

**POST-WAR POLITICAL CHANGES,
CONSTITUTIONAL DEVELOPMENTS
TOWARDS INDEPENDENCE AND CHANGING
CONCEPTIONS OF JUDICIAL REVIEW IN MALAYSIA**

Prior to the outbreak of the Second World War and the subsequent occupation of the Malay peninsula by the Japanese, the governmental structures in Malaya were manifold. These were the outcome of differing historical developments, and in general reflected various degrees of British involvement. The Federated Malay States constituted one regime, the Unfederated Malay States another, and the Straits Settlements a third. In terms of broad juridical status, the Straits Settlements were settled colonies while the others were protectorates. The Straits Settlements were thus a Crown Colony set apart from the hinterland of Malaya. However, in the hinterland itself the protectorate system was in reality an amalgam of a variety of governmental structures. The Federated Malay States constituted a more or less homogenous unit with one streamlined higher judiciary, but the "federation" then in existence was in fact a looser form of association which lent itself to alternating phases of centralisation and decentralisation. The Unfederated Malay States, on the other hand, were independent units, each with a separate constitutional structure and a separate judiciary. For such a small region the multiplicity of governmental structures was remarkable, and was generally regarded as inefficient and inimical to the development of a common policy for the whole region. Although such was generally the case, it would be inaccurate to regard the sphere of judicial administration in these territories as exhibiting major dissimilarities. In this sphere at least, it could be said that by then there existed more similarities than differences. The common law tradition and broadly similar court systems had by this time taken root in the various territories. A symbiotic relationship existed between the Malay States and the Straits Settlements so far as judicial administration was concerned, and was manifested, for instance, by the interchangeability of personnel, the inclination towards the enactment of similar laws, and the manipulation of judicial discretion as to forge a large measure of uniformity in substantive law.

In all these territories the idea that there were legal controls on government was perhaps accepted, though its ramifications remained ill-defined. Judicial review of state action was then a general idea with an uncharted potential existing within governmental structures characterised by an accumulation, rather than a dispersal, of power. Its gradual development into the form now imbedded in the Constitution of Malaysia was interlocked with the political changes which began after the War. As the movement towards constitutional government (in the sense in which organs of govern-

ment are limited in their powers by law, and may be controlled by legal process) gained momentum, the concept of judicial review came to be further moulded, and indeed may be regarded as one product of the broad political changes which ended in independence for Malaya in 1957. It is, therefore, instructive to chart the growth of constitutional government in Malaya during this period, and place the particular type of judicial review which emerged in its proper perspective. The conception of judicial review now operative in Malaysia, if related to this background, can thus be properly evaluated and its future growth given a more realistic forecast. If, as is attempted in this study, judicial review is seen as a product of political change, in a way which suggests a closer interaction between strict law and politics, it becomes possible to appreciate that judicial review in Malaya was a changing element following in the path of major political changes. The *concept* of judicial review as a means of control over government may have been accepted even before the Second World War, but the *conception* now received was conditioned by, and may be regarded as the culmination of, a process which really started in the late 1940s.

A. *The British Military Administration*

Immediately after the surrender of the Japanese forces in Malaya, the peninsula was placed under the governance of the British Military Administration (B.M.A.), a move intended as a transitional phase prior to the reintroduction of civilian rule. The B.M.A., as the governing authority of Malaya, lasted for seven months.¹ It is of particular interest to this study that during this period the administration of justice was not neglected for the Administration instituted a system of Courts. The Superior Court, B.M.A. was by the very nature of the Administration manned by military officers. Reported cases appear to suggest that the style of justice administered was rather rough-and-ready to accord with a common sense view of the idea rather than conform with legalism. One significant case,² for example, was decided without the citation of a single case, even though the actual decision can on any view be regarded as fair. The B.M.A. was a brief interlude; in tracing the development of judicial review, this brief period remains insignificant.

The significant development, which was to set in train a chain of events of great moment in the constitutional development of Malaya, was the constitutional system replacing it — the Malayan Union. The Union and its ultimate rejection focused various political demands of the major races in Malaya, and moulded several very significant features into the fabric of constitutional law of Malaysia; an understanding of the present-day Constitution is perforce incomplete without appreciating the interchange between political change and public law during the period of Malayan Union, and, thereafter, the period of Federation of Malaya.

