FEDERATION OF MALAYA CONSTITUTION

PART ONE

This article is the first of a series designed, when completed, to form as a whole an annotated version of the Federation of Malaya constitution.

PART I

THE STATES, RELIGION AND LAW OF THE FEDERATION

1. (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[1] are Johore,[2] Kedah,[2] Kelantan,[2] Negri Sembilan,[3] Pahang,[3] Perak,[3] Perlis,[2] Selangor[3] and Trengganu[2] (formerly known as the Malay States) and Malacca[4] and Penang[4] (formerly known as the Settlements of Malacca and Penang).

(3) The territories of each of the States mentioned in Clause (2) are the territories of that State immediately before Merdeka Day.[5]

Notes

1. Before this constitution came into force, on 31st August, 1957, the same territories had previously been joined in the Federation of Malaya (since 1948) and the Malayan Union (1946-1948).

2. Before the establishment of the Malayan Union in 1946, Johore, Kedah, Kelantan, Perlis and Trengganu were separate states under British protection.

3. From 1895 until 1909, Negri Sembilan, Pahang, Perak and Selangor were joined in an executive and judicial federation known as the Federated Malay States. From 1909 until the establishment of the Malayan Union (when the Federated Malay States was dissolved), the federation also had a federal legislature. Each component state retained its own legislature throughout.

4. Immediately before the establishment of the Malayan Union, Malacca and Penang were part (with Singapore and Labuan) of the unitary colony of the Straits Settlements. In 1946, Singapore became a separate colony, Labuan became part of North Borneo, Malacca and Penang became parts of the Malayan Union (from 1948, Federation of Malaya), and the Straits Settlements ceased to exist as a separate colony.

5. Merdeka Day was 31st August, 1957.

2. Parliament[1] may by law—(a) admit other States to the Federation;[2] (*b*) alter the boundaries of any State; but a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of that State[3]) and of the Conference of Rulers.[4]

Notes

1. Parliament, the federal legislature, is constituted by articles 44-68, and its general powers are governed by articles 73-79.

2. The most likely candidate for admission to the federation in the near future is the State of Singapore. Leaders of all main political parties in that colony support the policy popularly known as "merger."

3. The composition of the Legislative Assembly of any State is governed by the State constitution and laws. Privileges are covered by article 72 of the federal constitution, and powers generally by articles 73-79.

4. The main provision relating to the Conference of Rulers is article 38.

General note A: *comparable provisions*. (i) U.S.A. constitution, article 4, section 3, clause 1: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the consent of the Legislature of the States concerned as well as of the Congress." (ii) Australian constitution, chapter 6: section 121: "The Parliament may admit to the Commonwealth or establish new States, any may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit." Section 122 : "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit." Section 123: "The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected." Section 124: "A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected." (iii) Indian constitution, articles 2 and 3: article 2: "Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit." Article 3: "Parliament may by law— (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the

area of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State; provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the boundaries of any State or States specified in Part A or Part B of the First Schedule or the name or names of any such State or States, the views of the Legislature of the State or, as the case may be, of each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President."

General note B: *interpretation.* The Malayan and American provisions are similar in their generality, while Australia and India have more detail. In particular, the following questions and observations may be put with regard to the Malayan article. (i) Can the Malayan Parliament admit as a State a piece of populated territory not previously a State? For example, would it be possible for a few thousand square miles of Thailand to be ceded to the Federation of Malaya as a new State? It is submitted that this could be accomplished, for the word "States" in article 2 (a) relates to the status of the territory in the federation (where "State" is a technical term) and not to its previous status (when "State" is not a word of technical significance). (ii) Can the Malayan Parliament increase the number of States by subdividing existing States? The answer would appear to be that this is a simultaneous exercise of their power under *(a)* and (6) and that, assuming the answer to question (i) to be in the affirmative, and subject to the necessary consents, they can do so. (iii) Can there be secession of a State from the federation by coincidence of laws of the Parliament and of the legislature of the State concerned? This operation does not appear to be encompassed by article 2 (or any other article), and so would presumably have to be by way of amending article 1(2) by the appropriate procedure for constitutional amendments. On the other hand, the United States wording, "New States may be admitted by the Congress into this Union...," does include power to amalgamate States. (iv) The American theory is that all States are equal, but the Australian and Indian constitutions expressly allow a departure from the principle of equality for newly admitted States. In this respect, the Malayan provision seems to be analogous to that of the U.S.A. (v) Can the Malayan Parliament acquire federal territory, or, subject to the requisite consents, carve federal territory out of a State? The Congress of the U.S.A. can, and there seems no reason in principle why the Malayan Parliament should not be able to do so. Under articles 73-79, the legislative powers of Parliament are limited, but it is nevertheless possible for Parliament to legislate effectively outside these powers for a federal territory because under article 4(3) only a State can challenge federal legislation "on the ground that it makes provision with respect to any matter with respect to which Parliament...has no power to make laws," and presumably the State has standing to do so only if the federal legislation purports to apply to that State.

