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THE MALAYSIAN PUBLIC SERVICE: PENSION
LIABILITY, INSTITUTIONAL AUTONOMY AND
ADMINISTRATIVE AUTHORITY**Mohd Helmi Mat Zin^{1*}, Nazli Ismail @ Nawang²¹Faculty of Law and International Relations, Universiti Sultan Zainal Abidin, 21300 Kuala Nerus, Terengganu Darul Iman, Malaysia. mohdhelminmatzin@gmail.com <https://orcid.org/0009-0004-7768-521X>² Associate Professor, Faculty of Law and International Relations, Universiti Sultan Zainal Abidin, 21300 Kuala Nerus, Terengganu Darul Iman, Malaysia. inazli@unisza.edu.my <https://orcid.org/0000-0002-0428-7593>

*Corresponding Author

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Abstract:

Whereas the Federal Constitution provides for separate and distinct constitutional arrangements for both the federal and State public services, with specific institutional functions in the context of the federal constitution of Malaysia, doubts have been raised regarding whether and how the Federation's pension liability could affect the management of the State public service. Specifically, the question is whether the Federal pension liability would enable it to regulate issues related to appointments, qualifications, and conditions of service of the State public service. This article will consider this question through the doctrinal approach based on the analysis of the provisions of the Federal Constitution, legislation, judgments and constitutional materials concerning the history of the development of the public service regime in Malaysia. It will be shown that Articles 112 and 132(2) carry out different functions under the Federal Constitution and, thus, cannot be confused. While Article 112 seeks to protect the financial interests of the Federation due to its pension liability, Article 132(2) seeks to maintain regulatory power of appointments and conditions of service to the States' institutions of constitutional law.

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Malaysian Federalism; State Public Service; Federal Constitution; Public Service Commissions; Pension Liability; Constitutional Governance.



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Introduction

Under the Malaysian federal system, the powers of the government are constitutionally shared between the Federation and the States. The sharing of powers includes not only the legislative powers but also the executive and public administration powers. The Federal Constitution enshrines the separate public services at federal and State levels, thus emphasizing the constitutional commitment to federalism and separation of institutions.

The regulation of the public service stands in the special place in the Malaysian constitutional regime. While in most other jurisdictions civil service issues are mainly regulated by legislation, the Federal Constitution provides for the fundamental elements of the public service system. Articles 132 to 148 define the branches of the public service, constitutionally protected Public Service Commissions, as well as provide for the jurisdiction over appointments, promotions, disciplinary control and other related issues. From these provisions it follows that the organization of the public service is an integral part of the constitutional framework of the Federation and is not merely an administrative issue.

Although the Constitution makes the distinction between the federal and State public services, the application of this dual system has brought about some constitutional issues. The problem concerns the interaction between the participation of the federal government in administrative issues and the constitutional autonomy of the States. This problem becomes apparent when it comes to the pension administration and its influence on the governance of State public services. As the pension liabilities are funded via federal statutory provisions, the involvement of federal institutions in this process has sometimes been viewed as exceedingly merely the fiscal coordination and entering the realm that affects State administration.

In this way, one can formulate the core constitutional issue considered in this article. The problem is not whether the Federation is entitled to protect its fiscal interests with regard to pension liabilities but whether such fiscal responsibilities create a basis for exercising the constitutional authority with respect to appointments, qualifications or conditions of service in the State public service. Such distinction is important since, apparently, the Constitution divides the fiscal responsibility from the administrative authority providing for both in different provisions, each with its own purpose. The need for maintaining the separate spheres of governmental powers has already been recognized by the Federal Court in *Government of the State of Kelantan v Government of the Federation of Malaya* case where it was held that the

Federation and the States obtain their powers directly from the Federal Constitution and perform them within their constitutional domains.

The State Public Service Commissions are the good illustration of the federal structure of Malaysia. The success of this mechanism requires the maintenance of the constitutional boundaries of federal powers by the federal government ensuring that what belongs to the states is left to the states without any federal interference.

There are various studies of the Malaysian federalism, the constitutional status of the public service and the functions of the Public Service Commissions. However, there is very little scholarly work on the constitutional relationship between Articles 112 and 132(2) of the Federal Constitution. In particular, the influence of federal pension liability on the constitutional autonomy of State public services remains unclear. This unresolved issue creates the main gap in current research to be studied in this paper.

Based on this background, the aim of this paper is to investigate the constitutional limits of federal administrative involvement in issues connected with State public services. It will conduct the doctrinal analysis of the Federal Constitution, statutes governing pensions, judicial precedents and constitutional history to see whether the federal fiscal responsibility under Article 112 impacts the constitutional authority granted to the States under Article 132(2).

