NOTES OF CASES

MANOEUVRABILITY IN JUDICIAL INTERPRETATION

Government of the Federation of Malaya v. *Surinder Singh Kanda*

To those who dabble in the jurisprudential art of analysing the nature of the judicial process, *The Government of the Federation of Malaya* v. *Surinder Singh Kanda*[1] provides "fair game," and exposes the slot-machine theory of the function of judges. It also raises a question of considerable importance as to the interpretation of certain provisions of the Constitution of the Federation of Malaya.

The facts of the case may be briefly summarised. The respondent, an Inspector in the Royal Federation of Malaya Police, was dismissed by the Commissioner of Police. He brought an action for a declaration and other consequential relief, stating that his purported dismissal was void and that he was still a member of the said Police Force on the ground, *inter alia,* that the dismissal was contrary to Article 135 (1) of the Constitution which provides:

> No member of any of the services mentioned in paragraphs (b) to (g) of clause (1) of Article 132 [this includes the Police Force] shall be dismissed . . . . by an authority subordinate to that which, at the time of dismissal . . . . has power to appoint a member of that service of equal rank.

The constitutional issue involved may thus be resolved into the question: At the material time, who was the person empowered under the Constitution to dismiss Inspector Kanda — the Police Service Commission or the Commissioner of Police by virtue of the powers vested in him by the Police Ordinance, 1952?

The Court of Appeal (Thomson C.J. and Hill J.A.; Neal J. dissenting) reversing the decision of Rigby J. in the lower court, held in favour of the Commissioner of Police after a consideration of all the relevant provisions of the constitution which provisions we must now examine.

Article 140 provides for a Police Service Commission with jurisdiction extending to all persons who are members of the Police Service subject to Article 144, clause (1) of which reads:

> Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends . . .

The crux of the case turns on the interpretation of the phrase "subject to the provisions of existing law . . ."

The majority of the Court held them to be words of limitation, and reference was made to *Smith* v. *London Transport Executive,* where Lord Simonds said[2]:

1. [1961] M.L.J. 121.
2. [1951] A.C. 555, 565.

> The words 'subject to the provisions of this Act . . .' are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon the authority will be found.

The view of the Court therefore was that these words have the effect of limiting the jurisdiction of the Police Service Commission subordinating it to the provisions of the Police Ordinance 1952 which falls within the category of "existing law."[3] Under the Police Ordinance, the power of appointment, and thus of dismissal is vested in the Commissioner of Police (with the exception of gazetted police officers, the respondent not being a gazetted officer) and as the powers of the Commissioner of Police are continued by the phrase "subject to the provisions of existing law" in Article 144(1), the proper authority empowered to dismiss the respondent was not the Police Service Commission but the Commissioner of Police.

This line of interpretation has the effect of perpetuating on the one hand the powers of the Commissioner of Police and on the other, of refuting the existence of the Police Service Commission, since whatever power is granted to the latter under Articles 140 and 144(1), is swallowed up by the proviso in clause (1) of Article 144. Short of an amendment of Article 144, there can never be a Police Service Commission operating as provided by the Constitution because the Commissioner of Police would be entitled to say at all times that he had the power under the law as it existed prior to Merdeka Day. Aside from this negation of the Police Service Commission, the immediate practical result of such a conclusion is that all the appointments made by the Commission ever since Merdeka Day are *ultra vires* and void. [4] That this was most unfortunate was conceded by Thomson C.J., but it could not be helped since as he said, "I am bound to state the law as I believe it to be without any regard to any unfortunate consequences that may follow." [5]

It is submitted that this is a typical example of judicial technique which is frequently adopted when the court is faced with a decision it dislikes but feels compelled to accept in the absence of alternative reasoning which will avoid such a conclusion. It is not quite true to say that judges merely state the law as it is, without due regard to the consequences, for in truth, a judgment is invariably an *ex post facto* rationalization of what the judge in question thinks desirable, subject to the limits imposed by the judicial technique, *e.g.,* the decision must be one acceptable to the profession at large and can withstand the scrutiny of an appellate court.

In the case at hand, is there room for an alternative interpretation? It is submitted that such an alternative does exist as Article 144(1) is susceptible of another interpretation without any straining of language. This interpretation was adopted by Neal J. and it appears to be as cogent as that adopted by the majority, if not more, since it has the salutary effect of putting into operation the provisions of the Constitution with respect to the Police Service Commission which the constitution-makers evidently must have intended to establish or else whence the relevance of all those elaborate provisions relating to such a Commission.

The other interpretation to which Article 144(1) is susceptible is to read "subject to the provisions of existing law" as setting a limitation on the Police Service

8. Art. 160 (2): "Existing law" means any law in operation in the Federation or any part thereof immediately before Merdeka Day.

4. The submission that the Police Service Commission is not necessarily defunct since it could be said to be exercising jurisdiction over gazetted police officers as opposed to non-gazetted officers who are under the control of the Police Commissioner, is untenable because on the same argument, prior to Merdeka Day such officers were appointed by pre-Merdeka tribunal of the Civil Service Appointments and Promotions Board, which would also be perpetuated by the phrase "subject to the provisions of existing law." At any rate, Art. 140 makes it quite clear that the jurisdiction of the Commission is to extend to all officers of the Police Service.

