy clause in providing that a state law to the extent of its inconsistency with federal law, shall be void. "Inoperative" would seem to be a better choice of word than "void," and the Reid Commission used the words "cease to operate," but this criticism of the form of the Australian supremacy clause was apparently overlooked.

Under the 1948 constitution, the powers of the central government were very large, and central supremacy is maintained in the 1957 constitution. The exclusive powers of the central parliament are very extensive: they include elaborately defined external affairs and defence powers; wide authority over internal security, including the police; very general power over the area of criminal and civil law and judicial administration; 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 and capital issues. The central authority is also given legislative power with respect to the production, supply and distribution of goods, price control, over corporations and industries; imports and

exports; industrial property and insurance; over shipping, navigation and fisheries, communications and transport, education, medicine and health; over labour and social security, including trade unions, industrial and labour disputes and labour welfare; over newspapers and other publications and censorship. This is a selective account and does not purport to set out in detail all the areas of central exclusive legislative power. The state exclusive list is a poor thing by comparison; it includes power over the Muslim religion and the personal and family law of Muslims, various matters touching land and land tenure, local government outside the federal capital, and various works and services of a local character. The concurrent list is short, and the more important matters are social welfare, town and country planning, public health, sanitation and disease prevention, drainage and irrigation.

This distribution of powers reflects a very strong central emphasis. There are other interesting provisions touching the exercise of central power. It is provided in Sec. 76 that parliament may 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 organisation of which the Federation is a member. In light of the Bricker amendment controversy, this clause is of particular interest, and it is obviously designed to quiet any doubts as to the scope of federal power to implement treaties or international obligations. The federal legislature is also authorised to make laws for the sole purpose of ensuring uniformity of law and policy with respect to various matters of land law, including land tenure, registration of titles, the relations of landlord and tenant, the compulsory acquisition of land and with respect to local government. This exercise of central legislative power is not subject to state approval, except so far as any 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 a state if it is to operate there.

VII

The executive authority of the Federation is vested in the Yang di-Pertuan Agong, the Supreme Head of the Federation, though Parliament is authorised to confer executive functions on other persons. The constitutional machinery for the election of the Supreme Head is designed to rotate the office among the rulers of the Malay states, and the third schedule to the constitution ordains the procedure to be followed by the Conference of Rulers in making an election. The election is for a five-year term, and a deputy Supreme Head is also elected to serve during any vacancy of office or while the Supreme Head is absent from the Federation or is otherwise unable to act. During his term of office the Supreme Head may not exercise his functions as a State Ruler, other than those of Head of the Muslim religion. Provision is made for the removal of the Supreme Head by the decision of the Conference of Rulers.

The Supreme Head is a constitutional ruler, as are the rulers of the states. The governmental structure of Malaya is geared to responsible government and the constitution spells out some of the rules which in the United Kingdom and elsewhere in the Commonwealth are formulated as constitutional conventions. Save in defined cases, it is provided that the Supreme Head shall act on Cabinet advice. He is required to appoint a Prime Minister who shall be a member of the House of Representatives and who "is likely to command the confidence of the majority of the members of that House." The doctrine of responsible government is 'one of responsibility to the lower House. The Supreme Head, acting on the advice of the Prime Minister, is required to appoint a Cabinet of Ministers from among the members of either House. The Cabinet is collectively responsible to Parliament, and if the Prime Minister ceases to command the confidence of the House of Representatives, he must resign unless he can persuade the Supreme Head to grant him a dissolution of Parliament. Rather more unusual, the constitution provides that members of the Cabinet may take part, without voting rights, in the proceedings of the House other than that of which they are members; and that they (together with the Attorney-General, who is a permanent official) may be non-voting members of committees of the House of which they are not members.

It is further provided that the Supreme Head may act in his discretion (that is to say, need not accept advice) in appointing a Prime Minister, in withholding consent to a request for a dissolution of Parliament, and in summoning a meeting of the Conference of Rulers concerned solely with their privileges, position, honours and dignities and concerned with any action at such a meeting. In the exercise of these discretions in respect of the appointment of a Prime Minister and the refusal to grant a dissolution of Parliament, there will be cases where the situation will lead the Supreme Head to a clear and obvious decision, but if there should be a multiplication of party groups in the Federation, and if, for example, the Alliance coalition should break down, the Supreme Head may be faced with hard problems. In the United Kingdom there have been cases where the choice of a Prime Minister was not obvious; and in various parts of the Commonwealth the decision on the grant or refusal of a dissolution has been a difficult and uncertain one. The Reid Commission observed that there were substantial objections to the view that the Prime Minister should have an unrestricted *right* to a dissolution, regardless of the situation in the Parliament, that it was impossible to define with precision the circumstances in which a request for a dissolution ought to be granted, and that the Supreme Head "ought in a critical case to be free to decide what is in the best interests of the country."⁴

VIII

The Commission made provision for the election of the Supreme Head and the Deputy Supreme Head by the Conference of Rulers, but made

⁴ Ibid. 29.

no proposal for the establishment and functions of the Conference. The constitution makes such provision and establishes the Conference which is composed of the Malay rulers and the Governors of Malacca and Penang, but the two Governors take no part in the election of the Supreme and Deputy Supreme Heads or in discussions of the privileges, position, honours and dignities of the Rulers.

