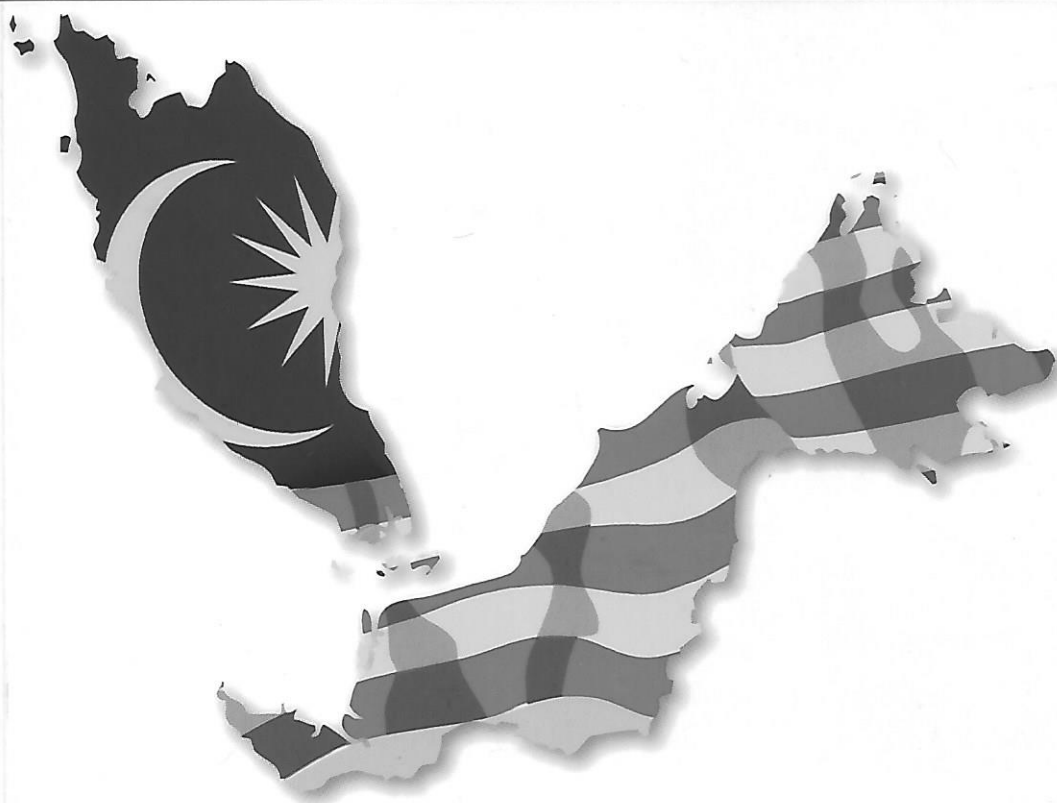


50 YEARS OF MALAYSIA

FEDERALISM REVISITED



Edited by Andrew J. Harding & James Chin

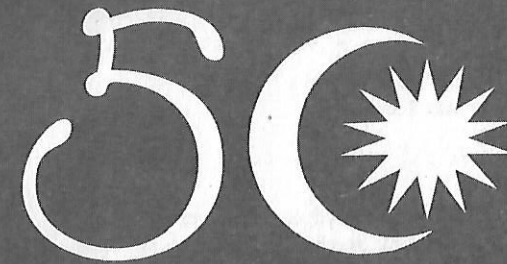
"Let me paraphrase the feeling of a particular Sabah academic. He pointed out that Sabahans and Sarawakians agreed to be part of Malaysia on the understanding that the interests of the states were safeguarded. These interests were enshrined in the 20/18-point Agreements, the London Agreements and the Inter-Governmental Reports. He further pointed out that the safeguards were not honoured and were taken away at the whim and fancy of the Federal Government, and added in no uncertain terms that Sabah and Sarawak are equal partners to the Federation of Malaya in Malaysia and not two of her thirteen states..."

A complaint from Sarawak took on a more symbolic strain. The formation of Malaysia was compared to a marriage with a prenuptial agreement, that is, the 18-point Agreement. The complainant described how the wife, Sarawak, was hurt by the lack of attention from the husband, Kuala Lumpur, but continued to be the dutiful and responsible wife.

In the recent past, a Sabah politician bluntly remarked that Sabah belongs to Sabahans and not to Malaysia as the Malaysia Agreement has yet to be implemented... He argued that Sabah has lost most of the 20 points after decisions affecting the state were made by Kuala Lumpur [and]... that Sabah was treated like a colony instead of an equal partner in Malaysia."

—Y.B.M. TENGKU RAZALEIGH HAMZAH


*Excerpt from The Malaysian Branch of
The Royal Asiatic Society Lecture,
in conjunction with the fiftieth Anniversary
of the Formation of Malaysia, 25 Sep 2013*



YEARS OF MALAYSIA

FEDERALISM REVISITED

Edited by
ANDREW J. HARDING & JAMES CHIN

 Marshall Cavendish
Editions

© 2014 Marshall Cavendish International (Asia) Private Limited

Cover Design by Bernard Go Kwang Meng

Published by
Marshall Cavendish Editions
An imprint of Marshall Cavendish International
1 New Industrial Road, Singapore 536196

All rights reserved

No part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the copyright owner. Request for permission should be addressed to the Publisher, Marshall Cavendish International (Asia) Private Limited, 1 New Industrial Road, Singapore 536196. Tel: (65) 6213 9300, Fax: (65) 6285 4871. E-mail: genref@sg.marshallcavendish.com. Website: www.marshallcavendish.com/genref

The publisher makes no representation or warranties with respect to the contents of this book, and specifically disclaims any implied warranties or merchantability or fitness for any particular purpose, and shall in no events be liable for any loss of profit or any other commercial damage, including but not limited to special, incidental, consequential, or other damages.

Other Marshall Cavendish Offices:

Marshall Cavendish International. PO Box 65829 London EC1P 1NY, UK • Marshall Cavendish Corporation. 99 White Plains Road, Tarrytown NY 10591-9001, USA • Marshall Cavendish International (Thailand) Co Ltd. 253 Asoke, 12th Flr, Sukhumvit 21 Road, Klongtoey Nua, Wattana, Bangkok 10110, Thailand • Marshall Cavendish (Malaysia) Sdn Bhd, Times Subang, Lot 46, Subang Hi-Tech Industrial Park, Batu Tiga, 40000 Shah Alam, Selangor Darul Ehsan, Malaysia.

Marshall Cavendish is a trademark of Times Publishing Limited

National Library Board, Singapore Cataloguing-in-Publication Data

50 years of Malaysia : federalism revisited / edited by Andrew J. Harding & James Chin. –

Singapore : Marshall Cavendish Editions, 2014

pages cm

ISBN : 978-981-4561-24-2 (paperback)

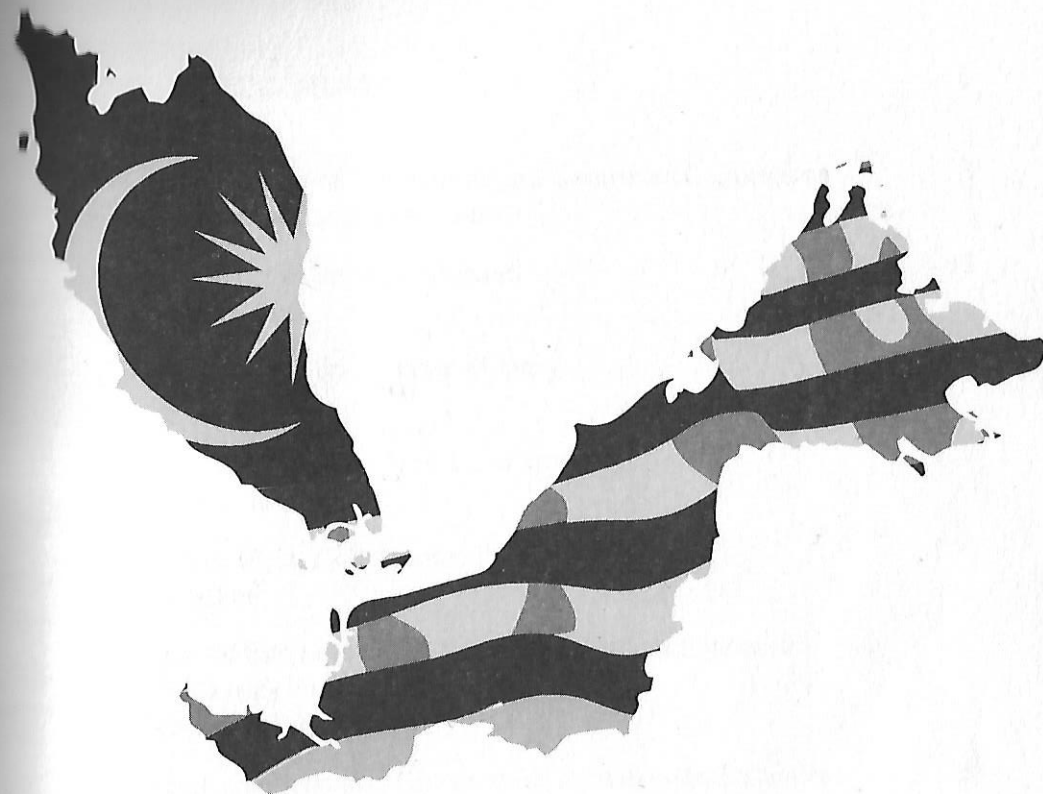
1. Federal government – Malaysia. 2. Central-local government relations – Malaysia. 3. Malaysia – Politics and government – History. I. Harding, Andrew, 1950-, editor. II. Chin, Ung-Ho, 1967-, editor.

