HRH Sultan Azlan Shah

Judge ❀ Ruler ❀ Monarch

1965	Elevated as Judge of the High Court, Malaya
1973	Appointed as Federal Court Judge, Malaysia
1979	Appointed as Chief Justice of the High Court, Malaya
1982	Appointed as Lord President (now renamed Chief Justice) of the Federal Court, Malaysia
1984	Ascended to the Throne as the 34th Sultan of the State of Perak
1984–1989	Timbalan Yang di-Pertuan Agong of Malaysia (Deputy King of Malaysia)
1989–1994	The Ninth Yang di-Pertuan Agong of Malaysia (King of Malaysia)

“ The Rule of Law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it.

The ideal of the Rule of Law in this sense is often expressed by the phrase ‘government by law and not by men’. ”

—HRH Sultan Azlan Shah
Supremacy of Law in Malaysia

1 Supremacy of Law in Malaysia

Tunku Abdul Rahman Lecture XI
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During the past decade, we have seen people in high places being convicted of criminal offences under our law. These people thought they could flout the law with impunity. They were mistaken.

In the present decade, the situation is no different. Abuse of power occurs at all levels of society. It is a part of life today. The extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the Rule of Law over these people.

The Rule of Law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it. The ideal of the Rule of Law in

this sense is often expressed by the phrase "government by law and not by men".

Let me mention the independence of the judiciary very briefly, lest we forget its significance. The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter. Attacks on the independence of the judiciary have been numerous. In some countries, such as Chile and Uruguay, the jurisdiction of the ordinary civilian courts has been curtailed so that they are unable to hear certain classes of criminal offences, and they are deprived of jurisdiction to hear challenges to government decrees or actions. Certain remedies such as writs of habeas corpus are made unavailable. Special courts and military tribunals are created and their jurisdiction supplants that of the ordinary civilian courts.

The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter.

At times, judges are harassed for rendering decisions unpopular with the government. In Pakistan, the judges of the High Court of Baluchistan received notice of tax investigations ten days after the court had unanimously declared of no effect several government decrees which radically altered the system of justice. In the Central African Republic three examining magistrates were arrested because they ordered the release of several pre-trial detainees after reviewing their files and determining that the evidence was insufficient to justify their continued detention.[1]

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See (1980) 10 CLB 1370.

The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law.

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In Malaysia, fortunately, we still have wise men around us today who subscribe to the Rule of Law. Without it, to my mind, civilised life would be very soon reduced to a state of chaos.

However, to those men in high places let me use Thomas Fuller's words spoken over 300 years ago:

> Be you ever so high, the law is above you.

It is these factors which provoked me to choose "supremacy of the law" as my subject in this Tunku Abdul Rahman Lecture XI.

While sitting on the Federal Court I have myself had occasion to pronounce on the consequences of supremacy of the law. In delivering the judgment of the court in the case of *Loh Kooi Choon v Government of Malaysia*,[2] I stated that:

2 [1977] 2 MLJ 187, FC at 188.

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the state may encroach. The second is the distribution of sovereign power between the States and the Federation … The third is that no single man or body shall exercise complete sovereign power but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not men.

And if I may add, that right to be governed by laws and not by arbitrary officials is the most precious right of democracy—the right to reasonable, definite and proclaimed standards which we as citizens can invoke against both malevolence and caprice.

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The term "supremacy of law" was first introduced by Professor Dicey, one of the most outstanding constitutional lawyers. Dicey in his *Introduction to the Study of the Law of the Constitution* in 1885 explained the concept of the Rule of Law to mean:

(1) the absolute supremacy or predominance of the law as opposed to arbitrary exercise of power;

(2) the fact that every man is subject to the ordinary law of the country; and

(3) a system where the principles of the constitution pertaining to personal liberties are a result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Dicey, when he was referring to this third aspect was of course, referring to the British Constitution which is an unwritten constitution and not to a written constitution like the Malaysian Constitution.

The term "supremacy of law" is also sometimes used in contradistinction to supremacy of Parliament.

The term "supremacy of law" is also sometimes used in contradistinction to supremacy of Parliament. In countries like England, where as pointed out earlier, there is no written constitution, it is a fundamental principle of English constitutional law that the British Parliament is supreme and that it may do anything it wishes. Parliament, therefore, may pass any law it so wishes, so long as it conforms to the necessary legislative procedure.

