

THE CONSTITUTION OF MALAYSIA*

The Malaysia Act

I. INTRODUCTION

The Malaysia Act, which became law on September 16, 1963, can be spoken of as amending the Constitution of the Federation of Malaya; but it would seem to be more accurate to regard it as creating essentially a new constitution for a new nation, Malaysia. This would appear so not only because the 96 provisions of the Act number slightly more than half the total of the articles of the Federation of Malaya Constitution, but because, in a very real sense, the fundamental structure of government is new.

The Constitution of the Federation of Malaya had, with certain not very important exceptions,¹ provided for a nation of equal States. There was room for the conceptualist's argument that the entity created was unitary rather than federal because of the preponderance of power in the central government; but within their area of legislative competence, States were equal and so were the citizens of all of the States. A kind of State citizenship did exist;² but this was, in practice, determined by residence; and the British system of mobility of voters and candidates for office was recognized.

The conceptual argument under the Constitution for Malaysia is whether a federation or confederation is created. The legislative competence of units is variable in important respects. Representation in the national Parliament is not proportionate, and the mobility of the population is subject to great restrictions. Moreover, the differences between the units is heightened by the fact that for many of the most significant purposes the units are really not fourteen States but are, rather, four units, Malaya, Singapore, Sabah and Sarawak, of which the first consists of eleven parts. Much of the language of the Constitution acknowledges this reality. The new Constitution does not in any very significant sense bring the new units into association with

* As to the earlier Constitution of the Federation of Malaya see Groves, "The Constitution of the Federation of Malaya", *The Indian Year Book of International Affairs*, 1962, at p. 103; see, also, Groves, "Fundamental Liberties in the Constitution of the Federation of Malaya—A Comparative Study" (1959) 5 *Howard Law Journal*, 190; and see Groves, "Constitution (Amendment) Act, 1962" (1962) 4 *Malaya Law Review* 324,

1. For example, the State of Perlis was permitted some variation in the "essential provisions" of its constitution. See Art. 71(5)(b).
2. See, for example, Article LXIII of the Constitution of Selangor.

the former States, as such; what it does is bring the new units into association with the former Federation of Malaya, *per se*.

II. LEGISLATIVE COMPETENCE

A. GENERAL

Article 1 has been amended to add Sabah, Sarawak and Singapore to the list of eleven States of Malaya, all now under the name of Malaysia. No inequalities are described in this Article.

As will be seen below, while the Borneo States have control over more subjects of legislation than the original eleven States, the subject matter is somewhat below the first order of importance, with the possible exception of Sabah's control over its railway. By contrast, Singapore's control of education, medicine and health, labour and social security, factories, and elections to the State Assembly, relates to matters of great significance.

The Constitution permits encroachment by the Federal Parliament into matters on the State list of the original eleven States in the interests of implementing treaties, agreements or conventions with foreign countries and decisions of international organizations.³ This provision applies to the new States, as well. But the further provision permitting Parliament, for the purpose of uniformity of law and policy, to make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, rating and valuation of land and local government, applies only to the original eleven States.⁴

The Constitution also limits the legislative power of the original eleven States through the creation of certain national bodies, on which the States are represented, but with the Federal Government possessing voting control. One such body is the National Land Council, the duty of which is to formulate a national policy for the promotion and control of the utilisation of land throughout the Federation for mining, agriculture, forestry or any other purpose, and for the administration of any laws relating thereto. Both Federal and State Governments are obliged to follow the policy so formulated.⁵ Another body similar in construction and purpose is the National Council for Local Government. Its duty is to formulate a national policy for the promotion, development and control of local government throughout the Federation and for the administration of any laws relating thereto. Both Federal and State Governments are obliged to follow the policy so formulated.⁶ Moreover the Federal executive has power to put into operation a development plan, *i.e.*, a plan for the development, improvement, or

3. Article 76(1) (a).

4. Article 95 D.

5. Article 91.

6. Article 95 A.

conservation of the natural resources of a development area by a proclamation of the Yang di-Pertuan Agong proclaiming the area or areas as a development area; and thereupon Parliament has power to give effect to the development plan or any part thereof, notwithstanding that any of the matters to which the plan relates are matters with respect to which only States would have power to make laws.⁷ Finally, the executive authority of the Federation extends to the conduct of research, the provision and maintenance of experimental and demonstration stations, the giving of advice and technical assistance to the Government of any State, and the provision of education, publicity, and demonstration for the inhabitants of any State, in respect of any of the matters with respect to which the Legislature of a State may make laws; and the agricultural and forestry officers of any State shall accept any professional advice given to the Government of that State under this power.⁸

With the exception that Singapore, a non-agricultural and non-forested State, is bound to accept agricultural and forestry advice, none of the new States, without the concurrence of their Governors, in the case of national land policies and development areas, or their legislatures in the case of local government, are subject to federal control.⁹ And as to agricultural and forestry advice to Borneo States, they may consider, but need not accept it.¹⁰

Formerly only a Government, State or Federal, could bring an action to challenge a legislative act on the grounds of an absence of power in the legislature concerned to enact the law. This limitation as to party plaintiff has been removed; and the Constitution now only requires leave of a judge of the Federal Court, with the right in the Federal Government to be a party, as well as such right in any State that might have been a party had the action been only inter-governmental,¹¹ to bring such an action.

B. FEDERAL LIST

No significant changes have been made in the legislative lists as between the former Federation and the original eleven States. The Federal List includes, *inter alia*, external affairs, defence, internal security, newspapers, publications, publishers, printing and printing presses, censorship, civil and criminal law and the administration of justice, federal citizenship and naturalisation, aliens, finance, trade, commerce and industry (including corporations), shipping, navigation and fisheries, communication and transport, education (including libraries, museums, ancient historical monuments and records and archeological sites and remains), medicine and health, labour and social security, unincorporated societies, professional occupations.

7. Article 92.

8. Article 94.

9. Article 95 E.

10. Article 95 E(4).

11. Article 4(4).

C. STATE LIST

The State List for the original eleven States includes, *inter alia*, Muslim law, land, agriculture and forestry, local government, State works and water (the latter subject to the Federal list), machinery of State government, State holidays, turtles and riverine fishing.

The general State List is applicable to the Borneo States; but in addition the following are added: native law, incorporation of authorities and other bodies set up by State law, if incorporated directly by State law, ports and harbours (other than those declared to be federal by or under federal law), cadastral land surveys, libraries, museums, ancient and historical monuments and records and archeological sites and remains; and in Sabah, the Sabah Railway.

The general State List is applicable to Singapore; but in addition the following are added: education, medicine and health, labour and social security, pensions, gratuities and like allowances, factories, electricity, gas and gas works, itinerant hawkers.

D. CONCURRENT LIST ¹²

The Concurrent List for all States includes, *inter alia*, social welfare (subject to the other lists), scholarships, protection of wild animals and birds, animal husbandry, town and country planning, public health, vagrancy and itinerant hawkers.

Added to the Concurrent List for the Borneo States are, *inter alia*, personal law, shipping under fifteen tons, water power, agricultural and forestry research, charities and charitable trusts, theatres, cinemas and places of public amusement, elections to the State Assembly held during the period of indirect elections; and in Sabah, until the end of 1970, medicine and health.

Added to the Concurrent List for Singapore are, *inter alia*, personal law, borrowing by the State and its authorities, production, supply and distribution of goods (but not bounties on production), imports and exports, insurance and banking, industries, shipping and navigation, professional occupations, unincorporated societies, charities and charitable trusts, newspapers, publications, publishers, printing and printing presses, censorship, theatres, cinemas, places of public amusement; and until the end of August, 1968, and thereafter until Parliament with the concurrence of the State Government otherwise provides, elections to the Legislative Assembly.

