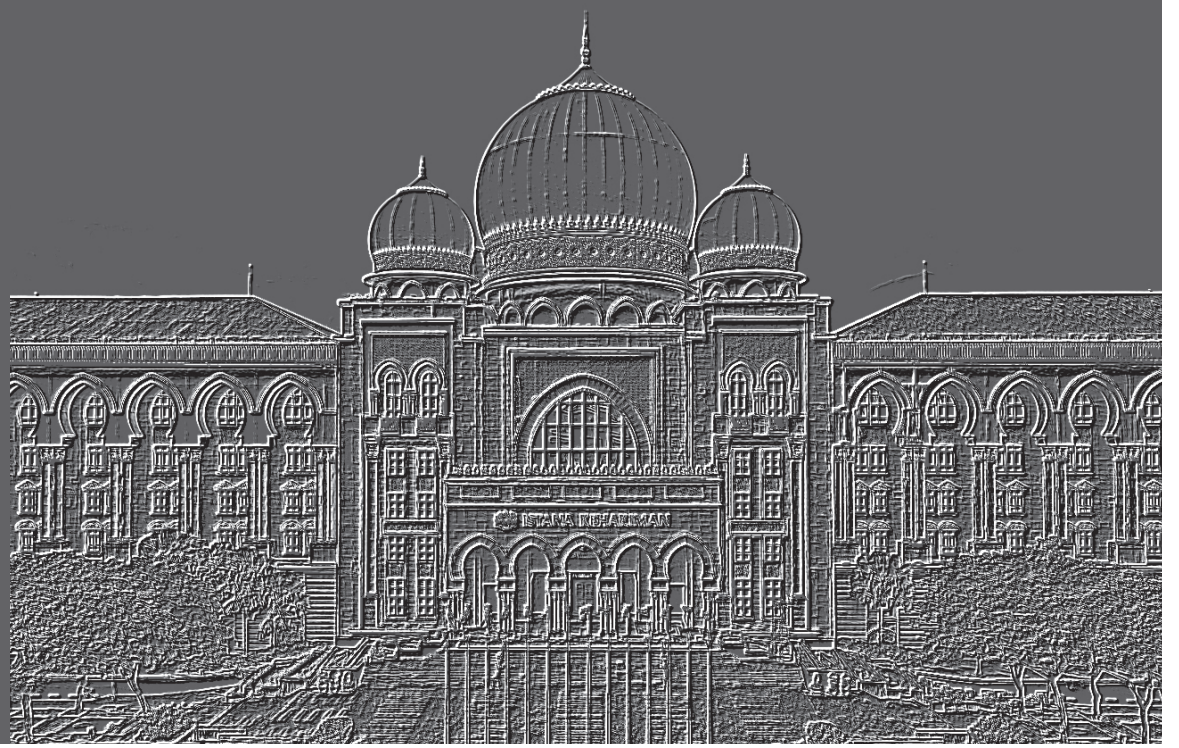
JOURNAL OF THE MALAYSIAN JUDICIARY

January 2019

Barcode
ISSN 0127-9270

JOURNAL OF THE MALAYSIAN JUDICIARY

January 2019



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MODE OF CITATION
Month [Year] JMJ page

ADMINISTRATIVE SERVICE
Publication Secretary, Judicial Appointments Commission
Level 5, Palace of Justice, Precinct 3, 62506 Putrajaya
www.jac.gov.my
Tel: 603-88803546 Fax: 603-88803549

ISSN 0127-9270
(bi-annually)

Published by
Judicial Appointments Commission
Level 5, Palace of Justice, Precinct 3, 62506 Putrajaya, Malaysia.

Editing, design and layout by THOMSON REUTERS
for RDA Press Sdn Bhd

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PREFACE

We welcome our esteemed readers to the sixth issue of the *Journal of the Malaysian Judiciary*. Building from the successful publication of the Journal since its inaugural publication in July 2016, in this issue, we continue to delve into various interesting areas of law as part of our knowledge sharing, learning process and capacity development.

You will notice in this issue that we discuss the subject of doctor-patient relationship focusing in particular on the move away from a paternalistic view of medical practice to one that places much greater weight on the autonomy of the patient. The issues surrounding Parliament's monumental power to amend the constitution are discussed in the article on constitutional amendments, whereas the article on criminal and civil proceedings highlights a just and proper approach to be adopted by the court in addressing the situation where criminal and civil proceedings in respect of a common party or parties and the same act or transaction are instituted and scheduled to proceed simultaneously. Other interesting areas of law which are analysed in this issue are sovereign immunity, domestic immunity and state-owned enterprises with the spotlight on the enforcement of an investment treaty arbitration award by investors against a state, assessing damages in defamation, the effect of the decision in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* which concerns breach of contract and remedies as well as the enforcement of liquidated damages, and the adoption of the Westminster-style government in decolonisation and state building in British Asia.

We are happy to mention that there is plenty more this Journal will offer as we march on from here into the future, in particular in the upcoming issue in the second half of this year. It is our fervent hope that you will continue to give strong support to the Journal and that more judges, legal and judicial officers, lawyers and members of academia will contribute interesting articles to it. We hope you will find the articles in this issue insightful.

Justice Idrus Harun
Managing Editor

From Paternalism to Patient Autonomy: The Changes and Implications Arising From the Decision of the Singapore Court of Appeal in *Hii Chii Kok v Ooi Peng Jin London Lucien & Anor* [2017] 2 SLR 492

by

*The Honourable Chief Justice Sundaresh Menon**

I. Introduction

[1] In May 2017, the Singapore Court of Appeal delivered its decision in *Hii Chii Kok v Ooi Peng Jin London Lucien & Anor*[1] ("*Dato' Hii*"), where it considered the question of when a doctor would be held to have fallen short of the standard of care expected of him in the provision of medical advice. In *Dato' Hii*, the patient submitted that the Singapore courts should depart from the well-established standard set by the English High Court more than 60 years ago in *Bolam v Friern Hospital Management Committee*[2] ("*Bolam*") which, as supplemented by an addendum from the later decision of the House of Lords in *Bolitho v City and Hackney Health Authority*[3] ("*Bolitho*"), has come to be known as the "*Bolam-Bolitho*" test. Given the significance of the issue at stake, the court took the unusual step of convening a five-judge panel to consider the matter; and although the State was not a party to the dispute, the Attorney-General deemed the matter of sufficient public importance that he sought and obtained leave to furnish written submissions on the points of policy involved. After careful consideration of all the relevant material, the Court of Appeal decided to depart in some respects from the *Bolam-Bolitho* test in favour of a new test.

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* Chief Justice of Singapore. This paper is a slightly revised version of a lecture that was delivered on November 19, 2018 at the Academia, Singapore General Hospital. I am grateful to my law clerks, Hairul Hakkim and Tan Ee Kuan and to my colleague Assistant Registrar Scott Tan, for all their assistance in the research for and preparation of this paper.

1 [2017] 2 SLR 492 ("*Dato' Hii*").

2 [1957] 1 WLR 582 ("*Bolam*").

3 [1998] AC 232 ("*Bolitho*").

[2] *Dato' Hii* has been of significant interest to the Singapore medical profession, and has attracted its share of both acclaim and criticism.[4] The principal objective of this paper is neither to endorse nor to respond to any of these views, but simply to explain the context of the decision and to explore some of the possible implications it might have for medical practitioners. As the author of the decision of the court in *Dato' Hii*, I wish to make clear at the outset that even though I will be commenting on that judgment in this paper, nothing here detracts from, changes or affects it, because the judgment is final, authoritative, and speaks for itself.

[3] This paper will be divided into three parts. The first section traces in broad strokes how the doctor-patient relationship has evolved over time, focusing in particular on the move from a paternalistic view of medical practice to one that places much greater weight on the autonomy of the patient. The second section discusses the law on medical negligence, focusing specifically on the extent to which Singapore has departed from the *Bolam-Bolitho* test in *Dato' Hii*. The third section explores some of the practical implications that arise from the decision.

II. The evolution of the doctor-patient relationship

[4] I will focus on the evolution of the doctor-patient relationship in the Western world, because it was against that historical backdrop that the common law has developed.

A. The period before the mid-twentieth century

[5] In the ancient world, the doctor-patient relationship was coloured by the perceived close connection between medicine and religion. Disease and disability were thought to have a supernatural origin,[5] and, consequently, all healers, whether physician or priest, "were seen

4 Dr Nigel Fong, "Adopting a more patient-centric legal standard the right call", *Today* (May 17, 2017) <https://www.todayonline.com/commentary/adopting-more-patient-centric-legal-standard-right-call> (accessed October 19, 2018) ("Fong"); Edmund Khoo Kim Hock, "Engage patients? Yes, but don't expect doctors to mind-read", *The Straits Times* (May 27, 2017) <http://www.straitstimes.com/forum/letters-in-print/engage-patients-yes-but-dont-expect-doctors-to-mind-read> (accessed October 20, 2018).

5 Sidney Smith, "Magic, Medicine and Religion: The Persistence of an Idea" (1953) 4815 *British Medical Journal* 847 ("Smith") at 847.

as sharing in the power of God or [of] the gods to overcome evil".[6] The doctor's relationship with her patient was therefore akin to that between priest and supplicant.[7]

[6] This changed with the ancient Greeks. Hippocrates and his followers saw disease as a natural phenomenon and medicine as being practised in a rational way for the patient's benefit.[8] However, the Hippocratic view was that it was the *physician alone* who would determine what would benefit the patient.[9] With the introduction of the Hippocratic model, the relationship between doctor and patient evolved from one of priest and supplicant to one of parent and child.[10] The concept of informed consent was entirely absent and communication with the patient, and deference to her preferences, was neither expected nor required *unless the doctor happened to think* that it would advance the patient's interests.[11] Indeed, in his treatise *Decorum*, Hippocrates advised doctors to take the course of "concealing most things from the patient … turning his attention from what is being done to him … revealing nothing of the patient's future or present condition".[12]

[7] It was only during the Enlightenment that it was first acknowledged that doctors might have a duty to advise their patients of the nature and risks of any contemplated treatment, but even so, this was heavily circumscribed by the principle of beneficent paternalism that informed the Hippocratic model.[13] For instance, Thomas Percival wrote in his 1803 treatise, *Medical Ethics*, that it would be a "gross and unfeeling wrong to reveal the truth" where to do so would be detrimental to the

6 Alastair Campbell, Grant Gillett and Gareth Jones, *Medical Ethics*, 4th edn (Oxford University Press, 2013), p 21.

7 Thomas S Szasz, William F Knoff and Marc H Hollender, "The Doctor-Patient Relationship and its Historical Context" (1958) 115(6) *The American Journal of Psychiatry* 522 ("Szasz, Knoff and Hollender") at 522.

8 Smith, n 5 above at 849.

9 Ruth R Faden and Tom L Beauchamp, *A History and Theory of Informed Consent* (Oxford University Press, 1986) ("*History of Informed Consent*"), p 62.

10 Szasz, Knoff and Hollender, n 7 above at 522–523; see also J Balint and W Shelton, "Regaining the initiative: Forging a new model of the patient–physician relationship" (1996) 275(11) *Journal of American Medical Association* 887 at 887–890.

11 *History of Informed Consent*, n 9 above, p 62.

12 Jay Katz, *The Silent World of Doctor and Patient* (The Johns Hopkins University Press, 2002) ("*The Silent World of Doctor and Patient*"), p 4.

13 *History of Informed* Consent, n 9 above, p 66.

patient; instead, he asserted that the patient's right to be told the truth was "suspended, and even annihilated" where its revelation would not be in her best interests[14] – and under the Hippocratic conception, it was *the doctor* who would determine just what the patient's best interests were.

[8] Percival's *Medical Ethics* was the basis for the development of the first Code of Medical Ethics ("the AMA Code") published by the American Medical Association ("the AMA") in 1847.[15] A clear streak of paternalism ran through the AMA Code. The patient was seen as immature and unable to deal with the burdens of her medical condition or to process information relevant to the proposed course of treatment. By contrast, the doctor was seen as wise, knowledgeable and responsible for making decisions in the patient's best interests. On this view, arming the patient with too much information was thought to be undesirable as it would likely impede the best efforts of the doctor. The hierarchical nature of the relationship is captured in the section of the AMA Code entitled "Obligations of patients to their physicians", in which it was provided that:[16]

> The obedience of a patient to the prescriptions of his physician should be *prompt and implicit*. He should never permit his own *crude opinions* as to their fitness to influence his attention to them. (Emphasis added.)

[9] This perspective on the doctor-patient relationship dominated the Anglo-American approach to medical ethics until the mid-twentieth century,[17] when a number of developments precipitated a sea change in thinking on the subject.[18] This started with a growing acknowledgment that there was no principled basis for denying a patient her right to choose whether to be treated or not and how so; and it then gained

14 Thomas Percival, *Medical Ethics* (Manchester: S Russell, 1803), p 166; Profs Faden and Beauchamp note that Percival consulted the then-leading British moral philosopher, Francis Hutcheson, who endorsed the practice of deceiving patients for their own benefit: *History of Informed Consent*, n 9 above, p 75.

15 *History of Informed Consent*, n 9 above, p 69.

16 *The Silent World of Doctor and Patient*, n 12 above, p 232.

17 Trudo Lemmens, "Informed consent" in Yann Joly and Bartha Maria Knoppers (eds), *Routledge Handbook of Medical Law and Ethics* (Routledge, 2015) ("Trudo Lemmens"), p 28. Indeed, the authors of *History of Informed Consent* note that until its 1980 revision, "the viewpoint on the patient-physician relationship [in the AMA Code] remained largely unchanged": n 9 above, p 74.

18 *History of Informed Consent*, n 9 above, p 143.

momentum when it became apparent after the Second World War that placing so much power in the hands of doctors could lead to serious abuse.

B. The rise of informed consent

[10] It is apposite to begin this account with the celebrated opinion of Justice Benjamin Cardozo in *Schloendorff v Society of New York Hospital*[19] ("*Schloendorff*"). Mrs Schloendorff went to the hospital with "some disorder of the stomach".[20] A lump was found in her abdomen, and she consented to an examination under anaesthesia, but specifically told the doctor in no uncertain terms that "there must be no operation".[21] Upon examination, the lump was found to be a tumour and the doctor removed it without first consulting Mrs Schloendorff. Unfortunately, she suffered complications as a result of the surgery and sued the hospital. Here was a clash between the interest of the patient in preserving her autonomy and the power of the doctor to decide what was best for her. In his judgment, Justice Cardozo famously wrote:[22]

> *Every human being of adult years and sound mind has a right to determine what shall be done with his own body*; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. (Emphasis added.)

[11] These words have been described as "a classic statement of the patient's right to self-determination";[23] and they reflect a commitment to the liberal conviction, as John Stuart Mill put it, that "[o]ver himself, over his own body and mind, the individual is sovereign".[24]

[12] The emerging notion that doctors should be required to get their patients' consent to proposed medical treatment gathered pace after the Second World War, when the Nuremberg Doctors' Trial laid bare the horrors perpetrated by Nazi physicians on concentration camp inmates in the name of science. Among other things, the Nazi physicians simulated "war wounds" on inmates by forcibly implanting wood,

19 105 NE 92 (CA NY, 1914) ("*Schloendorff*"); Trudo Lemmens, n 17 above, p 28.
20 *Schloendorff*, ibid, at [2].
21 Ibid.
22 Ibid, at [5].
23 *History of Informed Consent*, n 9 above, p 123.
24 John Stuart Mill, *On Liberty* (Hackett Publishing, 1978), p 9.

glass, and bacteria into their bodies, and infected them with diseases to study their effects.[25] Confronted by these horrors, the Nuremberg tribunal endorsed ten principles of research and experimental ethics that have come to be known as the Nuremberg Code. Principle One states in no uncertain terms that the "voluntary consent of the human subject is absolutely essential", and emphasises that the subject "should have sufficient knowledge and comprehension … to enable him to make an understanding and enlightened decision".[26] This is widely seen as the first authoritative statement of the requirement and centrality of consent in biomedical ethics.[27]

[13] Ten years after the Nuremberg Code was promulgated, the term "informed consent" was first coined in the 1957 decision of the Federal Court for the District of California in *Salgo v Leland Stanford Jr University Board of Trustees*[28] ("*Salgo*"). Mr Salgo became a paraplegic after undergoing a translumbar aortography and he sued the doctors involved, claiming that he had not been adequately informed of the risks of the procedure. The doctors admitted that disclosure as to the details of the procedure and its attendant risks had been inadequate, and the court ruled in Mr Salgo's favour, stressing the need for "the full disclosure of facts necessary to an informed consent".[29] In so doing, the court drew a crucial link between consent and information, and for good reason, for it would be meaningless to speak of consent without tying it to knowledge and information about what it was that the patient was supposedly consenting to and on what basis.[30]

[14] The final case that will be referred to in this brief survey is the 1972 decision of *Canterbury v Spence*[31] ("*Canterbury*"). Mr Canterbury

25 Horst H Freyhofer, *The Nuremberg Medical Trial: The Holocaust and the Origin of the Nuremberg Medical Code* (Peter Lang, 2004), pp 29 and 32.

26 Ibid, p 103.

27 Neil C Manson and Onora O'Neill, *Rethinking Informed Consent in Bioethics* (Cambridge University Press, 2007), p 2.

28 317 P 2d 170 (Dist CA Cal, 1957) ("*Salgo*"); Trudo Lemmens, n 17 above, p 29.

29 *Salgo*, ibid, at [12].

30 That said, however, the court also held that doctors had "a certain amount of discretion" to withhold disclosure based on their view of what the patient's welfare required. This reflected the persistent tension between the established principle of beneficence underpinning the Hippocratic model and the emerging principle of patient autonomy. It has been said that in *Salgo*, the principles "met clumsily … like two figures backing into each other in a darkened room, both struggling to reach the light": see *History of Informed Consent*, n 9 above, p 127.

31 464 F 2d 772 (DC Cir, 1972) ("*Canterbury*").

underwent a laminectomy but was not told beforehand that the procedure carried a minor risk of paralysis. Unfortunately, the risk materialised and Mr Canterbury sued the surgeon and the hospital for failing to disclose that risk. In a landmark judgment, the Court of Appeals for the District of Columbia Circuit held that a doctor had a duty of care to disclose risks that *a reasonable person in the patient's position* would likely have considered material.[32]

[15] It is important to note that the court defined the duty of disclosure by reference to the *patient's perspective*, rather than by reference to professional standards or custom. The court explained this on the basis of the principle of *self-determination*, noting that "it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie".[33] The court also observed that disclosure was different from diagnosis and treatment because it was "largely divorced from professional considerations".[34] This was an important insight into the distinction between disclosures on the one hand, which is not, strictly speaking, concerned with questions of medical skill or practice, and diagnosis or treatment on the other, which turns entirely on an assessment of such matters. It is noteworthy that 45 years would pass before the Singapore courts came round to a similar view in the *Dato' Hii* case.

[16] *Canterbury* heralded a new dawn in medical ethics in which the principle of informed consent developed with the principle of patient autonomy and started to take hold around the world. The concept of informed consent, which had first developed in the field of surgical practice, also began to filter into clinical medicine. Two illustrations of this shift are worth noting:

1. In 1981, the Judicial Council of the AMA published a statement recognising that "[i]nformed consent is a basic social policy", and rejecting "the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego [much] needed therapy".[35] This was a significant departure from the paternalistic stance taken in earlier iterations of the AMA Code.

32 Ibid, at 787.
33 Ibid, at 781.
34 Ibid, at 785.
35 *History of Informed Consent*, n 9 above, p 96.

2. In 1983, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research in the United States published a report in which it opined that the self-determination of competent patients was of "special importance", and expressed the view that where a conflict arose between a competent patient's interest in self-determination and the views of others as to her well-being, the former "should be given greater weight".[36]

[17] It was against the background of this wider shift in medical ethics that Singapore moved from the *Bolam-Bolitho* standard to that enunciated in *Dato' Hii*.

III. The law relating to the duty to advise

[18] To set the stage for the discussion that will follow, it should be recalled that a patient will only succeed in a medical negligence claim if she establishes three things: first, that the doctor owed her a duty of care; second, that the doctor breached that duty by failing to take sufficient care; and third, that that breach or failure caused the patient injury or loss. The *Bolam-Bolitho* test pertains to the second stage of the inquiry, namely, the question of whether the doctor has met the standard of care.

A. The Bolam-Bolitho test

[19] The common law had initially proceeded on the basis that it would be for a jury of lay persons to determine the standard of care to which doctors would be held. The rule – as expressed in the nineteenth century case of *Rich v Pierpont*[37]– was that a doctor was "bound to have that degree of skill which … *in the opinion of the jury*, was a competent degree of skill and knowledge" (emphasis added).[38] As one commentator has observed, such an approach "provided considerable scope for external evaluation of medical practice", and effectively made liability a function of "community standards".[39] In

36 United States, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research, *Deciding to Forego Life-Sustaining Treatment* (US Government Printing Office, 1983), p 27.

37 (1862) 176 ER 16.

38 Ibid, at 19.

39 Harvey Teff, "The Standard of Care in Medical Negligence – Moving on from *Bolam*" (1998) 18 OJLS 473 ("Teff") at 473.

my view, this traditional approach is illogical because a lay jury cannot meaningfully be expected to prescribe the applicable standard for areas involving technical skill and expertise, such as medical practice.

[20] This changed in 1957 with the decision in *Bolam*. Mr Bolam was hospitalised for treatment for depression and he consented to electroconvulsive therapy, but he was not told, before he gave his consent, of the risk that he might suffer fractures. He was also not given relaxant drugs before treatment, and effective restraints were not applied while the therapy was administered. In the course of treatment, Mr Bolam sustained serious pelvic fractures. He then sued the hospital, alleging negligence in, among other things, the hospital's failure to inform him of the risks, but his claim was dismissed.

[21] The court began by explaining that while the ordinary test of negligence in cases not involving any special skill was whether a defendant had fallen below the standard of the reasonable man, this was not the case for areas involving "special skill or competence". Instead, in these specialised areas, the applicable standard was that of "an ordinary and reasonable skilled person exercising or professing to have that special skill or competence".[40] In this way, *Bolam* moved the law past the old position, under which liability was "rooted in community standards".[41] The difficulty with the new test, however, is that it may sometimes be difficult "to identify a single professional consensus on the correct course that should have been taken".[42] To address this, the court explained that a doctor "is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art". It is this more specific standard that is now commonly referred to as the "*Bolam* test".