The Conference is assigned other functions which fall into three categories. It will exercise the function of consenting or withholding consent to certain laws; where laws alter the boundaries of a state or directly affect the privileges, dignities, honours or position of the Rulers or Governors, the Conference acts in its discretion, but where the law affects the special position of the Malays or the legitimate interests of the other communities, the Supreme Head is required to act on cabinet advice and the other Rulers and Governors on the advice of their Executive Councils. The Conference is to be consulted, each Ruler acting in his discretion, on the appointment of various functionaries, including the Chief Justice and the Judges of the Supreme Court. The Conference is to be consulted on policy changes affecting the special position of the Malays, and on various matters touching the Muslim religion. The Conference may also deliberate on questions of national policy (the example given in the constitution is changes in immigration policy), in which case the Supreme Head is to be accompanied by the Prime Minister and the Rulers by their Chief Ministers, and in reaching their decisions the Rulers are to act on Cabinet or on Executive Council advice, as the case may be.

IX

The constitution provides that the judicial powers of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law. The provisions for the appointment and removal of Judges depart in some respects from the recommendations of the Reid Commission. The Commission had recommended that the Supreme Head should appoint the Chief Justice of the Supreme Court and that the Puisne Judges should be appointed by him after consultation with the Chief Justice. The constitution requires the Supreme Head to consult with the Conference of Rulers on the appointment of all Supreme Court Justices; that he should consider the advice of the Prime Minister, and in the appointment of Puisne Judges should act on the advice of the Judicial and Legal Service Commission which is established by the constitution. The removal provisions are interesting. The Commission had followed a traditional British pattern in providing for removal by the Supreme Head on an address passed by a two-thirds majority of each House, on proof of misconduct or infirmity of mind or body. Somewhat curiously, it was believed that this threatened judicial independence, and the constitution provides for removal after reference to a tribunal of not less than five persons who are or have been Judges of the Supreme Court or who hold or have held equivalent office elsewhere in the Commonwealth. This tribunal will be appointed at the request of the Prime Minister or

the Chief Justice after consultation with the Prime Minister and its members will be appointed on the recommendation of the Judicial and Legal Service Commission. A Judge may be removed only on the recommendation of the tribunal to the Supreme Head.

The constitution provides for the retirement of Judges of the Supreme Court at the age of 65.

The organisation of jurisdiction is very simple. It is provided that the Supreme Court shall have such original, appellate, and revisional jurisdictions as may be provided by federal law, but that it shall have exclusive jurisdiction in any dispute between states or between the Federation and any state. Where a question involving the interpretation of the constitution arises in another court, the Supreme Court may on the application of a party remove the cause and determine it or remit it to the inferior court to be disposed of in accordance with the determination. It is provided further that the Supreme Head may refer to the Supreme Court "any question as to the effect of any provision of this constitution which has arisen or appears to him likely to arise" for an advisory opinion.

Compared with the intricacies of federal jurisdiction and with the disordered scheme of original jurisdiction in the Australian federal judicial system, the Malayan organisation of jurisdiction appears to be admirably simple and well conceived. There is, however, a somewhat surprising provision governing standing to challenge the constitutional validity of state and federal legislation. Sec. 4 (3) of the constitution provides that the validity of any such law 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 (a) if the law was made by Parliament in proceedings between the Federation and one or more state; (b) if the law was made by the legislature of a state, in proceedings between the Federation and that state." This very severely limits the scope of constitutional review insofar as it denies the right of any person (using that word in a broad legal sense), other than a government, to challenge a state or federal law on the ground that it is *ultra vires*. This limitation on the scope of judicial review does not, apparently, extend to every case. Thus Sec. 5, which provides that a person shall not be deprived of his life or personal liberty, save in accordance with law, specifically authorises suit in the Supreme Court to inquire into the lawfulness of a detention. It seems clear that in a review of the legality of any detention it is competent to the party aggrieved to challenge the constitutional validity of the state or federal law under which he is detained.

The constitution preserves the appeal to the Privy Council, on terms consistent with the new status of Malaya and its relationship to the British Crown. The provisions regulating appeals to the Privy Council have already been discussed.

