RULE OF LAW IN THE *MERDEKA* CONSTITUTION

This article[1] will look at the original intent of the drafters of the Federal Constitution of Malaysia, as reflected in the *Reid Commission Report 1957*,[2] and as modified in the *Government White Paper*[3] which formulated the *Merdeka* Constitution[4] in the creation of an autochthonous Rule of Law for Malaysia. Law, including the meaning of the Rule of Law, is never a static phenomenon. This is especially so when there is no clear meaning or content assigned to it by either the Constitution or the legislature of a country. The meaning and the future development of a constitutional doctrine therefore are open to the forces influencing its development. In the creation of an autochthonous Rule of Law in Malaysia, other than the meaning of the Rule of Law as evidenced by the *Merdeka* Constitution, account must be taken too of the role of the common law, ASEAN law, Islamic law and international law as the primary determinants of a Rule of Law for Malaysia. This article however will only focus on the role of the original intent of the drafters, as reflected in the *Reid Commission Report 1957*, and as modified in the *Government White Paper* which formulated the *Merdeka* Constitution.

---

[1]This article is based, with some amendments, on Chapter II, Khoo Boo Teong, *Rule of Law and Fundamental Liberties in Malaysia*, Unpublished PhD thesis, Faculty of Law, University of Sydney, 1999.

[2]Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957*, Colonial No. 330, London: Her Majesty's Stationery Office, 1957, *Reid Commission Report 1957*.

[3]Colonial Office, *Constitutional Proposals for the Federation of Malaya*, Cmnd. 210, London: Her Majesty's Stationery Office, 1957 (hereinafter referred to as the *'Government White Paper'*).

[4]The new Constitution for the future independent Federation of Malaya as recommended by the Reid Commission had undergone changes in both substance and form, and was published as Annexe I to the *Government White Paper*. This Annexe, 'Proposed Constitution of the Federation of Malaya', became the *Merdeka* Constitution of independent Malaya on 31 August 1957.

A. Drafters, Original Intent and the *Merdeka* Constitution

The meaning and content of the Rule of Law in the Federal Constitution of Malaysia can be seen in its development from primarily the meaning and content assigned to the doctrine by the drafters of the Constitution and its subsequent modifications. The original intent, as noted above, was reflected in the *Reid Commission Report 1957* to which was appended a Draft Constitution.[5] The original intent in the Draft Constitution was modified by the elected representatives of the Malayan community at the time immediately before independence with the agreement of the British Government and the Malay Rulers which modification was reflected in the *Government White Paper* which formulated the Constitution for independence. The Malayan Constitution, upon Malaya gaining independence, will be referred to as the '*Merdeka* Constitution'. This article will look at the original meaning and content of the Rule of Law in the Reid Constitutional Commission Report as reflected in its Draft Constitution, and its modification in the *Government White Paper* which formulated the *Merdeka* Constitution. It is divided into three parts. The first part will examine the meaning of the Rule of Law, the second, the struggle with regard to the content of the Rule of Law, and finally, some concluding observations.

B. Meaning of the Rule of Law

The Reid Constitutional Commission presented its recommendations in the form of a Draft Constitution for the Federation of Malaya. Article 3 which was under Part II of the Draft Constitution dealt with the Rule

[5]The Draft Constitution was appended to the *Reid Commission Report 1957* as Appendix II.

of Law. Part II is the fundamental liberties part of the Draft Constitution. The marginal notes to article 3 stated 'The Rule of Law'.[6]

Article 3 gave a very formalistic meaning to the Rule of Law, that is, the supremacy of the Federal Constitution over any law and executive acts. It has to be interpreted in light of the meaning of the Rule of Law in England as at 1957 with one modification, that is, the supremacy of the written constitution over the sovereignty of Parliament. The law and executive acts referred to cover both Federal and State laws and Federal and State executive acts.

Article 3 of the Draft Constitution was made into article 4 of the Merdeka Constitution and renamed 'Supreme law of Federation'.[7] The

---

[6]Article 3 provided:

3(1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.

(2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or of any law, such act shall be void.

[7]The new article 4 of the *Merdeka* Constitution provided:

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) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except-

(a) if the law was made by Parliament, in proceedings between the Federation and one or more of the States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

removal of the marginal note 'The Rule of Law' in the original article 3 of the Draft Constitution from the new article 4 of the *Merdeka* Constitution was to have serious consequences not forseen then. The Rule of Law returned to haunt the landscape of Malaysian constitutionalism, especially in the aftermath of the 13 May 1969 racial riots and has regularly returned since to demand its rightful place in Malaysian constitutionalism.

C. Struggle Over the Contents of the Rule of Law

Justice Abdul Hamid, one of the five Reid Constitutional Commissioners, wrote a note of dissent[8] to the majority report. This note of dissent is arguably one of the most important constitutional documents in the finalisation of the *Merdeka* Constitution. Some of the most important changes to the Reid Draft Constitution which undermined the Rule of Law flowed from this note of dissent.[9] The main reasons, according to Justice Abdul Hamid, for his note of dissent were the disregard by the Reid Commission of the recommendations of the Alliance[10] on controversial political matters and that certain provisions in the Draft Constitution would cause constitutional and

---

[8]Justice Hamid's minority report was unfortunately entitled 'Note of Dissent'. See telegram (13 February 1957) from Lennox-Boyd (Secretary of State Colonies, United Kingdom) to Sir David MacGillvray (High Commissioner Federation of Malaya) in Stockwell, A.J. (Editor), *Malaya: Part III The Alliance Route to Independence 1953-1957*, London: HMSO, 1995, at page 361.

[9]Justice Hamid initially had a 30 page memorandum, but eventually decided to 'curtail his note' of dissent. See ' "Note of discussions in Rome on 29th January, 1957": note by Sir D Watherston of his discussions with the constitutional commissioners; views of Mr Abdul Hamid on the special position of the Malays' in Stockwell (Editor), Note 8, at pages 350-352.

[10]The Alliance originated as an ad hoc coalition between the United Malays National Organisation (UMNO) and the Malayan Chinese Association (MCA) in the 1952 Kuala Lumpur municipal elections. In the 1955 general election for the Federal Legislative Council, the expanded Alliance, with the inclusion of the Malayan Indian Congress (MIC), under the leadership of Tunku Abdul Rahman swept 51 out of the 52 seats contested. The Alliance being a coalition of UMNO-MCA-MIC was officially registered in 1957.

legal complications.[11] Justice Hamid divided his dissent into points of a political nature and points relating to constitutional and legal complications.[12] In relation to the meaning of the Rule of Law directly, Justice Hamid made four major points of dissent being matters that would lead to legal and constitutional complications and two major points of dissent which is of a political nature.

1. Matters Relating to Constitutional and Legal Complications

In relation to the Rule of Law directly, the matters that were said to lead to legal and constitutional complications were with reference to articles 4 (enforcement of the Rule of Law), 10 (limitations on the fundamental liberties of speech, assembly and association), 63 (royal assent to legislation), and 137 (special powers against subversion and emergency powers) of the Reid Draft Constitution. The *Government White Paper* adopted two of Hamid's four points of dissent.

---

[11]Four reasons, it is suggested, could be attributed to Justice Abdul Hamid's note of dissent. They are, firstly, Justice Hamid's belief that the will of the elected representatives, especially where the elected representatives have come to the solutions of the various controversial political problems after long and protracted deliberations, should be accorded the greatest value and respect. Secondly, there were personal differences between Justice Hamid and the Chairperson, Lord Reid, especially after his opinions and views had been consistently brushed aside by Lord Reid during the Commission's time in Malaya. Thirdly, Justice Hamid's concern regarding constitutional provisions that will give rise to constitutional and legal complications. Finally, there is the religious element, that is, the personal beliefs of Justice Hamid as the only Muslim in the whole Commission. The religious beliefs of a Muslim, especially if the person is a devout Muslim, is vitally important as Islam does not draw a separation between the faith and the state. A devout Muslim is always a Muslim first and last.

[12]In the *Reid Commission Report 1957*, Justice Hamid made three points of dissent of a political nature and eights points of dissent on matters relating to constitutional and legal complications.

(a) Principles of Natural Justice

Article 4 of the Draft Constitution provided for the 'Enforcement of the Rule of Law'.[13] It provided for the judicial forum and the required procedure to enforce the rights in article 3. Draft article 4 therefore

---

[13]Article 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 provision are void;

(b) where any person affected by any 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* [emphasis added], 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 this 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.

(2) Nothing in this Article shall entitle any person to institute proceedings in the Supreme Court if he is

(a) a person subject to military law and he seeks to institute proceedings against a public authority to whom he is subject under military law otherwise than for the purpose of securing a decision whether that authority acted with or without jurisdiction; or

(b) an alien enemy.

throws very little additional light on the meaning and scope of the Rule of Law within the constitutional framework of Malaya then.

