ADMISSION OF NEW STATES

The Government of the State of Kelantan v. *The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj.*[1]

It is not uncommon for federal constitutions to provide for the entry of new states into the federation.[2] When the independent Federation of Malaya came into existence on 31 August 1957, the basic constitutional instruments were first, the Federation of Malaya Agreement 1957[3] between the Rules of the nine Malay States and the Government of the United Kingdom, and secondly, the Constitution which was annexed to the Agreement and which was to be the "supreme law" of the new Federation. After setting out the name of the new Federation and the various States thereof,[4] the Constitution provided: [5]

11. (1964) 30 M.L.J. 153, 164. Italics added.

12. See *State of Bombay* v. *Atma Bam Shridhar Vaidya* A.I.R. 1951 S.C. 157, 161; *Dr. Ram Krishnan Bhardwaj* v. *State of Delhi* A.I.R. 1953 S.C. 318, 320.

13. S. 2, Part III of Third Schedule of the Constitution.

1. (1963) 29 M.L.J. 355. The Prime Minister, Tunku Abdul Rahman, was joined as a defendant in his capacity as Chief Executive Officer of the Federation.

2. See, *Constitution of India Art.* 2: "Parliament may by law admit into or establish new States on such terms and conditions as it thinks fit."; *Constitution of the United States*, Art. IV, s. 3(1): "New States may be admitted by Congress into this Union...."; Australian Constitution, a. 121: "Parliament may admit into the Commonwealth or establish new States...."; and the 1962 *Constitution of Pakistan*. Art. 1(2): "The Republic shall consist of.... (b) such other States and Territories as are or may become included in Pakistan, whether by accession or otherwise".

3. Apart from the Agreement, the other instruments bringing the Constitution into force were (a) in the U.K., the Federation of Malaya Independence Act 1957, and the Orders-in-Council made thereunder; (b) in the Federation, the Federal Constitution, and State Enactments in each of the Malay States approving and giving the force of law to the Federal Constitution.

4. Art. 1 read, inter alia, "(1) The Federation shall be known by the name of Persekutuan Tanah Melayu (in English the Federation of Malaya). (2) The States of the Federation are Johore, Kedah. Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu (formerly known as the Malay States) and Malacca and Penang (formerly known as the settlements of Malacca and Penang."

5. Art. 2(a).

"Parliament may by law —
(a) admit other States to the Federation;
...."

Though the Constitution clearly stated that new States may be admitted by Federal law, it was evident that this could only be done by way of an amendment to the Constitution in view of Article 1 which enumerated the States comprising the Federation.

While the case under review can be said to be directly concerned with this power of admitting new States and the manner in which it is to be exercised, it also brings to light broader and fundamental questions of constitutional law, of the position and rights of the States in the Federation, and of the amending power vested in Parliament and, further, some pertinent questions as to the effect of the 1957 Federation of Malaya Agreement also arise. The case also has significance in that it is the first case where post-Merdeka Federal law has been challenged because unconstitutional and has provided the first occasion when a Stato. has brought proceedings against the Federation. The facts are as follows:

On July 9 1963, the Governments of the Federation of Malaya. United Kingdom, Sarawak, North Borneo (also known as Sabah) and Singapore signed the Malaysia Agreement whereby Singapore, Sarawak and Sabah would federated with the existing States of the Federation of Malaya (which included Kelantan) and whereafter the Federation would be called "Malaysia". United Kingdom was to relinguish all rights of sovereignty over those three territories upon the establishment of Malaysia in accordance with the Agreement.

The Federal Parliament then passed the Malaysia Act [6] (the Bill form of which had been annexed to the Malaysia Agreement) to amend the Constitution of the Federation of Malaya to provide, *inter alia,* for the admission of the three new States, for the alteration of the name of the Federation to "Malaysia" and for matters consequent to, and in connection with, the admission of those States.[7] This Act received the Royal Assent on August 26 and was to come into operation on Malaysia Day, September 16 1963.

Insofar as the Malaysia Act affected Articles 38 (Conference of Rulers) and 153 (Special position of the Malays), the consent of the Conference of Rulers had been obtained[8] to the passing of the Act. Apart from, this, neither the Parliament nor the Federal Government consulted individual States, individual Rulers or the Conference of Rulers separately as regards the signing of the Malaysia Agreement or the passing of the Malaysia Act.

