CONSTITUTIONAL SUPREMACY IN MALAYSIA IN THE LIGHT OF TWO RECENT DECISIONS

The concept of constitutional supremacy is set out in Article 4(1) of the Malaysian Constitution. The provision reads as follows:

> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency, be void.

Clause 1 can be analysed as making two propositions of law.

(1) That the Constitution is the supreme law.

(2) That a law passed after Merdeka Day will be void if inconsistent with the Constitution.

One question comes to mind on examining the second of the two propositions made. What is the position of laws made before Merdeka Day which are inconsistent with any provisions of the Constitution? To answer this question an examination of the cases on the question of supremacy of the Constitution would be relevant.

Assa *Singh* v. *Mentri Besar, Johore*[1]

There was a time in 1958 when the supremacy of the Constitution in Malaya was doubted *vis-a-vis* laws passed before Merdeka Day. In the case of *Chia Khin Sze* v. *Mentri Besar, State of Selangor,*[2] Sutherland J. was of the opinion that the Restricted Residence Enactment which was passed before Merdeka Day, was not affected by the supremacy clause in the Constitution. That part of the Enactment which was inconsistent with the Constitution was upheld on the ground that the Constitution did not apply to pre-Merdeka laws.[3]

This stand taken by the Court was heavily criticised[4] but nevertheless remained a part of the law until the case of *Surinder Singh Kanda* v. *Government of the Federation of Malaya.*[5] In that case one of the issues was whether the Commissioner of Police who had the power to appoint (and therefore dismiss) any police officer before the promulga-

1. [1969] 2 M.L.J. 30.
2. (1958) 24 M.L.J. 105.
3. For further discussion on the case see Loke Kit Choy "Fundamental Rights of Arrested Persons" (1968) 10 *Mal. L.R.* 133.
4. (1958) 24 M.L.J. xli; Sheridan, "Constitutional Problems of Malaysia" (1964) 13 *I.C.L.Q.* 1349.
5. (1962) 28 M.L.J. 169.

tion of the Constitution, retained that power despite Article 144(1) which vests the same power in the Police Service Commission. The argument revolved around the opening words of Article 144(1) : "Subject to the provisions of any existing law." The Government's contention was that the Constitution was subject to existing law and therefore the powers of the Commissioner of Police were preserved. The Privy Council rejected the argument and Lord Denning who delivered the judgment on behalf of the Board stated: [6]

> "If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution."

This was the death blow to Sutherland J.'s concept of limited constitutional supremacy in Malaya. His Lordship's decision to categorise laws into post and pre-Merdeka Day legislation, and to apply the supremacy clause only to post Merdeka laws, was given its final burial in two recent decisions.

In 1968, *Aminah* v. *Superintendant of Prison, Pengkalan Chepa Kelantan,*[7] was heard by Wan Suleiman J. The facts were on all fours with the case of *Chia Khin Sze* and the applicant's contention was that Article 5(3) of the Constitution should apply to him even though the provisions in the Restricted Residence Enactment made no such provision. Wan Suleiman J. expressed an opinion that *Chia Khin Sze* was wrong on the law relating to this question of constitutional supremacy,[8] and refused to follow the decision. It is regretted however, that no reasons were given for the disagreement.

The judgment in *Aminah's* case has since been endorsed by the Federal Court in the case of *Assa Singh* v. *Mentri Besar, Johore.*[9] The applicant, Assa Singh, was detained under the Restricted Residence Enactment on an order issued by the Mentri Besar, Johore. He applied for an order in the nature of *habeas corpus* on ground *inter alia* that "the provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void." The learned High Court judge referred the above matter to the Federal Court.

The case stated was discussed under two separate questions:

1. Is the Enactment contrary to the Constitution?
2. If so, is it void?

6. *Ibid.*, at p. 171.
7. [1968] 1 M.L.J. 92.
8. *Ibid.*, at p. 93. "Before proceeding any further, I must make it clear that I have considered the decision of Sutherland J. in the case of *Chia Khin Sze* v. *The Mentri Besar of Selangor* wherein the learned judge held, *inter alia,* that article 5(4) was intended to apply to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment and that, article 5(3) does not apply to cases under the Enactment. I would, with great respect, say that I am unable to agree with this decision."
9. *Supra,* footnote 1.

Five judges[10] deliberated over the matter and came to the unanimous decision that the answer to both parts was in the negative.

The constitutionality of the Enactment was examined in the light of Articles 9 and 5 of the Constitution.[11] It was held by the Court that Article 9 could not be relied on to support the applicant's claim because of Article 4(2) (a)[12] which states that the Court has no power to question the authority of Parliament to pass any law relating to public order.

It was held further that the Enactment was silent on the fundamental rights given under Articles 5(3) and (4). But this did not make the Enactment unconstitutional.[13] There was provision in Article 162[14] for the Yang di-Pertuan Agong to make modifications to

10. Azmi L.P., Ong Hock Thye C.J. (Malaya), Suffian F.J., Gill F.J. and Raja Azlan Shah J.

11. Article 9 reads: "(1) No citizen shall be banished or excluded from the Federation.

"(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

"(3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by clause (2) in respect of movement and residence."