¹From September 1945 to April 1946

²*In Re Eric Woodford* (1946) 12 M.L.J., 19. Decision of the Superior Court, B.M.A., before Wing-Commander F.A. Briggs (President), Major M.D. Wein and Captain J.T. Kerrigan.

B. Malayan Union

In what is seen by most commentators as an about-turn in British colonial policy in the region, the Malayan Union abandoned the previous general trend towards increasing decentralisation. Convinced that the stage had been reached when the system of government should be simplified and reformed, the plan substituted a unified system to replace the untidy arrangements present prior to the period of Occupation.³ But in postulating this "reform" the plan proved to be too hasty and too drastic.⁴ It was preceded by the signing of the notorious "MacMichael Treaties"⁵ whereby the terms governing the relationship between Great Britain and the Malay States were altered in that the Rulers now ceded full power and jurisdiction in their respective States to the British Government. Acting on these new treaty arrangements, legislative power under the Foreign Jurisdiction Act, 1890 was invoked and the Malayan Union Orders-in-Council⁶ were passed for the Malay States while the Straits Settlements (Repeal) Act, 1946⁷ was passed to deal with the Straits Settlements. By their combined effect the Malay States, together with Penang and Malacca, were merged into the aforementioned unified system. Singapore, however, was retained as a separate Colony because of "economic and social interests distinct from those of the mainland".⁸ In the interests of "efficiency" and "democratic progress", power was centred in a Governor with a corresponding loss in the power of the Rulers in the States. The Rulers, having ceded full power and jurisdiction, were relegated to a minor position in this system of government. The old State Councils with their various measures of independent power were abolished, and new State Councils (together with Settlement Councils for Penang and Malacca) were to exercise delegated power over matters of purely local concern. The plan contemplated a strong central authority with a Governor assisted by an Executive and Legislative Council; as such the Malay Rulers were left with being "traditional and spiritual leaders of the Malay people" and thereby

³See generally, *Malayan Union and Singapore: Statement of Policy on Future Constitution*, Cmd 6724 (1946); *Malayan Union and Singapore: Summary of Proposed Constitutional Arrangements*, Cmd 6749 (1946).

⁴The deliberations which led to its formation as a policy and a plan were shrouded in secrecy, and the full ramifications were made known only a few months before its implementation.

⁵Sir Harold MacMichael was sent to Malaya to "invite each Malay Ruler's co-operation in the establishment of a fresh constitutional organisation of Malaya" and authorised as "Special Representative" of the British Government to conclude these treaties. Sir Harold arrived in Malaya in October, 1945. He was able to persuade the nine Rulers to sign the treaties in a very short space of time.

⁶Necessitated by the nature of the legal regime in the Malay States, namely the Protectorate System.

⁷Repealing an Act of the U.K. Parliament, and necessitated by the legal regime of Crown Colony obtaining in the S.S.

⁸*Statement of Policy on Future Constitution*, para 5.

able to preside over a Malay Advisory Council in each State with members to be appointed by them, but nevertheless subject to the Governor's approval. Each Ruler was to have legislative power exercised through the Advisory Council, but only on Islamic matters and even here the power did not extend to passing law concerning the collection of tithes and taxes. The limited nature of the Ruler's power under the plan is highlighted by the overriding provisions that such allowable legislation required the Governor's assent, which he was to exercise with the assistance of a "Central Advisory Council of Malay Rulers" or "Council of Rulers" of which he was Chairman. With misplaced liberalism, the plan allowed the Council of Rulers the liberty of discussing other matters either at the instance of the Governor or any of the Rulers with the Governor's consent. With mistaken optimism, it was believed that "by these arrangements it will be ensured that each of the Rulers can play his part not only in the affairs of his State but in the future development of Malaya as a whole".⁹

It may be said that the Malayan Union was perhaps motivated by a right spirit but was achieved by a wrong method; in addition to its stress on efficient government, it was also contemplated as a mechanism which was to facilitate the move towards "democratic progress" or eventual self-government. The latter justification accounts for the inclusion of liberal citizenship provisions which would have made it possible for a large segment of non-Malay and immigrant population to acquire citizenship,¹⁰ either by birth in the Malayan Union or Singapore, or after fulfilling a suitable period of residence.¹¹ These citizenship provisions, an important element in the plan, together with the other drastic changes mentioned above became a subject of contention by the Malays in whose mind the plan amounted to an "annexation" of Malaya. For all practical purposes, Malaya became a colony except that different nationality laws applied to it since Malayan Union citizens were not to be citizens of the United Kingdom and Colonies. The concentration of power in the colonial administration therefore reached its apex during this period, although concentration was envisaged as leading the way towards democratic growth. Whereas previously the Rulers had some pretence of power and, from the strict legal view, sovereign power save where limited by treaty provisions, the Malayan Union replaced the general indigenous autocracy with a col-

⁹*Ibid.*, para 8.