On September 10, with only six days to go for Malaysia Day, the Government of the State of Kelantan commenced proceedings for declarations that the Malaysia Agreement and the Malaysia Act were null and void or, alternatively, were not binding on the State. Kelantan contended (a) that the Malaysia Act would abolish the 'Federation of Malaya' thereby violating the Federation of Malaya Agreement 1957; (b) that the proposed changes needed the consent of each of the constituent

6. No. 26 of 1963.

7. The first two clauses of Art. 1 were amended to read as follows:
"(1) The Federation shall be known, in Malay and in English, by the name Malaysia.
(2) The States of the Federation shall be —
(a) the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu.
(b) the Borneo States, namely, Sabah and Sarawak.
(c) the State of Singapore."

8. See preamble to the Malaysia Act. See also, Art. 159(5): "A law making an amendment to Article 38, 70, 71(1) or 153 shall not be passed without the consent of the Conference of Rulers."

States and that this had not been obtained; (c) that the Ruler of Kelantan should have been a party to the Malaysia Agreement; (d) that constitutional convention called for consultation with Rulers of individual States as to substantial changes to be made to the Constitution; and (e) that the Federal Parliament had no power to legislate for Kelantan in respect of any matter regarding which that State had its own legislation.

On September 11, Kelantan gave notice of motion that pending the ultimate disposal of their suit, the Court should by order restrain the defendants from carrying into effect the provisions of the Malaysia Act, or in other words, to prevent the formation of Malaysia until the case had been disposed of.

It was this motion, then, that was before the Court for its decision. Thomson C.J. dismissed the motion.[9] Though he took the attitude that the question for decision (this being an interlocutary application of some sort) was whether there was a *probability* that the plaintiff Government was entitled to the relief which it sought, the learned Chief Justice, as we shall shortly examine, in fact arrived at an authoritative holding on the merits of the case. For all intents and purposes, he held that both the Malaysia Agreement and the Malaysia Act were *intra vires* the Constitution, and that the Federal Executive and Parliament had not in any way exceeded their powers.

(a) *Interim remedy in State-Federation suits: jurisdiction and criterion.*

Kelantan did not proceed by way of injunction as they were precluded from so doing by the provisions of the Government Proceedings Ordinance 1956, and this also meant, of course, that they could not seek an interim injunction. At the same time their choice — surely a Hobson's choice — of proceeding by way of declarations still placed them in a dilemma. The Malaysia Act was to come into operation in five days' time, and if they waited for their suit to take its natural course, the decision would have been arrived at after several weeks, that is, well after Malaysia Day. This would have naturally frustrated the *raison d'etre* in their challenge of the legality of the Act: Malaysia would have been, politically, a *fait accompli* though, from the strictly legal viewpoint, there was still the possibility of a Court declaring the Malaysia Act unconstitutional after it had come into operation.

It is not surprising, therefore, that Kelantan filed notice of motion that pending the ultimate disposal of their suit, the Court "should make an order" to restrain the defendants from executing the provisions of the Malaysia Act. This was clearly an application for an interim remedy, but the report of the case indicates that the plaintiff Government was uncertain as to the nature of this interim remedy which they sought. The learned Chief Justice was not only also uncertain, but had serious doubts whether the Court had power to grant an "interim declaration" or indeed to make any interim remedy, and cited the case of *International General Electric Co. of New York Ltd. & anor.* v. *Commissioner of Customs and Excise.*[10] In view of this and considering that the plaintiff should establish that the relief they seek is appropriate, the question then arises whether the case ought to have been disposed of on these procedural grounds. Was it correct for Thomson C.J. to have proceeded to deal with the case and to have heard the constitutional arguments?

9. Kelantan has not appealed against the decision of Thomson C.J. and has also abandoned her original action.

10. [1962] 2 All E.R. 398; See Upjohn L.J., p. 400: "....an order declaring the rights of parties must in its nature be a final order....subject only, of course to a right of appeal.... [This] order we are being asked to make. ...is not apparently to be binding on the parties....speaking for my part, I simply do not understand how there can be such an animal....as an interim declaratory order which does not finally declare the rights of the parties....it seems to me to be quite impossible to invent some form of declaration which does not determine the rights of the parties but is only meant to preserve the status quo."
cf. Zamir, The Declaratory Judgment, who suggests that it is possible that a Court has the inherent power to grant an 'interlocutary declaration'.