It is suggested in this article that Articles 112 and 132(2) are in different constitutional spheres. Article 112 protects the fiscal interests of the Federation by regulating the financial implications of pension liabilities while Article 132(2) reserves the authority to make appointments, qualifications and conditions of service in the respective States to their constitutional institutions. When properly understood, these provisions do not contradict each other. The distinction made in this article clarifies the constitutional framework of the roles of the Federation and the States in the administration of the Malaysian public service and contributes to the current scholarship on Malaysian constitutional federalism.

Methodology

For the purposes of this essay, a doctrinal legal research methodology is used to analyse the constitutional division of powers between the Federation and the States in connection with the Malaysian public service. Since the issues concern the interpretation of the constitutional provisions and their implications, this analysis is based on the relevant legal sources but not on empirical data.

The starting point of this analysis is the Federal Constitution with its Articles 112 and 132-148 as the basic legal framework for the constitution of public service. Relevant statutory provision is considered as well in order to identify what effects the statutory pension scheme has on the relationship of the constitutional principle of federal financial responsibility and the state administrative authority.

Besides, the relevant judicial decisions are considered with a view to identifying the relevant legal principles and how courts have resolved issues related to constitutional supremacy, institutional capacity and jurisdiction of the Federation and the States.

For better understanding of the constitutional provisions in question from the historical perspective, the relevant pre-independence constitutional sources such as the Reid Commission Report, the White Paper on the Federation of Malaya Constitution and other relevant instruments are considered as well. They provide the constitutional rationale behind the current constitution of the Malaysian public service.

Where necessary, the analysis considers some comparative Commonwealth authorities as well. These authorities provide a relevant constitutional reasoning on the same kind of issues related to federalism, institutional autonomy and the constitutional distribution of governmental powers, but not as a case law. Instead of interpreting Articles 112 and 132(2) separately, this essay interprets these provisions as an inseparable part of the constitutional scheme of public service.

Literature Review

The federal system in Malaysia as outlined in the country's Constitution is not a new topic in academic discourse. According to Wheare's theory of federalism, this system of governance refers to a state in which there is sharing of power between the central government and state governments. Other authors like Harding, Faruqi, and Lee have discussed how this theory applies in the Malaysian situation. As such, their research demonstrates that while the Constitution recognizes the role of the states, there is usually more influence exerted by the federal government in practice. However, most of this literature has focused on the structural aspects of the federation without addressing the matter of delegation of administrative functions relating to the state's public services.

Research about Malaysia's public service revolves around the design of this system as provided by the Constitution. There is recognition of the need to establish distinct Public Service Commissions in order to ensure that the recruitment and disciplining processes in the civil service are professional and devoid of any political influences. The establishment of State Public Service Commission is viewed as an expression of Malaysia's federal structure. This body of literature is useful in understanding the organization of the country's public service but is silent on issues relating to overlapping of federal administrative functions and management of state public services.

The case law has also contributed significantly to the interpretation of the country's constitution. This includes landmark decisions in *Ah Thian v Government of Malaysia* where the Federal Court affirmed that the Constitution provides for all powers enjoyed by government officials. Although it is a criminal law matter, the decision in *PP v Kok Wah Kuan* has influenced scholarly discussion on the separation of powers and relations between different constitutional entities.

There are several case law pronouncements about the legal rights of public officers in Malaysia. One such case is *Surinder Singh Kanda v Government of the Federation of Malaya* which was heard before the Privy Council. The court held that public officers should be given proper treatment when under disciplinary measures in accordance with the doctrine of natural justice. The Federal Court case of *R Rama Chandran v Industrial Court of Malaysia* confirmed that courts have jurisdiction to review administration. The Privy Council ruling in the international case of *Hinds v The Queen* was influential in holding that powers provided by the constitution cannot be overridden by other laws.

However, despite the substantial literature and case law available, there remains an unexplored area of constitutional law. Majority of the works have approached Malaysian federalism, Public Service Commissions, pensions and general matters of the constitution as separate issues. There is no specific discussion on the relationship between Article 112 and Article 132(2) of the Federal Constitution in regard to federal responsibility for pensions of public services and its implications for state management of appointment, qualifications and terms of service of the public servants.

Historical Foundations: The Reid Commission and the Malaysian Public Service System

The public service system of Malaysia was determined by the historical events preceding the formation of the country. The system provided for in the Federal Constitution was designed on purpose and reflected the desire to create a federal system of governance that involved delegation of powers between the national and state governments, keeping permanent structures intact.