E. FISCAL MATTERS

1. SINGAPORE

The revenue provisions as to Singapore are far less specific than

12. Should the Federal Government and a State legislate on the same matter on the concurrent list, the State legislation, by virtue of Article 75, is void to the extent of its inconsistency with the Federal Act.

those applying to the Borneo States. Much more than as to the latter the applicable provisions as to Singapore in the Malaysia Act provide for a situation for two sovereignties to deal in the future and at arms length. To be settled from time to time and by agreement between the Federal Government and the Government of Singapore are such matters as the division between the Federation and the State of Singapore of revenue derived by the Federation from Singapore and the manner in which this revenue is to be collected and accounted for are also subjects for agreements from time to time, as is the determination of what revenue is to be treated as derived from Singapore. To be further negotiated are the inclusion of Singapore in a common market with the rest of the Federation, the establishment of a Tariff Advisory Board and the laying down of conditions for the levying of import and export duties in relation to goods imported into or exported from Singapore. All Federal grants and assignments of revenue made to the States under the Constitution may, as to Singapore, be excluded or modified by agreement. Payments, by loan or otherwise, by the Federation to Singapore or Singapore to the Federation are subject to agreement.¹³

The Malaysia Act contemplates the appointment of an "independent assessor" to settle those financial matters which are the subject of agreement but on which the parties cannot agree. No method for the appointment of the assessor is, however, provided for. The Act possesses an interesting termination provision. It has an expected provision that the financial Article in question may cease to be effective by agreement; but it also provides that no further agreements can be made if at any time there is no agreement in force under the Article. This contingency is not likely to occur by chance, however, in view of the possibility of making a number of separate agreements for the different subjects of the Article. A period during which an agreement is under review is not, for the purpose of the termination provision, to be regarded as a period when no agreement is in force.¹⁴

In view of the considerable degree of financial independence contemplated for Singapore, it is, perhaps, surprising to find that Singapore may borrow money only with the approval of the Central Bank of the Federation.¹⁵

The Auditor-General of the Federation has the power to audit and report on the accounts of all the new States,¹⁶ as he has with the old.¹⁷

2. BORNEO STATES

a. GENERAL

Some of the new fiscal provisions have application in both Borneo

13. Article 112 E.

14. *Ibid.*

15. Article 112 B.

16. Article 112 A.

17. Article 106.

States; others are devised for Sabah and Sarawak separately.

Both Borneo States may make laws for imposing sales taxes, and any sales tax so imposed shall be deemed to be among the matters enumerated in the State List and not in the Federal List; but there shall not in the charging or administration of a State sales tax be any discrimination between goods of the same description according to the place in which they originate; and the charge for any federal sales tax shall be met out of sums collected from a person liable for that tax before the charge for a State sales tax.¹⁸

As to both Sabah and Sarawak, Parliament may prohibit or restrict, as for the other States, the levying of royalties or similar charges on minerals, except that these two States may levy royalties on minerals up to ten per cent *ad valorem* (calculated as for export duty).¹⁹ Both Borneo States are assigned import and excise duty on petroleum products and export duty on timber and other forest products.²⁰ Both are assigned the revenue from fees and dues from ports and harbours, other than federal ports and harbours.²¹ Certain other lesser and limited sources of revenue are assigned to the Borneo States.²² Clauses (3A) and (4) of Article 110 do not apply to the Borneo States, the special provisions as to grants being in lieu thereof.²³

b. SABAH

For Sabah a rather complex formula for Federal grants²⁴ to the State was devised.²⁵ 1963 has been taken as the base year; and the hypothetical net amount of revenue which the Federation would have derived from Sabah for that year had the Malaysia Act been in effect for the whole of the year must be calculated. For this calculation any alteration of any tax or fee made after Malaysia Day²⁶ is ignored. Two-fifths of this hypothetical sum is the amount of the yearly grant to Sabah. Perhaps the most striking feature of this formula is that it provides a constant figure for each year of the grant, whereas the grant to Sarawak increases progressively by from \$3½ to \$5 million for each of the first five years. These grants for Sabah are subject to the same provisions of review as the grants to Sarawak and are similarly charged on the Consolidated Fund.

18. Article 95 B.

19. Article 112 C and Tenth Schedule, Part V.

20. Tenth Schedule, Part V(1) and (2).

21. Tenth Schedule, Part V(8).

22. Tenth Schedule, Part V.

23. Article 112 C(3).

24. The amounts for grants to States are charged on the Consolidated Fund. See Art. 112 C(2).

25. Tenth Schedule, Part IV.

26. September 16, 1963.

In the case of Sabah, should the State road grant from the Federation, under the formula applicable to all States, fall below \$5,179,500 in any year before 1968, a federal supplement will be made to its grant to bring it up to that figure.

Sabah, which has concurrent legislative competence over the subjects of medicine and health until 1970, and if it bears the expenses in reference to those matters, is entitled to 30 per cent of all customs revenue, in addition to those sources of customs revenue common to all the States.²⁷

c. SARAWAK

The formula for the Federal grant to Sarawak, although divided into two aspects, is much simpler than that for Sabah. Sarawak is to receive (a) a grant of \$5,800,000 in each year; and (b) a grant of which the amount in 1964 and each of the four following years shall be respectively \$3½m., \$7m., \$11½m., \$16m., and \$21m., and in later years shall be fixed on a review by the Federal and State Government.²⁸ On the first review, *i.e.*, after five years, the matter of the grant itself may not be brought into question, only the amounts for the succeeding five years. Review as to the abolition of the grants cannot, therefore, take place until 1974. The Constitution specifies that the Federation and Sarawak must agree on the decision as to alteration or abolition of grants; and in the event of failure to agree, the matter is to be referred to an independent assessor, whose recommendations will be binding.²⁹ No machinery is provided for the appointment of the assessor, an omission which is perhaps wise in view of the long period of time before any possibility of his need can arise. It would appear that the assessor would need to be one of the highest competence in the economics of governmental finance. Being independent of either the federal or state government concerned, perhaps he could come from another State or from an institution, like a university; but it would appear more likely that he would need to come from some other country or international body, such as the United Nations.

III. CONSTITUTIONAL AMENDMENTS AS AFFECTING THE RIGHTS OF STATES

A. GENERAL

The question is not beyond dispute,³⁰ but the provisions of the original Constitution seem to lend themselves readily to the interpretation that the power had been placed in Parliament, especially in its right of admission of new States, to alter the nature of the relationship

27. Tenth Schedule, Part V(4).

28. Article 112 D.

29. *Ibid.*

30. For example, the State of Kelantan instituted legal action challenging the constitutionality of the Malaysia Act on the ground that adequate State concurrence had not been secured. The Court found against the State and the Federation Government proceeded with the proclamation of Malaysia. See *Straits Times*, September 11, 1963, p.1, Col. 3.

of the original States *vis a vis* the Federation without the necessity of their concurrence.³¹ Moreover, constitutional amendments could be effected without reference to the States,³² although certain amendments affecting the rights of the Rulers or of Malays required the consent of the Conference of Rulers.³³ The new States have, however, secured control over some amendments to the Constitution affecting certain of their rights.

B. BORNEO STATES

No amendment³⁴ shall be made to the Constitution without the concurrence of the Governor of the Borneo State or each of the Borneo States concerned, if the amendment is such as to affect the operation of the Constitution as regards any of the following matters: (a) the right of persons born before Malaysia Day to citizenship by reason of a connection with the State, and (except to the extent that different provision is made by the Constitution as in force on Malaysia Day) the equal treatment, as regards their own citizenship and that of others, of persons born or resident in the State and of persons born or resident in the States of Malaya; (b) the constitution and jurisdiction of the High Court in Borneo and the appointment, removal and suspension of judges of that court; (c) the matters with respect to which the Legislature of the State may (or Parliament may not) make laws, and the executive authority of the State in those matters, and (so far as related thereto) the financial arrangements between the Federation and the State; (d) religion in the State, the use in the State or in Parliament of any language and the special treatment of natives of the State; (e) the allocation to the State, in any Parliament summoned to meet before the end of August 1970, of a quota of members of the House of Representatives not less, in proportion to the total allocated to the other States which are members of the Federation on Malaysia Day, than the quota allocated to the State on that day.³⁵

Moreover, in relation to any rights and powers conferred by federal law on the government of a Borneo State as regards entry into the State and residence in the State and matters connected therewith (whether or not the law is passed before Malaysia Day), such a law, except in so far as it provides to the contrary, is treated as if it had been embodied in the Constitution for the purpose of requiring the concurrence of the Governor of an affected Borneo State for any subsequent change in that law.³⁶

31. Article 2(a).

32. Article 159(1).

33. Article 159(5).

34. "Amendment" includes addition and repeal. See Article 161 E(5).