¹⁰*Summary of Proposed Constitutional Arrangements*, p. 5: "The policy of His Majesty's Government is to promote a broad-based citizenship which will include, without discrimination of race or creed, all who can establish a claim, by reason of birth or a suitable period of residence, to belong to the country.

¹¹Thus, persons ordinarily resident in the territories for ten out of the preceding fifteen years were deemed eligible. In fact, naturalisation may be applied for after fulfilling a much shorter period of five years' ordinary residence.

onial administration that contained few checks on the ultimate power holder, namely the Governor.¹²

The intense opposition to the Malayan Union proposals led to the plan's early termination after a period of less than two years.¹³ The Union formally came into force on the first of April, 1946. It was superseded by the Federation of Malaya on the first of February, 1948. The full plan in fact did not bear fruition; the citizenship proposals, for example, never came into force; throughout the period the Governor ruled only with an Advisory Council which was originally intended merely as a transitional arrangement pending the appointment of the contemplated Executive and Legislative Councils.

The Malayan Union remains as an object lesson in the folly of establishing a constitutional structure without prior local consultation. The structure which superseded it was therefore established only after steps were undertaken to determine local popular opinion.¹⁴ The Federation of Malaya Agreement, 1948 was ultimately signed. It re-established a federal form of government, returned power to the Rulers, accommodated various competing demands of the Malays and non-Malays, and, as has been noted above, set the pattern of constitutional growth thereafter.

C. *The Federation of Malaya, 1948*

Under the Agreement of 1948, the constitution which was established resulted from the joint exercise of power by the United Kingdom Government and the respective Rulers of the Malay States. A federal form of government was established with a strong central authority with a measure of State autonomy. Broadly, it demarcated legislative power to the centre and executive power to the States. A new body, an Interpretation Tribunal, was established as a necessary element in this federation to ensure compliance with the Agreement. At the State and Settlement level, local legislatures known as Council of States and Settlement Councils were established, and to this end States which hitherto had functioned without

¹²The width of the Governor's power followed normal colonial pattern.

¹³Opposition was led mainly by the then newly-formed Malay political party, United Malay National Organisation (UMNO), in alliance with the Rulers.

¹⁴The Governor, the Rulers and representatives of UMNO met in conference on the 24th July 1946 when a set of draft proposals, prepared by the Rulers and UMNO, was handed to the Governor. On the 25th July 1946, a Working Committee was appointed comprising representatives of all three parties (5 members represented the Malayan Union Government, 4 the Rulers, and 2 UMNO). Its power was "to examine the constitutional proposals put forward by Your Highness and the United Malays National Organisation and to work out in detail, for Your Excellency and Your Highness to examine and criticise, fresh constitutional arrangements in the form of a provisional scheme which would be acceptable to Malay opinion, and which would provide a more efficient administration and form the basis of future political and constitutional developments". See *Constitutional Proposals for Malaya: Report of the Working Committee*, Kuala Lumpur 1947. The Report of the Working Committee was next tabled before a Consultative Committee which represented the non-Malay population. See *Report of the Consultative Committee on the Constitutional Proposals*, Kuala Lumpur, 1947.

written constitutions now functioned otherwise. Thus the written constitutions of many of the States date from 1948. At the centre the Chief Executive was renamed High Commissioner who exercised power in some respects as a representative of the British Government and in other respects under authority jointly delegated to him by that government and the Malay Rulers. In this dual capacity, he held wide legislative and executive powers. In exercising legislative power he acted upon the advice of the Federal Legislative Council of which he was President. It is clear that the Council was advisory in nature since the High Commissioner had overriding and reserve powers; he could refuse his assent to a Bill on the grounds of "public order, public faith, or good government", and he could declare any Bill not passed by the Council as having effect as if it were passed by that body on the same grounds. He was, of course, accountable to the Colonial Secretary who could reverse his decisions ultimately. At the State level, the Rulers were given similar reserve powers on matters within the State's competence. Executive power was exercised by the High Commissioner with the assistance of an Executive Council. In the States, State Executive Councils were established and the State administration functioned under a Chief Minister (Menteri Besar). At both levels, the High Commissioner or the Ruler could act in opposition to the advice given by the respective executive bodies.¹⁵