However, in Malaysia, where there is a written constitution, the Constitution itself provides that it is the Constitution, and not Parliament, which is supreme. Article 4(1) of the Federal Constitution provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Tun Suffian echoed this Article as follows:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures is limited by the Constitution, and they cannot make any law they please.[3]

In my lecture this evening, I shall use the term "supremacy of law" to mean that the Constitution as law is the supreme authority in the country. This would mean that as enshrined in the Malaysian Constitution, it is supreme over Parliament, the executive or even the judiciary.

Written laws have not only bestowed power upon institutions and individuals charged with duties under our system of government, but in so doing have explicitly laid down limits upon the exercise of any such power.

It also needs to be emphasised that written laws, in particular the provisions enshrined in the Constitution, have not only bestowed power upon institutions and individuals charged with duties under our system of government, but in so doing have explicitly laid down limits upon the exercise of any such power.

Whereas Parliament is empowered to enact Federal legislation, it cannot transgress the boundaries of its own defined jurisdiction. It is quite powerless, for example, to make laws on matters which have clearly been reserved for the State legislatures. Neither can Parliament make any laws that contravene the fundamental rights guaranteed for citizens and other individuals.

3 See *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, FC at 113.

When one talks of law in Malaysia one tends to refer to statute law, that is laws which have been passed by Parliament. But this is only one aspect of law. Law as defined by the Federal Constitution is much broader. Article 160 defines law to include:

> … written law, the common law of England insofar as it is applicable in Malaysia and any custom or usage having the force of law.

Written law includes the Federal Constitution and the Constitutions of the various States of the Federation.

> Sometimes judges in interpreting a statute law in a particular manner may, or may not, give effect to the true intention of Parliament. In such cases, it is not unknown for Parliament to subsequently amend the written law so as to override case law.

Therefore, the term "law" is capable of a much wider meaning than merely statute law. There is, in fact, one other source of law which is often overlooked by the layman. This is case law or judge-made law. Courts in countries which have their origin in the English system follow the doctrine of precedent. It is a basic principle of this doctrine that like cases should be decided alike. Therefore a judge will decide a particular case in the same way as that in which a similar case was decided by another judge in an earlier case. Therefore, a decision made by a judge in a particular case becomes law in the sense that it has binding effect. Sometimes, under the guise of interpreting an earlier case, a judge may give his own interpretation to it and then make new law. Some branches of our law are almost entirely the product of the decisions of the judge. This is particularly true, for example, with the law of torts.

It should also be pointed out in this connection that sometimes judges in interpreting a statute law in a particular manner may, or may not, give effect to the true intention of Parliament. In such cases, it is not unknown for Parliament to subsequently amend the written law so as to override case law.

The role of the judiciary is to interpret the law and not to usurp the function of Parliament by making laws. It is ultimately Parliament which has the major power to make laws.

The importance of case law should not, however, be over-emphasised. After all, the role of the judiciary is to interpret the law and not to usurp the function of Parliament by making laws. It should be emphasised that it is ultimately Parliament which has the major power to make laws.

Over the recent years, with more and more laws being passed by Parliament, the role of the judge as a law-maker is gradually being reduced. When we talk of law, we necessarily mean a law that has been passed by Parliament in accordance with the provisions of the Federal Constitution. Hence the term "supremacy of law" broadly read refers first, to the Constitution itself as a higher law and second, to such laws which conform with the Constitution.

The procedure for making laws is spelt out in detail by the Federal Constitution. Article 66 provides that the power to make laws shall be exercised by Bills passed by the Dewan Rakyat and the Dewan Negara and assented to by the Yang di-Pertuan Agong. A Bill when passed by both Houses is presented to the Yang di-Pertuan Agong for his assent. Before the recent amendment to

the Constitution in 1984,[4] it was not expressly provided that the Agong must signify his assent to all Bills presented to him. With this amendment, it is now provided that the Yang di-Pertuan Agong shall, within 30 days after a Bill is presented to him, either assent to the Bill or return the Bill to the House with a statement of the reasons for his objection to the Bill. Where such a Bill has been returned to either House of Parliament, and it is again passed by both Houses, with or without any amendments, the Bill shall again be presented to the Yang di-Pertuan Agong for his assent and he shall then give his assent within 30 days.

The Federal Constitution sets out in the Ninth Schedule, the various matters which the Federal Parliament and the State Legislative Assemblies may legislate upon. Article 159 also provides for a more stringent procedure to be complied with for any amendment of the Constitution itself. On certain matters affecting the Conference of Rulers or the National Language, for example, no amendment may be made to the Constitution without the consent of the Conference of Rulers.

> Parliament is duty-bound to ensure that the Constitution is dynamic in nature, and does not remain static in the face of social change and progress.