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

(2) In every State other than Malacca and Penang the position of the Ruler[2] as the Head of the Muslim religion in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole[3] each of the other Rulers shall in his capacity of Head of the Muslim religion authorise the Yang di-Pertuan Agong[4] to represent him.

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

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

Notes

1. It is not clear whether "Islam is the religion of the Federation" means anything. Possibly it imposes an obligation on the participants in any federal ceremonial to regulate any religious parts of the ceremony according to Muslim rites. Beyond that it is difficult to see how a federation, as opposed to the people living in it, can have any religion. Freedom of worship is guaranteed to people of all religions by article 3(1) itself and by article 11.

2. The Rulers of the Malay States are the Yang di-Pertuan Besar of Negri Sembilan, the Raja of Perlis, and the Sultans of the other seven States.

3. "...the Federation as a whole..." presumably means the federation as opposed to the States, not all the States.

4. The Yang di-Pertuan Agong is the federal head of state, usually known in English as the King. His election and tenure of office are governed by article 32.

4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day [1]which is inconsistent with this Constitution shall, to the extent of the inconsistency,[2] be void.[3]

(2) The validity of any law shall not be questioned on the ground that — (a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or (6) 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.[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 provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except — (a) if the law was made by Parliament, in proceedings between the Federation and one or more States; (6) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.[5]

Notes

1. Merdeka Day was 31st August, 1957. The constitutionality after that date of legislation passed before that date is governed by article 162.

2. This raises the issue of severance of void from valid parts or applications of legislation, which is discussed in general note B, below.

3. As to the jurisdiction of courts to hold unconstitutional legislation void, see general note A, below.

4. This clause (2) of article 4 will be considered later in conjunction with articles 9 and 10.

5. Clause (3) of article 4 is considered in general note C, below.

General note A: *supreme law and voidness of unconstitutional legislation.* If legislation inconsistent with the constitution is void it must be because the constitution is the supreme law. There does not seem to be any legislative effect in a constitution declaring itself to be the supreme law, for only a law which is supreme could effectively so declare itself. It would therefore appear that clause (1) is otiose to this extent, that unconstitutional laws would be invalidated by the courts without it. This is the position achieved in the United States and India: see *Marbury* v. *Madison* (1803) 1 Cranch 137; *Gopalan* v. *State of Madras*, A.I.R. 1950 Sup. Ct. 27.

General note B: *severance of statutes.* Any law passed after Merdeka Day, inconsistent with the constitution, is void "to the extent of the inconsistency." This raises the question: when a law has been held void to some extent, what happens to the rest? There seem to be two main possibilities: (i) the whole piece of legislation becomes inoperative, or some part or section or words of it become inoperative, on the blue pencil principle; (ii) the words, so to speak, remain intact, but are inoperative in some (unconstitutional) of their possible applications, remaining operative in other (constitutional) possible applications.

If the part of the law in question has been held void as to its only possible application, or as to its main possible application, then that part is presumably wholly void. Then, any other part of the law which is ancillary to the void part, or which fails to make sense in view of the void part being void, will also be void. This may include the whole of the rest of the law. If, on the other hand, the part of the law in question has been held void only as to one of several possible applications, it may remain valid as to another or others.

Example 1: — An Act of Parliament provides that all road passenger and freight haulage undertakings shall vest in the Yang di-Pertuan Agong, but makes no provision for compensation of expropriated owners.

It also contains provisions in detail as to dates and manner of transfer of these undertakings, for running them after vesting, and for prosecution of persons who run road passenger or freight haulage vehicles for hire after vesting day. By article 13(2) of the constitution, "No law shall provide for the compulsory acquisition or use of property without adequate compensation." The whole Act is void in this case, because all its other provisions are ancillary to or senseless without the (unconstitutional) compulsory acquisition of property without adequate compensation.

Example 2: — An Act of Parliament provides that all internal passenger and freight haulage undertakings shall vest in the Yang di-Pertuan Agong, but makes no provision for compensation of expropriated owners. It also contains provisions in detail as to dates and manner of transfer of these undertakings, for running them after vesting, and for prosecution of persons who run internal passenger or freight vehicles for hire after vesting day. By article 13 (2) of the constitution (see Example 1, above), the Act may be void in so far as it relates to road haulage, but valid in so far as it relates to railways (as these are already under public control).

In general, it will be for the first court considering a law to some extent void merely to state the extent of the voidness, any proposition as to the validity of some other extent not in issue being not binding. It is only when some later court holds the same law valid to some extent that the operation of severance is completed.