It seems clear that the Federation of Malaya Agreement did not introduce constitutional government. Both the High Commissioner and the respective Rulers were not constitutional rulers under the Agreement.¹⁶ Nevertheless, the constitution which was established remains an important milestone as one which maintained a generally acceptable degree of political equilibrium, and provided a structure which made it possible to advance towards self-government with a constitutional form of government. In assessing the role of the judiciary in present-day Malaysia as a means of controlling governmental power, it appears necessary to place the growth of constitutional government in its proper perspective and not to attribute to judicial power unrealistic demands and potentials. The growth of judicial power was affected by these political events, but it is only during the period subsequent to independence that the doctrine of judicial review is given gradual articulation which in principle distinguishes it from the power claimed and exercised by courts prior to this period.

¹⁵In the Settlements of Malacca and Penang the corresponding bodies were the Nominated Council and the Settlement Council. The principal officer was the Resident Commissioner who acted in the name of the High Commissioner. The latter held the reserve powers *vis-a-vis* the Settlements.

¹⁶See *Report of the Federation of Malaya Constitutional Commission 1957* (hereafter *Reid Commission Report*), para 177 for an acknowledgement that the Rulers could not then be regarded as constitutional Rulers.

D. Structure of the Courts and the Interpretation Tribunal

The Malayan Union scheme introduced a streamlined court structure with one Supreme Court for the whole Union;¹⁷ Singapore, being placed outside the immediate scheme, was therefore given a separate Supreme Court. But the old practice of interchangeability of judges was continued by providing that judges of the Supreme Court, Malayan Union, could preside as judges of the Supreme Court, Singapore, and *vice versa*. The arrangement of the Supreme Court was an extension of the court structures previously obtaining in the Straits Settlements: it was to consist of a Court of Appeal and a High Court under a Chief Justice. The Subordinate Courts too were revised by local legislation, by abolishing the differentiation between First and Second Class Magistrates and substituting therefore a structure of District Courts and Magistrates Courts. For nearly two years, the Malayan Union Courts dispatched judicial work against the background of rapid political changes and mounting attack on the governmental structure of the Union. The effects of these developments on judicial attitude are difficult to pin down, but the immediate post-war preoccupation with reconstruction could be seen as curbing any judicial tendency towards activism *vis-a-vis* the government. Indeed, the first (and last) Chief Justice of the Malayan Union, Willan, is reported to have called for "forebearance and co-operation" between *inter alia* the Government and judges.¹⁸

With the demise of the Malayan Union, the structure of courts experienced another change at two levels: first, the introduction of a tribunal charged with the express task of judicial review necessitated by the nature of the federation arrangement of 1948, and second, the restructuring of the Subordinate Courts. So far as the Supreme Court was concerned, the Federation of Malaya Agreement continued the pre-existing structure and provided further that the Chief Justice and Judges of the Supreme Court of the Malayan Union were to be the first Chief Justice and Judges of the Supreme Court of the Federation of Malaya.¹⁹ A somewhat similar continuity was maintained for the Subordinate Courts as regards their personnel, although the Agreement went on to provide for constituting these new Courts by ordinary legislation. The Courts Ordinance, 1948²⁰ substituted for the Malayan Union Subordinate Courts a structure of Sessions Courts, Magistrates' Courts and Penghulu's Courts in a descending jurisdictional order;²¹ this structure has been continued up to the present in West Malaysia.

¹⁷Constituted under Malayan Union Orders-in-Council, 1946.

¹⁸Reported in (1946) 12 M.L.J., xlvi at xlviii. Local legal literature during this period shows a predominance of attention being accorded to issues of the international law of war, and, generally, respect for the Rule of Law on the international plane.

¹⁹Clauses 77 and 78 of the Federation of Malaya Agreement, 1948.

²⁰Ordinance No. 43 of 1948.

²¹*Ibid.*, s.3.

