

THE EVE-OF-INDEPENDENCE CONSTITUTIONAL DEBATE ON FUNDAMENTAL LIBERTIES AND JUDICIAL REVIEW: A WINDOW ON ELITE VIEWS AND CONSTITUTIONAL GOVERNMENT IN MALAYSIA?

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Pembentukan keputusan tentang perlembagaan, dan kontroversi-kontroversi yang kadangkala dicetuskannya, adalah sebenarnya usaha pengimbangan dan pembedaan nilai-nilai politik yang bersaing. Sifat berdilema ini menjadikan perdebatan-perdebatan perlembagaan selaku satu yang turut menonjolkan pemikiran politik - nilai, kepercayaan dan sikap - pedebat-pedebatnya. Yang amat menarik sekali adalah pemikiran elit pemerintah kerana ianya berkemungkinan kuat mempengaruhi bentuk politik negara. Makalah ini meneliti debat atas soal hak asasi dan peranan kehakiman sebelum sahaja merdeka sebagai usaha awal mengenalpasti beberapa pandangan elit berkaitan dengan pemerintahan berperlembagaan di Malaysia. Dicadangkan yang pandangan elit ini masih mempengaruhi secara luasnya perkembangan perlembagaan negara dan kerana itu hal ini harus diakui dan dihadapi jika trend masa lampau ingin kita hindarkan.

INTRODUCTION

"In civil society as in the state of nature, rights are threatened most of all by other men and by other nations, and the primary function of government is to protect men from other men and other nations."¹ The first requirement for securing rights or liberties, therefore, is a government endowed with adequate powers to defend men's rights against other men and other nations. However, the powers which government needs in order to perform this basic function include the powers of depriving men of their rights - to the various personal freedoms, to property, and indeed to life itself - and if these powers are abused, as all powers in human hands can be, it would defeat the very purpose for which they have been bestowed upon government. Thus a second, and hardly less important, requirement for securing men's rights in civil society is to prevent government from abusing its powers, as well as provide mechanisms for protecting the individual against improper governmental infringement of his rights.

Both the need for, and the main methods of, protecting individual rights against improper governmental encroachment have been eloquently stated by James Madison in the following oft-quoted passage in *Federalist 51*:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to

be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.²

The primary general method of making the government dependent on the people is by having regular and free elections, while the extent and exact nature of that dependence is, in large part, a function of the electoral system. Madison's "auxiliary precautions" are perhaps more popularly known today as "constitutional government" or "constitutionalism", which, in essence, seeks to secure a minimum sphere of genuine autonomy for the individual by imposing restraints upon governmental power.³ These restraints consist mainly of the distribution of power among separate governmental institutions and the guarantee of certain rights to the individual together with an independent judiciary to adjudicate complaints of infringement and provide appropriate remedies. The latter method of judicial review is not only useful in relation to mobilising and focusing public opinion, upon which its effectiveness ultimately depends - a function and condition which it shares in common with other institutional checks - but has the added advantage that it can be triggered into action by the aggrieved person or persons long before that final (but, alas, often distant) bastion of public outrage is reached.

In this paper I shall examine an episode of constitutional decision-making which took place just prior to the achievement of independence by the Federation of Malaya in 1957 and which concerns the role of the judiciary in protecting individual rights or fundamental liberties provided for in Part II of the country's constitution. As is widely known, the Draft Constitution recommended by the five-man Constitutional Commission headed by Lord Reid was reviewed and changed in several important respects by the so-called Working Party (consisting of the High Commissioner, four representatives of their Highnesses the Rulers, four representatives of the Alliance government, the Chief Secretary and the Attorney-General) before it was enacted as the constitution of independent Malaya. The Working Party was set up mainly to meet Malay dissatisfaction with elements of the so-called communal bargain embodied in the Draft Constitution. Malay leaders of the Alliance pointed to important recommendations in the Draft Constitution which had departed from the Alliance proposals to the Reid Commission. The bulk of the counter-recommendations of the Working Party sought to correct or undo these departures which were believed to be the main source of Malay unhappiness with the Draft Constitution. Included in its counter-recommendations, however, were also several important changes to the Reid recommendations on the role of the judiciary or judicial review in relation to the protection of fundamental liberties.⁴ These changes became the subject of a sustained and substantial debate when the revised constitutional proposals

incorporating the counter-recommendations of the Working Party (hereinafter referred to as the Proposed Constitution) were laid before the Federal Legislative Council for obtaining a motion of support in July 1957 and during its passage, in the form of the Federal Constitution Bill, through the same Council in August 1957.

As the Working Party's amendments to the Reid Commission recommendations on judicial review in relation to fundamental liberties still form part of the Constitution of Malaysia, an examination of these amendments and the reasons given for them would appear necessary for a proper understanding of this part of the present-day constitution of the country. However, there are more important reasons for examining this eve-of-independence constitution-making episode. In an article on the development of judicial review in Malaysia, a legal scholar, Mohd. Ariff Yusof, has pointed out that the accompanying debate in that episode also reveals "the various competing beliefs in the nature of judicial review" and "go(es) a long way in illuminating the conception of judicial review presently entrenched in the Constitution of Malaysia".⁵ This conception is of course that of the Alliance leaders who were then about to form the first government of an independent Federation of Malaya. The same legal scholar also suggested that this restrictive conception of judicial review which prevailed in the process of constitution-making in 1957 has conditioned the actual exercise of judicial power by the Courts since independence: "While ... it is a hazardous exercise to trace the actual influence of these debates on judges, a correlation between the present-day exercise of judicial power and the dominant ideas voiced in these debates can plausibly be found."⁶ To the present writer, the debate on judicial review and fundamental rights is interesting for another, or at least for a more general, reason. The arguments put forward by the two sides in the debate are revealing not only of differing conceptions of judicial review, but, more generally, of differing conceptions of constitutionalism and its practice in constitutional government. Of primary interest are the views of government leaders or the ruling elites. The views of ruling elites on important matters are always important because they are better placed than others to act out their views. In Malaysia, their views have an added importance because of their dominance in public decision-making (including, and especially, constitutional decision-making) and because of the essential continuity of the ruling group in the country. The beliefs and attitudes of ruling elites clearly deserve more attention than has hitherto been given them in the study of Malaysian politics. For this purpose, it may be more reliable to examine the expression of their views by elites themselves in real situations or actual decision episodes than to elicit their views by means of interviews or questionnaires in more artificial or contrived situations. The constitution-making episode on fundamental rights and judicial review chosen for analysis here contains elaborate statements and arguments made by the Alliance government bearing upon constitutional government. This,

together with the considerable care that evidently went into the formulation of these statements and arguments, makes it a particularly suitable case for the examination of government leaders' views on the important subject of constitutional government.

The remainder of this paper is divided into four parts. The first two parts lay out the relevant recommendations in the Draft Constitution drawn up by the Reid Commission and the changes made to them by the Working Party. The third part reproduces, as far as possible in the protagonists' own words, the criticisms and responses made in relation to the changes recommended by the Working Party. The fourth and final part identifies what appears to be the most salient strands in the governing elites' thinking in relation to constitutional government, suggests the continuing relevance of these views to the post-independence development of constitutional government in the country, and discusses some implications or lessons for the future.

FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW IN THE DRAFT CONSTITUTION: THE REID RECOMMENDATIONS

The Reid Constitutional Commission explained its provisions for the protection of fundamental rights in the Draft Constitution in the following words:

A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. The rights which we recommend should be defined and guaranteed are all firmly established throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done. The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise.⁷

The Reid Commission provided for the basic principles of the rule of law and the supremacy of the constitution in Article 3 of the Draft Constitution. In full recognition of the principle that there is no right if there is no remedy, the commission provided, in Article 4, Clause (1), for access to a Supreme Court endowed with the powers necessary for enforcing rights. Article 4(1) reads:

4(1) Without prejudice to any other remedy provided by law -

- (a) where any person alleges that any provision of any written law is void, he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.
- (b) where any person affected by an act or decision of a public authority alleges that it is void because -
 - (i) the provision of the law under which the public authority acted or purported to act was void, or
 - (ii) the act or decision itself was void, or
 - (iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,

he may apply to the Supreme Court, and if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case;

- (c) where it is alleged that a public authority owes a duty under the Constitution, or the Constitution of any State, and that such duty has been neglected or has not been carried out in accordance with the law, any person aggrieved thereby may apply to the Supreme Court for an order requiring the public authority to perform such duty in accordance with the law, and, if the Court is satisfied that the allegation is correct, it may make such order as it may consider appropriate in the circumstances of the case.⁸