One of the key factors behind such design was the establishment of the Reid Commission in 1956 that was supposed to provide the necessary guidelines on how to establish a constitution for the independent Malaya. Two major objectives of the Commission were creation of a politically neutral professional public service system and preservation of the special status of the Malay States in the new federal system.

Thus, the Commission recommended separation of the public administration in two separate structures. The independent Public Service Commissions were expected to secure the process of appointing, promoting and disciplining civil servants, while taking into account the autonomous nature of state administrations.

Later on, these recommendations became the basis for Articles 132 to 148 of the Federal Constitution. Article 132 lists sectors of public service in Malaysia, while Article 132(2) provides for the right of states to organize the processes of appointment, qualification and conditions of service in the state public services. In other words, the Constitution defines a clear distinction between federal and state administration, rather than giving all the power to the federal government.

As these provisions are stated in the Federal Constitution, they have legal validity and cannot be changed by administrative decisions. Thus, any change in the allocation of powers must necessarily reflect the constitutional provisions.

Such approach was confirmed in the case *Government of the State of Kelantan v Government of the Federation of Malaya* in which the Federal Court pointed out the dependence of the Federation and state authorities on the Constitution.

Therefore, the system of governance created after the Reid Commission was supposed to keep the balance between national integration and state autonomy. On the one hand, the federal government can be responsible for national issues, including pensions, while the state public service administration remains to be under state control unless there are some special provisions in the Constitution

Diversity Of Institutional Structures Of State Public Service Commissions In Malaysia

The Malaysian Constitution provides a federal system where the federal and state governments share power to perform public administration functions. In contrast to the creation of the single federal body for managing the public service, the Constitution gives an opportunity to organize the public service at the state level in consideration of specificities and needs of each state. One of such peculiarities of Malaysia's system is the establishment of State Public Service Commissions.

According to Article 132(1)(g), state level public services are recognized to be separate from the federal public services. Also, Article 133(2) provides the right of establishing own Public Service Commission by the state in case it wants to exercise this possibility. Thus, it is obvious that Malaysia's Constitution provides the right to the state to organize its own Public Service Commission.

However, not all states create their own Public Service Commission. This issue depends on the internal laws and constitution of each state. It means that the system of organization of the public services is diversified but such diversification is not a problem for the federal level. There are several states that established their own commission and perform the function of appointing, promoting, confirming and disciplining members of the state public service.

Specifics Of Such Commissions' Powers Are Defined By State Constitutions And Legislation.

The existence of the state commissions indicates that the responsibility for the management of state public services is delegated directly to the state but not to the federal bodies. Although the federal Public Service Department performs the functions of coordination of the whole system of public services, it does not mean that it controls the activities of the state in this issue. Such situation corresponds to the decision of the Federal Court made in case between the *Government of the State of Kelantan and the Government of the Federation of Malaya*. According to the Court's ruling, federal and state government derive their powers from the same Constitution which determines the limits of their activities. The federal government is allowed to intervene in managing of the state institutions in case there is such permission in the Constitution or law.

Thus, diversity of the way of organizing the public services reflects the constitutional principle of the distribution of the powers between the federation and the states. This principle provides the possibility to combine the activities of the federation and the states in the interests of all Malaysia. Parliament can adopt the acts concerning the federal matters, and the federal departments can participate in coordination. But it does not allow the federal bodies to exceed the limits of the constitutional competence and to intervene in issues reserved for the states.

Administrative Agreements Pre-Dating Independence and State Appointments

The placement of federal public service officers in state departments is derived from agreements that were established before the independence era, rather than from the literal interpretation of the Federal Constitution. For example, the Agreements of 1934 and 1948 as well as the Kelantan Agreement gave the British an opportunity to establish the civil service

that could function in the Malay States; hence, setting a foundation for the contemporary system.

It is often argued that historical agreements are the justification of the placement of federal public service officers in state departments. According to this argument, the systems introduced before independence have remained to be legally sound in justifying the continuation of integration of parts of the public service both in the federal and the state level.

Nonetheless, the justification requires closer consideration from the perspective of constitutional law. The Federation of Malaya Agreement of 1948 introduced the system that was administered by the British High Commissioner with extensive powers to coordinate the administration within the Federation. In line with Section 14 of the agreement, there were roles that could function in different states thus providing the framework for the civil service.

Despite the above-mentioned fact, the powers of the Malay Rulers over the public service of their state were not affected; in accordance with Section 14 of the Federation of Malaya Agreement of 1948, the disciplinary actions regarding an officer who worked in a particular state should be approved by the ruler of the state.