The innovative feature of the Federation of Malaya structure can be seen in the introduction of a body expressly vested with the power to interpret the Federation of Malaya Agreement. Hitherto, such broad power of review was by no means generally accepted. Indeed, it was denied by the Court of Appeal, Johore in *Anchom v Public Prosecutor*²² where, although it was conceded that the Constitution of Johore was part of the law, the court held against regarding it as overriding. Confronted with the written Constitution of Johore ("this remarkable document"),²³ the Court of Appeal totally declined power even to construe or interpret it. Sovereignty in the State resided in the Sultan and the Legislature, the Court held. The written Constitution could not, therefore, control Enactments passed by the Sultan-in-Council. To hold otherwise would mean treating Enactments "as the English Courts treat by-laws."²⁴

Under clause 153 of the Federation of Malaya Agreement the power to interpret the Agreement was "exclusively exercisable" by an Interpretation Tribunal "whose decisions as to the meaning, interpretation, construction or effect of any such provision of the Agreement shall be binding upon the parties to this Agreement and upon all other persons and shall not be called in question in any Court". Whatever disquiet there was towards judicial review of legislation was temporarily set to rest by this new provision, but the Tribunal itself contained features which set it apart from judicial bodies presently vested with the power of judicial review. It appears clear from the Federation of Malaya Agreement that it was not conceived as a Court;²⁵ its composition also distinguished it from the Courts

²²(1940) M.L.J. 18(McElwaine C.J.(S.S.); Poyser C.J. (F.M.S.); Gordon-Smith Ag.J.A.; Pedlow J.; Manning J.). The issue before the Court concerned whether provisions in the Offences by Muhammedans Enactment (No. 47) (a Johore law) were *ultra vires* the State Constitution and therefore void.

²³Per Gordon-Smith Ag.J.A., at p. 23.

²⁴Per Poyser C.J. (F.M.S.), at p.22. See also judgment by McElwaine C.J. (S.S.) at p.21: "While it is unusual, I see no reason to think that a sovereign legislature cannot say that a particular enactment shall be interpreted by a particular person or body of persons and that it shall not be interpreted by the Courts . . . The position then is that the Legislature is the sole authority which can decide whether what it does is *intra vires* or not. It is constituted by enactment and the sole judge of its own cause. In legislating, it must be presumed to have interpreted the Constitution as permitting that legislation."

Cf. *Wong Ah Fook v State of Johore* (1937) M.L.J.121 (Supreme Court), per Whitley J., where an executive act of the Sultan (grant of gambling rights) was successfully challenged on the argument that the Sultan was himself subject to law since he had made a solemn declaration to that effect in 1908. *Wong Ah Fook* is a decision before a single judge. Its holding is open to question in light of the decision handed down by the full bench in *Anchom*. Generally, see also the following older Straits Settlements cases as examples of judicial restraint: *In re ex Sultan Abdullah* (1877)2 Ky.(H.C.); *Yap Hon Chin v Jones Parry and Cowan* (1911) 2 F.M.S.(P.C.)70; *Wah Ah Jee* (1919) 2 F.M.S.193. Cf. e.g. *In Re Dunlop ex parte Rykshroeff* (1879)2 Ky(H.C.)30, and the early case of *Kamou v. Busset* (1808)1 Ky, 1.

²⁵The Tribunal was constituted under Part XIV of the Agreement under the heading "Miscellaneous" whereas Courts were dealt with under Part VII, headed appropriately "Courts".

proper since aside from the Chief Justice, who was Chairman, the two other members of the Tribunal could be either Judges of the Supreme Court or possessed qualifications of such Judges. A decision of the Tribunal, as noted above, was final and no Court could invalidate it. Indeed, these unsatisfactory characteristics attracted the attention and mild criticism of the Selangor Bar Sub-Committee in its memorandum submitted to the Consultative Committee on the Constitutional Proposals of 1947.²⁶ Despite its shortcomings, this bold experiment, which preceded the more sophisticated judicial review doctrine tabled by the Reid Commission for independent Malaya, has to be regarded as an important event in the development of the doctrine in Malaysia. The Tribunal's life was brief and heard only one reference, namely *In Re Land Acquisition by the State of Selangor*,²⁷ but in doing so it turned its back on the cautiously narrow attitude shown by the Judges in *Anchom*. In this reference, it construed a clause in the Federation of Malaya Agreement, defined the procedural requirements for compulsory acquisition by a State Authority, and struck down a purported compulsory acquisition of land for purpose of defence made by the Selangor State Government as one made without executive authority under the Agreement. A condition precedent to acquisition (a so-called "requirement") had not been satisfied so that there could be no power to compulsorily acquire. Willan C.J., delivering the decision of the Tribunal, felt that acquisition of land was an interference with private property; it was thus "essential" to "comply strictly" with the law governing compulsory acquisition.