[22] The *Bolam* test specifically countenances that there might be no one "right" answer to the question of what should be regarded as acceptable professional conduct in any given context. This was a reflection of the court's attempt to strike a fair and acceptable balance to guide doctors, by excluding, on the one hand, idiosyncratic or outlandish behaviour, while upholding reasonable and responsible efforts to innovate, develop, and push the boundaries of medical

40 *Bolam*, n 2 above at 586.
41 Teff, n 39 above at 473.
42 *Dato' Hii*, n 1 above at [55].

science on the other. The *Bolam* test contemplates that conduct will be deemed legally acceptable as long as some who are suitably skilled would view it as such. It was for this reason that Mr Bolam's claim was dismissed. The expert evidence which was given in the case was that it was consistent with respectable medical opinion at the time to withhold disclosure of the risks of pelvic fracture (which was rare and occurred only once in about 50,000 treatments) unless the patient specifically asked a question that would require this to be mentioned.[43]

[23] It has been said that the *Bolam* test contemplates a "peer review" standard, but this notion needs to be unpacked. In a sense, all cases of professional negligence are adjudicated on some sort of a peer review standard. When a plaintiff sues an engineer or a lawyer or an auditor for negligence, the legal question is how the defendant's conduct measures up against the standard of the reasonably competent engineer or lawyer or auditor as the case may be,[44] and this in turn will be established by the expert evidence of the relevant professionals. And this is entirely reasonable, because if the issue concerns a matter of *judgment*, one would expect the defendant to succeed so long as the course he took was deemed defensible by a responsible body of opinion within the relevant profession.[45] In that sense, *Bolam* does not prescribe a different standard.

[24] But the difficulty is one of application. Over time, the courts have tended not to subject medical opinions to the sort of scrutiny they perhaps ought to have, and which they do, where the other professions are concerned.[46] The criticism was that the *Bolam* test "became no more than a requirement to find some other expert(s) who would declare that they would have done the same as the defendant did".[47] This deference to doctors was partly due to the concern of precipitating a rise in medical litigation and the fear of impeding the development of medical science.[48] It is not clear, however, that these

43 *Bolam*, n 2 above at 585 and 590.

44 (John L Powell and Roger Stewart (gen eds), *Jackson & Powell on Professional Liability*, 8th edn (Sweet & Maxwell, 2017), para 2-131.

45 *Dato' Hii*, n 1 above at [73]–[74].

46 See generally Lord Woolf, "Are Courts Excessively Deferential to the Medical Profession?" (2001) 9 Med Law Rev 1.

47 Margaret Brazier and José Miola, "Bye-Bye Bolam: A Medical Litigation Revolution?" (2000) 8 Med L Rev 85 at 85.

48 *Dato' Hii*, n 1 above at [84].

considerations justified the excessively deferential approach taken by the courts. First, there was scant evidence that a straightforward application of the *Bolam* test would have opened the floodgates; and, in any event, even if it were the case that there would be an increase in medical litigation, it would seem to be wrong in principle to relax the standard – thereby denying patients recovery in circumstances when they would legitimately be entitled to it – for the *sole* purpose of reining in the risk of litigation. Second, there was no need to water down the *Bolam* test to allow for developments in medical science because the very structure of the test, as has been explained above, already addresses this. The *Bolam* test does not require all medical decisions to be in conformity with the lowest common denominator and it accommodates reasonable experimentation, so long as what is done is in conformity with a responsible body of medical opinion.[49]

[25] Apart from these two reasons, the deference accorded to doctors has sometimes also been justified on the basis of patently questionable notions, such as the idea that the courts were ill-equipped to deal with medical evidence and that to scrutinise medical opinion would involve the court "playing doctor".[50] The former is plainly untrue, given that the courts regularly receive, and are called on to examine, medical evidence in other areas of the law (e.g. in the criminal law).[51] The latter critique must be parsed carefully. If what is meant is that the courts should not adjudicate matters over which medical experts themselves cannot agree on, then I would agree. However, that is plainly not what the *Bolam* test contemplates. As noted above, the *Bolam* test explicitly recognises that there might be more than one clinically acceptable course of action, and does not require the courts to choose between them.[52]

[26] Over time, the *Bolam* test came to be applied to all aspects of a doctor's duty, including diagnosis, treatment, and advice and disclosure. It remained unchanged in principle, though perhaps not in practice, for nearly 40 years until it acquired a gloss in the *Bolitho* case, in which it was held that the expert opinion relied upon by

49 Ibid, at [22].

50 See, e.g. *Khoo James & Anor v Gunapathy d/o Muniandy and Another Appeal* [2002] 1 SLR(R) 1024 ("*Gunapathy*") at [3] and [144].

51 See below, [28].

52 See above, [22].

the defendant doctor, to establish that his conduct was viewed as acceptable by a responsible body of opinion, must have a "logical basis".[53] In truth, the *Bolitho* addendum did not add to the *Bolam* test so much as it unpacked it, because an expert who advances a patently illogical opinion cannot be said to have acted as a reasonable and responsible skilled member of the profession would have done.[54] In hindsight, *Bolitho* might be seen to be an attempt by the House of Lords to counter the excessively deferential attitude that the courts had taken to expert opinions in the context of medical negligence and encourage greater scrutiny.

[27] Until *Dato' Hii*, the *Bolam-Bolitho* test had been consistently applied by the Singapore courts.[55] Nonetheless, over the years it was subjected to heavy attack. Two criticisms are worth noting: one general and one specific.

[28] The *general* criticism is that the test does not accord with the approach taken by the courts to expert evidence, including in relation to *medical evidence*, in other areas of the law. For example, in a criminal case, the court may have to grapple with conflicting expert medical evidence on the mental state of the accused person at the time of the offence.[56] In such cases, it is, and always has been, the *duty* of the court to decide between those competing views, and it has never been suggested that the court may decline to choose between them just because each view is supported by a body of medical opinion.

[29] While there is force to this view, it should be noted that there is a difference between medical negligence cases and other cases where

53 *Bolitho*, n 3 above at 242 *per* Lord Browne-Wilkinson; *Dato' Hii*, n 1 above at [76(d)]. The *Bolitho* addendum essentially contemplates a two-step analysis. At the first stage, the court considers whether the expert had actually directed his mind to the comparative risks and benefits relating to the matter. At the second stage, the court considers whether the medical expert has arrived at a "defensible conclusion" in the sense that it is internally consistent and not contradicted by proven facts: see *Gunapathy*, n 50 above at [64]–[65].

54 The point of the *Bolitho* addendum was simply "to remind courts and judges that they were not to abdicate the responsibility of assessing the acceptability of the defendant doctors' conduct to the medical expert(s)": see *Dato' Hii*, n 1 above at [63]–[64].

55 For example, in *Gunapathy*, n 50 above.

56 Disa Sim, "*Dr. Khoo James & Anor v Gunapathy d/o Muniandy and another appeal*: Implications for the Evaluation of Expert Testimony" [2003] Sing J LS 601 at 605.

medical evidence may be relevant. For example, in the criminal context the court is usually concerned with a question of pure fact such as the accused's state of mind or mental condition. Even if opinions vary, the court is bound to make a finding of fact, applying the usual rules of evidence, such as the rules as to the burden and standard of proof, in order to arrive at an outcome. In the context of medical negligence, however, the issue is less one of pure fact, and more of assessing the doctor's professional judgment; and the issue, as noted above, is that there may be more than one legitimate way of proceeding in any given case.[57] As already noted, the application of a "peer review" standard is not a special privilege accorded only to doctors, but is the appropriate way to approach the question of the standard of care in any setting where a professional may appropriately choose from more than one course.[58] It appears that the nub of the criticism is instead rooted in the perception that the courts have at times been unwilling to scrutinise medical opinion, and to the extent that that is true, it is a matter for the courts to set right.

[30] Then there is the *specific* criticism, which pertains to the applicability of the *Bolam-Bolitho* test to advice and disclosure. Under the *Bolam-Bolitho* standard, a doctor who fails to disclose certain information to a patient will not be found liable as long as his decision can be supported by the logical testimony of a responsible body of his peers. But if the point of disclosure is to allow the *patient* to "be armed with all the information he reasonably requires in order to make a proper decision as to whether to proceed with the proper treatment",[59] then it seems to be counterintuitive to hold that the sufficiency of disclosure should be assessed from the *doctor's* perspective.[60] This is a powerful argument, at least insofar as the area of advice and disclosure is concerned.

B. The decision in Dato' Hii

[31] Against this background, one can understand why some might have thought that the law was ripe for change in Singapore. It is necessary to briefly recount the facts of the case in which the Singapore Court of Appeal considered the question. In 2016, Dato' Hii Chii

57 See above, [21]–[23].
58 See above, [23].
59 *Dato' Hii*, n 1 above at [122].
60 Ibid, at [125].

Kok underwent scans which revealed that there were lesions in his pancreas that were *suspected*, but not known, to be cancerous. After obtaining advice from his doctors, he agreed to undergo the Whipple procedure, which is a major surgery that involves the resection and reconnection of parts of the digestive tract. Post-operative tests showed that the lesions were not in fact cancerous. As much as this was good news for Dato' Hii, it was tempered somewhat by the unfortunate fact that he suffered serious post-operative complications. Shortly after he was discharged, Dato' Hii sued his surgeon and the National Cancer Centre of Singapore ("the NCCS") for, among other things, their alleged failure to properly inform him about the reliability of the scans used for diagnosis, claiming that he would not have consented to undergoing the Whipple procedure had he been properly advised.

[32] On appeal, Dato' Hii contended that the *Bolam-Bolitho* test should not apply to the doctor's duty to advise, because it did not give sufficient weight to the patient's right to make a fully informed decision about his medical care. Instead, he invited the court to apply the test set out by the UK Supreme Court in *Montgomery v Lanarkshire Health Board (General Medical Council intervening) ("Montgomery")*,[61] where it defined the standard of care incumbent on the doctor in respect of his duty to advise the patient by reference to the *patient's* perspective.[62] Dato' Hii submitted that the question to be asked was not what *a reasonable doctor might think the patient ought to be told*, as was the case under *Bolam-Bolitho*, but what *the patient would reasonably have wanted to know*, which was the approach taken in *Montgomery*.

[33] Against this, the defendants and the Attorney-General argued that the *Bolam-Bolitho* test should be retained and applied even in this context.[63] They pointed out that medical practitioners were already required to act in accordance with the Singapore Medical Council's Ethical Code and Ethical Guidelines ("the ECEG"),[64] which requires doctors to uphold their patients' "desire to be adequately informed and … their desire for self-determination".[65] They contended on this basis that since the importance of patient autonomy was already

61 [2015] AC 1430 ("*Montgomery*").
62 *Dato' Hii*, n 1 above at [46].
63 Ibid, at [123].
64 Singapore Medical Council, *Ethical Code and Ethical Guidelines (2016 Edition)* ("the 2016 ECEG").
65 Ibid, at 13.

recognised and provided for, there was no need to depart from the *Bolam-Bolitho* test.[66] Further, they also argued that revising the test would encourage defensive medicine and drive up healthcare costs.

[34] As noted earlier, there were two main criticisms of the *Bolam-Bolitho* test.[67] The general criticism – that the *Bolam-Bolitho* test entails an abdication of the judicial function – would, if it were valid, support a wholesale abandonment of the test in all areas of medical practice. (And indeed some jurisdictions have gone down that route.)[68] However, the court rejected this argument and held that the *Bolam-Bolitho* test should continue to be applied in the areas of diagnosis and treatment.[69] The reasons provided by the court, briefly summarised, were as follows:

(a) *First*, medical science will always be engaged in a process of learning and discovery, such that there will always be legitimate differences of opinion within the profession over the propriety of the course taken by a doctor that the court is ill-equipped to adjudicate.

(b) *Second*, rejecting the *Bolam-Bolitho* test entirely might encourage therapeutic conservatism, stifle innovation, and encourage defensive medicine. In an evolving field of knowledge, practitioners who act consistently with the opinions and judgments of a body of responsible fellow practitioners should not be left to face the prospect of liability because, with the benefit of hindsight, a court might later find that more could or should have been done.

66 *Dato' Hii*, n 1 above at [123].

67 See above, [27]–[30].

68 This was the case in Australia: see, generally, *Rogers v Whitaker* (1992) 175 CLR 479 at 488–489 and *Naxakis v Western General Hospital* (1999) 197 CLR 269 at [20]. It should be noted, however, that these cases were partially reserved by statute to restore the applicability of the *Bolam-Bolitho* test to diagnosis and treatment: see Kumaralingam Amirthalingam, "Medical Negligence and Patient Autonomy: *Bolam* Rules in Singapore and Malaysia – Revisited" (2015) 27 SAcLJ 666 ("Kumaralingam") at para 11. In Malaysia, the decision of the Federal Court of Malaysia in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 was read by some as rejecting the *Bolam* test in all aspects of medical negligence: see also Kumaralingam at paras 27 and 34. However, in 2017, the Federal Court of Malaysia in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumari P & Ors* [2017] 5 MLJ 438, clarified that the *Bolam* test remained applicable for negligence in diagnosis and treatment in Malaysia.

69 *Dato' Hii*, n 1 above at [81]–[83] and [100]–[103].

(c) *Third*, the resolution of controversies and competing ideas in medical science is best left to the scientific method rather than the forensic process that is employed by a court. Thus, there is good reason to allow the medical community to be the arbiter on matters of medical knowledge.

[35] However, the court also observed that these considerations did *not* apply with the same force with respect to the doctor's duty to advise the patient, for two main reasons. First, unlike diagnosis or treatment, the question of whether a patient has been furnished with sufficient information to make an informed choice does not raise an issue of *medical science* so much as it raises a normative-ethical question of the sufficiency of disclosure in light of the nature and significance of the medical decision contemplated. This is an evaluative inquiry of the sort that courts regularly perform and in the course of which they regularly take cognisance of, but do not defer to, professional opinion.[70]

[36] Second, the court also reasoned that there was a significant difference in the role of the patient at different stages of the medical process. A patient generally plays a passive role when she is being diagnosed and undergoing treatment and in that context the issue of patient autonomy is not directly implicated.[71] This, however, is not so when the issue is whether to undergo a particular treatment or not. In that context, the patient is not "a passive recipient of care, but an active interlocutor in whom ultimately rests the power to decide what course to pursue".[72] This, in the final analysis, is nothing more than a recognition that it is for the patient to decide what may be done to or for her because it is her life and the consequences of her decision will be borne by her alone. If this is accepted, it follows that the court should also adopt the *patient's* perspective in determining whether sufficient information was provided to enable her to make that choice.

[37] For these reasons, the court decided to depart from the *Bolam-Bolitho* test as far as advice was concerned. In its place, it adopted a modified version of the *Montgomery* test.[73] The court held that where

70 Ibid, at [125]; see also *Montgomery*, n 61 above at [115].
71 *Dato' Hii*, ibid, at [93].
72 Ibid, at [113].
73 *Montgomery*, n 61 above at [87].

a patient wishes to bring a claim for the negligent provision of advice, the court should proceed in three stages:[74]

(a) First, the patient must identify the exact nature of the information that she alleges was not given to her and establish why that information should be regarded as relevant and material.

(b) Second, if the court is satisfied that the information was relevant and material, the court must determine whether the doctor had that information.

(c) Third, if the doctor is found to have been in possession of the information, the doctor must provide a satisfactory justification for the non-disclosure. If he fails to do so, he will be found to have acted negligently.

[38] I briefly elaborate on each of these three stages below.

C. The three stages examined

[39] At the first stage, the court adopts the vantage point of the patient in considering whether the doctor had failed to provide any relevant and material information.[75] The law does not require a doctor to disclose *everything* which an individual patient *wishes* to know. That would require the doctor to be a mind-reader and this is not what the law can or does demand.[76] Instead, the test is relevance and materiality. In broad terms, there are two categories of information which should be disclosed.

[40] The first is information which a *reasonable patient in the position of the particular patient* would consider relevant and material to her decision.[77] Practically speaking, this requires a doctor to exercise professional judgment in deciding what information would be necessary for an informed choice. With regard to risks, the assessment will be based on the probability of a risk arising and the severity of the consequences. As a rule of thumb, remote risks with minor consequences will generally

74 *Dato' Hii*, n 1 above at [132]–[134].
75 Ibid, at [137].
76 Dr Michael Loh Toon Seng, "Let's not mix up efficient diagnosis with mind reading", *The Straits Times* (June 7, 2017) <http://www.straitstimes.com/forum/letters-in-print/lets-not-mix-up-efficient-diagnosis-with-mind-reading> (accessed September 16, 2018).
77 *Dato' Hii*, n 1 above at [132].

be immaterial, while likely risks with severe consequences will almost certainly be risks that should be disclosed.[78]

[41] Although the standard is objective, it is applied from the viewpoint of the particular patient before the doctor. For example, suppose that a doctor is advising a professional model to undergo facial surgery which carries a small risk of scarring – that risk would probably have to be disclosed because most reasonable persons in the model's position would place significance on the risk of scarring.[79]

[42] The second category of information which should be disclosed is information *which the doctor knows or has reason to know* was of special concern to the patient.[80] Again, this does not require mind-reading; nor does it require a doctor to interrogate the patient on all her personal traits and preferences. Generally speaking, the onus will be on the patient to bring her unique concerns to the doctor's attention, either by directly expressing them or by asking questions which reveal the presence of such a concern. For example, a doctor is not expected to know that a patient is a keen amateur football player and would thus be especially concerned about risks to joint mobility unless the patient shares this with the doctor.[81] Likewise, a doctor cannot be expected to know that the patient is an amateur part-time model unless this is conveyed to the doctor.

[43] In thinking about the disclosure of information, it might be helpful for doctors and patients to view their undertaking as a cooperative enterprise. Patients must be candid and open in seeking counsel; while doctors should strive to be helpful in advising and educating their patients. The duty to advise should not be seen as a box-ticking exercise to be completed as a matter of formality.[82] Merely getting a signature on a consent form serves no purpose and will not be regarded as sufficient if the doctor has not in fact sought to ensure

78 Ibid, at [140].

79 Ibid, at [144], citing Rob Heywood, "Subjectivity in risk disclosure: considering the position of the particular patient" (2009) 25(1) *Professional Negligence* 3 at 7. A similar example was given in a letter written to the *Today* newspaper: see Fong, n 4 above.

80 *Dato' Hii*, n 1 above at [145].

81 Ibid, citing José Miola, "On the Materiality of Risk: Paper Tigers and Panaceas" (2009) 17 Med L Rev 76 at 103.

82 JK Mason, GT Laurie and M Aziz, *Mason and McCall's Smith Law and Medical Ethics*, 8th edn (Oxford University Press, 2011), para 4.114.

that the patient actually understands what it is that she is consenting to. And in like manner, overloading the patient with an "information dump" will be unhelpful and likely to undermine the patient's ability to make an informed choice by leaving her confused.[83] The ideal is shared decision-making, where both, after a rational and informed deliberation of the available options, are able to reach agreement on the best clinical decision,[84] though it must be emphasised that the ultimate decision rests with the patient.

[44] If the patient shows that relevant and material information was not disclosed, the court moves on to the second stage, which relates to whether the doctor had the relevant information when he was advising the patient. This is important because if the doctor did not have the information, he could not have withheld it. But this should not be taken as a charter for ignorance. A doctor who is unaware of a risk because he did not conduct the necessary test might not be liable for failing to *advise*, but he might well be liable for negligence in *diagnosis*. Whether that is so will, as noted earlier, turn on the application of the *Bolam-Bolitho* test.[85]

[45] If the first two stages are satisfied, the doctor has a further chance to exonerate himself at the third stage by establishing a justification for non-disclosure. In *Dato' Hii*, the court deliberately chose not to draw up a comprehensive list of such reasons. Instead, it recognised three of the more commonly invoked exceptions, namely, waivers, emergencies, and cases where patients might suffer serious physical or mental harm due to disclosure which fall under the rubric of what has been described as the "therapeutic privilege".[86]

IV. Implications and consequences

A. Change in perspective; not standard

[46] Turning to the implications of the *Dato' Hii* decision, it will be apparent that the most fundamental change wrought by *Dato' Hii* is a

83 *Dato' Hii*, n 1 above at [143].

84 Judy M Laing, "Delivering informed consent post-*Montgomery*: Implications for medical practice and professionalism" (2017) 33 *Journal of Professional Negligence* 128 at 136; see also Tracey Evans Chan and Prem Raj Prabakaran, "Biomedical Law and Ethics" (2017) 18 SAL Ann Rev 100 at para 6.21.

85 *Dato' Hii*, n 1 above at [133].

86 Ibid, at [133]–[152].

shift in perspective from one in which the adequacy of advice is viewed through the lens of the *physician* to one in which the perspective of the *patient* is adopted. This means, among other things, that a doctor will not be free of liability merely because *other doctors* might *also* have chosen not to disclose the information in question. It also means that a doctor will not be able to justify not disclosing relevant information on the basis that he did not want to worry the patient into turning down the course of treatment he thought would be best for her, save in the exceptional case where therapeutic privilege applies.

[47] However, it is important to note that at a practical level, *Dato' Hii* did not in fact change the terrain. This is because the shift from paternalism to patient autonomy in Singapore had *already* taken place in the context of medical ethics. This can easily be validated by reference to the 2002 edition of the ECEG ("the 2002 ECEG") which provided that:[87]

> It is a doctor's responsibility to ensure that a patient under his care is ***adequately informed*** *about his medical condition and options for treatment so that he is able to* ***participate in decisions*** *about his treatment*.
>
> (Emphasis added in italics and bold italics.)

[48] This is put in even stronger terms in the 2016 edition of the ECEG ("the 2016 ECEG"), which begins with the affirmation that "Patient autonomy is a fundamental principle in medical ethics and must be respected. Patients are entitled to have accurate and sufficient information to be able to make their own decisions about their medical management."[88] It then provides that doctors must:[89]

> … ensure that patients are made aware of the purpose of tests, treatments or procedures to be performed on them, as well as the benefits, *significant limitations,* ***material risks*** *(including those that would be* ***important to patients in their particular circumstances****) and possible complications as well as alternatives available to them*.
>
> (Emphasis added in italics and bold italics.)

87 Singapore Medical Council, *Ethical Code and Ethical Guidelines (2002 Edition)* ("the 2002 ECEG"), Ethical Guideline 4.2.2.

88 The 2016 ECEG, n 64 above, Ethical Guideline C5.

89 Ibid, Ethical Guideline C6(3).

[49] In short, the 2016 ECEG provides for a doctor to disclose to the patient all information which the *patient* would consider relevant and material. This is essentially the same requirement that was recognised by the court in *Dato' Hii*. It should be noted that the 2002 ECEG and the 2016 ECEG also laid down *obligations* for doctors, and not simply best practices or suggestions. This much is clear from the mandatory language of the guidelines[90] and from the explanatory notes to the 2016 ECEG.[91]

[50] In this light, it becomes apparent, as the Singapore Medical Council noted in its December 2017 Newsletter, that *Dato' Hii* did not in truth increase the *demands* on doctors because doctors were *already* ethically bound to act in line with the requirements spelt out in the case.[92] Instead, what the court was simply doing was to allow the law of medical negligence to catch up with the prevailing ethical norms. To the extent that the sphere of *legal liability for negligence* has widened to hold doctors liable in circumstances where previously they might not have been, this was thought by the court to be an essential change. That was why the court rejected the arguments advanced on behalf of the defendants in *Dato' Hii* that there was no need to change the law in relation to *Bolam-Bolitho* because the ECEG already incorporated the principle of patient autonomy. That argument was flawed as it amounted to a submission that the medical community should be content with paying lip service to the fundamental importance of patient autonomy and not be concerned with giving it real substance.[93]

B. Practical examples

[51] But what exactly does the decision in *Dato' Hii* mean for doctors as a matter of *practice*? The answer is that *it depends*, because the test

90 See, e.g. ibid, Ethical Guideline C5 and the 2002 ECEG, n 87 above, Ethical Guideline 4.2.4.1.

91 "[T]he ethical guideline is an *overriding duty* … [which] *must be upheld* unless circumstances prevent it" [emphasis added]: Singapore Medical Council, *Explanatory Notes – Principles of Revised ECEG*, the 2016 ECEG, n 64 above, para 9.