JQ1062

320.4595 — dc23

OCN883822061

Printed in Malaysia by Vivar Printing Sdn. Bhd.



CONTENTS

ACKNOWLEDGEMENTS	6
Fifty Years of Malaysia: Reflections and Unanswered Questions <i>(by Andrew Harding and James Chin)</i>	8
Interview with Tan Sri Simon Sipaun <i>(by Bridget Welsh)</i>	50
Interview with Tan Sri Sir Peter Mooney <i>(by Bridget Welsh)</i>	88
Federating for Survival: The Case of Singapore <i>(by Kevin Y.L. Tan)</i>	112
Federal-East Malaysia Relations: Primus-Inter-Pares? <i>(by James Chin)</i>	152
Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System <i>(by Andrew Harding)</i>	186
Confusion, Coercion and Compromise in Malaysian Federalism <i>(by Khairil Azmin Mokhtar)</i>	220
Fifty Years of Water Resources Management in Malaysian Federalism: A Way Forward <i>(by Rasyidah Md Khalid, Faridah Jalil and Mazlin Bin Mokhtar)</i>	266
INDEX	296
CONTRIBUTORS	298

CONFUSION, COERCION AND COMPROMISE IN MALAYSIAN FEDERALISM

by Khairil Azmin Mokhtar

The Malaya Constitutional Commission 1957 was tasked to draft the constitution for an independent Malaya and one of the terms of reference stated:

To make recommendations for a federal form of constitution for the whole country as a single, 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 the residual legislative power to be examined by, and to the subject of recommendations 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;...¹

Federalism is a basic concept of the Constitution of Malaysia. The terms of reference sought to confer the federal government with significant centralised powers and to ensure the union of the states in the new Federation of Malaya (Persekutuan Tanah Melayu) in 1957, which six years later was renamed Malaysia. Federalism is 'the method of dividing

¹ *Report of the Federation of Malaya Constitutional Commission 1957*, Colonial No. 330, London: Her Majesty's Stationary Office, 1957.

powers so that the general and regional governments are each within a sphere, co-ordinate and independent.² Although the federal and state governments have some autonomy, their activities, administrations and policies are coordinated. They are equal within a federal system and adhere to the division of powers in the supreme written federal constitution and the states cannot be coerced or forced by the federal authorities. However, in practising federalism, Malaysia has experienced varying degrees of uncertainty and confusion, and at times conflicts, coercion and compromise. The chapter in the beginning touches on the confusion over the method of admission of new member states into Malaysia. It will be shown that coercive means are available to the federal government in dealing with 'unfriendly' states by virtue of the overwhelming control of the ruling coalition since independence with the support of the former colonial power and the traditional ruling elite. Even so, the ruling coalition has been weakened with the recent political setbacks. The continuance of a strong-arm attitude by the federal ruling coalition may cause more conflicts with the states and further erode whatever dwindling support that it has. It is believed that the ruling federal authority may adopt a more diplomatic stance towards the states to reach an amicable compromise.

A FEW IDEAS ON FEDERALISMS AND FEDERATIONS

A federation is formed when several independent states are federally united because they are not fit or disposed to line under one unified government.³

2 K. C. Wheare, *Federal Government* (4th edn), London, Oxford University Press, 1953, p.10.

3 John Stuart Mill, *Considerations on Representative Government*, London, Longman, Greene & Co. Ltd., 1926, p.124.

In this sense, federalism can be perceived as an intermediate between two extremes, balkanisation breaking up into smaller independent states and forming a large single state,⁴ or in the words of William P. Maddox, a perfect balance or compromise between the extremes.⁵

The relationship between federal and state governments in a federal system is different compared to the relationship established in a unitary system and confederal system of government. A confederal system is a 'union of states whose members have not decided to create a new federal nation-state; the component units have retained a greater or lesser portion of their freedom of action while voluntarily joining the association on some common goals and some delegation of authority to a common machinery'.⁶ A federation stands between a unitary form of government, whereby the central authority is so powerful that regional authorities become subordinate, and confederation, in which the central power ceases to exercise independent will and thus becomes the servant of the local governments.

Wheare states that the principle of organisation in a federal system is that the federal and the state governments are 'co-ordinate and independent within their respective spheres'.⁷ The principle of organisation in a confederation is the principle of subordination of common authority or

4 E. A. Freeman, *History of Federal Government in Greece and Italy* (2nd edn), London, Macmillan and Co., 1893, pp.84–5.

5 William P. Maddox, 'The Political Basis of Federation', *American Political Science Review*, 1941, p.1121.

6 Ivo D. Duchacek, *Comparative Federalism*, pp.160–1.

7 K. C. Wheare, *op.cit.*, pp.4–5.

general government to member states.⁸ In a confederation the machinery of the common authority, in principle, is only authorised to operate upon the state governments and not directly upon the population.⁹ Even in situations where the common authority is authorised to use its machinery to act directly upon the citizens of the member states, the authority extends only to minor areas and unimportant matters. Furthermore, the common authority does not have significant central coercive and tax-collecting powers.¹⁰ On the contrary, all governments within a federal system are equal. They are not subordinate to each other, but co-ordinate among themselves.

HISTORICAL GLIMPSE OF FEDERALISM IN MALAYSIA

Before independence British indirect rule in the Malay States was exercised in two forms, federal and state administrations. The Federation of Protected Malay States, also known as the Federated Malay States (FMS),¹¹ practised federal administration.¹² In other Malay States, referred to as the Unfederated Malay States (UFMS),¹³ the existing state administration was preserved. The formation of the FMS was due to financial reasons,¹⁴ administrative simplicity,¹⁵ uniformity of policy, and enhancement of co-ordination and

8 K. C. Wheare, *op.cit.*, p.4.

9 K. C. Wheare, *op.cit.*, pp.11–4.

10 I. D. Duchacek, *op.cit.*, p.160.

11 Hereinafter the Federated Malay States shall be referred to as the FMS. It comprised Perak, Selangor, Pahang, and Negeri Sembilan.

12 The FMS was established by the Treaty of Federation 1895.

13 Hereinafter the Unfederated Malay States shall be referred to as the UFMS. It comprised Kedah, Kelantan, Terengganu, Perlis and Johor.

14 Emily Sadka, *The Protected Malay States*, pp.364–6.

15 B. Simandjuntak, *Malayan Federalism 1945–1963: A Study of Federal Problems in a Plural Society*, Kuala Lumpur, Oxford University Press, 1969, pp.17–8.

co-operation.¹⁶ Power was concentrated in the Resident-General, who stood at the apex of the federal hierarchy,¹⁷ and federal secretariats,¹⁸ at the expense of State Governments.¹⁹ Measures later had been introduced to decentralise the administration of the FMS but failed. The establishment of the Rulers' Conference or *Durbar* did not increase the power and influence of the Sultans because it was a purely advisory institution with no legislative or financial power.²⁰ Instead it became an instrument that took away a degree of legislative independence from the State Councils.²¹ The 'Agreement for the Constitution of a Federal Council, 1909' meanwhile, only shifted the centralised authority from the Resident-General to the High Commissioner.²² Furthermore the Federal Council had deprived the legislative power of State Council and ended the financial prerogatives of the States.²³ Amidst the centralisation, the absence of a federal executive body caused an anomaly, because although in theory the executive power of the states was in the hands of the Ruler in Council, in practice it was exercised by the High Commissioner and the Resident-General.²⁴

16 Jagjit Singh Sidhu, *Administration In The Federated Malay States 1896-1920*, Kuala Lumpur, Oxford University Press, 1980, pp.24–6.

17 Eunice Thio, *British Policy In The Malay Peninsula 1880-1910*, Kuala Lumpur, University of Malaya Press, 1969, pp.167–71.

18 David McIntyre, 'Political History 1896–1946', in Wang Gungwu ed., *Malaysia: A Survey*, London and Dunmow, Pall Mall Press, 1964, pp.138–9.

