

THE GENERAL CHARACTERISTICS OF THE PARLIAMENTARY SYSTEM OF GOVERNMENT UNDER THE MALAYSIAN CONSTITUTION

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INTRODUCTION

Politically, the notion of parliamentary system of government refers to that of British system of government or better known as Westminster model. This system differs from other systems because of the relationship between the two organs of government namely; legislature and executive. The relationship between the legislature and the executive depends on whether the executive is independent of the legislature or is responsible to it.¹ The principle of independence or responsibility is based on the doctrine of separation of powers.² This doctrine was said to have been suggested by the Englishman John Locke in 1690³ and further developed by the French Montesquieu in mid-eighteenth century. He made a comparison between the French and British governments and came to the conclusion that the government in England had administered the state in a fair and just way. He argued that England had far more liberty than most other countries including France on the ground that in England there was a separation of powers between governmental organs and in France such separation did not exist.⁴ In France all powers, legislative, executive, and judicial, were concentrated in one person, that is, the King.

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1. Robert R. Bowie, *The Federal Legislature*, in Robert R. Bowie and Carl J. Friedrich (eds.), *Studies in Federalism*, Little Brown and Company, Boston Toronto, 1954, p. 10.

2. For comprehensive discussion on the doctrine of separation of powers, see M.C.J. Vile, *Constitutionalism and the Separation of Powers*, The Clarendon Press, Oxford, 1967.

3. John Locke, *Second Treatise of Civil Government*, 1690, ch. XII, para. 143, quoted in M.C.J. Vile, *ibid.* p. 62.

4. W.Ivor Jennings, *The Law and the Constitution*, Fifth ed., University of London Press Ltd., London, 1959, p.21.

According to the classic form of this doctrine there are five principles for a just government. First, it is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments; the legislature, the executive and the judiciary. Second, to each of these three organs there is a corresponding identifiable function of government; legislative, executive, or judicial. Third, each organ of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other organs. Fourth, the persons who compose these three organs of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. And, fifth, each of the organs will be a check to the others and no single group of people will be able to control the machinery of the State.⁵

Legally speaking, the doctrine does not create a legal principle but a political theory.⁶ The classical doctrine has been severely criticized. A complete separation of powers is not possible neither in theory nor in practice.⁷ The long history of the doctrine reflects the developing aspirations of people over the centuries for a system of government in which the exercise of governmental power is subject to control. It illustrates how this basic aspiration towards limited government has had to be modified and adapted to changing circumstances and needs.

First of all it is necessary to ensure checks and balances between the organs of government. A complete separation of powers, in the sense of a distribution of three functions of government among three independent sets of organs with no overlapping or coordination, would bring government to a standstill⁸ and the conferment of too much power on any one person or body might cause abuse of power. In modern government checks and balances are required to avoid any concentration of power in a specific organ of government. If the classical doctrine is to be applied to might be difficult to check the power of the agencies of government.⁹ Second, related to the first, according to the theory of mixed government in which each organ was given the power to

5. M.C.J. Vile, op. cit., p. 18.

6. Collin R. Munro, *Studies in Constitutional Law*, Butterworths, London, 1987, p. 186.

7. E.L.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, Tenth ed., Longman, London and New York, 1985, p. 53; see also M.C.J. Vile, supra.; Hood Phillips, *Constitutional and Administrative Law*, Sixth ed., Sweet & Maxwell, London, 1978, pp. 14-16; W. Ivor Jennings, op. cit., pp. 22-88.

8. Hood Phillips, *ibid.*

9. M.C.J. Vile, supra., p. 18.

exercise a degree of direct control over the other by authorising it to play a part, although only a limited part, in the exercise of the other's functions for example, the executive branch was given a veto power over legislation¹⁰, or the legislative branch was given the power of impeachment. Thus, each organ could exercise some authority in the field of all three functions.¹¹ Third, new demands are made on the government to solve many complex socio-economic problems of contemporary society and new institutions need to be created and new procedures evolved where more and more legislation are needed. Law has become the instrument of social change. The legislature is not able to cope with the legislative programme fully. The legislature would be subjected to an impossible workload if it were to endeavour to enact legislation by itself, complete with all details. Further, as most of the present-day legislation pertains to socio-economic matters, the details inevitably tend to become technical and complex and only professional experts specialised in the subject matter can work them out rather than the legislators who are generalists and not specialists. Therefore, to fulfil all of the above factors, flexible law is required. The only justified way is to confer some legislative power which is called delegated legislation to the executive.¹² In Malaysia delegated legislation is known as subsidiary legislation. According to section 5 of the Interpretation Act 1967, subsidiary legislation is defined as meaning any proclamation, rule, regulation, order, notification, bye-law, or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect. This delegated legislation has now come to be regarded as a useful and indispensable technique of modern government.

THE FEATURES OF RELATIONSHIP

Nowdays the relation between both governmental organs: legislature and executive, in most of the Commonwealth federations have combined the

10. For the recent development of the legislative veto power in the United States of America, see *Immigration and Naturalization Service v. Chadha* (1983) 103 S. Ct. 2764. For its comment, see Peter W. Rodino, *The Legislative Veto and the Balance of Powers in Washington* (1984) LXV *The Parliamentarian*, p. 22.

11. Peter W. Rodino, *ibid.*; see also Collin R. Munro, *supra.*, 192.

12. See E.C.S. Wade and A.W. Bradley, *supra.*, ch. 33 especially pp. 611-612; Harry Street and Rodney Brazier (eds.) *de Smith Constitutional and Administrative Law*, Fifth ed., Penguin Books, Middlesex, 1985, ch. 17 especially pp. 349-351; M.P. Jain, *Administrative Law of Malaysia and Singapore*, *Malayan Law Journal* (Pte.) Ltd., Singapore, 1980, ch. V especially pp. 31-33; and D.C. Wadhwa, *Executive's Law-making Lesson From East India Company*, (1986) Vol. 28 *Journal of the Indian Law Institute*, p. 193.