See, for a consideration of Commonwealth and American cases, Newark, "Severability of Northern Ireland Statutes" (1950) 11 *Northern Ireland Legal Quarterly* 19; subsequent consideration of the problem in Northern Ireland: *Ulster Transport Authority* v. *James Brown & Sons, Ltd.* [1953] N.I. 79; Sheridan, 17 *Modern Law Review* 249, 252-3; as to India, see Basu, *Commentary on the Constitution of India*, 3rd ed., p. 82 and authorities there cited.

General note C: *restriction of challenge to inter-governmental suits.* Article 4(3) is difficult to interpret. However, the following propositions seem obvious. First, in some cases, a challenge to the validity of primary legislation can be made only in an inter-governmental suit. Secondly, in other cases, the challenge can be made in any suit. The article cannot have been intended to confine such challenges to inter-governmental suits, for it has specified that only challenge on a stated ground is thus restricted. The difficulty is to ascertain what the ground is.

It is stated as follows: "...on the ground that [the legislation in question] makes provision with respect to any matter with respect to which [the legislature in question] has no power to make laws..."

There must therefore be some catalogue of grounds on which legislation is void, of which this is an example. In other words, there is a distinction between laws which the legislature has no power to make, and laws with respect to a matter with respect to which the legislature has no power to legislate, the latter being an example of the former.

Laws, it would appear, may be invalid for one or more of the following reasons: (i) the federal legislature has trespassed on the State sphere, or *vice versa*; (ii) a fundamental liberty has been infringed; (iii) informality, e.g., a law to alter the boundaries of a State is passed by Parliament without there having been any consenting law passed by the legislature of that State (see article 2).

It is submitted that article 4(3) restricts challenge on ground (i) to inter-governmental suits, leaving grounds (ii) and (iii) available to every litigant. The clause looks to subject-matter, not to effect or form. In other words, it is an *inter se* clause. This impression is strengthened by the consideration that the restriction of challenge to inter-governmental suits makes sense with regard to *inter se* questions but not with regard to questions of form or effect. If a State government does not challenge a federal invasion of the State legislative sphere, there is no reason why anyone else should. The State legislature would have had power to make the law anyway. But challenge on the ground of infringement of a fundamental liberty is useless unless available to individuals. The State estoppel principle does not apply, for neither federal nor State legislature had power to make such a law.

Example 1: — The federal Parliament passes an Act providing that whenever a Muslim dies in Perak his property is to pass to his second cousins twice removed in equal shares. Abdul, a Muslim residing in Perak, claims a share in the estate of a deceased relative under the Muslim law of succession in force in Perak before the passing of the Act. For the purpose of enforcing his claim, Abdul starts an action in the Supreme Court in Ipoh against Mat and Hamid, two of the deceased's second cousins twice removed, who have taken possession of the property. In this action, Abdul cannot argue that the federal Act is invalid. Under article 74 and the Ninth Schedule, List II, para. 1, "Muslim Law and personal and family law of persons professing the Muslim religion, including the Muslim Law relating to succession, testate and intestate..." are "matters" (the word used in article 74) on which the legislature of a State may make laws, subject to certain exceptional powers of Parliament under article 76, which need not be considered here. The challenge to the Act would therefore be that it made provision with respect to a matter with respect to which Parliament had no power to make laws. So, by article 4(3)(a), the Act could be questioned only in proceedings between the Federation of Malaya and the State of Perak.

Example 2: — The federal Parliament passes an Act providing that all Guatemalans living in Malacca shall work without reward as domestic servants of the Chief Minister of Malacca every Saturday and Sunday. Pedro, a Guatemalan living in Malacca, is prosecuted for absenteeism, an offence against the Act, and wishes to contend that the Act is void as contravening article 6(1) — "No person shall be held in slavery." He can do so, for slavery, forced labour, domestic service, criminal law, etc., are all matters on which Parliament has power to legislate. The challenge is not on the ground that Parliament has no power to legislate on the matter in question, but that it has no power, when legislating on any matter, to produce the result that any person is held in slavery. The result is illegal, whether essayed by Parliament, a State, or anyone else.

One other problem of some difficulty arising under article 4(3) is that of locus standi. If, for example, the Johore legislature passes an Enactment with respect to a matter with respect to which only Parliament has power to make laws, and consequently which is challengeable only in proceedings between the Federation and Johore, can the Federation (i) question the Enactment only as defendant in an action by Johore to enforce it or as plaintiff in an action in tort, breach of contract or breach of some other legal duty existing in priority to the Enactment, or (ii) question the Enactment as plaintiff in an action (e.g. for a declaration) in which their only interest is as watchdogs of the constitution? In other words, does article 4(3) give each government standing to challenge legislation without any further interest in the proceedings? It is submitted that it does not, and that alternative (i) is correct. It follows from either interpretation that the courts must apply legislation in many suits where the legislation, if challenged in the appropriate way in another suit, would clearly be held void.

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