19 R. Braddell, *The Legal Status*, p.14.

20 R. Winstedt, *Britain and Malaya*, pp.39–41.

21 Laws, which were drafted by a Federal Officer and the Legal Adviser in Kuala Lumpur, were passed on to the Conference. The Rulers then would submit it to their State Councils so that the laws would be approved in identical form. S. W. Jones, *Public Administration in Malaya*, pp. 32–4.

22 Chai Hon Chan, *The Development of British Malaya* (2nd edn), Kuala Lumpur, Oxford University Press, 1967, pp.72–5.

23 *Administration In The Federated Malay States*, pp.78–81 and pp.101–2.

24 Chai Hon Chan, *ibid*, pp.72–7.

After World War II, the unitary Malayan Union was abandoned due to claims for more rights for the Malays as the indigenous inhabitants of the country, and also due to the desire to maintain the sovereignty of the Rulers. The Federation of Malaya Treaty 1948 established the Federation of Malaya 1948. The 1948 Federation established autocratic colonial rule at federal level and autocratic local feudal rule at state level. At the federal level the British High Commissioner, who exercised his executive power with the assistance of a Federal Executive Council, headed the government. Legislative power was exercised by the Federal Legislative Council, which was dominated by unofficial members nominated by the High Commissioner. The Rulers at this level acted through a body called 'the Conference of Rulers', which had the power to decide some important matters affecting the Federation as a whole. A Supreme Court, which consisted of a High Court and a Court of Appeal, had been constituted for the whole Federation. One of the notable features of the 1948 Federation is the restoration of the feudal structure at State level. The federal system is more closely associated with the rights and privileges of the Malays and the Rulers. The federal system during this period thus has been used to re-establish the feudal system, and accords privileges to the indigenous population. Federalism thus seems unattractive to supporters of equality and liberal democracy because it has been used as a method for the preferential treatment of the indigenous ethnic community.

The federal system that had been practised in Malaya before independence did not provide a good experience for the states. The Federated Malay States (FMS), which marked the beginning of a modern centralised administrative organisation in the Peninsula, turned out to be a device for British colonial rule to consolidate power. It also reduced the autonomy of the member states and made state bureaucracy subordinate to federal authority. The effects blurred the distinction between direct and indirect rule. Instead of preserving local or state independence and encouraging diversity at a regional level, federalism before World War II served only as a colonial tool for centralisation and greater intervention.

The primary force behind the adoption of the federal system in 1957 lies with the role and power of the Rulers. Federalism, which underpins unity in diversity, appears to have provided the most appropriate system to accommodate the retention of the special position of the Malays and the sovereignty of the Rulers while geographical factors and demography only played subsidiary roles. The main causes of the adoption of the system in 1957 thus are quite different from those of any other federation, while the reasons for the enlargement of the Federation in 1963 are quite similar to those of other federations. The most important reasons in 1963 were those of security, military and defence. Economic and administrative factors also became the contributing factors for the decision of new member states to federate. Behind the successful establishment of Malaysia in 1963 were the political will and power of the British and Malayan governments.

SOME CONFUSIONS AT THE EARLY STAGE OF MALAYSIAN FEDERALISM

It is pertinent at this stage to understand the basic principles underlying the powers in the Malaysian constitutional framework. The recognition of the individuality, identity and power of its thirteen member states, as manifested by Article 1,²⁵ Part V,²⁶ and Part VI²⁷ of the Constitution, does not mean that they have complete sovereignty. Sovereignty in the Federation, from the international perspective, lies not with the states but with the Federation. Consequential to the formation of the Federation, the associating states transferred their sovereignty to the new nation, which was the Federation of Malaysia; a view that has been accepted by the component members as can be observed in the memorandum submitted by the Malaysia Solidarity Consultative Committee.²⁸ The power to conduct external relations and to represent the federation as sovereign state, are exclusive to the federal government. More importantly the legal status of the state denies the application of a principal of unanimity, which is a principle in a confederation. The states of a federation do not have the right of unilateral

25 The article relates to the name and territories of the components of the Federation.

26 Part V of the Federal Constitution enumerates provisions relating to the Heads of States of the member states, the guarantee of the State Constitution and the privileges of the State legislative assembly.

27 Part VI of the Federal Constitution relates to the distribution of power between federal and state governments.

28 In the memorandum it is stated that the Federation of Malaysia is envisaged as 'an association of several sovereign States with a central organ invested with powers directly over the citizens of the member State and in certain defined circumstances over the member States themselves. There would be a central government and also State Governments, but from the view-point of international law, the collection of States forming the Federation would be recognised as one Sovereign State within the family of nations.' It is also mentioned that 'there is no doubt in the mind of the Committee that, from the international point of view, sovereignty rests with the Federation of Malaysia.' 'Malaysia Solidarity Consultative Committee Memorandum On Malaysia', in James Wong Kim Min, *The Birth of Malaysia*, p.113.

secession, and admission and expulsion of a member state does not require the unanimous approval of all member states. These federal principles can be observed in the relevant constitutional provisions as shall be discussed later and as expounded by the court in the case below.

IS THE FEDERATION OF MALAYA 1957 A FEDERATION OR A CONFEDERATION? IS MALAYSIA A NEW FEDERATION OR AN ENLARGED EXISTING FEDERATION?

The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj

Before Malaysia was proclaimed, a legal action was initiated to stop the federation from being established. The case manifested the confusion or uncertainty over the actual relationship between the states and the federal government, and the position and role of the Malay Rulers within the federation.

*The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*²⁹ deals with the power of admission of new member states into the Federation. In this case, the Government of the State of Kelantan attempted to prevent the formation of Malaysia and had sought for a declaration that the Malaysia Agreement and

29 [1963] 1 MLJ 355.

the Malaysia Act to establish the Federation of Malaysia, 'were null and void or alternatively were not binding on the State'. It was argued, among others, that the proposed changes caused by the Agreement and the Act

needed the consent of each of the constituent States, including Kelantan, and this had not been obtained; that the Ruler of Kelantan should have been a party to the Malaysia Agreement; that constitutional convention called for consultation with Rulers of individual States as to substantial changes to be made to the Constitution.³⁰

The judge however was satisfied that Article 2 of the Constitution permits Parliament to admit other states into the Federation. The Malaysia Act had been passed in accordance with Article 159 which requires any amendment of the Constitution made in connection with the admission of any state to have only the support of a simple majority in both Houses of Parliament. The judge further held that Parliament had not acted beyond its power in passing the Act.

It may be said that the view of the judge stated above is consonant with the general power of admission in a federal system where majoritarian rule applies and since Parliament is comprised of representatives of the whole population in the House of Representatives and Senate, the passing

30 [1963] 1 MLJ 355, p. 357.

of the Malaysia Act, not only with simple majority but also by a two-thirds majority in both houses, fulfilled such a requirement. Moreover, in the Reid Commission Report there is no mention of admission of new members to the Federation, or the requirement of consent or consultation with the state government or the Malay Rulers regarding the matter.

The validity of the Malaysia Agreement entered into by the Prime Minister and five other federal ministers on behalf of the Federation was also upheld in the case as being an exercise of the executive power of the federation under Article 39. Such power, by virtue of Article 80 (1), extends to all matters which the Parliament may make laws as provided under Article 74 read together with the Ninth Schedule i.e. external affairs.³¹

Nevertheless it is interesting to note that the judge in *The Government of the State of Kelantan*³² alluded to the need for states to be consulted before certain changes could be made to the Constitution when such is 'so fundamentally revolutionary'.

In doing these things I cannot see that Parliament went in any way beyond its powers or that it did anything *so fundamentally revolutionary as to require fulfilment of a condition which the*

31 Item 1 of the Federal List of 9th Schedule of the Federal Constitution states the power over external affairs, includes:

- (a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country;
- (b) Implementation of treaties, agreements and conventions with other countries.

32 [1963] 1 MLJ 355.

*Constitution itself does not prescribe, that is to say a condition to the effect that the State of Kelantan or any other State should be consulted.*³³

Albeit, when an amendment is ‘so fundamentally revolutionary’ is not further explained in the case and is also not prescribed in the Constitution.

The unilateral power of admission of a new member by the federal legislature and executive in Malaysia may not necessarily jeopardise the rights of the existing states. In 1963 the admission of the new states did not jeopardise the rights and position of the existing members and the relationship between the existing or original states and the federal government remained unimpaired although the new members were accorded more rights and privileges.

Although it has been stated above that the process of determining is democratic after being approved by Parliament and after local populations were consulted by the Commissions, the issue of fairness may still be argued. The local populations of North Borneo and Sarawak were consulted by the Commissions and there was a referendum in Singapore. However, the population of Malaya was neither consulted nor given the opportunity to vote in a referendum. It was not discussed as an issue in the previous general election held in 1959, as the idea was mooted in 1961 and materialised two years later. We can never know whether the population of the Federation of Malaya in 1963 would have agreed to the larger federation or not.