British parliamentary cabinet system with a federal form of government. They include Canada, Australia, India, Pakistan, Malaysia and Nigeria. The British system adopted a cabinet system where the executive is responsible to the legislature. The executive is not independent as its members (ministers) are members of Parliament. No pure separation of powers exists as to the legislature and the executive. Each division is interrelated to each other.

The relations between the Cabinet and the Yang di-Pertuan Agong and between the Cabinet and Parliament in Malaysia are almost similar to the positions of the Queen, Parliament and Cabinet in England.¹³ This is because, although the difference between Malaysia and England as regards the constitution is that the former has a written and supreme one and the latter is unwritten with Parliament as sovereign, but most of the principles of constitutional law are the same as the Federal Constitution is a given constitution with some modifications to suit local circumstances.

The basic features of the relationship between the legislature and the executive in a federal parliamentary system of government like Malaysia can be viewed from a number of aspects. The first one is the Assembly becomes a Parliament. The word Assembly here means a body of representatives who act as watchdogs over the Government and as partners in legislature. Nowadays the Assembly has taken over responsibility for government, acting as a Parliament, the Monarch being deprived of most of his traditional powers. The Monarch has ceased in practice, though not in form, to exercise even the executive power. Government has passed to its ministers who are responsible to the legislature.

Second, the executive is divided into two parts. As a result of the Assembly having taken over the place of Parliament, the executive becomes split into two: the Prime Minister becoming the head of government and the Monarch acting as head of state. Although the Yang di-Pertuan Agong is given the executive power of the Federation but in practice the Prime Minister and his ministers carry out it. The Yang di-Pertuan Agong is a constitutional Monarch acting on advice. He is not responsible for his personal act but the government is.¹⁴ In *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* No. 2¹⁵ the court held that article 32(1) only protects the Yang di-Pertuan Agong's personal capacity from proceedings in a court and that he is liable in his official capacity.

13. L.A. Sheridan, *Introduction*, in L.A. Sheridan (ed.), *Malaya and Singapore the Borneo Territories-The Development of Their Laws and Constitutions*, Stevens & Sons Limited, London, 1961, p. 55.

14. Federal Constitution, AA. 32(1) and 69(2).

15. [1967] 1 M.L.J. 46.

Therefore the, article does not protect the Federal Government from action in the courts in respect of its acts committed in the name of the Yang di-Pertuan Agong, and that when the Yang di-Pertuan Agong acts on the advice of the Cabinet his act must be deemed to be the act of the Federal Government. So that the citizen who aggrieved by His Majesty's official act may sue the Federal Government as defendant.

An interesting issue arose over the Head of State's personal act. Although the Federal Constitution gives him personal immunity to any proceeding whatsoever in any court and this was upheld by the court, the issue arose if he would be liable if he committed a serious criminal offence; for example murder or drug smuggling which both in Malaysia carry out death penalty upon conviction.¹⁶ The point is arguable in law, especially in view of the fact that before taking his office he declared that he would carry out his duty in accordance with law and the Constitution and in all times would uphold the rule of law and order in the country. As no such case (capital offence) has arisen in practice it is quite difficult to make a judgment. It is submitted that the Conference of Rulers should exercise its discretion under articles 32(3) and 38(6) to remove the Yang di-Pertuan Agong from his office.¹⁷

As regards civil matters the court recognises absolute immunity of the Yang di-Pertuan Agong and the Malay Rulers. In *Daeng Baha Ismail v. Tunku Mahmood Iskandar Al Haj & Ors.* (K.L. - Civil Suit No. A21-14-1986)¹⁸ where both the High Court and the Supreme Court held that once a Ruler has been elected the Yang di-Pertuan Agong by the Conference of Rulers under articles 32(3) and 38(2) (a) of the Federal Constitution the immunity from court proceedings under article 32(1) applies and the immunity is absolute. In this case the appellant (plaintiff) had claimed damages for an assault on him and the respondents (defendants) had applied to strike out the writ of summons and statements of claim of the appellant. It was held the court has no jurisdiction to hear and determine any question as to the legality or otherwise of the election of a Ruler to the office of Yang di-Pertuan Agong. Only the Conference of Rulers has such jurisdiction and no one else.

16. Penal Code (F.M.S. Cap. 45), ss. 300 and 302; and Dangerous Drugs Act, 1952, s. 39B.

17. Article 32(3) says 'The Yang di-Pertuan Agong shall be elected by the Conference of Rulers for a term of five years, but may at any time resign his office by writing under his hand addressed to the Conference of Rulers or be removed from office by the Conference of Rulers, and shall cease to hold office on ceasing to be a Ruler'; and article 38(6) says 'The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following functions, that is to say - (a) the election or removal from office of the Yang di-Pertuan Agong or the election of the Timbalan Yang di-Pertuan Agong ...'.

18. [1987] 1 M.L.J. vi.

At the state level there are two cases decided recently by the High Court. In *Karpal Singh v. Sultan of Selangor*¹⁹ the High Court decided that by virtue of article 181(2) of the Federal Constitution any court proceedings cannot be brought against the Sultan. In this case the Sultan of Selangor was said to have made a public statement on 26.7.1987 that he would not pardon anyone who has been sentenced to the mandatory death sentence for drug trafficking in Selangor. His statement was reported in the *New Straits Times* and the *Star* on the following day. The plaintiff a lawyer filed originating summons seeking determination of the court and a declaration to the effect of the public statement on the ground that the Sultan's public statement is in violation of article 42 of the Federal Constitution in that the Sultan can only reject a petition for clemency after considering the advice of the Selangor Pardons Board and then applying his mind to the petition before him. The Court held that the statement was done in his personal capacity and not made in the course of or during the progress of a Pardons Board meeting. Therefore article 181(2) applies. Meanwhile in *Mobil Oil Malaysia Sdn. Bhd. v. Official Administrator, Malaysia*²⁰ the Court decided that immunity does not only apply to His Highness in person but it extends to His estate after he has died. In this case the Al-Marhum Sultan of Perak Sultan Idris al Mutawakkil billah Shah was the sole owner of a mining company. The plaintiff supplied diesel oil to the company but no full settlement was made during the life of the Al-Marhum Sultan. When the Al-Marhum Sultan passed away, his estate was placed under the Official Administrator of Malaysia the defendant. Now the plaintiff claimed against the estate of the Al-Marhum Sultan for the outstanding debt of \$68, 132.86. The issue is whether the plaintiff can claim against the Official Administrator of the Al-Marhum Sultan's estate. The court held that the nature of the prerogative of immunity from all legal process was personal to the Al-Marhum Sultan and could not be transmitted to the administrator of his estate i.e. Official Administrator. This is because both from the Federal Constitution article 181(2) and the Laws of the Constitution of Perak article XI of Part II, no legal proceedings of whatever nature, criminal or civil could have been maintained against the Al-Marhum Sultan.

