THE YANG DI-PERTUAN AGONG'S PREROGATIVE
IN THE APPOINTMENT OF THE PRIME MINISTER

1. For over 50 years, the Yang di-Pertuan Agong never had a free hand in the choice of Prime Minister. Since 1957, the Alliance coalition and after 1972 the Barisan Nasional coalition always enjoyed commanding majorities in the Dewan Rakyat and 5 of its leaders became Prime Ministers. This practice continued in March 2008 when the Yang di-Pertuan Agong invited Abdullah Badawi to form his second government. However, one month after the historic general elections it is appropriate to consider the viability of Abdullah's government. Thus having regard to the political uncertainties surrounding Abdullah's leadership of UMNO (which automatically results in the leadership of Barisan Nasional and the Prime Ministership), the challenge by Tengku Razaleigh, the constant public attacks by former UMNO leader and former Prime Minister Dr Mahathir, the narrow margin by Malaysian standards of Barisan's victory with the opposition needing just another 30 seats to form a government, the possibility of defection by Barisan Members of Parliament (which is not an illegal practice in Malaysia), the political acumen of Anwar Ibrahim and his right to return to Parliament have led to much public speculation that a motion of no confidence may be tabled against Prime Minister Abdullah after Parliament convenes on 28th April 2008. As Malaysia enters uncharted waters, it is vital that the constitutional position becomes clear, particularly when some quarters have expressed fear as to whether our system of government can cope with such political instability. No constitutional issue arises if a confidence motion is not tabled or is defeated.

The Federal Constitution

2. What is the constitutional position if the motion of no confidence is carried. The inquiry begins with the status of the Yang di-Pertuan Agong under the Federal Constitution. Article 32 (1) provides that the Yang di-Pertuan Agong shall be the Supreme Head of the Federation, shall take precedence over all persons in Malaysia and shall not be liable to any proceedings whatsoever except in the Special Court. The executive authority of the Federation vests in the Yang di-Pertuan Agong pursuant to Article 39 of the Federal Constitution and he is the Supreme Commander of the nation's

armed forces under Article 41. That the Yang di-Pertuan Agong is a Constitutional Monarch is enshrined first, in Article 40(1) which provides that in the exercise of his functions under the Constitution or federal law, the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet, and secondly in Article 40 (1A) that in all such cases the Yang di-Pertuan Agong shall accept and act in accordance with such advice. In this category of decisions, which form the vast majority, the actual decision maker is the Prime Minister, Cabinet or other person who takes a decision in the name of the King. In contrast, Article 40 (2) states that the Yang di-Pertuan Agong "*may act in his discretion in the performance of the following functions, that is to say:-*

(a) *the appointment of a Prime Minister;*

(b) *the withholding of consent to a request for the dissolution of Parliament;*

(c) *the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honour and dignity of Their Royal Highnesses, and any action at such a meeting,*

and in any other case mentioned in this Constitution."

Article 40 (2) accordingly specifies 3 types of decisions, and a fourth general category, which are personal to the Yang di-Pertuan Agong. They represent the constitutional convention of the royal prerogatives enjoyed by the British Monarch or the personal prerogatives of the Governor Generals of Canada and Australia and also described in those countries as "*reserve powers*".

3. Article 43 of the Constitution pertains to the Cabinet. Article 43 (2)(a) provides that the Yang di-Pertuan Agong shall appoint as Prime Minister "*a member of the House of Representatives <u>who in his judgment</u> is likely to command the confidence of the majority of the members of that House*", and who shall then advice the Agong on the appointment of the members of his Cabinet. Article 43(3) states that the Cabinet shall be collectively responsible to Parliament, thereby recognizing that Malaysia has a system of responsible government, that is, an Executive that is accountable to the Legislature. Article 43(4) states that 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.

4. On a plain and ordinary meaning of Articles 32, 39, 40 and 43, the following propositions of constitutional law can be made relating to the appointment by the Yang di-Pertuan Agong of a Prime Minister:-

(i) the Yang di-Pertuan Agong is the and exclusive sole appointing authority of the Prime Minister;

(ii) in the exercise of that solemn duty, the Yang di-Pertuan Agong is not required to take the advice of the outgoing Prime Minister or his Cabinet; neither is the Conference of Rulers (established under Article 38) involved in the decision-making process;

(iii) the discretion of the Yang di-Pertuan Agong is not absolute or without limits;

(iv) the Prime Minister must be a member of the House of Representatives (Dewan Rakyat); he cannot be a Senator. Thus, he must be an elected member of Parliament, and not an appointed member;

(v) Article 43 (7) prohibits a person who is a citizen by naturalization or by registration to be appointed Prime Minister;

(vi) there is no racial, religious or gender qualification: thus the office of the Prime Minister is not confined to a Malay/Muslim man.