This notwithstanding, Justice Abdul Hamid regarded article 4(1)(b)(iii) as unsatisfactory. Justice Hamid wrote:

> "But paragraph (iii) of sub-clause (b) seeks to protect not the Constitution but the "principles of natural justice". "The principles of natural justice" are not a part of the Constitution, nor are they a part of any written law. They have not been defined either in the Constitution or in any other law. If a constitution has a provision which seeks to protect the principles of natural justice without having defined those principles anywhere, the result would be chaos. "Principles of natural justice" are capable of innumerable interpretations. No two jurists are agreed upon the extent of those principles. Some rules of natural justice have been laid down in judgments but as views in judgments are liable to alteration, rules of law based on judgments do not provide safe and definite standards. If a provision like this is allowed to stand in the Constitution many acts of the judicial and quasi-judicial authorities will be challenged in the Supreme Court almost every day on the ground that they are contrary to the principles of natural justice. With principles of natural justice defined nowhere 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. My suggestion is that the words "or that the procedure by which act or decision was done or taken was contrary to the principles of natural justice" should be deleted."

The dissenting view of Justice Hamid was accepted by the authorities[14] studying the *Reid Commission Report 1957* and came to be reflected in the *Government White Paper* which stated categorically:

> "The Article [4] proposed by the Commission on the subject of the enforcement of the rule of law was, however, found unsatisfactory

[14]The 'authorities' were the delegation sent by the Working Party and the United Kingdom Government.

> and has been omitted on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by the ordinary law."

This is an endorsement of the dissenting opinion of Justice Hamid. Article 4 of the Reid Draft Constitution was amended and consolidated with article 3. The result was article 4 of the *Merdeka* Constitution.[15]

This notwithstanding, the view of Justice Hamid on the enforcement of the Rule of Law cannot be sustained on at least five main reasons. Firstly, the jurisprudence of rules of natural justice which first developed in a judicial context is not only a municipal principle, it is an international principle that has been recognised in the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). Thus article 10 of the UDHR and article 14 of the ICCPR provide for all persons to be equal before the courts, and that in the determination of any criminal charge against him or her, or of his or her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing

---

[15]Article 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) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except-

(a) if the law was made by Parliament, in proceedings between the Federation and one or more of the States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

by a competent, independent and impartial tribunal established by law.[16] Secondly, there are other constitutions that have provisions for rules of natural justice. Principles of natural justice are an integral part of both English and American constitutional law. Under English constitutional law, rules of natural justice flow from the common law maxim that no one should be condemned unheard.[17] Dicey has pointed out under his third meaning to the Rule of Law that the laws of the constitution under English constitutional law was the result of the ordinary law of the land[18] which ordinary law includes the common law. Furthermore Dicey's second meaning of the Rule of Law on the principle of equality before the law that all classes are under equal subjection to the ordinary law of the land administered by the ordinary law courts includes the principles of natural justice as it evolved initially in judicial proceedings. Rules of natural justice are also an integral part of American constitutional law under the due process clause. The Fifth and Fourteenth Amendment to the United States Constitution provide that no person is to be deprived of his or her life, liberty or property without due process of law.[19] Thirdly, even in Commonwealth Constitutions that do not have provisions on rules of natural justice,

---

[16]Centre for Human Rights Geneva, *Freedom of the Individual Under Law*, New York: United Nations, 1990, at page 135.

[17]Jain, M.P., *Administrative Law in the Common Law Countries: Recent Developments and Future Trends* (an inaugural lecture delivered at the University of Malaya on 23 December 1983, Kuala Lumpur: University of Malaya, 1983), at page 6.

[18]Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, Tenth Edition, London: Macmillan & Co Ltd; New York: St Martin's Press, 1965, at pages 195-197 and 203.

[19]The Fifth Amendment is a federal guarantee. The Fourteenth Amendment ensures that the same guarantees are observed by the States. The due process clause crystalises and develops the common law concepts of 'arbitrariness', 'capriciousness' and 'unreasonableness'. See Abraham, Henry J., *Freedom and the Court*, Oxford: Oxford University Press, 1988, at page 119. The United States Supreme Court has defined due process in *Palko v Connecticut* 302 US 319 (1937) as comprising of substantive and procedural due process. Substantive due process covers the content or subject matter of a law and procedural due process covers the manner in which a law, administrative process or judicial task is executed.

the judicial arm has read into the Constitutions the requirement of rules of natural justice. Thus in a 1953 Canadian constitutional law case, the court recognised rules of natural justice as they were stated by the Chief Justice of Canada:

> "The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be at stake, is of universal equity ... Nothing less would be necessary than an express declaration of the legislature to put aside this requirement, which applies to all courts and to all bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual."[20]

Such an approach was endorsed by post independence constitutional law cases from both Singapore and Malaysia which thus reaffirmed the position taken by the majority of the Reid Constitutional Commission. In the Singapore case of *Ong Ah Chuan v Public Prosecutor*[21] the Privy Council made the position of rules of natural justice in the constitutional scheme of things clear when it pointed out that:

> "In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', equality before the law', 'protection of the law' and the like, in their Lordship's view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise, it would

---

[20] *Alliance des Professeurs Catholiques de Montreal v Labour Relations Board of Quebec* (1953) Dominian Law Reports (Canada) 161, at page 174.

[21] [1981] 1 MLJ 64.

> be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9 (1) and 12 (1) would be little better than a mockery."

In the later Singapore case of *Haw Tua Tau v Public Prosecutor*,[22] the Privy Council noted that the content of fundamental rules of natural justice may change over time.[23] Such an observation, although it is a 'double edged sword', must be interpreted in light of the Privy Council's rejection in *Ong Ah Chuan* of the Malaysian Federal Court case of *Arumugam Pillai v Government of Malaysia*[24] where the Federal Court took the formalistic view that the word 'law' in the Constitution meant that all that was required was that legislation be enacted in due form and be within the competence of the legislature notwithstanding the arbitrariness of the law. The position in *Ong Ah Chuan's* case has been endorsed by the Malaysian courts in the Federal Court case of *S Kulasingam v Commissioner of Lands, Federal Territory & Ors*[25] with the caveat however that the legislature can exclude by clear words the principles of natural justice in the absence of specific constitutional guarantees.[26] Fourthly, it must be remembered that the rules of natural

---

[22][1981] 2 MLJ 49.

[23]In *Maneka Gandhi v Union of India* AIR 1978 SC 597, the Indian Supreme Court stated that natural justice consists of two components. They are the component of procedural and substantive matters. See also Iyer, T.K.K., 'Article 9(1) and Natural Justice' (1981) 23 *Malaya Law Review* 213; Harding, A.J., 'Natural Justice and the Constitution' (1981) 23 *Malaya Law Review* 226. Harding argues for natural justice to be limited to only procedural matters as that is the sense in which natural justice is understood under the common law. See also Sheridan, L.A., and Groves, Harry E., *The Constitution of Malaysia*, Fourth Edition, Singapore: Malayan Law Journal (Pte) Ltd, 1987, at page 44.

[24][1975] 2 MLJ 29.

[25][1982] 1 MLJ 204.

[26]Mohamed Ariff Yusof, 'Saving "Save in Accordance with law": A Critique of *Kulasingham v Commissioner of Lands, Federal Territory*' (1982) 9 *Journal of Malaysian and Comparative Law* 155. See also *Cheow Siong Chin v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1986] 2 MLJ 235, at page 238. For some recent pronouncements on the wider concept of duty to act fairly, see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289.

justice is an English principle of law and the remainder of the four Reid Constitutional Commissioners are equally, if not more well versed, in both English and constitutional principles of law. Thus on matters of English law and constitutional principles, deference perhaps should have weighed in on the side of the remaining four Constitutional Commissioners.

Finally, even in Islamic law, the principles of natural justice are recognised as part of Islamic constitutional law. Principles of natural justice are part of the Islamic Holy Constitution[27] and is derived from *Quran 38: 21-6* in an episode involving the Prophet Dawud (David). Two litigants came before the Prophet David and one of them presented his case eloquently stating that his brother had 99 ewes and he had only one ewe and that his brother forcibly prevailed against him in the dispute to add his single ewe to his brother's flock. Since the case was convincingly presented by one side and without hearing the other party, the Prophet David immediately gave judgment to that side whereupon a direct revelation came to the Prophet David that he was a prophet and vicegerent on earth and that he was to judge men with justice and not to follow vain desire lest it leads him astray from the path of God. Following the above way of dispensing justice leads to caprice for the Prophet David heard only one party and thereafter issued his decision whereas justice required that he should hear both sides before making a decision.[28]

Thus from the above five reasons, the majority view of the Reid Commissioners, especially in matters of a constitutional and legal nature, should have been accepted by the governing authorities instead of the dissenting view of Justice Hamid. This can be contrasted with matters which are of a political nature where the dissenting position of Justice Hamid could and should be given careful consideration by the governing authorities as the political agreements which are the result of careful and long deliberations among the political parties representing the three main races in Malaya then are of the utmost importance in assuring a secure future for the independent country. The adoption of Justice

---

[27]Kurdi, Abdulrahman Abdulkadir, *The Islamic State: A Study based on the Islamic Holy Constitution*, London and New York: Mansell Publishing Limited, c 1984, at pages 4-5.