Third, the head of state appoints the head of government. In appointing the head of government, the head of state is bound by the results of the parliamentary federal election and must conventionally appoint the head of the party which is clearly the winner. In *Stephen Kalong Ningkan v. Tun Abang Haji*

19. [1988] 1 M.L.J. 64.

20. [1988] 1 M.L.J. 518.

Openg & Tawi Sli²¹ the plaintiff was dismissed by the Governor the first defendant from the post of Chief Minister and Penghulu Tawi Sli the second defendant was appointed as the Chief Minister. The plaintiff brought the action in the High Court asking for a declaration that the dismissal was unconstitutional. One of the issues in this case is on the question of the power of the Governor of Sarawak as to appoint and dismiss the Chief Minister. The learned judge held that a Governor has limited discretionary power, because, in appointing a Chief Minister he must be a member of State Council who in his judgment is likely to command its confidence.²² Tun Suffian, in his book written in 1972, opines that the Yang di-Pertuan Agong, when appointing a Prime Minister, is not, however, completely free,²³ because, the Federal Constitution prescribes the conditions when a person can be the Prime Minister, namely, he must be a member of the House of Representatives and one who is likely to command the confidence of the majority of the members of that House,²⁴ and he must not be a citizen by naturalization or by registration under article 17.²⁵ This discretion will, therefore, only be important when the majority party has no established leader but even then the prudent course would be to wait until the majority leader had been chosen in the party room.²⁶

In the recent case of Tun Datu Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2)²⁷ the plaintiff asked for a declaration that the removal of the plaintiff and the appointment of the second defendant as the Chief Minister by the Governor the first defendant, were ultra vires the Constitution of Sabah and claimed an injunction to restrain the second defendant from exercising the powers of the Chief Minister.

In this case the State election was held on April 21, 1985. Before the result of all constituencies were announced, at about 5.30 a.m. on April 22, the plaintiff took the prescribed oath of office of a Chief Minister before the first defendant. Subsequently, he appointed five nominated members to enable him

21. [1966] 2 M.L.J. 187.

22. Distinguish that case with case Adegbenro v. Akintola [1963] A.C. 614.

23. Tun Mohamed Suffian bin Hashim, *An Introduction to the Constitution of Malaysia*, Second ed., Government Printer, Kuala Lumpur, 1976, p. 23.

24. Federal Constitution, A. 43(2) (a).

25. Ibid., A. 43(7).

26. F.A. Trindade, *The Constitutional Position of The Yang di-Pertuan Agong*, in Tun Mohamed Suffian, H.P. Lee and F.A. Trindade (eds.), *supra*, p. 110.

27. [1986] 2 M.L.J. 420.

to form a government.²⁸ When all the results were announced it was found that the second defendant's party had secured a majority. On the same day the first defendant revoked the appointment of the plaintiff as the Chief Minister. At about 8 p.m. on the same day the first defendant appointed and swore in the second defendant as the Chief Minister. One of the important issues raised in this case is whether nominated members can be taken into account, by the Governor, in making an appointment of the Chief Minister under article 6(3) of the Sabah Constitution. The court held that the head of state (Governor) may not constitutionally take into account any nominated member for the purpose of making his judgment in the choice of a Chief Minister; nor can be constitutionally take any of them into consideration for the purpose of inflating the seats of a party having a minority of elected seats in order to secure a majority over the party with the majority of elected seats. If he does so, such a judgment would not be in accordance with the requirements of article 6(3) of the Sabah Constitution.

Since only the Sabah constitution provides for such nominated members in the Assembly, it is submitted that for the purpose of an appointment of a Chief Minister, article 6(3) should be read with the word 'elected' in between of the words 'the' and 'members'; so it reads "... who in his judgment is likely to command the confidence of the majority of the elected members of the Assembly", or the provision for nominated members should be repealed.

Although both cases interpreted the State Constitutions one of Sarawak and the other of Sabah regarding the appointment of a Chief Minister by the Governor, it is submitted that both interpretations are applicable to the power of the Yang di-Pertuan Agong in appointing the Prime Minister and the Rulers in appointing their Menteri Besars as article 6(3) is in pari materia with article 43(2) and section 2(2) (a) of Eighth Schedule of the Federal Constitution.²⁹

Fourth, the head of the government 'appoints' minister. In this situation the Prime Minister has full prerogative power to choose and submit the names to the Yang di-Pertuan Agong. The Yang di-Pertuan Agong has no choice but to accept the advice tendered by the Prime Minister.³⁰ Conventionally, the Prime Minister selects the cabinet members from among the ruling political

28. The Sabah State Constitution allows the Governor acting on advice of the Chief Minister to appoint nominated members to be the member of the Assembly, see the Constitution of the State of Sabah, A. 6(3).

29. For further discussion of the power of the Head of State in appointing and dismissing the Prime Minister or a Chief Minister, see Ahmad Ibrahim, *Power to Dismiss the Prime Minister or a Chief Minister in Malaysia*, (1977) LVIII The Parliamentarian, p. 34.