Article 5 reads: "(1) No person shall be deprived of his life or personal liberty save in accordance with law.

"(2) Where complaint is made in a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful shall order him to be produced before the court and release him.

"(3) Where a person is arrested he shall be informed as soon as may be be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

"(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority."

"(5) Clauses (3) and (4) do not apply to an enemy alien."

12. Article 4(2): The validity of any law shall not be questioned or the ground that—

(a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

13. [1969] 2 M.L.J. 30, at p. 33; Azmi L.P.: "In my view, the Enactment is not unconstitutional merely because it does not have provisions similar to those of article 5 of the Constitution and in my view therefore the provisions of article 5 which are relevant should be read into the provisions of the Enactment." See also the judgment of Suffian F.J. at pages 39 and 41, and the judgment of Gill F.J. at page 44.

14. Article 162(4) reads: "The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law, other than the Constitution of any State, as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution; but before making any such order in relation to a law made by the legislature of a State he shall consult the Government of that State." This clause was repealed by Act 25/1963, s. 8.

any existing law, to bring it into accord with the Constitution. This power was exercisable within two years from Merdeka Day. By virtue of Article 162 (6)[15] read in conjunction with Article 4(1), the relevant provisions of the Constitution which were absent in the Enactment would be read into the Enactment by the Court so as to bring the Enactment into accord with the Constitution. Four [16] of the five judges discussed the decision of the Privy Council in *Surinder Singh Kanda v. Government of the Federation of Malaya*,[17] on the point and endorsed the judgment of Wan Suleiman J. in *Aminah* v. *Superintendent of Prison, Pengkalan Chepa*, *Kelantan*[18] as correct. It was then concluded that the Enactment was not void on ground of unconstitutionality, but was instead to be read as supplemented by the fundamental rights provided for in the Constitution.

With the case of *Assa Singh* it would seem as if the corpse of limited constitutional supremacy is finally buried. Article 4(1) is then to be read as enunciating the position that any law inconsistent with the Constitution (passed after Merdeka Day) is, to the extent of the inconsistency, void. Any law passed before Merdeka Day and found to be inconsistent with the Constitution, is to be applied with such modification as will bring the legislation within the ambit of the Constitution.

Stephen Kalong Ningkan v. *Tun Abang Haji Openg and Tawi Sli*[19]

The second facet of Article 4 which provokes comments deals with the question of judicial review of the constitutionality of any law. When can a law be challenged as contrary to the Constitution?

To answer this question it would be relevant to examine the whole of Article 4. *Clause (1)* of the Article states the supremacy of the Constitution. *Clause (2)* [20] is a restrictive clause preventing the institution of proceedings with regard to Articles 9(2) and 10(2). *Clause (3)* [21] sets out the procedure which must necessarily be followed by any party

15. Article 162(6) reads: "Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

16. Ong Hock Thye C.J. (Malaya) did not expressly deal with the case but adopted the judgment of Gill F.J.

17. *Supra*, n. 5.

18. *Supra,* n. 7.

19. [1967] 1 M.L.J. 46.

20. *Supra,* n. 12.

21. Article 4(3): The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provisions with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —
    (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
    (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

wishing to challenge a law as invalid on the ground that there has been a trespass by the Federal legislature on matters within the State sphere, or *vice-versa.* The party must apply to the court for a declaration that a law be declared invalid because there has been a trespass by the Federal legislature on the state sphere or *vice-versa.* The action must be for the sole purpose of obtaining such a declaration from the Court. Where the Federation institutes proceedings against one or more States, then the procedure in clause (3) need not be followed. *Clause (4)* [22] adds the further requirement that the leave of a judge of the Federal Court must be obtained before proceedings under *Clause (3)* may be commenced. Leave is not required in proceedings by the Federation against one or more States.

It would be apparent that Article (4) does not state the various situations where a law is contrary to the Constitution. The only discussion is in clause (3) where one ground is provided, namely that there is trespass by the federation on the state sphere or *vice-versa*. In this then the only ground whereby a law may be challenged as contrary to the Constitution?

The only case discussing this point is the case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli (No. 2).*[23]

The plaintiff who was the Chief Minister of Sarawak, was dismissed from his post by the first defendant in his capacity as Governor of Sarawak.

In this case the plaintiff claimed —

1. A declaration that the calling, meeting and vote of the Council Negri on September 23, 1966, was illegal, null, void and of no effect.

2. A declaration that his purported dismissal by the first defendant was *ultra vires,* null and void.

3. A declaration that the purported appointment of the second defendant as Chief Minister was illegal, null, void and of no effect.

4. A declaration that the plaintiff is and was at all material times from the 22nd day of July, 1963 the Chief Minister of the State of Sarawak.