35. Article 161 E(2). The portion of this provision as to representation in Parliament is especially significant in view of the fact that the Borneo States were granted disproportionately large representation in relation to their populations.

36. Article 161 E(4).

C. SINGAPORE

No amendment³⁴ shall be made to the Constitution without the concurrence of the Governor if the amendment is such as to affect the operation of the Constitution in relation to Singapore as regards any of the following matters: (a) citizenship of Singapore, and the restriction to citizens of Singapore of the right to be a member of either House of Parliament for or from Singapore, or to be a member of the Legislative Assembly of Singapore, or to vote at elections in Singapore; (b) the constitution and jurisdiction of the High Court in Singapore and the appointment, removal and suspension of judges of that court; (c) the matters with respect to which the Legislature of the State may (or Parliament may not) make laws, the executive authority of the State in those matters, the borrowing powers of the State and the financial arrangements between the Federation and the State; (d) the discharge of functions of the Public Services Commission or of the Judicial and Legal Service Commission by a branch established for the State, and the constitution of any such branch; (e) religion in the State, the use in the State or in Parliament of any language and the special position of the Malays in Singapore; (f) the allocation to the State, in any Parliament summoned to meet before the end of August, 1970, of a quota of members of the House of Representatives not less, in proportion to the total allocated to the other States which are members of the Federation on Malaysia Day, than the quota allocated to the State on that day.³⁷

The original Constitution required extensive uniformity in large parts of the State constitutions and empowered the Federal Parliament to make laws giving effect to the required provisions as to those States which neglected to enact them or enacted inconsistent provisions.³⁸ The essential portions of this Article apply to the Borneo States,³⁹ but not to Singapore. However, should Singapore, after Malaysia Day, enact constitutional amendments materially inconsistent with the provisions required of other States, such amendments will not have effect, except as approved by Act of Parliament.⁴⁰

IV. PARLIAMENT

A. GENERAL

Parliament in the Federation of Malaya is modeled on that of England, although it might be more accurate and immediate to compare it, especially as to its upper House, with the Parliament of India. It consists of the Yang di-Pertuan Agong and two Houses, the Senate and the House of Representatives.

37. Article 161 G.

38. Article 71(4).

39. Article 71(7).

40. Article 71(8).

B. THE HOUSE OF REPRESENTATIVES

As in England, the significant legislative power lies in the "lower" House, the House of Representatives, with effective direction and control exercised by a Cabinet, led by a Prime Minister. The House of Representatives of the new Federation consists of one hundred and fifty-nine members, who are currently selected in differing ways. In the former Malaya, the principle of universal adult suffrage is recognized, except that the vote of "rural" voters may carry twice the weight of "urban" voters.⁴¹ In Singapore universal adult suffrage is observed. In the Borneo States indirect elections by members of the State Legislative Assemblies is permitted for a short transitional period.⁴²

Of the total number of Representatives one hundred and four come from the States of Malaya, sixteen from Sabah, twenty-four from Sarawak and fifteen from Singapore. These figures are not proportionate to the relative populations of these areas,⁴³ but resulted from hard political bargaining preceding the formation of the Federation and take into account, *inter alia*, the large land area of the Borneo States and the greater legislative and governmental powers of the State of Singapore.

Previously, the Constitution did not place any particular limitations on the mobility of voters or candidates for office within the Federation.⁴⁴ A voter was required to be a "resident" of a constituency; but the period of residence was not stated and was liberally construed.⁴⁵ Nor did the constitutionally sanctioned limits on freedom of movement⁴⁶ have any effect on national elections. Under the Constitution of Malaysia, however, a Singapore citizen is not qualified to be an elected member of either House of Parliament except as a member for or from Singapore; and a citizen who is not a Singapore citizen is not qualified to be a member of either House for or from Singapore.⁴⁷ And a citizen is not entitled to vote in a constituency in any election if (a) the constituency is not in the State of Singapore and he is on the qualifying date a Singapore citizen; or (b) if the constituency is in the State of Singapore and he is not on that date a Singapore citizen.⁴⁸

C. THE SENATE

The 'upper' House, the Senate, consists of fifty members. Of this

41. Thirteenth Schedule, Part I, 2, C.

42. Malaysia Act, Part IV, Transitional and Temporary, Paragraph 94.

43. The most recent figures show the population of Malaya at 7.1 million (1961); Singapore — 1,634,100 (1960); Sabah — 454,421 (1960); Sarawak — 744,529 (1960). See Federation of Malaya Official Year Book, 1962; Singapore Annual Report, 1960; North Borneo Annual Report, 1962; Sarawak Annual Report, 1962.

44. See Article 47.

45. Article 119.

46. Article 9.

47. Article 30 A(1).

48. Article 30 A(3).

number, twenty-eight are chosen by indirect election from the States, *i.e.*, the Legislature of each State elects two persons. The remaining twenty-two are appointed by the Yang di-Pertuan Agong, the Constitution directing that the appointed members should be persons who have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interests of aborigines.⁴⁹ The basic qualifications for all Senators are citizenship and having attained the age of thirty years.⁵⁰ The Constitution permits Parliament to increase to three the number of members to be elected for each State, to provide that the members to be elected for each State shall be so elected by the direct vote of the electors of that State; and Parliament may decrease the number of appointed members or abolish appointed members.⁵¹ To date the Parliament has not chosen to effectuate any of those possible changes in the Senate.

Any bill, except a money bill, may originate in the Senate, as well as in the House of Representatives.⁵² The Senate has power to amend all bills; but the House is not obliged to accept the amendments, in which case the Senate has only the power of delaying money bills by one month⁵³ and non-money bills by a year and a month, forcing the reconsideration of the latter in the next session.⁵⁴ During the life of the Federation of Malaya the Senate was not noted for taking legislative initiative nor for departing from the legislative program of the party in control of the House of Representatives.

V. CITIZENSHIP

The citizenship provisions under the new Constitution are complex. Fundamentally, the concept of separate citizenship for the units making up the Federation is kept; and in addition a Federation citizenship is provided for. But generalizations as to the means of acquisition or as to the rights and obligations of either State or Federation citizenship cannot be made; for these vary among the units. Three basic methods are recognized for acquiring Federation citizenship: (a) by operation of law, (b) by registration, and (c) by naturalisation. A fourth term, by transfer, is applicable to Singapore citizens.⁵⁵

49. Article 45.

50. Article 47.

51. Article 45(4).

52. Article 66(2).

53. Article 68(1).

54. Article 68(2).

55. As to Singapore the drafters have preferred to use the terms "enrol" and "transfer" to those of "register" and "registration"; but there seems to be little merit in adding these semantic distinctions since the procedure and purpose are similar and, indeed, in most instances the same "registration" provisions apply, with only negligible modifications. For example, in actions for deprivation of citizenship, the drafters found it necessary to equate "enrolment" with "registration" for some actions and with "naturalisation" for others, an exercise which could have been eliminated by avoiding the term "enrolment" in the first instance.

A. Acquisition of Federation citizenship as applied to persons of the former Federation of Malaya, who are not Singapore citizens:

1. By Operation of Law⁵⁶

a. If born before September 16, 1963,⁵⁷ a person is a citizen who:

- (1) Immediately before August 31, 1957, was a citizen of the Federation of Malaya by virtue of the Federation of Malaya Agreement, 1948.
- (2) Was born within the Federation of Malaya on or after August 31, 1957, and before October, 1962.⁵⁸
- (3) Was born within the Federation of Malaya after September, 1962, of whose parents one at least was at the time of the birth either a citizen or permanently resident⁵⁹ in the Federation.⁵⁸
- (4) Was born within the Federation of Malaya after September, 1962, who was not born a citizen of any other country.⁵⁸
- (5) Was born outside the Federation of Malaya on or after August 31, 1957, whose father was a citizen at the time of his birth and was either born in the Federation of Malaya or was at the time of the birth in service under the Government of the Federation of Malaya or of a State of the Federation of Malaya.
- (6) Was born outside the Federation of Malaya on or after August 31, 1957, whose father was a citizen at the time of the birth if the birth was, or is, within one year of its occurrence or within such longer period as in any particular case was or is allowed by the

56. Article 14.

57. Provided that:

- (a) A person born on board a registered ship or aircraft shall be deemed to have been born in the place in which the ship or aircraft was registered, and a person born on board an unregistered ship or aircraft of the Government of any country shall be deemed to have been born in that country. See Second Schedule, Part III, 19 A.
- (b) Any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.