X

Under the 1957 constitution the Federation is effectively the sole taxing authority. Though the Pakistani member of the Reid Commission argued in favour of state power to levy taxes in respect of all matters on

the state list, the majority view was that in the interests of national unity and the avoidance of waste and overlapping, the Federation should be the sole taxing authority. The financial needs of the states which the Commission characterised as "of vital importance for the future of the country" are recognised by the obligation of the Federation to make annual capitation and road maintenance grants, calculated by reference to a formula set out in the tenth schedule to the constitution. It is also provided that the taxes, fees and other sources of revenue derived from sources enumerated in the schedule shall accrue to the states so far as collected, levied or raised within the state, subject to the right of the Federal Parliament to substitute other sources of revenue of substantially equal amount. The states are also guaranteed a minimum of 10% of the export duty on tin produced in the state.

To this extent the states have a guaranteed revenue. The federal legislature is also authorised to make grants in aid on such terms and conditions as it prescribes; and it may transfer to the states the whole or any portion of the proceeds of any tax or fee raised or levied by the Federation. The states 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 by the Federal Government.

The Reid Commission was required by its terms of reference to propose machinery for consultation on financial matters between federal and state governments. The Commission's recommendation for the establishment of a National Finance Council was adopted in the constitution. This body which is composed of two representatives of the federal government, including the Prime Minister or his deputy, and one representative of each State, is required to meet at least once a year. Its functions are consultative; the federal government must consult it on a variety of matters, including the making of federal grants and loans to the states and the assignment of tax revenues to the states. It is further provided that the federal government may consult the National Finance Council in respect of any other matter whether or not it involves financial questions, and that a state government may consult it in respect of any matter affecting the financial position of the state.

XI

One of the most remarkable aspects of the grant of independence to Malaya was that it was made at a time at which a guerilla war was still being waged in the jungle against Malayan Communist forces. The Malayan Communist Party had become a significant political movement as a result of the disruption caused by the Second World War. During the Japanese occupation the Malayan Communist Party led the most effective Communist-dominated resistance movement in this area of Asia, and it emerged from the war as probably the best organised and most experienced party in South-East Asia. Following the Japanese surrender, the Malayan Communist Party made a concerted attempt to take over

the control of unions and to exploit and create difficulties in an attempt to weaken, discredit and ultimately overthrow the British administration. In Singapore, early in 1948, an attempt was made by strike action to close the port, to paralyse essential services and to create general chaos. This was a prelude to direct acts of violence, when the Communists withdrew to the jungle, following the Calcutta Communist Party conference early in 1948, where the decision was taken to resort to violence in South-East Asia. Of all the Communist parties in the area, it appears that the Malayan party made the fullest commitment to a programme of organised violence, and that it has had the closest associations with the Chinese Communists, mainly because it is composed almost entirely of Chinese.

The original aim of the Communists was to produce a revolutionary situation in which economic and social chaos would result, and would lead to the defeat and withdrawal of the British administration. The effects on the economy of the free world of the denial of the rubber and tin resources of Malaya would have been very serious. That the Communists failed to attain their objectives is now clear. In the early days of the emergency the situation was difficult and serious, but the tide of the war, waged in extremely difficult conditions, moved progressively against the Communists. The number of terrorist incidents, which rose to 509 in May 1950, dropped to one a week by the end of 1954. The cost in terms of human life and resources was high; by the end of 1956 the numbers of local civilians killed by the terrorists were 1,691 Chinese, 318 Malays, 224 Indian, 106 European and others. In the same period it was calculated that 5,778 Chinese and 437 other terrorists had been killed. The financial burdens which the prosecution of the war imposed on the Federation and United Kingdom Governments were heavy, and the plan of campaign involved the tremendous task of moving more than half a million squatters, principally Chinese, from isolated and scattered sites on the edges of the jungle where they were a source of supply, willing and unwilling, for the Communist guerillas, and of resettling them in 500 new villages.

Even though a hard core of a few thousand Communist guerillas remains in the jungle as a fighting force, the judgment of the British Government was that an independent Malayan Government, assisted by British and Commonwealth troops, whose presence in Malaya rests on treaty, could cope adequately with the situation. This judgment is in part an appraisal of the military situation, in part an estimate of the capacity and willingness of the Malayan Government to deal with the situation. During 1955 the Malayan Communist Party offered to end hostilities on terms which would have legalised the party and would have allowed it to carry on its activities in the open political arena. In September, 1955, Tunku Abdul Rahman offered an amnesty in pursuance of the Alliance election platform on condition that the Communists laid down their arms. Chin Peng, the Communist leader, asked for a meeting with the Chief Minister, which took place during the last days of 1955 in northern Malaya. At this meeting Tunku Abdul Rahman rejected the Communist

terms of an unconditional amnesty and legal recognition of the Communist Party. The breakdown of the talks was followed by a withdrawal of the government amnesty and by a firm declaration of government policy to extirpate the Communist forces by vigorous prosecution of the war. At the time of this meeting it was the judgment of the United Kingdom, evidence by a statement by the High Commissioner for the Federation, Sir Donald MacGillivray, that "it does not lie within the power of the Communists as a beaten enemy to impede the Federation's political progress."