30. Federal Constitution, A. 43(1) (b).

party leaders who have been elected in the general election and having influence over members in the party and country.³¹ The Prime Minister and the ministers form the Cabinet as the chief organ of the Federal Government.

In England there is no statutory requirement that a member of the Cabinet must be a member of either House but by convention they are members of one House and most of them are from the House of Commons. In contrast in Malaysia the Federal Constitution requires a member of the Cabinet to be a member of either House.³² Most members are members of the House of Representatives.³³ Therefore, a minister is also a member of Parliament.

The Prime Minister can reshuffle his colleagues throughout his period of office. Although all ministers, other than the Prime Minister hold office during the pleasure of the Yang di-Pertuan Agong³⁴ but in practice all ministerial offices are regarded as being continuously at the Prime Minister's disposal. Unlike in England where the Prime Minister has no need to take the advice of the Head of State (Queen or King) to dismiss a minister but can simply call for the colleague's resignation, in Malaysia the power of appointment and of revocation are in the hand of the Yang di-Pertuan Agong upon the advice of the Prime Minister.³⁵

The role of the Prime Minister in the British Parliamentary cabinet system has been traditionally referred to as 'first among equals'. But in actual fact in recent time the role and power of the Prime Minister are seen as considerably greater than that.³⁶ Many countries have adopted the Westminster-style of government, so some of the Prime Ministers had been in extremely powerful positions. The evidence for this may be seen in the appointment of ministers; even though some of them have secured important posts such as vice-president or member of the supreme council of the ruling party in the party election; yet they have been dismissed from being the minister or pressure is made for them to resign or the ministry is abolished to ensure the minister in charge of that

31. O. Hood Phillip, *Reform of the Constitution*, Chatto & Windus Charles Knight.

32. Op. cit., A. 43(2) (b).

33. In the cabinet reshuffle which was made on May 19, 1987, there are twenty four cabinet members and all of them are the members of the House of Representatives, see *New Straits Times*, May 20, 1987, pp. 1-3.

34. Op. cit., A. 43(5).

35. Ibid., A. 43(2) (b) and (5).

36. Gregory S. Mahler, *The Westminster Model Away From Westminster: Is It the Only Way?*, (1986) LXVII *The Parliamentarian*, p. 106.

ministry is no longer in the government. In the UMNO³⁷ General Assembly which was held on April 24 to 26, 1987 Dr. Mahathir Mohamad the Prime Minister retained his post as the UMNO President³⁸ by a marginal vote of 43 securing 761 votes against his direct challenger Tengku Razaleigh Hamzah who was also the Minister of Trade and Industry who secured 718 votes.³⁹ Less than one month later as a result of his cabinet reshuffle on May 20, five ministerial posts had been vacated: two resigned⁴⁰ and three were sacked⁴¹; and four deputy ministers were also sacked.⁴² All of them were said to have challenged his authority as party president.⁴³

Fifth, the Cabinet is a collective body. It means that the state is governed by a group rather than an individual. In a parliamentary cabinet system the notion of collective responsibility has two aspects. The first one is that a single person has been replaced by a collective body where all national policies must be decided and agreed upon collectively by all cabinet ministers because one of the main functions of the Cabinet is to make final determination of the national policy. The second one is that the Cabinet is collectively responsible to the federal legislature where public confidence is entrusted in it. This is a form of accountability.

The first aspect is supported by the argument that whatever policy is prescribed by Parliament is in fact carried out by the Cabinet. But the fact has proved the contrary where through the Government's tight control of its party in the House of Representatives, Parliament has been forced to prescribe what the Government wants. Since the Prime Minister is appointed from the leader from the strongest party in the Government and naturally the composition of the Cabinet is formed from his party's members, it has been alleged that it is

37. UMNO is the backbone of the ruling coalition party in Malaysia.

38. Being the UMNO President, conventionally, he would become the Prime Minister of Malaysia.

39. *New Straits Times*, April 25, 1987, p. 1.

40. Tengku Razaleigh Hamzah, Minister of Trade and Industry and Datuk Rais Yatim, Minister of Foreign Affairs, see *ibid.*, April 30, 1987.

41. Datuk Abdullah Ahmad Badawi, Minister of Defence who is also the UMNO Vice-President; Datuk Shahrir Abdul Samad, Minister of Welfare and Datuk Ajib Ahmad, Minister in the Prime Minister's Department (both are the UMNO Supreme Council members), see *ibid.*, May 1 and 2, 1987, pp. 1 and 1.

42. Datuk Radzi Sheikh Ahmad, Deputy Primary Industries Minister; Datuk Sheikh Kadir Sheikh Fadzil, Deputy Foreign Affairs Minister; Datuk Zainal Abidin Zain, Deputy Energy, Telecommunications and Posts Minister and Hajjah Rahmah Othman, Deputy Transport Minister, see *ibid.*

43. For full picture of the development of the UMNO General Assembly which was held on April 24-26, 1987, see *Far Eastern Economic Review*, May 7, 1987, pp. 12-15 and May 28, 1987, p. 14.

the Cabinet which controls Parliament and governs the country.⁴⁴ All important matters involving national policy, except membership of the Cabinet itself, are for the Cabinet to make the final determination and decision. In practice the Prime Minister's power has influenced the Cabinet. Apart from his power and prerogative in their appointments and dismissals, he also has discretion to enlarge the membership of the Cabinet. Although it is not suggested that the increase of the Cabinet members is to favour the power of the Prime Minister but it is presumed to be the motive behind the increase.⁴⁵ This is because any increase would comprise his supporters to ensure his victory in government policy.