We also do not know exactly why Kelantan opposed the admission of the new member States as no official statement or record was issued. However based on the argument made by Kelantan it appears that it was not acting alone but perhaps with the support of the Malay Rulers. When the Federation of Malaya was born on 31st August 1957, many checks had been made with relevant authorities, such as the traditional rulers, local politicians, and the local population. Unfortunately the Malay Rulers and the states were marginalised in the process of establishing Malaysia. Tradition requires that elders and leaders must be consulted and at least informed whenever important decisions are made and significant events are done. Unfortunately the Malay Rulers and the states were marginalised in the process of establishing Malaysia. There is no record found so far that the Conference of Rulers gave its consent on the matter. Individual rulers were also not met and consulted by the federal authorities. Perhaps this is the main reason why Kelantan initiated the legal action, so that all states should be treated as equal partners as required by ideals of federalism.

UNITARY COUNTRY OR FEDERAL COUNTRY?

Perhaps for most Malaysian citizens, especially from Peninsular Malaysia, the issue whether they are living in a unitary country or in a federation does not make any real difference. The indifference is due to the dominance of the same ruling party since independence at both federal and state levels. The ability of Barisan Nasional (previously known as the Alliance) to control the federal government for more than fifty years has facilitated a centralised federalism. This domination coincides with the increased role

³³ [1963] 1 MLJ 355, 359.

of the federal authority in decision-making which has been legitimised in terms of the need to ensure Malaysia's security and to preserve ethno-religious harmony in multi-ethnic, multi-religious Malaysia. The abolition of local authority elections in the 1970s has allowed the federal government to further penetrate into the third tier of government where their appointed councillors dominate the municipalities, town councils and district councils. Thus it does not really make much difference where a citizen lives, except perhaps if in opposition-controlled states, because members of the state governments act as if they are federal administrators. In reality it is hard to distinguish between unitary government and Malaysian federalism Alliance/BN style.

The sovereignty or autonomy of the state in exercising power over matters assigned to it is very crucial in federalism. However in Malaysia state autonomy appears not to be a very serious or important issue except in opposition-controlled states. Perhaps most people are more concerned about the plight of their states' football teams in Piala Malaysia.³⁴ The insensitivity relates to the fact that most ordinary citizens do not have a good understanding of the system. Based on a recent survey conducted almost half of the people interviewed have only medium knowledge or understanding on the federal system of government in Malaysia. About 11 per cent of the

³⁴ Ironically Singapore also took part in this tournament and had successfully denied Malaysian states from winning the trophy many times until 1994 when the team withdrew from the tournament.

population do not really know about the system and only 40 per cent have a good understanding of the system.³⁵

LEVEL OF KNOWLEDGE					
LOW		MEDIUM		HIGH	
n	per cent	n	per cent	n	per cent
102	10.6	473	49.3	385	40.1

THE UBIQUITOUS COERCIVE MEANS AND LEGAL POWERS OF THE FEDERAL GOVERNMENT

i) Principle of equality in federalism

The principle of equality in a federal system requires all governments within a federal system be of equal status. Since the two levels of government are equal 'sovereigns', neither federal nor state governments are subordinate to each other. As pointed out in the Kilbrandon Report:

In a federal system sovereignty is divided between two levels of government. The federal government is sovereign in some

³⁵ 'The Level of Acceptance on the Concept of Federalism and Its Application in Malaysia', Researchers: Assoc Prof Dr Faridah Jalil, Dr Nazri Muslim, Assoc Prof Dr Khairil Azmin Mokhtar, Mrs Norhafilah Musa and Mrs Rasyikah Md Khalid. Presented at The Roundtable Discussion to Commemorate 50 Years of Malaysian Federation (Series 1), 25 September 2013 (Wednesday) at Danau Golf Club, Universiti Kebangsaan Malaysia.

matters and the provincial governments are sovereign in others. Each within its own sphere exercises its power without control from the other, and neither is subordinate to the other.³⁶

Consequential to the principle of equality in a federal system is that each level of government possesses exclusive power in matters which come under their own jurisdictions. Based on the division of power established by a federal constitution, each government has the right and should possess the ability to establish a legislative body to make law, an executive organ to formulate policy, and the judiciary to decide disputes that fall within its jurisdiction. They also should be able to have administrative bodies to implement their own policies and laws.³⁷ These rights and abilities are essential to maintain the notion of 'co-ordinate and independent' governments and to maintain the notion of the equal status of federal and state governments.

The principle of equality also precipitates the rejection of the use of any kind of threat and coercion by one government to another because that affects the independence of the other government.

ii) Power and process relating to admission, expulsion and secession of member states

It is crucial that the power of secession and expulsion of member states is not put in a position whereby it can be abused by either federal or state.

³⁶ Royal Commission on the Constitution 1969–1973. Report. vol.1, Cmnd. 5460, London. HMSO, 1973, p.502.

³⁷ M. Forsyth, *Unions of States*, pp.13–4 and K. C. Wheare, *op.cit.*, p.4.

In Malaysia where power to secede and expel a member state has been exercised, and the power of admission has also been used, it is felt that such matters should come under closer scrutiny.

The worst threat and coercion that can be made by a federal government is expulsion of a member state from the federation, and the worst threat that can be made by a state government is secession. Therefore Wheare holds the view that the 'unilateral right to secede or to expel makes for bad federal government'.³⁸

Thus it is believed that both rights are inconsistent with the principle of equality and should not be recognised in a federal system. Admission of a new member to a federation could weaken the position of the existing member states due to a larger number of states in the federation. However unlike the consequence of secession and expulsion the effect of the admission does not cause the federation to disintegrate. Thus it is viewed that unlike the unilateral right to secede by the state or to expel by the federal government, the use of unilateral power of admission by the federal government does not constitute an extremely serious threat to the state.

iii) Admission of new member state

Power to admit a new member is exercised by the federal legislature by passing a federal law, obviously a law that includes an amendment of the Federal Constitution.³⁹ The constitutional provision that needs to

³⁸ K. C. Wheare, *op.cit.*, pp.86–7.

³⁹ Article 2 (a) states 'Parliament may by law admit other States to the Federation'.

be amended is Article 1(2), which enumerates the States comprising the Federation. Basically, the admission requires only the support of a simple majority of the members voting in both houses of Parliament in order to amend the constitution.⁴⁰ The power has been used once so far — when Sabah, Sarawak and Singapore joined the existing members of the Federation of Malaya 1957 to form the Federation of Malaysia in 1963.

The admission of these states was done by means of the passing of the Malaysia Act, which provides, *inter alia*, for the admission of the three new states⁴¹ and for the renaming of the federation⁴². Prior to the passing of the Malaysia Act, the Malaysia Agreement was signed after the Federation of Malaya, the three states, and Britain had agreed to the idea of forming the Federation of Malaysia. In the process of forming Malaysia neither state governments nor the Malay Rulers were involved or consulted which caused dissatisfaction. It is felt that if the power of the federal government to admit new members may cause any form of subordination of the existing states to the federal government or can be used by the federal government against state government as a form of coercion and threat, then the power should not be vested in the federal government alone. If admission of new members

40 Since (4) of Article 150 states that an 'amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof' does not come under clause (3) of Article 159, which requires the support of a two-thirds majority in both houses of Parliament, amendment of Article 1 (2) in order to include new members comes under the amendment procedure for the fourth category of constitutional provisions that have been discussed earlier.

41 Article 1(2)

42 Article 1(1) of the Federal Constitution. This provision has been amended to change the name of the 1957 Federation which is known as 'Persekutuan Tanah Melayu (in English the Federation of Malaya)' to Malaysia.

will alter the political and economic position of the existing states to their disadvantage, the states should be able to have some power in the process.

iv) Secession of member state

There is no constitutional provision dealing with secession in the Malaysian Constitution. There is also no mention about the matter in the Reid Report and the IGCC. However, in the Report of the Commission of Enquiry of North Borneo and Sarawak (the Cobbold Commission), there were some suggestions made by several witnesses to provide a trial period for the prospective members, with a right to secede from the Federation. The Commission however did not recommend the inclusion of such a clause, because it was felt that the decision to create a federation should be made wholeheartedly and without reservation. The Commission was also concerned that such an inclusion 'would mean a continuation throughout the trial period of political and perhaps racial division.'⁴³

It is considered that the absence of a clause for secession does not conflict with the principle of federalism.⁴⁴ Whether it should be included in the constitution or not depends on political expediency. The parties to

43 The Report of the Commission of Enquiry of North Borneo and Sarawak, in James Wong Kim Min, *The Birth of Malaysia*, pp.60–1. It seems that the concern of the Commission was based on the social and economic realities during the time and its decision is not unfounded. Even today, the processes of racial and territorial integration, and nation building are still going on and beset with difficulties. The importance of the matter and the magnitude of the problem are manifested by the existence of a ministry that deals specifically with such matters.