Similar approach was used in the Kelantan Agreement of 1948 that implied that the Ruler of Kelantan should accept federal officers appointed for federal functions. At the same time, those federal officers were permitted to perform the duties that were delegated to the officers of state public services only after obtaining the consent of the Ruler or State Legislature. Consequently, the appointment of federal officers in the state departments was not sufficient to transfer the control of state public service to the federal government.

One of the key changes took place when the Federation became independent. With the enactment of the Federation of Malaya Agreement of 1957, a new Constitution was introduced for an independent country. Hence, the new settlement, Clause 5 in particular, annulled previous agreements, including the Agreement of 1948.

Consequently, the revocation of those agreements means that the agreements of pre-independence era are not legal foundations of the federal-state relations anymore because they lost their validity due to the introduction of the new constitutional settlement.

At present, the Federal Constitution, Articles 132 to 148 in particular, introduces the division between the federal public service and the public services of each state. As per Article 132(2), each state is authorized to regulate the process of appointments, qualifications and service conditions of its public service by the Ruler or the Yang di-Pertua Negeri of the particular state. Thus, it is not implied that the federal intervention in the coordination or pensions affects the scope of powers of states.

The intentions of the framers of the Constitution can also be seen in the White Paper prior to independence; it proposed creating the State Public Service Commissions, hence giving the states the exclusive power over the public services.

Thus, the current practice of the placement of federal officers in state departments can be regarded as a remnant of administrative practices that were developed before the independence and is justified by administrative convenience rather than by necessity.

Overall, although the agreements prior to independence are useful to understand how certain traditions of administration were introduced, they cannot override the new constitutional order that was introduced in 1957. The Federal Constitution was created to provide the states with the autonomy over the public services, hence replacing the colonial system.

Constitutional Interpretation of Articles 132–148

A proper understanding of the governance of the Malaysian public service can only be achieved when one takes an overview of the entire constitutional framework, rather than concentrating on individual clauses. Articles 132 to 148 form a complex whole, defining the respective responsibilities of the Federation, States, and the different Public Service Commissions. The purpose of these provisions goes beyond merely organizing the civil service – they provide for balancing central administration and state autonomy.

First of all, Article 132 needs to be mentioned in this context since it provides information on the branches of public services in Malaysia. Instead of establishing one uniform system, the Constitution deliberately recognizes the existence of two distinct public services: that of the Federation and those of the States. It is important to remember that this provision confirms that the public services of the States are independent organizations under the Constitution, rather than extensions of the Federal bureaucracy.

The next five Articles (133-139) provide for the regulation of these two branches. In particular, the Constitution establishes a number of Public Service Commissions and specifies the extent of their competences. Such an arrangement represents a deliberate choice of the Constitutional authors, as certain decisions regarding the appointment, promotion, transfer, and discipline of members of civil service are to be left to independent Commissions rather than the respective government ministries. At the same time, Article 133 (2) provides for establishing State Public Service Commissions, thus providing additional protection of state control over its own public service administration.

Next four Articles (140-144) define the competences of these Commissions in detail. Namely, these provisions vest in the Commissions the power to perform recruitment, service confirmation, advancement and disciplinary action of members of civil service. Moreover, it is explicitly stated in the Constitution that the Commissions can only be deprived of such powers if there is a provision in the Constitution allowing it.

Finally, Articles 145-148 establish certain offices and structures, which are needed for the efficient functioning of the public service system in Malaysia. Although these provisions perform different functions, they represent a single system of organization and administration of public services in Malaysia.

As can be seen from the above, Articles 132-148 form a consistent constitutional scheme, according to which the organization of the public services is deliberately separated into spheres and responsibilities are allocated accordingly. Agencies of the Federation take care of their own matters, and the Constitution also makes sure that state public services stay under control of the corresponding state institutions. The provisions of Articles 132 to 148 hardly suggest the presence of any supervisory role of the Federal Government over state civil services.

This understanding is also confirmed by the case *Government of the State of Kelantan v Government of the Federation of Malaya*, where the Federal Court ruled that the Federation and the States obtain their powers directly from the Constitution and must perform their activities in their respective spheres. Thus, considering the above, one may conclude that Articles 132 to 148 affirm the autonomy of state public services in Malaysia.

Constitutional Restrictions on Federal Intervention in State Public Services Schemes

The core of the constitutional dispute is not the question of whether or not the Federation is responsible for funding pensions of the employees in question. This point is undisputed. The issue is rather in the right of the Federation to dictate how the State public service should hire its personnel and what qualifications and conditions of employment should be set for them.