5. Ibid. at p. 127.

Commission in so far as it relates to the *exercise* of the jurisdiction conferred upon it by Article 140 *as* opposed to the *extent* of its jurisdiction, *i.e.,* that the powers vested in the Commission by Article 140 are to be subject to the procedural limitations of Article 144(1), there being an effective repeal of the functions of the Commissioner of Police and its substitution by the Police Service Commission. A distinction should thus be drawn between *"jurisdiction"* and *"duty,"* and in Article 144(1) the limitation relates not to the jurisdiction but the duty — in other words, in the manner the jurisdiction is exercised, there being no detraction from the jurisdiction granted. An examination of the statement made by Lord Simonds in *Smith* v. *London Transport Executive* shows that there is nothing there which forces one to state that the restriction is of necessity one on jurisdiction; it may conceivably be one of procedure. Here we have the not unusual occurrence in the annals of judicial interpretation of the usage of the same case to support different view-points, which is a clear refutation of the idea that judges merely apply the law without any scope for judicial legislation. That this interpretation is far more preferable is seen in the fact that it effectuates the provisions of the Constitution which clearly contemplated the establishment of a Police Service Commission. This interpretation is fortified by the presence of Article 176 which provides,

> Subject to the provisions of this Constitution and any existing law, all persons serving in connection with the affairs of the Federation immediately before Merdeka Day shall continue to have the same powers and to exercise the same functions on Merdeka Day on the same terms and conditions as were applicable to them immediately before that day.

As was pointed out by Neal J. the necessity for the insertion of this Article is due to the fact that the promulgation of a new Constitution involves the cessation of and the loss of all powers or functions of officers prior to promulgation, including the powers of the Commissioner of Police except where these powers are permitted by the Constitution to continue in existence (in the instant case the power of the Police Commissioner being repealed and substituted by the Police Service Commission under Articles 140 and 144). This being so, Article 176 is necessary to cover the interim period, and this is made abundantly clear by the heading "Transitional Provisions" given to Part XIII of the Constitution which embodies Article 176. The implication therefore is that there is a substitution of one set of tribunals by a fresh set — the life of the former being prolonged to last until the new bodies are set up.

It is thus submitted that the combined effect of Articles 140 and 144 is to create a Police Service Commission with jurisdiction over all members of the Police Service, which Commission shall perform its duties in accordance with the principles of and the procedure created by existing law as at Merdeka Day, and hence the appropriate authority to dismiss Inspector Kanda should be the Police Service Commission instead of the Police Commissioner.

Another interesting problem is raised by Article 162 (6) in connection with this. Article 162 (6) provides: Any court or tribunal applying the provisions of any existing law which has not been modified on or after Merdeka Day under this article or otherwise *may*[6] apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

The use of the word "may" coupled with Article 4(1) which after stating that the Constitution is the supreme law of the Federation, continues "and any law passed after Merdeka Day, which is inconsistent with this Constitution shall to the extent of the inconsistency be void" render it difficult to decide whether a court or tribunal must make such modifications or has the discretion to apply the law in its inconsistent form. As has been said, "The idea of some law being modified and some not is

6. Italics are mine.

peculiar and even more so is the idea of some courts modifying the law and other courts applying the same law unmodified."[7] For this reason, the unequivocal expression by the whole court that where there is any inconsistency between existing law and the Constitution, the court is under an obligation to modify the law,[8] is wholly welcomed.

The majority of the Court upon the particular interpretation they have adopted held that there was no inconsistency and hence there was no need for modification. Meanwhile Neal J. took the view that should his interpretation of "subject to the provisions of any existing law" in Article 144(1) be incorrect, then the Court would be under the obligation to modify the law by virtue of Article 162(6) to give effect to the permanent provisions of the Constitution. It is submitted with respect that this is inconsistent. If the interpretation of Neal J. is wrong and that of the majority right, then there will be no need to apply Article 162(6) for the simple reason that there will be no inconsistency at all, since Article 144(1) itself provides for the continuance of the powers of the Commissioner of Police.

In conclusion, one is tempted to stress again the wide room for manoeuvre which judges have, whilst indulging in that delightful game of judicial interpretation so well illustrated in the case.

HUANG SU MIEN.

7. L. A. Sheridan: "Federation of Malaya Constitution." (1960) 2 *U.M.L.R.* 319.

8. *Cf. Chia Khin Sze* v. *Mentri* Besar *of Selangor* [1958] M.L.J. 105, where a detainee under the Restricted Residence Enactment (Selangor) passed prior to Merdeka sought to enforce his right to be represented by counsel under Article 5(3) in an inquiry instituted by the Mentri Besar. It was held *inter alia* that Article 5(3) is merely declaratory of existing law and hence no right of counsel existed. This ruling was provoked by Article 4(1) which after stating that the Constitution is the supreme law of the Federation, provided that any law passed after Merdeka which is inconsistent with the Constitution shall be void to the extent of the inconsistency, the implication of which being that any inconsistency between existing law and the Constitution were nonetheless valid. However this takes no notice of Art. 162(6) and it is submitted that not only was it proper for the Court to modify the law, it was in fact under a duty so to act, a matter which is now confirmed by the Court of Appeal.