The various State Constitutions also make provisions for the exercise of legislative powers by the respective State Legislative Assemblies. No Bill passed by a State Legislative Assembly shall become the law of that State unless it has been assented to by the Ruler of that State.[5]

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Editor's note:
See Postscript, below.

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Editor's note:
See Postscript, below.

However, it cannot be denied that Parliament can make changes to the written provisions of the Federal Constitution by exercising the power of amendment under Article 159. Such power has in fact been entrusted to it as the supreme law-making authority in the country, in order only to ensure that our supreme law keeps up with the ever-changing needs of the people and the times. Parliament is thus duty-bound to ensure that the Constitution is dynamic in nature, and does not remain static in the face of social change and progress.

Yet even in the exercise of this significant socio-political power, Parliament's freedom to act merely on its own whims and fancies has been curbed. The framers of the Federal Constitution in their wisdom have outlined stringent procedures that cannot but be followed. Though it may seem rather easy to abide by these procedures, that fact does not derogate from the principle that the amendment process is quite distinct from the ordinary legislative process. Perhaps that is also why our Constitution has so far been amended at an average of only less than once per year since Independence. Changes that have thus far been introduced cannot at all be said to have drastically altered the various basic features of our system of government.[6]

Constitutional conventions serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general.

So the executive itself cannot just act as it pleases, for its own powers are also subject to precise restrictions. Even where limits

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Editor's note:
See further notes at the end of chapter.

do not appear to be sufficiently clear, there are rules of unwritten law which dictate the courses of action that may be followed. These rules are called constitutional conventions. They serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general. That point was perhaps illustrated by events in late 1983 when controversies raged throughout this land over the propriety of certain proposals made by the government [pertaining to certain amendments to the Federal Constitution]. Ultimately the outcome was one which met with the approval of all parties affected, reflecting the wishes of the people.[7]

> Supremacy of law is a noble principle and a yardstick by which government acts can be evaluated to ascertain whether they conform to those various, important democratic values enshrined in the written Constitution.

So the spirit of the Constitution and of laws need also to be given attention, especially in a country aspiring towards democracy. Power that is held in the hands of some and the laws that enable them to act in exercise of such power all ultimately depend on acceptance by the general public. After all, the powers wielded by representatives are based on the final authority of the people. To quote from the celebrated American case of *Marbury v Madison*[8] Chief Justice Marshal's words ring true in many a country:

> [It is] … the people [who] have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness … [this] … is the basis on which the whole [social] fabric has been erected.

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Editor's note:
See Postscript, below.

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(1803) 5 US (1 Cranch) 137.

Properly understood, a Constitution consists not of static laws, but of laws reflecting a certain agreed content chosen by the people. In our system of government, that content includes chosen democratic values.

The strength of a Constitution lies not so much in the elegant phraseologies which is used in the text, but more in the manner in which the various principal actors in the governmental process view and implement it.

Supremacy of law is thus seen as a noble principle and a yardstick by which government acts can be evaluated to ascertain whether they conform to those various, important democratic values enshrined in the written Constitution. As promulgated, these values are sometimes necessarily skeletal, since the Constitution cannot successfully attempt to enumerate, elaborate and cater for all the myriad, complex circumstances characteristic of a modern democratic society. To be sure, the strength of a Constitution lies not so much in the elegant phraseologies which is used in the text, but more in the manner in which the various principal actors in the governmental process view and implement it. It needs constant nourishment and a continuing commitment, lest it transforms itself into a mere facade—an elegant frontage which may conceal practices which are democratically questionable.

It is thus of utmost importance that a strong political tradition supportive of these values be inculcated. Where such political tradition lies deeply embedded in a particular society, perhaps nurtured through centuries of political development, the principle of supremacy of law receives its due accolade in actuality.

Few countries, if at all, can claim to reach this level of achievement. In most countries, the Constitution retains its function as a primary force in developing a mature, democratic society founded on justice through law.

By way of digression, let me relate to you a little bit of English constitutional history.

In the old days the Kings of England exercised supreme executive power in the land. The courts were historically the King's courts and the judges were always the King's judges. The King appointed them and the King at one time could remove them at his pleasure. On one occasion King James I summoned all the judges before him and told them that he proposed to take any case he pleased away from the judges for decision and to try them himself. But Chief Justice Sir Edward Coke[9] told the King that he had no power to do so, and that all cases ought to be determined in a Court of Justice and according to the law and custom of the realm. King James replied:

> I always thought and I have often heard the boast that your English law is founded upon reason. If that be so, why have not I and others reason as well as you the Judges?