Article 132 of the Federal Constitution is explicit enough when dealing with the separation of the public services of the Federation and the State. Moreover, Article 132(2) establishes that requirements concerning recruitment and conditions of employment in the State public services shall be established either by State law or, if such a law does not specify the matter, by the Ruler or Yang di-Pertua Negeri. It means that no connection between the matters mentioned above could be reasonably assumed on the basis of the constitution.

Such an interpretation is consistent with the overall scheme of federalism established by the Constitution of Malaysia. As it was held by the Federal Court in *Government of the State of Kelantan v Government of the Federation of Malaya*, the federal and the State governments derive their powers from the Constitution and none of them is superior to the other in relation to the matters pertaining to its domain of competence. In this respect, the argument that there is the need of federal regulation of those matters that are left for the States under the Constitution must be backed up by the latter.

One of the major arguments for the intervention in the field of the State public services is the fact that the Federation bears the expense of funding pensions of these employees. Thus, since the cost comes from the Federal purse, there should be the need of having some voice in the creation of the pensionable jobs, in the creation of the service schemes, etc.

Nevertheless, although it may look reasonable, the mentioned argument has no support in the wording of the Constitution. According to Article 112 of the Constitution, it is the obligation of the Federation to provide funding for pensions and other payments to public officers and Article 132(2) speaks about State powers to establish the requirements for employment in State public services. These provisions play different roles – while the former is to protect the financial interests of the Federation, the latter is intended to ensure State control over its internal administration.

It is worth mentioning that the separation of financing and regulation can also be found in another important law, namely the Pensions Act 1980. The said Act provides the criteria of eligibility for pensions, regulates the process of their distribution, determines the methods for covering the pension liability of the Federation. Thus, it establishes a uniform procedure for managing the financial issues but does not confer any regulatory powers to federal authorities over the constitutional functions assigned to State laws or Ruler/Yang di-Pertua Negeri according to Article 132(2).

Acknowledgement of this constitutional division does not mean the negation of the legitimate interest of the Federation in safeguarding its public finances. In case State authorities make the decision that leads to increasing the liabilities of the Federation, some consultations, financial approval or even cooperation of governments could be both reasonable and constitutional. However, these measures should concern only financial matters but not the introduction of additional powers of the Federation to regulate the matter that has been already regulated by the Constitution in favor of the States.

In sum, the connection of Articles 112 and 132(2) shows an intentional division of competences. While management of money does not necessarily imply the management of regulation and vice versa, the Federal Constitution separates these two spheres in order to preserve the federalism of Malaysia.

Constitutional Authority over Qualifications and Conditions of State Public Service

Of the various provisions governing the public service, Article 132(2) stands out in particular because it concerns the power to regulate the qualifications of appointment and the conditions of service within the State public service. What sets Article 132(2) apart from other constitutional provisions that describe structures generally is that it specifically enumerates the constitutional authorities with the power to regulate two specified matters; namely the qualifications for appointment and the conditions of service of persons who serve in the public service of the State. This means that the Constitution has assigned these functions explicitly and intentionally.

An examination of Article 132(2) shows that there are two possible sources of such regulation. According to the Constitution, these matters can be regulated by the law of the State, made by the State Legislature. Alternatively, where there is no State law on this matter or where the State law provides for it, this power is exercisable by the Ruler or Yang di-Pertua Negeri of the State. This means that, in respect of the regulation of the internal organization of the State public service, this function has been placed within the constitutional institutions of the States. It is noteworthy, however, what the Article does not say. The provision contains no mention of the Federation, the Public Service Department, the Federal Public Service Commission or indeed any other federal administrative body. Had the Constitution been intended to confer concurrent or supervisory power to the Federation on these issues, it could easily have done so. That means that the omission of the Federation is constitutionally significant.

When read in the context of the overall constitutional structure of the Malaysian Federation, Article 132(2) reinforces that conclusion. The Constitution makes a clear distinction between the powers that have been assigned to the federal institutions and the powers reserved to the States. As was recognized in *Government of the State of Kelantan v Government of the Federation of Malaya*, the source of authority of each institution lies in the Constitution, and not in the other. The power granted by Article 132(2) has thus to be understood against this background, as one that confers the power in the federal system of Malaysia.

The phrase "qualifications for appointment" has to be interpreted to mean not only the academic or professional qualifications required of prospective officers. This term has to be construed to include the legal criteria of eligibility for appointment, the classification of offices and the criteria of entry into the State public service. Similarly, the phrase "conditions of service" refers to all the legal incidents of public employment, including tenure of office, confirmation of

appointment, promotion, discipline, pay and other matters regulating the employment relationship between the State and its officers. These are basic elements of public service administration.