44 On the contrary, it has been argued that the absence of such a clause can be the reason for the complete disintegration of a federation. J. H Proctor Junior, 'Constitutional Defects and the Collapse of the West Indian Federation', *Public Law*, 1964, p.125.

the Malaya and Malaysia Agreements decided that there should be no turning back after forming the federation. Furthermore, the Federation of Malaya, which later become the Federation of Malaysia, was intended to be a federation with a strong federal government.⁴⁵ Accordingly, it was felt that at the time there was no need for a clause for secession. This view is in consonance with the general acceptance of the idea of forming a federation. Such a clause is also absent in other federations such as India, Australia and the United States of America. It is thought therefore that a federation, as a nation, must be an indestructible union.

In the absence of the express provision of a right of unilateral secession by a member state, such power is accordingly denied to the state. This view is in conformity with federalism, and in line with the legal status of the member state. The states of the Federation of Malaysia are not fully sovereign nations. They are not sovereign from the international law perspective, and thus do not have the right to secede or break away from the federation thus formed. Not being subjects of international law, the constituent units of a federation do not have the same rights as members of a confederation. Thus in Malaysia, where there is no unilateral right of secession by the states, the constitutional position relating to secession is in conformity with the federal principle.

⁴⁵ This notion can be observed in the terms of reference for the Reid Commission in drafting the Federation of Malaya Constitution 1957, and the terms of reference mentioned in the Malaysia Solidarity Consultative Committee Memorandum on Malaysia, which later became the guide for the Inter-Governmental Committee in drafting a detailed proposal of constitutional arrangements consequential to the admission of Sabah and Sarawak into Malaysia.

Any act or movement to secede unilaterally can be regarded as treason. Any such attempt can be interpreted as an attempt to break the federation and may come under the ambit of Article 150(1),⁴⁶ which gives the reasons for the declaration of an emergency by the King. Circumstances which give rise to a situation which can disintegrate the federation seem to be one of the valid and legal reasons to declare an emergency, because Article 150 (1) states 'a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened.' It seems justifiable for the Malaysian government to make use of drastic law and military power to deal with unilateral secession because any such act and movement can be regarded as rebellion against the Federation. Separation seems, as in the case of Singapore in 1965, only possible when it is initiated by the federal government.

In addition before the Internal Security Act (ISA), which allowed the federal executive to detain a person without trial, was repealed, the federal executive deemed it necessary to make use of the power of detention without trial in order to stop any person 'from acting in any manner prejudicial to the security of Malaysia'. It is believed that detention based on such an act relating to secession has been invoked several times.⁴⁷

⁴⁶ Article 150 (1) states 'If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.'

⁴⁷ The reason for detention under ISA is not made public, therefore it is not possible for the writer to determine the exact cause for detention. However it is believed that the detention of Datuk Dr Jeffrey G Kitingan, who is the brother of the former Chief Minister of Sabah and also head of PBS which is the opposition party at the federal level, was in connection with an alleged attempt to secede Sabah from Malaysia.

v) Expulsion of a member state

There is no provision which specifically deals with expulsion in the Malaysian Constitution. There is also no mention about it in the Reid Report, IGCC and the Cobbold Report. Despite the absence of express constitutional provision, a state was 'expelled' or separated from the Federation in 1965.

Under the present constitutional arrangement, the power to expel a state lies with the federal government. It can be affected by a federal law, which amends the Constitution to exclude the state from being part of the Federation, and is passed by Parliament. The legal or constitutional power and process to expel a state from the Federation under the Malaysian federal arrangement is similar to the power and process of admitting a new member state. Amendment to the Constitution in order to affect expulsion need not be supported by a special majority, it is sufficient for it to receive the support of a simple majority of both houses. The support of two-thirds majority in both houses is required only if the amendment relates to Sabah or Sarawak.⁴⁸ The requirement for a special majority provides a certain degree of safeguards and puts the two states in a better position compared to other states.

⁴⁸ Obviously there are two different procedural requirements to pass an amending Act in order to expel a member state. The first procedure applies to all states except Sabah and Sarawak, while the second procedure applies only to Sabah and Sarawak. The first procedure requires an amending law to be supported only by a simple majority of both houses of Parliament. In order to affect the separation, the Parliament has to amend Article 1(2) to exclude or delete the state concerned from the provision. The amendment of Article 1(2) has to observe Article 159 (4) (bb), which requires the amending bill to be supported by simple majority. The second procedure, which only applies to Sabah and Sarawak, requires the amending bill to be supported by at least a two-thirds majority in both houses of Parliament. The requirement for a two-thirds majority is in pursuant to Article 161E (1), which excluded Sabah and Sarawak from the application of Article 159 (4) (bb).

The secession or expulsion of Singapore in 1965 illustrates the power and process of the expulsion of a state in Malaysia. Singapore, which became a member of the Federation of Malaysia in 1963, ceased to be a member of the Federation in 1965. The separation was affected by the amendment of the Malaysian Constitution consequent to the passing of the Malaysia (Singapore Amendment) Act 1965. The amendment Act was preceded by the Separation of Singapore Agreement, 1965 which was entered into by the Federal Government and the State Government of Singapore. After the amendment in 1965, further amendments consequential to the separation were effected in 1966 by the Constitution (Amendment) Act, 1966.

It is considered that the power to expel a member state can be exercised unilaterally by the federal government. However, according to Shafruddin, the agreement that took place between the Federal and State Government of Singapore before the amending Act for the separation was passed, suggests that, 'separation or secession must be effected through Centre-State agreement rather than by unilateral action'.⁴⁹ Shafruddin's suggestion is probably right if the requirement for bilateral agreement prior to the passing of the amending Act is based on political expediency and necessity. However such requirement has no legal basis. From a legal point of view, it is submitted that the Federal Government is not bound to consult the state prior to the expulsion. Consequently there is no legal obligation for the Federal Government to enter into agreement with the state government concerned prior to its expulsion.

⁴⁹ B. H. Shafruddin, *The Federal Factor*, p.26.

It is believed the power to expel a member state should not be treated in a similar manner to the power of admitting a new member. Unilateral power of expulsion by a federal government is inconsistent with federalism. It is not in accordance with the principle of equality of status because it will cause the subordination of state government to federal government. In accordance with the principles of equality and the prevention of the subordination of one level of government to the other, the power of expulsion or separation of a member state from the federation must not be vested in one government only. If such power is vested solely in the federal government, who may exercise it unilaterally, it can be used as a means of threat and coercion which will cause the subordination of state government. The power of expulsion or separation must be exercised mutually between the federal government and the member state concerned. Only in this manner does the power of expulsion not jeopardise the equal status between the two governments and safeguard the rights and interests of state government. Accordingly, the constitutional position relating to expulsion in Malaysia is inconsistent with federalism.

vi) Constitutional power to amend the federal constitution

The power to amend the supreme written federal constitution is of enormous significance, because the document embodies the division of power between the federation and the states and the safeguards of both levels of governments. As equal partners, the state and the federal government must have the right to have some say in the process of amending the constitution. Thus there should be a mechanism in which both levels of government are involved in

the process of amending the constitution. Usually the involvement of the state in amendment process is achieved by having a bicameral legislature, whereby states are represented in the upper house of federal legislature, which has been generally referred to as the Senate.

Constitutional recognition of the legal power to amend the constitution means that federal terms in the constitution are susceptible to changes. In such a situation, where constitutional provisions relating to the federal relationship can be altered, it is important not only to determine to what extent it can be changed, but more importantly who has the power and how the power should be exercised. These matters determine to what extent the principle of equality, and the notion of independent and co-ordinate governments apply in the Malaysian federal system

The Federal Constitution of Malaysia is the supreme law, but it is not unalterable sacred divine document.⁵⁰ The courts have rejected the idea that the Constitution cannot be changed, as well as arguments that deny that the power of formal amendment is vested in the Parliament⁵¹. The need for reconciliation between permanency and flexibility however has resulted in some constitutional entrenchments that render some parts of the Federal Constitution more difficult to amend than ordinary law. The entrenchments

50 When drafting proposals for the Independence Constitution in 1957, the Reid Commission mentions in its proposal that 'it is important that the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to seriously weaken the safeguards which the Constitution provides'. *Report of The Federation of Malaya Constitutional Commission 1957*, p.31.

51 *Loh Kooi Coon v. Government of Malaysia* [1977] 187.

are prescribed by Articles 159 and 161E of the Constitution, which deal with the formal amending power of the Constitution. Unlike Article 159, which is of general application, Article 161E only applies to the States of Sabah and Sarawak. The power of formal amendment of the Malaysian Constitution, which is vested in the Parliament, can be exercised at any time.