The doctrine, evolved by the American Courts,[11] of avoiding constitutional determinations where possible may be a wise one under certain circumstances.[12] But this principle of judicial review however should not be axiomatically applied regardless of the circumstances of the case: there may well be situations where the issues posed may indeed call for the clarification of the constitutional questions despite technical or other bases on which the case may be otherwise decided. This case is an excellent illustration. Here we had one of the constituent units of the federal structure challenging the legislative and executive actions of the centre on grounds that they had no power under the Constitution. To have avoided determination of the constitutional issues on technical grounds, it is submitted, would mean that the Court would have failed in its duty and would have invited uncertainty and suspicion within the Federation as regards what were unquestionably the most important actions of the centre since the establishment of the Federation in 1957. The course of action adopted by Thomson C.J., therefore, had much merit:

> "....the application has been opposed on its merits. In my view it is in the public interest that it should be disposed of on its merits and in my view counsel for the Government [of the Federation] has been wise to leave over for the time being any objections of a procedural nature." [13]

Having decided to entertain the motion for interim remedy, Thomson C.J. then made it clear that he was not going to merely scratch the surface of the matter, and in this connection, he had necessarily to contradict himself. On the one hand, he felt that the test to be applied in this application for interim remedy was that as laid down by Cotton L.J. in *Preston v. Luck,*[14] *viz.* that the Court should not decide finally the rights of the parties; that it should be satisfied that there is a serious question to be tried at the hearing; that on the facts there was a probability that the plaintiffs were entitled to relief. Having approved this test, the learned Chief Justice had to indulge in a certain amount of judicial manoeuvering to explain why he was not going to adhere to it rigidly:

> "....The question, then, which has to be decided is whether on the facts before the Court there is a *probability* that the plaintiff Government is entitled to the relief for which it has asked and is still asking in the substantive proceedings. *Convention* demands that in discussing such a question a judge should as far as possible, consistently with disposing of the question immediately before him, refrain from expressing any definitive views as to the merits of the plaintiff's case. *Today, however, the Court is sitting in exceptional circumstances.* Time is short and the sands are running out. We cannot close our eyes and ears to the conditions prevailing in the world around us [15] and *a clearer expression of opinion than would be customary is*

11. See the opinion of Brandeis J. in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 80 L.Ed. 688 (1635).

12. There is evidence that the doctrine has influence here. See *Ratnavale* v. *Government of the Federation of Malaya* (1963) 29 M.L.J. 393. Here the plaintiff, who had been compulsorily retired, challenged the action of the Government on grounds, *inter alia,* that it violated Art. 135(1), (2) of the Constitution. Hepworth J. completely avoided the constitutional questions ("It is not necessary, however, for me to go into any of these questions....") and found for the plaintiff on some other ground. See also, Straits Times, March 24 1964, p. 5, giving an account of a case where Ong J. held that the entry of a condition on a taxi license that the vehicle be driven by a person of the Malay race only was invalid. Appellant had argued that such condition was *ultra vires* the Road Traffic Ordinance and the equal protection provisions of the Constitution. Ong J. although finding for appellant, did not decide the constitutional question. He felt that, due to the Malaysia Act, it was outside his jurisdiction.

    It is true that the Malaysia Act seems to vest in the Federal Court exclusive jurisdiction to determine constitutional questions. But the point is that had Ong J. felt that the determination of the constitutional question was "necessary for the determination of the proceedings", he could have stayed the proceedings and submitted the question to the Federal Court for its decision. See Rule 37(3) Federal Court (Original and Consultative Jurisdiction) (Transitional) Rules 1963, Malaysia Govt. Gazette, Leg. Supp. 53, 17 Oct. 1963. See also Sections 30, 48 of Courts of Judicature Act 1964.

13. (1963) 29 M.L.J., p. 357.

14. (1884) 27 Ch.D. 497, 506.

15. Obviously a reference to the agitation against the formation of Malaysia by Indonesia and Philipines.

clearly required in a matter which relates to the interests of political stability in this part of Asia and the interests of ten million people...."[16]

(b) *The Constitutionality of the Agreement and the Act.*

Though the Kelantan Government had put forward five different arguments in support of their case, Thomson C.J. did not feel it necessary to consider each of them separately and felt that the pith and substance of Kelantan's submissions was that changes were proposed to be made by the Malaysia Agreement and the Malaysia Act without the plaintiff Government having been consulted. He, consequently, preferred to frame the issues into one general question, that is whether Parliament or the Federal Executive "had trespassed in any way the limits placed on their powers by the Constitution". This is rather curious. It is possible that this procedure was adopted because of the interlocutary nature of the proceedings. But then, if he had considered the issues sufficiently grave to warrant a decision of the Court on merits, it is submitted that the different arguments of Kelantan would have required separate analyses as to their validity. After a decision to hear the motion on merits, it comes as a judicial anti-climax to generalise as one issue what were clearly five different bases for challenging the constitutionality of the Agreement and the Act.