By recognizing this State power, it does not diminish the legitimate interest of the Federation in the case of any financial obligation. Decisions affecting pensionable establishment will inevitably affect any expenditure incurred by the Federation under Article 112 and the Pensions Act 1980. But whatever may be the need for any form of consultation and fiscal scrutiny, the constitutional power remains as per Article 132(2). Financial considerations and constitutional competence operate at different levels and should not be confused.

It is particularly relevant for the purpose of determining the legal status of the federal administrative practice in relation to State service schemes. Convenience of administration, historical practice or inter-governmental cooperation can never widen constitutional powers beyond those contained in the Federal Constitution. Any involvement of the Federation in fixing the qualifications and conditions of service within the State public service has therefore to be based upon constitutional or statutory authorization and not implied from any financial responsibility or administrative necessity.

In sum, Article 132(2), properly understood, serves a purpose beyond mere personnel administration. It preserves an integral aspect of Malaysian federalism by ensuring the constitutional independence of the States to organize and regulate their own public services. Whether Administrative Circulars and Intergovernmental Decisions Can Override Constitutional Allocation of Powers

The debates regarding the Malaysian public service do not end up with interpretations of Articles 112 and 132(2) of the Federal Constitution. They also include the discussions about the legal validity of administrative traditions that have emerged since the Independence of Malaysia. For instance, the federal authorities have referred to the decisions of the Conference of Menteri Besar and Chief Ministers held in 1973, and the subsequent Service Circular No. 14 of 1974 in justification of placement of federal officers in state departments. However, the question of the actual ability of those practices to affect the balance of constitutional powers needs clarification.

It is impossible to solve the problem through pointing to the traditionality of existing administrative practices. It is typical for the public administration to use circulars, instructions, and unofficial agreements to enhance the cooperation between federal and state authorities. While it is possible to admit that the existence of the described practices can be essential to ensure the efficiency of the process of governing, the practicality of the routine should not be equated with legal capacity. The existence of some routine cannot automatically become a reason to alter the constitutional arrangement of the powers.

The described consideration becomes especially topical when it comes to functions allocated by the Constitution to some institution. Article 132(2) is explicit concerning which entity is responsible for the issues related to the qualifications for appointments and conditions of service in the state public service. Once the Constitution has defined the responsible entity, the main question is not the ability of any other body to perform the duty, but the ability of the Constitution to provide this body with the ability to do it. The Constitution does not suggest anything of the kind.

It is possible to argue that the public service circular issued by the Public Service Department may gain legal significance as a result of repeated usage. However, this approach deserves skepticism. It is typical for circulars to clarify the way the allocated powers should be exercised. At the same time, circulars do not allow the executive bodies to exercise the powers that the Constitution has attributed to some other body. The interpretation of the executive instructions as the sources of the constitutional power is inconsistent with the structure of the Federal Constitution.

The situation is similar with the decisions adopted during intergovernmental conferences. The meetings of the Prime Minister, Menteri Besar, and Chief Ministers play a crucial role in ensuring the cooperation and consistency of the policies. However, their outcomes cannot be considered the same way as the acts adopted by the parliament. The results of the meetings are the outcome of the executive coordination that cannot exceed the legal power of the participating governments.

The decision of the Federal Court in *Government of the State of Kelantan v Government of the Federation of Malaya* makes the described point clear. According to the case, the powers of both the Federation and states emanate directly from the Constitution, not from each other. Thus, it is impossible to shift the constitutional power to any other body through executive agreements and administrative traditions unless such shifts are permitted either constitutionally or legally. Otherwise, it would be possible for the government practices to achieve what can be achieved only via constitutional amendment or proper legislation.

The durability of the specific administrative tradition cannot add any legitimacy from the constitutional perspective. At times, administrative routines exist during several decades just because they are accepted by the successive governments and work without any controversies. Even though it may indicate wide acceptance or practical benefits, it does not convert those routines into the constitutional norms. The legality is the only factor that determines the legitimacy of the practices from the constitutional perspective. Those practices that contradict the constitutional distribution of the power remain invalid regardless of their duration.

None of the discussed points implies the lack of the importance of cooperation between the federal and state authorities. The modern public administration is impossible without consultations, coordination, and common standards, particularly when there is the overlapping of the financial responsibilities. Service Circular No. 14 of 1974 can be used to coordinate actions further. However, its main function is to facilitate the exercise of the allocated powers, not to redefine their holders.

In general, it is important to distinguish where the constitutional power is exercised from the tool that allows for that. When the Constitution defines the entity that is responsible for appointments and service conditions in state public services under Article 132(2), neither the circular nor the intergovernmental decision can change this allocation unless the Constitution or any other law allows for that.