Although the Prime Minister is in theory merely first among equals, there has been a trend towards Prime Ministerial power where most of the Cabinet Ministers become 'yes ministers'. Thus when a policy is tabled for discussion at a meeting in either Parliament or the Cabinet they do not raise any contrary view over certain programmes or projects although in their opinions they do not give much benefit but may rather be detrimental. There were some instances where ministers resigned from ministerial posts as they disagreed with the Prime Minister's policy. The resignation of the former Deputy Prime Minister Tun Dr. Ismail bin Abdul Rahman during the administration of the first Prime Minister Tunku Abdul Rahman Putra Al Haj was as a result of the Tunku's policies which gave too much favour to non-Malays. Consequently after May 13, 1969 in which a racial riot occurred, Tunku was forced to resign by the UMNO young leaders.⁴⁶ It was alleged that the position of Malays was unprotected and worse than the colonial period.⁴⁷ In the recent resignation of Dato' Musa Hitam the former Deputy Prime Minister was said to have disagreed with the Prime Minister Datuk Sri Dr. Mahathir's policies in certain prestigious projects, for example the new car project, the Penang bridge and some others.⁴⁸ It was also had been alleged that his resignation is as a result of some mismanagement

44. See D.N. Chester, *Who Governs Britain?*, (1961-1962) XV *Parliamentary Affairs*, p. 519.

45. O. Hood Phillip, *supra.*, 33.

46. Stuart Drummond, *Malaysia: The New Generation Takes Over*, (1981) *The World Today*, p. 318; see also Harold Crouch, *The UMNO Crisis: 1975-1977*, in Harold Crouch, Lee Kam Hing & Michael (eds.), *Malaysian Politics and the 1978 Election*, Oxford University Press, Kuala Lumpur, 1980, p. 13.

47. For example in education at the University of Malaya in academic session 1959/60 out of 332 students there were only 62 Malays. Five years later in session 1963/64 out of 1736 there were only 358 Malays. Ten years later in session 1968/69 out of 5566 there were only 1825 Malays. Most of the Malay students were in the Social Sciences Faculty. In that session also there was only 0.32% were studying engineering and 5.12% were studying medicine. For further information, see *Tan Sri Dr. Haji Abdul Majid Ismail Report*, Government Printer, 1971.

48. See *New Straits Times*, April 23, 1987, pp. 2-3.

over national problems when he was the Acting Prime Minister. One of them was the fighting between a group of Muslims and the police force in Baling, Kedah as a result of his direction as the Home Affairs Minister. It was reported that this matter was not brought in the Cabinet meeting before he issued such direction.⁴⁹

Since the Prime Minister in Malaysia and also in other countries has become so powerful in recent time it was argued that there no longer 'Cabinet Government' but 'Prime Ministerial Government'. National policy was not usually initiated by the Cabinet. Decisions tend to be taken by either the Prime Minister alone or by him in consultation with one or two ministers or else by cabinet committees or ad hoc meetings of the departmental ministers concerned. Thus, recently, there is evidence that the final transformation of Cabinet Government into Prime Ministerial Government has taken place.⁵⁰ It may be said that the power of the Prime Minister is not as powerful as the President of the United States of America who has legislative veto, but it tends to be.⁵¹

In contrast to the first notion of the cabinet as a collective body i.e. collective decision-making, the second notion is the Cabinet as collectively responsible to Parliament. The basis for this responsibility is that Cabinet decisions are confidential. The word 'responsible' has a variety of meanings and responsibility takes a number of forms.⁵² Within a democratic state, those who govern should be accountable or answerable to those whom they govern. Since direct government by the people is impracticable, the constitution provides a framework within which the government may be responsible to the representatives of the people.

Conventionally, ministerial responsibility can be divided into two categories; first, individual responsibility and second, collective responsibility. The former applies to each individual minister requiring him to be responsible for his personal acts which he orders or authorises to be done or in which he actively participates, the general conduct of his department and acts done

49. Ibid., April 17 and 23, 1987, pp. 7 and 2 respectively.

50. See G.W. Jones, *The Prime Minister's Power*, (1964-65) *Parliamentary Affairs*, p. 167; A.H. Brown, *Prime Ministerial Power*, (1968) *Parliamentary Affairs, Part 1 and 2*, pp. 28 and 96; and for comprehensive study of the cabinet system, see John P. Machintosh, *The British Cabinet*, First ed., Steven & Sons, London, 1962.

51. See Peter W. Rodino, *supra*.

52. F.A.H. Birch, *Representative and Responsible Government*, George Allen and Unwin, London, 1964, pp. 17-19; see also Herbert J. Spiro, *Responsibility in Government: Theory and Practice*, Van Nostrand Reinhold Company, New York, 1969, pp. 14-20; Max Beloff and Gillian Peele, *The Government of the UK: Political Authority in a Changing Society*, Second Ed., Weidenfeld and Nicolson, London, 1985, p. 33.

(or left undone) in their name by their departmental officials.⁵³ The latter applies to Government or Cabinet.⁵⁴ It requires that all ministers be jointly responsible as a team to Parliament. It also implies that all Cabinet Ministers assume responsibility for Cabinet decisions and action taken to implement those decisions. This means that individual ministers may not in public express views that contradict or criticise government policy nor may they vote against government policy.⁵⁵ A minister may disagree with a decision or with the manner of its implementation, but if he wishes to express dissent in public he should first resign. If a vote of no confidence against the government is carried out in Parliament, the whole Cabinet must resign. In this way the government leaves office.

In practice, the convention of ministerial responsibility is extremely difficult for Parliament to enforce. The main reason for this is the emphasis that has been given to party solidarity and party discipline so that members of Parliament are obliged to follow the wishes of the party rather than to vote according to their own conscience.⁵⁶ Thus, the convention of ministerial responsibility has shortcomings in the political system where the government of the day has a large majority. It purports to provide an effective sanction for government blunders, but it may not do so.