What, then, are the fundamental rights which the Reid Articles 3 and 4 seek to protect? These rights, defined in Articles 5 to 13 of the Draft Constitution, consist of individual rights which are commonly protected in other constitutions and mostly take the form of rights to do or keep things and, correspondingly, not to have things done to or taken from the individual. There is considerable variation, however, in the extent to which these rights are protected in the constitution. Some, such as the right to profess and practise one's religion, freedom from slavery, freedom of citizens from

banishment and freedom from retrospective criminal laws and repeated trials, appear to be absolute in the terms of their constitutional grant; others are, in varying degrees, qualified, either by exceptions provided in the constitution itself or, as is mostly the case, by the power of Parliament to pass laws restricting them. Thus, no express condition or limitation appears to be placed upon the power of Parliament to pass laws restricting the freedom of the person (life and personal liberty) or laws depriving a person of his property, for the terms of their constitutional grant merely state that there shall be no restriction or deprivation "save in accordance with law"; the only protection afforded to these rights by the constitution is protection against executive acts which are not authorised by any existing law (apart from some procedural safeguards in the case of freedom of the person). Greater protection seems to be accorded by the constitution to the freedom of movement and especially to the freedom of speech, assembly and association - perhaps because these freedoms are intrinsic to popular participation in politics and hence to popular control of government and, for that reason, are most prone to governmental nibbling. It provides that a law imposing restrictions on these rights must meet certain specified conditions: it must be in the interest of specified objects or purposes, and, in the case of a law restricting freedom of speech, assembly and association, that the restrictions it imposes are reasonable as well. For some reason, not quite apparent, the standard of reasonableness is not expressly required of legislative restrictions on the freedom of movement and residence. The relevant articles on the freedom of movement and residence (Article 9[2]) and on the freedom of speech, assembly and association (Article 10) in the Draft Constitution are reproduced below:

- 9(2) Subject to any restriction imposed by federal law in the interest of the security of the Federation, public order, or public health, every citizen shall have the right to move freely throughout the Federation and to reside or settle in any part thereof.
- 10(1) Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restriction imposed by federal law in the interest of the security of the Federation, friendly relations with other countries, public order, or morality, or in relation to contempt of court, defamation, or incitement to any offence.
- (2) Every citizen shall have the right to assemble peaceably and without arms, subject to any reasonable restriction imposed by federal law in the interest of the security of the Federation or public order.
- (3) Every citizen shall have the right to form associations, subject to any reasonable restriction imposed by federal law in the interest of the security of the Federation, public order or morality.⁹

As the changes introduced by the Working Party and the debate which followed pertain mainly to these two articles (and the aforementioned Article 4 on the role of the Supreme Court), it may be useful to examine briefly the scope of, or grounds for, judicial review provided by the express limitations upon legislative interference contained in them. By permitting legislative restrictions on the liberties concerned only for a limited number of specified purposes, the language of Article 9(2) and Article 10, as ordinarily understood, would permit an aggrieved person to go to court and challenge any restriction on the ground that it was imposed not in the interest of any of the specified purposes, but for some other purpose or purposes. At issue then would be the *bona fides* of the legislative restriction and its justiciability would thus require Parliament to use its legislative powers in good faith. The import of inserting the word "reasonable" into all the three clauses of Article 10 is to impose an additional condition or requirement on legislative restrictions and thus provide an additional ground for judicial review of legislative restrictions upon the rights contained in that article. It permits the courts to judge whether any restriction imposed by law for any of the specified purposes meets the additional requirement of being reasonable and to annul it if it does not. Whether the Reid Commission was following the Indian Constitution in this matter, as may be surmised, or otherwise, reference to the debate in the Indian Constituent Assembly which led to the insertion, by amendment, of the term "reasonable" into Article 13 and subsequently into other articles concerning fundamental rights in the Draft Indian Constitution, is useful in clarifying the effect of the insertion. One of the speakers in the debate, Hukum Sardar Singh, voiced the widely-felt dissatisfaction with the unnamed Article 13 in the following words:

The sphere of the Supreme Court will be very limited. The only question before it would be whether the legislation concerned is "in the interest of public order". Only the *bona fides* of the legislation will be the main point for decision by the Court and when once it is found by the Court that the Government honestly believed that the legislation was needed "in the interest of the public order", there would be nothing more left for its interference ...¹⁰

The solution, which was finally accepted, was proposed and explained by another speaker, Pt. Thakur Das Bhargava:

Sir, one speaker was asking where the soul of the lifeless Article 13 was? I am putting the soul there. If you put the word "reasonable" there, the court will have to say whether a particular Act is in the interest of the public and, secondly, whether the restrictions imposed by the legislation are reasonable, proper and necessary in the circumstances of the case. The courts will have to go into the question and it will not be the legislature and the

executive who could play with the fundamental rights of the people. It is the courts who will have the final say. Therefore, my submission is that we must put in these words "reasonable" or "proper" or "necessary" or whatever good word the House likes ... Otherwise, Article 13 is a nullity. It is not fully justiceable now and the courts will not be able to say whether the restrictions are necessary or reasonable.¹¹

To recapitulate, the Reid Commission's Draft Constitution defines the extent of certain fundamental liberties which are to be guaranteed and, in its own words, "afford(s) means of redress, readily available to any individual, against unlawful infringements of personal liberty in any of its aspects".¹² This, then, is the Reid Commission's design for the protection of fundamental liberties in its Draft Constitution of the Federation of Malaya.

Before examining the changes to the above design made by the Working Party it is pertinent to note that one of the members of the Reid Commission, Mr. Justice Abdul Hamid from Pakistan, disagreed with the other four commission members on some recommendations in the Draft Constitution, including the incorporation of the rules of natural justice into the constitution in Article 4(1)(b)(iii) and the insertion of the word "reasonable" in all the clauses of Article 10. Mr. Justice Abdul Hamid's main objection to the inclusion of the principles of natural justice into the constitution, as stated in his Note of Dissent, was that these principles were vague and subject to change by judicial interpretation and therefore "do not provide safe and definite standards"¹³ for inclusion in the constitution:

With principles of natural justice nowhere defined there will be no standard by which judicial and quasi-judicial authorities will be guided in their actions, and no standard by which the Supreme Court will be able to measure the challenge when the matter is brought before it. A provision like that has no place in any known constitution.¹⁴

The main ground of his objection to putting the word "reasonable" before "restriction" in the clauses of Article 10 was that it would cause conflict between the legislature and the judiciary and thus bring about uncertainty in the law. In his own words:

If the word "reasonable" is allowed to stand, every legislation on this subject will be challengeable in court on the ground that the restrictions imposed by the Legislature are not reasonable. This will in many cases give rise to conflict between the views of the Legislature and the views of the court, on the reasonableness of the restrictions. To avoid a situation like this it is better to make the

Legislature the judge of the reasonableness of the restrictions. If this is not done the Legislatures of the country will not be sure of the fate of the law which they will enact. There will always be a fear that the court may hold the restrictions imposed by it to be unreasonable. The laws would be lacking in certainty.¹⁵

As will be seen below, these dissenting views of Mr. Justice Abdul-Hamid were to find markedly more favour with the Working Party than they did with his fellow commission members.

FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW IN THE PROPOSED CONSTITUTION: CHANGES TO THE REID RECOMMENDATIONS

The changes made by the Working Party to the Reid Commission's Draft Constitution were incorporated into the so-called Proposed Constitution of the Federation of Malaya. The draft articles concerning fundamental rights and judicial review were among those affected by these changes. A comparison of the proposed articles on the subject with the relevant Reid draft articles reveals that the major changes were introduced by the proposed Articles 4, 9(2) and 10; these are reproduced below for ease of reference and comparison with the original draft articles reproduced earlier.

- 4(1) 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.
- (2) The validity of any law shall not be questioned on the ground that -
 - (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or
 - (b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
- (3) ...
- 9(2) Subject to any restriction imposed by any law relating to the security of the Federation, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

10(1) Subject to Clause (2) -

- (a) every citizen has the right to freedom of speech and expression;
- (b) all citizens have the right to assemble peaceably and without arms;
- (c) all citizens have the right to form associations.

(2) Parliament may by law impose -

- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence;
- (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or public order;
- (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation, public order or morality.¹⁶

The following changes are particularly noteworthy. First, the Reid Article 4, which provides for access to the Supreme Court and for the Court's powers of review and redress, was omitted in the Proposed Constitution. The Reid Commission explained in its Report that "the insertion of Fundamental Liberties in the draft Constitution requires the establishment of a legal procedure by which breaches of those Fundamental Liberties can be challenged (Art. 4)".¹⁷ The absence of any constitutional guarantee of such a procedure and of adequate remedies in the Proposed Constitution therefore rendered these matters dependent upon ordinary legislation by Parliament. This, it may be noted, went considerably beyond Mr. Justice Abdul Hamid's objection to the Reid draft Article 4, for his objection was confined to that part of the article, i.e., paragraph (iii) of part (b) of Clause (1), which would have breach of the rules of natural justice as a ground for judicial review and intervention entrenched in the constitution. Mr. Justice Abdul Hamid explicitly endorsed most of the remainder of the draft Article 4 in his Note of Dissent:

Every constitution needs and generally has a provision which protects it from violation by the executive and the legislature. Provision for this purpose has been made in article 4(1) part (a) and part (b)(i) and (ii).¹⁸

Second, and also as Mr. Justice Abdul Hamid would have it, the word "reasonable" was deleted from Article 10 and the constitutional grant of the freedoms of speech, assembly and association, originally subject to "any reasonable restriction", was now made subject to "such restriction as it (i.e. Parliament) deems necessary or expedient" in the interest of specified purposes. The reasonableness or otherwise of any restriction for an approved purpose thus becomes no longer justiciable. Third, while the proposed Article 4 retains in Clause (1) the principle of the supremacy of the constitution, it has an entirely new Clause (2) which would appear to curtail considerably, if not remove entirely, whatever scope that remains for judicial review in the two areas of fundamental rights provided for by the proposed Articles 9(2) and 10.