Article 112 and Federal Pension Liability

Among the most widely debated constitutional provisions relating to the State's jurisdiction on the regulation of state public services in Malaysia is Article 112 of the Federal Constitution.

Indeed, the article plays a crucial role in regulating the financial relations between the Federation and the State in terms of pensions for public servants.

Basically, Article 112 acts as a limitation of State Governments in terms of making any financial commitments for the Federation in relation to pensions, gratuities, and similar payments. As far as the provision is concerned, the States cannot unilaterally change anything in order to increase the federal pension burden.

However, it should be stressed that the scope of the application of Article 112 is wider than it is often believed to be. The article does not deprive the State Government of the constitutional right to make appointments in its own public service; instead, the article bans only such activities that could lead to an increase in the amount of pension burden of the Federation.

Administration wise, the limitation is regulated by establishment warrants issued by the Public Service Department of Malaysia to the State Secretariats. In particular, these establishment warrants contain information about the amount of pensionable posts and salary scales. When established, establishment warrants become the official number of the pensionable posts in state public service.

Using these federally approved establishment warrants, the State Governments usually stick to the limitation imposed by Article 112. As a result of sticking to the number of posts and salaries, they cannot increase the pension liability of the federal government.

Establishment warrants thus become an administrative instrument to regulate the financial relations between the Federation and the State. Although this instrument is used to regulate the financial aspect of pensionable posts, it does not override the States' constitutional right to regulate their public service in terms of appointments and terms of employment.

It should also be noted that all the actions increasing pension liability should be differentiated from personnel changes. In particular, reassignment and removal of the federal public service officers from the State posts does not increase the amount of pensionable posts in the state public service.

Thus, Article 112 should be treated as a financial protection instrument that does not allow the States to change anything in regard to public service in order to increase the pension liability of the Federation. At the same time, the article does not aim to influence the State's jurisdiction over its public service.

Along with Article 132(2), the articles make up a well-balanced division of power. Indeed, Article 132(2) allows the State Government to determine who will be appointed and what will be the conditions of service for its public servants, while Article 112 makes sure that the fiscal aspects of the decisions made by the States are not changed.

In general, the two articles can be viewed as those that regulate two different aspects of the same issue: one regulates the administrative control, the other one – the financial accountability.

To sum it up, Article 112 should be perceived as a financial instrument that limits the State's jurisdiction but not the administrative one. In case of broad interpretation of the article, the line dividing the two aspects will become vague.

Reconciliation of Constitutional Authority and Financial Responsibility in Malaysian Federalism

Regulation of employment of public servants in Malaysia finds its explanation in balancing state-level autonomy and federal control over the financial aspects of the issue. Such a balance is created via interrelation of Article 132(2) and Article 112 of the Federal Constitution and Pensions Act 1980.

Division of powers is one of the characteristic features of the federal system of Malaysia. State Governments govern their own public administration and establish the terms of service of state public servants while at the same time remaining within the constitutional framework of regulation. Right to define the criteria of who qualifies as state public servant and under what terms becomes one of the state authorities.

Such an autonomy of the states is limited by the constitutional provision of financial responsibility of the states for their actions. According to Article 112, states are prohibited from undertaking actions that would make the Federal Government liable for increased pension and retirement benefits.

The scope of application of Article 112 is financial control rather than direct management of state public service. The question of employment and appointment of public servants and qualifications of the candidates for such a position is not the concern of this article. The main goal of Article 112 is protection of the interests of the Federation from financial consequences of the decisions of the State.

Financial obligations of the Federation regarding pension issues are regulated by the Pensions Act 1980, that determines the rules for pensions, gratuities, and retirement benefits of the public service members under the federal pension scheme. With the help of this legal act the Federation acquires its financial commitment to provide pension payments.

Due to long-term nature of the financial obligations, the Government of the Federation undertakes special measures to maintain the oversight over number of pensionable posts and their remuneration level. As a result, the Public Service Department provides establishment warrants and service schemes approvals that help the government monitor number and salaries of pensionable posts of the state agencies.

Nevertheless, despite all those administrative methods, the federal constitution creates an absolute barrier for the transition of power from the sphere of management to the sphere of finance. Article 132(2) leaves State Governments responsible for establishing the qualifications and conditions of state service, while Article 112 and Pensions Act protect the Federation from extra pension obligations.

All these constitutional and legal provisions prove that the federalism of Malaysia divides public service governance into administrative and financial components. The State Governments are in charge of the public service system, but if their decisions influence the

finances of the Federation, then constitutional guarantees are activated in order to protect its interests.

Thus, Articles 112 and 132(2) are interconnected: Article 112 protects the financial interests of the Federation, while Article 132(2) – the interests of state authorities in management of public services. Consequently, the framework that was created in this way is balanced and considers needs of national financial discipline and state-level autonomy.