92 "The [2016 ECEG] already requires doctors to inform patients of the purpose of tests, treatments or procedures, the benefits, significant limitations, material and more common risks (including those that would be important to patients in their particular circumstances) or possible complications, as well as the alternatives which are available. … *Accordingly, doctors need not see the [Dato' Hii] decision as something that drastically alters how they practise.*" (Emphasis added.): see Singapore Medical Council, *SMC News*, December 2017, Issue 09, p 21.

93 *Dato' Hii*, n 1 above at [124]–[126].

is extremely fact-sensitive and it is impossible to be prescriptive. That being said, it is useful to consider some of the case law in an attempt to extract some practical guidance that might be helpful.

[52] First, it is useful to have regard to the facts of *Dato' Hii*. Applying the new test, the court found that the doctor and the NCCS had in fact met the required standard. This was because voluminous written records in that case showed that Dato' Hii's doctors had informed him, among other things:[94]

(a) that the scans did not conclusively show whether the lesions were cancerous, and also articulated the degree of certainty they had in the diagnosis;

(b) of the likelihood and magnitude of consequences of the risks associated with the Whipple procedure; and

(c) of the alternatives to undergoing the Whipple procedure immediately, such as waiting for some time before undergoing a second scan or removing just one of the two lesions, which would not have required him to undergo the Whipple procedure.

[53] On the facts, the court found this sufficient to meet the doctors' duty of fair advice and disclosure of the relevant risks. The court rejected Dato' Hii's argument that the doctors should also have informed him of, among other things, the number of times the scan conducted on him had been performed on other patients in the past and the results in those cases. The court took the view that such additional material was not information that a reasonable patient would have considered relevant and material, and that bombarding Dato' Hii with such details could instead have hampered his understanding of, and focus on, the more important issues. Importantly, the court noted that Dato' Hii had not asked any questions which suggested that he was, for his own idiosyncratic reasons, especially concerned with such details.[95]

[54] The second case which will be considered is *Montgomery*. Briefly, the facts were these. Mrs Montgomery, an expectant mother, was diabetic which meant that there was a 9–10% risk of shoulder dystocia if she delivered her baby by means of normal vaginal delivery. Her

94 Ibid, at [191]–[196].
95 Ibid, at [186]–[187].

doctor failed to inform Mrs Montgomery of this risk because, in the doctor's experience, where she disclosed such information, most women elected to undergo a caesarean section, and she did not consider this to be "in the maternal interests for women".[96] Unfortunately, the risk materialised. Due to difficulties with the delivery, the baby was deprived of oxygen for about 12 minutes and was later diagnosed with cerebral palsy.[97] Mrs Montgomery sued her doctor for negligently failing to advise her on the risk of shoulder dystocia.

[55] The UK Supreme Court found that the doctor was under a duty to disclose the risk to Mrs Montgomery because it was a substantial one.[98] Critically, the court held that the doctor was not entitled to have withheld the risks of vaginal delivery based on *the doctor's belief* that a caesarean section would not be in the *patient's best interests*. The decision whether to undergo such treatment, the court stressed, was one for the patient to make, and while the doctor was entitled to offer her view on why one course might be preferable to another, she first had to apprise the patient of both options and the pros and cons of each.[99]

[56] Third, there is another English case, *Sebastian Webster (a child and protected party, by his mother and Litigation Friend, Heather Butler) v Burton Hospitals NHS Foundation Trust*, which also concerned a pregnancy.[100] The facts were also tragic. Two months before delivery, the mother had undergone an ultrasound scan which revealed, among other things, that the foetus was small for its gestational age and that there was excess liquor in the womb. There was an emerging, although incomplete, body of material suggesting that where both these factors were present, any delay in delivery would result in an increased risk in perinatal mortality. However, the mother was neither advised of this nor did the hospital offer to induce labour despite the fact that the mother had spent more than 10 days in the hospital after she was due. Unfortunately, the patient's baby was born with cerebral palsy, and it was undisputed that this could have been avoided if the baby had been delivered two or three days earlier.

96 *Montgomery*, n 61 above at [13].
97 Ibid, at [13] and [22].
98 Ibid, at [94].
99 Ibid, at [95].
100 [2017] EWCA Civ 62.

[57] The patient sued the hospital for failing to advise her properly and the court ruled in her favour. It is relevant to note that although the body of material indicating the increased risk in perinatal mortality was not complete and there was only a small statistical base for it, the mother had said that if there had been *any* suggestion of risk, she would have opted for early delivery. In the circumstances, given that the consequences of the risk materialising were grave but could easily have been averted by a course that was readily available and involved virtually no additional risk to either mother or child (namely, the early inducement of labour), the court held that disclosure should have been made.

[58] Fourth is yet another English case – *David Spencer v Hillingdon Hospital NHS Trust*[101] – which was decided in 2015, shortly after *Montgomery*. The patient in that case underwent a hernia operation but was neither advised of the post-operative risks of deep vein thrombosis and pulmonary embolism, nor of the symptoms that might indicate the development of these conditions. As a result, he did not seek prompt medical treatment when he felt pain in his calves the day after his operation and only did so more than two months later, after his condition had worsened significantly. He then successfully sued the staff of the hospital for failing to advise him of the symptoms that would have put him on notice of the need to seek timely medical treatment. The court found that these symptoms were typical and indicative of a *potentially fatal* condition that could have been more easily treated with immediate medical attention and ought to have been disclosed to the patient before the operation.

[59] Finally, there is the decision of the Supreme Court of New South Wales in *Morocz v Marshman*.[102] Ms Morocz underwent a surgery to disrupt her sweat glands. After the surgery, she suffered from various side effects, such as pain and nausea, and she sued the doctor for failing to warn her of the possible side effects. The court ruled against her, finding that the doctor had advised her of all material risks, partly by way of a pre-operative discussion to warn her of the risks and side effects of the operation and partly by providing her with a brochure, which served as a reminder of the most salient risks. Importantly, the court stressed that it was not the duty of a doctor to advise a patient in

101 [2015] EWHC 1058 (QB).
102 [2015] NSWSC 325.

precise medical terms but rather to refer in "an easily comprehensible way" to the possible risks and side effects.[103]

[60] Although the judicial development of any set of principles must await a suitable case, and without in any way committing to any judicial view on this, let me distill some rules of practice that might be drawn from these cases:

(a) First, it appears that there is no need for the doctor to undertake a detailed and closely reasoned analysis of each and every risk associated with a proposed operation; instead, what is critical is that the *essence* of the *material* information must be conveyed.

(b) Second, it does not appear to be necessary for the doctor to strive for absolute precision about the risk percentages or to use particular medical jargon. What is crucial is to ensure that the advice is generally and reasonably accurate and conveyed in terms that would be comprehensible to the patient.

(c) Third, a doctor's duty might sometimes extend to providing information on the relevant risks and uncertainties of a proposed treatment, even where the science on the issue is developing, especially if the consequences of the risk materialising are likely to be grave and are capable of being readily addressed.

(d) Fourth, a doctor might be required to disclose not only the material risks, but also, in certain cases, the symptoms that would allow a patient to appreciate that a risk may have materialised.

[61] Additionally, doctors might consider adopting some or all of the following methods or practices, where appropriate, when advising patients:

(a) First, tools such as anatomical models, drawings and online videos can be used to assist with the process, although they should generally be accompanied by oral explanations.

(b) Second, leaflets, checklists, brochures and the like are useful explanatory aids, but these should supplement and cannot substitute the doctor's efforts to ensure the patient is adequately informed.

103 Ibid, at [109].

(c) Third, adequate time should be given to the patient to allow her to consider whether to undergo the procedure. Consent should generally not be obtained at the door of the operating theatre.[104]

[62] These are just some rules of thumb that might be useful in practice. In Singapore, the general position appears to be that as long as a doctor involves the patient in the decision-making process, and advises her in accordance with the guidelines in the 2016 ECEG, which have been carefully and prudently drawn up after consultations,[105] the doctor will almost invariably be on the right side of the law.

C. Importance of good record keeping

[63] Finally, there is the matter of the keeping of good medical records, which often arises in the context of disputes over a doctor's failure to advise. As a starting point, it should be noted that the maintenance of proper medical records has been recognised in Singapore as an independent ethical duty since 2002. Ethical Guideline 4.1.2 of the 2002 ECEG provided that:[106]

> Medical records kept by doctors shall be clear, accurate, legible and shall be made at the time that a consultation takes place, or not long afterwards. … All clinical details, investigation results, discussion of treatment options, informed consents and treatment by drugs or procedures should be documented.

[64] There are at least four important reasons to keep good medical records. The first is that, in Singapore, it is a legal obligation for doctors to keep good records, and a doctor may be charged for failing to do so, even in the absence of a breach of a duty of care to advise a patient.[107] Second, the existence of clear and accurate records enhances clinical decision-making and especially helps in ensuring continuity of care. Third, a clear evidential record is of enormous value in the event of litigation. In many medical negligence suits, a key issue is *whether the information in question had in fact been disclosed to the patient*. The best way to put this point to rest is by adducing accurate and

104 See the decision of the High Court in *Jen Shek Wei v Singapore Medical Council* [2018] 3 SLR 943 ("*Jen Shek Wei*") at [138].

105 2016 ECEG, n 64 above, p 8.

106 2002 ECEG, n 87 above, Ethical Guideline 4.1.2.

107 *Lam Kwok Tai Leslie v Singapore Medical Council* [2017] 5 SLR 1168 ("*Leslie Lam*") at [46].

contemporaneous documentation of such communication,[108] which was precisely what the defendants in *Dato' Hii* did by disclosing the voluminous correspondence that had been exchanged between the parties before the operation. Fourth, keeping detailed records might also deter potential lawsuits as patients might sometimes be led to commence such suits because they have an inaccurate or partial recollection of what took place during the consultation. In such cases, disclosing the relevant records could nip potential litigation in the bud.

[65] For these reasons, it is imperative not only that proper medical records be kept, but also that they should be prepared on the basis that they will be scrutinised. It is therefore vital that these records be: (a) contemporaneous; (b) clear and legible; (c) unambiguous with no obscure abbreviations; (d) sufficiently detailed, such that "any other doctor reading them would be able to take over the management of a case";[109] and (e) not tampered with, so that all amendments should be clearly marked, countersigned, and dated.

[66] Two decisions illuminate the approach the Singapore courts may take in dealing with situations where there was a lack of proper medical records.

[67] The first is *Jen Shek Wei v Singapore Medical Council*[110] ("*Jen Shek Wei*"). There, a mass was found in the patient's pelvis during a MRI scan. The doctor, Dr Jen, advised her to undergo a surgery to remove the mass. During the surgery, Dr Jen not only removed the mass but also removed the entire left ovary. The patient only discovered this after she consulted another gynaecologist. Dr Jen was charged with two counts of professional misconduct. The first was that he had advised the patient to undergo surgery without conducting further evaluation and investigation when such further assessment was warranted. The second was that he had surgically removed the patient's ovary without first obtaining her informed consent. The Disciplinary Tribunal (the "DT") found Dr Jen guilty of both charges, and its decision was upheld on appeal.

108 Indeed, given that the doctor is obliged to keep such documentation, the absence of such notes may lead the court to infer that the information was not communicated: see ibid, at [45].

109 The 2002 ECEG, n 87 above, Ethical Guideline 4.1.2; see also *Jen Shek Wei*, n 104 above at [118].

110 Note 104 above.

[68] Notably, *the lack of proper records was relevant to both charges*. In relation to the first charge, the court rejected Dr Jen's claim that he had advised the patient in relation to alternative treatments besides surgery, emphasising that there was no documentary evidence of this.[111] The court also noted that Dr Jen's case notes did not indicate that he had considered factors which would have pointed to the need for further evaluation and investigation and found against him on this basis.[112] In relation to the second charge, Dr Jen contended that the signed consent form he exhibited demonstrated that he had obtained informed consent from the patient.[113] However, this argument gained no traction. The High Court observed that the consent form merely indicated that the patient would undergo a "left oophorectomy", but that there was no evidence that the patient had been advised that or understood that this would entail the removal of the entirety of her left ovary, rather than just the mass which had been found.[114] Again, the lack of proper records was fatal, because nowhere in the records was it indicated that Dr Jen had explained all required matters to the patient. At [104] of its judgment, the High Court put the matter as follows:[115]

> … the *obligation to obtain informed consent is rooted in process and not a mere signed piece of paper.* Where a course of medical treatment is to be given or a surgical procedure is to be performed, the process requires a doctor to explain the required matters. *The signed consent form is the end point of that process. The form is, at best, an indicator (and no more) that the obligation has been discharged but it is not conclusive as a defence to a charge of failing to take informed consent.* Whether or not the consent form is a sufficient indicator of informed consent having been taken, such as to raise a reasonable doubt against a charge of failing to take informed consent, has ultimately to be considered in the context of the other evidence. (Emphasis added.)

[69] The fact-sensitivity of the exercise can be seen in the case of *Leslie Lam*.[116] There, the patient complained, among other things, that Dr Lam had carried out a percutaneous coronary intervention

111 Ibid, at [56] and [61].
112 Ibid, at [65].
113 Ibid, at [98].
114 Ibid, at [113]–[119] and [127].
115 Ibid, at [104].
116 Note 107 above.

("PCI") without properly advising the patient of the benefits, risks and possible complications of a PCI and of the alternative treatments available. Dr Lam's clinical notes were bare and did not record that he had undertaken any such explanation. An investigation was carried out and Dr Lam was convicted of one charge of professional misconduct under section 53(1)(*d*) of the Medical Registration Act[117] for having failed to obtain the informed consent of the patient prior to carrying out the PCI. In arriving at its finding, the DT treated the lack of contemporaneous documentation of consent-taking by Dr Lam as "virtually conclusive of the question of whether or not the [p]atient's informed consent had been obtained".[118]

[70] On appeal, Dr Lam's conviction was set aside on the basis that there was *sufficient evidence* to suggest that Dr Lam did in fact provide such advice, even though he did not record it. In arriving at this conclusion, the court noted not only that there was a signed consent form, which was brief, to the point and signified that the risks of the procedure had been explained to the patient, but also, critically, that the patient was (a) a confident and knowledgeable person who was unafraid to raise issues about his medical condition; and (b) was familiar both with the risks, benefits and alternatives to the particular procedure in question as well as with the consent-taking process in general. In these circumstances, the court considered it extremely unlikely that he would have signed the form if the risks had not in fact been explained to him. Taken together, these points convinced the court to allow the appeal.[119] However, the court commented that Dr Lam's record-keeping was unsatisfactory and observed that, even though he might not have breached his duty to obtain the patient's informed consent, a different charge for the failure to keep accurate and contemporaneous records could have been preferred.[120]

V. Conclusion

[71] The story of medical ethics over the past 60 years has been about the migration of the patient from the periphery to the centre of the medical process. Today, patients are no longer seen as objects to be acted upon, but as participants in the process of determining the

117 (Cap 174, 2004 Rev Ed).
118 *Leslie Lam*, n 107 above at [65].
119 Ibid, at [63]–[64].
120 Ibid, at [46].

course of treatment that they will accept. This is indisputably sound because it is ultimately the *patient, not the doctor*, who must live with the consequences of the decision whether to elect one course of treatment or the other and therefore has the moral right to make that choice. And once this proposition – which is the foundation of the principle of patient autonomy – is accepted, it follows that one must guarantee the proper flow of information necessary to make the patient's right of self-determination a reality. Until and unless a compelling case is made for rejecting the principle of patient autonomy, no other alternative appears possible.

[72] Indeed, this appears to be the conclusion which the medical community itself has long accepted. The essence of a doctor's obligation to advise is not a radical one, and may simply be stated as follows: take reasonable care to give the patient the information she needs in order for her to make an informed decision about her own health, and deliver that information in a form which she can understand. This is no more and no less than what has been required of doctors in Singapore under the ECEG from as early as 2002.

[73] Some have criticised the new law as being too "patient-friendly", but as I have noted on another occasion,[121] this is a somewhat unhelpful expression because it suggests that battle lines are drawn with patients on the one side and doctors on the other. That would be inaccurate and inappropriate. The issue is not *whom* the law favours, but setting the right standards for the *public good*. On the one hand, an *unrealistically stringent* standard would lead to defensive practice, which in turn would lead to increased costs, stifle medical innovation and give rise to other adverse consequences for patients. On the other hand, an *unduly lax* standard would erode public trust in doctors and the dignity of the whole profession. Neither benefits society. Instead, what is in the best interests of patients as well as doctors is for the law to strike a *sustainable balance* between the need to maintain high standards and the need to avoid placing excessive burdens on doctors. This has been the balance which the law has always endeavoured to strike.

[74] The medical profession is an honourable profession dedicated to that highest of callings – the preservation of life and health –

121 Sundaresh Menon, "The Evolving Standard of the Doctor's Duty to Advise", NUH Grand Round (July 28, 2017), para 9.

and bound together by the eternal ideals of honour, service, and excellence.[122] This must be its rock and anchor. The form of medical practice will change over time, but the profession's commitment to its foundational ideals must not. I therefore urge medical practitioners to see the accommodations that the present reality requires of them not as burdens to be avoided, but as milestones in the evolution of the doctor-patient relationship and adjustments that must be made in order that they might continue serving the public faithfully.

122 See generally Sundaresh Menon, "23rd Gordon Arthur Ransome Oration: Law and Medicine: Professions of Honour, Service and Excellence" (2017) 46(9) *Annals Academy of Medicine* 1.

The Dilemma of Concurrent Criminal and Civil Proceedings

by

*Justice Gunalan Muniandy**

[1] The existence of concurrent criminal and civil proceedings based on the same set of facts or transaction involving a common party or common parties often poses a problem to the trial judge, particularly of a civil suit. A balance has to be struck between the need to dispose of the civil suit promptly and expeditiously and the interests of justice in avoiding prejudice to the accused in the criminal trial should both trials proceed simultaneously. In the event that the civil trial is stayed pending the completion of the criminal case, unwarranted and inordinate delay may be the result, which may be prejudicial to the rights of the civil litigants in having their day in court. A just and proper approach has to be adopted by the court in resolving this lingering issue in the best manner possible.

[2] There is no known specific legal provision to address the situation where criminal and civil proceedings in respect of the same act/transaction and/or series of acts are instituted and scheduled to proceed simultaneously. It is usual for the affected party or parties to invoke the court's general discretionary powers and/or its inherent powers under Order 92 rule 4 of the Rules of Court 2012 ("the ROC") to grant an order to stay the trial of the civil suit until the criminal proceedings are disposed of.

[3] The dilemma of concurrent proceedings stems from the risk and danger of self-incrimination of the accused person who is the defendant or one of the defendants in the simultaneous civil action. There are provisions in our Evidence Act 1950 (Act 56) ("the EA") to protect a person charged with an offence from self-incrimination.

[4] An article that appears in the *Touro Law Review* published by the Touro College Jacob D Fuchsberg Law Center in the United States

* Judge of the High Court of Malaya.

("the US") captures the essence of the dilemma faced by the court in instances of concurrent proceedings.

[5] The following excerpts from the well-researched article[1] which deals with domestic violence cases involving common defendants in civil and criminal proceedings before the same Integrated Domestic Violence ("IDV") Courts, which are specialised courts, should be usefully reproduced:

> A. Concurrent Civil-Criminal Proceedings
>
> Courts that combine civil and criminal cases, such as IDV courts, increase the possibility that a defendant's Fifth Amendment right would be violated because the statements that he makes in these proceedings are likely testimonial, coerced, and incriminating. The Supreme Court in *United States v Ward* stated, "The distinction between civil penalty and criminal penalty is of some constitutional import." Criminal and civil courts have different practices, procedures, and burdens of proof. However, the essential difference between these courts is their purpose. The goal of civil court is to correct a legal wrong by awarding monetary or equitable relief to the plaintiff. The purpose of criminal courts, on the other hand, is to protect society by punishing the defendant. While there is an arsenal of civil remedies, there are more fundamental rights afforded to a criminal defendant because of the severity of punishment he would face should he be found guilty.
>
> Although the privilege against self-incrimination provides broad protections, it is not absolute particularly in civil cases. This becomes a problem for defendants who find themselves in IDV courts where one judge hears these simultaneous proceedings. The factual overlap between these cases creates a particular risk for the defendants in that their statements in one proceeding may be used against them in another. A survey conducted by the Battered Women's Justice Project on specialized criminal domestic violence courts suggested that combined civil and criminal jurisdiction may inappropriately encourage judges and prosecutors to focus on facts that should not influence their decisions in criminal cases.

1 Rhona Mae Amorado, "'I Plead the Fifth': New York's Integrated Domestic Violence Courts and the Defendant's Fifth Amendment Dilemma" [2016] 32 Touro L Rev 709.

A study conducted by the Center for Court Innovation regarding the litigant's perspective of IDV courts revealed that only 44% of defendants felt that their cases were treated fairly. In addition, over 75% of defendants reported being unhappy with the judge's decision in their family court case. Their satisfaction with their case outcomes was significantly related to whether they viewed the IDV courts process as fair or not. What is most concerning is that 80% of both victims and defendants felt the judge used information from their criminal case in making decisions about their family court case, or vice-versa. These results show that having the criminal, family and matrimonial cases under one court to be heard in front of one judge potentially violates the defendant's Fifth Amendment privilege against self-incrimination.

1. Dilemma in Concurrent Proceedings

The one family-one judge structure of IDV courts can blur the procedural differences between criminal and civil courts thereby increasing the chance that a defendant's Fifth Amendment right would be violated. Although each case in the IDV courts retains its own docket, the fact that one judge hears each case in one day, beginning with the criminal case, places the defendant in a problematic position of whether to remain silent and suffer the consequences, or waive his Fifth Amendment right and suffer possible consequences of this confession.

Havell v Islam highlights the differences among civil, matrimonial and criminal cases, and it also illustrates the dangers had these cases been integrated under one court. In *Havell*, the parties were involved in concurrent matrimonial and criminal cases. … The defendant (husband) was subsequently arrested and charged for second degree attempted murder and first degree assault. Subsequently, the plaintiff filed a divorce action against the defendant. A month later, the defendant was alleged to have violated the terms of his temporary order of protection when he went into the marital residence with his attorney to remove personal property.

The defendant requested a stay for his contempt case. He argued that the concurrent criminal cases, one arising from his attempted murder charge and the other from a violation of an order of protection, would open him to a risk of self-incrimination. Specifically, the defendant argued that testifying about his violation could lead to inferences about his state of mind, which could be used against him in his

pending attempted murder case. In deciding whether to grant such stay, the court looked to the factors used by federal courts. Finding that several factors applied in this case, the trial court stayed the criminal contempt proceeding for six months.