One effect of the new Clause (2) is to remove the *bona fides* of any restrictive legislation in relation to the rights in Article 9(2) and Article 10 from consideration by the courts and as a possible basis for judicial review. While it may appear that even the proposed Articles 9(2) and 10(2) still import the implicit requirement that Parliament acts in good faith, this avenue of challenging any restriction imposed by parliamentary legislation is now blocked by Clause (2) of Article 4. That this was precisely the intent of the proposed clause was later made clear by the then Attorney-General in his reply to Mr. S.M. Yong's inquiry as to the "true meaning" or "intention"¹⁹ of the proposed Article 4 in the Federal Legislative Council:

The question is as to the effect of Article 4. The effect is, if I might say so to save time on this, that if a restriction is imposed by law passed by the Parliament, then it is not open to somebody to go to Court and say "Parliament thought it related to public security, but I ask you to say that it does not". That is all.²⁰

But what if Parliament, in imposing a restriction, does not say in the legislation that the restriction is related to the specified matters, in the case of Article 9(2), or is in the interest of the specified purposes, in the case of Article 10(2)? Or if Parliament says that the imposed restriction has to do with some matter or purpose other than those specified in Articles 9(2) and 10(2)? Would Article 4(2) protect such a legislative restriction from being struck down as unconstitutional by the Supreme Court? Neither the language of Article 4(2) nor the clarifications offered by the government in the Federal Legislative Council appears to afford a completely unambiguous answer. Nevertheless, a well-known commentator on the Malaysian

Constitution, Harry Groves, appears to have answered the last question in the affirmative:

Article 9(2) places freedom of movement within the complete discretion of Parliament. Moreover Article 4(2)(a) relieves Parliament of even the requirement of drafting niceties in laws it enacts limiting freedom of movement or the right to reside in any part of the Federation.

Article 10(2) places freedom of speech, association and assembly within the complete discretion of Parliament, and, as in the case of Article 9, Article 4(2)(b) relieves Parliament of the necessity of care in drafting and protects Parliament from any impugning of its motives.²¹

Even if Article 4(2) does not relieve Parliament of the "requirement" of care in drafting, that requirement is one that can be met with the utmost ease. Thus, Groves was hardly exaggerating in his summation that the Proposed (and the present) Constitution places the freedoms of movement, speech, association, and assembly within the complete discretion of Parliament.

THE ENSUING DEBATE

Following the publication of the White Paper entitled *Constitutional Proposals for the Federation of Malaya*, a motion was introduced in the Federal Legislative Council in July 1957 to welcome the constitutional proposals and to support all the steps necessary to give effect to them. The debate on this motion concerned largely the ethnically-charged matters in the Proposed Constitution such as citizenship, language and the special position of the Malays. However, one member, Mr. K.L. Devaser, asked the government to explain its proposed changes to the Reid draft articles on fundamental rights and judicial review. *The Straits Times*, the leading English-language daily in Singapore and Malaya at the time, also began to express concern over the proposed amendments.²² The debate on the Federal Constitution Bill in August was almost entirely devoted to this matter. Mr. K.L. Devaser and Mr. S.M. Yong, both lawyers and nominated members from component parties of the Alliance, spoke at length against the amendments, while the explanation from the government came from the then Chief Minister, Tunku Abdul Rahman and the Attorney-General, Mr. T.V.A. Brodie.

The White Paper on the Proposed Constitution contains only the following brief explanation for dropping the Reid Article 4:

The Article proposed by the Commission on the subject of the enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies.²³

The omission of the Reid Article 4 was criticised by Mr. Devaser in the Federal Legislative Council:

With your permission, Sir, I shall say that Article 4 of the Reid Commission Report embodies constitutional remedies in the Constitution, whereas the draft Constitution has omitted them entirely, and there is no reference anywhere that we have got any constitutional remedy. I hope I am allowed to quote - there is a memorandum being submitted to various Honourable Members in which it is stated - and I agree with it - that by giving a right but not providing a remedy is like giving a gun and not providing ammunition.²⁴

To *The Straits Times*, the Working Party's proposed amendments "considerably weaken the guarantee of fundamental rights".²⁵ On the Working Party's claim that it was impracticable to provide for all possible contingencies in the Constitution, it countered:

Other countries do not seem to have found this impracticable. The Reid Commission did not find it impracticable.²⁶

The Straits Times, also found the Working Party's reason, as stated in the White Paper, for dropping the Reid Article 4 both misleading and unconvincing:

The White Paper explained that it was omitted because it was impracticable to provide within the limits of the Constitution for all possible contingencies. It was considered that sufficient remedies could best be provided by the ordinary law ... It was not to be supposed, however, that the Reid Commission tried to provide for all possible contingencies. It gave the individual the right to apply to the Supreme Court for an order making void any provision of any written law. It gave him the right to challenge any act or decision, or to seek to compel a public authority to perform its duty under the Constitution. This right was without prejudice to any other remedy provided by law.

Article 4 of the draft was admittedly elaborate. But ... it could have been simplified. Article 32 of the Indian Constitution is a model of brevity and clarity. It provides for "the right to move

the Supreme Court by appropriate proceedings for the enforcement of the rights conferred". If the Working Party was seriously concerned with all possible contingencies, it could have done so in less than twenty words. By dropping the clause instead, the Constitution makes the enjoyment of fundamental rights dependent on the legislature which need not provide "sufficient remedies" or indeed any remedies at all ...²⁷

The above criticisms both inside and outside the Federal Legislative Council moved the government to provide a fuller justification for its action during the debate on the Federal Constitution Bill. Both Tunku Abdul Rahman and the Attorney-General elaborated on the government's rationale for dropping Article 4. Noting that "principally the target of attack within this Council and without was on the absence of Article 3 and 4 of the original draft Constitution and the substitution therefor of Article 4 of the redraft", the Tunku explained:

Members of Council will remember that the draft of the Reid Commission on fundamental liberties was criticised by Mr. Justice Abdul Hamid ... The points made by Mr. Justice Abdul Hamid were very carefully considered by the Federation Government and Their Highnesses, and acting on the advice of legal advisors, both in this country and in the United Kingdom, we agreed to omit Article 4 of the Reid draft ...

The omission of Article 3 and 4 has been severely criticised and it has been suggested that this was done for some sinister purpose. There is no truth whatsoever in that suggestion. Our legal advisers both here and in the United Kingdom advised that Article 3 and 4 should be omitted because it was not suited having regard to all the varying conditions that might arise and if they had been left in, they would have unduly fettered the power of Parliament to make appropriate provision in order to safeguard and protect the rights of individuals and of the public. Various attempts were made to improve the wording of the Article but they appeared open to the same objection or else were too vague to be of any use, and accordingly it was decided that it would be better to omit the Articles altogether. Our legal advisers did not consider that retention of Articles 3 and 4 was essential for the preservation of fundamental rights and liberties. The true guardian of fundamental rights and liberties must remain with the people themselves and entrusted to the safekeeping of their representatives in the Parliament.²⁸

The Tunku's main point that the provisions of the Reid Article 4 would "unduly fetter" the government in taking actions which it might deem necessary under varying conditions was amplified by the Attorney-General:

It (Article 4) takes things too far. It does not mention the proper limitation; and every attempt we made to improve on it either produced something which equally takes things too far or produced the proper limitation in such a general form that it rendered the thing meaningless. Under those conditions we thought it wiser to scrap it altogether.²⁹

As to how the Reid Article 4 "takes things too far", the Attorney-General offered the following specific points of criticism:

On Article 4(1)(a):

Now, Sir, the present position is that any individual who is interested in the subject matter involved may have a right to go to the Court for a declaration. But here [i.e. Article 4(1)(a)] there is no such limitation at all. Any person can go, whether he is interested or not ... And, Sir, it is not confined even to those in this country ...³⁰

On Article 4(1)(b):

The effect of this article was this: that a person had an absolute right of appealing to the Supreme Court whenever he alleged that any decision was contrary to the principles of natural justice or whenever jurisdiction was in excess and so on. He invariably and always had a right of appealing to the Supreme Court for relief. ... If any attempt is made to restrict or limit it, it would have been unconstitutional. Now, the first point to be made is that this Article is not confined to constitutional rights at all, but extends to any rights conferred by any law. It may well be thought reasonable that where a right is actually created by law, the law should be entitled to limit the right and provide for its own means of enforcement ...