(vii) there is no requirement for the candidate to be a member of a political party or coalition of parties, let alone be its elected or undisputed leader;

(viii) the candidate must be *"likely to command the confidence of the majority of"* the 222 members of the Dewan Rakyat, that is, at least 112 members of the lower house must support him;

(ix) the *"judgment"* (which connotes a more subjective element than *"opinion"*) that a candidate enjoys such majority support in the

Dewan Rakyat belongs solely and exclusively to the Yang di-Pertuan Agong;

(x) in making his decision the Yang di-Pertuan Agong can take into account political reality as it appears to him, political considerations are therefore relevant;

(xi) once the Yang di-Pertuan Agong exercises his independent judgment or personal discretion and appoints a person as Prime Minister, the Yang di-Pertuan Agong is functious officio (that is, he cannot immediately dismiss that person and appoint another person), and the Prime Minister upon such appointment must be given a reasonable time to govern and to test his popularity by a confidence motion in the Dewan Rakyat;

(xii) if the new Prime Minister after appointment is defeated on a no confidence motion, he and his Cabinet shall tender their resignation; the outgoing Prime Minister can also request the Yang di-Pertuan Agong to dissolve Parliament and hold fresh elections;

(xiii) if such a request is made, the Yang di-Pertuan Agong can decline, and can instead exercise his judgment under Article 43 (2) (a) to invite another person who in his judgment can form a administration which will command majority support in the Dewan Rakyat;

(xiv) only if the Yang di-Pertuan Agong is satisfied that no person can form a stable administration that would last for a reasonable period of time without being defeated on a no confidence motion should Parliament be dissolved; and

(xv) hence, the dissolution of Parliament and the calling of elections is a remedy of last resort, and should be avoided until and unless all other means of forming a government, including attempting to establish an all-party or national government fail. In reaching his

decision, the King can take into consideration the length of the remaining Parliamentary term: everything being equal, elections should be avoided if they have just been held and the will of the electorate made sufficiently clear.

The Reid Report

5. Although the Merdeka Constitution which was accepted by newly independent Malaya on 31st August 1957 has been amended on numerous occasions, the provisions relating to the appointment of Prime Minister have substantially remained intact. Indeed, they were modeled on the draft prepared by the independent Constitutional Commission chaired by Lord Reid, and which included Professor Ivor Jennings, the then leading constitutional law scholar in the Commonwealth and author of leading constitutional texts. Accordingly, the Westminister style of government based on parliamentary democracy in a constitutional monarchy which has characterized the British Constitution for at least 200 years influenced Lord Reid, Sir Ivor Jennings and the 3 other members of the Commission to draft their model constitution for Malaya, which in the material articles relating to the appointment of the Prime Minister, remain in the original form.

6. The relevant paragraphs of the Reid Report read as follows.

> *"58. The Yang di-Pertuan Besar will be the Head of the State (Article 27), but he must be a constitutional Ruler. He must therefore act on the advice of his Ministers with regard to all executive action. He will be a symbol of the unity of the country. ... The choice of the Prime Minister and the dissolution of Parliament should, we recommend, be his constitutional responsibility (Article 35), ..."*

> *"68. We recommend (Article 35) that it should be the responsibility of the Yang di-Pertuan Besar to appoint the Prime Minister of the Federation. The Prime Minister must be a member of the House of Representatives. The Yang di-Pertuan Besar would normally appoint the leader of the majority party in the House of Representatives because no one else would be likely to command the confidence of the House, but there may be occasions when it is doubtful who should be appointed, and we see no practicable alternative to leaving the Yang di-Pertuan Besar to choose the person whom he thinks most likely to command the confidence of the House of Representatives."*