In the divorce action, the defendant filed a motion to preclude the plaintiff's offering any evidence concerning his conduct during marriage. The trial court, however, denied the defendant's motion, which the Appellate Division affirmed. The court reasoned that while conduct is generally not considered in determining equitable distribution, there are exceptions to this rule. Specific to this case was the catchall provision, which includes "misconduct that 'shocks the conscience' of the court." Having found that the defendant's conduct falls under this exception, which had been substantiated by several witnesses, the court held that the trial court did not err in considering the defendant's abusive behaviors toward his wife in determining equitable distribution.

This case demonstrates the complexity of domestic violence cases, and how these cases are usually ongoing. This also shows the possible dilemma that defendants face when there are concurrent proceedings similar to those in IDV courts. Often, a defendant would have to choose between testifying and risking that his statements would be used against him at a later proceeding or asserting his privilege against self-incrimination and risking other consequences of his silence.

[6] Another article from the US entitled "Federal Discovery in Concurrent Criminal and Civil Proceedings" which featured in the *Tulane Law Review* in June 1978[2] is instructive on the issue of the integrity of the proceedings being strained by the discovery process when both the proceedings run concurrently.

[7] The relevant passages of interest from the article[3] are these:

Civil discovery is supported by a liberal policy requiring almost total, mutual disclosure of each party's evidence prior to trial. This broad disclosure is intended to "take the sporting element out of litigation," to fully reveal the nature and limits of the dispute, to simplify and narrow the issues involved, and to provide all parties

2 52 Tul L Rev.

3 Robert B Mitchell, "Federal Discovery in Concurrent Criminal and Civil Proceedings" [June, 1978] 52 Tul L Rev 769.

with the information necessary to prepare fully for trial. The desired result is the elimination of needless and time consuming legal fencing in civil trials. Although the legal community is familiar with the parameters of discovery under the civil rules, it is important to review its scope in order to compare and contrast it with the narrow discovery provisions of the Federal Rules of Criminal Procedure. …

There are several distinct problems that may arise during the discovery process in concurrent proceeding. The central issue is the danger of an imbalance in discovery available to the parties to a criminal proceeding if one side is able to use civil discovery procedures to expand unilaterally the scope of discovery. If the criminal provisions are circumvented by the prosecutor, a violation of the defendant's privilege against self-incrimination or of his right to a fair trial may result. If either party has been able to circumvent the criminal rules, the integrity of those procedures has been violated. Finally, if a stay of civil discovery is granted to protect the criminal process, an unacceptable burden may be placed on the civil plaintiff's right to a speedy and fair disposition of his case.

The self-incrimination danger in concurrent proceedings results from the difference in the scope of protection afforded by the Fifth Amendment in civil and criminal actions. It is a basic precept of Anglo-American criminal law that the accused does not have to take the stand or offer any testimony during the course of proceedings. On the other hand, although the privilege against self-incrimination has been held applicable to civil proceedings, the civil defendant has no absolute right to refuse to testify. The court may compel the civil defendant to testify, protected only by his right to plead the privilege in answer to each specific question. In such case, a determination of the merits of the defendant's claim to the privilege would be made by the court following a rule 37(a) motion to compel discovery. Thus, a criminal prosecutor may gain otherwise unobtainable "leads" by reviewing a criminal defendant's civil testimony. Even assuming, pro arguendo, that a prosecutor learns nothing more than questions the defendant declined to answer in the civil investigation, this knowledge of areas sensitive to the defendant may well lead to a "link in the chain of evidence" that unconstitutionally contributes to his conviction.

Without questioning, the criminal defendant's fifth amendment privilege must be protected. The issue is how much protection is

> required and how is it to be provided. Neither the criminal nor civil rules deal with this question. …
>
> In considering the issue of the criminal defendant's right, the jurisprudential dispute involves not only how much protection the claimed rights warrant, and how this protection should be provided, but also whether certain rights exist at all. In *In re Murchison*, the Supreme Court declared that the due process requirement of fundamental fairness precluded even the "probability of unfairness" in criminal proceedings. In accord with this principle, some courts have held that the integrity of the criminal process is an aspect of due process that is constitutionally guaranteed, and that allowing a criminal prosecutor to circumvent the restrictions of criminal discovery, by utilizing information gathered under the civil rules, violates the criminal defendant's right to due process of law.

[8] In our jurisdiction, a similar position and dilemma prevails as neither the civil nor the criminal rules of procedure have dealt with this important question and the courts have yet to squarely address this issue or propound principles of general application to this area of the law.

[9] In *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail & Anor*[4] ("*Suruhanjaya Sekuriti*"), the Court of Appeal had occasion to decide an application for stay of a civil suit in the High Court by reason of criminal prosecution instituted simultaneously in the Sessions Court by the appellant. This is a common scenario faced by the High Court where a stay application is made under similar circumstances. The brief facts of that case adapted from the judgment are these:

> By notice of application dated 13 July 2016, the appellant in this particular case applied pursuant to O 92 r 4 of the Rules of Court 2012 to stay all further proceedings in the High Court Civil Suit No D-24NCC-968-06 of 2012 ("the civil suit") until the conclusion of the hearing and final disposal of the criminal proceedings instituted by the appellant against the first respondent in the Kuala Lumpur Sessions Court Arrest Case No. 62SC-004-06 of 2016 ("the criminal proceedings") and any appeal arising therefrom ("the stay application"). The High Court in its decision given on 19 August 2016 dismissed the stay application. Hence, this appeal. In this appeal,

4 [2017] 3 MLJ 478.

> the grounds that the appellant relied upon are that: (a) the learned judge erred in law and fact when found that there were no special circumstances warranting the stay application; (b) the learned judge erred when finding that the danger of inconsistency of finding of fact and law between the courts hearing the civil suit and the criminal proceedings were purely speculative; (c) the learned judge failed to follow the English Court of Appeal's decision in *Jefferson v Bhetcha* [1979] 2 All ER 1108 ("*Jefferson*'s case"); (d) the learned judge erred in law when determining that the stay application should be refused because the appellant ought to have preferred the criminal charges at a later stage, after the disposal of the civil suit, because the charges were preferred by the attorney general ("the AG"); and (e) the learned judge was wrong in law and fact in failing to appreciate that the civil suit was required to be filed urgently in 2010 in order that the appellant could obtain an ex parte order dated 14 June 2010 pursuant to s 360 of the Capital Markets and Services Act 2007 ("the Act") by which the proceeds of the first respondent's breaches of ss 177 and 188 of the Act were restrained.

[10] In allowing the appeal against the decision of the learned High Court judge in refusing the stay application, the Court of Appeal distinguished the facts in *Jefferson Ltd v Bhetcha*[5] ("*Jefferson*") from those in the present appeal while adopting the principle enunciated in that case and concluded as follows:[6]

> Contrary to the plaintiff in *Jefferson*'s case, the first respondent herein suffered no prejudice at all from a stay of the civil suit because he was the defendant. As the criminal proceedings had already been set down for trial, it would be "that if the criminal proceedings were likely to be heard in a very short time … it would be fair and sensible to postpone the hearing of the civil action". A stay of the proceedings in the civil suit would also avoid the potentially embarrassing outcome, in the form of conflicting decisions on the same facts by the two courts hearing the criminal proceedings and the civil suit. There was so much commonality of facts and issues as well as a strong likelihood of overlap in the evidence in both proceedings which would make conflicting decisions potentially an ineluctable fact. Thus, the possibility of inconsistent findings by both courts on

5 [1979] 2 All ER 1108.
6 *Suruhanjaya Sekuriti* at p 479.

> the same facts could not be dismissed as purely speculative and one that could be resolved on appeal.
>
> The learned judge's findings that the criminal proceedings was made a tad late in the day was misplaced because His Lordship did not seem to realise that the decision to commence the criminal proceedings was made by the AG in the exercise of his constitutional function pursuant to art 145(3) of the Federal Constitution and not the appellant who was devoid of such power and was thus totally out of the appellant's control. In totality, the learned judge had exercised his discretion wrongly as it was obvious that the grounds discussed above amounted to special circumstances upon which His Lordship ought to have exercised his discretion to grant the stay application.

[11] It would be observed that the Court of Appeal in the above case had distinguished *Jefferson*'s case on the facts and in conclusion relied primarily on the usual "special circumstances" test for stay applications in allowing the appellant's application for stay instead of the test of "real danger or risk of prejudice or injustice in the criminal proceedings" to the defendant as enunciated in *Jefferson*. It is submitted that, under the circumstances, this is a correct approach as the principle is that each case must be judged on its own peculiar facts to determine where the interests of justice lie. Where there are special circumstances justifying the civil trial to commence only after the conclusion of the criminal proceedings, the court should be at liberty to exercise its discretion judicially to grant the stay regardless of any risk of prejudice to the accused which is, nonetheless, one of the important factors that has to be considered.

[12] *Jefferson* is a leading decision of the Court of Appeal in England where Megaw LJ dealt with a situation where a defendant in a civil action sought a stay of proceedings pending the conclusion of criminal proceedings against her, both of which arose from the same set of facts. The plaintiff in the civil action objected, and the court in balancing the plaintiff's right to pursue its claim against the prejudice suffered by the defendant from having to face two concurrent proceedings, laid out the following factors relevant to the grant of a stay of civil proceedings pending the conclusion of criminal proceedings under the circumstances alluded to:[7]

7 *Jefferson* at pp 1112-1113.

As I understand it, the judge based his decision on the view that there is an established principle of law that, if criminal proceedings are pending against a defendant in respect of the same subject-matter, he, the defendant, is entitled to be excused from taking in the civil action any procedural step, which step would, in the ordinary way, be necessary or desirable for him to take in furtherance of his defence in the civil action, if that step would, or might, have the result of disclosing, in whole or in part, what his defence is, or is likely to be, in the criminal proceedings. Counsel for the defendant in this court submitted that that is the general rule which ought to be followed ... With the view, if it were put forward, that this is an established principle of law, I would respectfully but firmly disagree. There is no such principle of law. There is no authority which begins to support it, other than, to a limited extent, *Wonder Heat Pty Ltd v Bishop*, which, with great respect, I should not be prepared to follow, if indeed it does purport to lay down such a principle. I do not think that it does.

I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be a master, a judge, or this court, would have a discretion, under s 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings, if it appeared to the court that justice (the balancing of justice between the parties) so required, having regard to the concurrent criminal proceedings and taking into account the principle, which applies in the criminal proceeding itself, of what is sometimes referred to as the "right of silence" and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right.

… In my judgment, while each case must be judged on its own facts, the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with. Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases (no doubt there are) where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. It *may be that,* if the criminal proceedings were likely to be heard in a very short time ... it would be fair and sensible to postpone the hearing of the civil action. It might be that

> it could be shown, or inferred, that there was some real, not merely notional, danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way.

[13] The principles enunciated by Megaw LJ in the above case are regarded as good law in Malaysia as held by Abdul Malik Ishak J (as he then was) in *Dato' Ding Lian Cheon v Yap You Jee & Ors*.[8]

[14] It could be seen that the learned judge, Idrus Harun JCA (as his Lordship then was), who delivered the judgment of the Court of Appeal in *Suruhanjaya Sekuriti* rightly placed due emphasis on the element of prejudice against the respondent and the likely danger of causing injustice in the criminal proceedings while adopting the usual "special circumstances" test in deciding the issue of stay.

Position under English law/English authorities

[15] It would be useful to look at developments in English law when faced with the question whether one set of proceedings ought to be stayed pending the trial of the other proceedings on the ground of fairness. In *Patel v Patel & Ors* ("*Patel*")[9] a case decided by the Chancery Division of the High Court of Justice of England, Marcus Smith MJ observed, *inter alia*, that:[10]

> There is, however, no doubt that there are cases where a court can decide not to go ahead with one set of proceedings because they might in fact prejudice the fairness of the trial of other proceedings. There are also cases where the High Court can intervene. The leading case in this field is the decision of this court in *Jefferson v Betcha* [1979] 1 WLR 898, and there are other cases to the same effect. But the main principle is that this discretion to adjourn is only to be exercised where there is a real risk of serious prejudice which may lead to injustice.

8 [1999] 3 MLJ 209.

9 Thursday, July 27, 2017. Case No.: HC-2017-000905 in the High Court of Justice, Chancery Division, before Mr Justice Marcus Smith at p 3.

10 Ibid, at p 4.

The next case is *M v M* [1997] 1 FLR 762, a yet further decision of the Court of Appeal. Lord Bingham of Cornhill CJ said at 764:

> "It would appear that those authorities establish three principles. The first is that there is no absolute rule that civil proceedings (including contempt proceedings) should not proceed when criminal proceedings are pending. The second is that there is a general rule that contempt proceedings should be dealt with "swiftly and decisively" (per Stephen Brown LJ (as he then was) in *Szczepanski* at 469). The third principle is that the test as to whether or not contempt proceedings should proceed in advance of criminal proceedings is whether there is a real risk of serious prejudice leading to injustice if the contempt proceedings go ahead. That is a summary of what was said by Neill LJ in *H v C* at 789. If the answer is that there is no real risk of serious prejudice leading to injustice, then in the ordinary way the contempt proceedings should go ahead. If, on the other hand, there is adjudged to be a real risk of serious prejudice leading to injustice if the contempt proceedings go ahead, the court may properly stay the contempt proceedings and would ordinarily do so."

Picking up the judgment of Lord Bingham later on, at 765:

> "However, where there are pending criminal proceedings we must take account of another principle, namely that a defendant should not be prejudiced in the conduct of his defence to what may be, and is in the present case, a serious charge. It may be that a defendant will be prejudiced if allegations in the criminal trial are the subject of contested civil proceedings before the jury trial, perhaps with different evidence. It was, as I understand the recorder's judgment, that consideration which finally led him to take the view that he did. Having reviewed the matter in the light of the extremely helpful arguments advanced to us, and bearing in mind that the recorder was referring to the appropriate authorities and directing himself correctly, I do not find myself persuaded that he exercised his discretion in a manner that was plainly wrong. It was a question of the exercise of his judgment, he exercised it and it was a sustainable exercise of that discretion."

Moving on to two post-*Barnet* cases, I begin with the decision in *Attorney General of Zambia v Meer Care & Desai & Ors* [2006] EWCA Civ 390, [2006] 1 CLC 436. In this case, the appellant applied for a stay on three grounds, only one of which matters for present

purposes, but I will summarise all three. The first ground was that the appellants could not travel to England for the purposes of the English proceedings; the second ground was that England was *forum non conveniens*. Neither of these points arise here, and I consider them no further. The third point was that the English proceedings would prejudice the appellant's ability to defend criminal proceedings going on in Zambia.

This argument, regarding prejudice, is then set out in [20] of the judgment:

> "The appellants' argument at first instance that the English proceedings would prejudice them in their ability to defend the criminal proceedings was shortly to this effect: (1) documents and other information disclosed in civil proceedings might be used by Zambia in the criminal trial; (2) that being the case, the need to serve witness statements and provide disclosure in the civil proceedings would undermine the appellants' right to silence in the criminal trial; (3) the appellants would be forced to reveal their line of defence; and (4) giving oral evidence and being cross-examined in the English civil proceedings would undermine the appellants' defence in the Zambian criminal proceedings."

[16] Before concluding his review of the authorities, the learned judge Mr Justice Marcus Smith observed further that:

> The second post-*Barnet* decision is *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324, [2008] CP Rep 13. This is again a decision of the Court of Appeal, and I am quoting from the judgment of Richards LJ beginning at [35]:
>
> > "35. As to the chairman's view that proceeding with the appeals could not possibly prejudice the criminal proceedings, the main point advanced by Mr. Lofthouse was that the appeals would provide the department and local authority with an unfair opportunity for a rehearsal of the criminal trial. In this case, unlike the previous cases cited, the parties to the civil proceedings were the same as the parties to the criminal proceedings: the department and the local authority were not only respondents to the appeals but also prosecutors in the criminal proceedings. The hearing of the appeals, submitted Mr. Lofthouse, would give them the opportunity to study the appellant's reaction and to assess what questions to ask in the criminal trial. This was a prejudice to the

appellant which could not realistically be the subject of an abuse of process application in the criminal proceedings. There was no effective remedy for it apart from postponing the hearing of the appeals pending the conclusion of the criminal trial.

36. The rehearsal point does not feature in any of the decided cases concerning concurrent proceedings. The nearest one gets to any mention of it is in *R v Payton*, where the representations to the court stated that one of the advantages of adjourning the parallel forfeiture proceedings pending the conclusion of the criminal trial was that the defendant would "not be embarrassed into having to rehearse what may be part of his defence to the criminal allegation" ([27] above). I do not think that the point being made there was the same as the rehearsal point put forward by Mr. Lofthouse, and in any event it is not clear what weight it carried with the court. In general, as it seems to me, the fact that the prosecution has had a previous opportunity to rehearse its case cannot be said to give rise to substantial prejudice to the defendant in a subsequent criminal trial. If it were otherwise, it would provide a ground of objection to a retrial in criminal proceedings where the jury have been unable to agree in the first trial or where a conviction in the first trial has been quashed on appeal. If this were a point of substance, I would also expect it to have been mentioned in the previous cases. In any event, it cannot in my view assist the appellant in the present case, since there is nothing to show that it was relied on in the representations made to the tribunal or, therefore, that the chairman fell into error in failing to have regard to it or to cover it in his reasons."

That concludes my review of the authorities. I should say that although I have derived real help from them, at the end of the day this is a question of judicial discretion, in terms of applying a relatively straightforward legal test - whether there is a real risk of serious prejudice which may lead to injustice. What really matters are the facts of the individual case, and whilst past cases are no doubt helpful, it is the facts as they are before me that really count.

[17] To summarise the position under the English law on the subject at hand, the paramount considerations are these:

(a) The question of whether to stay the civil proceedings in view of the pending criminal proceedings is essentially a matter within the court's judicial discretion;

(b) Whether there is a real risk of serious prejudice that would result in injustice to either party; and

(c) The above question ought to be answered in the light of the facts of the individual case while cases decided in the past could at most be for guidance purposes and not the determinant factor.

Conclusion

[18] On the law as it stands today, in respect of an accused person who is also facing civil proceedings arising from the same subject-matter as the criminal proceedings, the remedy that is open to him to address the likely prejudice to his right to a fair trial brought about by the concurrent proceedings would be to invoke the civil court's discretionary power to stay the proceedings pending disposal of the criminal trial. It is well established that the court is vested with this discretionary power under Order 92 rule 4 of the ROC. As correctly emphasised by the Court of Appeal in *Suruhanjaya Sekuriti,* the likelihood of inconsistent findings by the civil and criminal courts cannot be dismissed as merely speculative but must be carefully considered as real and genuine in appropriate cases where the facts and circumstances so indicate. The danger of the interests of justice being compromised as a result of the concurrent proceedings is worthy of due consideration and has to be weighed fairly against the interests of the litigant or litigants who instituted the civil suit to have it disposed of justly and expeditiously and not to have it denied or justice unduly delayed. In short, a balance must be struck between the competing interests upon having taken into account the peculiar facts and circumstances of the case at hand. In exercising the court's judicial discretion, what should be forefront in the court's consideration is the avoidance of any miscarriage of justice in the criminal proceedings should the stay be refused. In the meantime, we await specific legislation or future judicial pronouncements by the higher courts for guidance to resolve this pressing and important, though not prevalent, issue.

Sovereign Immunity, Domestic Immunity and State-Owned Enterprises

by

*Justice Dr Anselmo Reyes**

[1] Dugan, Wallace, Rubins and Sabahi's *Investor State Arbitration* observes in its chapter on the "Enforcement of Awards":[1]

> [E]nforcing an investment treaty arbitration award against a recalcitrant state may be the most difficult, lengthy and expensive phase of an investor-state arbitration.

This article will suggest that, on the contrary, there are rays of hope for the future. It will attempt to pinpoint the grounds for optimism.

[2] State immunity has two aspects. The first is that, within their own borders, many governments enjoy immunity from civil suit. This first aspect is often justified by the Latin maxim, *rex non potest peccare* ("a ruler can do no wrong"). For convenience, this first aspect may be called "domestic immunity". The second aspect is that a foreign State cannot be sued before the courts of another State. This is often justified by the Latin maxim, *par in parem non habet imperium* ("equals do not exercise jurisdiction over each other"). For convenience, this second aspect may be referred to as "sovereign immunity".

[3] Over time, in many countries, the scope of domestic immunity has been whittled or removed by statute. For example, the Government Proceedings Act[2] in Singapore enables civil suits to be brought against the Government. Similarly, the Government Proceedings Act 1956 (Revised in 1988) in Malaysia makes the government liable in civil proceedings.

This article is based on a keynote address delivered at the 3rd IPBA Asia-Pac Arbitration Day in Kuala Lumpur on September 25, 2017.

* PhD, International Judge of the Singapore International Commercial Court.

1 (New York: Oxford, 2008), p 700.

2 Chapter 121.

[4] In Hong Kong, both before and after July 1, 1997, the Crown Proceedings Ordinance[3] has enabled civil suits to be brought against the Hong Kong Government. In the post-handover case of *The "HUA TIAN LONG"*[4] Stone J further found that, at common law, by analogy with the traditional concept of "Crown immunity", the Central People's Government of the People's Republic of China ("PRC") enjoyed immunity from suit in Hong Kong. As a result, *The "HUA TIAN LONG"* occasioned much concern in arbitration circles in Hong Kong. It was feared that Stone J's decision would lead to Chinese State-owned enterprises ("SOEs") invoking domestic immunity in Hong Kong-seated arbitration proceedings. Many suggested that, to be safe, parties transacting business with Chinese SOEs should avoid Hong Kong and specify some other jurisdiction as the seat in their arbitration agreements.

[5] These concerns over the immunity of Chinese SOEs in Hong Kong were recently laid to rest by the judgment of Mimmie Chan J in *TNB Fuel Services Sdn Bhd v China National Coal Group Corp*[5] *("TNB Fuel Services Sdn Bhd").* TNB was seeking to enforce a Malaysian arbitral award against a Mainland Chinese SOE (China National Coal Group Corporation) ("CNCGC")) in Hong Kong. The latter resisted enforcement on the basis that it was a wholly-owned State enterprise and thus, as an entity of the PRC Government, entitled to domestic immunity in Hong Kong.

[6] Invited to intervene, the Secretary for Justice sought instructions from the Hong Kong & Macau Office of the State Council on CNCGC's status under PRC law. In response, the Hong Kong & Macau Office issued a letter clarifying, that:

> … save for extremely extraordinary circumstances where the conduct was performed on behalf of the state via appropriate authorization, etc., the state-owned enterprises of our country when carrying out commercial activities shall not be deemed as a part of the Central Government, and shall not be deemed as a body performing functions on behalf of the Central Government.