58. A person is not a citizen by virtue of this paragraph if, at the time of his birth, his father, not being a citizen, possessed such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong. See Second Schedule, Part I(2).

Federal Government, registered at a consulate of the Federation or, if the birth occurred in Singapore, Sarawak, Brunei or North Borneo, registered with the Federal Government.

- b. If born on or after September 16, 1963,⁵⁷ a person is a citizen who:
- (1) Is born within the Federation of Malaysia, outside Singapore, of whose parents one at least is at the time of the birth either a citizen, but not a Singapore citizen, or permanently resident⁵⁹ in the Federation of Malaysia.⁶⁰
 - (2) Is born outside the Federation whose father is at the time of the birth a citizen, but not a Singapore citizen, and was either born in the Federation⁶¹ of Malaysia or is at the time of the birth in the service of the Federation of Malaysia or of a State.
 - (3) Is born outside the Federation of Malaysia whose father is at the time of the birth a citizen, but not a Singapore citizen, and whose birth is, within one year of its occurrence, or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government.
 - (4) Is born within the Federation, outside Singapore, who is not born a citizen⁶⁰ of any other country otherwise than by virtue of this paragraph.⁶²

59. A person shall be treated as having been at any time permanently resident in the Federation if, but only if, he was then resident in the Federation and either:
- (a) he then had permission, granted without limit of time under any federal law, to reside there or,
 - (b) it is certified by the Federal Government that he is to be treated for those purposes as a permanent resident in the Federation. See Second Schedule, Part III, 19 C.
60. A person is not a citizen by virtue of this provision if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy. See Second Schedule, Part II, 2(1).
61. For this purpose "born in the Federation" includes his having been born before Malaysia Day in the territories comprised in the Borneo States or Singapore. See Second Schedule, Part II, 2(b).
62. For the purposes of this provision a person is to be treated as having at birth any citizenship which he acquires within one year afterwards. See Second Schedule, Part II, 3.

- (5) As to any new territory admitted to the Federation after September 16, 1963, Parliament may determine what persons are to be citizens by reason of their connection with that territory.⁶³

2. By Registration.

- a. Any married woman⁶⁴ whose husband is a citizen, but not a Singapore citizen, is entitled upon making application to the Federal Government, to be registered as a citizen⁶⁵ (a) if the marriage was subsisting and the husband a citizen at the beginning of October, 1962, or (b) if she satisfies the Federal Government that she has resided⁶⁶ in the Federation outside Singapore⁶⁷ throughout the two years preceding the date of the application, and that she intends to do so permanently and that she is of good character.⁶⁸
- b.⁶⁵ The Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen, but not a Singapore citizen, to be registered as a citizen upon application made to the Federal Government by his parent or guardian.⁶⁸
- c.⁶⁵ A person under the age of twenty-one years who was born before the beginning of October, 1962, and whose father is (or was at his death) a citizen, but not a Singapore citizen, and was also a citizen at the beginning of that month (if then alive), is entitled upon application made to the Federal Government by his parent or guardian, to be registered as a citizen if the Federal Government is satisfied that he is ordinarily resident in the Federation outside Singapore and is of good character.⁶⁸

63. Article 22.

64. "Married woman" refers to a woman whose marriage has been registered in accordance with any written law in force in the Federation, including any such law in force before Malaysia Day in territories comprised in the Borneo States or Singapore. To this clause has been added the following proviso: "Provided that this Clause shall not apply where the woman applies to be registered as a citizen before the beginning of September, 1965, or such later date as may be fixed by order of the Yang di-Pertuan Agong, and is at the date of the application ordinarily resident in the Borneo States or Singapore." See Article 15(5).

65. Article 15.

66. For this purpose residence before Malaysia Day in the territories comprised in the Borneo States shall be treated as residence in the Federation outside Singapore. See Article 15(4).

67. For this purpose "outside Singapore" shall not have effect in the case of a woman whose husband is a citizen by naturalisation under Clause (2) of Article 19. [See V A 3 b of the text herein].

68. 1. A person over eighteen years of age must take an oath of allegiance.
2. No one who has renounced or has been deprived of citizenship under the Federation Constitution or the Constitution of the State of Singapore or of federal citizenship or citizenship of the Federation under the Federation of Malaya Agreement, 1948, may be registered as a citizen except with the approval of the Federal Government. See Article 18.

- d.⁶⁹ The Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.⁶⁸
- e.⁷⁰ Any person of or over the age of eighteen years who was born in the Federation before August 31, 1957, is entitled, upon making application to the Federal Government, to be registered as a citizen if he satisfies the Federal Government:
 - (a) that he has resided in the Federation outside Singapore during the seven years immediately preceding the date of the application, for periods amounting in the aggregate to not less than five years;
 - (b) that he intends to do so permanently;
 - (c) that he is of good character; and
 - (d) that he has an elementary knowledge of the Malay language.⁶⁸

3. By Naturalisation⁷¹

- a. The Federal Government may, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalisation to that person if satisfied: (a) that he has resided in the Federation outside Singapore⁷² for an aggregate of not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which include the twelve months immediately preceding that date, and intends, if the certificate is granted, to do so permanently; (b) that he is of good character; and (c) that he has an adequate knowledge of the Malay language.⁷³
- b. The Federal Government may, in such special circumstances as it thinks fit, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalisation to that person if satisfied: (a) that he has resided⁷⁴ in the Federation⁷² for an aggregate of not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which include the twelve months immediately preceding that date; (b) that he is of good character; and (c) that he has an adequate knowledge of the Malay language.⁷³
- c. The Federal Government shall upon application made by any person serving in the forces under the jurisdiction of

69. Article 15 A.

70. Article 16.

71. Article 19.

72. Residence before Malaysia Day in the Borneo States shall be treated as residence in the Federation outside Singapore.

73. An oath of allegiance is required.

74. Residence before Malaysia Day in Singapore shall be treated as residence in the Federation for the purpose of this provision.

the Armed Forces Council grant a certificate of naturalisation to that person if satisfied: (a) that he has served satisfactorily for a period of not less than three years in full-time service, or for a period of not less than four years in part-time service and (b) that he intends, if the certificate is granted, to reside permanently in the States of Malaya.⁷⁵

B. Acquisition of Federation citizenship as applied to persons of the Borneo States who are not Singapore citizens:

1. By Operation of Law —

A person ordinarily resident in a Borneo State or in Brunei⁷⁶ on Malaysia Day is a citizen by operation of law if he was immediately before that day a citizen of the United Kingdom and Colonies and either (a) was born⁵⁷ in the territories comprised in the Borneo States; or (b) became such a citizen by registration in those territories or by or in consequence of naturalisation there.⁷⁷

2. By Registration —

- a. Any person of or over the age of eighteen years who is on September 16, 1963, ordinarily resident in a Borneo State is entitled, upon making application to the Federal Government before September, 1971, to be registered as a citizen if he satisfies the Federal Government (a) that he has resided before September 16, 1963, in the territories comprised in those States and after September 16, 1963, in the Federation outside Singapore for periods which amount in the aggregate to not less than seven years in the ten years immediately preceding the date of the application, and which include the twelve months immediately preceding that date; (b) that

75. This provision is in effect only until February 1, 1964, the relevant Article in the 1957 Constitution having been repealed effective that date by the Constitution (Amendment) Act, 1962. The Article permits an application either while the applicant is serving in the armed forces or within the period of five years, or such longer period as the Federal Government may in any particular case allow, after his discharge. Since the amending act was silent on the subject, the presumption exists that January 31, 1964, is the last date of entry into the armed forces from which the right here given could arise. No discrimination as to persons from Singapore is provided for.

76. The reference to Brunei is curious and perhaps represents a failure on the part of the draftsmen to eliminate this reference after the breakdown in the negotiations by which Brunei might have become a State.