[28]Kurdi, Note 27, at page 49.

Hamid's dissenting view in this matter was to have grave consequences for independent Malaya and later on Malaysia as it blurred the government's understanding of the meaning of the Rule of Law and contributed to the constitutional crisis of 1988 which resulted in the removal of the highest judge together with two other judges of the highest court in the land. Such a crisis can never be without constitutional costs in terms of the growth and development of constitutionalism and the Rule of Law of any country.

(b) Judicial Review of Reasonableness of Legislation

The next major issue of a constitutional and legal nature directly related to the Rule of Law in the Reid Draft Constitution attacked by Justice Hamid was article 10.[29] Justice Abdul Hamid criticised the inclusion of the word 'reasonable' in article 10 of the Draft Constitution which adoption he asserted would lead to legal and constitutional complications. Justice Hamid reasoned as follows:

> "Article 10. The word "reasonable" whenever it occurs before the word "restrictions" in the three sub-clauses of this article should be omitted. Right to freedom of speech, assembly and association has been guaranteed subject to restrictions which may be imposed in the interest of security of the country, public order and morality. If the Legislature imposes any restrictions in the interests of the aforesaid matters, considering those restrictions to be reasonable, that legislation should not be challengeable in a court of law on the ground that the restrictions are not reasonable. The Legislature alone should be the judge of what is reasonable under the circumstances. If the word

---

[29]Article 10 in the Draft Constitution read as follows:

10(1)Every citizen shall have the right to freedom of speech and expression, subject to any *reasonable* [emphasis added] 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* [emphasis added] 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* [emphasis added] restrictions imposed by federal law in the interest of the security of the Federation, public order or morality.

> "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 Legislature 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."

Justice Hamid's dissent was accepted by the *Government White Paper* without even any mention of it being made in the text of the White Paper itself. In the *Merdeka* Constitution, the word 'reasonable' was deleted from article 10.[30] Justice Hamid's rationale is that the inclusion of the word 'reasonable' would, firstly, derogate from the sovereignty of the legislature as the legislature alone should be the sole judge of the reasonableness of any such legislation; secondly, that such a state of affairs would create uncertainty in the law as all such legislation would be open to challenge in a court of law; and thirdly, that there

---

[30]The new article 10 read as follows:

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.

would be tension and conflict between the views of the legislature and the courts.

Justice Hamid's dissent is untenable and most unwise for a number of reasons. The inclusion of the word 'reasonable' in a Constitution to limit the powers of a legislature is not a new or alien phenomenon. The provision of the Reid Draft Constitution was very much influenced by the provisions of the Constitution of India promulgated on 26 November 1949 and the Indian Constitution in article 19 which is the corresponding provision of article 10 of the Draft Constitution had the word 'reasonable'. Thus in India, such freedoms are only limited by reasonable restrictions. This fact alone would be sufficient to rebut Justice Hamid's dissent. The remainder of the Reid Commissioners must have had the foresight to know that when the Westminster model is transplanted to former colonies upon their gaining independence that in these colonies there may not have developed a culture of constitutionalism. It must be remembered that the Westminster system worked well in England because of the culture of constitutionalism that has developed and accumulated since the Magna Carta in 1215. Thus it is better to limit the powers of the legislature bearing in mind that the legislature in a Westminster model is an all powerful executature.[31] In a Westminster export model the immediate best possible safeguard is the judiciary which can act as a restraint on the powers of the executive and legislature and thus gives an opportunity for the culture of constitutionalism to be nurtured. Furthermore the concept of reasonableness is a familiar one as it is an established concept of the common law system especially in the law of torts. Post independence article 10 cases have vindicated the approach taken by the majority of the Reid Commissioners.[32] The failure of the government of the day in the time leading to independence to follow the

[31]This is a term coined by Lord Hailsham to denote the partial fusion of the executive and the legislature: Lord Hailsham of St Marylebone, 'The Independence of the Judiciary in a Democratic Society' [1978] 2 *MLJ* cxv, at page cxvii.

[32]*Chai Choon Hon v Ketua Polis Daerah, Kampar and Government of Malaysia* [1986] 2 MLJ 203 (Supreme Court); *P Patto v Chief Police Officer, Perak & Ors* [1986] 2 MLJ 204 (Supreme Court).

recommendations of the majority of the Reid Constitutional Commission has helped to nurture a culture in all the three organs of government that is not conducive to the growth and development of the Rule of Law. This is especially evident in the attitude of the executive and the legislature and has led to confusion and the erosion of the Rule of Law. Without the word 'reasonable' in article 10 as a restriction on the powers of the legislature, which is controlled by the executive, the Judiciary is quite powerless to exercise restraint on the powers of Government or to attempt to cultivate and nurture a culture of Rule of Law and constitutionalism.

(c) Royal Assent to Legislation

The third point of dissent of a constitutional and legal nature relates to the assent to legislation by the *Yang di-Pertuan Agong* (King) for Federal legislation and the respective State Rulers for State legislation which was provided in article 63 of the Draft Constitution.[33]

Justice Hamid dissented, as follows:

> "Article 63. If this article is allowed to remain in the Draft as it stands the *Yang di-Pertuan Besar* will have no choice in the matter of assent. He shall be bound to assent to the Bill passed by the two Houses. In other words, a Bill passed by the two Houses shall become law. If this is the intention, it is far better to approach this subject direct by saying in article 59 that a Bill passed by the two Houses shall become law. No mention of assent is necessary at all. But if assent is to be mentioned the Constitution should give power to the *Yang di-Pertuan Besar* to accord assent or to withhold assent. In all

---

[33]Article 63 of the Draft Constitution provided:

63. When a Bill is passed in accordance with the provisions of this Chapter it shall be presented to the *Yang di-Pertuan Besar* for his assent and he shall assent thereto:

Provided that when a Bill is presented to the *Yang di-Pertuan Besar* for his assent in accordance with the provisions of Article 60 or of Article 61 it shall bear a certificate under the hand of the Speaker of the House of Representatives that the provisions of that Article have been complied with, and such certificate shall be conclusive for all purposes and shall not be questioned in any court.

constitutions the power to accord assent goes with the power to withhold assent. As the *Yang di-Pertuan Besar* will act on advice, the Cabinet or the Prime Minister will be answerable to the Legislature if assent is withheld. In my opinion the provision in article 63 should be as follows:

> "63. When a Bill is passed in accordance with the provisions of this chapter it shall be presented to the *Yang di-Pertuan Besar* and he may assent thereto or declare that he withholds his assent therefrom."

Similar provision should be made in the relevant sections in the Fifth Schedule and in the Penang and Malacca Constitutions."

This particular dissent was not accepted by the Government in its White Paper. Instead in the *Merdeka* Constitution, the Draft Constitution article 63 was incorporated into article 66 as clause (4).[34] Justice Hamid

---

[34]The *Merdeka* Constitution article 66 thus reads as follows:

66(1) The power of Parliament to make laws shall be exercised by Bills passed by both Houses (or, in the cases mentioned in Article 68, the House of Representatives) and assented to by the *Yang di-Pertuan Agong*.

(2) Subject to Article 67, a Bill may originate in either House.

(3) When a Bill has been passed by the House in which it originated it shall be sent to the other House; and it shall be presented to the *Yang di-Pertuan Agong* for his assent when it has been passed by the other House and agreement has been reached between the two Houses on any amendments made in it or when it is required to be so presented under Article 68.

(4) The *Yang di-Pertuan Agong* shall signify his assent to a Bill by causing the Public Seal to be affixed thereto, and after assenting to a Bill he shall cause it to be published as a law.

(5) A Bill shall become law on being assented to by the *Yang di-Pertuan Agong*, but no law shall come into force until it has been published, without prejudice, however, to the power of Parliament to postpone the operation of any law or to make laws with retrospective effect.