3 Cap 300.
4 [2010] 3 HKLRD 611.
5 HCCCT 23/2015 (June 8, 2017).

[7] The letter stressed that a Chinese SOE should be regarded as "an independent legal entity" which "carries out activities of production and operation on its own" and which "independently assumes legal liabilities". There was "no special legal person status or legal interests superior to other enterprises" enjoyed by a Chinese SOE and, as far as the PRC Government was concerned, "in the Mainland or in foreign states, all state-owned enterprises of our country respond to litigation arising from their activities of production and operation in the capacity of independent legal persons".

[8] In her judgment, Mimmie Chan J observed that, at common law, a claim of Crown immunity by an SOE needs to be scrutinised by the court in light of the law under which the SOE was incorporated. The question is whether, under that law, the SOE was acting in a particular matter as "an agent or instrumentality" of the Crown. The court has to consider (among other matters) the degree of control exercised by a government over the SOE's conduct. Citing Peter Hogg's *The Liability of the Crown*,[6] Mimmie Chan J held that, when carrying out an analysis of the control exercised by a State over an SOE, "[a]ny substantial measure of independent discretion will suffice to deny the status of Crown agent to a public body that is subject to some degree of direct control".[7] In short, the doctrine of "Crown immunity" in Hong Kong does not bestow blanket immunity from civil suits on an SOE. It will

6 (Toronto: Carswell, 2011), p 465.

7 Note, however, the qualifications to the control test identified in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52, where the Federal Court of Australia (Lander, Greenwood and Rares JJ) noted in the context of the Foreign States Immunities Act: "[47] Ownership and control will be important in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. However neither, in our opinion, can be determinative factors. [48] We agree with Rares J that it will be a matter of fact in each case to determine whether a natural person or corporation is an agency or instrumentality of a foreign State and in determining that question regard will have to be had to ownership, control, the functions which the natural person or corporation perform, the foreign State's purposes in supporting the natural person or corporation and the manner in which the natural person or corporation conducts itself or its business." Applying the test, the Federal Court held that Garuda was entitled to claim sovereign immunity as "the means by which Indonesia carried on the business of an airline". On the other hand, Malaysia Airlines in which the Malaysian Government merely held a majority shareholding at the relevant time was not entitled to sovereign immunity.

depend on the specific circumstances and it will only be the rare case where a plea of domestic immunity will succeed.

[9] So far the focus here has been on domestic immunity (that is, the first aspect of state immunity). But the same analysis applies to an SOE's claims to sovereign immunity (that is, the second aspect of state immunity). This is evident from the Hong Kong & Macau Office's letter. In the Mainland and abroad, extraordinary circumstances apart, Chinese SOEs are supposed to "respond to litigation … in the capacity of independent legal persons" and not as emanations of the State. This would be the case, even where the jurisdiction in which the SOE is sued, adheres (like Hong Kong) to a doctrine of absolute (as opposed to relative) sovereign immunity. As an "independent legal person", an SOE will not normally be able to invoke sovereign immunity, even if its sole or majority holder happens to be a sovereign State.

[10] This then is the first glimmer of hope. Save in exceptional cases, there should be little difference in practical terms between the enforcement of an award against an SOE and the enforcement of an award against an ordinary corporation.[8]

[11] Consider now the implications of the Hong Kong Court of Final Appeal's decision in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC*[9] ("*FG Hemisphere Associates LLC*"), involving an appeal from my decision as first instance judge. The case involved the enforcement in Hong Kong of two ICC awards against the Democratic Republic of the Congo ("DRC"). The awards had been assigned to FG Hemisphere by the successful claimant (Energoinvest) in the ICC arbitrations. The DRC claimed sovereign immunity in respect of the enforcement of the two arbitral awards against it.

[12] Reference has been made to the doctrines of absolute and relative sovereign immunity. Some countries (such as the United

8 See, for another example of the use of the control test, *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27. The control test has the consequence that an SOE will not typically be able to claim sovereign immunity against a commercial party with whom the SOE has contracted. But, on the flip side, the control test may have the consequence that an investor suing a State will not be able to execute against an SOE's assets, the SOE being treated as a separate entity from the foreign State, even where the latter holds a majority or controlling interest in the SOE.

9 FACV Nos 5, 6 and 7 of 2010 (June 8, 2011).

Kingdom ("UK"), Singapore and Malaysia)[10] adopt a restrictive or relative concept of sovereign immunity. Where a foreign country enters into a purely commercial contract, it may be sued in the UK or similar jurisdictions for the breach of that contract. The foreign State will not be able to raise sovereign immunity as a defence to breach of contract or as a means of forestalling enforcement. In a State where the doctrine of restrictive immunity applies, a plea of sovereign immunity will only be available where the foreign State entered into a contract in the exercise of its sovereign authority. Other countries (notably, the PRC (including Hong Kong as part of the PRC)) follow an absolute concept of sovereign immunity. This absolute concept does not distinguish between a State entering into a contract in the exercise of its sovereign authority and a State entering into a commercial contract in the manner of an ordinary business entity. In both situations, the State will be able to claim sovereign immunity.

[13] Whether a State follows an absolute or relative concept, sovereign immunity may be waived. But, in assessing whether sovereign immunity has been waived, it is necessary to proceed in two stages.

[14] The first stage involves assessing whether there has been "adjudicative waiver". The issue is whether a government has waived sovereign immunity by submitting to the jurisdiction of an arbitral tribunal in a particular seat. The second stage involves what might be called "enforcement waiver". The issue, at least as far as international arbitration is concerned, is whether a government has waived sovereign immunity in relation to the enforcement of an arbitral award. The fact that there has been adjudicative waiver does not mean that there has been an enforcement waiver.

[15] Assume an investor in an international arbitration is seeking to enforce an interim order or final award against the assets of a government in a foreign jurisdiction (say, Hong Kong). In *FG Hemisphere Associates LLC*, the investor's assignee instituted proceedings before the Hong Kong court to enforce the two ICC awards by garnisheeing a sum to be paid by a Chinese consortium to the DRC. Ultimately, the investor's assignee was unsuccessful because there had been no enforcement waiver. The question is this: Can anything be inserted in

10 See, for example in the case of Malaysia, *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd* [1990] 1 MLJ 475.

the rules of an administering arbitral institution or in an arbitration agreement to assist a creditor in enforcing an interim order or final award in the circumstances just described? In other words, can the terms of an arbitration clause or the terms of an institution's arbitral rules, when agreed to or accepted by a sovereign State, automatically give rise to adjudicative and enforcement waiver?

[16] In *FG Hemisphere Associates LLC*, the DRC had agreed to (and had taken part in) Swiss and French arbitrations under the 1998 ICC Rules. Rule 28.6 stipulates that:

> Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

The legal result, as held by the majority of judges (including myself) who dealt with *FG Hemisphere Associates LLC* from first instance to final appeal (that is, seven out of nine judges), was that agreement to Rule 28.6 only constituted adjudicative, but not enforcement, waiver.

[17] According to the majority of the Court of Final Appeal judges in *FG Hemisphere Associates LLC*, the following principles apply:

(1) An arbitration agreement between a State and an investor company cannot be a voluntary submission to an enforcing State's jurisdiction. The arbitration agreement is only a contractual obligation. The failure by the State to comply with such obligation would amount to a breach of contract – nothing else.

(2) When a State agrees to refer a dispute to arbitration, it agrees to submit to the jurisdiction of an arbitral tribunal. That is not the same thing as submitting to the jurisdiction of an enforcing State (as opposed to submitting to the jurisdiction of a supervising State, that is, the court of the arbitral seat).

(3) At common law, a party enforcing an award against a foreign State must show enforcement waiver in two steps:

    (i) Where an investor applies for recognition by an enforcing court of the award for the purposes of converting the award into an order or judgment of the court, the investor must

establish that the State has waived the right to object to the recognition of the award on the ground of sovereign immunity. This might be called recognition waiver.

(ii) Where an award has been recognised and the investor seeks to enforce the award against an asset belonging to the State, it must be shown that the targeted asset is itself not subject to immunity from enforcement.[11]

(4) It must be plain that the State actually intended to submit to the enforcing court's jurisdiction. This would be in keeping with what Savile J expressed in *A Co Ltd v Republic of X*:[12] "[N]o mere *inter partes* agreement could bind the [foreign] State to such a waiver, but only an undertaking or consent given to the Court itself at the time when the Court is asked to exercise jurisdiction over or in respect of the subject matter of the immunities".

(5) It is true that a "significant body" of academic opinion[13] favours changing the common law as formulated by Savile J in *Republic of X*, so that waiver can be more easily implied. But change is unwise and undesirable. The reason is that "the rationale of state immunity remains the *par in parem* principle". By this principle, co-equal sovereign States must refrain from exercising jurisdiction over one another without each other's clear consent. A contrary approach is "likely to be damaging to the relations between the two States and may very well be ineffectual in any event".

[18] These propositions may be thought to preclude hope of arguing enforcement waiver, especially where all that an investor can rely upon as evidence of waiver is an agreement to arbitrate under a particular set of rules. On the logic of *FG Hemisphere Associates LLC*, it would not be enough that the agreed arbitral rules contain an express provision that the State waives reliance on sovereign immunity in all enforcement situations whatsoever. Such provision could not (according to the Hong

11 On enforcement waiver, the parties in *FG Hemisphere Associates LLC* requested that the Court of Final Appeal focus on the first stage of recognition, rather than on the second stage of enforcing against a specific asset that may independently be subject to immunity from attachment.

12 [1990] 2 Lloyd's Rep 520 at 524.

13 See, for instance, the scathing criticism of Savile J's decision in *A Co Ltd v Republic of X* by FA Mann in "Waiver of Immunity" (1991) 107 LQR 362.

Kong Court of Final Appeal) amount to a submission to a particular enforcing court. It will only be where a foreign State is impleaded before an enforcing court and actually acknowledges jurisdiction in the face of that enforcing court, that there can be enforcement waiver at common law. Even then, the waiver will only be in relation to the recognition of the arbitral award, with the question left open whether the award (once recognised) can be enforced against any specific asset.

[19] But it is submitted that there is a silver lining. That is because, in its judgment, the majority in *FG Hemisphere Associates LLC* also said:[14]

> [B]y taking part in an arbitration, a State is obviously agreeing to submit to the contractual jurisdiction of the arbitrators. But that is obviously not the same thing as submitting to the jurisdiction of another State's courts. Such conduct may however constitute an implicit submission to the jurisdiction of the courts – the French and Swiss courts in the present case – exercising a supervisory jurisdiction over the conduct of the arbitration.

The majority differentiated between submitting to the jurisdiction of a supervising court and submitting to the jurisdiction of an enforcing court. By initially agreeing to and actually taking part in an arbitration, a government may be deemed to have submitted to the jurisdiction not just of the arbitral tribunal, but also of the supervising court (that is, the court of the arbitral seat).

[20] Consequently, in the course of an arbitration, a claimant investor may seek an interim measure from an arbitral tribunal against a respondent State. This may take the form of an order by the tribunal that the respondent pay a sum of money to a stakeholder by way of security (1) to forestall future action by the respondent (in particular, evasion of liability through a claim of sovereign immunity) that would prejudice the arbitral process; or (2) to preserve an asset of the respondent within the arbitral seat out of which an award may be satisfied. Such order of the tribunal may be converted into an order of the supervising court (to which the respondent is deemed to have submitted). This court order should then be enforceable

14 At [378].

against security provided by (or assets of) the foreign State within the territory of the arbitral seat without being subject to a plea of sovereign immunity.[15]

[21] As a result of the tribunal's grant of an interim measure, an asset (for example, cash) should be made available by a State within the territory of the arbitral seat with the ultimate objective that enforcement can later be sought against that asset.[16] Applying the reasoning in *FG Hemisphere Associates LLC*, there having been an implicit submission to the court of the arbitral seat as a result of a foreign country taking part in an arbitration there, one should also be able to treat the foreign country as having submitted to enforcement against the very assets ordered by the supervising court to stand as security for the relevant arbitration. If that is right, agreement to arbitration and participation by a State in an arbitration would be an implicit submission to the jurisdiction of the supervising court insofar as it concerns:

(1) that court recognising an interim measure ordered by an arbitral tribunal for the provision of security in the arbitration; and

(2) that court converting the interim measure into an enforceable judgment against the assets within the territory of the arbitral seat that are covered by the interim measure.

[22] Note that, on this reading of *FG Hemisphere Associates LLC*, an express agreement on the seat of an arbitration will not of itself be enough to amount to an acceptance of the supervising court's jurisdiction. *FG Hemisphere Associates LLC* posits that submission to the jurisdiction of the supervising court arises out of a State's actual participation in an arbitration pursuant to an agreement to arbitrate. By participating in an arbitration, a State implicitly acknowledges the jurisdiction of the court of the designated seat to supervise the

15 See, for example, Article 17H(1) of the 2006 UNCITRAL Model Law on International Commercial Arbitration: "An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17I".

16 The State may, of course, refuse to put up the security ordered by the tribunal or by the court. At that point, the claimant would have to make a commercial decision whether or not to proceed with the arbitration, knowing that it may later have difficulty in enforcing any award against the State's assets.

arbitration, including the doing of all things necessary to ensure that an award rendered by the arbitral tribunal is effective and enforceable.[17]

[23] The foregoing paragraphs represent what, it is submitted, is a conservative view. There is a more liberal possibility. It may be that, depending on its wording, an agreement to arbitrate could by itself be sufficient to constitute a submission to the jurisdiction of a supervising court at common law. This possibility emerges from the August 2017 decision of Justice Sir Jeremy Cooke of the Dubai International Financial Centre Courts ("DIFC Courts") in *Pearl Petroleum Co Ltd & Others v The Kurdistan Regional Government of Iraq*[18] (*"Pearl Petroleum").*

[24] The case involved an application by Pearl Petroleum to have an LCIA award recognised and enforced in its favour against assets in Dubai belonging to the Kurdistan Regional Government ("KRG") of Iraq. It was assumed, for the sake of argument, that the KRG was entitled to plead sovereign immunity. In his judgment, Cooke J concluded that the common law on sovereign immunity went further than *FG Hemisphere Associates LLC* in at least two respects.

[25] First, Cooke J held that, even on an assumption that the KRG could raise a plea of sovereign immunity in Dubai, nevertheless simply by reason of KRG's agreement to arbitrate, KRG could not oppose recognition and enforcement of the award. That was because, in relation to the jurisdiction of the English court as the supervising court:

> [i]t was inherent in that agreement … that the KRG waived any immunity from the exercise of the Court's supervisory powers under English law… Moore-Bick LJ in giving the judgment of the court in *Svenska Petroleum Exploration AB v the Government of the Republic of Lithuania* [2007] QB 886, at paragraph 117, stated that arbitration is a consensual procedure and that where a state has agreed to submit

17 In this connection, see also *C v D* [2007] EWHC 1541 (Comm) where Sir Jeremy Cooke J stated (at [29]): "The significance of the 'seat of arbitration' has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration."

18 [2017] DIFC ARB 003.

> to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective. Whilst this was said in relation to section 9 of the English State Immunity Act of 1978, the principle holds good in respect of any agreement to arbitrate.

Thus, contrary to *FG Hemisphere Associates LLC*, there would be an implicit submission to the jurisdiction of the supervisory court, even where a State has not participated in an arbitration.

[26] But Cooke J went further. He added:

> [i]n agreeing to arbitrate, a party agrees that the arbitration shall be effective in determining the rights of the parties. Recognition of the validity of an award goes no further than that. As applied to the stage reached here in the DIFC, the agreement to arbitrate is sufficient waiver to the orders for recognition …, and (though less clearly) the orders for enforcement as a judgment …, since they do not deal with execution and actual enforcement on assets.

In other words, an agreement to arbitrate may be enough to amount to recognition waiver, and possibly enforcement waiver as well, not just in a supervising State, but also in an enforcing State. That would be true regardless of whether a government does or does not actually participate in the underlying arbitration. It all depends on the precise terms of the agreement to arbitrate.[19]

[27] Cooke J distinguished *FG Hemisphere Associates LLC* on the basis that the terms of Rule 28.6 of the 1998 ICC Rules applicable there did not go far enough. Rule 28.6 did not expressly state that the DRC was

19 See also, in Singapore, *Maldives Airports Co Ltd & Anor v GMR Malé International Airport Pte Ltd* [2013] SGCA 16, where the Singapore Court of Appeal held that a contractual clause was sufficient to constitute enforcement waiver. The clause there read: "To the extent that any of the Parties may in any jurisdiction claim for itself … immunity from service of process, suit, jurisdiction, arbitration … or other legal or judicial process or other remedy…, such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction". The court held that the clause constituted consent (within the meaning of s 15(3) of the State Immunity Act (SIA) (Chapter 313)) by the Maldives Government to waiver of sovereign immunity, so that the doctrine could not be relied on to oppose a grant of injunction (at §§17–18). By its terms, s 15(3) of the SIA contrasts "a provision merely submitting to the jurisdiction" (adjudicative waiver) with "a consent for the purposes of this subsection" concerning enforcement (enforcement waiver).

waiving immunity against enforcement. In contrast, the arbitration agreement in *Pearl Petroleum* could not have been clearer: "[T]he KRG waives on its own behalf and that of the KRG any claim to immunity for itself and its assets".[20]

[28] Second, the Court of Final Appeal in *FG Hemisphere Associates LLC* had heavily relied on *Mighell v Sultan of Johore*[21] ("*Mighell*") and *Duff Development Co Ltd v Government of Kelantan*[22] ("*Duff Development*") for the proposition that enforcement waiver had to be in the face of the court. But, referring to Lord Collins' analysis of *Duff Development* in *NML Capital v Republic of Argentina*[23] ("*NML Capital*"), Cooke J pointed out that *Duff Development* had been decided erroneously. By 1924 when *Duff Development* was decided, it had been possible to submit to the jurisdiction of the English court by an agreement to do so. Between the time of *Mighell* and that of *Duff Development*, the law had changed.

20 See now Article 35(6) of the 2017 ICC Arbitration Rules: "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." It is submitted that Article 35(6) would not be enough to amount to enforcement waiver. See also Rule 32.11 of the 2017 SIAC Arbitration Rules: "Subject to Rule 33 and Schedule 1, by agreeing to arbitration under these Rules, the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made." It is submitted that Rule 32.11 may not be effective either to give rise to enforcement waiver. Nor does Rule 12(10) of the 2017 KLRCA Arbitration Rules go far enough: "By agreeing to arbitration under the KLRCA Rules, the parties undertake to carry out the award immediately and without delay, and they also irrevocably waive their rights to any form of appeal, review or recourse to any court or other judicial authority insofar as such waiver may be validly made, and the parties further agree that an award shall be final and binding on the parties from the date it is made." Contrast Rule 34.2 of the 2013 HKIAC Administered Arbitration Rules, which might be wide enough to establish enforcement waiver: "The parties and any such person shall be deemed to have waived their rights to any form of recourse or defence in respect of enforcement and execution of any award, in so far as such waiver can validly be made."

21 [1894] 1 QB 149.

22 [1924] AC 797.

23 [2011] 2 AC 495. *NML Capital* was decided on July 6, 2011, about a month after the Hong Kong Court of Final Appeal delivered its decision in *FG Hemisphere Associates LLC*. The Court of Final Appeal accordingly did not have the benefit of Lord Collins' observations in *NML Capital*, when delivering its judgment.

Duff Development had overlooked the introduction of a provision in 1920 into the English Rules of the Supreme Court, providing for the English court to assert jurisdiction on the basis of an agreement to submit to its jurisdiction. Cooke J concluded:

> The corrected view of the common law position prior to the English Act of 1978 is as expressed by Lord Collins and not as expressed by the Hong Kong Court and the *Mighell* rule does not reflect current English law, common law, civil law in general nor customary international law at the time of the Contract or now … Where a clear and unequivocal waiver from suit and enforcement has been given in a contract, there is no good reason why effect should not be given to the words used. Where the construction is governed by English law and any relevant rules, customs or practices of International law, the conclusion which the DIFC court should reach is clear. Effect must be given to the plain words and they cannot be rendered meaningless by the means that the KRG suggest. To accede to the submission of KRG here would be to render the wording meaningless. It would destroy the bargain that the parties had made and enable a state or state body to succeed on an argument that it had expressly agreed not to run.

[29] In brief, reading *FG Hemisphere Associates LLC* in conjunction with *Pearl Petroleum*, there is a real glimmer of hope when it comes to enforcement of awards by investors against States. The glimmer is that supervising and enforcing courts in civil and common law jurisdictions will likely be readier, even in absolute immunity jurisdictions, to treat governments as having waived immunity against enforcement, merely as a result of having entered into arbitration agreements. What is important is that an arbitration agreement clearly records a government's agreement to waive immunity in relation to enforcement against some precisely identified assets or against all of the State's assets wherever situated. The arbitration agreement can do this on its own terms or by incorporating institutional rules which make it plain that a party is waiving any immunity it might claim in relation to enforcement against all or any particular assets. Institutions will no doubt wish to review their rules to beef up their equivalents of Rule 28.6 of the 1998 ICC Rules.

[30] It is accepted that, in coming to the conclusion in the preceding paragraph, this article has relied heavily on the decision of the DIFC Courts. No apology is made for this. In the working out of principles

of cross-border commercial law, there is no room for parochialism. The jurisprudence of international commercial courts (such as the Commercial Court in London, the DIFC Courts in Dubai, and the SICC in Singapore) are able to establish binding or, at the least, highly persuasive precedent in a way that arbitral awards cannot. The decisions of international commercial courts can thus provide authoritative guidance on the resolution of long-standing debates in international commercial law (including the scope of sovereign immunity as a defence to civil proceedings and enforcement). The greater certainty that would result is something to be welcomed.

Assessment of Damages in Defamation: Reconciling the Irreconcilable?

by

*Dato' Wan Ahmad Farid Wan Salleh**

[1] There is no straitjacket formula when it comes to assessing damages in defamation actions. Stephen J in *Robert James Gordon Coulter v Sunday Newspapers Ltd*[1] remarked that damages are at large in the sense that they cannot be assessed by reference to any mechanical, arithmetical or objective formula (see *Broome v Cassell & Co Ltd*[2] ("*Broome v Cassell*")). The court is, therefore, according to the learned judge, entitled to take into account a wide range of matters.

[2] This article seeks to examine that "wide range of matters" in the award of damages in libel cases in Malaysia and other related jurisdictions for the past forty years. Although the quantum of the award might differ depending on the circumstances of each case, this article will try to analyse the criteria used by the Malaysian courts in arriving as they did at the respective quantum. I will also explore whether the days of the mega awards in defamation cases are gone.

The arrival and "departure" of *Vincent Tan*

[3] In Malaysia, until the judgment in *Tan Sri Vincent Tan Chee Yioun v Haji Hassan bin Hamzah & Ors*,[3] substantial damages awarded in defamation cases were relatively unheard of. In *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor*,[4] the plaintiff took offence to being referred to as "Abu Jahal" which the court held to be actionable *per se* since the term denoted a person "who has one of the qualities, character and attitudes of Amru bin Hisham, *e.g.*, a person who tells lies". The plaintiff was awarded a sum of RM10,000 as damages to vindicate him in the eyes of the public and console him for the wrong done.