Again, it is sometimes necessary and indeed essential to restrict or control the right to go to the Court to set aside the decisions of a tribunal ...

Finally, Sir, the Clause is inconceivably vague. It empowers the Court to "make such Order as it may consider appropriate in the circumstances of the case". There is no restriction or limitation on what the Court may consider appropriate. It could issue any kind of

order at all ... We must suppose that in those circumstances the Court would endeavour to formulate rules, as they have now. But the effect of their formulating rules is to legislate. It may be said that they legislate now - judge-made law. But at least we have a position now that when judges make bad law it can be corrected by Parliament. Under this provision, when the judges make bad law, they couldn't be corrected by anybody, not even, so far as I know, by themselves.³¹

According to the Attorney-General, the excesses of Article 4(1)(a) could be remedied easily but the above-mentioned objections to Article 4(1)(b) were "very extensive and very serious"³² and the government decided to drop the entire Article 4.

But isn't the wholesale omission of the Reid Article 4 in order to create a strong government a rather extreme or one-sided measure? What of the need to protect individual rights? Providing a gun but no ammunition, as Mr. Devaser said, is pointless. Or, as *The Straits Times* contended, a guarantee of rights without guaranteed remedies is an "empty guarantee". The Attorney-General's reply to these misgivings about the omission of constitutionally-guaranteed remedies in the Proposed Constitution was that the critics have "greatly exaggerated"³³ the importance of providing for such remedies in the constitution. He argued that as the government could be trusted to provide sufficient remedies in its ordinary legislation, attempts to guarantee remedies in the constitution were not only impracticable, as the government had discovered, but "unnecessary" as well:

We concluded also that they were unnecessary since ... the existence of remedies in appropriate cases and subject to appropriate limits in particular cases, are convenient to all Governments. And I find it difficult to believe that Government would totally abolish all these remedies any more than they would abolish actions for damages throughout the country - a power which they have been allowed to retain under the Reid draft. I might add that of all the countries which have power to abolish all these remedies under their constitution or absence of constitution - England, Australia, Canada or elsewhere - none have ever attempted to do so, and there seems no reason at all to suppose that Malaya would wish to establish a precedent in this respect.³⁴

The changes made to Articles 9 and 10 of the Draft Constitution, together with the new Article 4 introduced by the Working Party, as we have seen earlier, placed the freedoms of movement and residence (Article 9) and the freedoms of speech, assembly, and association (Article 10) virtually within the complete discretion of Parliament, or the government of the day, whereas the Reid

recommendations accorded the judiciary an important role in keeping legislative restrictions upon these freedoms within specified limits and in enforcing the requirements of reasonableness and good faith. Mr. Devaser also objected to these changes during the debate on the motion of support for the Proposed Constitution. *The Straits Times* protested that their effect was "to authorise the Government to violate the right of a citizen to live where he likes and go where he likes as well as to violate freedom of speech and assembly".³⁵ In his reply, the Attorney-General first defined the main point at issue as follows:

We have accepted ... the view, and I think everybody accepted it ... that you cannot possibly have an absolutely unlimited right of expression or association. There must always be some power to impose restrictions which are reasonable and in the public interest ... The real question is this: you have got to have some discretion somewhere as to what restrictions you should impose, and the question is who should determine whether the restrictions are reasonable or not-should it be the courts or should it be the Legislature.³⁶

He then defended the amendments made by the Working Party and the government's decision not to follow the usual practice of leaving the matter to the courts:

Now I have no doubt, in fact I know, that it is possible to have a variety of opinions on that point. We know the Reid Commission itself had different opinions on that point. In some constitutions, I think perhaps in most existing constitutions, this question has been left to the Courts ... We thought it right to do what we thought was most suitable in the interests of this country and declined slavishly to follow other countries in that respect. Now, as Mr. Justice Abdul Hamid said, it seems very undesirable to give to a single Judge the business of over-ruling, if he thinks fit, the considered opinion of Parliament. It seem absurd and unreasonable in itself to set up the opinion of one or two men on such matters against the opinion of over a hundred. Moreover, in most of these cases, the question that would be before the Court would be whether something was reasonable or whether it was in the public interest. Such a question is essentially political and in most cases the Judge is not the best person to decide a political issue of that sort ... Now, it may be said that we should have adopted Mr. Justice Abdul Hamid's suggestion of simply omitting the word "reasonable" from "reasonable restriction"; but unfortunately, such is the ingenuity of lawyers, as my Honourable and learned friend well knows, that that would not have been a complete answer, because then a lawyer

could have gone to the Court and said that the restriction imposed by the Legislature was in any case not "in the interests of public order" and the whole question would still have to be fought out before a completely unsuitable tribunal. But there is one greater objection than all the others to the proposal that the Courts should be asked to pass in review, so to speak, the legislation of the Legislature. We have tried our best, not entirely satisfactorily it would appear, to keep the Courts separate from politics ... I am quite sure that we should never succeed in keeping them separate if we entrusted them with such a function as this - of being able to set aside legislation where the issue is merely concerned with matters of opinion as to whether something was reasonably required or not in the public interest ... It is quite clear that no Courts in this country at the present moment have anything like such a tradition or prestige behind them, and to set them in the forefront of the political battle ... would obviously lead before long to the complete subjugation of the Courts by politics ...³⁷

While the Attorney-General emphasised the reasons for not entrusting the final say on legislative restrictions to the courts, Tunku Abdul Rahman, in moving the second reading of the Federal Constitution Bill about a month later, stressed the desirability of relying upon the legislature as well:

With regard to Article 10, members of Council will remember that Mr. Justice Abdul Hamid took the view that the legislature should decide whether restrictions are reasonable and necessary and that these issues should not be left to the Courts. The Working Party agreed with the view of Mr. Justice Abdul Hamid ...

It must be remembered that the freedom to which we aspire is the freedom to govern ourselves under a system in which parliamentary institutions shall be exclusively representative of the people's will ... We should, therefore, not rush into the presumption that the fully elected Parliament will not have regard to the principles of justice. In the elected Parliament to come there will, I trust, be representatives of all sections of the community, representing all shades of opinions. It must not be presumed that such people will not be able to discharge their responsibilities when they are confronted with issues affecting the rights of the people whom they represent. The questions as to what is in the public interest and as to what is reasonably necessary to secure it are essentially political questions and not judicial ones and the machinery to determine what is in the public interest must be the parliamentary machine.³⁸

The government's position can briefly be summarised as follows. Both the Attorney-General and Tunku Abdul Rahman argued that the question of whether a restriction is reasonable or in the public interest is a matter of political opinion which judges are not the best persons to decide and which should be left to Parliament. If judges are entrusted with the power to decide such political matters, it will not only increase uncertainty in the law but will most certainly lead to the erosion of the courts' independence by political forces. It was also emphasised that Parliament, being elected by the people, can be confidently depended upon to look after the rights of the people. The dissenting views of Mr. Justice Abdul Hamid in the Reid Commission were used by both the Attorney-General and Tunku Abdul Rahman in support of their position.

Two members of the Federal Legislative Council, Mr. K.L. Devaser and Mr. S.M. Yong, were not satisfied with the government's explanation or rationale and strongly opposed the amendments. They disagreed with the view that the legislature and not the courts is the best body for protecting fundamental rights and were clearly more mindful of the possible abuse of its powers by an executive-dominated legislature in the absence of judicial checks.

Mr. S.M. Yong protested that the new Article 4 introduced by the Working Party "appear to have taken away the fundamental rights conferred by the other Articles"³⁹ (i.e. Articles 9 and 10) and objected to the removal of the word "reasonable" from Article 10. He contended that "if government intends to act reasonably, there should be no fear of putting the word 'reasonable' in the Article".⁴⁰ He then argued for reinstating it as a basis for judicial review of legislative restrictions:

Sir, another question that has been raised is: who is going to decide whether it is reasonable or unreasonable? ... I would suggest that this question be decided by the Court. My learned friend the Honourable the Chief Minister said it should be decided by the party in power or the Parliament. But the flaw I can see, or rather the argument which I would like to suggest, is this: our judiciary is independent and has the highest reputation of being fair and impartial in its judgement. There could always be an appeal if a mistake is made ... In other words, if a magistrate makes a mistake, it goes before the Court of a Judge; if still there is a mistake, it can go to a Court of Appeal of three Judges. If still a mistake is made, it can go further up to the Judicial Committee. Sir, I cannot say the same thing in respect of a political party in power because such a party will be guided more by political interests than by a desire for pure justice. If that happens, the fundamental rights of individuals would

be better safeguarded by the judiciary than by a political party in power ...⁴¹

Mr. Devaser also protested against Clause (2) and Clause (3) of the new Article 4 introduced by the Working Party for creating a situation in which "we cannot oppose any law and cannot question its validity".⁴² He deemed these clauses "very dangerous ... in the sense that Parliament can pass any law and be out of Court"⁴³ and felt that "the right of the subject is much better safeguarded if the last say is in a Court of Law rather than in the hands of the executive authority".⁴⁴ He emphasised the likelihood of power being abused and thus the need for providing for constitutional checks or restraints:

Sir, it is said that power is indeed a heady thing, and whether it is in the hands of a king or president or legislature or a Court or administrative authority, power begets more power and power can be abused ...