5. An injunction restraining the second defendant from acting as the Chief Minister of the State of Sarawak.

22. Article 4(4): Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purposes under paragraph (a) or (b) of the Clause.

23. *Supra,* n. 19.

The grounds for the declarations sought were set out in the Statement of Claim and can be summarised under two general headings —

1. That the Proclamation of a state of Emergency made by the Yang di-Pertuan Agong on the advice of the Federal Cabinet is null, void and of no effect by reason of the fact that it was not made *bona fide* was made in *fraudem legis.*

2. That the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 is *ultra vires* the Parliament of Malaysia —

   (i) because the Proclamation of Emergency is void on ground that it was made in *fraudem legis*, or

   (ii) because it conflicts with the provisions in Article 161 (E) (2) of the Malaysian Constitution.

The defendants applied to have the Writ of Summons and Statement of Claim struck out on the ground that they involved matters beyond the jurisdiction of the Court. After deciding that the Court had jurisdiction to hear the plea of *fraudem legis* (with which we are not concerned here) Pike C.J. (Borneo) proceeded to discuss the jurisdiction of the Court *vis-a-vis* the claim that the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 was *ultra vires* the Federal Parliament because it was contrary to the Malaysian Constitution.

The defendants based their argument on the Articles of the Constitution, Article 128 and Article 4.[24] Pike C.J. first set out the two Articles named and then proceeded to examine the interpretation of the Articles. With regard to Article 4 the learned Chief Justice made the following remarks.[25]

> "Firstly, it seems clear that the intention of clause (3) of Art. 4 is to ensure that an Act of Parliament *shall only be challengeable on the ground that it makes provision in respect of a matter in respect to which Parliament has no power to make a law.*[26] Secondly, it seems equally clear that the intention of Parliament was that unless such a law was being questioned in proceedings between the Federation and a State the only method by which it is permissible to question it is by an action for a declaration that the law is invalid on the ground above stated."

He next proceeded to examine the statement of claim of the plaintiff and came to the conclusion that certain paragraphs of the statement of claim clearly questioned an Act of Parliament on the ground that it made provisions in respect of a matter in respect of which Parliament had no power to make a law. He then went on to say:[27]

24. Article 4: See *supra.*

25. [1967] 1 M.L.J. 4 , at p. 49.

26. Emphasis added.

27. [1967] 1 M.L.J. 46, at p. 49.

> "In my opinion Article 4(3) and (4) of the Federal Constitution was designed to prevent the possibility of the validity of laws made by Parliament being questioned on the ground mentioned in Art. 4 incidentally. It was for this very reason that the Article requires that such a law may only be questioned in proceedings for a declaration that the law is inivalid.In other words, the subject must ask for a specific declaration of invalidity and may not, in my opinion, by seeking declarations of another. *albeit* perfectly proper nature, question the validity of such a law."

The comments made by his Lordship are startling in that he has interpreted Article 4(3) to be the governing provision, limiting the scope of Article 4(1). According to the learned Chief Justice, there is but one ground on which an Act of Parliament may be challenged by any party [other than the Federation or a State] and that is on the ground that there has been a trespass by the Federal legislature on matters within the sphere of the State or *vice-versa.* Further, that the only method by which such a challenge may be made is by way of a declaration on this point.

Is his Lordship suggesting that there are no other grounds available to a party who wishes to challenge a law as unconstitutional? What if a law infringes the fundamental liberties? Would this be a valid ground for challenging the law as being unconstitutional? Similarly, can a party challenge the validity of a law on the ground that the prescribed procedure laid down in the Constitution has not been compiled with?

Sheridan and Groves, in their book, "The Constitution of Malaysia" set out three reasons for which a law may be invalidated.[28]

1. The federal legislature has trespassed on the state sphere or *vice-versa.*

2. A fundamental liberty has been infringed.

3. Informality of procedure, *e.g.* a law to alter the boundaries of a state has been passed by Parliament without there having been any consenting law passed by the legislature of that state (Article 2).

The learned authors were of the opinion that clause 3 was concerned with legislative competence only, that is, it is an *inter se* clause. The need to go by way of a declaration, after obtaining the leave of a federal judge, is the procedure set out in Article 4(4). Where the litigant wishes to challenge the law on grounds (2) and (3) above, he may do so in all proceedings, without the encumbrance of Article 4(3) and Article 4(4).

It is the writer's submission that the more liberal interpretation placed by the two learned authors should be preferred in defining the scope of Article 4, and that the learned Chief Justice has given Article

28. At p. 30,

4 too limited an interpretation. Further, it is contended that he is wrong in holding Article 4(3) to be the governing provision in Article 4. There is nothing in the language of Article 4 to substantiate the learned Chief Justice's views. A review of the constitutional document as a whole, tends, to suggest a contrary conclusion. It would be consistent with logic and reason to infer that where fundamental liberties are expressly provided for in a Constitution declared to be supreme, any law which abrogates or interferes with the rights so given, can be challenged as contrary to express provisions in the Constitution. To hold otherwise would be to deprive these rights of much of their content.

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