77. For the purposes of deprivation of citizenship a person who on Malaysia Day became a citizen by operation of law because immediately before that day he had the status of a citizen of the United Kingdom and colonies shall be treated as a citizen (a) by registration, if he acquired that status by registration; and (b) by naturalisation if he acquired that status by or in consequence of naturalisation. See Article 28 A(2). However, a person shall not be deprived of his citizenship under Article 25 if he was born before Malaysia Day in the territories comprised in the Borneo States and is to be so treated by virtue of a status acquired by or in consequence of naturalisation in those territories. See Article 28 A(5).

he intends to reside permanently in the Federation outside Singapore; (c) that he is of good character; and (d) except where the application is made before September, 1963, and the applicant has attained the age of forty-five years at the date of the application, that he has a sufficient knowledge of the Malay language or the English language or, in the case of an applicant ordinarily resident in Sarawak, the Malay language, the English language or any native language in current use in Sarawak.⁷⁸

b. As in A 2 d above.

3. By Naturalisation — As in A 3 above.

C Acquisition of Federation citizenship as applied to persons of Singapore:

1. By Operation of Law:⁷⁹

a. Every citizen of Singapore.⁸⁰

b. Every person born⁵⁷ in Singapore on or after Malaysia Day, other than a Singapore citizen, of whose parents one at least is at the time of the birth⁶⁰ a citizen, but not a Singapore citizen; and who is not born a citizen otherwise than by virtue of this paragraph.

2. By Registration (transfer or enrollment) :⁵⁵

a. Married women who are Singapore citizens may be enrolled as Federation citizens who are not Singapore citizens under the provisions of Article 15 (1) [see A 2 a above], except that the provisions of Article 18, requiring an oath and providing for the effect of renunciation or deprivation of citizenship do not apply.⁸¹

b. Singapore citizens under the age of twenty-one years who meet the terms of Article 15 (2) or (3) [see A 2 b and c above], subject to the exceptions noted in C 2 a, immediately above, may be enrolled as Federation citizens who are not Singapore citizens.⁸¹

78. Article 16 A.

79. Except that any other applicable provision of the Constitution will not be defeated, provision with respect to citizenship of Singapore may be made by the constitution of Singapore, and may be amended by laws passed by the Legislature of Singapore and approved by Act of Parliament.

80. For purposes of deprivation of citizenship one who is a Singapore citizen will be treated as a Federation citizen not by operation of law but (a) by registration, if he acquired Singapore citizenship by registration, or if he acquired it by enrolment when he was (or for those purposes was to be treated as being) a citizen of the Federation by registration, or (b) by naturalisation, if he acquired Singapore citizenship by naturalisation, or if he acquired it by enrolment when he was (or for those purposes was to be treated as being) a citizen of the Federation by naturalisation. See Article 28A.

- c. The Federal Government may enrol, in such special circumstances as it thinks fit, as a Federal citizen who is not a Singapore citizen, any Singapore citizen, subject to the exceptions noted in C 2 a, above.⁸¹

3. By Naturalisation:⁸²

The Federation Government may, upon application made by any Singapore citizen of or over the age of twenty-one years, enrol him as a citizen who is not a Singapore citizen, if the Federal Government is satisfied that he has resided in the Federation outside Singapore for an aggregate of not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which include the twelve months immediately preceding that date, and intends, if the certificate is granted, to do so permanently; that he is of good character; and that he has an adequate knowledge of the Malay language.⁸³

D. Deprivation of Citizenship

All Federation citizens may be deprived of citizenship under certain circumstances; but in the case of those who are citizens by operation of law they must be guilty of having committed some overt and deliberate act, inconsistent with their claim of Malaysian citizenship, whereas those whose citizenship was acquired by one of the other available methods may be deprived of that citizenship for reasons which could not be applied against a citizen who is so by operation of law.

1. As applied to all citizens:

- a. The Federal Government, if satisfied that any citizen by voluntary and formal act⁸⁴ has acquired the citizenship of any country outside the Federation, may deprive him of his citizenship.⁸⁵

81. See Article 19A 2. Probably the oath is not required for the reason that the loyalty of a Singapore citizen to the Federation should be presumed. But why Article 18(2), concerned with the effect of a previous renunciation or deprivation of citizenship in either the Federation or Singapore should not be as appropriate here as in the other applications of Article 15 is not clear.

82. With the concurrence of the Singapore Government, the Federal Government may, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalisation, creating Singapore citizenship, to that person if satisfied that (a) he has resided in Singapore for an aggregate of not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which include the twelve months immediately preceding that date, and intends if the certificate is granted to do so permanently; (b) that he is of good character; and (c) that he has an adequate knowledge of the Malay language. See Article 19(6), (7).

83. Article 19A.

84. Marriage to a foreign citizen is not regarded as such an act, except that a woman who herself acquired citizenship by virtue of having married a Federation citizen, and who, in the view of the Federal Government, acquires the citizenship of any country outside the Federation by a subsequent marriage, may be deprived of her Federation citizenship. See Article 24(4).

85. Article 24(1).

- b. The Federal Government, if satisfied that any citizen has voluntarily claimed and exercised in a foreign country any rights available to him under the law of that country, being rights accorded exclusively to its citizens, may deprive him of his citizenship.⁸⁶
2. Deprivation of citizenship of those who are citizens by registration or naturalisation:⁸⁷
- a. The Federal Government may by order deprive of his citizenship any person who is a citizen by registration under Articles 16 A⁸⁸ or 17⁸⁹ or who is a citizen by naturalisation⁹⁰ if satisfied: (i) that he has shown himself by act or speech to be disloyal or disaffected towards the Federation; (ii) that he has, during any war in which the Federation is or was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business which to his knowledge was carried on in such manner as to assist an enemy in that war; (iii) that he has, within the period of five years beginning with the date of the registration or the grant of the certificate, been sentenced in any country to imprisonment for a term of not less than twelve months or to a fine of not less than five thousand dollars or the equivalent in the currency of that country, and has not received a free pardon in respect of the offence for which he was so sentenced;⁹¹ (iv) that, without the Federal Government's approval, he has accepted, served in, or performed the duties of any office, post or employment under the Government of any foreign country or any political sub-division thereof, or under any agency of such a Government, in any case where an oath, affirmation or declaration of allegiance is required in respect of the office, post or employment;⁹² (v)⁹³ that he has been ordinarily resident in foreign count-

86. Article 24(2).

87. No person shall be deprived of his citizenship under these provisions, *i.e.*, Articles 25, 26 or 26A, unless the Federal Government is satisfied that it is not conducive to the public good that he should continue to be a citizen; and no person shall be deprived of his citizenship (except for fraud, false representation, the concealment of a material fact, or, in the case of a woman who is a citizen under Article 15(1) whose marriage is dissolved within two years) if the Federal Government is satisfied that as a result of the deprivation he would not be a citizen of any country. See Article 26B.

88. See V B 2 of the text.

89. Article 17 has been repealed; but the deprivation of citizenship provisions are applicable to those who became citizens by virtue of that Article.

90. See V B 3 of the text.

91. Article 25(1).

92. A person shall not be deprived of citizenship under this Clause by reason of anything done before the beginning of October, 1962, notwithstanding that he was at that time a citizen. See Article 25(1A).