The validity of the Malaysia Act. The learned Chief Justice held that in enacting the Malaysia Act, Parliament had not exceeded the powers conferred on it by the Constitution. A reading of the Constitution will show that there is very little to quarrel with this holding. Indeed it appears, to one's surprise, that the Kelantan Government during the hearing had not even "suggested that the Malaysia Act was not passed strictly in accordance with the provisions of the Constitution relating to Acts amending the Constitution."[17]

One may even suggest that the Kelantan Government's attacks should not have been directed against the Malaysia Act. Their arguments were, in fact, directed against the wide powers of amending the Constitution vested in Parliament — a power, after all, conferred on Parliament by Kelantan and the other States parties to the Federation of Malaya Agreement 1957 which established the Constitution. The swiftness with which Thomson C.J. held that the Malaysia Act was *intra vires* the Constitution does not reflect any lack of thoroughness on his part, but only serves to highlight this immense power of Parliament to amend the Constitution and the negligible say, if any, that the States have in such amendments.

The provisions for amending the Federal Constitution stand in sharp contrast with corresponding provisions in the United States and Indian Constitutions. In the United States, any amendment to the Constitution must ultimately be ratified by three fourths of the States, either through their legislatures or through conventions called for this purpose (the method of ratification depending on decision of Congress).[18] There is no question of any amendment being passed without this consent of the required majority of States, and in this respect the Constitution is as rigid as it can be.[19] In India, elements of rigidity manifest themselves in two ways. First, the Bill for amendment must be passed in each House of Parliament by a majority of the total membership of that House which must also be a majority of at least two-thirds of the members present and voting in the House. Secondly, there are several significant provisions (mainly pertaining to the federal structure and rights of States) the amendment of which require the ratification of at least half of the States.[20]

16. (1963) 29 M.L.J., p. 357, italics added.

17. *Ibid.*

18. Constitution of the United States, Art. V.

19. See, incidentally, the move on the part of some States to amend the Constitution to deprive Congress the right to choose the method of ratification — Swindler, "The Current Challenge to Federalism: The Confederating Proposals," 1963 Georgetown Law Journal, p. 1.

20. Constitution of India, Art. 368.

In the Constitution of the Federation of Malaya, however, there was[21] little to distinguish a Bill for amending the Constitution from ordinary legislation. The relevant Article 159 provided that a Bill for amendment must be supported by at least two-thirds majority of the total number of members of each House (but even this was not necessary for an amendment made for or in connection with the admission of any State.[22]) The only real element of rigidity appears to be the requirement of the Consent of the Conference of Rulers to any amendment to Articles 38 (Conference of Rulers), 70 (Precedence of Rulers and Governors), 71(1) (Federal Guarantee of State Constitutions) or Art. 153 (special position of the Malays).[23] The consent of, or consultation with, the States as such was not required for any amendment whatsoever.[24]

In view of the above, and the express provisions granting Parliament power to admit new States, it was clear that the Malaysia Act, in amending the Constitution to admit the new States and changing the name to Malaysia, fulfilled the liberal requirements of the Constitution. The gravity of the changes itself, of course, could not render the Act invalid:

> "If the steps that have been taken are in all respects lawful the nature of the results they have produced cannot of itself make them unlawful. *Fiat justitia, ruat coelum!*. . . .In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the consistuent States including the State of Kelantan."[25]

The validity of the Malaysia Agreement. This posed an even smaller problem to the Court. The Constitution vested the federal executive authority in the Yang di-Pertuan Agong and, with certain exceptions, was exercisable by him or a Minister authorised by the Cabinet.[26] The competence of the executive authority of the Federation extended to all matters within the legislative competence[27] and these included external affairs (including the making of treaties and conventions).[28] The Malaysia Agreement undoubtedly fell within this category, and as the learned Chief Justice pointed out, it was signed for Malaya by the Prime Minister and five other Cabinet members, and there being no requirement for consultation with States, the Agreement was constitutional.

(c) *The Federation of Malaya Agreement; was the Federation abolished?*

As has been pointed out Thomson C.J. considered the question to be, broadly, whether the Constitution required consultation with individual States. To conclude this note, the writer feels some comment is necessary on Kelantan's argument that the Malaysia Act abolished the 'Federation of Malaya' in contravention of the Federation of Malaya Agreement 1957.