One of the most important conclusions from this analysis is that the Federal Constitution creates two parallel systems – of federal public service and of each State public service. Such a conclusion corresponds to the decision of the Federal Court in *Government of the State of Kelantan v Government of the Federation of Malaya* which explains that both Federation and State have their constitutional basis and operate separately within it.

The review of the above cases also proves that Article 132(2) provides each State with the constitutional authority to establish appointments, qualifications and terms of service which become possible because of state legislation and powers of the Ruler or Yang di-Pertua Negeri. Such an outcome becomes possible due to the doctrine of the supremacy of constitution illustrated in *Ah Thian v Government of Malaysia* case and obligating public authorities to abide by the Federal Constitution.

Even though the Federation assumes financial obligations according to constitutional and statutory provisions, this duty does not give it the power to manage state public services except when such powers are explicitly given in the Constitution or statutes. This conclusion is similar to the arguments presented in *Hinds v The Queen* about inability to change the constitutional divisions of governmental powers with ordinary laws or administrative actions.

The review proves that Articles 112 and 132(2) have to be interpreted together. In such a way it is possible to secure the financial interests of the Federation and, simultaneously, to protect the constitutional independence of the states in management of their public services, following the principles of Malaysian federalism.

New developments in administrative law support the conclusions made on the constitutional level. Decisions of *Surinder Singh Kanda v Government of the Federation of Malaya* and *R Rama Chandran v The Industrial Court of Malaysia* prove insistence of courts on adherence to the constitutional and legal bases of administrative powers influencing public officers. Similarly, reasoning of the Privy Council in *Hinds v The Queen* proves the idea that constitutional grants of governmental powers cannot be amended via administrative or institutional actions. All these facts imply that the public service system of Malaysia works in a purposefully created constitutional system. Coordination between the Federation and States is possible on the constitutional level only if it does not interfere with the constitutional duties of the State concerning public services management. Thus, any pension or public service coordination agreement cannot be interpreted as giving the Federation the power over matters that are by the Constitution reserved for State Public Service Commissions.

Discussion

Thus, it becomes evident that public service of Malaysia operates in accordance with the Constitution's framework, where the Federation and States may coordinate their administration,

as long as they respect the constitutional constraints imposed on State's power. Therefore, any agreements with respect to pension management and coordination of public service activities should not be considered as an attempt to impose the Federation's control over the areas delegated to State Public Service Commissions in accordance with the Constitution.

The findings described above have a significant impact on the interaction of the Public Service Department of Malaysia (JPA), State Public Service Commissions and State Governments. On the one hand, the federation coordination in areas, such as pension funding and policy development, is necessary. However, these efforts should comply with the constitutional limits of the Federation's power. It is crucial to clearly distinguish in administrative process federal financial issues from the States' constitutional responsibilities.

The results presented above will also play an important role in the future attempts of public service reform in Malaysia. In case of any efforts directed at harmonization of public service administration throughout the country, it is important to remember that division of authority established by the Constitution cannot be violated in order to achieve certain uniformity. Although better coordination between federal and State institutions could provide greater efficiency, any changes concerning issues of appointment, qualification, employment and management of State public services should comply with the States' authority described in Article 132(2), unless explicitly prohibited by the Parliament or Constitution.

Overall, the analysis performed in this paper provides a significant insight into the functioning of public administration of Malaysia. The examples provided by Articles 112 and 132(2) demonstrate that financial and administrative responsibilities are divided and exercised in different constitutional channels, serving their purposes.

Conclusion

In summary, this paper discusses the relationship between federal power and State's independence in management of Malaysia's public service. Based on the analysis of the Federal Constitution, legislation, historical documents and court decisions, it became clear that the Constitution draws a very distinct line between responsibilities of the federation and State in terms of administrative and financial functions.

The primary focus of this research is to provide an explanation as to how Articles 112 and 132(2) of the Federal Constitution are interrelated with each other. In contrast to the assumption that federal obligation of funding pensions and State responsibility of public service management are connected, this study has proven that both serve different purposes under the constitution. Article 112 protects financial interests of the Federation while Article 132(2) guarantees States' authority over appointment, qualification and employment conditions in State public services.

The implications of these findings are rather significant for the way federal and State Governments of Malaysia function. Although it is desirable and sometimes necessary for the Federation and States to cooperate in order to achieve certain goals, these efforts should always be consistent with the principles of constitutional division of power. Any administrative agreement concerning pensions and public service management should respect the States' independence, unless it contradicts the Constitution or legislation.

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