(6) Nothing in this Article or in Article 68 shall invalidate any law confirming an undertaking given by the Federal Government to the effect that a Bill to which the undertaking relates shall not be presented to the *Yang di-Pertuan Agong* for his assent except in accordance with the undertaking.

expressed two particular concerns in this particular dissent. Firstly, that the article was unclear: if the intention was not to give the King power in relation to assent to bills, then that should be expressly stated. Secondly, if the King was to be given a power of assent, then it would logically follow that there must be a power to withhold assent. It is however submitted that the majority position of the Reid Commission was the better one. It must be remembered that under the terms of reference of the Reid Constitutional Commission, the Commission was to take 'into account the positions and dignities' of the Malay Rulers and to include provisions for 'safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States' and a 'constitutional *Yang di-Pertuan Besar* (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers'. Thus the Reid Commission recommended a constitutional monarchy for Malaya in which the King is given the role of assenting to legislation consistent with the position and dignity of the King just like the position and dignity of the Queen in England in relation to assenting to legislation under English constitutional convention, that is, the Queen does not withhold assent to legislation passed by Parliament. Furthermore the Draft Constitution is clear in article 35 that the general rule is that the King acts on advice of the Cabinet, the Prime Minister[35] or the appropriate Minister as the case may be and he has a discretion in only three matters which does not include the withholding of assent to legislation.[36] Furthermore under Islamic law, based on *Quran* 42:38

[35]Article 35 of the Draft Constitution in the proviso however further provides that 'if the *Yang di-Pertuan Besar* is advised by the Prime Minister or other Minister on a matter which has not been considered by the Cabinet, the *Yang di-Pertuan Besar* may require that the matter be so considered'.

[36]The three matters in the Draft Constitution where the King has a discretion are the appointment of a Prime Minister, the dissolution of Parliament, and the exercise of his right to obtain information in accordance with the provisions of article 34. Article 34 states that the King shall be entitled to obtain from any other part of the Federal Government such information relating to the administration of the affairs of the Federation as he may call for. Even in the appointment of the Prime Minister, the King is constrained by article 36(2) which states that the Prime Minister is to be appointed from among the members of the House of Representatives who in his judgment is most likely to command the confidence of the majority of the members of that House.

'Their [the Believers'] communal business [*amr*] is to be [transacted in] consultation among themselves', the Ruler should not have a power to withhold assent to legislation passed by an assembly chosen specifically for this purpose.[37] This note of dissent by Justice Hamid, although not adopted in the White Paper, may very well have contributed to the constitutional crisis involving the Malay Rulers and the elected government in 1983 by giving a false sense of security to the Malay Rulers that the position taken by their Highnesses, which precipitated the constitutional crisis was, consistent with the Rule of Law.

The position created by the *Merdeka* Constitution's article 66 led to a constitutional crisis in 1983 which controversy was only decisively resolved in 1994.[38] This was based on a misunderstanding by the Malay Rulers of the meaning of the Rule of Law. If an established meaning or culture of the Rule of Law existed, Malaysia would have been spared a constitutional struggle that lasted eleven years.

(d) Special Powers against Subversion and Emergency Powers

The fourth and final major point of dissent by Justice Hamid in relation to points of a constitutional and legal nature is with regard to special powers against subversion and emergency powers as found in Part XI of the Draft Constitution. Justice Hamid's dissent was not accepted by the Government's White Paper. Justice Hamid dissented as follows:

> "Article 137. This part of the Constitution deals with Emergency provisions which can be invoked only when a grave situation arises which is beyond the power of ordinary law to combat. In fact, no request has been made from any quarter for inserting a part relating to Emergency provisions of this nature in the Constitution and no constitution of the Commonwealth countries excepting India and Pakistan has a chapter of this kind. In other countries where the constitution is bare of fundamental guarantees of the type mentioned

[37]Muhammad Asad, *The Principles of State and Government in Islam*, Gibraltar: Dar Al-Andalus, 1980; first published University of California Press, 1961, at pages 44-45.

[38]See Constitution (Amendment) Act 1994 (Act A885).

in Part II if a serious situation arises for which ordinary law of the land is found to be inadequate special legislation for the suppression of those extraordinary conditions is enacted by Parliament. As this Constitution contains constitutional guarantees ordinary legislation in contravention of those guarantees would no doubt be *ultra vires*. But the object can be achieved if power is conferred on Parliament by engrafting exceptions to the relevant guarantees. Under such exceptions it would be legal for Parliament to make laws during emergencies in complete disregard of the fundamental guarantees. Under that device it would not be necessary to have an Emergency Part in the Constitution at all.

But if for meeting emergency conditions a separate part is necessary because apart from suspending constitutional guarantees it may also become necessary for the Federal Government to take over legislative and executive authority from the States then it is necessary that such extraordinary powers should be available only on the occurrence of an emergency of an extremely dangerous character and not when the Parliament without the existence of an emergency of any serious kind makes use of these extraordinary powers by making a statement that a situation has arisen which calls for the exercise of those powers. If there arises any real emergency, and that should only be emergency of the type mentioned in article 138, then and only then should such extraordinary powers be exercised. It is in my opinion unsafe to leave in the hands of Parliament power to suspend constitutional guarantees only by making a recital in the Preamble that conditions in the country are beyond the reach of the ordinary law. Ordinary legislative and executive measures are enough to cope with a situation of the type described in article 137. That article should in my view be omitted. There should be no half-way house between government by ordinary legislation and government by extraordinary legislation under the conditions mentioned in article 138. The Constitutions of India and Pakistan which contain provisions relating to emergency have no such half-way house. Their provisions correspond to the provisions embodied in article 138."

The gravamen of Justice Hamid's objection to the existence of a part in the Constitution providing for special powers against subversion and emergency powers was threefold. Firstly, Justice Hamid did not

see the need for a separate part in the Constitution providing for special powers against subversion and emergency powers. Secondly, if there was to be an emergency powers part in the Constitution, such a part must be narrow and strict thus ensuring that fundamental guarantees were not unnecessarily eroded. Finally, there was no necessity for a half-way house between ordinary legislation and emergency legislation as has been provided in article 137. Justice Hamid's note of dissent in relation to special powers and emergency powers was doomed to failure because of the security situation existing in Malaya then. Malaya was still under communist insurgency which began in 1948 and did not end until 1960. The issue, if any, therefore, was not whether provisions should be made to deal with emergencies but rather the extent of emergency powers. Emergency powers is an oxymoron in constitutionalism but nevertheless an accepted doctrine to preserve constitutionalism itself from those who seek to destroy it. As to the objection of a half-way house between ordinary and emergency legislation, the issue is again not the existence of such legislation but the extent of such legislation. In both cases, such provisions must be narrow and strict to ensure that fundamental liberties are not unnecessarily eroded. Furthermore Justice Hamid's objection to emergency powers cannot be supported by Islamic law doctrines. For Islamic law does recognise the concept of emergency in its jurisprudence. In Islamic law the concept is that of *darura*. The concept of emergency in Islamic law nevertheless has such checks and balances so it that it is not open to abuse. If and when such provisions are abused either through constitutional amendments, legislation, or executive actions, the cause may not necessarily solely be the executive and legislature. It also needs to be asked to what extent the judiciary helped to encourage such a culture.[39] The misunderstanding of the Rule of Law may not be that of the executive and legislature alone.

In relation to the existence of special powers against subversion and emergency powers, the *Government White Paper* endorsed the majority position of the Reid Commission Report 1957. Justice Hamid's

[39]Consider the judicial attitude towards the basic structure doctrine; see Harding, Andrew, *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1996, at pages 51-54.

concern in these matters was not accepted by the *Government White Paper*. This notwithstanding, the non-acceptance of Justice Hamid's concern about emergency powers and special powers against subversion led to two unhealthy developments in Malaysian constitutional law. Firstly, the existence of such powers leads to the growth and eventual abuse of preventive detention powers; and secondly, the abuse of the emergency powers provisions leading to Malaysia having four declarations of emergency which are still subsisting.[40] When the White Paper was silent on a particular matter mentioned in the Reid Commission Report 1957, it meant that the position was accepted. Although the recommendations on special powers against subversion and emergency powers were accepted, there was one important addition made in the *Merdeka* Constitution. The addition was that while a Proclamation of Emergency is in force Parliament may, notwithstanding anything in the Constitution, make laws with respect to any matter enumerated in the State List other than any matter of Muslim law or the custom of the Malays, extend the duration of Parliament or of a State Legislature, suspend any election, and make any provision consequential upon or incidental to any provision made in pursuance of this clause. Thus Muslim law and customs of Malays are immune from emergency powers. This immunity of Islamic law and customs of the Malays merely demonstrates the ultimate importance attached in Malaysian constitutional law to the sanctity of Islam and 'Malayness'. Islam and Malayness thus have exerted and will continue to exert the most profound influence on Malaysian constitutionalism. It can even be theorised that all constitutional developments in Malaysia must eventually receive the sanction of Islamic law and the consent of the Malays to have any real chance of acceptance.