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* Judicial Commissioner of the High Court of Malaya.

1 [2016] NIQB 70.

2 [1972] AC 1027 at 1071.

3 [1995] 1 MLJ 39.

4 [1978] 1 MLJ 75.

[4] In 1981, the then Federal Court, in the case of *John Lee & Anor v Henry Wong Jan Fook*,[5] reduced the High Court award of RM50,000 to RM8,000. In the aforesaid case, there was no allegation of malice and on the facts there was no evidence of malice. It was not until the case of *Dato Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor*[6] ("*Dato Harris*"), when Siti Norma Yaakob J (as she then was) awarded the plaintiff a sum of RM100,000 as compensatory damages. At that stage, it was thought that the aforesaid award was the beginning of a new trend in Malaysia. Lawyers were bracing themselves for what they then termed as the era of the mega-defamation suits. It was not to be. It was much ado about nothing.

[5] In *Great One Coconut Products Industries (M) Sdn Bhd v Malayan Banking Bhd*[7] ("*Great One Coconut*") Zakaria Yatim J (as he then was) awarded the plaintiff the sum of what his Lordship termed as "substantial damages" of RM15,000 against the defendant bank for the wrongful dishonour of the five bank drafts although the plaintiff sought the amount of RM75,000. The learned judge said, "the amount asked for by the plaintiff is far too exorbitant". The judgment in *Dato Harris* was handed down on August 25, 1983. *Great One Coconut* was dated October 5, 1985. If an award of RM15,000 in 1985 was considered as "substantial", how would one describe the award of RM100,000 two years earlier?

[6] In *Tan Sri Vincent Tan Chee Yioun v Haji Hassan bin Hamzah & Ors*,[8] Mokhtar Sidin J (as he then was) at first instance, held that one of the impugned articles ridiculed the plaintiff as a corporate figure who was involved in *The Sun* newspaper with the ulterior motive of furthering his own personal business interests and further carried the innuendo that he was unscrupulous in manoeuvring the editorial staff of the said newspaper by making them subordinate to their reporting of news his personal business interests. The learned trial judge then made the following award against:

(a) the first defendant, the editor-in-chief – RM3 million;

(b) the second defendant, writer of the article –RM750,000;

5 [1981] 1 MLJ 108, FC.
6 [1984] 1 MLJ 97.
7 [1985] 2 MLJ 469.
8 Note 3 above.

(c) the third defendant, writer of the article – RM2 million;

(d) the fourth defendant, writer of the article – RM1 million;

(e) the fifth defendant, writer of the article who apologised – RM250,000;

(f) the sixth defendant, publisher and proprietor of the magazine – RM2 million; and

(g) the seventh defendant, printer of the article – RM1 million.

[7] The Court of Appeal in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun and Other Appeals*[9] by a unanimous decision affirmed the decision of Mokhtar Sidin J (as he then was). On damages, Gopal Sri Ram JCA (as he then was) in delivering the main judgment of the court, outlined one of his reasons as follows:

> I must record my strong disapproval of any judicial policy that is directed at awarding very low damages for defamation. That is not to say that low or even nominal damages may not be awarded in particular cases, for example, where a plaintiff is without any or any worthwhile reputation. But I do hold the view that injury to a person's reputation may occasion him at least as much, if not greater, harm than injury to his or her physical self.
>
> No one, least of all a journalist, should rest in the comfort that a person's reputation may be injured with impunity on the footing that the consequence would be the payment of a few thousand ringgit in damages.

[8] The Court of Appeal's judgment was then affirmed by the Federal Court; see *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun and Other Appeals*[10] (hereinafter collectively referred to as "*Vincent Tan*"). The Federal Court made this remark:

> Unless the verdict is so outrageously exorbitant, or shockingly excessive in relation to the libel, or manifestly unreasonable, unjust or irrational, the appellate courts should proceed with caution before making any variation in assessment of damages in libel cases.

9 [1995] 2 MLJ 493, CA.
10 [2000] 3 CLJ 728, FC.

[9] There is no doubt that *Vincent Tan* had started the trend of the Malaysian courts granting mega awards to the plaintiffs in defamation cases. This was observed by none other than Gopal Sri Ram JCA (as he then was) in a post-*Vincent Tan* case of *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* ("*Liew Yew Tiam*")[11] when his Lordship said:

> In the process of making our assessment we have not overlooked the recent trend in this country of claims and awards in defamation cases running into several million ringgit.
>
> No doubt that trend was set by the decision of this Court in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun (supra)*. It is a decision that has been much misunderstood.

At a later part of his judgment, his Lordship further observed as follows at p 395:

> We would add that we do not regard the affirmation by the Federal Court of the decision in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun (ibid)* as an insurmountable hurdle of binding precedent to our decision in the present case. For, at the end of the day, the Federal Court affirmed the award made in the circumstances of that particular case as a proper exercise of judicial discretion by the High Court upon the question of damages.

The Court of Appeal then reduced the sum of RM1 million awarded by James Foong J (as he then was) to RM100,000.

[10] The aforesaid observation by Gopal Sri Ram JCA (as he then was) was echoed by Abdul Hamid Mohamad JCA (as he then was) in *Karpal Singh a/l Ram Singh v DP Vijandran*[12] ("*Karpal Singh*") when his Lordship remarked:

> Until the arrival of *Vincent Tan* in 1995, the highest award ever given by the court in this country was RM100,000.00. *Vincent Tan* sky rocketed the awards. When the award was confirmed by the Court of Appeal, what was an isolated pinnacle in an otherwise undulating plain, the trend is set. When the Federal Court confirmed it, it became a binding precedent in all the courts in this country. But, now the

11 [2001] 2 CLJ 385, CA.
12 [2001] 4 MLJ 161, CA.

> Court of Appeal in *Liew Yew Tiam* has had second thoughts about it. The learned judge of the Court of Appeal who wrote the main judgment in *MGG Pillai* has sought to distinguish *MGG Pillai*'s case. "It is a decision that has been much misunderstood and the trend should be checked," he said.

[11] For whatever it is worth, it cannot be denied that *Vincent Tan* did feature in the Malaysian legal annals. Its influence in terms of the quantum of damages, nevertheless, was temporary. Equally however, it cannot be denied that the case had impacted the awards granted in subsequent cases, at least at the High Court stage. As an example, in *Cheah Cheng Hoc & Ors v Liew Yew Tiam & Ors*[13] (at first instance) James Foong J (as he then was), made specific reference to the Court of Appeal's decision in *Vincent Tan*. In delivering his judgment before awarding a sum of RM1 million, his Lordship said:

> After taking into consideration all these, as well as those laid down for exemplary and aggravated damages expounded in *MGG Pillai*'s case …

[12] In *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram*,[14] the same learned judge again made reference to *Vincent Tan* and remarked in no uncertain terms as follows:

> After considering all those factors listed above for general damages, and those principles enunciated in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun's* case for exemplary and aggravating damages for defamation …

A total award of RM3.5 million was granted to the plaintiff. The court further held that the defendant was in the thick of the whole conspiracy to defame the plaintiff. On conspiracy alone, a sum of RM500,000 was awarded.

[13] In another case, *Normala Samsudin v Keluarga Communication Sdn Bhd*,[15] the plaintiff, a well-known television personality and a prime time newscaster sued the defendant, a publisher of *Mingguan Wanita* that had published on its cover a photograph of the plaintiff and

13 [2000] 6 MLJ 204.
14 [2000] 5 MLJ 465.
15 [1999] 2 MLJ 654.

featured an article which, *inter alia*, mentioned a third person in her married life and payment of RM3 million to her husband to release her by way of "*tebus talak*". The learned trial judge, after having referred to the Court of Appeal's decision in *Vincent Tan*, awarded her RM100,000 as general damages for libel and a further sum of RM100,000 as aggravated damages.

[14] However, I must underline that not every judgment that arose between *Vincent Tan* and *Liew Yew Tiam* granted mega awards in damages in defamation cases. In *Chiew Foo Hua v The Publisher Miri Daily News & Anor*,[16] for example, Sulaiman Daud JC (as he then was) referred to *Vincent Tan* and took cognisance of the "aggravating factor" of the circumstances of the case. His Lordship took into account the position and standing of the plaintiff, the tremendous emotional distress suffered, the seriousness of the allegation and the effect of such a defamatory article on the character, integrity and honesty of the plaintiff, yet awarded the sum of RM40,000 only.

[15] The aforesaid case goes to show that contrary to popular belief, *Vincent Tan*, standing alone, was not an authority for a mega award that had overwhelmingly influenced the courts. There are other factors considered by the courts in determining the quantum of damages. Abdul Hamid Mohamad JCA (as he then was) put this succinctly in *Karpal Singh*:

> This court is bound by the decisions of the Federal Court. But what is binding is the principle laid down by the Federal Court in assessing damages in libel cases, not the amount. The amount to be awarded in each case depends on the facts and the circumstances of the case. Indeed, how much is too much, how much is too little and how much is reasonable is quite subjective. No scale can be fixed.

[16] In what is seen as an attempt to put a judicial handbrake to the excitement, Gopal Sri Ram JCA (as he then was) said this in *Liew Yew Tiam* at p 395:

> We do not think that it automatically follows as a matter of policy that the plaintiff in every case should be entitled to receive an award in millions of ringgit.

16 [2000] 8 CLJ 68.

Can *Vincent Tan* and *Liew Yew Tiam* be reconciled?

[17] The question that arises is, at least on the issue of quantum, has *Liew Yew Tiam* put *Vincent Tan* to rest? In delivering the judgment of the Federal Court in *Vincent Tan*, Eusoff Chin CJ was of the opinion that:

> But, one must not forget that the "chilling" effect that a large amount of damages has on the freedom of speech is nothing or is too mild compared to the great pains and sufferings that the libel had inflicted upon the respondent due to the venomous accusations made by the appellants against the respondent.
>
> We have considered whether the award of RM2 million damages against the first appellant is excessive. We do not think so.

[18] The then learned Chief Justice in *Vincent Tan* spoke of the "chilling" effect of a large amount of damages on the freedom of speech but nevertheless proceeded to affirm the same. I agree that this part of the judgment is not a policy statement. As pointed out by the Court of Appeal in *Liew Yew Tiam*, the affirmation by the Federal Court of the quantum in *Vincent Tan* does not in any way mean that as a matter of policy the plaintiff in every case should be entitled to receive an award in millions of ringgit.

[19] What is more important is, *Liew Yew Tiam* and *Karpal Singh* did not in any way indicate that *Vincent Tan* should not be revisited or the same amount should not be given in the future. In fact, Abdul Hamid Mohamad JCA (as he then was) recognised this in *Karpal Singh* when he said that "the amount to be awarded in each case depends on the facts and the circumstances of the case". There was not a slightest of suggestion that the Federal Court's judgment in affirming the quantum in *Vincent Tan* was *per incuriam*.

[20] Even the Federal Court in the most recent reported case of *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor*[17] ("*Harris Salleh*") did not venture to declare that *Vincent Tan* was wrongly decided. In the aforesaid case, the High Court awarded a global sum of RM1 million for compensatory, aggravated and general damages. The Court of

17 [2017] 6 MLJ 133, FC.

Appeal held that the award was excessive and reduced it to RM100,000. The Federal Court in allowing the appeal on quantum increased the total damages awarded to the plaintiff to RM600,000.

[21] The Federal Court had referred to *Vincent Tan* in many parts of the judgment. The strongly constituted quorum of the Federal Court would have had every opportunity to actually make a categorical departure from *Vincent Tan* and hold that the quantum therein was wrongly awarded. The fact that the apex court opted not to do so, means that *Vincent Tan* is still good law both on the principles therein and in quantum. To my mind, it also means that the Federal Court in *Harris Salleh* refused to make a ruling that the RM2 million award in *Vincent Tan* was "so outrageously exorbitant, or shockingly excessive in relation to the libel, or manifestly unreasonable, unjust or irrational".

The checklist

[22] In the final analysis, a trial judge has to resort to the general guidelines in determining the quantum. It is helpful to reflect the checklist adopted by Hirst LJ in *Jones v Pollard*[18] ("*Pollard*"). The checklist, which I have taken the liberty to summarise for the purpose of this article, and though by no means exhaustive, is generally as follows:

(a) The objective features of the libel itself, such as its gravity and its prominence;

(b) The medium of circulation in which it was published, and any repetition;

(c) The subjective effect on the plaintiff's feelings (usually categorised as aggravating features) not only from the publication itself, but also from the defendant's conduct thereafter both up to and including the trial itself;

(d) Matters tending to mitigate damages, such as the publication of an apology.

(e) Matters tending to reduce damages, e.g. evidence of the plaintiff's bad reputation, or evidence given at the trial which the jury are

18 [1996] EWCA Civ 1186, CA.

entitled to take into account in accordance with the decision of this court in *Pamplin v Express Newspapers Ltd*[19] ("*Pamplin*"); and

(f) Vindication of the plaintiff's reputation, past and future.

The gravity of the allegation

[23] It is a well-established principle of law that words imputing a criminal offence are actionable *per se* without proof of special damage. In *Webb v Beavan*,[20] Pollock B held that "words which impute any criminal offence are actionable *per se*". The approach by the courts seems to suggest that the more serious the imputed criminal offence is, the bigger the damages would be. In *Sharifah Norziah bt Syed Mokhtar v Syarikat GPSM Holding Bhd & Ors*,[21] the allegation was that the plaintiff had committed criminal breach of trust by misappropriating or siphoning the company's money by forging the company's cheques. Suraya Othman J (as she then was) held that it was a serious allegation, which if it had a basis, could render the plaintiff to a criminal charge in the law courts. The court awarded RM150,000 in general damages to the plaintiff. Again, in *Dr Jenni Ibrahim v S Pakianathan*[22] where the allegations involved serious allegations of criminal breach of trust, a sum of RM30,000 was awarded as damages for the embarrassment, distress and humiliation which the plaintiff had suffered. It must be borne in mind that RM30,000 in December 1985 when the judgment was delivered, could be considered as substantial in today's present value.

[24] The defamatory allegation need not necessarily be in the nature of a crime to attract substantial damages. It could be as substantial if, for example, the cumulative effect of the defamatory words could be proved to have ruined the plaintiff's business or even political fate. In *Abdul Jalil bin Ahmad & Anor*,[23] the plaintiff who was then the Sabah Chief Minister, leader of the Barisan Nasional in the State of Sabah, sued the defendant, the author and publisher of a book titled *Tumbangnya Harris Salleh* published just before the general election, for libel. The defendant's motive in publishing the libel just before the

19 [1988] 1 WLR 116, CA.
20 [1883] 11 QBD 609.
21 [2015] 10 MLJ 618.
22 [1986] 2 MLJ 154.
23 [1984] 1 MLJ 97.

general election could only be motivated by malice, and the libel was perpetrated for political and financial gains. The court awarded the plaintiff a sum of RM100,000 as compensatory damages. By standards at the time the judgment was handed down in 1983, the said sum was indeed quite substantial.

[25] In *Vincent Tan*, the offending words were, *inter alia*:

> Tan Sri Vincent called another meeting of his editorial staff and complained that the paper was preventing him from getting government contracts since approval for some of his projects had to come from Samy Vellu. Vincent warned that Vellu was not to be criticized anymore. As a result, *The Sun* was reduced to being an in-house paper for the Berjaya Group.
>
> Vincent's insistence that the paper "not criticize his friends or praise his enemies" saw four senior members of the editorial staff resigning in protest.

The impugned article carried what in legal parlance is known as a "false innuendo" that the plaintiff was an unscrupulous and unprincipled businessman and was calculated to disparage and discredit the plaintiff personally and in his trade. Further, the main thrust of the plaintiff's case against the defendants was that they conspired to defame him. The learned trial judge found that there was sufficient evidence from which a conspiracy could be properly inferred and that finding was affirmed by the Court of Appeal.

[26] As aforesaid, the sting and venom of a defamatory allegation need not necessarily be criminal in nature for the award of damages to be substantial. The libel could well be perpetrated for financial or political gains without any criminal connotation. The more serious the allegation is, the greater the damages would be. If over and above this, the libel was pursuant to "a concerted agreement between and among the defendants with a predominant intention to injure and damage the plaintiff's personal and commercial reputation and personal career" as in *Vincent Tan*, it can only be expected that the damages would be substantial.

The extent and width of publication

[27] The width or extent of publication is always a relevant consideration when assessing damages in an action for defamation.

In *John v MGN Ltd*,[24] the plaintiff, Elton John, a well-known musician and entertainer, began an action against the defendant publisher of *Sunday Mirror*, a national newspaper claiming compensatory damages for defamation which claimed that the plaintiff engaged in a bizarre diet of chewing but not swallowing food and had been observed at a Hollywood Christmas party spitting chewed food into a napkin. The article also quoted medical opinion to the effect that such dietary conduct constituted a form of bulimia and was potentially fatal. In the Court of Appeal, Sir Thomas Bingham MR said at p 607:

> The extent of publication is also very relevant; a libel published to millions has a greater potential to cause damage that a libel published to handful of people.

[28] The aforesaid proposition has always been the position in Malaysia. In *Dato' Musa bin Hitam v SH Alatas & Ors*,[25] all the 10,000 copies of the first print of the impugned book were almost sold out as a result of which a second print of another 10,000 copies were made. The quantum of damages awarded to the plaintiff was RM100,000 which was quite a substantial sum in 1990 when the judgment was handed down.

[29] On the other hand, in *Yeo Ing King v Melawangi Sdn Bhd*,[26] the Court of Appeal set aside the award of RM5,000,000 ordered by the High Court and substituted it with a global sum of RM50,000 which "would be more than sufficient compensation for the damage done to the plaintiff's reputation". In the aforesaid case, the publication was limited to the Joint Management Committee who numbered only 13 members and to owners of the Amcorp Trade Centre. The Court of Appeal referred to *Arul Chandran v Chew Chin Aik Victor JP*[27] ("*Arul Chandran*") where it was held that the limited size of the circulation in question would be relevant in the assessment of damages. In *Arul Chandran*, the Singapore High Court awarded Mr Arul $150,000 in total as damages. Aggrieved by the award, Mr Arul appealed and at the Court of Appeal argued that an award of a total of around $1.875

24 [1997] QB 586, CA.
25 [1991] 1 CLJ 314.
26 [2017] 1 CLJ 512, CA.
27 [2000] SGHC 111.

million would be nearer to the mark. The Singapore Court of Appeal, in affirming the decision of the learned judicial commissioner, held that Mr Arul's assertion that he should be awarded around $1.875 million in damages could not be countenanced and that such a figure was "totally unrealistic"; see *Arul Chandran v Chew Chin Aik Victor* JP.[28]

[30] In *Morgan v Odhams Press Ltd & Anor*[29] ("*Morgan*"), the defamatory article was understood as referring to the plaintiff only by a small segment and, so to speak, esoteric circle of friends and neighbours who knew the relevant circumstances. Consequently, the award of £4,750 was excessive and "inordinately large" and a new trial was ordered on the issue of the quantum of damages.

[31] In an era of social media, defamatory statements are often made throughout the cyber world. Take for example, a Facebook account holder who has 1,000,000 followers. If he were to make a libellous remark against the plaintiff and that particular posting is shared by several thousand other account holders, the multiple effect of the venom can be left to imagination.

[32] This is more so if the defamatory posting was allowed to remain on the Facebook platform for a certain period of time before the plaintiff could take steps to get an injunction for it to be removed. Even then, the original maker of the defamatory statement could not have control of his posting that was shared by other account holders.

[33] In the circumstances, the court at first instance has to take into account the medium of publication in order to determine the extent and width of publication. Books can be measured by the number of copies sold. Newspapers can be gauged by the total number of its circulation.

[34] However, there is a caveat here. The trial judge must be able to realistically estimate the extent and width of publication. To begin with, not all followers on Facebook, Twitter and Instagram read the impugned postings anyway. Some are passive followers. The trial judge must therefore be realistic in making such estimation.

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28 [2001] SGCA 3, CA.
29 [1971] 2 All ER 1156, HL.

The subjective effect on the plaintiff's feelings

[35] In *Goh Chok Tong v Jeyaretnam Joshua Benjamin and Another Action,*[30] Yong Pung How CJ in delivering the decision of the Singapore Court of Appeal made the following observation:

> It is well-established that aggravated damages in defamation represent merely a component of the compensatory damages and aggravated damages are awarded when the defendant's conduct before and during trial has aggravated the hurt to the plaintiff's feelings. For such conduct, the quantum of damages payable in respect of the defamatory publication may be enhanced to compensate adequately the plaintiff for the injury occasioned.

[36] It is important to note that the defendant's conduct before and even during the trial is an important factor to be considered for the purpose of assessing damages. Such conduct of the defendant is what Hirst LJ in *Pollard* referred to as "aggravating features" which if proved could lead to an award of substantial damages.

[37] In *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3)*[31] ("*Abdullah Hishan*"), the learned trial judge observed the issue of aggravated damages as follows:

> Under this head the plaintiff is entitled to damages if he can show that the conduct of the defendant was so obnoxious as to warrant an award. The plaintiff was subjected to humiliating and insensitive questions which were never substantiated.

[38] In fact, in the aforesaid case, the plaintiff was subjected to prolonged and lengthy cross-examination for more than 14 days without let up by two experienced counsel on matters that remained unrebutted. The cross-examination was, moreover, conducted in a callous manner. Suggestions were put which the defendant knew she could not establish. The plaintiff was awarded the sum of RM500,000 as aggravated damages.

[39] In *Rookes v Barnard*[32] ("*Barnard*"), the House of Lords held that the court can take into account the motives and conduct of the

30 [1998] 3 SLR 337, CA.
31 [1999] 6 MLJ 589.
32 [1964] AC 1129, HL.

defendant where they aggravate the injury done to the plaintiff. Lord Devlin in his speech remarked that the motives and conduct "may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride". These are matters which the court can take into account in assessing the appropriate compensation.

[40] In *Lee Kuan Yew v Seow Khee Leng*,[33] the learned trial judge referred to *Gatley on Libel & Slander*, 8th Edition that the conduct of the defendant in handling his case and his state of mind are matters which the plaintiff may rely on as aggravating the damages. The court may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action, and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case.

[41] The conduct of the defendant's counsel was commented on by the learned trial judge in *Abdullah Hishan* where it was put to the plaintiff during cross-examination that he was an "incorrigible liar". The defendant through her counsel had put the plaintiff through the indignity of being subjected to disparaging and contumelious questions during cross-examination.

[42] I, however, cannot respectfully agree with this approach. To implicate the defendant with the conduct of his counsel at the trial is in my view stretching the "conduct argument" too far. In any event, the court should not unreasonably restrict any counsel from putting and suggesting to any witnesses or parties if it was for the purpose of advancing his client's case. Likewise, the client should not be punished for the method of advocacy of his counsel. Advocacy, as they say, is a matter of style.

[43] The importance of the conduct of the defendant in determining the quantum of damages was reiterated by our own Court of Appeal in a fairly recent case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and Another Appeal*.[34] Although the case was not strictly a defamation case, the Court of Appeal referred to a line of cases involving defamation including that of *Barnard* and *Broome v*

33 [1989] 1 MLJ 172.
34 [2018] 1 MLJ 784, CA.

