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Independent Federation of Malaya

ON the stroke of midnight, Friday, 30th August, 1957, a new nation was born — Persekutuan Tanah Melayu — the independent and sovereign Federation of Malaya.

The strong firm voice of the Prime Minister, Tunku Abdul Rahman Putra, concluded the Proclamation of Independence with the following words: "And with God's blessing shall be for ever a sovereign democratic and independent State founded upon the principles of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations."

In framing a written Constitution different minds are inspired by different ideologies. In a democracy the choice inevitably lies between an unlimited parliamentary sovereignty and supremacy of the Constitution. Enshrined in the preamble of every modern Constitution is the concept of popular sovereignty albeit with varied limitations. In theory the legislature reflects the will of the people though a surer guide is a referendum, as impracticable as it is unwieldy and undesirable.

Legislation is a painfully slow process. Public indignation is not easily roused nor grievance speedily remedied. Public apathy still clings with concupiscent affection to old beliefs and the traditional way of living, distrustful of any innovation even for the better; only the ideologists, intellectuals and the under-privileged, disgruntled and dissatisfied, pine for a change so that "the dignity and freedom of the individual may be assured." The Legislature is inclined to follow a policy of *laissez faire*, the path of least resistance until overwhelming pressure of public opinion or world events remedy social evils. Today even more insistent is the increasing demand for social justice and social equality and the Legislature has a special responsibility.

The bond between the elected representative and the electorate is indeed tenuous. The Lord Chancellor recently declared "no rights are of any value unless you know how to enforce them." Apprehension is felt in some quarters that the Legislature may not rise to the occasion and provide adequate remedies for the enforcement of fundamental rights written into the Constitution nor ready access to the Courts: freedom of speech and freedom of association have not been made subject to reasonable restriction: judicial review can only establish whether, if at all and, if so, to what extent, the Supreme Court is empowered to declare void an impugned legislation repugnant to the Constitution. This has led to a regrettable clash of personalities, a situation which could have been easily avoided by a realisation that impersonal and constructive criticism is not only the hall-mark of democracy but a stimulus for creative thought. Neither of the two opposing views, equally honest and sincere, is a distorted reflection on the mirror.

This matter of contemporary controversy is of great moment. Nevertheless, it is not that under the new Constitution the protection of fundamental rights of the citizen with regard to personal liberty, freedom of speech and freedom from arbitrary detention have ceased to be important. Only that world events, powerful neighbouring elements imbued with violently conflicting ideology and continual threat to internal security have been the main-spring of an unusually cautious approach.

Having regard to the declared objective of the Constitution as framed, the Legislature faces no mean task. It must ensure equal protection of the laws: at the same time it must not encroach on the fundamental rights of the citizen save only to the minimum extent necessary for the preservation of peace and order to promote good Government: it must avoid at all costs any imputation of fraud on or arbitrary exercise of legislative power. On their part the Legislature can equally demand, for the time being, as a necessary condition implicit faith by the citizen in its wisdom and anxiety and ability to uphold the spirit of the Constitution. The Legislature will in addition require assistance from a body of highly skilled legislative draftsmen to implement its policy. To a relatively untrained mind, language is but a poor vehicle to convey thoughts and ideas with sufficient precision and clarity to stand the test of judicial scrutiny.

Under either system, the Rule of Law prevails; whether it is the supremacy of the Legislature or of the Constitution. The danger in the former, unlike in the latter, lies, amongst others, in delegated legislation, administrative law and creation of administrative tribunals with more or less despotic powers, against which 30 years ago Lord Hewart entered a *caveat* and Robson and C. K. Allen raised their formidable voice. True it is, that notwithstanding any barriers created by rules against access to the Courts, where the rules of natural justice have been violated or the tribunal exceeds its jurisdiction, there has been successful intervention by the Courts to prevent injustice. In a complex world faced with ever increasing problems of social welfare and industrial activities, the creation and maintenance of administrative tribunals became a painful necessity, though in the process much injustice was done. The Crichel Down affair and *Odlum v. Stratton* attracted great publicity. Various proposals have been current, the most prominent being the establishment of an Administrative Court of Appeal.