"69. We recommend (Art. 47) that the duration of each Parliament should be five years subject to power of dissolution at any time within the life of the Parliament, and that the Constitutional responsibility for dissolving Parliament should rest with the Yang di-Pertuan Besar (Art 35 (b)) Experience has shown that there are substantial objections to the Prime Minister or Government of the day having unrestricted power to insist on a dissolution of Parliament. A Prime Minister may ask for a dissolution in various circumstances and it is not possible to define the circumstances in which his request ought to be granted. Normally the Yang di-Pertuan Besar would accept the advice of his Prime Minister but he should not be bound to do so in all cases. <u>He ought in a critical case to be free to decide what is in the best interests of the country</u>. We recommend (Art. 36) that if the Prime Minister ceases to command the confidence of the House of Representatives he must either vacate his office or ask for a dissolution. If the Prime Minister asks for a dissolution and the Yang di-Pertuan Besar refuses this request, then the Prime Minister must vacate his office. It will be open to a Prime Minister who vacates his office to suggest as his successor a member who he thinks will command the confidence of the House but it will rest with the Yang di-Pertuan Besar to decide whether he should accept this advice…."

[my emphasis]

The British Experience

7. Accordingly, it is proper to consider historical precedents of British monarchs inviting Prime Ministers to kiss hands, and form a government. Sir Ivor Jennings, writing on the British monarchy, observed:-

"The difficulty of explaining the process of government lies in the fact that it depends so much on intangible relationships which are more easily felt than analysed. This is particularly true of the Crown. On the one hand, it is easy to exaggerate the influence of the monarch by adopting a legalistic attitude and emphasizing the part played by the Crown in the theory of constitutional law. On the other hand, it is easy to minimize the royal functions by stressing the great trilogy of Cabinet, Parliament and People. The truth lies somewhere in between, but it is not a truth easily demonstrated, nor is it constant in its content. So much depends on private interviews which political scientists do not attend, and so much on the personalities of those who do attend".[1]

1 The British Constitution (4th Ed. 1961) Page 107, and referred to by Sultan Raja Azlan Shah in "*The Role of Constitutional Rulers in Malaysia*" published in the Constitution of Malaya – Further Perspectives and Development s edited by F.A. Trindade and H. P. Lee (1986) Page 79.

8. In contemporary United Kingdom the Queen's choice is not unfettered because all the British political parties now elect their parliamentary leaders thereby circumscribing such choice. As a result "*the monarch's choice, except in unusual cases, is in practice restricted to the person who seems most likely to have the support of a stable majority in the House of Commons, or, failing such a person, that politician who seems able to form an administration with a reasonable prospect of remaining in office. This will usually be the leader of the party which commands a majority in the House of Commons but if no party commands an overall majority, the party leader who is most likely to be supported by a working majority in that House may be called upon*".[2] Thus, the British system is very similar to ours.

(i) 1931 – Ramsay Macdonald

9. Twentieth century precedents in United Kingdom are of interest to Malaysia. In the May 1929 elections, the Labour Party won the highest seats, though not an overall majority, and Ramsay MacDonald[3] became Prime Minister of a Labour government. The Great Depression caused a great economic crisis, and in August 1931, Ramsay MacDonald submitted his resignation as Prime Minister of a Labour Government. He was immediately invited by King George V to form a National Government, including Conservatives and Liberals. The Labour Party refused to join the coalition. Ramsay MacDonald accepted the invitation and became Prime Minister of a National Government, consisting of Conservatives and Liberal members. The Labour Party accused him of treachery and expelled him. The National Government remained in office until June 1935. King George V's unique role in crafting the National Government is brilliantly captured by his biographer:

> "*Next morning (24th August 1931) at 10 o' clock when Prime Minister MacDonald, Baldwin (Conservative leader) and Samuels (Liberal leader) assembled in the Palace, the Prime Minister repeated his by now familiar litany; indeed, he had the resignation of the entire Cabinet in his pocket. For the third time in 24 hours, the King replied that it was out of the question. He told MacDonald that by remaining at his post with such colleagues as were still faithful to him, his position and reputation would be much more*

2 Halsbury Laws of England (4th Ed. Reissue) Vol. 8 (2) (1996). Paragraph 394.

3 Malaysians will be interested to learn that his son, Sir Malcolm Macdonald, had a "real" Malayan connection, being the Governor General of British Territories in S.E. Asia in the late 1940's which included Malaya.

enhanced than if he succumbed. The Prime Minister must come to some arrangement with Baldwin and Samuel to form the National Emergency Government which would restore British credit and the confidence by foreigners. And in his best quarterdeck manner, the King impressed on the three party leaders that before they left the palace there should be a communiqué to end speculation at home and abroad. Then he withdrew to his own rooms to let them get on with it.

