

*Foreword*

*Constitutional Conflicts in Contemporary Malaysia*

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# *Constitutional Conflicts in Contemporary Malaysia*

by Associate Professor H.P. Lee

## FOREWORD

The Hon. Justice Michael Kirby AC CMG\*

As a schoolboy I learned a lot about Malaya. It was part of the Empire, upon which the sun never set. The teacher would point to the large, faded map on the schoolroom wall. The crimson-coloured lands on every continent were, we were told, part of our "family of nations". I remember being mildly irritated, at the time, by the severance of Burma and Malaya. But for this, you could travel from Singapore to the Khyber Pass, uninterrupted, in lands where the English language was spoken, uncorrupted officials presided over government and independent judges administered the law.

Later, I was to discover that my romantic, nostalgic introduction to the Empire and the community of its peoples, was somewhat divorced from practical reality. Yet recent responsibilities, including in Cambodia, have taught me that the historical phase of the British Empire had its good, as well as its bad, points. With the English language came the vast treasury of literature and other writings, with the inspiring stories of constitutional struggles by which one people asserted their rights of political self-determination. With the officialdom came general financial honesty and notions of the rule of law, the separation of powers and competent administration. With the independent judges came the ideals of neutral guardians of the Constitution, supported by independent lawyers and upholding fundamental human rights. Such rights

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included a high level of free expression and the power to criticise, without retaliation, even the fundamentals of the Constitution: even the sovereign.

This is a book about some of the problems which have arisen in Malaysia since the Constitution, established first for the Federation of Malaya, and later applied to the Federation of Malaysia, came into force on Merdeka Day, 31 August 1957. It was then, for Malaya, that the bonds of Empire were severed and a new independent nation emerged. It had its own rich heritage and precious culture. It had enjoyed the advice of an independent constitutional commission, chaired by one of the greatest jurists of the century in the English speaking world (Lord Reid). It adopted a unique autochthonous approach to the selection of its constitutional Head of State from among the Malay rulers. The Constitution had to deal, at once, with the protection of the special position of the Malay people and the defence of the legitimate interests of the other ethnic communities of the new Federation<sup>1</sup>. Very soon, the new state was challenged by the enlargement of its component parts, the ill-fated Indonesian policy of *Konfrontasi* and the subsequent withdrawal of Singapore. Through all of these changes, and the many challenges noted in this book, the Constitution has endured.

It is important to put the achievements of Malaysia's constitutional stability and continuity into proper perspective. When considering the conflicts chronicled here, the economic and social achievements of Malaysia must be remembered. They have been built upon the bedrock of stable governmental and judicial institutions which the Constitution establishes. Anyone in doubt about Malaysia's achievements in that regard should look to the contrast of other countries of the region where the same constitutional stability and curial integrity have not been achieved.

What Professor Lee has offered in this book is a description of how the Constitution came about, and how, successively, it has been subjected to tests and trials. In some of these, he feels constitutionalism has been sorely shaken and even found wanting. Each of the principal organs of Malaysia's polity has come under attack. This book describes what happened. The office of the Yang di Pertuan Agong (King), and its prerogatives came under legislative challenge in 1983. The

Constitution was amended to reduce the royal power to delay assent to a Bill enacted by the Legislature. Much more serious was the constitutional conflict of 1988. This led to the removal from office of the Lord President of the Supreme Court of Malaysia (Tun Salleh Abas) and other disturbing interference in the tenure and independence of the judiciary<sup>2</sup>. The membership of the first tribunal which inquired into the allegations against the Lord President was seriously flawed. The participation in it of a judge who stood to gain from the removal of Tun Salleh, who was a witness to relevant events, and later replaced the accused, is roundly criticised by Professor Lee. This was a grave conflict. It may have left scars which weaken the culture of a judiciary which should always act "without fear or favour, affection or ill will".

The serious battle over royal immunities which broke out in December 1992, is seen by Professor Lee as a turning point in the shaping of the constitutional balance of powers in the Malaysian constitutional system<sup>3</sup>. Once again, the Constitution was altered to accord to the will of the elected Executive. The hereditary rulers were left in no doubt as to where real governmental powers in Malaysia lay.

Some of the storms described in this book may be seen as the passing constitutional controversies which beset any country. Some of the amendments to the Malaysian Constitution may be viewed as the natural evolution of a mature system from the symbols of monarchy to the reality of democratically elected power. For the outsider, the most serious constitutional crisis is that which affected the judiciary after 1988. An independent, courageous judiciary, safe in its tenure, is essential in any rule of law state, and doubly so in a federation. The functioning of a courageous judiciary is especially important in the context of Malaysia because of the need to assure protection to ethnic and other minorities who may, at times, be unpopular. Such a judiciary is also needed to defend abiding values and fundamental human rights in a context where amendment of the Constitution is so easily secured.

As I read Professor Lee's book, it was brought home to me how many features of the inherited colonial legal system have been preserved in Malaysia, whereas elsewhere in the crimson lands of Empire, they have been allowed to fade away. The

emergency powers, for example, remain as a serious departure from constitutionalism and respect for fundamental human rights<sup>4</sup>. The laws of sedition, devised originally to defend an imposed colonial ruler, are now available to suppress the expression of opinions which, in other countries, would be regarded as legitimate. Perhaps Malaysia needs, at last, to throw off these lingering relics of colonial government.

This is an important book because, on the face of things, Malaysia appears to be the very model of a modern constitutional government in a region where this is by no means the norm. The conflicts portrayed in these pages demonstrate the reality, found elsewhere, of the rise of the power of the elected Executive, whilst that of the other organs of government declines. Yet contrary to some media opinions, there are diverse voices at the highest level of government in Malaysia. Happily, there are voices which are lifted in the cause of human rights, diversity of opinion and legitimacy of criticism. They must be nurtured, for they bear the seeds of greater freedom.

It is important that constitutionalism should work in Malaysia, not only for its diverse and multicultural peoples. But also for the model which is thereby provided to other countries to whom history has been less kind. Malaysia is, in this sense, a testing ground for the universality of human rights principles, asserted by the United Nations but questioned by some leaders of the region, and certainly not practised by some of its autocratic governments.

By describing the challenges collected in this book, Professor Lee has not only performed a service to international observers of Malaysia, and the many admirers and friends of its peoples. He has also held up a mirror, as it were, so that Malaysians can see their constitutionalism for themselves. Out of that perception may grow a recognition of the constant need for restraint in the exercise of power, and respect for the abiding values which constitutionalism ultimately safeguards.

Sydney

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## FOOTNOTES

- 1 See Tun Haji Mohd. Salleh bin Abas "Traditional Elements of the Malaysian Constitution" in F.A. Trindade and H.P. Lee, *The Constitution of Malaysia*, OUP, Singapore, 1986, 1 at 10.
- 2 See Tun Salleh Abas and K. Das, *May Day for Justice*, Magnus, Kuala Lumpur, 1989.
- 3 Cf. Y.A.M. Raja Azlan Shah, "The Role of Constitutional Rulers in Malaysia" in Trindade and Lee, above n 1, 76.
- 4 Cf. H.P. Lee, "Emergency Powers in Malaysia" in Trindade and Lee, above n 1, 135.