53. Harry Street and Rodney Brazier (eds.), *supra.*, p. 187. The resignation of Datuk Musa Hitam the former Deputy Prime Minister and who was also the Home Affairs Minister in early 1986, apart from that he had lost the confidence in the Prime Minister and his (Musa) mismanagement over Baling issue, he was also alleged of being responsible for 'handing over' the Government of Sabah to the Parti Bersatu Sabah (PBS) under Datuk Joseph Pairin Kitingan following PBS's close victory in the Sabah election on May 21, 1985, while the Prime Minister who was in London; see *New Straits Times*, April 17, 1987, p. 7.

54. See E.C.S. Wade and A.W. Bradley, *supra.*, pp. 107-109.

55. Since Merdeka there were several ministers who resigned as their disagreement with the Prime Minister's policy and they criticised the policy publicly. There were among others: (1) Abdul Aziz Ishak who resigned as Minister of Agriculture in September 1962; (2) Abdul Rahman Talib who resigned as Minister of Education in December 1964; (3) Datuk Musa Hitam who resigned as Deputy Prime Minister and Minister of Home Affairs in early 1986; (4) Tengku Razaleigh Hamzah who resigned as Minister of Trade and Industry on April 29, 1987; and (5) Datuk Rais Yatim who resigned as Minister of Foreign Affairs on May 7, 1987. As regard to Tengku Razaleigh and Datuk Rais both resigned after they failed to secure posts in the UMNO General Assembly on April 24-26, 1987. Both were considered as the direct challengers to Datuk Sri Dr. Mahathir's leadership as both were in the same team and Dr. Mahathir in another. But in the cases of Datuk Abdullah Ahmad Badawi, Datuk Shahril Abdul Samad, Datuk Ajib Ahmad and the other four deputy ministers, they did not resign even though they opposed the Prime Minister's leadership openly and publicly, but they were sacked by the Prime Minister before the cabinet reshuffle on April 30, 1987 (cabinet reshuffle was made on May 19, 1987). See *New Straits Times*, April 30, p. 1; May 1, p. 1; May 2, pp. 1 and 2.

56. M. Puthucheary, *Ministerial Responsibility in Malaysia*, in Tun Mohamed Suffian, H.P. Lee and F.A. Trindade (eds.), *supra.*, p. 124.

In many of the newly independent Commonwealth countries, the Westminster convention has been spelt out in some details, with modification, in the text of the constitution.⁵⁷ In Malaysia this convention has been enacted in the Federal and the State Constitutions. The Federal Constitution provides, *inter alia*, the Cabinet shall be collectively responsible to Parliament. If the Prime Minister ceases to command the confidence of the majority of the members of the House of Representatives, then, unless at his request the Yang di-Pertuan Agong dissolves Parliament, the Prime Minister shall tender the resignation of the Cabinet.⁵⁸ This pattern is repeated in the State Constitutions.⁵⁹ In *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli*,⁶⁰ one of the issues discussed by the court is how a vote of no confidence is to be assessed. In that case, on June 16, 1966, the first defendant the Governor of Sarawak received a letter dated June 14 signed by twenty one members of the State Council to the effect that the writers had no longer any confidence in the plaintiff the Chief Minister. Relying upon this letter Acting Private Secretary to the Governor, upon request by the first defendant, wrote a letter dated June 16, to the plaintiff that the first defendant required him to be present at Astana (palace) and to tender his resignation. On the following day June 17, the plaintiff replied to that letter. On the same day the first defendant wrote another letter stating that, "I am now appointing the Honourable Penghulu Tawi Sli A.B.S. (second defendant) Chief Minister of Sarawak with effect forthwith". On the same day also the plaintiff wrote a letter to the first defendant stating that twenty one members could not be the majority of forty two and his removal would be questioned in the court. On the same day, the Sarawak Government Gazette Extraordinary announced that the plaintiff had ceased to be the Chief Minister and then the second defendant had been appointed. The plaintiff brought this matter to the High Court at Kuching for a declaration that he was still Chief Minister and for an injunction restraining the second defendant from acting as the Chief Minister.

In answering the question of lack of confidence, the court referred to the case of *Adegbenro v. Akintola*⁶¹ where the Federal Supreme Court of Nigeria had held that the constitutional method of assessing lack of confidence required a decision or resolution on the floor of the House but where the Privy Council took an opposite view and held that there was no limitation as to the material

57. For some details, see S.A. de Smith, *The New Commonwealth and Its Constitutions*, Steven & Sons, London, 1964, ch. 3.

58. Federal Constitution, A. 43(4).

59. *Ibid.*, Eighth Schedule, ss. 1 and 2.

60. *Supra.*; see also Yash Ghai, *supra*.

61. [1963] 3 W.L.R. 63.

by which lack of confidence should be assessed. In the view of the learned judge, the Privy Council's judgment relating to the Constitution of Nigeria did not apply to the Constitution of Sarawak on the grounds that: (i) in Akintola's case there was more than half the House who no longer supported the premier; (ii) the measurement in Nigeria was a measurement of 'support' not of 'confidence'. The Sarawak Constitution is dated subsequent to the decision in Akintola's and the 'confidence' of majority of members being a term of art may imply reference to a vote such as a vote on a major issue; (iii) in Nigeria it was not disputed that the Governor had express power to remove the premier from office if he no longer commanded support; (iv) in Nigeria the Governor had express power to assess the situation 'as it appeared to him'; and (v) in Nigeria all ministers including the premier had office 'during the Governor's pleasure' although there was an important proviso to this. The learned judge therefore held that lack of confidence may be demonstrated only by a vote in the State Council (House). Those who put their name on a 'Top Secret' letter may well hesitate to vote publicly in support of their private views. Therefore a signed letter attached together with the names of the State Assemblymen expressing no confidence in the Chief Minister to the Governor did not constitute a vote of no confidence. The vote of no confidence must be taken on the floor of the House. Based on the above grounds the plaintiff was reinstated.