Rather more than an hour later, the party leaders sent a message asking the King to return. They had drawn up a memorandum agreeing to a National Government led by MacDonald...

......without the King's initiative there would have been no National Government. Three times in twenty-four hours MacDonald tried to resign and three times the King dissuaded him. Then he gave way and agreed to remain Prime Minister, an eminence for which he professed no enthusiasm."[4]

<u>(ii) 1940 – Winston Churchill</u>

10. The "*inquest on Norway*" debate on 7th and 8th May 1940 was an innocuous motion for the adjournment of the House of Commons, it was neither a confidence nor a censure motion on the Neville Chamberlain government. Yet it proved to be "*the most dramatic and most far-reaching in its consequence of any parliamentary debate of the twentieth century.*"[5] A Conservative Member of Parliament, L. S. Amery ended his speech devastatingly:-

"You (Chamberlain) have sat too long here for any good you have been doing. Depart, I say, and let us have done with you. In the name of God, go".[6]

11. Lloyd George, a former Prime Minister, and Liberal Member of Parliament stated:-

"He (Chamberlain) has appealed for sacrifice. The nation is prepared for every sacrifice so long it has leadership... I say solemnly that the Prime Minister should give an example because

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4 Kenneth Rose, King George V page 376-377, and cited in "*Constitutional Texts*" by Rodney Brazier [1990] Page 47-48.
5 "*Churchill" by Roy Jenkins [2001]* Page 577.
6 Ibid. Page 579.

there is nothing which can contribute more to victory in this war than that he should sacrifice the seals of office".[7]

12. Chamberlain's Conservative Government's majority of about 240 fell to 81, and although he survived the motion, public calls for a War Cabinet resulted in an invitation to the opposition Labour Party to join a National War Government. Its leader, Clement Atlee stated that it would only be willing to join such a coalition under a Churchill administration although Chamberlain and Lord Halifax harboured hopes to lead it. Winston Churchill, who had been in the political wilderness for years and was not the leader of the Conservative Party (Neville Chamberlain was) was invited by King George V to become Prime Minister. According to Churchill's biographer:

" In most circumstances, this was a perfectly sustainable position. Most governments had survived for years on less than half of it. But in the circumstances of the time, with Britain on the road to losing the war, with the Prime Minister having been so assailed from all sides of the debate and with a strong underlying desire for natural unity and more inspiring leadership, it was devastating. Chamberlain left the House pale and grim. Between then and midnight he had Churchill to his room and told him that he did not think he would go on".[8]

"Churchill was not the choice of the King. He was not the choice of the Whitehall establishment which reacted with varying degrees of dismay to the prospects of his alleged wildness. And he was not the choice of the majority party in the House of Commons. In an inchoate way, however, he was, or quickly became, the accepted champion of the nation in the eyes of both public and press. And those who had initially been reluctant and suspicious, from Sovereign to permanent secretaries, fairly quickly came round to his indispensability".[9]

(iii) 1957 – Harold Macmillan

13. Before 1965 the British Crown's role in choosing a Prime Minister was greater than it has now become because the 2 major political parties, Conservative and Labour, had no party machinery then in electing a leader. Before 1965, the death or a retirement of a Prime Minister made it necessary for a choice to be made by the Monarch in accordance with the convention that the office should be filled by a person most likely to command the support of a Common's majority. This principle dictated the choice as the Prime Minister's successor of a leading personality in the party, but did not

7 Ibid. Page 580.
8 Roy Jenkins. Ibid. Page 582
9 Ibid. Page 588

indicate precisely who the appointee should be when a party was in office with a comfortable majority and there were competing claimants for the succession. This situation arose on 2 occasions to 2 Conservative administrations: in 1957, when Anthony Eden retired and in 1963, when Harold MacMillan retired and on both occasions, the Sovereign did not favour Rab Butler. In 1957, Queen Elizabeth II sought and acted upon the advice of Sir Winston Churchill and Lord Salisbury, both elder statesmen of the Conservative Party who had themselves harboured no personal ambitions and who appeared to the Queen, her Private Secretary and other advisers to enjoy the confidence of their own party. Macmillan was invited to form an administration.