93. This clause applies to persons who are citizens by operation of law as having been a citizen of the Federation immediately before August 31, 1957; moreover foreign residence before or after August 31, 1957, is equally relevant as to such citizens. See Article 25(2) and Article 28(3).

ries⁹⁴ for a continuous period of five years and that during that period has neither (a) been at any time in the service of the Federation or of an international organisation of which the Federal Government was a member; nor (b) registered annually at a Consulate of the Federation his intention to retain his citizenship; (vi) that the registration or certificate of naturalisation (a) was obtained by means of fraud, false representation or the concealment of any material fact; or (b) was effected or granted by mistake.⁹⁵

- b. The Federal Government may by order deprive of her citizenship any woman who is a citizen by registration under Clause (1) of Article 15⁹⁶ if satisfied that the marriage by virtue of which she was registered has been dissolved, otherwise than by death, within the period of two years beginning with the date of the marriage.⁹⁷
- c. Where a person has renounced his citizenship or been deprived thereof, under Article 24 (1),⁹⁸ *i.e.*, for an overt voluntary act inconsistent with Malaysian citizenship, or under Article 26 (1) (a), *i.e.*, for fraud, false representation or the concealment of any material fact,⁹⁹ the Federal Government may by order deprive of his citizenship any child of that person under the age of twenty-one who has been registered as a citizen pursuant to the Federation Constitution or the Constitution of Singapore and was so registered as being the child of that person or of that person's wife or husband.¹⁰⁰

VI. JUDICIARY

A new judicial structure was made necessary by the creation of the new federation. Three High Courts of coordinate jurisdiction and status have been designated: one in the States of Malaya, one in the Borneo States and one in the State of Singapore. Above these three High Courts is a new Court, known as the Federal Court, with its principal registry in the capital, Kuala Lumpur.¹

Each of the High Courts consists of a Chief Justice and not fewer than four other judges to a maximum of twelve for Malaya, eight for

94. The term "foreign countries" does not include any part of the Commonwealth or the Republic of Ireland.

95. Article 26.

96. See V A 2 of the text.

97. Article 26(2).

98. See V D 1a of the text.

99. See V D 2a of the text.

100. Article 26A.

1. Article 121(1).

Borneo and eight for Singapore. Parliament may by an ordinary law increase the number for any of the three courts.²

The Federal Court consists of the Lord President of the Federal Court, together with the three Chief Justices of the High Courts, and two other judges. Parliament may vary the number of "other judges." Where the Lord President feels justice so requires, he may on such occasions appoint a judge of a High Court, other than its Chief Justice, to sit in the Federal Court.³

All members of the Federal Court and of all High Courts are appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister. The Constitution directs "consultation" with a number of bodies and persons in reference to judicial appointments: (a) the Yang di-Pertuan Agong is to consult the Conference of Rulers as to all appointments; (b) the Prime Minister is to consult the Lord President and all the Chief Justices as to the appointment of the other judges of the Federal Court; (c) the Prime Minister is to consult each High Court Chief Justice before making any appointment to that office; and if the appointment is for Singapore or Borneo, he is also to consult the respective Chief Minister; (d) the Prime Minister shall consult the Chief Justice of the High Court concerned as to an appointment of a judge of that court.⁴ (It will be noted that the Prime Minister is not obliged to consult anyone in recommending the appointment of the Lord President. And in the final analysis the Yang di-Pertuan Agong must appoint any judge determined upon by the Prime Minister.).

A special provision was devised apparently to accommodate the geography and somewhat undeveloped communication network of the Borneo States. "For the despatch of business of the High Court in Borneo in an area in which a judge of the court is not for the time being available to attend to business of the court," a judicial commissioner may be appointed. He is subject to such limitations or conditions as may be contained in his order of appointment and his jurisdiction is limited to the area of his appointment; but otherwise he has the same powers and privileges as a High Court judge. It is contemplated that such an appointment will be for a limited period of time and that the action taken by the commissioner will be only that which it was necessary to perform without delay. Power to appoint judicial commissioners resides in the Governor of each Borneo State for the territory of that State. The Governor is obliged to act on the advice of the Chief Justice of the High Court of Borneo. Concurrent power of appointment of judicial commissioners for the Borneo States lies in the Yang di-Pertuan Agong. He must, however, act on the advice of the Lord President of the Federal Court. And he may, of course, unlike a Governor, appoint a commissioner for an area in either of the Borneo States.⁵ It must be supposed that the exercise of this function by the Yang di-Pertuan Agong will be rare, since it is far more logical

2. Article 122A.

3. Article 122.

4. Article 122B.

5. Article 122 A(3) and (4).

for the Chief Justice of the Borneo High Court, with a more intimate knowledge of the local scene and within his general administrative function, to recommend the appointment of a commissioner as needed. A reserve power of appointment in the Yang di-Pertuan Agong may have some usefulness if one can contemplate a breakdown in what would be the normal and preferable machinery of judicial administration. As might be expected in view of the few members at the Bar in the Borneo States and of the necessitous situation the appointment contemplates, a judicial commissioner need not have the qualifications of a High Court judge, but need only be an advocate or person professionally qualified to be admitted as an advocate of the High Court.⁶

The Constitution also permits *ad hoc* appointments as judges of the High Courts; but such persons must be qualified for appointment as High Court judges; and the same machinery of consultation and appointment must be followed as in the case of a regular appointment to the High Court.⁷ Transfer of High Court judges, other than a Chief Justice, is permitted from one High Court to another. Such transfer is effected by the Yang di-Pertuan Agong, on the recommendation of the Lord President of the Federal Court, after consulting the Chief Justices of the two High Courts concerned.⁸ These transfer provisions apply only to judges newly appointed after Malaysia Day. Judges who hold their offices by virtue of holding judicial appointment in their respective States before Malaysia Day may be transferred only with their consent.⁹

Qualifications for a judge of the Federal Court or of the High Court are the same. They are: (a) citizenship and (b) that for the ten years preceding he shall have been an advocate of any of the High or Federal Courts or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.¹⁰ The citizenship requirement is, however, waived for any person who immediately before Malaysia Day was a member of the judicial and legal service of the Federation, or immediately before Malaysia Day was a member of the judicial and legal branch of the Public service of North Borneo, Sarawak or Singapore. This waiver accommodates largely British jurists serving especially in the Borneo territories. And for a limited period the requirement of ten years standing as an advocate or the equivalent is reduced to five years qualification to practice as an advocate of a Court in any Commonwealth country having unlimited jurisdiction in civil or criminal matters. The reduced time requirement applies to appointments made to the Federal Court or the High Court in Malaya within ten years of Merdeka Day; *i.e.*, until August 31, 1967. As to appointments to the Singapore or Borneo High Courts, it applies within

6. Article 122 A(3).

7. Article 122 A(2).

8. Article 122 C.

9. Malaysia Act, Part IV, Transitional and Temporary, Paragraph 89(6).

10. Article 123.

ten years of Malaysia Day, i.e., until September 16, 1973.¹¹

The High Courts possess all the judicial power of the Federation, less that specifically granted to the Federal Court. Except as federal law may otherwise provide, any order, decree, judgment or process of the High Courts, or of any of their judges, have full force and effect throughout the Federation, and may be executed or enforced in any part of the Federation; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.¹²

The Federal Court has exclusive jurisdiction (a) to determine appeals from decisions of a High Court or of a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court.)¹³ This appellate jurisdiction is subject to Parliamentary control;¹⁴ (b) to determine any challenge to the competence of a legislature to enact a particular law;¹⁵ (c) to determine disputes on any other question between States or between the Federation and any State;¹⁶ (d) to determine any question as to the effect of any provision of the Constitution, which question has arisen in proceedings before another Court. The Federal Court does not assume jurisdiction of the whole case but only of the constitutional issue, remitting the case to the court of original jurisdiction for disposition in accordance with the constitutional determination. Rules of court may regulate the exercise of this jurisdiction;¹⁷ (e) to render advisory opinions on questions referred to it by the Yang di-Pertuan Agong as to the effect of any provision of the Constitution which has arisen or appears likely to arise.¹⁸

Appeals may be taken from the Federal Court to the Judicial Committee of the Privy Council.¹⁹

The existing structure and jurisdiction and personnel of subordinate courts in the new States have been retained,²⁰ but may be changed by Parliament, which has power also to create inferior courts.²¹

Transitional provisions preserve the jurisdiction of courts seized

11. Malaysia Act, Part IV, Transitional and Temporary, Paragraph 90.

12. Article 121.

13. Article 121(2) (a).

14. Article 121(3).

15. Article 128(1) (a).

16. Article 128(1) (b).

17. Article 128(2).

18. Article 130.

19. Article 131.

20. Malaysia Act, Part IV, Transitional and Temporary, Paragraph 88.

21. Article 121(1).

of matters and of the competence of judges considering issues before Malaysia Day to dispose of those issues afterwards. All Supreme Court and High Courts justices in the three areas assumed equivalent positions in the new court structure, with the former Chief Justice of the Federation becoming Lord President of the Federal Court and the judges of the Court of Appeal becoming judges of the Federal Court.