The sixth feature is that the head of government may advise the head of state to dissolve Parliament. There are two situations when Parliament would be dissolved. First, when Parliament's life has expired. In Malaysia, Parliament (House of Representatives) dissolves automatically after five years from the date of its first meeting.⁶² Second, when the Yang di-Pertuan Agong exercises his discretion to dissolve Parliament upon the request by the Prime Minister before the expiration of five years, but he may withhold the consent of such request.⁶³

Herman Finer⁶⁴ gives three circumstances when a dissolution is thought advisable. First, when the position of the parties is such as to produce a deadlock, preventing legislation which any party liable to be called on to be a government conceives necessary, or when there is such criticism of the administration that the government can no longer preserve its dignity. Second, when a government sees convincing signs that it is no longer trusted by the country or is unsure of its authority and following. Third, when a policy of fundamental importance is newly evolved and there has been no opportunity of consulting the country.

62. Federal Constitution, A. 55(3).

63. Ibid., A. 42(2) (b).

64. Herman Finer, *The Theory and Practice of Modern Government*, Fourth ed., Methuen & Co. Ltd., London, 1961, p. 393.

The first two circumstances are quite relevant to Malaysian politics especially in the general election which was held in August 3 and 4, 1986, after the leadership of Dr. Mahathir Mohamad was severely criticized by his party colleagues. During his administration since 1981, there were several prestigious projects which have been considered as luxurious ones, for example, the Penang Bridge, the Dayabumi complex and the national car - PROTON SAGA - which were started and completed during his administration.⁶⁵ The resignation of the former Deputy Prime Minister had shown that his administration had faced a critical problem. In addition, UMNO's rifts manifested clearly the problems when some of his senior ministers opposed him publicly. The coalition party's problems also forced him to advise the Yang di-Pertuan Agong to dissolve Parliament much earlier than was scheduled to complete its term until mid-1987.⁶⁶

There are two important legal issues relating to the power of the Yang di-Pertuan Agong in relation to the dissolution of Parliament. First, whether the Yang di-Pertuan Agong would or would not dissolve Parliament without prior advice or request from the Prime Minister. Second, whether the Yang di-Pertuan Agong would or would not refuse to dissolve Parliament upon the advice or request by the Prime Minister. As regards the first issue, article 40(2) (b) provides that the Yang di-Pertuan Agong may exercise his discretion to withhold consent to dissolve Parliament after only a request was made by the Prime Minister. The article does not say that the Yang di-Pertuan Agong has discretion to dissolve or not to dissolve Parliament. The condition necessary, before any exercise of his discretion to withhold consent is where there was a request to dissolve. The request must come from the Prime Minister. In other words he has discretion to withhold a consent to request for the dissolution but may not take the initiative and dissolve on his own without request.⁶⁷ It is submitted, the Yang di-Pertuan Agong has no discretionary power to dissolve Parliament without prior request or advice from the Prime Minister. If the Yang di-Pertuan Agong still wishes and is keen, for some purpose to dissolve Parliament, the proper solution is that by summoning the Prime Minister to tender his advice or make a request to the Yang di-Pertuan Agong. Upon such advice or request, then, the Yang di-Pertuan Agong can exercise accordingly. If, upon summons, there still no advice or request from the Prime Minister, it is submitted, the proper solution is a motion of a vote of no confidence be passed.

65. Although these projects, except the national car (PROTON SAGA), had been suggested before his administration but all of them were carried out and completed during his administration, see *New Straits Times*, April 23, 1987, pp. 2 and 3.

66. See Stuart Drummond, *Malaysia Defies the Auguries*, (1986) *The World Today*, p. 165.

67. L.A. Sheridan & H.E. Groves, *The Constitution of Malaysia*, Malayan Law Journal (Pte.) Ltd., Singapore, 1979, p. 156; see also Douglas v. Verney, *The Analysis of Political System*, Routledge & Kegan Paul Ltd., Third Impression, London, 1965, p. 31.

As regards the second issue the Yang di-Pertuan Agong normally dissolves parliament upon a request made by the Prime Minister. There has been no such incident in the independent Malaysia constitutional-political history that the Yang di-Pertuan Agong did not give consent to the dissolution when a request was made by the Prime Minister. Refusal of the request tends to become direct confrontation between the Head of State and the Head of Government. In *Stephen Kolong Ningkan v. Tun Abang Haji Openg & Tawi Sli*,⁶⁸ the court held that a Chief Minister may advise a dissolution even though he has not as yet lost the confidence of the Council Negeri (House) and in such circumstances the Governor's refusal to dissolve might be conventionally unconstitutional, although not illegal.

The Head of State in England, may properly refuse a Prime Minister's request for a dissolution if there are substantial grounds for believing:⁶⁹ (1) The existing Parliament is still vital, viable, and capable of doing its jobs; (2) A general election would be detrimental to the national interests; and (3) It is possible to find another Prime Minister who could carry on the government for a reasonable period with a working majority.

Should the Yang di-Pertuan Agong still refuses to dissolve upon the request by the Prime Minister, it is submitted, the Prime Minister should tender his resignation. This is because historically the Prime Minister often requested earlier dissolution because his government has faced a variety of problems. Alternatively, if he still refuses to resign, it is submitted, it would be justified for the Yang di-Pertuan Agong to dismiss him.⁷⁰

EFFECTS OF THE RELATIONSHIP

In practice, if not in theory, the responsible executive exercises leadership in developing a federal legislative programme. This can be seen from various positions. First, Parliament is the focus of power in the political system. All the state representatives are in Parliament. The Yang di-Pertuan Agong is in Parliament, the Ministers are in Parliament and politicians are in Parliament.

Although in theory the supreme institution is the Federal Constitution all the state sources of power are in Parliament. A person cannot be a parliamentarian without being a politician (except the Yang di-Pertuan Agong).

68. *Supra*.

69. Harry Street and Rodney Brazier, *supra*., p. 130; see also E.C.S. Wade and A.W. Bradley, *supra*., p. 240.

70. The first Prime Minister Tunku Abdul Rahman relinquished his premiership after being forced by the young UMNO leaders and university students as a result of the blackest racial riot occurred on May 13, 1969. Meanwhile the third Prime Minister Tun Hussein Onn relinquished his premiership in early 1981 as a result of his unwell health.