The public in England sought "Protection against the Leviathan". The report of the committee under the Chairmanship of Sir Oliver Franks has been published and they suggest that *openness*, fairness and impartiality are the three ideals at which all administrative tribunals must aim. Adequate protection against this highly undesirable state of affairs can only be achieved where either the Constitution is the supreme law or the Legislature vigilant and safeguards with anxious care the legitimate interests of all and sundry by providing access to the Courts of Justice.

Had the White Paper justified the deletion of the clause in the Reid draft relating to the enforcement of the Rule of Law only on the ground of expediency, the reason for such change would be obvious and understandable. But the omission was explained on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies and it considered that sufficient remedies can best be provided by the ordinary law. This merely echoes a rather antiquated sentiment expressed by Lord Simon over 30 years ago and the simple clause, as the United States, Pakistan and Indian Constitutions enact, provides all the legal procedure to protect fundamental rights and empowers the Superior Court to devise new forms of process to meet cases in which these remedies are inappropriate.

The other reason is stated to be "it seemed, moreover, improper that his (the Judge's) single opinion or that of a few of his colleagues should be sufficient to over-rule the opinion of political questions of one hundred or more representatives of the people." It would seem paradoxical therefore, that, in the absence of statutory legislation, the Courts have already been invested with power to formulate principles in accordance with justice, equity and good conscience. Numerical strength by itself is a nebulous qualification. To do justice requires no political predilection: indeed it is a disqualification. Judges do not make political decisions: their duty is to ascertain what is just, fair and reasonable, in the circumstances.

The supremacy of the Constitution over the Legislature was established by the United States Supreme Court in February 1803 over a trivial litigation as it were by a side-wind. *Marbury v. Maddison** arose from a clash between the Federalists and Anti-Federalists over the appointment of "midnight justices of the peace". William Marbury (whose commission was not delivered in time) claimed that commission by a writ of mandamus before the Supreme Court. While discharging the rule for lack of jurisdiction, it held that any legislation repugnant to the Constitution is void, which though *obiter*, is the rock upon which the nation has been built. The opinion of Chief Justice John Marshall concluded as follows:—

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, *supposed to be essential to all written Constitutions*, that a law repugnant to the Constitution is void; and that Courts, as well as other departments, are bound by that instrument".

A great concept was born as it were through sheer accident. The cornerstone of liberty was laid upon which successive generations have built an impressive edifice to uphold the dignity of man. The genius of the common law, on the other hand, by gradual process found expression in an unwritten Constitution no less deserving of respect and admiration. It has been nonetheless a very slow process by any standard extending over centuries of conflict.

But it is idle to discuss the relative merits of the two forms of Constitution. The success of the present Constitution of the Federation of Malaya will depend as much on the energy, ability, skill, foresight and dedicated service of her legislators as on the honesty, integrity and efficiency of the executive.

Independence is now an accomplished fact: the Federation of Malaya has taken her rightful place in the comity of nations: the set-up of the hierarchical structure is slightly altered: necessary change in the personnel of her public officers has become inevitable: the law is the same and will continue to be administered as before in the spirit of the splendid inherited tradition of the common law. *Plus ca change plus c'est la meme chose!*

In wishing the Federation of Malaya God-speed and continued prosperity, we reiterate our abiding faith in her willingness and ability to ensure justice between subjects *inter se* and between the subject and the State. Merdeka was celebrated with great pomp and pageantry marked by colourful ceremonies and blessed with the good wishes of many nations. No untoward incident marred the spirit of universal good-will and brotherliness that prevailed amongst the multi-racial communities resident in Malaya. And yet the solemn thought of great responsibility and hard task that lie ahead to build up a nation was ever present. It is a happy augury for a bright, peaceful and prosperous future.

*(1803) 5 U.S. 137; 2 Law Ed. 60.