The power of amending the Constitution is vested in the Parliament.⁵² Amendment to the Constitution is made by the passing of an amending law, which is a federal law, in accordance with the requirements prescribed by Article 159, which should be read together with Article 161E. The procedure to amend the Constitution under the Articles is not uniform; there are four different procedural requirements. Each procedure applies to certain provisions of the Constitution. Hence provisions of the Malaysian Constitution can be classified into four categories according to the procedural requirement for their amendment. The categorisation of constitutional provisions, which is made below, shows some of the provisions are more important than others, and preferential treatment for some states. More importantly the discussion below enables us to determine whether the method of amendment of the Malaysian Constitution is consonant with the principles of federalism.

The first category is constitutional provisions that can only be amended by an Act that has been supported by at least a two-thirds majority in both

52 The Parliament comprised of the House of Representatives, the Senate, and the King.

Houses of Parliament on the second and third readings as stated in Article 159 (3). This procedure is the general procedure of amendment because it applies to any provision of the Constitution unless otherwise stated. The provisions that come under this category include those relating to essential aspects of democracy and federalism, such as the doctrine of separation of power, judicial review, judicial independence, election and distribution of power between federal and state.

The second category is provisions that can only be amended through an Act that commands the support of a two-thirds majority in each House of Parliament on the second and third readings, and has later received consent from the Conference of Rulers.⁵³ The constitutional provisions in perspective are those relating to citizenship,⁵⁴ the Conference of Rulers,⁵⁵ the precedence of Rulers and Governors,⁵⁶ the federal guarantee of Rulers,⁵⁷ the special position of the National Language,⁵⁸ and 'the special position and privileges of Malays and natives of Sabah and Sarawak and the legitimate interests of other communities'.⁵⁹ The category also includes a constitutional provision which limits the freedom of expression as mentioned under Article 10(4) and any law made under it, and Articles 63(4) and 72(4).

53 Article 159 (5). The Article provides 'a law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, 63 (4), 70, 71 (1), 72 (4), 152 or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.'

54 Part III of the Federal Constitution.

55 Article 38 of the Federal Constitution.

56 Article 70 of the Federal Constitution.

57 Article 71(1) of the Federal Constitution.

58 Article 152 of the Federal Constitution.

59 Article 153 of the Federal Constitution.

The third category covers provisions that can only be amended by an Act supported by a two-thirds majority in each House of Parliament on the second and third readings, together with the concurrence of the Governor of the East Malaysian States concerned. The amendment procedure for the provisions, which is stated in Article 161E, only applies to the states of Sabah and Sarawak regarding certain matters. The concurrence of the Governors of both states, effectively the government of the respective states, is required if the amendment affects both East Malaysian States, if the amendment affects only one of the States, then only the consent of the Governor of that state is required. This category covers provisions that relate to matters enumerated in Article 161E, which generally concerns the special position and privileges of the two East Malaysian States.

The fourth and final category is provisions that can be amended by a Bill supported by a simple majority in the House of Representatives and the senate. Simple majority here means a majority of members present and voting, similar to that required by ordinary legislative process. The constitutional provisions that come under this category are those which are not covered by any of the above procedures.⁶⁰ The matters include 'any amendment made for, or in connection with, the admission of any state to the Federation or its association with the states thereof, or any modification made as to the application of this Constitution to a state previously so admitted or associated'.⁶¹

60 Article 159 (4).

61 Article 159 (bb) of the Federal Constitution.

In addition to the special requirements stated in Articles 159 and 161E, it is submitted that law passed to amend the Constitution is also subject to general legislative procedure as stated in Article 66. Since any constitutional amendment takes the form of federal laws, the mode of exercise of legislative power by Parliament applies. Accordingly assent of the King is required before any amendment bill, which has gone through the requirements of Article 159 or 161E, becomes a law. However, in this regard the assent is just a formality. The reason for this is by virtue of an amendment of the constitutional provision in 1984, that the assent will be 'deemed to be given' thirty days after it has been presented to the King for his assent. If an amending Bill is not assented by the King, it shall become law 'in the like manner as if he had assented to it', thirty days after it was presented to him.⁶²

Based on several decided cases, it appears to be no substantive limitation on the formal power of amendment exercised by the Parliament. The decision of the courts in *Loh Kooi Choon v Govt Of Malaysia*⁶³ and *Phang Chin Hock v PP*⁶⁴ shows that there is no provision in the Constitution that cannot be amended by parliament. In these cases the courts have been urged to adopt the doctrine of implied limitation or the doctrine of basic structure of constitution, which has been followed by Indian courts.⁶⁵ If the doctrine is followed then there are some features of the Constitution that cannot be changed, which include the federal structure of the government. However,

62 Articles 66(4) and (4A) of the Federal Constitution..

63 [1977] 2 MLJ 187.

64 [1980] 1 MLJ 70.

65 *Kesavananda Bharati v State of Kerala* [1973] SCR Supp. 1; AIR 1973 SC 1461.

the Federal Court of Malaysia has refused to adopt the doctrine. Thus there is no limitation of the power of the Parliament to amend the Malaysian Constitution. As long as the power is exercised by the federal legislature in compliance with the relevant procedural requirements, the amendment is then valid and constitutional. Federalism would be real.

Several aspects relating to federalism can be deduced from the four categories and the procedure above. Firstly, relating to the role of the state in the process of amendment: the state does not become involved in the amending process at all. This applies to the legislature and executive bodies of all states, except Sabah and Sarawak, in all matters. These two states have constitutional rights to veto any amendment which comes within the ambit stipulated under Article 161E, that is prejudicial to their interest, because under Article 161E assent of the Governor of the states is required. It is submitted that the Governor has no discretion regarding his assent to such a Bill, and he has to exercise it in accordance with advice tendered by the state government.⁶⁶ It can be concluded firstly that the states of Sabah and Sarawak have more rights, safeguards and power than the rest of the member states in the Federation. These two states are more equal than other members of the Federation. The discriminatory aspect affects the principle of equal status of member states in a federation. Although the arrangement

⁶⁶ The requirement of the Governor to act as constitutional monarch in this respect stems from the argument that he has to exercise his power and function in accordance with advice except in matters stated in clauses (a) and (b) of s. 1 (2) of the 8th schedule to the Federal Constitution. These discretionary provisions do not cover his assent to a Bill passed under 161E.

was felt as practically and politically necessary and expedient, it negates the principle of equality, which forms part of federal principles.

Secondly, the absence of direct involvement of the state might be prejudicial to their rights and interests. The defect of the parliamentary system and the dominance of the federal government in the senate, which shall be discussed later, makes the state helpless to protect their rights in the Parliament. The power to amend the constitution generally rests with the Parliament, which can easily succumb to the control of the executive or ruling authority at the federal level. In this regard it is believed that the amending procedure which does not involve the state, even in matters affecting their rights, interest and autonomy, with the exceptions of Sabah and Sarawak, is prejudicial to the notion of independent and co-ordinate government. This position also puts the state at the mercy of the federal government, which is contrary to the principle of equality between federal and state.

Thirdly, there is no special procedure dealing with the amendment of federal terms or constitutional provisions, which relates to the relationship between federal and state, except for Sabah and Sarawak. Special procedure is required to amend provisions affecting the rights and position of the Malay Rulers, and the rights of Sabah and Sarawak. However there is no special procedure for the amendment of the federal terms of the Constitution, or provisions affecting the autonomy, rights and interest of most member states. The federal terms incorporated in the Federal Constitution, agreed between the contracting parties or the associating states, can be changed unilaterally

by the Parliament, which can be dominated by the federal government. Due to this reason, and reasons mentioned in the above paragraph, the balance of power is tilted towards the Federal Government and renders the safeguards for the states ineffective.

It can be said that there are four different levels of difficulty in amending the Federal Constitution. The level of difficulty correlates to the safeguards of the provision. A better safeguard is afforded by provisions that are more difficult to amend. The constitutional provisions of the last category, which can be amended by a Bill supported by a simple majority of members present in both houses, seems to afford no protection at all. By comparison, the provisions of the first category, where a special majority of two-thirds is required in both houses to support the Bill, has better safeguards. The second and third categories, which require the assent of the Conference of Rulers or the Governors of the two East Malaysian states, are the most difficult to amend. Apart from the need to be supported by two-thirds majority, there are additional requirements that involve the assent of 'outside' institutions or institutions that do not form part of Parliament. It is regarded as the most difficult procedure because the parties whose rights are affected by the proposed amendment have the right to veto the Bill. Accordingly these provisions are the most safeguarded.

If the level of difficulty is consequential to the level of importance of the provisions, it may lead to an absurd legal position. Firstly it would mean that the rights of the states of Sabah and Sarawak are more important than

the rights of other members of the Federation. This has to be admitted based on what was agreed in the Malaysia Agreement. Secondly, the fundamental concept of democracy and federalism is less important than the special position of the Malay Rulers. Thirdly, the power to expel a member state from the Federation is the least important. Clearly the second and third propositions are unacceptable and in conflict with principles of equality and democracy.