(iv) 1963 – Lord Home

14. In 1963, MacMillan having decided to resign on grounds of illness, arranged for soundings to be take among the Cabinet, the Parliamentary Party, Conservative peers and the constituency parties: the collective weight of opinion appeared to favour Lord Home, and MacMillan advised the Queen accordingly. Although Lord Home was not a member of the House of Commons, he was summoned by the Palace and formed the next government. He renounced his peerage and took office as Sir Alec Douglas Home.

(v) 1974 – Harold Wilson

15. Finally, the election in February 1974 resulted in no party with an overall majority. The governing Conservatives under Ted Heath were narrowly outnumbered by the Labour Party, although the balance of power was held by the Liberals and other small parties. Heath, the outgoing Prime Minister, invited the Liberals to form a coalition which would have enabled him to form a new administration but they declined, and he resigned. Queen Elizabeth II appointed Harold Wilson, the Labour leader, Prime Minister, and he formed an administration, relying on sufficient support from the other parties to enable him to command a working majority, until a second general election later in the year gave Labour a narrow overall majority. This last example demonstrated the practical consideration after the upheaval of a general election and particularly when an election does not provide a decisive result, that it is in the national interest that there

should be a period of political stability so that the necessary process of government can be undertaken. In his memoirs, Harold Wilson recalled:

> "*Contrary to widespread belief, there is no duty on the retiring Prime Minister, still less any inherent right, to recommend the man to be sent for. It is the sovereign who decides whom to send for and invite to form a government".*[10]

> *"The constitutional practice on a change of government is that the sovereign asks the party leader who has been called to the Palace whether he can form the government. There are two possible answers. One is for him to express assurance that a viable government can and will be formed. The other is a statement of willingness to hold the necessary consultation to find out* ***whether*** a government can be formed."[11]

16. A review of the Malaysian Constitutional provisions, seen against the background of the British experience, indicates that if a motion of no confidence is carried in the Malaysian Parliament in the coming months, Prime Minister Abdullah Badawi and his Cabinet must tender their resignation pursuant to Article 43 (4) of the Federal Constitution. Abdullah Badawi may at the time of his resignation request the Yang di-Pertuan Agong to dissolve Parliament. If such a request is made, the Yang di-Pertuan Agong would be perfectly entitled to decline, particularly since the country only went to polls in March 2008, and the will of the electorate was expressed thereat. The Yang di-Pertuan Agong can instead summon a person who, in the King's judgment, can survive a motion of no confidence and undertake the task of forming a new administration. The only requirement is that such a person should enjoy the support of the majority of the Dewan Rakyat, whether he is the leader of any party or indeed member of any political party is not the constitutional test, even if political reality demands it. Under established usage of British constitutionalism (which in the absence of any precedent in Malaysia offers guidance and is of persuasive value) a new Prime Minister so appointed by the Yang di-Pertuan Agong is entitled to a fair trial in government, at least until it becomes clear that he or she is unable to secure Dewan Rakyat support which is necessary to carry on the executive government. Hence, as incumbent, the new Prime Minister by exercising the great power that resides in his office may be able to entice fence-sitters to join his government. The process can go on for some months. Only if it is established to the King's satisfaction that no person

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10 Harold Wilson, "The Government of Britain" (1976) and cited in "*Constitutional Texts*" by Rodney Brazier [1990] Page 29.

11 Ibid. Page 25. Wilson's emphasis.

can secure majority support in the Dewan Rakyat, should the King dissolve Parliament and call for fresh elections.

Is the King's judgment justiciable?

17. If the King appoints a new Prime Minister in the exercise of his royal prerogative under Article 43(2)(a) of the Constitution, can the King be sued, particularly since any suit must include the King as a litigant because he made the appointment. The starting point is again the Federal Constitution. Article 32 (1) states that the Yang di-Pertuan Agong *"shall not be liable to any proceedings whatsoever in any court except in the Special Court"*. Article 181 (2) states that *"no proceedings whatsoever shall be brought in any court against the Ruler of any State in his personal capacity except in the Special Court"*. The Special Court is established pursuant to Article 182 (1). Article 182 (2) states that *"any proceedings by or against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity shall be brought in a Special Court established under Clause (1)"*. Article 182 (3) provides that the Special Court shall have exclusive jurisdiction to try *"all civil cases by or against the Yang di-Pertuan Agong or the Ruler of a State"*. Finally, Article 183 states that no civil action shall be instituted against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity except with the consent of the Attorney-General.