The original Constitution of the Federation of Malaya created a Judicial and Legal Service Commission which was abolished by the Constitution Amendment Act, 1960, the judicial and legal service being transferred to the Public Services Commission. A Judicial and Legal Service Commission has now been recreated, consisting of a Chairman, who is the Chairman of the Public Services Commission; the Attorney-General; and one or more other members appointed by the Yang di-Pertuan Agong, after consultation with the Lord President of the Federal Court, from among persons who are or have been a judge of the Federal Court or a High Court or shall before Malaysia Day have been a judge of the Supreme Court.²²

Two branches of the Judicial and Legal Service have also been created — one for the Borneo States and one for Singapore. For Borneo the branch consists of the Chief Justice of the High Court in Borneo, as Chairman; the legal adviser of each of the Borneo States; the Chairman of the State Public Service Commission, if any, in each Borneo State; and two persons designated by the Federal Government from among the members of the main body of the Judicial and Legal Service Commission or Public Services Commission.²³

The Singapore branch of the Judicial and Legal Service Commission consists of the Chief Justice of the High Court in Singapore as Chairman, the State's legal adviser, the chairman of the State Public Service Commission, a judge of the High Court in Singapore designated by the Chief Justice, and not more than two members of the Public Service Commission.²⁴

The new amending provisions do not, with one notable exception, specify the functions of the Judicial and Legal Service Commission. These are derived from Part X of the original Constitution, especially from Article 144, with the necessary consequential amendments having been made to remove this service from the jurisdiction of the Public Services Commission. The new function of the Judicial and Legal Service Commission is its role in the discipline of members of certain of the other services. Formerly members of the railway service, the joint public services and the public service of each State could be dismissed or reduced in rank or otherwise disciplined by certain authorities within the Service in question. Now such disciplinary action can only be taken on the concurrence of the Judicial and Legal Service Commission in those instances where the subject matter of the offence

22. Article 138.

23. Article 146A(1) and (2).

24. Article 146A(1) and (3).

is alleged to be something done or omitted by the member of the service in the exercise of a judicial function conferred on him by law.²⁵ The provision creating the two branches of the Judicial and Legal Service is silent as to whether they are to exercise the same role with respect to the discipline of persons in the other services for their areas. It would appear desirable that the branches should not have this particular function. Both branches have more of the serving judiciary among their members than the main body can have and since disciplinary issues of the type contemplated might well find themselves the subject of appeal to the courts, it is perhaps as well that High Court Justices not be subsequently obliged to disqualify themselves through familiarity with the matter at the administrative stage.

It is provided that so long as there is a branch of the Judicial and Legal Service Commission in Borneo or Singapore the jurisdiction of the Commission shall extend to members of the public service of those States who are seconded to the judicial and legal service.²⁶ Oddly, no provision exists for the similar exercise of jurisdiction in the event of such secondment in the States of the former Malaya, perhaps for the reason that secondment of members of the public service to the Judicial and legal service in Malaya is deemed to be less likely than in Singapore or Borneo; although if such should be the thought, it would have appeared more likely that Singapore, with its highly developed legal system and large number of persons with legal training and administrative experience, would scarcely fall in the same category as Borneo.

The two branches of the Judicial and Legal Service have an established life until 1968, any time after which the Federal Government can terminate the Borneo branch; and Parliament with the concurrence of the Governor of Singapore may terminate the Singapore branch.²⁷

Freedom to practice the profession of law does not extend throughout the Federation as of right to one qualified in any of the three major units separately. An authorizing Act of the State legislature is required before any Act of Parliament, which by affecting residence qualifications, might confer a right to practice in a Borneo court on one not previously so permitted.²⁸ It is, of course, not unknown in federal nations for lawyers to be permitted to practice before the State courts of only one State, unless especially admitted to practice in others. This is true in the United States. But that country has two complete systems of courts, state and federal. Admission to practice before the federal courts there runs to all the federal courts in the nation, except the United States Supreme Court, where admission is based essentially on length of admission to practice in either a State or the federal system. Malaysia has a unified or "fereral" system of courts, apart from customary courts of negligible significance, against which the limitations on mobility of legal practitioners appears somewhat strange.

25. Article 135(3). This function was performed by the Judicial and Legal Service Commission under the 1957 Constitution.

26. Article 146 A(5).

27. Article 146 A(6).

28. Article 161 B.

VII. FUNDAMENTAL LIBERTIES

A. INTRODUCTION

In the Federation of Malaya Constitution several subjects were included in the Part on Fundamental Liberties under the headings of liberty of the person;²⁹ prohibition of slavery and forced labour;³⁰ protection against retrospective criminal laws and repeated trials;³¹ equality;³² prohibition of banishment, and freedom of movement;³³ freedom of speech, assembly and association;³⁴ freedom of religion;³⁵ rights in respect of education;³⁶ and rights of property.³⁷ Of these liberties several were stated in absolute terms; for example, without constitutional amendment, no legislation authorizing slavery or forced labour (except compulsory service for national purposes or work incidental to imprisonment imposed by a court of law) could be valid. The same would be true of retrospective criminal laws, laws authorizing repeated trials or laws banishing citizens or excluding them from the Federation. It would also be true of a law providing for the compulsory use of property without adequate compensation. Others of the liberties were subject to constitutional qualifications, such as that of equality, special privileges being granted to Malays;³⁸ freedom of religion, the States being permitted to control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion;³⁹ and rights in respect of education, laws providing special financial aid for Muslim institutions being authorised.⁴⁰ Finally, some of the "fundamental liberties" were effectively placed entirely within Parliamentary control. These included liberty of the person, freedom of movement and freedom of speech, assembly and association, all subject to Parliamentary encroachment for the widest scope of reasons.

The Malaysia Act preserves the pre-existing philosophy of the fundamental liberties, such changes as have been made being generally more restrictive as to those liberties.

B. EQUALITY

In all of the States of the former Federation, Malays will continue

29. Article 5.

30. Article 6.

31. Article 7.

32. Article 8.

33. Article 9.

34. Article 10.

35. Article 11.

36. Article 12.

37. Article 13.

38. Article 153.

39. Article 11(4).

40. Article 12(2).

to enjoy, as before, special privileges, notably as to positions in public service, scholarships and bursaries, and business licenses. Singapore possesses the general right to advance Malays; but they have no special rights as to positions in the public service which are filled by recruitment in Singapore; nor do they have special rights as to permits or licences for the operation of any trade or business in Singapore.⁴¹ As for special privileges in the Borneo States, the Malaysia Act requires the substitution of the term "natives of the State" for the term "Malays". In Sarawak Malays, if citizens, are included as "natives," the races who are native being specified. In Sabah the term "native" is less well defined, being a citizen born in Sabah or to a father domiciled there and who is the child or grandchild of a person "of a race indigenous to Sabah." The critical term, "race indigenous to Sabah," is not defined. Special privileges in the Borneo States are granted only as to positions in the public service and as to business licenses, not as to scholarships and similar grants or educational facilities.⁴²

C. RELIGION

Article 3 (1) has left unchanged the language proclaiming Islam to be the religion of the Federation, and it preserve the right to practice other religions in peace and harmony. Clause (3) had formerly required the only two States then without hereditary Muslim rulers, Malacca and Penang, to make provision in their constitutions for conferring on the Yang di-Pertuan Agong the position of Head of the Muslim religion in those States. Singapore has been added to that list, but not Sabah and Sarawak. Nor can Islamic religious acts, observances or ceremonies be extended to Sabah or Sarawak, as they can be extended to the other States.⁴³ The Constitutional provision permitting State law to control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion⁴⁴ does extend to the whole Federation; however, the Borneo States may include in their constitutions provisions requiring a special majority, not being a majority greater than two-thirds of the total number of members of the Assembly, for the enactment of such legislation.⁴⁵ It is, thus, apparent that with the joining of the Federation by the Borneo States, the significance of the constitutional proclamation of Islam as the religion of the Federation is somewhat reduced; for in reality it is now the official religion of only a part of the Federation; and the concept of religious pluralism, which was also an integral part of the original Constitution, has been strengthened. Census figures point up some anomaly as to the status of Islam in the new States. Singapore, which has agreed to come within that part of the Federation acknowledging Islam as the state religion, has the smallest percentage of Muslims in its population. While entirely accurate figures are not available, less than fifteen per cent of Singapore's

41. Article 161 G.

42. Article 161 A.

43. Article 38(7).

44. Article 11(4).

45. Article 161 D.

population is regarded as being Muslims,⁴⁶ whereas approximately twenty per cent of the population of Sarawak is so listed;⁴⁷ and over one-third of that Sabah is said to espouse Islam.⁴⁸ Doubtlessly one important factor distinguishing Sabah from Singapore in matters of religion is the extremely significant role played by Christian mission schools in the education of the former country. Religious schools still have a place in the life of Singapore; but the situation is not comparable. In Sabah, in 1962, 3121 children were enrolled in Mission secondary schools as compared to 1235 in Government secondary schools.⁴⁹ Similar figures are not published for Singapore; but the increasingly successful effort of the Government to expand public education has resulted in a decline in the relative importance of religious schools.