---

[40]For a detailed study of emergency powers in Malaysia, see Das, Cyrus V., *Governments & Crisis Powers: A Study of the Use of Emergency Powers under the Malaysian Constitution and Parts of the Commonwealth*, Kuala Lumpur: Malaysian Current Law Journal Sdn Bhd, 1996. For Das's comments on overlapping proclamations of emergencies, see pages 305-311 and Lee, H.P., *Constitutional Conflicts in Contemporary Malaysia*, Kuala Lumpur: Oxford University Press, 1995, at page 104.

2. Points of a Political Nature

Justice Hamid raised two points of a political nature which are directly related to the Rule of Law. They are in relation to the special position of the Malays and Islam as a State Religion and both were endorsed by the *Government White Paper*. It is significant that in both the special position of the Malays and Islam as religion of the Federation, the *Government White Paper* rejected the recommendations of the Reid Commission and went further than even the note of dissent of Justice Hamid. Both the positions advocated by Justice Hamid may have short term political justifications but may very well undermine the meaning and growth of the Rule of Law in the long term.

(a) Special Position of the Malays

In relation to the special position of the Malays, the Draft Constitution provided two main constitutional provisions. The first dealt with the special position of the Malays with regard to land (Malay reservations) and the second with regard to the public service, the economics field and education.

i) Special position of the Malays with regard to land

The Draft Constitution provided for Malay reservations in article 82.[41] The crux of the Reid Commission's recommendation was that 'subject to two qualifications, there should be no further Malay reservations, but that each State should be left to reduce Malay reservations in that State at an appropriate time'. The two qualifications were first, 'if any

[41] Article 82 of the Draft Constitution provided as follows:

82(1) Notwithstanding anything in this Constitution, where in accordance with law any land in a State was a Malay reservation on the first day of January, 1957, such land may continue to be a Malay reservation in accordance with existing law until the Legislature of that State otherwise provides by an Enactment passed by a majority of at least two-thirds of the members of the Legislative Assembly present and voting, but no land, not being a Malay reservation on the said date, shall be a Malay reservation except in accordance with the provisions of this Article.

land at present reserved ceases to be reserved, an equivalent area may be reserved provided that it is not already occupied by a non-Malay' and secondly, 'if any undeveloped land is opened up, part of it may be reserved provided that an equivalent area is made available to non-Malays'.[42]

Justice Abdul Hamid drew the attention of the Reid Commission to the fact that article 82 did not include any reference to a majority of the total number of members of the State Legislature.[43] The Reid Commission did not object to such a provision being inserted in the article but said that it was too late for the Reid Commission to amend the Draft Constitution when the matter was raised by Justice Hamid.

In relation to the special privilege of Malay reservations the White Paper noted the following:

---

(2) Where any land ceases to be a Malay reservation, an area equivalent to the area which has ceased to be a Malay reservation may be made a Malay reservation:

Provided that nothing in this clause shall authorise the reservation of land which was immediately before *Merdeka* Day occupied by a person who was not a Malay.

(3) Any land in the State which is not a Malay reservation and which has not been developed or cultivated may be made a Malay reservation, in accordance with existing law, provided that an equivalent area of such land is made available for persons who are not Malays.

(4) For the purposes of this Article a Malay reservation means -

(a) land reserved for alienation to Malays or to natives of the State in which it lies; or

(b) a Malay holding in the State of Trengganu.

(5) Nothing in this Constitution shall affect the validity of any restriction imposed by law on the transfer or lease of customary land, or any interest therein, in the State of Negri Sembilan or the State of Malacca.

[42]*Reid Commission Report 1957*, at page 72, paragraph 166.

[43]The idea of 'something more than a bare majority' was given to Mr Justice Abdul Hamid by Sir David Watherston, the Chief Secretary (1952-57) and officer administering the government of the Federation of Malaya. See 'Note of discussions in Rome on 29th January, 1957': note by Sir D. Watherston of his discussions with the constitutional commissioners; views of Mr Abdul Hamid on the special position of the Malays in Stockwell (Editor), Note 8, at page 352.

> "A number of modifications have been made to the principles recommended by the Commission with regard to Malay land reservations and the preservation of the rights of the other persons. The first and the most important concerns the manner in which existing law may be amended. It is proposed that an enactment of a State Legislature for this purpose shall not only be passed by a majority of the total number of members of the Legislative Assembly and by the votes of not less than two-thirds of the members present and voting, but shall also be approved by a resolution of each House of Parliament passed in a similar way. Secondly, it is proposed that land which has not been developed or cultivated may only be declared as a Malay reservation if an equal area of similar land is made available for general alienation and if the total area of such land in a State declared as a Malay reservation after *Merdeka* Day does not at any time exceed the total area of such land in that State which has been so made available for general alienation. Thirdly, it is proposed that any Malay State should be entitled to acquire by agreement developed or cultivated land and to declare such land to be a Malay reservation in accordance with the existing law. Fourthly, it is proposed that the Government of any State should be entitled, in accordance with law, to acquire land for the settlement of Malays or of other communities and to establish trusts for that purpose. This last provision is intended primarily to have effect in Malacca and Penang where the other provisions do not apply."

The recommendations of the White Paper in relation to Malay reservations have been entrenched in article 89 of the *Merdeka* Constitution. Therefore it can be seen that Malays have extra 'protection' or privileges in land in the constitutional system of Malaysia.

ii) Special position of the Malays: public service, economics field and education

The special position of the Malays with regard to the public service, the economics field and education was found in article 157[44] of the

---

[44]Article 157 of the Draft Constitution read:

157(1) Notwithstanding anything in this Constitution where there was reserved on the first day of January, 1957, either by legislation or otherwise, any quota for Malays in -

Draft Constitution. Justice Hamid in his note of dissent wanted to ensure that the safeguards of the special position of the Malays and the legitimate interests of the other communities were in accordance with the recommendations of the Alliance and be reflected in the Draft Constitution. Justice Hamid pointed out the following deficiencies:

> "In my opinion special quotas of the Malays under article 157 should either be made the special responsibility of the *Yang di-Pertuan Besar* in respect of matters which are within the legislative competence of the Parliament, and of the Rulers of the States in respect of matters which are within the exclusive legislative competence of the State Legislature, as the Alliance unanimously recommended, or a provision on the lines of the proviso to article 82 should be inserted in article 157 as well, so that the special quotas of the Malays may also be alterable by Parliament only if Parliament takes a decision by a majority of the total number of members of each house and by a majority of not less than two-thirds of the members present and voting. The safeguards in this case should be in line with that provided in article 82. If at anytime the Malays or those who think that it

---

(a) any branch of the public services, or

(b) the issuing of permits or licences for the operation of any trade or business, or

(c) the award of scholarships, bursaries or other forms of financial aid for the purposes of education,

such quota may, subject to the provision of this Article, be continued after *Merdeka* Day.

(2) If in any year there are insufficient Malays duly qualified to fill such quota, the quota shall be reduced for that year.

(3) After the expiration of a period of fifteen years from *Merdeka* Day but not earlier the appropriate Government shall cause a report to be made to the appropriate legislature as to whether the quotas be continued, reduced or discontinued; and after considering such report the appropriate legislature may continue, reduce or discontinue any quota; and if a quota is not then discontinued similar reports shall be made to the appropriate legislature at intervals of not more than fifteen years.

(4) For the purposes of this Article, "the appropriate legislature" means the legislature to which the matter to which the quota relates is assigned by the Legislative Lists, and "the appropriate Government" shall be construed accordingly, and "quota" means a proportion of the total number of persons to be appointed or places to be filled in respect of the matters specified in clause (1).

would be unjust to abolish the quotas are in a minority in Parliament then the special quotas mentioned in article 157 will be subject to abolition by a bare majority of the members. These quotas can only be effectively safeguarded if one of the two devices suggested in this note is adopted.

My suggestions in this connection are as follows:

(1) If the special quotas mentioned in article 157 are to be the special responsibility of the *Yang di-Pertuan Besar* and the Rulers, then the following changes should be made:

(a) A provision to the following effect should be inserted in the Constitution as article 157A:

> "157A (1) The safeguarding of the special position of the Malays and the legitimate interests of other communities in relation to matters specified in article 157 shall, in respect of matters which are within the legislative authority of Parliament, be the special responsibility of the *Yang di-Pertuan Besar* and in respect of matters which are within the exclusive legislative authority of the Legislature of the State by the special responsibility of the Ruler or Governor of the State as the case may be.
>
> (2) In the discharge of the aforesaid special responsibility the Yang di-Pertuan Besar or, as the case may be, the Ruler or the Governor may take such action and make such provision as he may deem fit, and no such action or provision shall be invalid by reason of the fact that it is contrary to the provisions of any Federal or State law."