The aforesaid assessment of clause 153, and its working by the Tribunal, merely illustrates what may justly be described as a rather bold experiment, but to see it as an example of an unquestioning commitment to the doctrine of judicial review may be overstretching its importance. The debate on judicial review was to continue in the formative years before independence, and the exact scope of the doctrine found today in the Federal Constitution of Malaysia is the outcome of this debate which in fact even modified the Reid Commission recommendations on the matter.

E. The Independence Constitution

The preamble to the Federation of Malaya Agreement evidenced the desire

²⁶The Consultative Committee (*supra*) in fact recommended that the two other members be Judges of the Supreme Court and that the "representations of the Selangor and Penang Bar Sub-Committee . . . be given careful consideration". See *Report of the Consultative Committee on the Constitutional Proposals*, p. 14.

²⁷(1950)M.L.J., Vol. XVI, 152. Reference No. 1 of 1950 from the Court of Appeal. Members of the Tribunal were (1) Sir Harold Willan, C.J. (Chairman), (2) Pretheroe, J. (3) Haji Abdul Wahab bin Abdul Aziz, (4) Dato Panglima Bukit Gantang, *Menteri Besar*, Perak. The composition of the Tribunal included only two judges, both British. It is interesting to note that it did not debar a member of a State Executive, a *Menteri Besar*, from sitting and exercising an essentially judicial function. It is also significant that the two other members were Malays, an important example of indigenous participation in the administration of justice at a high level preceding that Malayanisation programme of the judiciary in later years.

of the British Government and the Rulers that "progress should be made towards eventual self-government"; as a first step, it was agreed that legislation should be introduced whereby members of the various legislatures established under the Agreement could be elected as soon as circumstances and local conditions permitted. The movement towards self-government was gradual, and it was only in 1955 that the first election was held, although between 1950 to 1953 local elections to elect members to local authorities were undertaken to introduce the population to participatory democracy. During the period leading up to the first general election, numerous significant developments occurred: the Member system was introduced in 1951 by which a number of Unofficial Members of the Federal Legislative Council were given quasi-ministerial posts; in 1952 amendments to the citizenship provisions of the Agreement loosened further still eligibility for citizenship; in 1953 a representative committee was appointed to consider and report on the composition of the various legislatures and the introduction of general elections. When finally elections were held, the Federal Legislative Council came to consist of an Unofficial majority of 52 seats out of a total of 99. The growth in the power of these elected Unofficials was matched by a gradual decline in the power of the High Commissioner. Thereafter, the momentum towards independence accelerated and the principle was accepted by the British Government, the Rulers and the Alliance Party that a "Commonwealth Constitutional Commission" be appointed to review the constitution established under the 1948 Agreement. A Constitutional Conference attended by representatives of the British Government, the Malayan Government, the Rulers and the Alliance met in London in early 1956, and reached agreement on a fundamental point — that full self-government and independence should be proclaimed by August, 1957. Subsequently, upon the further recommendation of the Conference, agreement on the composition and terms of reference of the Constitutional Commission was finalised. The Reid Commission, as it has come to be called, was appointed and charged with the following terms of reference:

To examine the present constitutional arrangements throughout the Federation of Malaya, taking into account the positions and dignities of Her Majesty The Queen and Their Highnesses the Rulers;

and

To make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature, which would include provisions for:

- (i) the establishment of a strong central government with the States and the Settlements enjoying a measure of autonomy . . . and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution;

- (ii) the safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States;
- (iii) a constitutional Yang di Pertuan Besar (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers;
- (iv) a common nationality for the whole of the Federation;
- (v) the safeguarding of the special position of the Malays and the legitimate interests of other communities.²⁸

The Reid Constitutional Commission

Working within the abovementioned terms of reference, and they have clearly left an indelible mark on important features of the present-day Constitution, the Reid Commission explored and recommended changes to the existing constitutional arrangements; it reported that many existing arrangements were inappropriate for a self-governing and independent country,²⁹ although it bore in mind that new provisions recommended "must be both practicable in existing circumstances and fair to all sections of the community". The Commission had to recommend not merely a form of constitutional government, but one which balanced competing demands of the various races in Malaya, and proved workable given the special circumstances of the country. Thus, citizenship, language, special position of the Malays and the legitimate interests of the other communities were issues of tremendous importance which were incorporated as constitutional provisions.