Even to be a member of the Senate he must be an active politician supporting the existing government in power although the Federal Constitution provides that senators are to become the representatives of certain professions or groups⁷¹ yet their appointments are based on political bias. How high his academic qualification may be, without being an active politician, a person has no hope to be a parliamentarian. Parliament becomes the ultimate goal among the power seekers as it has power to make, amend, repeal all laws including the Federal Constitution itself.⁷²

Second; Does Parliament control the government or does the government control Parliament? To some extent the same persons belong to the legislative and the executive branches of government. There is, first, the Yang di-Pertuan Agong, who is at the head of the executive⁷³ (in theory) and who is part of Parliament.⁷⁴ A very important fact is that the Prime Minister must be a member of the House of Representatives and his cabinet ministers, the deputy ministers and the parliamentary secretaries who are the most important persons in the executive branch of government, shall also be members of either House of Parliament.⁷⁵

When Parliament is in session and a government has been formed, Parliament, or more specifically the House of Representatives controls Parliament and ultimately controls the government. In other words it is commonly asserted that the legislature controls the executive. But there is another sense in which the executive often appears to control the legislature where the Cabinet formulates the policy and Parliament must either accept the policy or risk dissolution. The essence of it all, is that one party (coalition party) normally has an overall majority in the House of Representatives. If that party has an overall majority, then the government will be formed from that party and the Cabinet contains the leaders from that party. Party discipline today is much stronger and so a government with a working majority may impose the policy on Parliament and expect that, on major issue at least, the party to vote in its favour. Therefore, the government is able to dominate in Parliament.⁷⁶

Third, legislative programmes. Under the cabinet system, the ministers heading the executive department are entrusted with the task of initiating and

71. Federal Constitution, AA. 4 and 159.

72. Ibid., A. 45(2)

73. Ibid., A. 39.

74. Ibid., A. 44.

75. Ibid., AA. 43(2) (a) and (b), 43A(1), and 43B(1).

76. W. Ivor Jennings, *supra.*, p. 183.

drafting all important Bills, and steering them through the legislature. Since the government is able to dominate Parliament with its majority and its ability to shape the business of the House of Representatives, the government is able to ensure that all of its Bills become law. Not only can the government be certain of a majority for its legislative proposals, but it also can control the procedure of the House in order to pass legislation in its own way and at its own time. Thus, in examining and revising the Cabinet's proposal, the standing legislative committees which are organised along party lines and under the control of the Cabinet, limit themselves to making minor corrections in detail, not involving open conflict with the executive.

Much of the legislative output consists of subsidiary or delegated legislation made by someone other than Parliament. The recipients of these powers are ministers or government departments. In fact, the number of subsidiary legislation produced in a year exceeds that of primary (parent) legislation.

CONCLUSION

It is on basis of the above discussions that the closeness of relationship between these two branches of the Federal Government may be seen in the legislative process. Legislation is largely a function of government or Parliament and is used by the government as a means of securing those changes in the law which it wishes. This could be evidenced in the amendment to article 66 of the Federal Constitution in 1984 where before the Constitution (Amendment) Act (No. 2) 1984⁷⁷ (hereafter referred to as '1984 Act'), which took effect on January 29, 1985 for a Bill to become law it was necessary that it be passed by both Houses of Parliament⁷⁸ and be assented to by the Yang di-Pertuan Agong.⁷⁹ There was no time limit for how long the Yang di-Pertuan Agong could give consent. Even from the literal wording of article 66(1) the Yang di-Pertuan Agong had the power whether to give assent or not.

Article 66 now provides that a Bill presented to the Yang di-Pertuan Agong for his assent shall be assented to by him within thirty days after it is presented to him. However, in the case of a Bill which is not a Money Bill, he may within such period of thirty days return such Bill to the House in which the Bill had originated with a statement of reasons for his objection to the Bill, or to any provision of the Bill. If the Yang di-Pertuan Agong thus neither of these things within the specific period of thirty days, the Bill shall become law at the expiration of that period, in like manner as if he had assented to the Bill.

77. Act No. A585 of 1984.

78. Except in the case of Money Bills; see; *op. cit.*, A.68.

79. *Ibid.*, A. 66.

Where the Yang di-Pertuan Agong returns a Bill which is not a Money Bill to the House in which it originated with a statement of the reasons for his objection to the Bill, or to any provision of the Bill, the House shall proceed to reconsider the Bill as soon as possible. If after such reconsideration the Bill is passed, with or without amendment, it shall be sent together with the objection to the other House, by which it shall likewise be reconsidered. If the Bill is similarly approved by members of that House, the Bill shall again be presented to the Yang di-Pertuan Agong of his assent. The Yang di-Pertuan Agong shall give his assent within thirty days after the Bill is presented to him. If the Yang di-Pertuan Agong fails to assent to the Bill within the specified period of thirty days, the Bill shall become law at the expiration of that period, in the like manner as if he had assented to the Bill. The Bill which thus becomes law, shall not come into force until it has been published, without prejudice, however, to the power of Parliament to postpone the operation of any law or to make laws with retrospective effect.

The Cabinet as the chief organ in government has very wide powers both legislative and executive.⁸⁰ It dominates Parliament and the Federal Government. The late Professor de Smith described the Prime Minister and his Cabinet in England before 1917, "(H)e (the Prime Minister) is the keystone of the Cabinet arch, a sun around which planets revolve an elected monarch, a President, or what you will ...".⁸¹#

80. Legislative power in the sense that all Cabinet ministers are empowered to make subsidiary legislation; see Harry Stret and Rodney Brazier (eds.), *supra.*, pp. 171-180; see also E.C.S. Wade and A.W. Bradley, *supra.*, pp. 256-261.

81. Harry Street and Rodney Brazier (eds.), *ibid.*, p. 171.

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