From a first glimpse of the foregoing observation, it might be stated that the existence of the states and the division of power between the federation and the states can be amended by Parliament through a Bill supported by at least a two-thirds majority in both houses. However, it is submitted that this is not accurate because of several reasons. Firstly, the abolition of a state requires the application of Article 2 (b). The Article states that 'Parliament may by law alter the boundaries of any State, but a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of that State) and of the Conference of Rulers.' It is viewed that the abolition of the federal system has the effect of altering the boundaries of a state, even if there are subordinate regional authorities replacing the state government. In a unitary system, it can be generally said that the alteration of a boundary rests with the central authority alone.

Secondly, abolition of the federal system means there shall be no Head of State for the states. Any amendment that shall end the federal system in Malaysia has tremendous effect on the position and power of the Malay

Rulers. On this basis, the federal system of government can only be changed with the consent of the Conference of Rulers, which means the special procedure of amendment for matters affecting the Rulers must apply.

From the above observation it can be concluded that the procedural requirement for amendment of the Federal Constitution of Malaysia does not fully adhere to the principle of equality. It does not provide adequate safeguards to protect the rights of the states, and may lead to the subordination of states to the federation

vii) Emergency powers

In its recommendations the Reid Committee expressed its belief that 'neither the existence of fundamental rights nor the division of powers between the Federation and the states ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life'.⁶⁷ Accordingly, upon the proclamation of emergency by the King under Article 150, the Parliament not only has the authority to pass law which can be inconsistent with the Constitution and restrict fundamental liberties, it may also exercise the legislative and executive power of the states. Surely this power is only meant for extreme or grave situations and for a temporary period: It can hardly be imagined that the legal order and power established by virtue of the proclamation is meant for normal circumstances and for an indefinite period.

⁶⁷ Report of The Federation of Malaya Constitutional Commission 1957, p.74.

Unfortunately the state of emergency is not something that is 'abnormal' in Malaysia. The country gained independence during a state of emergency.⁶⁸ Since independence, emergency has been proclaimed for the whole federation twice,⁶⁹ and once each for the states of Sarawak⁷⁰ and Kelantan.⁷¹ Accordingly, as rightly asserted by Harding:

Malaysia has been under emergency law for most of its existence...and legal 'normality' has applied only for a brief period. Thus 'normality' has to be redefined; what has become normal is the existence of emergency laws in parallel with the operation of the ordinary constitutional legal system.⁷²

If the proclamation is declared throughout the Federation, the whole country can then be administered as a unitary state and the entire constitutional order is virtually suspended during the period. When only certain parts of the Federation have been declared as being in the state of emergency, the situation applies to that state. Therefore if an emergency is declared only in a state, the federal government then may exercise direct control of that state or assume the power of state government. Parliament thus performs

⁶⁸ Andrew Harding, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur, *Malayan Law Journal Sdn. Bhd.*, 1996, p.153.

⁶⁹ The first proclamation after independence was made in 1964 to meet armed aggression by Indonesia due to its objection to the formation of the Federation of Malaysia in 1963. The second proclamation was made on 15 May 1969 due to racial riots consequent to the general election which had been conducted a few days earlier.

⁷⁰ The proclamation, which was made on the grounds of a threat to the security of Sarawak, had been made in 1966.

⁷¹ The proclamation, which was made on the grounds that the security or economic life of Kelantan was threatened, had been made in 1977.

⁷² Andrew Harding, *ibid*, p.159.

the function and power of the legislative assembly of that state, and the federal executive governs the state. The Parliament is not only entitled to pass ordinary law, but also has the authority to amend the constitution of the state.⁷³ The federal government can exercise the power that under normal condition belongs to the state, except in religious and customary matters.⁷⁴ The enormous power assumed by the federal government during emergency renders the doctrine of constitutional supremacy and the distribution of powers unreal. This is one of the reasons why K.C. Wheare felt that the Federation was to be more of a 'quasi federation' rather than a truly federal system.⁷⁵

The proclamation of emergency and emergency powers does not involve the state government at all. In fact even the validity of the proclamation and emergency ordinance promulgated by the King are beyond the jurisdiction of the court.⁷⁶ Once Emergency been proclaimed, the state is helpless in protecting their rights, as happened during the emergency in the state of Sarawak in 1966, and in Kelantan in 1977. On both occasions the federal government made the proclamation despite the absence of any

73 *Stephen Kalong Ningkan v. Govt. of Malaysia* [1968] 1 MLJ 119 and *Stephen Kalong Ningkan v. Govt. of Malaysia* [1968] 2 MLJ p.238.

74 In addition to the absence of a procedural requirement to amend the Constitution, which has been discussed earlier, overwhelming substantive power is granted to the Parliament and the King to pass law inconsistent with the Constitution. The ability of Parliament to pass any law regardless of its inconsistency with the constitution is derived from clauses (5) and (6) of Article 150. The power of Parliament to amend any provision of the Constitution is limited only in matters mentioned in clause (6A) of the Art.

75 K. C. Wheare, *Federal Government*, p.29.

76 Article 150(8).

threat of security as contended by several scholars.⁷⁷ It is asserted that the proclamations are politically motivated, related to tensions between Federal and State Governments, and not due to elements which would normally be expected in an emergency situation.⁷⁸ In both states the Federal Government managed to topple the state governments, which are not favoured by the ruling party at the federal level, and caused the installation of new governments that were acceptable or pro-federal government. If the allegation that the power had been used by the federal government to topple state leadership and change the ruling party at the state level is true, than emergency power, which has been created to preserve democracy, can and has been used against federalism and democracy.

'Direct-intervention' or direct rule by federal government through a declaration of a state of emergency clearly militates against the idea of federalism. If it is used by the federation against the state, the use of power manifests the 'intolerance' of the ruling party at the federal level, which is contrary to the idea of co-ordinate and independent government in

77 Andrew Harding, *op.cit.*, pp.161–3.

78 The proclamation of emergency in Sarawak in September 1966 was due to the failure of the federal authorities to secure the dismissal of the Chief Minister who had irritated federal leaders. As a result of the proclamation the Parliament amended federal and state constitutions in order to summon a meeting of the Council Negri without the advice of the Chief Minister. Consequently the Chief Minister was dismissed from office by a vote of no confidence. Kelantan meanwhile was under the control of a different party from the dominant party at the federal level. The ruling party at the state level, which is PAS, initially was an opposition party but during this period had joined the ruling coalition at the federal level. The main opposition of PAS in the state was UMNO, which was the dominant member in the coalition. Although both parties were members of the coalition it seemed the relationship between the parties in the state was much worse than at the federal level. The use of emergency power resulted entirely from tension between the federal and state governments or between PAS-dominated state and UMNO-backed party and leaders.

federalism. Nevertheless it must be mentioned that the method of direct rule through emergency has not been used casually. The power seemed to be used as the last resort by the Federal Government after failing to make the recalcitrant state government succumb to federal control through political means, indirect approach, and ordinary legal powers.⁷⁹ Although emergency powers seem to be the last resort for the ruling party at the federal level to assert control over the state governments, there is no justification for the federal government to use emergency provisions, and any power arising from such proclamation, to resolve political problems and tensions due to their differences with state governments.

It is quite unfortunate that undemocratic and arbitrary power under the emergency provision, which is meant to safeguard the life, freedom and existence of the Federation, can be easily used and invoked for political purposes by the Federal Government. More unfortunate is that the proclamation and power are beyond the control and review of the court. Under the existing constitutional order, the state is helpless against federal intrusion during the state of emergency. Emergency power may also cause more damaging and lasting effects to the rights and autonomy of the state if amendment powers exercised by the federal executive and legislature are made to the detriment of the state.

⁷⁹ For instance, despite several bombings in the state of Sabah, which occurred after an opposition party came into power in 1980s, the Federal Government did not proclaim emergency in the state. This is due to the fact that the opposition party managed to be toppled when elected members of the state legislative assemblies, amidst allegation of receiving considerable sums of money, joined pro-Federal Government's party.

THE WAY FORWARD: COURTEOUS, COMPLIANCE, CONSENSUS AND COMPROMISE

i) Nature of Malaysian society — social contract, bargain and negotiation

The essence of federal government is the surrender of sovereignty by associating political units to a central entity. The Federal Constitution, as mentioned by Chief Justice Thomson, is also 'an Agreement between the previously sovereign States' of Malaysia.⁸⁰ The Federation of Malaya Agreement 1957 and later the Malaysia Agreement 1963 are foundational agreements that created the Malaysian Federation.

The Independence Constitution marks not only the transition of power from colonial rule to rule by the people, in line with democratic principles. It also marks the transfer of the right to govern from the Malay Rulers, who had absolute power, to the people. The people rule and the Rulers reign. As constitutional rulers, the Malay Rulers no longer have absolute power but have a few important discretionary powers to ensure the just operation of a democratic government.