In assessing the Reid Commission's recommendations on a constitutional form of government and, indeed, on other matters, the democratic and representative character of the Commission's deliberations is particularly noteworthy. In general, full opportunity was given to various sections of the population to voice their opinions whether orally or by written memoranda.³⁰ Its publication was followed by a further detailed examination and submission of counter-recommendations by a Working Party, appointed in Malaya, consisting of the High Commissioner, four representatives of Their Highnesses the Rulers, four representatives of the elected Government of the Federation, the Chief Secretary and the Attorney-General.³¹ The Working Party, thereafter, in turn reported to the Con-

²⁸See *Reid Commission Report*, para 3.

²⁹*Ibid.*, para 26.

³⁰The Commission was in Malaya from June to October, 1956. It received a total of 131 memoranda, held 31 meetings to hear evidence, and sat, as a full Commission, 118 times. See *Reid Commission Report*, paras 6—12. The Report was formally submitted to Her Majesty the Queen and Their Highnesses the Rulers on 21st February, 1957.

³¹23 meetings were held between 2nd February to 27th April, 1957.

ference of Rulers and the Federal Executive Council.³² Another meeting followed in London attended by the High Commissioner, the Chief Minister, representatives of Their Highnesses the Rulers, representatives of the Government of the Federation, and the Attorney-General;³³ the meeting "resulted in agreement being reached between all parties on all points of principle".³⁴ The initial Reid drafts were revised, and the revised drafts submitted again to the Working Party for examination.³⁵ A White Paper, "Constitutional Proposals for the Federation of Malaya," was subsequently published.³⁶ In July, 1957 a motion was introduced in the Federal Legislative Council to welcome the proposals contained in the White Paper and fully support the steps necessary to give effect to them.³⁷ The motion was passed after two lively debates during which concern was expressed on a number of matters by a minority of members.³⁸ The majority, including the whole of the elected membership, welcomed the proposed Constitution as a workable one which, to the best of ability, took into account the various conflicting interests of the day. As mirrored in the speech of the then Chief Minister, Tunku Abdul Rahman, it could provide the country with a "firm foundation", and, in his opinion, a better Constitution could not have been devised in the prevailing circumstances of the country.³⁹ The Federal Constitution Bill, 1957 was next passed by the Council during which another lively debate, devoted almost exclusively to provisions relating to judicial review, fundamental rights and independence of the judiciary, was to follow.⁴⁰ As in the earlier motion debate, dissenting voices were in a small minority; nevertheless, as shall be seen later, the arguments put by this small minority showed special concern for these matters and the replies given to them go a long way in illuminating the conception of judicial review presently entrenched in the

³²On 14th March to 7th May, and 3rd to 6th May respectively.

³³On 13th to 21st May.

³⁴See *Constitutional Proposals for the Federation of Malaya*, Cmd 210 (1957), para 2.

³⁵United Kingdom officials were present when the Working Party met in Malaya for this purpose.

³⁶Cmd 210 (1957), published in Malaya as Council Paper No. 42 of 1957.

³⁷The Motion read:

That this Council welcomes the constitutional proposals contained in Legislative Council Paper No. 42 of 1957 and annexes thereto and declares that it will fully support all the steps necessary to give effect to these proposals and to establish the Federation of Malaya as an independent sovereign State on 31st August, 1957.

³⁸See *Legislative Council Debates, Official Report of the Second Legislative Council of the Federation of Malaya for the Period (Second Session) October, 1956 to August 1957*, Kuala Lumpur, 1958: Debates on 10th and 11th July, 1957.

³⁹*Ibid.*, at col. 2866.

⁴⁰*Ibid.*, See in particular, the debate during the Second Reading of the Bill (15th August, 1957), Cols 3135 to 3178.