The answer to this, of course, is that the 'Federation' was not abolished — it continues to exist with additional States and the *appearance* that it has been abolished is probably due to the change in name. Neither the Federation of Malaya Agreement

21. The position in the Constitution as now amended by the Malaysia Act is slightly different. Certain amendments to the Constitution affecting the position of the Borneo States or Singapore may require concurrence of those States: Articles 161E, 161H. But the position of the States of Malaya has not changed and the amendment provision explained here still applies.

22. Art. 159(4) (bb).

23. Art. 159(5).

24. It is a plausible argument that the Ruler is to act on the advice of the State executive council, and therefore consent of the Conference of Rulers means consent of States. There is, firstly, little consolation in this for the items the amendment of which require consent of the Conference of Rulers are not of prime significance save, perhaps for Art. 71(1). Secondly it can be argued that the articles enumerated, possibly with the exception of the special position of Malays (Art. 163), are concerned with the privileges, position, honours or dignities of the Rulers, and by virtue of Art. 38(6)(c) they can act in their discretion in granting consent to such amendments.

25. per Thomson C.J. (1963) 29 M.L.J., p. 359.

26. Art. 39.

27. Art. 80(1).

28. See Item 1 of the Federal List, Ninth Schedule of the Constitution.

nor the Constitution envisaged that the structure of the Federation would be static. Indeed the provisions for admitting new States as wall as those for amending the Constitution are evidence that the framers of the Constitution contemplated that changes in the federal structure can and may be made. It is of course a Federation with many new alterations [29] but the crucial question was not whether these alterations were desirable, but whether they were properly effected.

This limb of Kelantan's case invites provocative questions as to the effect of the 1957 Federation of Malaya Agreement. There is nothing complex in this Agreement and in the operative part of it (Section 3) the parties agreed that the eleven States would form the Federation of Malaya "under the Federation Constitution set out in the First Schedule. . . .". We have already examined the provisions for amending the Constitution. The question arises whether Parliament can do whatever it likes and introduce whatever changes it deems necessary as long as it fulfils these provisions for amendment and does not otherwise infringe the Constitution. Or, can there be situations, where certain amendments which seek to introduce serious changes would, notwithstanding the absence of any prohibitive or restrictive provisions in the Constitution, nevertheless require consultation with States? Thomson C.J. speaking of the Malaysia Act, said: [30]

> ".... I cannot see that Parliament went in any way beyond its powers *or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe* [that is, consultation with States]....".

The italicised words invite comment. They imply that there can be amendments which, even if they complied with the Constitution, attempted to effect a change "so fundamentally revolutionary" that certain conditions not specified in the Constitution (like consent of or consultation with States) would also need to be fulfilled if the amendment is to be effective.[31]

Such an approach, it is submitted, is neither correct nor desirable, and creates, rather than solves, problems. For instance, what would be the criterion to determine that a change is indeed "so revolutionary"? The problem must be met, it seems, by referring only to the instruments which brought the Federation into being.[32] The States did not impose any conditions or limitations in the Federation of Malaya Agreement, nor did they reserve any powers therein. The only condition was that the Constitution, annexed to the Agreement, was to be the basis of the Federation. It is submitted that the proper reading of these documents should be that the States are deemed to have consented to the Constitution being an exclusive declaration of the rights, liabilities and obligations of the States and the Federation. If the States intended any fundamental limitations on federal powers, they should have included them in the Constitution in 1957.[33]

Considering, further, that the States did in fact include certain limitations on on the federal power in the Constitution (e.g. requirement of Conference of Rulers to certain laws) the doctrine of *expressio unius est exclusio alterius* would apply, and the States cannot now say that there are other limitations (not in the Constitu-

29. Thomson C.J. said: "It is true in a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name." But that is not all. It is now a Federation where the relations between The Federation and States of Malaya differ from the relations between Federation and Singapore, or between the Federation and Borneo States, on various matters such as citizenship, matters of State competence, or amendments to the Constitution.

30. (1963) 29 M.L.J., p. 359, italics added.

31. This is what Kelantan seems to have had in mind when it argued that there was a "constitutional convention" which called for consultation with States as to substantial changes to be made to the Constitution.

32. *Supra*. (paragraph one of text and footnote 3).

33. Witness, on the other hand, the position taken by the Borneo States and Singapore. They wished to federate with the existing States only upon certain terms and conditions which were included in the Constitution. They have also secured provisions in the Constitution restricting the Federation's power to amend these provisions by requiring the concurrence of the States to such amendments.

tion) which nevertheless apply. The very purpose of the Constitution would be undermined. If the States now, after seven years, feel thai; they have given the centre too much power, it is their own misfortune and their proper course would be to seek amendments to, but not rely on mysterious limitations outside the Constitution.

S. JAYAKUMAR.