A provision like this will be in conformity with the position obtainable under the Federation Agreement, 1948. It will also be in accordance with the recommendations of the Alliance.

(b) Apart from inserting an article to the above effect, article 157 should be amended and in clause (3) of that article for the words "appropriate legislature", the words "*Yang di-Pertuan Besar* or as the case may be the Ruler or Governor" should be substituted and clause (4) should read as follows:

"(4) for the purposes of this article 'quota' means a proportion of the total number of persons to be appointed or places to be filled in respect of the matters specified in clause (1)."

(c) In article 35 another sub-clause (d) should be added after clause (c) as follows:

"(d) The safeguarding of the special position of the Malays and the legitimate interests of the other communities."

(d) Similar amendments will have to be made in the Essential Provisions in Schedule V and in the Constitutions of Malacca and Penang.

(2) If the special quotas are not to be the special responsibility of the *Yang di-Pertuan Besar* then these quotas should not be alterable to the disadvantage of the Malays unless the Parliament takes a decision by a majority of the total number of members of each House and by the votes of not less than two-thirds of the members present and voting in respect of Federal matters, and the State Legislatures take decisions by a similar majority in relation to State matters. That would bring the safeguard relating to special quotas under the same protection under which Malay reservation rests under article 82.[45] In that case a proviso of the type added to article 82 will have to be added to article 157 as well."

For the special position of the Malays the White Paper stated that:

"The Commission's recommendations on the subject of the special position of the Malays were included in two Articles, one dealing with the reservation of quotas in respect of entry of certain categories of appointments in the public services, permits, etc, and the other dealing with reservations of land for Malays. So far as the former is concerned the Article has been redrafted to provide that the *Yang di-Pertuan Agong* should have the responsibility of safeguarding the special position of the Malays and the legitimate interests of the other communities, and that in discharging this responsibility he should

[45]See Note 43.

act on the advice of the Cabinet. He will be required to exercise his functions under the Constitution and federal law in such a manner as may seem necessary to safeguard the special position of the Malays and to ensure the reservation for Malays of such quotas as he may deem reasonable; and he will be entitled to give general directions to the appropriate authorities for the purpose of ensuring the reservation of these quotas. In the exercise of these functions, the *Yang di-Pertuan Agong* will be required to safeguard also the legitimate interests of the other communities. It is proposed to include corresponding provisions, with the necessary modifications, in the Constitutions of the Malay States.

The Commission recommended that their proposals for continuing the present preferences should be reviewed after 15 years. This recommendation was given careful consideration but it was not considered necessary to include such a provision in the Constitution. It was considered preferable that, in the interests of the country as a whole, as well as of the Malays themselves, the *Yang di-Pertuan Agong* should cause a review of the revised proposals to be made from time to time."

The special position of the Malays as stated in the White Paper became article 153 of the *Merdeka* Constitution.[46]

---

[46]Article 153 of the Merdeka Constitution read:

153(1) It shall be the responsibility of the *Yang di-Pertuan Agong* to safeguard the special position of the Malays and the legitimate interests of other communities in accordance with the provisions of this Article.

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the *Yang di-Pertuan Agong* shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and to ensure the reservation for Malays of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

In his note of dissent Justice Hamid thus suggested two solutions which he felt were consistent with the recommendations of the Alliance.

---

(3) The *Yang di-Pertuan Agong* may, in order to ensure in accordance with clause (2) the reservations to Malays of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.

(4) In exercising his functions under this Constitution and federal law in accordance with clauses (1) to (3) the *Yang di-Pertuan Agong* shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

(5) This Article does not derogate from the provisions of Article 136.

(6) Where by existing federal law a permit or licence is required for the operation of any trade or business the *Yang di-Pertuan Agong* may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays as the *Yang di-Pertuan Agong* may deem reasonable; and the authority shall duly comply with the directions.

(7) Nothing in this Article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or license when the renewal or grant might reasonably be expected in the ordinary course of events.

(8) Notwithstanding anything in this Constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays; but no such law for the purpose of ensuring such a reservation -

(a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or

(b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with the other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or

The first solution was to entrust the responsibility of safeguarding the special quotas of the Malays to the King for federal legislative matters and to the State Rulers for State legislative matters. In both these instances Justice Hamid recommended that the King and the respective State Rulers act in their discretion, that is, not on advice of the Executive.[47] The alternative solution was to provide a similar protection given to Malay reservations to safeguard the special quotas of the Malays. This means that there should be a similar requirement in article 157 that the special quotas of the Malays be only alterable by Parliament if Parliament takes a decision by a majority of the total number of members of each House and by a majority of not less than two-thirds of the members present and voting. The Government White paper not only endorsed a substantial part of Justice Hamid's first alternative in his note of dissent but went even further.

The soundness of Justice Hamid's first alternative position can perhaps be best evaluated in light of the considered opinion of the Reid Commission on the same issue. The Reid Commission stated at paragraph 168:

> "The Alliance in their memorandum said "The Constitution should therefore provide that the *Yang di-Pertuan Besar* should have the special responsibility of safeguarding the special position of the Malays". The majority of us take the view that the Alliance intended

---

(c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been *bona fide* carrying on, or authorise a refusal subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.

(9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays.

(10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.

[47]This is the effect of adding clause (d) to Article 35 of the Draft Constitution.

> that the *Yang di-Pertuan Besar* should act in this matter as in others as a constitutional Ruler and should accept the advice of his Cabinet. Accordingly, we think that the intention of the Alliance was that the whole matter should be dealt with by the Government of the day and articles 82 and 157 of the draft Constitution give expression to the view of the majority."

The view of the majority of the Reid Commission is the better view as the terms of Reference to the Reid Commission specifically state that they were to make recommendations for a Federal form of constitution based on 'Parliamentary democracy' and for there to be a constitutional *Yang di-Pertuan Besar* (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers. The intent therefore all along was to have a constitutional monarchy and not an absolute monarchy. The powers over such sensitive political matters therefore should not rest with the constitutional monarch as a discretionary power of the monarch but rather should be decided by the Government of the day. Furthermore under Islamic law, there is no such thing as an absolute monarch. The monarch himself is subject to the Shariah and does not have discretionary powers in legislative matters. Even in residual legislative matters, the monarch's power is governed by the principle of *shura*, that is, consultation. The monarch is bound by the decision of the *shura*.[48]

The *Government White Paper* also replaced the 15 year review of Malay special privileges that were not land related, 'as to whether the quotas be continued, reduced or discontinued' with providing for the *Yang di-Pertuan Agong* to 'cause a review of the revised proposals to be made from time to time' without any express mention of continuance, reduction or discontinuance. There are therefore two subtle differences. They are firstly, that the timing of the review is left to the *Yang di-Pertuan Agong* who in this instance acts on advice[49] and not in his discretion. The 15 years time reminder has therefore been removed.

---

[48]Asad, Note 37, at pages 51-52.

[49]Article 40(1) of the *Merdeka* Constitution provides that the Yang di-Pertuan 'shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet...'.

Secondly, and more importantly, the reference to 'continuance, reduction or discontinuance' was omitted altogether. The reminder about the eventual dismantling of positive discrimination was also removed. The soundness of the position taken in the *Government White Paper* as compared with that of the *Merdeka* Constitution can perhaps be best evaluated by the compelling rationale given by the Reid Commission for their original recommendations. The *Reid Commission Report 1957* stated in paragraphs 163 to 167 as follows:

> "Our terms of reference require that provision should be made in the Constitution for the "safeguarding of the special position of the Malays and the legitimate interests of other Communities". In addition, we are asked to provide for a common nationality for the whole of the Federation and to ensure that the Constitution shall guarantee a democratic form of Government. In considering these requirements it seemed to us that a common nationality was the basis upon which a unified Malayan nation was to be created and that under a democratic form of Government it was inherent that all the citizens of Malaya, irrespective of race, creed or culture, should enjoy certain fundamental rights including equality before the law. We found it difficult, therefore, to reconcile the terms of reference if the protection of the special position of the Malays signified the granting of special privileges, permanently, to one community only and not to others. The difficulty of giving one community a permanent advantage over the others was realised by the Alliance Party, representatives of which, led by the Chief Minister, submitted - "in an independent Malaya all nationals should be accorded equal rights, privileges and opportunities and there must not be discrimination on grounds of race and creed ..." The same view was expressed by their Highnesses in their memorandum, in which they said that they "look forward to a time not too remote when it will become possible to eliminate Communalism as a force in the political and economic life of the country".
>
> When we came to determine what is "the special position of the Malays" we found that as a result of the original treaties with the Malay States, reaffirmed from time to time, the special position of the Malays has always been recognised. This recognition was continued by the provisions of clause 19 (1) (d) of the Federation Agreement, 1948, which made the High Commissioner responsible