Constitution of Malaysia. Against this background, the process of constitution-making in pre-independent Malaya during 1956 to 1957 extended beyond the work and Report of the Reid Commission. In a process of accommodation, improvement and compromise, what finally emerged contained some provisions which differed from the initial Reid draft. Some changes were minor, but those on judicial review and aspects of fundamental rights reduced the suggested judicial power as against Parliament and the Executive. Lord Reid himself, however, appeared not to have viewed these changes with concern, for in the House of Lords' debate on the Federation of Malaya Independence Bill (U.K.) he is reported to have said:

... a greater part of the changes have been in the direction of giving more freedom to the executive and Parliament of Malaya and correspondingly less extensive guarantees of individual rights that we had recommended. I cannot speak for my colleagues but speaking for myself I am not dismayed at the changes which have been made. The other changes which do not come into this category I have described are mostly of minor importance.⁴¹

The general framework of government suggested by the Reid Commission.

In a sense, the Reid Commission built upon a foundation laid by the Federation of Malaya Agreement, 1948: it recommended a perpetuation of the federal system where control of the centre was to remain strong; in place of the unsatisfactory division of Federal-State powers, it recommended a neater demarcation with each level of government enjoying defined legislative and executive powers. The position of the Rulers under the State Constitution was recommended to be changed to keep in line with a constitutional form of government suggested for the Federation; a Yang di Pertuan Agong (Paramount Ruler and Head of State) for the Federation was suggested in whom vested executive power, although such power had to be exercised on the advice of the Prime Minister (the Head of Government); a similar pattern was to be established at State level where executive power resided formally in the Ruler; a Parliamentary system of government was to be a principal feature with a bicameral legislature from which government was to be appointed and to which it was to be accountable; at the State level, however, there was to be a unicameral legislature; election though universal suffrage was the means towards a representative legislature; the judiciary was to be independent and vested with the power of judicial review, to safeguard not only fundamental rights but also to settle Federal-State controversies; fundamental rights were to be entrenched and amendment power circumscribed. The main proposals distinguish the Reid draft radically from the Federation of Malaya Agreement, 1948, for the form of government suggested was a constitutional one, characterised by a formal separation of powers with checks and balances and based on a Parliamentary system. In this, the Courts were to occupy a key role

⁴¹Quoted at col. 3139 of Legislative Council Debates.

as guardian of the Constitution. To this end the old colonial regime was improved upon; provisions were inserted into the draft Constitution whereby judges were guaranteed both independence and security of tenure. The Working Committee accepted these principles, in particular strengthened the belief that the judiciary should be free from political influence. But, interestingly, this desire led not to an expansion of the suggested judicial power but its diminution. The initial Reid draft was amended. It is the amended version which is presently in force under the Malaysian Constitution. A detailed analysis of this change is therefore apt, as showing the various competing beliefs in the nature of judicial review. Arguably, the actual exercise of judicial power by the Malaysian Courts since independence appears at times to reflect the belief which ultimately prevailed in the process of constitution-making.

Recommendations on the Judiciary and Judicial Review

Basically, the Reid Commission did not recommend any change in the existing powers and procedure of the Supreme Court, but noted that its jurisdiction would have to be "considerably enlarged".⁴² It opposed the perpetuation of the *ad hoc* Interpretation Tribunal, and recommended that the power be given to the ordinary Courts, in particular the Supreme Court, in common with other federations. It saw judicial review as a necessary element to safeguard State autonomy as the States "cannot maintain their measure of autonomy unless they are enabled to challenge in the Courts as *ultra vires* both Federal legislation and Federal executive acts."⁴³ Additionally, the inclusion of entrenched fundamental rights "requires the establishment of a legal procedure, by which breaches of those Fundamental Liberties can be challenged."⁴⁴ For securing a rapid decision on a constitutional question, the Supreme Court was to be enabled to hear references made to it on the lines adopted in Canada, India and Pakistan. In Federal-State conflicts, it recommended that original jurisdiction be vested in the Supreme Court to the exclusion of all other Courts. To secure judicial independence, it suggested that the Chief Justice and other Supreme Court Judges should be appointed from persons suitably qualified, and opposed the idea that appointment power be vested in an independent Judicial and Legal Service Commission. Further, once appointed a Judge was not to be removed except by an order of the *Yang di Pertuan Agong* acting in pursuance of a motion passed by two-thirds of members of each House of Parliament, and even then there must be proved misconduct or infirmity of mind or body.⁴⁵ In the same spirit, the conduct of a Judge was made

⁴²Reid Commission Report, para 123.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Ibid.*, para 125.