Cassell. Zawawi Salleh JCA (as his Lordship then was) in delivering the judgment of the court remarked that:

> Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[44] A trial judge is therefore the best person to analyse and assess the conduct of a defendant (and the plaintiff) at the trial. But, and having said that, a trial judge should not succumb to the temptation of making uncalled for remarks such as "Has she fragrance? Would she have, without the strain of this, radiance?".[35]

Matters tending to mitigate damages

[45] It has been said again and again that apology would be a ground for reducing the damages to be awarded. Lord Hailsham of St Marylebone LC in *Broome v Cassell* was of the opinion that damages "can be reduced if the defendant has behaved well – as for instance by a handsome apology".

[46] What amounts to a "handsome apology" is somewhat difficult to define.

[47] An apology, which is an expression of regret for the publication of the defamatory material must be unequivocal and simultaneously coupled with an unqualified acknowledgment of the falsity of the statement and an offer to withdraw it. Generally, such an apology will go to mitigation of damages; see the Court of Appeal in *Vincent Tan*.

[48] In *Vincent Tan* at first instance, the court took into account that the fifth defendant had apologised three times in open court. In view of the apology, the court awarded the sum of RM250,000 as general damages against the fifth defendant as opposed to the remaining defendants who had refused or otherwise failed to apologise. This approach was affirmed by the Court of Appeal and subsequently by the Federal Court.

[49] From the aforesaid, it can be seen that an unconditional apology would reduce the award by nearly 90% (as compared to the co-

35 *Per* Caulfield J in *Archer v Daily Star Newspapers* (1987) unreported.

defendants who refused to apologise). This was so even though the fifth defendant was himself the author of one of the impugned articles. It must however be stressed that, in the final analysis, it all depends on the facts and circumstances of the case.

[50] In *Yap Bor Lim v Chia Thye Poh & Anor*[36] ("*Yap Bor Lim*"), the defendants admitted publishing a libel on the plaintiff and submitted to the judgment of the court with regard to the question of damages and costs. It was argued for the defendants that the publication in question was made without malice, though hastily and on information from a reliable source and that in all the circumstances damages should be nominal. The plaintiff, on the other hand, claimed that the libel was made recklessly and with malice.

[51] The statement was published as part of a political campaign to discredit the political opponents of the defendants. The defendants however published an apology that they were:

> convinced that the statements and imputations referred to and concerning Mr. Yap Bor Lim are wholly unfounded and we hereby withdraw them *in toto*. We tender our profound regrets and apologies to Mr. Yap Bor Lim for having published them and for any pain or annoyance that our untrue statements may have caused to him.

[52] The court reduced the damages from $5,000 to $3,000 in view of the apology.

[53] However, for the apology to be effective in reducing the damages, it must be unconditional. It is not sufficient if the defendant were to publish words to the effect that "if the said articles had tarnished the reputation of the plaintiff" or that he had met the plaintiff twice at the airport and apologised. That is certainly not sufficient, and to borrow the words of Begbe CJ in *Hoste v Victoria Times Publishing Co*[37] it is merely "an offer to offer an apology"; see *Vincent Tan*.

[54] Again, there is, however, a caveat. While an unconditional apology as in *Yap Bor Lim* and *Vincent Tan* would more than likely reduce the amount of damages, the failure to apologise or lack of it would not necessarily, in normal circumstances, enhance the damages payable. This is only logical. If a defendant denied ever publishing

36 [1965] 2 MLJ 123.
37 (1889) 1 BCR 365.

the defamatory statement, the question of him apologising does not arise since that in effect would amount to an admission of publication. The speech of Lord Reid in the House of Lords case of *Morgan* is illustrative of this:

> In the present case I do not see what room there was for an apology. The defendants' case throughout was that they never said anything at all about the plaintiff. The question for the jury was whether what they said should be regarded as applying to him or not. To have apologised – I do not know how – might have seemed to be going some way towards admitting that they had defamed the plaintiff.

[55] In the Singapore case of *Goh Chok Tong v Jeyaretnam Joshua Benjamin*,[38] the words uttered by the defendant did not have the extreme meaning canvassed by the plaintiff. The failure to apologise for such a meaning could not be held against the defendant. It was held that the absence of apology did not aggravate the damages payable by the defendant.

[56] It should, however, be noted that if the failure to apologise was due to the defendant's arrogance and dismissiveness of the plaintiff's efforts to resolve the matter, then this would clearly lend towards a higher amount in damages being awarded. In *Dato' Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1)*,[39] after having received the plaintiff's solicitors' letter demanding for an apology, the defendant tweeted suggesting that he had no intention to cease and desist. The defendant further tweeted that the plaintiff was trying to intimidate him and that he "loved a good battle" and would "take him on". The court held that aggravated damages could be awarded in light of the defendant's conduct in failing to make any apology, failure to withdraw the offending statements from his website thus allowing the defamatory statements to continue to be published right up to the date of the hearing. The court then awarded a sum of RM300,000 for general damages and another RM200,000 for aggravated damages caused by the publication of the defamatory words.

Matters tending to reduce damages

[57] Generally, evidence of the plaintiff's bad reputation would tend to reduce the award of damages in a libel action. In *Pamplin*, the plaintiff

38 [1988] 1 SLR 547.
39 [2012] 10 MLJ 203.

gladly accepted the label "artful dodger". He also told the press that a number of things that he said were simply not true. Mr Pamplin, also conceded that some of his conduct could be described as slippery and indeed unscrupulous, and in view of some of the things that he had said, did not really object to being called a liar. At the Court of Appeal, Oliver LJ speaking for himself said as follows:

> For my part, I find the verdict one which, given this background, a jury could quite properly reach, for a man who openly and avowedly behaves like a rascal suffers little further damage to his already sullied reputation by being categorised as a rascal of a slightly different type.

The Court of Appeal then affirmed the nominal damages of ½ p awarded to the plaintiff. Neill LJ held that the evidence must be evidence of the plaintiff's general reputation at the date of the publication of the words complained of and may not relate to specific acts of misconduct.

[58] *Pamplin* was referred to by the House of Lords in *Grobbelaar v News Group Newspapers Ltd & Anor*.[40] In that case, the plaintiff, a former professional footballer, appealed against a decision of the Court of Appeal quashing a finding that the defendant had libelled him. The plaintiff's reputation was destroyed following articles in a newspaper published by the defendant stating that he had taken bribes in order to fix football matches. The trial jury found that the defendant had libelled the plaintiff and awarded him substantial damages in the sum of £85,000. The Court of Appeal, however, considered the jury's verdict to be irreconcilable with the evidence presented and therefore perverse. The decision was reversed. The House of Lords by a majority (Lord Steyn dissenting) held that the jury's verdict should be reinstated but the award of damages reduced to the nominal sum of £1. Although an actionable libel had occurred, the plaintiff should not receive substantial damages as he had acted in flagrant breach of his legal and moral obligations by accepting money to fix games. The plaintiff could have no reputation capable of being protected.

[59] The position in Malaysia is not radically different. In *AJA Peter v OG Nio & Ors*,[41] the plaintiff was an agency supervisor of an insurance company, the third defendant. The plaintiff claimed damages for libel in respect of an article appearing in the official publication of

40 [2002] 1 WLR 3024, HL.
41 [1980] 1 MLJ 226.

the company, the "Pacemaker". The plaintiff contended that the words in the article meant, and he understood them to mean, that he was "one of the scoundrels that make up a minority society" and the uncomplimentary and adverse reference in the article as the person who created friction applied to him. The court made a rather significant observation that the conduct of the plaintiff was not in the circumstances totally innocent. The learned judge referred to *Duncan & Neill on Defamation* and quoted the following passage:

> In all such cases it must be appropriate to say with Lord Esher MR in *Preed v Graham* (1889) 24 QBD 53: "… in actions of libel … the jury in assessing damages are entitled to look at the whole conduct of the defendant" (I would personally add "and of the plaintiff") "from the time the libel was published down to the time they give their verdict".

In short, the conduct of the plaintiff is equally relevant. It is for this reason that Abdul Hamid Mohamad JCA (as he then was) held:

> In the circumstances of the case and in the light of the authorities, it is my considered judgment that a fair and reasonable compensation should be in the region of $15,000 for full liability. This sum must, however, be reduced for reason of the plaintiff's own behaviour in the matter. The court, therefore, enters judgment for the plaintiff against the 3rd defendant in the sum of $9,000 by way of damages.

Vindication of the plaintiff's reputation

[60] The Federal Court in *Harris Salleh* reiterated the proposition that the tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed. The vindication of the plaintiff's reputation is not only directed to the past but also the future as well. In *Aw Eng Sun & Anor v Lau Kooi Cheun & Ors*,[42] Prasad Abraham J (as he then was) referred to *Evans on Defamation in Singapore and Malaysia* (3rd Edition):

> If the element of consolation is insufficient to vindicate the Plaintiff, the damages ought to be increased. It is important to note that the vindication aspect is not just directed to the past, but must also be sufficient to allow the Plaintiff to vindicate his reputation in future should the earlier allegation resurface at a later date.

42 [2013] 10 MLJ 553.

[61] Again, in *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor*,[43] the court took into consideration the need to compensate for the harm done to the plaintiff's personal reputation as an MP of an Islamist-based party being accused of distorting verses from the Holy Quran and the vindication of the plaintiff's reputation, and also to redress the hurt caused to the plaintiff (*solatium*). The plaintiff was awarded the sum of RM70,000 in damages. Of course in *Vincent Tan*, the Court of Appeal took cognisance of the principle that the award must be "sufficient to convince any person of the baselessness of the libel and act as a necessary and sufficient signal to the public at large of the full vindication of the plaintiff's reputation both in Malaysia and internationally".

Conclusion

[62] The checklist as alluded to by Hirst LJ in *Pollard* is by no means exhaustive. Of course, there are other considerations, but what has been discussed may well serve as a general guideline in assisting a court of first instance to determine the amount of damages. By way of summary, a trial judge should take cognisance of these matters:

(i) The gravity of the allegation contributes largely to the amount of damages to be awarded. The impugned statement need not necessarily have a criminal imputation. A libelous statement that could be proved to have ruined the plaintiff's business or political fate could also attract substantial damages.

(ii) The trial judgment must be realistic in making an estimation of the extent and width of publication especially when the impugned statement has been posted online on social media platforms;

(iii) A trial judge should also take into account the motives and conduct of the defendant in determining whether aggravated damages should be awarded. However, a defendant should not be unnecessarily punished for the style of advocacy of his counsel during trial;

(iv) An unconditional, unequivocal apology coupled with an unqualified acknowledgement of the falsity of the impugned statement will go to the mitigation of damages;

43 [2012] 7 MLJ 301.

(v) The arrogance and dismissiveness of the defendant in the face of the plaintiff's efforts to resolve the matter would lend towards a higher amount of damages;

(vi) However, if the thrust of the defendant's defence is that he never said anything at all about the plaintiff, the question of his apologising does not arise since that in effect would amount to an admission of publication; and

(vii) The evidence of the plaintiff's sullied reputation would tend to reduce the award of damages. If the plaintiff could have no reputation to be vindicated, nominal damages would be sufficient.

[63] Running through the reported cases in Malaysia for the past 40 years, it cannot be disputed that there are some discrepancies. That is only to be expected. Some figures were even criticised as purportedly being plucked out of thin air. But then again, the quantum of the award is discretionary in nature. The trial judge has the benefit of evaluating the demeanour and testimony of the witnesses and observing the conduct of the parties "during the trial".

[64] A trial judge has the opportunity of "judging the true character of the plaintiff whose sensibility, refinement and feelings of honour are, where they exist, of no little importance when he is held up to public obloquy and infamy".[44]

[65] The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion. The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice.[45] Appellate intervention is only called for if the damages awarded are outrageously exorbitant, shockingly excessive or manifestly unreasonable, unjust or irrational.

[66] To answer the main question posed in this article: Can *Vincent Tan* and *Liew Yew Tiam* be reconciled? If the analysis is made from the perspective of the checklist hereinbefore discussed, the short answer

44 *Per* Gopal Sri Ram JCA (as he then was) in *Liew Yew Tiam*.
45 *Per* Lord Guest in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, PC.

to the question is in the affirmative. What stands out in *Vincent Tan* is the presence of conspiracy which is conspicuously absent in *Liew Yew Tiam*. In the premises, until and unless *Vincent Tan* is specifically overruled by the apex court of the country, the principles stated therein remain the law despite some views to the contrary.

[67] *Vincent Tan* has indeed arrived and it has not departed. It is still the law and if the facts of future cases are *in pari materia* with the aforesaid case, it is arguable at least, that a court of first instance may exercise its discretion on the principles set out there.

[68] Finally, a trial judge, in the course of assessing damages should bear in mind that the law of defamation is not an avenue to enrich a plaintiff. It is aimed at vindicating the reputation of the plaintiff, period. The trial court should also take heed of the current trend to celebrate the new found freedom of speech. It has to balance between awarding a large amount of damages and the "chilling effect on the freedom of speech" caused by large awards.

Constitutional Amendments: Form and Substance – Issues at the Periphery of Constitutionalism

by

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The essay examines some riveting issues surrounding Parliament's monumental power to amend the Constitution. It explores the controversial, judge-made doctrine of "basic structure" that imports implied limits into the power to constitute and de-constitute the basic charter. Informal, extra-constitutional and, often shadowy, ways of constitutional change are also noted.

A. The Constitution as a basic law

[1] A written and supreme Constitution is not just an ordinary law. It is the fundamental law of a land. It is the litmus test of the validity of all legislative and executive acts. It contains the most important rules of the political system. It is the repository of the nation's ultimate powers. It describes the manner in which the State is organised, government carried on and justice administered. It establishes the institutions of the State, defines and delimits their powers and functions and prescribes the procedures for the exercise of authority. It determines inter-governmental relationships.

[2] It balances the might of the State with the rights of citizens. It protects liberties and explains obligations.

[3] It encapsulates the basic values on which the society and the legal system are founded.

[4] In a fragmented and divided society, it seeks to promote unity in diversity and to weld people into one common nationality.

[5] In sum, it is the chart and compass, the sail and the anchor of a nation's legal and political endeavours. As it is such an important legal landmark, should it be allowed to be constituted and de-constituted

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by transient political majorities? If yes, then by whom, in what manner and to what extent?

B. Need for balance between stability and change

[6] Because the Constitution is the highest law of the land, its glittering generalities should not be written in the sands to be washed away by each new wave of Parliamentarians after a general election. Its rewriting, de-constitution or repeal should not be as easy as the alteration of ordinary laws.

[7] At the same time – and herein lies the great challenge – the Constitution's words should not be chiselled in granite so as to obstruct growth and change to accommodate the felt necessities of the times. "A Constitution that will not bend will have to break". This is specially so in an Asian and African socio-economic context where structural and systemic changes are often necessary.

[8] A balance is needed between the deliberated design of yesteryears and the need for a new blueprint for tomorrow. The method of amending should not be so difficult as to produce frustration nor so easy as to weaken seriously the safeguards of the Constitution.

C. Procedural and substantive limits on amendment powers

[9] Around the world many devices – some substantive, some procedural and some partaking of both – are employed to permit and facilitate formal changes to the Constitution. At the same time hurdles are put in the path of hasty amendments. The common devices are:

1. The requirement of special parliamentary majorities;
2. Consent of the State Assemblies in a federal system;
3. The requirement of a popular referendum;
4. The requirement of consent of persons, authorities or institutions outside of Parliament;
5. The setting up of a Constituent Assembly;
6. Unamendable "eternity clauses" (in some countries, some core provisions or features of the Constitution are declared to be not amendable at all); and

7. Substantive limits under the judicial doctrine of "basic structure" (this innovative but controversial judge-made doctrine holds that there are implied limits on Parliament's power to amend the Constitution. The "basic structure" of the Constitution cannot be tampered with).

1. Requirement of special parliamentary majorities

[10] Majority can be of three types – simple majority, absolute majority or special majority. The first requires 50% plus one vote of those present and voting. Absolute majority requires 50% plus one vote of the *total* membership. Special majorities can vary from Constitution to Constitution – generally they are two-thirds of the total membership as in Malaysia or three-fourths as in the United States ("the US").

[11] In Malaysia, Article 159(3) provides the procedure applicable to most constitutional amendments. The bulk of the provisions of the Constitution can be altered by an Amending Act which has been passed by a special two-thirds majority of the total membership of each House on the second and third readings and assented to by the King. Judicial review is possible if the Constitution (Amendment) Bill fails to meet the procedural requirements of Article 159(3).

2. Assent of State Legislatures

[12] In the US, constitutional amendments passed by the Congress must, additionally, receive the approval of three-fourths of the 50 States of the Federation. In India, for some amendments, ratification by the legislatures of not less than one-half of the States is needed. In Malaysia, under Article 2(*b*) any federal law altering the boundaries of a State must also be passed by the Assembly of the State concerned and assented to by the Conference of Rulers. A Constitution (Amendment) Bill that does not comply with the above procedures can be challenged in the courts because the Constitution can be amended only in accordance with the procedures mandated by the Constitution. Parliament is not supreme, and the courts have a duty to ensure that Parliament complies with all procedural requirements for the exercise of its legislative powers.

3. Referendum

[13] A referendum or plebiscite is a direct vote in which an entire electorate is invited to vote on a particular proposal. The proposal

may be about adopting a new Constitution, declaring independence, merging with an existing state, or approving a new law. Constitutional provisions for a referendum exist in many countries like Australia, Austria, Ecuador, Estonia, Iran, Ireland, Liechtenstein, Lithuania, the Philippines, Romania, Switzerland and South Korea.

[14] In Australia, for example, constitutional amendments must be approved by a majority of the electorate at a referendum. Malaysia has no provision for a referendum. However, it is conceivable that an informal, non-binding referendum may be held on some issue and the result may be a guide to legislative action. However, the result of an extra-legal, informal referendum cannot, by itself, initiate, overturn, repeal or amend the Constitution or a law in Malaysia.

4. Consent of persons, authorities or institutions outside of Parliament

[15] Many Constitutions require the consent of authorities, institutions or persons outside of Parliament for a constitutional amendment to be finalised. Examples are:

(a) ***Council of Guardians in Iran***: Under Article 177 of the Constitution of Iran, the revision of the Constitution of the Islamic Republic of Iran is initiated by the Supreme Leader issuing an edict to the President of Iran after consultation with the nation's Exigency Council stipulating the amendments or additions to be made by the Council for Revision of the Constitution. Ultimately, the Council of Guardians (*Shora-ye Negahban-e*) has the right to veto any Bill to amend the Constitution of Iran. The Head of the Council is appointed by the Council of Experts.[1]

(b) ***Conference of Rulers in Malaysia:*** Under Articles 159(5) and 38(4), the Conference of Rulers ("the Majlis Raja-Raja") is an essential component of the amending process in respect of those amendments specified in Article 159(5). The Majlis Raja-Raja has been conferred the momentous power to approve or block amendments to nine key provisions of the basic charter.

(c) ***Assent of State Governors in Malaysia***: Under Article 161E, any modification to the special rights of (the former Borneo States of) Sabah and Sarawak requires a two-thirds majority in both Houses of the Federal Parliament, the assent of the Yang

1 Borysfen Intel dated July 16, 2014. Bintel.com.ua/en/article/byla-li-popyka.

di-Pertuan Agong[2] and the consent of the Governors of Sabah and Sarawak: *Robert Linggi v Government*[3] ("*Robert Linggi*").

5. The Setting up of a Special Constituent Assembly

[16] There are *obiter dicta* here and there in many jurisdictions that the overthrow of the existing charter and the adoption of a new Constitution or the enactment of revolutionary or fundamental changes to the basic structure of the Constitution cannot be accomplished by the ordinary legislative procedure. Instead, a formal Constituent Assembly must be convened.

[17] There was a whiff of such a suggestion by Thomson CJ in *Government of the State of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*[4] ("*Government of the State of Kelantan")*. The issue in contention was that the federal government had signed the Malaysia Agreement to unite with three non-Malay states (Sabah, Sarawak and Singapore) to convert the Malay-dominated Federation of Malaya into the Federation of Malaysia which would then be numerically dominated by non-Malays. Kelantan objected to the enlarged union because its consent was not obtained to such a drastic change. Thomson CJ rejected Kelantan's contention because nothing in Articles 1, 2 and 159(4) required the consent of the States to admit new territories into the Federation. Nevertheless, he observed that if Parliament does something "fundamentally revolutionary", that may require "fulfilment of a condition which the Constitution itself does not prescribe".

[18] In India, *Golaknath v State of Punjab*[5] ruled that fundamental rights were not subject to the amendment procedures of Article 368 and if changes were to be made, a new Constituent Assembly must be convened for making a new Constitution or for radically changing it.[6]

[19] Similar suggestions were made in *McCawley v The King*[7] and *Hinds v The Queen*.[8]

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2 It is not clear from Article 161E(2) whether the consent of the King must precede or succeed the consent of the Governors of Sabah and/or Sarawak. Article 66(1), (3), and (4) seem to imply that the consent of the King must come after the procedures in the two Houses are complied with.

3 [2011] 2 MLJ 741.

4 (1963) 1 MLJ 355.

5 (1967) 2 SCR 762.

6 *Golaknath* was later overruled.

7 [1920] AC 691.

8 [1977] AC 195.

6. "Eternity Clauses"

[20] In order to protect some core, basic or fundamental features, some Constitutions have "eternity clauses" which are stated to be absolutely unamendable. This is the concept of formal constitutional unamendability or explicit substantive limits on amendment power. The framers thereby erect bulwarks against parliamentary majorities and safeguard some core, constitutional values against the power of Parliament.

[21] Such entrenched and unamendable clauses exist in Afghanistan (Article 149); Algeria (Article 178); Bahrain (Article 120C); Bangladesh (Article 7B); Brazil (Article 60(4)); Burundi (Article 299); Ceylon (Sections 2 and 3)[9]; Congo (Article 220); France (Article 89); Germany (Article 79(3)); Honduras (Article 374); Iran (Article 177(9)); Japan (Article 97); Namibia (Article 131); Russia (Article 135(1)); Timor-Leste (Article 156); Tunisia (Articles 1–2); and Turkey (Article 4).

[22] One of the earliest examples is Article 79(3) of the Basic Law of the Federal Republic of Germany, which bars explicitly any amendments to provisions concerning the federal structure and to "the basic principles laid down in Articles 1 and 20" (on human rights and the democratic and social set-up). Another example is Algeria's Article 178 which states that any constitutional revision cannot infringe on the republican nature of the State, "multi-partyism", Islam as the religion of the State, Arabic as the official language, fundamental liberties, and integrity of the national territory. Malaysia has no eternity clauses though many constitutional provisions are so difficult to amend procedurally that they are virtually entrenched.

7. Doctrine of "Basic Structure"

[23] Is there any safeguard against extreme use or abuse of amending power? Are there any implied limits on Parliament's power to destroy "the basic structure" of the Constitution? This issue has beckoned lawyers and judges in many countries.

