

PREFACE

In an age when far too much is written, a book of any kind requires justification. A book about the Malaysian Constitution requires even further justification, since it can hardly be said that the subject has been neglected in print; in fact few Commonwealth constitutions have been served as well as has the Malaysian Constitution by several learned and perspicacious writers. However, most of what has been published is now somewhat out of date, so much of constitutional importance having occurred over the last few years. And on the whole these publications are intended for lawyers, and are opaque to the lay reader; or else concentrate on illuminating only some aspects of the subject. I have aimed in this book to give a comprehensive picture of law, government and the constitution in Malaysia, and to set constitutional developments in their proper political and social context. I have also tried to perform this task in such a way that lawyers will see how perspectives other than the purely legal can enrich our understanding of constitutional issues in Malaysia, and that others for their part will comprehend the lawyer's perspective on these issues. Although much of the book is, of necessity, a statement of legal rules and principles, I have attempted neither to presume on the patience of the lay reader nor to underestimate her capacity to grasp the significance of legal technicalities.

The engagement with constitutional issues in Malaysia has burgeoned following a number of events occurring since the mid-1980s, by which time most of the current literature on the subject had been published. I refer to the advent of judicial activism from 1985; the controversial dismissal of the Lord President of the Supreme Court and two other Supreme Court Judges in 1988 and the simultaneous crisis over the illegality of UMNO, Malaysia's leading political party; the transition of power in the States of Sabah in 1985 and 1994 and Kelantan in 1990, and the curtailment of royal powers in 1983 and 1993. During my own visits to the Malaysia I have found an amazing increase in interest in constitutional issues, in some quarters almost amounting to obsession. The vocabulary has changed too, subtly: references to the British constitutional inheritance have been replaced with references to 'our constitution'; and references to the special nature of Malaysian society have been replaced with references to those things societies hold in common. Malaysia has become a more self-conscious as well as more confident nation, and an increasingly important voice in international deliberations.

For these reasons there is a pressing need for a reappraisal of the Malaysian Constitution in terms of its political and social dimensions and dynamics, and the extent of its adherence to, or its interpretation of, those principles which are collectively

known as 'constitutionalism' – democratic government, the rule of law, the separation of powers, and the observance of fundamental human rights and liberties. These concepts were enshrined in the Constitution of the Federation of Malaya in 1957, and can still be seen in the present Federal Constitution of Malaysia which has evolved over 39 years from that important document. This book attempts to discover how the Constitution has adjusted to its environment; how it is actually put into operation, as well as how its abstractions differ from 'reality'.

These considerations alone seem to me to justify a book of the kind I have tried to write, but there are others. Since independence Malaysia has enjoyed 33 years (39 if one considers Peninsular Malaysia alone) of continuous constitutional and democratic government. Although many people both inside and outside Malaysia will disagree with the use of these adjectives, citing frequent examples of 'unconstitutional' or 'undemocratic' actions, a comparison with the surrounding countries will reveal that only Singapore, itself constitutionally an offshoot of Malaysia, can rival this record; and even if one takes for comparison the entire Commonwealth, or the entire region of Pacific Asia, Malaysia stands out as a nation which, in spite of three turbulent decades of history, has not had its constitution consigned to oblivion at the whim of colonels or dictators as soon as the dust of independence settled. This record requires explanation and evaluation. There must be something which can be learned from the Malaysian experience.

I have therefore tried in this book to convey some idea of the uniqueness of this experience, in its failures and its achievements. I have also tried to do justice to the different points of view about the Malaysian Constitution which are held by various groups in Malaysia, rather than simply imposing my own view on the material. This does not mean, however, that I have tried to efface myself from the text, an impossible task even before the advent of structuralism! Indeed the book is also in many ways a personal interpretation of facts and events, legal and otherwise. It is therefore, I think, incumbent on me to state my premises.

Constitutionalism seems to me one of the great creations of human society. Undefined in theory and undeveloped in practice as it has sometimes been, and much as I feel that lawyers in particular are to blame for not giving more force and more sophistication to the development of constitutional doctrine, constitutionalism has nonetheless been a progressive and civilizing force. Nothing is likely to convince me that authoritarian or totalitarian government is generally superior, and the events of the post-war period, especially those all over the world since 1989, seem to me ample justification for this point of view: it is no accident that democracy and constitutional government tend to survive against unlikely odds, and to reemerge after apparently being obliterated.

Nonetheless, I feel with equal force that the attainment of constitutional government is not the only legitimate objective of government, and different political societies are entitled to take their own view as to how and when and in what degree or proportion they will pursue particular political, legal, economic, cultural, technological, and social objectives. Constitutionalism in its modern sense is principally and historically a concept of European origin; but Europeans are apt to overlook the significance of other constitutional traditions, and to seek to impose European concepts on the so-called 'developing societies' as if those concepts were innate and natural. In doing so they ignore the tremendous struggle Europe itself underwent

from the Middle Ages onwards to establish even the basic conditions for the survival of constitutionalism, a struggle which, far from being over, continues to this day.