> for safeguarding the special position of the Malays and the legitimate interests of other communities. We found that there are now four matters with regard to which the special position of the Malays is recognised and safeguarded.[50] ...
>
> ... We are of opinion that in present circumstances it is necessary to continue these preferences. The Malays would be at a serious and unfair disadvantage compared with other communities if they were suddenly withdrawn. But, with the integration of the various communities into a common nationality which we trust will come about, the need for these preferences will gradually disappear. Our recommendations are made on the footing that the Malays should be assured that the present position will continue for a substantial period, but that in due course the present preferences should be reduced and should ultimately cease so that there should then be no discrimination between races or communities. ...
>
> The effect of our recommendations (Art. 157) is that with regard to other preferences to Malays no new quota or other preference could be created. These preferences can only be lawfully created or continued to the extent to which that is specifically authorised by the Constitution. ... We recommend that after 15 years there should be a review of the whole matter and that the procedure should be that the appropriate Government should cause a report to be made and laid before the appropriate legislature; and that the legislature should then determine either to retain or to reduce any quota or to discontinue it entirely."

The observations of the Reid Commission are both compelling and sound for the governance of any modern democratic State. The logic, truth and reasonableness of the Reid Commission's reasoning are hard to fault. Furthermore even orthodox Shariah does not allow distinctions to be made on the basis of race. Orthodox Shariah however permits distinctions on the basis of either religion or gender. Even in these two

---

[50]The four matters are (i) Malay reservations of land, (ii) quotas for admission to the public services, (iii) quotas in respect of the issuing of permits or licences for the operation of certain businesses, and (iv) in many classes of scholarships, bursaries and other forms of aid for educational purposes preference are given to Malays.

areas, it is only in limited circumstances that distinctions can be made. Distinctions on the basis of religion are permitted in the law of evidence, criminal law, marriage, inheritance, involvement in the public affairs of the State, and depending on the opinion of the Muslim jurists concerned, non-Muslims could either be excluded from serving in government altogether or only excluded from high government positions. In reformed Shariah as contained in the original Meccan verses of the *Quran*, the position is that Islamic law forbids discrimination in law. Thus there can be no constitutional discrimination on the basis of gender, race or religion in reformed Islamic law.[51]

(b) Religion of the Federation

The final point raised by Justice Hamid which has a direct bearing on the evolution of the Rule of Law in Malaysia and which he regarded as a point of a political nature was the position of Islam as a State religion. In the Draft Constitution there was no provision for Islam to be the religion of the Federation and the only provision relating to religion was that of article 11 which provided for the freedom of religion.[52] The majority of the Reid Constitutional Commission did not insert a provision that Islam should be the State religion because

---

[51]See Mahmoud Mohamed Taha, *The Second Message of Islam*. Syracuse: Syracuse University Press, 1987.

[52]Article 11 of the Draft Constitution provided:

11(1)Subject to the requirements of public order, public health and morality, every person has the right to profess, practise and propagate his religion.

(2) No person shall be compelled to pay any special tax the proceeds of which are to be spent on the maintenance or the propagation of any religion other than his own.

(3) Subject to the requirements of public order, public health and morality, every religious group shall have the right-

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes; and

(c) to acquire, own, possess and administer property in accordance with the general law thereof.

Counsel for the Malay Rulers said to the Commission that 'it is Their Highnesses' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation'. The Counsel further stated that 'Their Highnesses are not in favour of such a declaration being inserted and that is a matter of specific instruction in which I myself have played very little part'.[53] It would appear that there was some tension here between the Malay Rulers and the Alliance for the Alliance recommendation was that 'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State'.[54] Justice Hamid noted that:

> "It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision

(4) Nothing in this Article shall invalidate any federal law prohibiting or restricting the propagation of religion among aborigines, but any such prohibition or restriction shall apply equally to all religions.

[53]The majority of the Reid Constitutional Commission however noted that there was nothing in the Draft Constitution to affect the continuance of the present position in the states with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which did not prejudice the civil rights of individual non-Muslims. See *Reid Constitutional Commission Report 1957*, paragraph 169.

[54]Ahmad Ibrahim wrote that the Malay Rulers initially rejected Islam as the religion of the Federation because they were informed by their constitutional advisers that such a provision would be in conflict with the position of each Ruler as head of the religion of Islam in his own state. However when it was explained by the Alliance Party that the intention of making Islam the official religion of the Federation was primarily for ceremonial purposes, and that it was not intended to interfere with the position of the Malay Rulers as head of Islam in their own states, they agreed to such a provision. See Ahmad Ibrahim, 'The Position of Islam in the Constitution of Malaysia' in Suffian, Tun Mohamed, Lee, H.P. and Trindade, F.A., *The Constitution of Malaysia-Its Development: 1957-1977*, Kuala Lumpur: Oxford University Press, 1978, pages 41-68, at page 49; Mohamed Suffian Hashim, 'The Relationship between Islam and the State of Malaya', *Intisari*, Volume 1, No. 1, Singapore: Malaysian Sociological Research Institute, 1962, at page 8.

that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after article 2 in Part I or at the beginning of Part XIII.

> "Islam shall be the religion of the State of Malaya, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practise and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim."

> ... In fact, in all the Constitutions of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitution and to embed it in the Federal."

This note of dissent stated by Justice Hamid was endorsed in the White Paper which went even further than his recommendation and amplified it. The White Paper provided that:

> "There has been included in the Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the Muslim religion."

The position in the White Paper became articles 3 and 11 of the *Merdeka* Constitution.[55]

---

[55]Articles 3 and 11 provided:

3(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

This adoption and amplification of Justice Hamid's dissent had far reaching consequences. Firstly, the State now has an official religion and it is Islam. Secondly, the right of propagation of religion between Islam and the other religions is only one way. Islam can be propagated to non-Muslims but the other religions can be controlled or restricted in its propagation to Muslims. Such a provision once again demonstrates the importance of Islam in the national psyche of the Malay race in the Malaysian State. Furthermore, constitutionally a Malay must be a Muslim as defined in article 160 of the *Merdeka* Constitution. As the Malays who are also Muslims are the largest ethnic group in the country,

---

(2) In every State other than Malacca and Penang the position of the Ruler as the Head of the Muslim religion in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the Muslim religion authorise the *Yang di-Pertuan Agong* to represent him.

(3) The Constitution of the States of Malacca and Penang shall each make provision for conferring on the *Yang di-Pertuan Agong* the position of Head of the Muslim religion in that State.

(4) Nothing in this Article derogates from any other provisions of this Constitution.

11(1) Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

(3) Every religious group has the right

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes; and

(c) to acquire and own property and hold and administer it in accordance with law.

(4) State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.

(5) This Article does not authorise any act contrary to any general law relating to public order, public health and morality.

it helps to entrench the pre eminence and dominant position of this group. The Malaysian constitutional system is therefore conducive for the growth and expansion of Islam. Furthermore, all things being equal, Islam can only gain in prominence rather than decline in such a constitutional climate.

D. Concluding Observations

From the above discussion, it can be seen that the evolution, meaning and scope of the Rule of Law was contested. As a result of the struggle, the Rule of Law as found in independent Malaya and then Malaysia has the following characteristics.

Firstly, the Rule of Law in Malaysia has its basic roots in the inherited English Law. The procedural justice theory of the Rule of Law thus forms the foundation of the Rule of Law. Although Part II of the *Merdeka* Constitution is the part providing for fundamental liberties, it was one in which there were many qualifications. Thus although there is some semblance of a basic rights theory of the Rule of Law incorporated in the Constitution, basic rights features are much overshadowed by firstly, the qualifications, and secondly, and more importantly by the change in the direction of constitutionalism as reflected in the *Government White Paper* which endorsed much of Justice Hamid's minority report. This contributed to make up the other characteristics of the Rule of Law in Malaysian constitutionalism besides the procedural justice theory notion of the Rule of Law.