The original Constitution permitted Acts of Parliament to provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion.⁵⁰ Now, State law, as well, may provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion.⁵¹ If the law, however, is federal that provides special aid to Muslim institutions or for instruction in the Muslim religion, before it can apply to a Borneo State, the consent of the Governor of that State must be secured. Moreover, should such federal aid not apply to either Sarawak or Sabah, and should it represent — as is most likely — a grant out of public funds, the Federal Government is obliged to pay the Borneo State a sum for social welfare purposes in such amount as is representative of the ratio the grant bears to revenue derived by the Federation from the State in the year in question.⁵²

D. FREEDOM OF MOVEMENT

The former Constitution had guaranteed freedom of movement and residence throughout the Federation, subject to restrictions which Parliament might impose relating to security, public order, public health, or the punishment of offenders.⁵³ Presumably such restrictions, within the acceptable limits of legislative classification, were required by the the equality article of the Constitution to operate in a manner not to discriminate between inhabitants of different States, *per se*. Now, however, in view of the “special position” of the new States and so

46. Singapore Annual Report, 1958.

47. Sarawak Annual Report, 1962.

48. North Borneo Annual Report, 1962.

49. *Id.*, at 94.

50. Article 12(2).

51. *Ibid.*

52. Article 161 C. It will be seen from this and many other provisions of the Malaysia Act that the scope of the work of governmental and other fiscal agencies has been enormously increased, as has been the potential areas of federal-State dispute and litigation.

53. Article 9(2).

long as that special position persists, Parliament may impose restrictions, as between a new State and the other States, in respect of both movement and residence.⁵⁴

The restrictions on the movement of inhabitants of Singapore appear potentially somewhat less severe than in the case of the Borneo States in so far as in the case of Singapore some enumeration of the subject matter of the restrictive legislation is made. The new provision states, *inter alia*, "Provided that no restriction on the right of movement between the State of Singapore and the States of Malaya shall be imposed by virtue of this Clause except by a law relating to labour or education or to any matter in respect of which, because of the special position of the State of Singapore, it appears to Parliament to be desirable to prevent the enjoyment of rights both in the State of Singapore and in the States of Malaya."⁵⁵ It should be noted that this proviso does not operate *vis a vis* Singapore and the Borneo States, as to which the motive for the restrictive legislation appears unlimited. Moreover, the proviso is itself subject to broad interpretation. If, in addition to labour and education, one adds to the reasons for population movement those of politics and business, which would seem also to be readily incorporated in the permissible "special position" rubric, it is not difficult to foresee that most population movement within the Federation in respect of the new States may be prevented or rigidly controlled. It would seem that at least one element in a federal nation must have an unfettered right of movement throughout the whole Federation, *i.e.*, party politicians. The one essential characteristic necessary to distinguish a federation from a confederation must be the right of any political party, lawful in one State, to try to secure adherents in all States in order that each political party may have the opportunity of securing control of the national government. The operation of any law which would in any sense frustrate such a possibility would negate a claim to federalism. Moreover, in the modern world, it becomes increasingly difficult to isolate the purely political from other forms of behaviour. Labor leaders are often indistinguishable from party politicians. Can one man, who is both, be properly subject to restrictions as to his movements in a federation?

E. FREEDOM OF SPEECH, ASSEMBLY AND ASSOCIATION

Parliamentary control over these 'rights', which was formerly very great, indeed, has been increased by adding the words "or any part thereof" to the restrictive clauses, which now read, "Parliament may by law impose on the rights conferred....such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof...."⁵⁶ And a new clause has been added as follows: "Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education."⁵⁷

54. Article 9(3).

55. *Ibid.*

56. Article 10(2).

57. Article 10(3).

F. EMERGENCY LAWS

Executive and Parliamentary power, *vis a vis* fundamental liberties, have been further increased by strengthening the Emergency provision of the Constitution. Some words of limitation, *i.e.*, "whether by war or external aggression or internal disturbance," appeared in the original Constitutional provision authorizing the invoking of emergency powers. These words have been eliminated; and the provision now reads, "If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency."⁵⁸

Under the previous Constitution those provisions which required consent or concurrence for a law to become valid, such as the consent of the Conference of Rulers,⁵⁹ or which required consultation with respect to the passing of a law, as with the Conference of Rulers,⁶⁰ were not affected by a Proclamation of Emergency. These requirements are now suspended during the period of Emergency.⁶¹ An amending provision seeks to make clear that legislation passed during an Emergency is not subject to challenge in the courts on the grounds of constitutionality, except as it relates to religion, citizenship or language.⁶² Two matters only on the State List were beyond the reach of Parliament during an Emergency. They were Muslim law and the custom of the Malays. To these inviolable subjects has been added any matter of native law or custom in a Borneo State.⁶³

G. LANGUAGE

Questions of language do not appear in the portion of the Constitution devoted to fundamental liberties, although they might well have been included there, posing problems in a multilingual society as emotive as those of religion.

The original Constitution made Malay the official language; but for ten years from Merdeka Day, *i.e.*, until 1967, English could be used for all official purposes and was to be the language of the authoritative text of all Bills in Parliament and all Acts of Parliament and all subsidiary federal legislation. For the same period it was to be the only language of the Supreme Court and the language of subordinate courts until Parliament otherwise provided.⁶⁴ Under the new Constitution Parliament may still terminate the official use of English in 1967 in all of the Federation except in and as related to Singapore and as to the Borneo States, the termination date for the use of English in

58. Article 150(1).

59. See, *e.g.*, Article 38(4).

60. See, *e.g.*, Article 38(5).

61. Article 150(5).

62. Article 150(6) and (6A).

63. Article 150(6A).

64. Article 152.

the Federal Parliament by representatives from the Borneo States being ten years from Malaysia Day, *i.e.*, 1973. As to the official use of the English language within the Borneo States, the concurrence of the legislatures of those States will be required even after 1973 to effect its termination.⁶⁵

Singapore representatives in the Federal Parliament will be bound to use Malay whenever after 1967 the Parliament makes such requirement.⁶⁶ But the Legislative Assembly of Singapore has complete discretion in determining the continued use of English, Mandarin and Tamil in the Legislative Assembly of Singapore, as well as English for the authoritative texts of all Bills, Acts and subsidiary legislation of the government of Singapore.⁶⁷

VIII. TRANSITIONAL PROVISIONS

Generally, all laws in force throughout the Malaysia area remain in force until changed. But references in existing laws to the Federation (except in relation to a time before Malaysia Day) shall be construed as references to Malaysia; otherwise an existing Federation law shall not extend to Singapore or the Borneo States, unless and until it is specifically so extended. Laws inconsistent with the Constitution are not valid.⁶⁸

By executive order existing Federation laws may be modified as made necessary by the Malaysia Act and may be extended to the new States, in those instance where Parliament could so legislate. State laws in the new States may, upon request by the Governor, also be modified by order of the Yang di-Pertuan Agong as may be necessary in consequence of the Malaysia Act.⁶⁹ Other temporary and transitional provisions deal with such matters as property occupied or used by the government of the United Kingdom and other public property;⁷⁰ succession to government rights, liabilities and obligations;⁷¹ succession as to criminal and civil proceedings;⁷² pensions for serving officers;⁷³ transfer of Singapore police force to the federal force;⁷⁴ and other lesser or related matters.

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65. Article 161.

66. Article 152.

67. Article 161 P.

68. Temporary and Transition, Paragraph 73.

69. *Id.*, at 74.

70. *Id.*, at 75.

71. *Id.*, at 76.

72. *Id.*, at 77.

73. *Id.*, at 81-83.

74. *Id.*, at 85.

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