The struggle of man throughout recorded history has been to take away power usurped by individuals or groups of individuals, and in all the constitutions, as far as I know, that is being achieved by providing restraints and checks. That is exactly what was recommended by Lord Reid ...⁴⁵

He then urged the government to restore the role of the courts in safeguarding fundamental rights under the Reid recommendations with the following argument:

Sir, I understand that the one way we can safeguard the fundamental rights of the subject is to give powers to the judiciary ...

... (W)hat I am asking for is that the judiciary be given power to sit quietly and calmly and balance the particular legislation. Judiciary review gives time for sober second thoughts. It interrupts the administrative process, to be sure, and makes it more time consuming. The cooling period is good, for most hotly contested issues are those where basic fundamental rights of the citizen are at stake. The contemplative pause necessitated by judicial review is more essential.

... I only want this, if possible, that Article 4 of the Reid Constitution be incorporated in our Constitution and do away with sub-sections 2 and 3 which have been added to Article 4 ...⁴⁶

Mr. Devaser was also irked by the government's frequent resort to the dissenting views of Mr. Justice Abdul Hamid in support of the Working

Party's amendments to the Reid recommendations. He had remarked early in the debate that "I have followed all the controversies in the papers, I have followed what was discussed at various platforms by the British Government, by the Rulers Conference, by the Alliance Government leaders and by various other associations, and I am not aware of any opposition from anywhere in the country against those recommendations of the Reid Commission Report - not any opposition from any part or quarter of the community, and I cannot understand why the Working Party should have considered it necessary to make this change",⁴⁷ and was unceremoniously told by the Attorney-General, with accompanying laughter in the Council, that "if the Honourable and learned gentleman had taken a little time off from reading the newspapers to complete his reading of the Reid Report he would have found at the end a dissenting note by no less a person than Mr. Justice Abdul Hamid".⁴⁸ When Mr. Justice Abdul Hamid's dissenting views were repeatedly invoked by the government during the debate on the Federal Constitution Bill, Mr. Devaser first pointed out that Mr. Justice Abdul Hamid's only objection to the Reid Article 4 was its incorporation, in paragraph (iii) of part (b) of Clause (1), of the principles of natural justice in the constitution and that the remainder of the article was accepted by Mr. Justice Abdul Hamid.⁴⁹ Thus the wholesale omission of the article by the government was not supported by Mr. Justice Abdul Hamid's Note of Dissent purportedly relied upon by the government. Then he went further:

Now, this morning my Honourable friend the Chief Minister has again referred to Mr. Justice Abdul Hamid - Mr. Justice Abdul Hamid who has given the Dissenting Note. I hope, in his reply, my Honourable friend the learned Attorney-General will help the House in telling what is the usual practice in a Court of Law. As far as I am aware, when there are three Judges, the decision that gets accepted is the decision of the majority. The Dissenting Note of a Judge may be of academic interest, but it cannot go very far from that - but my Honourable friend the Attorney-General, being so many years senior to me, can make it clear to the House. In this case, the Government has accepted the Dissenting Note of a Judge and chucked away the unanimous or agreed decision of the other four members. Sir, I am very chary to bring in any invidious comparisons of qualifications, but I can't help pointing out to Honourable Members what is the position we have got. Sir, I refer to the Report of the Reid Commission. We have got five members appointed from various Commonwealth countries, and the President was the Right Honourable Lord Reid, L.L.D. - which I hope means "Doctor of Laws" - F.R.S.E. - I am not sure what that means - a Lord of Appeal in Ordinary; No. 2 was Sir Ivor Jennings, K.B.E., Queen's Counsel, Doctor of Literature, Doctor of Laws, Master of Trinity Hall, Cambridge; then we have

the Right Honourable Sir William McKell, G.C.M.G., Q.C., former Governor-General of Australia; then we have Mr. B. Malek, a former Chief Justice of the Allahabad High Court; and lastly, Mr. Justice Abdul Hamid, of the West Pakistan High Court. From that it appears to me that the Honourable Mr. Justice Abdul Hamid was the most junior member of the Commission. I am sorry for these invidious remarks - I have nothing against him personally - but I am only pointing out what the Dissenting Note amounts to.⁵⁰

Another noteworthy point in the debate is that both Mr. Devaser and Mr. Yong entreated the government to take a longer view and urged that enlightened constitution-makers should make provision for less well-meaning men than themselves. In Mr. Yong's words:

... as long as a just Government or a Party like ours is in power such an abuse will not happen. But, of course, our Alliance Government could not last perpetually, or say 50 years.⁵¹

Mr. Devaser made the same point as follows:

I have full confidence in the government and its Honourable the Chief Minister, and we know that they will not pass any law which is unreasonable, but politics in a shifty game and one never knows who will come after the present Chief Minister ...⁵²

He added later:

I have no doubt that my Honourable friend the Chief Minister, being a member of the Bar, and a colleague, will appreciate our position as to why we are so apprehensive. We know something about it, and that makes us provoked sometimes. ... We don't worry if we don't know, and it is the same thing here ...⁵³

The above debate did not appear to have provoked widespread interest, or, at any rate, widespread participation, from other members of the Federal Legislative Council. Only two of them voiced their reactions. The Menteri Besar of Negri Sembilan, Encik Shamsudin bin Nain, in seconding the motion to have the Federal Constitution Bill read for a second time in the council, remarked:

I realise, Sir, that on such an important and complex subject as the Federal Constitution there are bound to be differences of opinion. There are still to-day people who will not concede a point of view and who are anxious about the future ...

As to the future, my own feeling is that we should not be unduly pessimistic ...⁵⁴

The other member who spoke out was Mr. P.P. Narayanan, the representative of trade unions in the council. Evidently persuaded by the arguments of Mr. Devaser and Mr. Yong, he urged the government to give serious consideration to their misgivings towards the close of the debate:

It is not my intention to participate in this debate at all because we are all sentimentally bound over to look forward to the day of Merdeka, but I think I take courage in admitting that in spite of the fact that I am not a lawyer and in spite of the fact that there has been a lot of legal controversy introduced, if sober thoughts prevail, there are ample sensible and rightful suggestions given by the two colleagues, the lawyers on the opposite side ... I sincerely believe that ... the speeches made by our two legal friends will be remembered by the people of Malaya for a long, long time to come. I can tell you, when discussing the fundamental rights of human beings, the fundamental rights of the free citizens of this country, there is no time for emotion. What we want is something rightfully given to the citizens of this country, and let us not cross swords. If, in all humility, you think there have been suggestions made by these two champions - I am not a lawyer but I have enough common-sense to understand what they have said and I appeal to the House and also the Attorney-General and the Father of the nation the Chief Minister himself, to listen and try to adjust the Constitution in such a way that we will not be condemned by posterity but we will be appraised and remembered that we have not, in our rush to freedom, ignored the fundamental rights of the people of Malaya.⁵⁵

In their closing speeches, the Attorney-General and Tunku Abdul Rahman sought to ground the amendments to the Reid recommendations upon the primary need of enabling the state or government to act with effectiveness and dispatch in facing the difficult circumstances confronting the soon-to-be independent nation. They also emphasised the hazards of unduly fettering the government with what they regarded as a surfeit of legal niceties and the necessity of trusting the government under these circumstances. In his more elaborate summary speech, the Attorney-General first tried to allay the fears of giving Parliament ultimate control over fundamental rights:

Sir, under these circumstances ... one must trust the elected representatives of the people. They are elected by the people and responsible to the people. If they make decisions which are unpopular or wrong they will suffer for it at the next elections. We are trusting the Parliament of this country with important decisions on a

vast number of matters; ... we are trusting them with a vast number of things: why cannot we trust them with this particular matter? ... You cannot have it both ways: you must trust, you must risk; and I say that the risk in this particular case is not very great. What exactly do you fear? ... do you think that restrictions which are manifestly abuses of power are going to be imposed by an elected Parliament which will have, within a few years at the most, to appeal to its own electorate? I say it is safe in this matter to trust the Legislature ...⁵⁶

He ended by emphasising that the amendments were necessary to ensure the security and well-being of the country:

Now, Sir, I can say with certainty that all who were concerned with the drafting of this Constitution spent many anxious days and nights, without sparing themselves, to give the country a fit Constitution, which would give it a fair chance. If the new ship of State were to be launched into a placid and sheltered pool, it would not perhaps matter very much. But it is setting out in stormy and tempestuous days, in days which have seen, not long ago, many a vigorous tempest which has sent many a State to the bottom. In those circumstances, it is obviously necessary to make as sure as we can that the hull and rigging are sound. It is necessary that everything is done to give this country a fair chance.