The Chief Justice replied:

> True it is, please your Majesty, that God had endowed your Majesty with excellent science as well as great gifts of nature; but your Majesty will allow me to say so, with all reverence, that you are not learned in the laws of this your realm of England … which is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden met-wand and

9 *Editor's note:* See *The Lion and the Throne*, a biography of Coke by Catherine Drinker Brown.

> measure to try the causes of your Majesty's subjects, and it is by that law that your Majesty is protected in safety and peace.
>
> King James, in a great rage, said:
>
> Then I am to be under the law—which it is treason to affirm.

The Chief Justice replied echoing the words of Bracton[10] that the King is under no man, but under God and the law. His refusal to place King James I above the law declared the independence of judges from royal dictation.

I have told you this piece of history because it has its modern counterpart. Whilst it had served as a limitation on King James, it has come to stand for a limitation on Rulers and ministers alike. That is expressed in the oaths and affirmations taken by the various participants in the governmental process in Malaysia.

His Majesty the Yang di-Pertuan Agong, in assuming office, subscribes to the oath listed in the Fourth Schedule of the Federal Constitution, whereby His Majesty "solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution".

Under Article 43(6), government ministers have to take and subscribe in the presence of the Yang di-Pertuan Agong the oath of office listed in the Sixth Schedule. Ministers swear or affirm that they "will faithfully discharge the duties of … office to the best of [their] ability", to "bear true faith and allegiance to Malaysia" and to "preserve, protect and defend its Constitution".

10 *Editor's note:* Henry de Bracton, English Judge and writer on English law. See *Bracton's Laws and Customs of England 1240–1260.*

The oath to "preserve", "protect" and "defend" the Constitution of Malaysia has also to be taken by Members of Parliament under Article 59(1).

Under Article 124, Judges of the Federal Court (Supreme Court) and the High Court have likewise to subscribe to the same form of oath.[11] Properly speaking, all the major participants in government are placed in the role of "guardians of the Constitution", but a special pride of place is reposed in the judiciary by the very nature of the judicial function.

> Basic to the doctrine of separation of powers is the elaborate system of checks and balances whereby it is ensured that power is not concentrated in any one body, but dispersed and mutually checked.

Based on the doctrine of separation of powers, the legislature makes the law, the executive administers the law, and the judiciary adjudicates on disputes which may result from the first and second processes. Basic to this doctrine is the elaborate system of checks and balances whereby it is ensured that power is not concentrated in any one body, but dispersed and mutually checked. Thus, for instance, power reposed in the legislature is moderated by the power placed in the judiciary, and vice versa.

The Constitution of Malaysia grants the power of judicial review[12] to our courts. The courts are enabled to control and correct laws passed by Parliament as well as actions undertaken by the executive if such laws and actions violate the Federal Constitution. Article 4(1) is clear on this general power in relation to laws passed

11 *Editor's note:* Now the Judges of the Court of Appeal also.

12 *Editor's note:* The expression "judicial review" in this context should not be confused with the power of the courts to review administrative actions in administrative law. See also further notes at the end of chapter.

by Parliament. Where a law passed after Merdeka Day is inconsistent with any provision of the Constitution, that law is void to the extent of the inconsistency.

The courts are enabled to control and correct laws passed by Parliament as well as actions undertaken by the executive if such laws and actions violate the Federal Constitution.

The judiciary is singled out as the organ of government with this power of correction. As Chief Justice Marshall of the United States Supreme Court once explained it, the power of judicial review flows from the province and function of the courts to interpret the law, and decide what it is on a given point. Where an Act of Parliament is clearly repugnant to the Constitution, the choice is between upholding the Act or the Constitution. Under our Federal Constitution, the choice is made plain: the Act is void.

It has been said that in conducting the business of democratic government the easiest way is seldom the best way. But it is a regrettable truth that whilst politicians in opposition loudly clamour for the best way, politicians in power seem irresistibly drawn to the easiest way. In pursuing the easiest way to govern they may act in a manner violative of the Constitution. This is inevitable in a system of government such as ours where the intervention of the State into the lives of the citizen can only be described as massive. The good faith of the democratic system to represent the aspirations of its electorate is not in issue, but its execution is. The power of judicial review can also be called in aid to invalidate excess of executive action.

With regard to excess of executive power I had occasion to say in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*:[13]

> Every legal power must have legal limits, otherwise there is dictatorship …; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law …

> Where a law passed after Merdeka Day is inconsistent with any provision of the Constitution, that law is void to the extent of the inconsistency. The judiciary is singled out as the organ of government with the power of correction.