In view of the fact that the emergency, though greatly attenuated, continues to exist, it was deemed necessary to make provision in the constitution for dealing with the existing situation, and to provide safeguards against further threats and dangers. The matter was complicated by the fact that Part II of the constitution contains a number of "bill of rights" provisions under the general rubric of fundamental liberties. The Reid Commission was of opinion that it was "usual and in our opinion right that (the constitution) should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life."⁵ It noted that there were "in certain quarters vague apprehensions about the future,"⁶ which, though in the view of the Commission unfounded, called for a guarantee of these rights, subject to limited exceptions in conditions of emergency, and subject also to provisions safeguarding the special position of the Malays. The apprehensions to which the Commission referred were, no doubt, those which arose from inter-racial fears and suspicions in the Malayan community.

The constitution, therefore, provides redress against unlawful infringements of personal liberty. There are provisions forbidding detention without the legal authority of a magistrate, forbidding slavery or forced labour (but not forbidding compulsory service) which apply to all, and provisions against banishment, exclusion from the Federation and restriction on freedom of movement which apply only to citizens of the Federation. There are prohibitions against retrospective criminal laws and double jeopardy, while freedom of speech and expression is guaranteed to all citizens subject to restrictions in the interests of security, public order, morality, or in relation to incitement, defamation or contempt of court. There is a guarantee of freedom of religion, subject also to requirements of public order, health and morality. Subject to the provisions touching the special position of the Malays, discrimination by government or public authority on grounds of religion, race, descent or place of birth is forbidden, and it is provided that there shall be no discrimination with regard to the right to carry on any occupation, that no person shall be deprived of property save in accordance with law, and that any law for the compulsory acquisition or requisition of property must provide for adequate compensation.

⁵ *Ibid.* 69.

⁶ *Ibid.* 70.

These fundamental liberties are subject to the exercise of the emergency powers. It is expressly provided that the existing Emergency Regulations Ordinance 1948, and all subsidiary legislation made thereunder, may be continued from time to time by resolution of each House of Parliament, that, unless so continued, it will expire within a year, and may at any time be repealed by the Supreme Head of the Federation. There are also more general provisions in Part XI, entitled special powers against subversion and emergency powers. Parliament is expressly authorised to enact legislation inconsistent with the fundamental liberties provision in Part II, on a recital in the Act that "action has been taken or threatened by any substantial body of persons whether inside or outside the Federation to cause a substantial number of citizens to fear organised violence against persons or property." This power to enact emergency legislation against subversion is subject to time-limit control. On the face of the section, it would seem that the courts cannot go behind the legislative recital which supports the exercise of the power. The Supreme Head, if satisfied that a grave emergency exists whereby the security or economic life of the Federation is threatened, is authorised to make a proclamation of emergency. The proclamation must be laid before Parliament in such a case, and it will cease to be operative within a limited time unless affirmed by a resolution of each House of Parliament. While a proclamation of emergency is in force the executive authority of the Federation, notwithstanding anything in the constitution, extends to any matter within the legislative authority of a state, and to the giving of directions to the government or any officer or authority of a state, and Parliament, during the currency of the proclamation, may with unimportant limitations, legislate on matters on the state list, extend its own duration, and suspend any election. Where, however, a person is detained under any emergency provision, he must, subject to the national interest, be informed of the grounds on which he is detained, and may not be detained for more than three months unless an advisory board of persons with high judicial qualifications shall have considered any representations made by him and shall have reported that there is in its opinion sufficient cause for the detention.

XII

The procedure devised for the amendment of the Malayan constitution is less difficult and complex than that prescribed in the United States or Australian constitutions. It was the view of the Reid Commission that the Australian referendum procedure was unsuited to Malaya, and they recommended an amendment procedure which "should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the constitution provides."⁷ The Commission proposed that a constitutional amendment might be carried by Act of Parliament by vote of two-thirds of the members of either House voting. It was considered that this was too lax, and the constitution provides that an amend-

⁷ *Ibid.* 33.

ment shall only be carried by an affirmative vote of two-thirds of the total membership of each House.

The form of the Malayan amendment process shows clearly enough that it is not primarily designed to cope with amendments which disturb the federal balance, for in terms of power distribution the central authority has an overwhelming preponderance.

The interests most likely to be threatened by future amendment of the constitution are those of the various communities—the provisions with respect to citizenship, the special position of particular communities, and fundamental liberties. So far as a constitution may safeguard these, the amendment process seems to be well designed.