It is easy for those without any responsibility to criticise. It is still easier to sneer from behind a screen of journalistic anonymity. But for those of us who are responsible - and appear responsible in the light of day - it would be criminal indeed if, in these times, we sent forth the new nation shackled and fettered, to deal with the perils that face it. It was with no desire to cut down the liberties of the people - I do not think for a moment that anything which we have done will cut down in any way the real liberties and the real interests of all the people in this country. What we did not wish to do was to send the State forth with so many pitfalls in its Constitution that every attempt made by the elected representatives of the people to preserve the State or to do good will be tripped up and foiled by a few individuals, who probably are not particularly interested in the welfare and safety of the people of this country at all.⁵⁷

In his speech, Tunku Abdul Rahman replied to Mr. P.P. Narayanan by saying that "he will find all the protection one needs to protect all his rights and liberties"⁵⁸ in the constitution and reiterated the danger of imposing too much legal restraints on the government:

What we have been arguing about this morning, and what we have been arguing before, was that it is necessary in the interest of this country that we should have a certain amount of restriction on these rights, particularly in view of the fact that we are fighting a dangerous enemy today, and, as has been pointed out by my Honourable and learned friend the Attorney-General, if, for every little thing we do, we have to go to court and account for it, then this country, I fear, will go to rack and ruin before we could start out on this great journey ... We will find that the ship will be wrecked on the rock of what we might call too much legal propriety. Therefore, I beg Honourable Members of this Council to accept what we have done as has having been done for the good of the country and to give ... this Constitution a trial. There is, under Article 159, provision for the House to amend the Constitution if at any time we find it unworkable ...⁵⁹

I have tried in this section to lay out the main arguments made by both sides in this eve-of-independence debate on the role of the judiciary in protecting fundamental rights, a debate occasioned by the amendments made by the Working Party to the recommendations of the Reid Commission on this matter. It may be useful at this point to refer to the remarks which Lord Reid himself made in the British House of Lords on the amendments. In the course of the debate in the Federal Legislative Council, Tunku Abdul Rahman in fact tried to attenuate the misgivings and criticisms expressed by Mr. Devaser and *The Straits Times* by quoting the following remarks of Lord Reid:

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 than 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.⁶⁰

Tunku Abdul Rahman also noted that Lord Reid "referred in particular to two Articles, which however he did not specify".⁶¹ It seems reasonably clear from Lord Reid's remarks that the unspecified articles were the new Article 4 introduced by the Working Party and the Reid Article 4 which was dropped by the Working Party:

There is one extremely important new article which is so drafted that I could not venture to prophesy what view a court will take of it ... To have an important article left in such a position of ambiguity and obscurity seems to me extremely unfortunate ...

I also regret the dropping of a clause which we included in order to enable fundamental rights to be more readily ascertained and defended. It is said in paragraph 53 of the White Paper "sufficient remedies can best be provided by the ordinary law". It appears to have been forgotten, however, that the ordinary law of this country grew up in a country where there is no written constitution and where there are no guaranteed rights. Therefore, it is not very surprising if the ordinary law is hardly adequate for a constitution which sets out to guarantee individual rights".⁶²

Tunku Abdul Rahman did not quote or repeat these remarks in the Federal Legislative Council. He merely observed that "Lord Reid is of course entitled to his taste and views on these matters but members of this Council should know that the wording of the final form of the Constitution has been accepted by a large number of legal advisers both in this country and the United Kingdom."⁶³

Another remark by Lord Reid on which Tunku Abdul Rahman was completely silent in the Federal Legislative Council was the following:

I regret to trouble your lordships with these technicalities but I feel bound, in the interests of the reputations of my distinguished colleagues, to disclaim all responsibility for the form of the constitution. I must just leave it at that.⁶⁴

The Straits Times, however, was quick to point out that "Lord Reid's anxiety to disclaim all responsibility suggests quite trenchant disagreement".⁶⁵ And when the Attorney-General followed Tunku Abdul Rahman in insisting that "the critics have no strong support from Lord Reid" who "said expressly that he is not dismayed by these changes at all",⁶⁶ Mr. Devaser promptly retorted:

I am sorry to interrupt my Honourable friend, but the most remarkable part of the statement made by Lord Reid in the House of Lords was that he and his colleagues disclaimed all responsibility for this amendment.⁶⁷

DISCUSSION

The explanations and answers given by Tunku Abdul Rahman and his partner, the Attorney-General, in the above debate reveal certain important elements of political thinking in relation to constitutional government. The most important and consistently articulated theme was the emphasis on strong government and the accompanying conception of institutional arrangements that would meet the requirement of strong government.

Tunku Abdul Rahman laid great stress on ensuring that Parliament had adequate powers "to make appropriate provision" under "the varying conditions that might arise" and warned that if this power was "unduly fettered" by "too much legal propriety" the country "will go to rack and ruin before we could start out". Similarly, the Attorney-General stressed the need to avoid putting in "so many pitfalls in its Constitution that every attempt made by the elected representatives of the people to preserve the State or to do good will be tripped up and foiled by a few individuals". A strong government was regarded as necessary for ensuring the security of the state and this primary concern was obviously accentuated by the existence of the Communist armed struggle at the time. The "emergency" was referred to by both Tunku Abdul Rahman and the Attorney-General to strengthen their case for strong government. The Tunku emphasised that "we should have a certain amount of restriction on these rights, particularly in view of the fact that we are fighting a dangerous enemy today" and the Attorney-General warned of the "perils" facing the country in those "stormy and tempestuous days". It is significant, however, that neither the Tunku nor the Attorney-General ever attempted to justify the extensive government powers sought by them as a temporary necessity. Throughout the debate, and despite Mr. Devaser's appeal to the Tunku "that he would do his best, as the man responsible, to amend the Constitution when the Emergency is over",⁶⁸ neither the Tunku nor the Attorney-General gave any assurance that the government would review the constitution in order to give a more important role to the judiciary in safeguarding fundamental rights when conditions in the country become more normal. The existence of the emergency appears only to confirm and strengthen an underlying belief in strong government on the part of the Tunku and his Alliance colleagues.

The most noteworthy component of the political thinking of government leaders, however, was their conception of institutional arrangements needed to ensure strong government. To the Tunku, "the freedom to which we aspire is the freedom to govern ourselves under a system in which parliamentary institutions shall be exclusively representative of the people's will". Hence the strongly articulated view that the elected legislature should rightfully be the sole judge and arbiter of fundamental rights, of the public interest and of the reasonableness or otherwise of legislative restrictions, and the apparent intolerance towards constitutionally-entrenched restraints upon the legislative power of the elected parliament. It is apparent that, to the Tunku, parliamentary government is a system of government in which Parliament is supreme and that he wanted this cardinal principle of the "unwritten" British constitution to be enshrined, as far as possible, in the written constitution of the Federation of Malaya. Such a situation, if fully realised, would render pointless any guarantee of individual or other rights in a written constitution, as Lord Reid intimated in his remarks on the amendments. This apparent inclination or predisposition towards a unitary or

monistic model of government, that is to say, one in which effective power resides in a single centre of authority, was also manifested in, and evidenced by, the highly restrictive conception of the rôle and competence of the judiciary. The Attorney-General considered it absurd that one or a few judges should ever be suffered to overrule the legislation of over a hundred elected representatives in the legislature. He also considered it extremely unreasonable and inadvisable that any person could go to the Supreme Court to seek to declare a written law void, or that the Court should be constitutionally and exclusively empowered to determine the appropriate remedy to be provided in each case before it. Both the government speakers regarded as self-evident that the reasonableness of legislative restrictions was a "political" issue and therefore beyond the competence and jurisdiction of the courts, even as the Attorney-General had to admit that the normal practice in other countries was to entrust the final say on reasonableness to the courts. They subscribed to Mr. Justice Abdul Hamid's view that harmony between the legislature and the judiciary and hence certainty in the law should be bought by subordinating the judiciary to the legislature. Whether or not they sincerely believed that limiting the courts' role is necessary to secure the judiciary's freedom from political influence, it is clear that they set little store by the advantages of judicial review so earnestly urged by their opponents in the debate. More generally, their monistic conception of effective government leaves very little room for that fundamental doctrine of constitutional government, namely, the separation of powers.

The government speakers were not unaware of "the constitutional dilemma", namely, that "(a)n institutional structure that enables the government to move decisively to do good things would also enable it to move with dispatch to do bad things, whatever one's definition of those terms".⁶⁹ However, they firmly believed that a government elected by the people and dependent upon the people's vote could be trusted not to abuse its powers. In the parliament of the independent country, said the Tunku, will be "representatives of all sections of the community, representing all shades of opinions" and "(i)t must not be presumed that such people will not be able to discharge their responsibilities ...". To the Attorney-General, "You cannot have it both ways: you must trust, you must risk; and ... it is safe in this matter to trust the Legislature." They looked askance at any suggestion that power could be abused even by elected representatives and at any call for more institutional restraints upon legislative powers to be provided for in the constitution. As elections alone would suffice, in their view, to prevent abuse, Madison's "auxiliary precautions", i.e. institutional safeguards and restraints, were simply regarded as unimportant, even unnecessary, and therefore should be kept to a minimum.