18. Until March 1993, the Yang di-Pertuan Agong and the Rulers enjoyed sovereign immunity, a doctrine widely recognized in constitutional and public international law. The Federal Constitution was amended with effect from 30th March 1993 to incorporate the establishment of the Special Court in Part XV which resulted in the abolition of immunity. In *Faridah Begum v. Sultan Ahmad Shah* [12], Mohd Azmi FCJ sitting as a member of the 5 member Special Court observed:

> *"It would therefore appear from the exclusivity provision of Clause 3 that the new Article 182 not only has taken away the legal indemnity enjoyed by HRH from being sued, but also abolished his rights to sue in the ordinary courts. HRH's capacity to sue or be sued, cannot now be recognized by the ordinary Court. As far as the ordinary Courts under Part IX of the Constitution are concerned, they continued as before to have no jurisdiction to hear any civil case against HRH, and in addition they also cease to have jurisdiction to hear all civil cases by HRH. The jurisdiction over these matters, even if the immunity is*

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12 [1996] 1 MLJ 617.

waived, has now been conferred exclusively on this Special Court."

[Page 629 D-G]

Legal proceedings can therefore be instituted against the Yang di-Pertuan Agung in the Special Court. But that does not answer the query: is his decision to appoint a Prime Minister justiciable in the Special Court?

19. In considering whether a particular decision of the Yang di-Pertuan Agong is justiciable, a distinction must be made between a decision made in the Yang di-Pertuan Agong's name but on the advice of the Cabinet, and a decision based upon the Yang di-Pertuan Agong's personal discretion. In the former, because it is in effect a Cabinet decision under Article 40 (1) & (1A), the decision is reviewable by the Courts: see *Teh Cheng Poh v. Public Prosecutor* [13] which held that even a Proclamation of Emergency by the Yang di-Pertuan Agong declared under Article 150 is subject to judicial review because the Cabinet in effect makes the decision. In the latter case, because the Yang di-Pertuan Agong exercises his personal discretion pursuant to Article 40 (2) or otherwise, his decision is not reviewable by the Courts. Two pardon cases of the Supreme Court had settled the issue by 1986. In *Sim Kie Chon v. Superintendent of Pudu Prison* the Supreme Court held that when the Yang di-Pertuan Agong exercises pardon pursuant to Article 42 (1) *"such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review"*[14], and in exercising such power the Yang di-Pertuan Agong *"acts with the greatest conscience and care and without fear of influence from any quarter"*. In *Superintendent of Pudu Prison v. Sim Kie Chon*, a second attempt by the same prisoner to challenge a decision of the Pardons Board was dismissed by the Supreme Court which held that he was *"attempting to circuitously challenge the exercise by His Majesty of his powers of clemency in this case under Article 42 of the Constitution which he is expressly precluded from doing by virtue of the provisions of Article 32 (1) of the Constitution which stipulates that His Majesty shall not be liable to any proceedings whatsoever in any capacity"*[15]. Finally, in *Karpal Singh v. Sultan of Selangor*[16], the Court struck out an application for a declaration that a public statement printed in a daily

13 [1979] 1 MLJ 50 [PC].
14 [1985] 2 MLJ 385, per Hamid FCJ.
15 [1986] 1 MLJ 495, per Eusoffe Abdoolcader FCJ.
16 [1988] 1 MLJ 64.

newspaper and attributed to the Sultan of Selangor relating to the exercise of pardon was invalid because Article 181 (2) confers sovereign immunity to the Sultan.

20. That the King's prerogative powers to appoint a Prime Minister and dissolve Parliament are not justiciable also represents the constitutional position in Britain, India and Australia. In *C.C.S.U v. Minister for Civil Service*[17], the House of Lords had to consider the ambit and scope of the royal prerogative. In the course of his speech, Lord Roskill stated:-

> "*Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and **the appointment of ministers** as well as others are not, I think susceptible to judicial review because their nature and subject are such as not to be amenable to the judicial process. The Courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.*"

[my emphasis]
[Page 418 B-C]

In the same speech, Lord Roskill referred to the definition given by Dicey to the prerogative, that is:

> "*the residue of discretionary or arbitrary power which at any given time is legally left in the hands of the Crown*".