I therefore take the view that a constitutional system of government must evolve out of the political genius of a particular society, and must be regarded in that light. At the same time one is not obliged to accept the official views of political leaders of the day with regard to the efficacy of constitutional government as a means of developing political institutions, but should rather, in my view, ponder the variety of opinion on this question which may exist in the society itself and within the international community. Executive heads tend to take a constitutional view prompted by short-term objectives; one must allow for this in assessing their pronouncements, and note that statesmen often express quite different views when they are no longer in office. Even so, the views of political leaders have naturally been extremely influential in the development of constitutional policy, and in this Malaysia has been no exception.

Much nonsense in my view is talked about the irrelevance of 'European' or 'Western' constitutional doctrines in the Asia-Pacific region. To imagine that scholars from one tradition cannot address or examine other traditions, that each tradition is confined by the parameters of its own history and conceptual framework, is a view which is both retrogressive and myopic, and perhaps flawed by racism. It also ignores the great advances made in recent years towards constitutional government all over the Asia-Pacific region. In the context of law, this view does not even make any practical sense, as law has always been a phenomenon which, although growing out of culture, has transcended culture, and proved remarkably durable and effective when transferred into very different cultural environments: the reception of law, in other words, rather than its spontaneous growth, is the rule rather than the exception.

Malaysia is one of the best living examples of legal reception, and not only in the field of constitutional law. In Malaysia one finds a meeting of several different legal cultures under the broad aegis of the common law, in a legal system which successfully contains its pluralism, and may well become an instrument capable of responding to the sophisticated social and economic needs of the 'Pacific Century', not just a feature of the South East Asian and late 20th century political landscape. Thus to argue that Malaysian legal culture as manifest in its constitution is in some way *sui generis* makes no sense at all, considering how much it has drawn on the British and Indian experience, how heavily influenced it has been by the multi-racial and multi-religious nature of Malaysian society, that it has not yet reached maturity, and that it has barely even been properly described.

Working from these premises I have tried to analyze constitutional developments in Malaysia in terms of Malaysian society itself, in all its multi-layered complexity. I have tried also to draw comparisons where necessary to illustrate particular points, but comparison *per se* is not a purpose of the book, and would in fact require a different kind of book altogether.

I have a large number of people to thank. A generous grant from the British Academy gave me a unique opportunity to travel around Malaysia, consult Malaysians of all shades of opinion, and assess the constitution also from the viewpoint of different geographical locations. A grant from the School of Oriental and African Studies, University of London, also helped enormously. I must also thank all those Malaysians who willingly gave me their time to discuss the constitution and legal, political or other developments in the country. These are far too numerous to list.

They include lawyers, judges, academics of several disciplines, politicians of all parties, civil servants, commentators, and ordinary people of all classes, races and persuasions, whose colourful observations at food stalls or in taxis provide the undefinable fourth dimension which is so necessary to the work of a scholar, either affording relief by confirming his expectations or else giving his abstract ruminations an unceremonious jolt. In Malaysia I was treated with disarming friendliness, great hospitality, much food and drink, and copious xeroxes everywhere I went. I must also thank my wife Kun Bek and my daughter Miranda for their eagle-eyed corrections to the manuscript, and Zainal Azlan Abdul Kadir, Roshan de Silva and Connie Carter for their help with much of the more tedious library work.

One overall impression of my travels stands out in my mind above all the others. I was able to talk to a wider variety of Malaysians than most Malaysians themselves are able to, and often found myself in the privileged position accorded to a foreigner of being able to talk to people who would not dare or desire to talk to each other. It dawned on me towards the end of my travels that I had not met a single person who could be described as an extremist or a bigot in the racial or religious sense, even though some seemed to think of each other in such ways. The more I listened to them passionately expressing their views about the injustice to Tun Salleh or Sabah's Twenty Points or the greatness of Islam or the economic achievements of Mahathir or the iniquity of the latest legislative amendment, the more they seemed to me to have something important in common with each other – a certain gentleness, an abhorrence of extremity and violence, a tolerance of difference, and a genuine love of country and of humanity. I began to wonder where all the bigots and racists and extremists were, and whether they existed only in the imagination. There was passion and determination, even great anger, but no viciousness or extremism. Everywhere I found a capacity to laugh at the world with all its absurdities, and simply enjoy being part of something important.

Now of course in one sense this is naive, and the ugly head of social discord occasionally does appear above the comparative calm of daily discourse and the general pursuit of happiness, as I have attempted to explain in this book. But it is all a matter of degree, and I believe Malaysians do have an instinctive genius for accommodation and understanding which is not given to every human society.

Malaysians sometimes do not realize how much they have in common, and how much they are deluded by their own superficial differences, to which, it seems to me, they are asked to attach unnaturally large significance. I cannot escape the conclusion that this cultural affinity lies in some way at the root of the comparative success of Malaysia in terms of its constitutional stability, which has formed the basis of its present and growing economic prosperity. It is an asset which Malaysians are nonetheless in danger of diminishing before they properly realize they have it.

However, I begin to anticipate my conclusions, and I have probably taken the liberty in this Preface of going beyond my brief.

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February 1996