This downgrading of the importance of institutional restraints stemmed in part from the confidence of the Alliance leaders in their own ability and good intentions in governing the new nation. That confidence appears to be unshakable even by such eloquent sceptics as Mr. Devaser and Mr. Yong. More remarkable, perhaps, is that the warning sounded by Mr. Devaser and Mr. Yong that the wide powers given to the government by the Alliance constitution-makers might fall into the wrong hands should the Alliance be defeated in future elections also went completely unheeded. This may be explained, at least in part, by the fact that the Alliance had won a resounding victory in the first federal elections held in 1955, winning 51 of the 52 seats contested. In 1957 as in 1955, there was no opposition party in sight conceivably capable, either singly or in coalition with other parties, of ousting the Alliance. The Alliance was therefore supremely confident of continuing in power for some time to come after 1957 and ignored the warning by Mr. Devaser and Mr. Yong together with their point that the essential purpose or *raison d'être* of the constitution lies in setting up institutional safeguards against fallible and less than altruistic power-holders.

The Constitution of the Federation of Malaya or, since 1963, the Constitution of the Federation of Malaysia, has been extensively amended, in both trivial and important ways, by the government, controlled since independence by the Alliance and its successor, the National Front. It has been amended on more than thirty occasions in roughly as many years of independence, or at a rate of about one amending legislation a year since 1957. The unmistakable trend of these amendments is towards further increasing the powers and freedom of the government and the diminution of constitutional safeguards and restraints upon the government. Space does not permit a fuller discussion of these amendments here but among the more notable ones are: the increase over time in the number of appointed members until they greatly outnumber the elected state representatives in the Senate, thus weakening considerably the protection afforded the states by the Reid Commission against constitutional amendments inimical to their interests; the amendments to the citizenship and emergency provisions which reduced procedural safeguards and vested wider discretionary powers in the government or the relevant minister; the amendments which removed the power of the Election Commission to determine electoral constituencies and made the delimitation of such constituencies by the Commission subject to the concurrence of Parliament or, in effect, the government of the day; the amendments to delimit the role of the Yang di-Pertuan Agong in legislation; and the amendments which removed the constitutional grant of powers to the courts and made judicial powers dependent upon legislative provision.⁷⁰

To point to the concentration of powers in government hands and the concomitant weakening of constitutional safeguards and restraints is not

necessarily to imply that the government has used the expanded powers to systematically cut down fundamental liberties in the country. The general restraint in the use of its vast powers by the government is often acknowledged even by critics who pointed to the presence of a tendency to diminish rather than expand individual rights in the country.⁷¹ To a significant number of informed and thoughtful persons (among them retired and active politicians, retired judges, lawyers and academics), however, this is no reason to be complacent or sanguine about the future. They have voiced their increasing unease with the trend of constitutional developments and raised the spectre of authoritarianism and arbitrary rule in the country.⁷² Even the retired Tunku Abdul Rahman has occasionally lent his voice to this chorus of concern. Mention must also be made of Tun Mohamed Suffian, a retired Lord President of the country. Having expressed for decades his confidence in the country's political leadership and the view that the leaders' self-restraint and good sense is the fundamental and surest safeguard of fundamental rights and good government, he has recently stated publicly that "the people should be concerned" about the amendments that have been made to the constitution and that "they should express their worry to the government".⁷³ However, it is difficult to say to what extent the fears of this vocal minority are shared, or even understood, by the larger Malaysian public, which appears to be generally lacking in both understanding and interest in constitutional matters.

For the purposes of this article, two other points or empirical observations on post-independence constitutional developments are especially relevant. The first is that the trend of an increasingly powerful executive is consistent with and appears to reflect the above-noted monistic conception of effective government and what may be described as the minimalist constitutionalism of political leaders at the time of independence. The other is that the important amendments in this regard are more or less evenly spread throughout the thirty-three years since independence and span the tenure of all the four prime ministers of the country. These two points suggest not only that the beliefs of political leaders have had action consequences but also that the same basic beliefs about the desirable structure of government are shared or held by all those who have occupied the pinnacle of power in the country. Beneath their frequently observed differences in political style and policy preferences there appears to be an essential similarity in their views and disposition in relation to institutional arrangements and constitutional government.⁷⁴

From a methodological standpoint, the above statements, as well as the earlier ones on the nature of elite political thinking, are no more than plausible hypotheses. One reason why they are interesting is that their acceptance, even as mere likelihoods or probabilities, has important and urgent practical implications. That is to say, if we are or should be concerned about

constitutional developments in the country, if political bads are to be averted rather than awaited and if it is probable that our political leaders hold certain political beliefs and that those beliefs are partly responsible for the amendments they have made to the constitution, then it seems prudent to somehow address those beliefs even if we are not quite sure that they are actually held or are consequential. It is important to point out that any difference with, or contestation of, the constitutional views and acts of leaders need not carry or imply any allegation that the leaders are misguided or self-serving in their views and acts. Important constitutional choices are always about competing political values and risks, or alternative packages of them; as such, they are inherently contestable and open to sincere and reasoned differences.

Constitutional decisions are collective gambles and if leaving them solely to political leaders have resulted in unsatisfactory decisions or in an unbalanced constitution containing too risky gambles, then it is time we re-learn the old political lesson that constitution-making (like politics, of which it is part) is too serious and important a matter to be left entirely to politicians. There is a need for wider public interest and participation in constitution-making, or in the discussion and contestation which precede the making of constitutional decisions. Only in this way can serious and mounting constitutional imbalances be averted and a constitution widely perceived as satisfactory and accepted by the people be achieved and maintained (necessarily with amendments) under changing conditions. To say this is not to deny or to belittle the role of political leadership. Leadership remains crucial in this as in other areas of political life, but equally important is a demonstrated public vigilance and readiness to influence the exercise of delegated powers by elected representatives. This can only occur in a citizenry with an adequate understanding of the ideals of constitutionalism and constitutional government and hence of the importance of the country's constitution as the major instrumentality for realising those ideals. This is why a lasting solution to the constitutional problem lies not so much in changing the views and dispositions of leaders as in changing the awareness and behaviour of the led, not so much in directly persuading the same elite constitution-makers that they should make or re-make the constitution in any particular way as in apprising enough citizens of the importance of constitutional government and of the relationship of our political institutions with the tenets of constitutionalism, so that they, hitherto content to be constitution-takers, will also want to be constitution-makers and to partake of their rightful share in constitution-making as well. Two other conditions of effective participation must also be met.⁷⁵ The first is getting to know what political leaders think of the constitution and of constitutional government. The second is an adequate understanding of constitutional theory, that is to say, of the body of thought relating to the structure of government or the state and to both the enabling and restraining of those occupying positions of authority within it. A knowledge of constitutional theory is needed to inform our understanding

of our own constitution and its redesign. To be in the dark about the thinking of political leaders or about other factors shaping the constitution is to be governed by forces we do not understand, a consequence of which is the inability to ascertain the range of effective action open to us, just as ignorance of constitutional theory hides from our view the range and workability of available solutions to our constitutional problems.

It is perhaps the bias but hopefully not the error of the teacher to see in every problem of action a problem of understanding, and hence of education, as well. Be that as it may, it should be obvious from the above remarks that constitutional government is much more than the interpretation of the meaning of constitutional provisions and the constitutionality or otherwise of given actions: it is thus both too large and too serious a subject to be left entirely to the field of law. Constitutional government is about the values of constitutionalism and the architecture of the state in the service of those values. Constitutionality, or obedience to established rules, is only a procedural requirement. Though important, it is not the most important part, much less the whole, of constitutional government. By itself, constitutionality says nothing about the achievement of constitutionalism or about the appropriateness of chosen institutional means. These prior questions lie outside the concern of current legal education. A major share of the task of imparting to future generations an adequate understanding and appreciation of constitutional government must be borne by departments and teachers of political science within our universities. We still have a long way to go in creating the critical mass of informed and conscientious citizens needed to popularise and uplift constitutional discussion and decision-making in the country. What is considerably less clear is whether we presently have the capacity and the conviction needed for making the necessary effort.

NOTES

- ¹ Walter Berns, "The Constitution as Bill of Rights", in Robert Goldwin and William Schambra (eds.), *How Does the Constitution Secure Rights?* (Washington, D.C.: American Enterprise Institute, 1985), p. 58.
- ² Clinton Rossiter (ed.), *The Federalist Papers* (New York: Mentor, 1961), p. 322.
- ³ For discussions of constitutionalism, see Carl J. Friedrich, "Constitutions and Constitutionalism", *International Encyclopedia of the Social Sciences*, vol. 3, pp. 318-326, and Giovanni Sartori, "Constitutionalism: A Preliminary Discussion", *American Political Science Review*, vol. 56, no. 4, 1962. See also the remarks by W.H. Morris-Jones and Sartori's rejoinder, *American Political Science Review*, vol. 59, no. 2, 1965 as well as Graham Maddox, "A Note on the Meaning of Constitution" and the exchange

between Maddox and Sartori, *American Political Science Review*, vol. 76, no. 4, 1982.