21. Article 74 (1) of the Constitution of India states that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall in the exercise of his functions, act in accordance with such advice. Article 75(1) states that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. In *R.K Jain v. Union of India*[18] the Supreme Court held that the President, while exercising executive power under Articles 53 and 73, discharges such of those powers which are exclusively conferred on his individual discretion, like a decision to appoint the Prime Minister under Article 75, which decisions are not open to judicial review. Indian

17 [1985] 1AC 375.
18 [1993] 4 SCC 119, 161.

authorities also place much weight on the British experience of dealing with the royal prerogatives.

22. Section 2 of the Australian Constitution states that a Governer-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth of Australia and may exercise such powers and functions of the Queen as she assigns to him. The power of the Governor-General to appoint and dismiss a Prime Minister is found in Section 64 of the Constitution. In the controversial dismissal of Prime Minister Gough Whitlam by Governor-General John Kerr in 1975 and his replacement by Malcolm Frazer who formed a new Government and then advised for the dissolution of Parliament which was agreed to by the Governor, reliance was placed on Section 64. The dispute did not result in litigation; instead, the political method of a general election resolved the impasse.

23. Although Commonwealth authorities indicate that the prerogative of the Queen (or her representative, as in Australia and elsewhere) in appointing a Prime Minister cannot be questioned in legal proceedings, the decision of the Supreme Court of Malaysia in *Tun Mohamed Adnan Robert v. Tun Mustapha*[19] in upholding the decision of the High Court in Sabah is out of line. That case involved the validity of the revocation of the appointment of Tun Mustapha as Chief Minister, and the validity of the subsequent appointment of Joseph Pairin Kitingan as Chief Minister of Sabah in April 1985. An application to strike out the claim on the ground of non-justiciability failed in both Courts. No reference was made in the judgments of the High Court and the Supreme Court to Articles 39, 40, 43 and 181 of the *Federal Constitution:* this is hardly surprising since the *Tun Mustapha* case concerned the discretion of the Yang di-Pertuan Negeri (formerly Governor) of Sabah in appointing the Chief Minister of Sabah. Although the position is somewhat similar, there are subtle differences in the King's prerogative in appointing a Prime Minister to that of a Sabah Governor appointing a Chief Minister. What is less surprising is that no reference was made to the first of the two Supreme Court decisions involving *Sim Kie Chon* which had just been decided[20], and which went the other way. Thus I am of the opinion that the *Tun Mustapha's* case offers little assistance to the issue whether the Yang di-Pertuan Agong's decision to appoint a Prime Minister is justiciable, and for the reasons discussed in Paragraphs 17 to

19 [1987] 1 MLJ 471.
20 Ironically, Hamid C.J. (Malaya) chaired both panels in the *Sim* & *Tun Mustapha* cases in the Supreme Court which sat in July and October 1985 respectively.

23 above, the King's decision is not judicially reviewable. If I am wrong, and it is, by virtue of the establishment Special Court in 1993 and the decision in the *Faridah Begum* case, any such litigation can only be instituted in the Special Court, and after securing the Attorney-General's personal consent, and not in the ordinary courts of the land.

24. Because the striking out application in the *Tun Mustapha* case failed, the claim went to trial. In dismissing Tun Mustapha's claims, Justice Tan Chiaw Thong stated:

> *"In my view, the Constitution envisages that the Head of State should be allowed to make his judgment quietly, freely, independently and impartially, without any influence, pressure, threat or other factors not sought by him which might influence his judgment."*[21]

> *"The Head of State must be allowed to make his judgment quietly, independently and in a dignified manner, as intended by our Constitution."* [22]

25. A strong Privy Council bench, which included Viscount Radcliffe, Lord Jenkins and Lord Devlin, had to consider in Adegbenro v. Akintola[23] the effect of a provision in the Constitution of West Nigeria empowering the Governor of the Western Region of Nigeria to remove the Premier if *"it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly"*. The Privy Council held that the Governor was entitled to act on a letter signed by 66 out of 124 members of the House of Assembly stating that they no longer supported the Premier and therefore acted constitutionally in removing the Premier even though there had been no vote adverse to the Premier in the legislature prior to his removal. In a judgment delivered by Viscount Radcliffe, the Privy Council held that there was nothing in the Constitution which legally precluded the Governor from forming his opinion on the basis of anything but votes formally given on the floor of the House. The Court determined that by the use of the words "it appears to him" the judgment as to the support enjoyed by a Premier was left to the Governor's own assessment, and there was no limitation as to the material on which he was to base his judgment or the contacts to which he might resort to for that purpose.