The power of judicial review is not a feature which is invariably found in all countries professing a written constitution. Even where judicial review exists, one can detect differences in approach between countries. Occasionally, too, this power of judicial review is misunderstood and, where this is so, can only lead to a dislocation of the balance of moderating influences which is supposed to pervade the Constitution.

Even though the courts in Malaysia have the power to challenge laws passed by Parliament, they are not thereby positioning themselves in active competition with that representative body. The

13 [1979] 1 MLJ 135, FC at 148.

legislature, and in particular the Dewan Rakyat, embodies the majoritarian principle, as it should surely be in a democracy. The Dewan Rakyat represents the wishes of the people through their elected representatives, and ordinarily laws passed through proper procedure by a majority vote have to be accorded due recognition and validity.

Democracy means more than just simple majority rule, for even the majority has to abide by the dictates of the Constitution. There are some matters, notably fundamental rights, which are regarded as so paramount that they ought not be varied merely by the transient wishes of a majority in Parliament.

Nevertheless, democracy means more than just simple majority rule, for even the majority has to abide by the dictates of the Constitution. There are some matters, notably fundamental rights, which are regarded as so paramount that they ought not be varied merely by the transient wishes of a majority in Parliament. This qualification on the majoritarian principle is indeed recognised by the amendment procedure prescribed under Article 159, under which in general a two-thirds majority of the total number of members of each House is required. Courts, following from their function to declare what the law is, merely test the legality of an Act of Parliament when they exercise review power, and are thus reinforcing the supremacy of law and, ultimately, the democratic ideal. Upon this mantle of legality, difficult problems needing definitive judicial resolution will arise.

Over the last 27 years since Independence, Malaysian courts have faced up to the challenge posed by review power, always

declining to judge on the merits of legislative decisions and have confined themselves to questions of legality. The merits of such decisions as to whether the mandatory death penalty ought to be imposed for drug trafficking, or unlawful possession of firearms or ammunition; whether preventive detention laws ought to be upheld; whether emergency laws ought to continue in force; and so forth, are best left to Parliament. Ultimately, the electorate through the power of the ballot box is the final authority, not the courts of law. The harshness or otherwise of laws is beyond the jurisdiction of the courts, unless a question of legality arises. As is sometimes said, just as politicians ought not be judges, so too judges ought not be politicians.

Parliamentarians, politicians and judges have to act in accordance with the Constitution and are subject to the limitations placed on their actions by law, since ours is a government of laws, not men.

As I have said in the *Sri Lempah* case:[14]

> Government by judges would be regarded as an usurpation of legislative authority.

Nevertheless, parliamentarians, politicians and judges are all expected to take their cue from the Constitution. They have to act in accordance with the Constitution and are subject to the limitations placed on their actions by law, since ours is a government of laws, not men.

In the final analysis, when we make determinations on supremacy of laws, we can never forget that the various injunctions

14 Ibid at 149.

and commands are but man-made ones. Right or wrong, good or evil—these value decisions are as perceived through man's own faculties of reasoning. They are indeed subject to man's strengths, and also his innate weaknesses. They may perhaps be based on correct moral foundations, or otherwise. Man can therefore not lay claim to perfection, and ought therefore to constantly seek guidance from some higher source of universal and immutable spiritual values.

Man is and always remains a mere trustee of God's will. Should that truth be forgotten, laws and legal systems would always fail to approach the ideal, the perfect and the best for mankind.

That is undoubtedly an area in which man continuously seeks and aspires to achieve—to be in consonance with the laws of nature and the revelations of the Almighty. For the Muslim faithful, as with followers of many other major religions, man is and always remains a mere trustee of God's will. Should that truth be forgotten, laws and legal systems would always fail to approach the ideal, the perfect and the best for mankind.

Editor's notes

Amendments to the Constitution: There have been a number of amendments to the Federal Constitution since this lecture was delivered. Some of the major changes that were introduced by these amendments include: (i) the removal of the immunities of the

Rulers; (ii) the abolition of appeals to the Privy Council; (iii) the establishment of the new Court of Appeal; (iv) the establishment of the Special Court; and (v) the removal of the provision relating to judicial powers in Article 121. Some of these are dealt with in the notes at the end of chapter 10 and the Postscript, below.

For a full list of the Constitutional Amendment Acts, and the various provisions of the Constitution which have been amended from 31 August 1957 to August 2003, see *Reprint of the Federal Constitution*, 2003, published under the authority of the Commissioner of Law Revision, Malaysia.

Judicial review of unconstitutional laws: This power of judicial review to declare laws to be unconstitutional if they conflict with the Constitution may be said to be similar to the powers of the United States Supreme Court. See also chapter 5, *Checks and Balances in a Constitutional Democracy*, below.