The Federal Constitution is also an agreement between the different racial and religious communities in the country. The Alliance coalition of political

⁸⁰ *The Government of The State of Kelantan V The Government of The Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355.

parties representing the three major races — Malay (UMNO), Chinese (MCA) and Indian (MIC) made its compromise proposals: citizenship for non-Malays and special privileges; special status of Islam and practice of other religions; monarchy and democracy; federal and states' rights; Malay as the national language and communal status of other languages. These compromises, which are embodied in the supreme constitution, is the constitutional basis that allowed the multi-racial and multi-cultural communities to live together as a nation. The spirit of give and take, as opposed to the winner takes all, underpins the idea of consensual democracy in Malaysia. The need for unity and diversity among different races is reflected not only in the governing coalition party (Barisan Nasional/National Front or formerly known as the Alliance), it also visible in the coalition of opposition parties (Pakatan Rakyat) which comprises several main parties such as PAS (Malay), DAP (Chinese) and PKR (liberal and multiracial).

It should be noted that the diversified ethnic communities, with the exception of the natives of East Malaysia, are not territorially grouped and traverse throughout the Federation. A similar pattern of demography at the national level exists within the states with the exceptions of Sabah, Sarawak, Terengganu and Kelantan.⁸¹ In this respect federalism does not appear to

81 In the East Malaysian States of Sabah and Sarawak, the natives of the states form the dominant majority but there are sizeable and influential minorities. In Sarawak, the predominant ethnic group in Census 2000 was the Ibans which accounted for 30.1 per cent of the state's total Malaysian citizens followed by the Chinese 26.7 per cent and Malays 23.0 per cent. In Sabah the predominant ethnic group is the Kadazan Dusun 18.4 per cent followed by Bajau 17.3 per cent and Malays 15.3 per cent. In Terengganu and Kelantan, which are situated at the east coast of the Peninsula, the Malays constitute the dominant majority while other ethnic groups are insignificant minorities. Other ethnic groups constitute less than 10 per cent of the population of the states.

be a solution for the racial differences or problems of the Malaysian society because 'federalism becomes nothing if it is held to embrace diversities that are not territorially grouped'.⁸² In practice the solution of the racial 'problem' lies with consociationalism.

'Consociationalism' according to Arend Lijphart may be understood as a 'government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy.' The aim of consociationalism is to prevent cleavages from leading to explosive conflicts and disintegration, whereby all significant decisions require agreement and consensus among the leaders of the different sub-groups or ethnic groups. Unlike the federal system, the consociational system is dependent upon concurrent majorities which may not necessarily be territorially grouped. Daniel J. Elazar writes that, unlike federalism which 'involves both structure and process of government', 'consociationalism involves the processes only.' Since consociationalism is not fixed by constitution or law, and not subject to institutions established by legal means, it can be regarded as more flexible than federalism. Consociationalism may exist in a plural society with and without a federal legal arrangement.⁸³

82 W. S. Livingston, 'A Note On The Nature Of Federalism', p.86.

83 Arend Lijphart, 'Consociational Democracy', *World Politics*, 1969, pp.207–208; Daniel Elazar, *Exploring Federalism*, Tuscaloosa and London, The University of Alabama Press, 1991, p.21.

As mentioned earlier the ruling coalition party, as well as the current opposition coalition party, manifests the consociational feature of Malaysian politics.⁸⁴

ii) The political landscape post-2008 General Election

In the 2008 General Elections BN lost five states and was deprived of its two-thirds majority in Parliament. Interesting events happened in the states after the election. A few Malay Rulers, who have the prerogative in appointing the Chief Minister, played an active role to determine who should be appointed. This can be seen in Terengganu⁸⁵ and Perlis⁸⁶ where the Chief Ministers suggested by the Federal Prime Minister were turned down by the Rulers and other suitable candidates were appointed. This is an example to indicate that the Malay Rulers and the states are being bold and beginning to flex their muscles.

⁸⁴ The National Front or Barisan Nasional, formerly known as the Alliance Party, is a coalition or confederation of fourteen component parties which represent almost all segments of the people of Malaysia. Each component party of the coalition claims to represent at least one ethnic or sub-ethnic group. The backbone of Barisan is the United Malays National Organisation (UMNO), which represents the Malays of the Peninsula. Other major parties of the Peninsula are the Malaysian Chinese Association (MCA), which represents the Chinese and the Malaysian Indian Congress (MIC), which represents the Indians of West Malaysia. The influence of Gerakan Rakyat Malaysia (GRM or GERAKAN), which is dominated by Chinese is mainly confined to the state of Penang, while the People's Progressive Party (PPP), which receives support from the Indians and Chinese, currently seems to be insignificant. The remaining parties of the coalition are based either in Sabah or Sarawak. In Sarawak, the Parti Pesaka Bumiputera Bersatu (PBB) represents the Malays and Melanau, Sarawak United People's Party (SUPP) represents the Chinese, Sarawak National Party (SNAP) represents the Iban and the Parti Bangsa Dayak Sarawak (PBDS) represents the Dayaks. In Sabah, the Sabah Progressive Party (SAPP) and Liberal Democratic Party (LDP) can be said to represent the Chinese, and Angkatan Keadilan Rakyat (AKAR), Parti Bersatu Rakyat Sabah (PBRS), Parti Demokratik Sabah (PDS) and UMNO represent the natives including the Malays. UMNO's President automatically becomes the President of Barisan Nasional while the president of each component party becomes the Vice-Chairman of Barisan Nasional.

⁸⁵ 'UMNO vs. the Royalty', <http://www1.malaysiakini.com/news/80594>, March 30, 2008.

⁸⁶ 'Perlis welcomes new Menteri Besar', <http://www1.malaysiakini.com/news/79943>, March 17, 2008.

Opposition-controlled states were also mulling about restoring local government elections. Penang took a further step by going to court to compel the Election Commission and the Federal Government to hold local authority elections in the state. The Penang Pakatan Rakyat government has been taking steps to try to restore local government elections in the state to return the third vote to the people. Local council elections used to be held in the country, and Malaysians got to elect their local councillors between 1951 and 1965. The local government elections were suspended in 1965 because of the Indonesian Confrontation. The Penang State Government filed an application for leave to petition the Federal Court to declare that the Penang state legislature has a right to hold local government elections in accordance with the Local Government Elections (Penang Island and Province Wellesley) Enactment 2012 which was passed by the State Assembly. The court granted them leave to file the petition to challenge provisions of the Local Government Act 1976, which prevent the holding of local government elections. The petition will be heard before a Bench of the Federal Court.

It could be said that the main beneficiaries of the recent election in 2008 and 2013 are the two states of East Malaysia which helped the BN to retain its position at the federal level. The Barisan Nasional within Peninsular Malaysia failed to obtain the majority of popular votes cast. It only obtained 49 per cent of the popular votes in Peninsular Malaysia whereas the Opposition had the majority of popular votes — 51 per cent. UMNO won 35 per cent of popular votes against 34.8 per cent won by PAS and Keadilan. Although the Barisan Nasional won 140 seats in Parliament, fifty-four seats came

from Sabah and Sarawak. So, without Sabah and Sarawak, Barisan Nasional would not even have obtained a simple majority in Parliament. The political conditions are therefore really favourable for the two states, which, being the kingmaker of the federal government, could demand more local autonomy and significant roles at the federal level.

Overall the 'political tsunami' which occurred in 2008, and to a certain extent was repeated in 2013, have rejuvenated the state's autonomy and provided opportunities for the states to decentralised power in the Federation.

CONCLUSION

Federalism can be described as the process by which two or more governments share powers over the same geographic area. The method of sharing power is outlined in the federal constitution binding on all governments. In the relationship between the federal government and the state government there are pulling factors (which pull the states towards the central government) that make the country centralised, and pushing factors (which push the states further from the central government) that cause the country to be decentralised. The centripetal and centrifugal factors which vary in degrees constantly in the Malaysian federal system manifest the dynamics of federalism. They allow the relationships between the governments to respond to the changing needs and aspirations of the various communities. As any other country in this world Malaysia is not a country with a perfect record. There are serious concerns relating to safeguards of state rights and autonomy. Nevertheless the Federal Constitution has

survived various tremendous challenges since its birth with some major and minor modifications. The federal system which has been adopted has its own significant roles in perpetuating democratic ideals in the country and maintaining unity.

The leaders especially must have mutual respect and courtesy among themselves and to the people. As role models the leaders must show great respect to the law and constitution. They must comply with the letter of the law and uphold the spirit and philosophy of the constitution. In order to strive for greater stability and security, instead of using repressive security laws with little or no concern for individual rights, good governance must be observed in all aspects of administration. This will protect the integrity of the governing authority and enable the government to govern with full authority because it can claim to have political, legal and moral legitimacy.