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21 (1986) 2 MLJ 420, 452 F.
22 page 474 B.
23 (1963) AC 614 [PC].

26. In his speech, Viscount Radcliffe referred to the "delicate political judgment" and "deliberate judgment" that had to be exercised by the Governor, and noted:

> *".....in democratic politics, speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordships somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of 'support' is concerned."*[24]

27. The *Adegbenro* case has received a mixed response in Malaysia. Justice Harley declined to follow it in *Stephen Kalong Ningkan v. Tun Abang Haji Openg* [25] which involved the validity of the dismissal of the Sarawak Chief Minister by the Governor. Justice Kadir Sulaiman accepted the Privy Council decision as good law in Malaysia in *Datuk Amir Kahar v.Tun Mohd. Said,*[26] and held that the resignation of the Sabah Chief Minister, meant that his entire cabinet also had to resign. In my opinion, if the issue is justiciable (which I doubt), then the opinion expressed by the Privy Council and followed by Justice Kadir Sulaiman is correct. It is significant that Justice Kadir in the *Amir Kahar* case in dealing with the refusal of the Yang di Pertua Negeri to dissolve the Sabah Legislative Assembly on the request of the outgoing Chief Minister observed:

> *"According to Article 10(2) of the Constitution, this power to withhold the consent is a power exercisable personally according to his subjective judgment and is therefore, non-justiceable."*[27]

28. Although this is obiter, in my opinion the Court expressed the correct principle. Article 10(2) of the Sabah Constitution mirrors Article 40(2) of the Federal Constitution, and deals with the discretion of the Yang di-Pertua Negeri to appoint a Chief Minister and to withhold consent to a request for the dissolution of the Legislative Assembly.

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24 pp 629.
25 (1966) 2 MLJ 187.
26 (1995) 1 MLJ 169.
27 Page 181 E.

Conclusion

29. Although there are no Malaysian precedents guiding the Yang di-Pertuan Agong in the exercise of his prerogative to appoint a Prime Minister under Article 43(2) of the Federal Constitution, as the institution of the monarchy forms the bedrock of the Malaysian governmental system any judgment made by the Yang di-Pertuan Agong would be accepted by the public as representing the national interest, unless the choice is so bizarre and unreasonable. The parameters or margin of discretion that the King enjoys is substantial, and he can be assured of public support regardless of the candidate chosen. The special role played by the Yang di-Pertuan Agong since Merdeka has proved that the creation of the office of the Supreme Head was a wise one. In 1964, Professor Groves was of the view:

> *"I think it is fair to say that the Yang di-Pertuan Agong has become a visible symbol of unity in a remarkably diverse nation ... and has emerged as one of the strong cohesive forces in the federal structure."*[28]

In 1975, Professor Hickling described the office of the Yang di-Pertuan Agong:

> *"as the essential one of the Malaysian Constitution, without which all others become meaningless".*[29]

30. In consequence, I venture to suggest that the Malaysian polity is so stable and secure that it can, with ease, adjust and accommodate to circumstances in the future when the Yang di-Pertuan Agong would have to deal with a successful motion of no confidence against a sitting Prime Minister, and to appoint a new Prime Minister under Article 43(2). It is a mark of Malaysia's maturity as a truly functioning democracy, particularly in the wake of last month's general elections, that the ship of state can successfully sail into uncharted waters without fear of the unknown.

Tommy Thomas
Advocate & Solicitor
9th April 2008

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28 The Constitution of Malaysia (1964) page 42, and cited in "The Constitutional Position of the Yang di-Pertuan Agong" by F.A. Trindade in "The Constitution of Malaysia, Its Development: 1957 – 1977" Edited by Suffian, Lee & Trindale (1978) page 117.
29 "The Prerogative in Malaysia" [1975] 17 Mal. L.R. 207, 219.