Secondly, as a result of the removal of the marginal note 'The Rule of Law' from article 3 of the Draft Constitution, it diminished the importance of the Rule of Law and erased the concept from the public mind. In its place in the marginal note, the words 'Supreme law of Federation' were inserted. This helped to engender instead the culture of Rule by Law rather than Rule of Law. Strangely enough, after the 13 May 1969 racial riots, the importance of the concept of 'Rule of Law' made a comeback in the *Rukunegara*.[56] This however did not

[56] *Rukunegara* literally means 'state pillars or state principles'. The five declared principles of the *Rukunegara* are: Belief in God, Loyalty to King and Country, Upholding the Constitution, Rule of Law, and Good Behaviour and Morality.

remedy the missed opportunity given by the Reid Constitutional Commission for two main reasons. Firstly, the *Rukunegara* was not part of the Federal Constitution and thus had no legal force. Secondly, the content of the principle of Rule of Law as found in the *Rukunegara* was never really taken to heart by the organs of government or have matured in political practice. In other words, there was a gap between the declaration of the principle and its actual practice. Communalism continues to hold sway as the principal force shaping Malaysian constitutionalism. It is an unwritten truism of Malaysian polity that political power must always be in the hands of the Malays. Some have even boldly asserted the opinion that the more specific truism is that the ruling dominant party, the United Malays Nationalist Organisation, must always hold ultimate political power.

Thirdly, the concept of the principles of natural justice was deleted from article 4 of the *Merdeka* Constitution. This has removed one of the most basic and fundamental protections available in constitutional law. The absence of an express mention of principles of natural justice in the *Merdeka* Constitution has allowed the flowering of ouster clauses even within the Constitution itself. Although later cases attempted to resurrect the rules of natural justice nevertheless it is still subject to legislative exclusion. This enlarges the scope of discretionary powers, to the extent of wide discretionary powers which merely facilitate non accountability, encourages authoritarianism and thus erodes constitutionalism.

Fourthly, the word 'reasonable' was deleted from article 10 of the Draft Constitution dealing with the most important of fundamental liberties, that is, the liberties of speech, assembly and association. The freedom of speech is the indispensable pre-requisite to almost all other freedoms, the cornerstone of fundamental liberties. By the deletion of the word 'reasonable', judicial review is thus severely eroded. The *Government White Paper* in 1957 in Malaya undermined the vigour of judicial review.

Fifthly, the existence of special powers against subversion and emergency powers in a Constitution where there are necessary safeguards against abuse of such powers is by itself acceptable especially in a country that was in the midst of an armed communist insurrection. However the existence of such powers in a constitutional system where

where there is no existing culture of constitutionalism in the society is indeed an invitation to undermine constitutionalism. As has occurred, emergency government is a regular and permanent feature of constitutional government in Malaysia today[57] and that in itself is a reflection of the state of constitutionalism in Malaysia.

Sixthly, the provisions for the special privileges of the Malays in the *Merdeka* Constitution as it stands (Supreme Court) rather than the Reid Commission version merely confirms a number of important factors in the constitutionalism equation of Malaysia. Firstly, communalism is entrenched in the constitutional system. Secondly, the Malays have pre eminence in the constitutional system. Thirdly, it is human nature that it is not easy for anyone to give up one's special privileges.

Finally, the provision of Islam as the official religion of the State has laid the foundations for the eventual ascendancy of Islam and Islamic law in Malaysia. Islam is a 'double edged sword'. This last characteristic, frequently omitted or downplayed by Western legal scholarship on Malaysia, is arguably the most important characteristic of the evolution and development of the Rule of Law in Malaysia and of Malaysian constitutionalism. The twin pillars, as the dominating force and influence in the evolution and development of the Rule of Law and constitutionalism in Malaysia, are therefore Malayness and Islam. In the past, Malayness and Islam have almost always been complementary. Where there was a conflict between Malayness and Islam in the past, Malayness has almost always prevailed. In recent years however there has been demonstrated that Malayness and Islam can clash.[58] Since the phenomenon of Islamic revival in the 1970s,

---

[57]Das, Cyrus, *Governments & Crisis Powers: A Study of the Use of Emergency Powers under the Malaysian Constitution and Parts of the Commonwealth*, Kuala Lumpur: Malaysian Current Law Journal Sdn Bhd, 1996.

[58]This tension and conflict have been heightened by the following examples of clash between Malay and Islamic values. Malay *adat* (customs) have animistic and Hindu elements of which some are in conflict with the Shariah. Malays champion communal identity, that is, ethnic nationalism whereas Islam teaches universalism. Malays are used to special *Bumiputera* rights and privileges whereas Islam advocates protection and justice for all. Malays are used to a strong feudal element in the leader-led relationship whereas a leader in Islam is a '*khalif*', that is, a vicegerent of God and a leader within Islamic law and tradition. The Malay States are a federation of small States with their own respective Malay Rulers whereas the Islamic *Umma* is an

which phenomenon is now part of the Malaysian social and political landscape by the late 1980s and early 1990s, the thesis is that if there is a clash between Malayness and Islamic values, Islamic values will eventually prevail. The situation is more complex in that Islam has many faces. It is yet uncertain which version of Islam will eventually prevail. The principal clash in Islam versus Islam in the Malaysian context is between orthodox Islam on the one side and progressive and reformed Islam on the other side. The State is backing progressive Islam; however even within progressive Islam there are various degrees of progressiveness and various understandings of progressiveness.

In light of the above analysis, to enable the continued development in Malaysia of a Rule of Law consistent with constitutionalism, both the letter and the spirit of the Reid Commissions's recommendations

---

ideological community transcending political and geographical boundaries. Within the majority of Malay Muslims, the understanding of Islam is as Malay Muslims as opposed to non-Malay Muslims. This can be contrasted with the universal non-racist creed of Islam. There is still a strong sense of Malaysia as belonging to the Malays which is different from the Islamic perspective of Malaysia belonging to all citizens irrespective of racial or religious affiliations. The traditional Malay stand that 'politics and religion should be separate' (position taken by the first Prime Minister of Malaysia, Tunku Abdul Rahman) can be contrasted with that of Islam in which there is no separation between religion and state. To the Malay Muslim, a non-Malay who converts to Islam is regarded as having '*Masuk Melayu*' (Enter Malay) whereas in Islam it is '*Masuk* Islam' (Entering Islam) which is joining a universal *Umma*. The UMNO slogan '*Hidup Melayu*' (Long Live The Malays) can be contrasted with the Islamic '*Hidup Keadilan*' (Long Live Justice). The Malay perception of national culture is Malay culture whereas in Islam all cultures are allowed to flourish side by side with Islamic culture. To the Malays, the Malay Rulers are sovereign and thus have sovereign immunity whereas in Islam nobody is above the law, sovereigns included. Malays have some characteristics of communal tendencies, chauvinism, and extremism whereas Islam preaches moderation and fairness to all irrespective of race, religion or creed. See Mutalib, Hussin, *Islam and Ethnicity in Malay Politics*, Singapore, Oxford, New York: Oxford University Press, 1990, at page 159.

as contained in the *Reid Commission Report 1957* ought to be observed and upheld by the institutions of government.

Khoo Boo Teong*

* Associate Professor
Faculty of Law
University of Malaya

JUDICIAL ACTIVISM OR CONSTITUTIONAL OBLIGATION: STUDY OF THE INDIAN SUPREME COURT'S GUIDANCE FOR STANDARDS IN PUBLIC LIFE

Question: *Are you taking steps to correct [corruption]?*
Answer: *We are trying. I would not claim that we have succeeded. But one thing that is helping also is the independence of judiciary.*[1]

Introduction

Six days after the United Nations General Assembly Resolution on *Action against Corruption*,[2] but with no knowledge of the Resolution, the Supreme Court of India pronounced a landmark judgment against corrupt Indian politicians.[3] These included the former Prime Minister of India, Mr. P.V. Narasimha Rao, some of his erstwhile cabinet colleagues, leaders of opposition parties and high-level bureaucrats. The Supreme Court took the decisive action by monitoring this case for nearly four years (popularly known as the *Hawala*[4] or *Jain diaries*)[5] on holding 'continuing *mandamus*', directed the Central Bureau of

[1]Interview: Inder K. Gujral, Indian Prime Minister, "Democracy Is the Key" (1997) *Far Eastern Economic Review*, August 27, at page 42.

[2]United Nations General Assembly Resolution 51/59, "Action against Corruption", December 12, 1996 reported in (1997) 36 *International Legal Material* 1039. See UNDP: New York "Corruption and Good Governance", Discussion Paper 3 (1997).

[3]*Vineet Narain and others* v *Union of India and another* (1998) 1 Supreme Court Cases 226.

[4]Hawala, a channel of transferring money illegally to India on trust, has been in vogue for decades. For details, see Kapoor, S., *Bad Money, Bad Politics: The Untold Hawala Story* (1996) New Delhi: Har-Anand; Bhargava, G.S., *Hawala Scam: Politics of Corruption* (1996) New Delhi: Arnold; see also Prakash, R., *Constitution, Fundamental Rights and Judicial Activism in India* (1997) Jaipur: Mangal Deep, at pages 273-293.

[5]Discussed below in brief history of the case.