- ⁴ Examination of the minutes of the five meetings of the Alliance Ad Hoc Political Committee held between 14 March and 6 July 1957 to review the Reid Draft Constitution reveals that the committee's attention was devoted almost entirely to the four issues of citizenship, language, religion and the special position of the Malays, with the agreed objective of reinstating the proposals made by the Alliance to the Reid Commission. Apart from a solitary entry in the minutes of the third of these meetings (paragraph 7) that "The MCA feels that there should be safeguards against the abuse of freedom of speech for stirring racial conflict", there is no other reference to fundamental rights. It is probable, therefore, that the amendments affecting fundamental rights and judicial review were largely the handiwork of the four Alliance representatives in the Working Party and especially of the two lawyer members, Tunku Abdul Rahman and Dato Abdul Razak, who were to become the first two Prime Ministers of the country. The other two Alliance representatives were Mr. Ong Yoke Lin and Mr. V.T. Sambanthan. However, the absence of any disagreement with these amendments, both in these Alliance meetings and in the subsequent debate in the Federal Legislative Council, on the part of the other Alliance leaders suggests that the amendments were generally consistent with their views as well. The minutes of the Alliance Ad Hoc Political Sub-Committee are found in the Leong Yew Koh Papers, File SP.3/A/114 entitled "Alliance National Council - Correspondence, etc." in the National Archives, Kuala Lumpur.
- ⁵ Mohd. Ariff Yusof, "Post-War Political Changes, Constitutional Developments Towards Independence and Changing Conceptions of Judicial Review in Malaysia", *Journal of Malaysian and Comparative Law*, Parts I and II, June-December 1982, pp. 30-32.
- ⁶ *Ibid*, p. 39.
- ⁷ *Report of the Federation of Malaya Constitutional Commission (hereafter Reid Commission Report)*, (London, H.M.S.O., 1957), para. 161.
- ⁸ *Reid Commission Report*, Appendix II: The Draft Constitution of the Federation of Malaya, p. 2.
- ⁹ *Ibid*, p. 4.
- ¹⁰ *Constituent Assembly Debates*, India, vol. VII, p. 733.

- ¹¹ *Ibid*, p. 739-740. Both this and the passage referred to in note 10 above are quoted in P.K. Tripathi, "Perspectives on the American Constitutional Influence on the Constitution of India", in Lawrence Ward Beer (ed.), *Constitutionalism in Asia: Asian Views on the American Influence* (Berkeley and Los Angeles: University of California Press, 1979), p. 86 and pp. 86-87 respectively.
- ¹² *Reid Commission Report*, para. 162. The above, however, is not a complete description of the Reid Draft Constitution's provisions affecting fundamental liberties; such as description must include relevant provisions in other parts of the Constitution, especially those on emergency powers and the special position of the Malays.
- ¹³ *Ibid*, Note of Dissent by Mr. Justice Abdul Hamid, para 13(i).
- ¹⁴ *Ibid*.
- ¹⁵ *Ibid*, para. 13(ii).
- ¹⁶ *Federation of Malaya Constitutional Proposals* (Kuala Lumpur: Government Printer, 1957), Annexe I: Proposed Constitution of Federation of Malaya, pp. 2, 4-5.
- ¹⁷ *Reid Commission Report*, para. 123.
- ¹⁸ *Ibid.*, Note of Dissent by Mr. Justice Abdul Hamid, para. 13(i).
- ¹⁹ *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* (hereafter *Legislative Council Debates*), cols. 3143-3144.
- ²⁰ *Ibid.*, col. 3144.
- ²¹ Harry E. Groves, "Fundamental Liberties in the Constitution of the Federation of Malaysia", in Tun Mohamed Suffian, H.P. Lee and F.A. Trindade (eds.), *The Constitution of Malaysia: Its Development: 1957-1977* (Kuala Lumpur: Oxford University Press, 1989), p. 29.
- ²² See its editorial on 31 July and 1 August 1957, entitled "The Empty Guarantee" and "Whittled to Nothing" respectively.
- ²³ *Constitutional Proposals for the Federation of Malaya* (London: H.M.S.O., 1957), para. 53.

²⁴ *Legislative Council Debates*, cols. 2984-2985.

²⁵ *The Straits Times*, editorial, 1 August 1957.

²⁶ *Ibid.*

²⁷ *Ibid.*, 31 July 1957.

²⁸ *Legislative Council Debates*, cols. 3137-3138.

²⁹ *Ibid.*, col. 3171.

³⁰ *Ibid.*

³¹ *Ibid.*, cols. 3171-3174.

³² *Ibid.*, col. 3171.

³³ *Ibid.*, col. 3170.

³⁴ *Ibid.*, cols. 3174-3175.

³⁵ *The Straits Times*, editorial, 1 August 1957.

³⁶ *Legislative Council Debates*, cols. 3019-3020.

³⁷ *Ibid.*, cols. 3020-3022.

³⁸ *Ibid.*, cols. 3138-3141.

³⁹ *Ibid.*, col. 3144.

⁴⁰ *Ibid.*, col. 3145.

⁴¹ *Ibid.*, col. 3146.

⁴² *Ibid.*, col. 2985.

⁴³ *Ibid.*, col. 2986.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, cols. 3151-3152.

⁴⁶ *Ibid.*, cols. 3156-3157.

- ⁴⁷ *Ibid.*, col. 2987.
- ⁴⁸ *Ibid.*, col. 3017.
- ⁴⁹ *Ibid.*, cols. 3148-3149.
- ⁵⁰ *Ibid.*, cols. 3153-3154.
- ⁵¹ *Ibid.*, col. 3145.
- ⁵² *Ibid.*, col. 2986.
- ⁵³ *Ibid.*, cols. 3155-3156.
- ⁵⁴ *Ibid.*, cols. 3141-3142.
- ⁵⁵ *Ibid.*, col. 3159.
- ⁵⁶ *Ibid.*, cols. 3168-3169.
- ⁵⁷ *Ibid.*, cols. 3176-3177.
- ⁵⁸ *Ibid.*, col. 3177.
- ⁵⁹ *Ibid.*, cols. 3177-3178.
- ⁶⁰ *Ibid.*, col. 3139.
- ⁶¹ *Ibid.*
- ⁶² *The Straits Times*, 2 August 1957, p. 6.
- ⁶³ *Legislative Council Debates*, cols. 3139-3140.
- ⁶⁴ *The Straits Times*, 2 August 1957, p. 6.
- ⁶⁵ *Ibid.*, editorial, 31 July 1957.
- ⁶⁶ *Legislative Council Debates*, col. 3161.
- ⁶⁷ *Ibid.*, col. 3162.
- ⁶⁸ *Ibid.*, col. 3157.

- ⁶⁹ James L. Sundquist, *Constitutional Reform and Effective Government* (Washington, D.C.: The Brookings Institution, 1986), p. 12.
- ⁷⁰ On post-independence constitutional developments in Malaysia up to the early 1980s, see Tun Mohamed Suffian, H.P. Lee and F.A. Trindade (eds.), *The Constitution of Malaysia, Its Development: 1957-1977* (Kuala Lumpur: Oxford University Press, 1978) and F.A. Trindade and H.P. Lee (eds.), *The Constitution of Malaysia: Further Perspectives and Developments* (Singapore: Oxford University Press, 1986). For a brief account of the 1988 amendments affecting judicial powers, see S. Jayasankaran, "Less Equal Than Others", *Malaysian Business*, 1 April 1988, p. 5.
- ⁷¹ For instance, R.H. Hickling, who recently opined that "the climate of freedom... here in Malaysia is far more favourable than in, for example, Singapore". See his "An Overview of the Development of the Malaysian Constitution: Major Achievements and Shortcomings", paper presented at the Conference on the Malaysian Constitution After 30 Years, Faculty of Law, Universiti Malaya, 22-23 August 1987, p. 8.
- ⁷² For a sense of the fears and unease with post-independence constitutional developments, see the papers presented at the Universiti Malaya Law Faculty conference cited in note 72 and at the ALIRAN conference on "Reflections on the Malaysian Constitution: 30 Years After Independence", 15-16 August 1987.
- ⁷³ *Malaysian Business*, 16 July 1986, p. 34. For his earlier views, see his speeches in J. Victor Morais, *Lord President Suffian: His Life and Times* (Kuala Lumpur: The Law Publishers, 1974).
- ⁷⁴ The similarity in the political thinking of Malaysian prime ministers has been pointed out by another writer with respect to the issue of national security, see Chamil Warya, "Leadership Change and Security in Malaysia: From the Days of the Tunku to Dr. Mahathir Mohamad", *Contemporary Southeast Asia*, vol. 11, no. 2, 1989.
- ⁷⁵ For a brief discussion of these and some related points, see John Dearlove, "Bringing the Constitution Back In: Political Science and the State", *Political Studies*, vol. 37, no. 4, 1989.