Germany

[24] The basic structure doctrine is believed to have originated in Germany in the writings of Prof Dietrich Conrad. "Any amending body

9 See *Mohamed Samsudeen Kariapper v SS Wijesinha & Anor* [1968] AC 717.

organised within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority".[10] Perhaps this view is inspired by Article 79(3) of the Basic Law of the Federal Republic of Germany, adopted on May 8, 1949, which explicitly bars amendments to provisions concerning the federal structure and to "the basic principles laid down in Articles 1 and 20" (on human rights and the "democratic and social" set-up). The Germans had learnt from the bitter experience of the Nazi era and had sought to prevent absolute powers from ever emerging again.

India

[25] In India, the basic structure doctrine was rejected in *Sri Shankari Prasad Singh Deo v Union of India & Ors*[11] and in *Sajjan Singh v State of Rajasthan*[12] (see also *State of Gujarat v Shantilal Mangaldas*).[13] But the idea was affirmed strongly in the case of *Golaknath v State of Punjab*[14] ("*Golaknath*") which held that no law, including an amendment, can violate the sanctity of fundamental rights. Though *Golaknath* was later overruled on a number of points, its trailblazing idea that the basic features of the Constitution cannot be destroyed finds an echo in many later cases like *Kesavananda Bharati v State of Kerala*[15] ("*Kesavananda Bharati*"); *Indira Nehru Gandhi v Raj Narain*;[16] and *Minerva Mills Ltd v Union of India*[17] *("Minerva Mills")*.[18] In *Minerva*

10 Noorani, AG (April 28–May 11, 2001), "Behind the 'basic structure' doctrine: On India's debt to a German jurist, Professor Dietrich Conrad", *Frontline*, The Hindu group, retrieved March 22, 2014.

11 AIR 1951 SC 458.

12 AIR 1965 SC 845.

13 AIR 1969 SC 634.

14 AIR 1967 SC 1643.

15 AIR 1973 SC 1461; (1973) 4 SCC 225.

16 AIR 1975 SC 2299.

17 AIR 1980 SC 1789.

18 "The basic features", *The Hindu*, September 26, 2004, retrieved July 9, 2012; Satya Prateek (2008), "Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations and the Future of Political Progress in India" (PDF) NUJS Law Review *West Bengal National University of Juridical Sciences* 1(3), retrieved July 17, 2012; Jasdeep Randhawa, "Understanding Judicialization of Mega-Politics: The Basic Structure Doctrine and Minimum Core", *Jus Politicum*, retrieved July 17, 2012; Raghav Sharma (April 16, 2008), "*Minerva Mills Ltd v Union of India*: A Jurisprudential Perspective", *Social Science Research Network*, SSRN 1121817, "Indian Constitution: Sixty years of our faith", *The Indian Express*, February 2, 2010, retrieved December 1, 2013.

Mills, the 42nd Amendment to the Constitution had been enacted by the Government of Prime Minister Indira Gandhi in response to the *Kesavananda Bharati*'s judgment. The amendment sought to reduce the power of judicial review of constitutional amendments by the Supreme Court. Lawyers for the plaintiff successfully moved the Supreme Court to declare sections 4 and 55 of the 42nd Amendment as unconstitutional because section 4 had amended Article 31C of the Constitution to accord precedence to the Directive Principles of State Policy over the fundamental rights of individuals. Section 55 prevented any constitutional amendment from being "called in question in any Court on any ground". It also declared that there would be no limitation whatsoever on the constituent power of Parliament to amend by way of definition, variation or repeal the provisions of the Constitution. The Supreme Court declared sections 4 and 55 of the 42nd Amendment as unconstitutional and endorsed the basic structure doctrine. The court ruled that Parliament could not by amending the Constitution convert its limited amending power into an unlimited power (as it had purported to do by the 42nd amendment). In the judgment on section 55, Chief Justice Yeshwant Vishnu Chandrachud wrote:

> Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

[26] The concept of basic structure has since been developed by the Supreme Court in subsequent cases such as *Waman Rao v Union of India*;[19] *Bhim Singhji v Union of India*;[20] *SP Gupta & Ors v President of India & Ors*[21] (known as the "Transfer of Judges" case); *SP Sampath Kumar v Union of India*;[22] *P Sambamurthy v State of Andhra Pradesh*;[23] *Kihota Hollohon v Zachithu & Ors*;[24] *L Chandra Kumar v Union of India*;[25] *PV Narasimha Rao v State (CBI/SPE)*;[26] *IR Coelho (Dead) by Lrs v State*

19 AIR 1981 SC 271.
20 AIR 1981 SC 234.
21 AIR 1982 SC 149.
22 AIR 1987 SC 386.
23 AIR 1987 SC 663.
24 AIR 1993 SC 412.
25 AIR 1997 SC 1125.
26 AIR 1998 SC 2120.

of Tamil Nadu;[27] and *Raja Ram Pal v Hon'ble Speaker, Lok Sabha & Ors*[28] (known as the "Cash for Query" case).[29]

[27] The Supreme Court's position on constitutional amendments laid out in these judgments is that Parliament can amend the Constitution but cannot destroy its "basic structure".

Bangladesh

[28] The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in *Kesavananda Bharati*, in its ruling in *Anwar Hossain Chowdhury v Government of the People's Republic of Bangladesh*.[30]

Other countries

[29] In a comparative setting, Turkey, Czechoslovakia, Norway and the US have also relied on this doctrine to limit Parliament's power. But the doctrine has been rejected in Singapore in *Teo Soh Lung v Minister*[31] and *Vincent Cheng v Minister*.[32]

Malaysia

[30] Malaysian judges have had to occasionally grapple with the issue of drastic changes to the Constitution. In the case of *Government of the State of Kelantan*,[33] the plaintiff argued that in bringing about the fundamental change of converting Malaya to Malaysia, the consent of the State of Kelantan should have been obtained even though no explicit provision of the Constitution required the federal government to consult with or seek the consent of the constituent States of the Federation. Thomson CJ, in rejecting the plaintiff's contention, nevertheless observed that if Parliament does something "fundamentally revolutionary", that may require "fulfilment of a condition which the Constitution itself does not prescribe". Herein

27 (2007) 2 SCC 1.
28 (2007) 3 SCC 184.
29 See also *P Vajravelu Mudaliar v Special Deputy Collector for Land Acquisition West Madras* AIR 1965 SC 1017; *Union of India v Metal Corp of India Ltd* AIR 1967 SC 637.
30 1989 BLD (Special Issues) 1; 41 DLR (AD) 165.
31 [1989] 2 MLJ 449.
32 [1990] 1 MLJ 449.
33 Note 4 above.

were the Malaysian seeds of the argument that the "basic structure" of a Constitution cannot be amended or destroyed even by the prescribed constitutional procedure.

[31] Subsequently in *Loh Kooi Choon v Government of Malaysia*[34] ("*Loh Kooi Choon*"), an amendment to Article 5(4) was unsuccessfully challenged as an affront to the basic structure of the Constitution. Article 5(4) guarantees that every arrestee shall be produced before a magistrate within 24 hours. The amendment provided that this fundamental right does not apply to arrests under the Restricted Residence laws. However, though the *Golaknath*'s argument that fundamental rights cannot be amended failed, the judges were divided and ambivalent on the relevance of the basic structure argument to Malaysia. Wan Sulaiman FCJ in a separate judgment did say that *abrogation of fundamental rights may not come within the ambit of Article 159* but reasonable abridgement of such rights is constitutional.

[32] In *Phang Chin Hock v PP*,[35] amendments to the Constitution in 1964 and 1978 were unsuccessfully challenged because they increased the number of appointed Senators so drastically as to reduce the indirectly elected "State Senators" to a one-third minority.[36] At the time of Merdeka the ratio of elected to appointed Senators was 22:16. At the time of the case hearing it stood at 26:44, converting the Senate into a rubber stamp for the executive.

[33] In *Mark Koding v PP*,[37] an amendment to Article 63 was challenged as a violation of the basic structure because, in a departure with all other democratic legislatures, freedom of speech in Parliament was subjected to the law of sedition. The challenge failed. The court held that the amendment concerned did not involve tampering with the basic structure. The court also doubted the relevance of the basic structure argument to Malaysian constitutional jurisprudence.

[34] In *Faridah Begum binti Abdullah v Sultan Haji Ahmad Shah Al-Musta'in Billah ibni Almarhum Sultan Abu Bakar Ri'ayatuddin*

34 [1977] 2 MLJ 187.

35 [1980] 1 MLJ 70.

36 Jaclyn Ling-Chien Neo and Yvonne CL Lee, "Protecting Rights" in Li-ann Thio and Kevin YL Tan (eds), *Evolution of a Revolution: Forty years of the Singapore Constitution* (London; New York, NY: Routledge-Cavendish, 2009), p 169; ISBN 978-0-415-43862-9.

37 [1982] 2 MLJ 120.

Al-Mu'azzam Shah[38] ("*Faridah Begum Abdullah*") an important issue before the court was whether Article 155 (on Commonwealth reciprocity) forbids Parliament from enacting a law to permit a foreigner to sue a Malaysian Ruler? Article 155 permits Parliament to reciprocally grant rights to Commonwealth citizens if such rights are granted to Malaysians in the Commonwealth country. One of the judges held that even if Parliament were to confer the right on a Singapore citizen to sue the Ruler, such conferment was illegal and *ultra vires* Article 155 unless a similar right is given to Malaysians in Singapore. There are echoes of the basic structure doctrine here in the sense that Parliament's power to amend the Constitution was declared to have some substantive limits. Even if all procedural requirements of Article 159 are satisfied, some fundamental features cannot be frittered away. The decision in *Faridah Begum Abdullah* comes from the Special Court, and is therefore, unlikely to bind the ordinary courts. But other decisions affirming the basic structure limitation are now available. In *Sivarasa Rasiah v Badan Peguam Malaysia*[39] ("*Sivarasa Rasiah*"), it was held that the way in which the Federal Constitution is constructed, there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts, form part of the basic structure of the Federal Constitution. *Sivarasa Rasiah* quoted extensively from *Kesavananda Bharati*.[40]

[35] Other Malaysian decisions lending support to the basic structure doctrine are *PP v Gan Boon Aun & Anor*[41] and *Nik Noorhafizi bin Nik Ibrahim & Ors v PP*.[42] The decisive turning point came in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[43] ("*Semenyih Jaya*") and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak*[44] ("*Indira Gandhi*"). In the last two cases the Federal Court held that the vesting

38 [1996] 1 MLJ 617.
39 [2010] 2 MLJ 333.
40 Note 15 above.
41 [2012] MLJU 1225.
42 [2013] 6 MLJ 660.
43 [2017] 3 MLJ 561.
44 [2018] 1 MLJ 545.

of judicial power of the Federation in the civil courts forms part of the basic structure of the Constitution and cannot be removed even by constitutional amendment.

[36] In *Semenyih Jaya*, compulsory acquisition of land and determination of the adequacy of compensation in accordance with Article 13(2) of the Constitution were involved. The Land Acquisition Act 1960 (Act 486) ("the LAA"), through a series of amendments had provided that the issue of compensation will be handled by a tribunal consisting of one judge and two lay assessors. The determination of the tribunal shall be final. The Federal Court consisting of Zulkefli Ahmad Makinuddin CJ (Malaya), Hasan Lah FCJ, Zainun Ali FCJ, Abu Samah Nordin FCJ and Zaharah Ibrahim FCJ held that under Article 121(1), the judicial power of the Federation resides in the civil courts. Only judges appointed under Article 122B of the Federal Constitution could exercise decision-making powers in superior courts. The exercise of judicial power by non-judges or non-judicial officers in superior courts was *ultra vires* Article 121 of the Constitution.

[37] Section 40D of the LAA was *ultra vires* the Constitution and had to be struck down. By virtue of Article 121(1) of the Federal Constitution, the power to award compensation in land reference proceedings was a judicial power that was vested in the High Court judge sitting in the land reference court. The assessors could not bind the High Court judge. If the judge disagreed with the opinions of both the assessors, he was at liberty to decide on a reasonable amount of compensation and give his reasons for so finding. The grounds of the judge in the land reference in this appeal was bereft of judicial reasoning. The judge had merely rubber-stamped the decision of the assessors, which was not only a breach of section 47 of the LAA, but more importantly, it violated Article 121 of the Constitution. The tribunal's decision though expressed to be final is not immune from judicial review.

[38] The criteria adopted to determine adequacy of compensation must be left to the court and not the tribunal. The act of determining the amount of compensation payable arising from land acquisitions involved judicial assessments on whether a particular head of claim was to be allowed, evidential issues and whether a response to a valuer's report was to be permitted. In breach of Article 121 of the Constitution, section 40D had effectively usurped the power of the court in allowing persons other than the judge to decide on the reference before it. Section 40D(1) and (2) of the LAA ignored the role of judges

as defenders of the Constitution and rendered the constitutional guarantee of "adequate compensation" illusory since that guarantee was now in the hands of two lay assessors.

[39] What is constitutionally significant about the decision is that it recaptures judicial power for the judiciary despite the explicit clause in the amended Article 121(1) that the courts "shall have such jurisdiction and powers as may be conferred by or under federal law". The court's bold ruling that the judicial power of the Federation resides in the courts and nowhere else, is significant because the dangerous implication of the amendment to Article 121 by Act A704 in 1988 is that the courts have no implied, inherent or prerogative powers and must exercise only such powers as are conferred by federal law.

[40] The creeping subordination of the superior civil courts to the Syariah courts after the insertion of Article 121(1A)[45] came up for consideration in *Indira Gandhi*. Indira Gandhi and Pathmanathan a/l Krishnan were non-Muslims at the time of their civil marriage under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("the LRA"). They had three children. The husband converted to Islam and obtained a custody order of the three children from the Syariah High Court. When the custody order was made, the older two children were with the wife but the youngest (eleven month old) was with the husband. Sometime later the wife received certificates of conversion showing that the Registrar of Converts ("the Registrar") had registered the children as Muslims.

[41] The wife then filed an application for judicial review challenging the decision of the Registrar on the ground, among others, that the Registrar had acted in breach of the procedure set out in sections 96 and 106 of the Administration of the Religion of Islam (Perak) Enactment 2004 ("the Perak Enactment"). The wife sought, *inter alia*, an order of *certiorari* to quash the certificates and alternatively, a declaration that the certificates were null and void.

[42] The respondents argued that matters of Islamic law would fall under the Syariah courts' jurisdiction pursuant to the Ninth Schedule to the Federal Constitution and that since the subject matter did not lie

45 Article 121(1A) was inserted into the Constitution by Act A704 with effect from June 10, 1988. It provides that "The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts".

within the High Court's jurisdiction, the High Court could not exercise its power to review the actions of the Registrar in the present case.

[43] The learned judicial commissioner hearing the wife's application found that the requirements for conversion to the religion of Islam as stated in sections 96 and 106 of the Perak Enactment had not been complied with. As such, the judicial commissioner concluded that the certificates were null and void and of no effect. The High Court thus allowed the wife's judicial review application and ordered the certificates issued by the Registrar to be quashed. The High Court also granted the wife custody of the three children.

[44] The respondents appealed. The Court of Appeal held that the High Court had no power to question the decision of the Registrar or to consider the Registrar's compliance with the statutory requirements of sections 96 and 106 of the Perak Enactment.

[45] At the Federal Court, the major issue was whether the High Court has supervisory jurisdiction to determine the legality of an administrative action by the Perak Registrar of Converts or whether such jurisdiction was excluded by Article 121(1A) of the Federal Constitution and section 101 of the Perak Enactment which provided that the decision of the Registrar of Converts was final.

[46] A further issue was whether certificates of conversion issued without the consent of the mother contravened Article 12(4) of the Federal Constitution and sections 5 and 11 of the Guardianship of Infants Act 1961 (Act 351) ("the GIA").

[47] In a scintillating and courageous judgment, it was held by a unanimous apex court (Zulkefli Ahmad Makinuddin PCA, Richard Malanjum CJ (Sabah and Sarawak), Zainun Ali FCJ, Abu Samah Nordin FCJ and Ramly Ali FCJ) that the power of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil courts' judicial function under Article 121(1). This power is an essential feature of the basic structure of the Constitution. Features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment.

[48] Under Article 121(1) judicial power is vested exclusively in the civil High Court and nowhere else. This judicial power may not be removed from the High Court; and may not be conferred upon bodies

other than the High Court, unless such bodies are covered by the provisions of Part IX of the Constitution.

[49] The jurisdiction and powers of the civil courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system.

[50] The supervisory jurisdiction of courts to determine the legality of administrative action could not be excluded even by an express ouster clause. It would be repugnant to the rule of law and the judicial power of the courts if the Registrar's decision was immune from review. In the present case the legal limits of the Registrar's statutory power to issue certificates of conversion were prescribed in the Perak Enactment. From a plain reading of the relevant sections, the requirements in sections 96 and 106 were cumulative: both had to be complied with. Based on the undisputed evidence, the requirement in section 96(1) had not been fulfilled in that the children had not uttered the two clauses of the affirmation of faith and had not been present before the Registrar before the certificates of conversion were issued. As such, the issuance of the certificates despite the non-fulfilment of the mandatory statutory requirement was an act which the Registrar had no power to do under the Perak Enactment and the Registrar had acted beyond the scope of his power.

[51] Section 50 of the Perak Enactment contained a list of subject matters that could be brought before the Syariah courts. However, section 50(3)(*b*)(x) was not applicable to the facts of the present appeals. As was explicit, section 50(3)(*b*)(x) specifically conferred jurisdiction on the Syariah court to issue a declaration that "a person is no longer Muslim". This would be applicable in a case where a person renounced his Islamic faith. However, the issue in the present appeals concerned the validity of the certificates of conversion issued by the Registrar in respect of the children's conversion to Islam. Nowhere was there any express provision in section 50(3)(*b*), which conferred jurisdiction on the Syariah court to determine the validity of a person's conversion to Islam. Thus, the majority decision of the Court of Appeal had misdirected itself on the construction of section 50(3)(*b*) of the Perak Enactment.

[52] The 1988 amendment to Article 121(1A) relating to Syariah courts does not constitute a blanket exclusion of the jurisdiction of civil courts in Islamic law matters if unconstitutionality or illegality is present.[46] Article 121(1A) did not oust the jurisdiction of the civil courts nor did it confer judicial power on the Syariah courts. The interpretation of the relevant state or federal legislation as well as the Constitution, would lie squarely within the jurisdiction of the civil courts. Article 121(1A) did not prevent civil courts from continuing to exercise jurisdiction in determining matters under federal law, notwithstanding the conversion of a party to Islam. This jurisdiction could not be excluded from the civil courts and conferred upon the Syariah courts by virtue of Article 121(1A) of the Constitution.

[53] The civil and Syariah courts operate on a different footing altogether. The boundaries of the exercise of powers (by each) are solely for the determination by (civil) courts. The determination of the present appeals did not involve the interpretation of any Islamic personal law or principles but rather with the questions of the legality and constitutionality of administrative action taken by the Registrar in the exercise of his statutory powers.

[54] The wife as a non-Muslim had no *locus* to appear before the Syariah court for the present application, and the Syariah court did not have the power to expand its own jurisdiction to choose to hear the wife's application.

[55] Under the GIA, both parents had equal rights in relation to the custody and upbringing of the infant children and the wishes of both parents were to be taken into consideration. The conversion of the husband to Islam did not alter the antecedent legal position, nor did it bring the children out of the ambit of the GIA. Based on a purposive interpretation of Article 12(4) read with the Eleventh Schedule to the Federal Constitution, and on an application of sections 5 and 11 of the GIA, it became clear that the consent of both parents was required before a certificate of conversion to Islam could be issued in respect of the children.

[56] This decision is one of the most important constitutional decisions in the last 61 years on the nature and extent of the power of judicial

46 See *Latifah binti Mat Zin v Rosmawati binti Sharibun & Anor* [2007] 5 MLJ 101.

review. It clarifies the civil-Syariah court relationship. We have to wait and see whether it will survive the test of time.

Pros and cons of basic structure doctrine

[57] The doctrine of the "unamendability of the basic structure" has beckoned lawyers and judges in many legal systems. There are riveting debates about its pros and cons. The prominent arguments against the doctrine are that:

(a) It invents implicit limits on Parliament's amendatory powers even though such limits are nowhere explicitly provided for. It is a blatant piece of judicial legislation.

(b) It is a violation of separation of powers.

(c) It is undemocratic because judges have no legitimacy to make law.

(d) It pits judges against the executive and the legislature. It drags judges into political controversies about what is at the heart of the Constitution.

(e) The basic structure doctrine is too open-ended because "basic structure" is difficult to define.

(f) In an Asian-African setting where structural, systemic changes are often needed, the basic structure doctrine may stand in the way of necessary structural changes.

[58] In favour of the doctrine it can be said that it provides an insurance against legislative over-exuberance.

(a) It safeguards the basic values of the Constitution against the power of transient political majorities. It prevents constitutional provisions on amendment from being employed to destroy the pillars of the Constitution!

(b) The argument that the basic structure is not identifiable is not convincing. In *Loh Kooi Choon*, Raja Azlan Shah FCJ identified three concepts as basic to Malaysia – fundamental rights, federal division of powers and separation among the executive, the legislature and the judiciary. The recent cases of *Semenyih Jaya* (2017) and *Indira Gandhi* (2018) have identified other pivotal

provisions like the courts' power of judicial review and the protection for minority rights. Many rights, institutions and procedures like those in Articles 2(*b*), 3, 14–28A, 38(4), 150(6A), 159(5) and 161E are so sacrosanct that they are not open to easy repeal. Even in times of emergency there are limits on Parliament's legislative power to enact law on these points. It is not difficult to distil out of these provisions the core values and inarticulate major assumptions of Malaysia's body-politic and to regard them as part of the basic structure.

(c) The argument that judicial assertiveness is a violation of separation of powers is based on a literal interpretation of Montesquieu's separation scheme. In Malaysia and the UK, there is no strict separation. Instead there is a check and balance. In the legislative sphere, for example, judges have the power to review the constitutionality of laws enacted by elected assemblies. Under Article 162(6), judges can modify or invalidate pre-Merdeka laws. Under the Civil Law Act 1956 (Act 67), judges can import into our *corpus juris* English precedents and, in some cases, even English statutes, if these are suitable to the Malaysian situation.

(d) The argument that judicial activism is undemocratic because judges are not elected and have no political legitimacy is partially true. However, an overview of the legal system will indicate that besides judges many other agencies and authorities, though not popularly elected, are legally authorised to take part in law-making. Among them are the Senate, the Yang di-Pertuan Agong, the Conference of Rulers and all delegates making subsidiary legislation. They all have a legal mandate but no popular or political legitimacy to make laws.

(e) The beautiful myths surrounding the "democratic legitimacy" of Parliament warm the heart but cannot camouflage the mundane realities. Parliament is an elite institution and does not adequately represent women, ethnic and religious minorities, orang asli, the poor, the disabled and the marginalised. The electoral process suffers from many defects. Voting age at 21 is so high that 45–50% of the population is not eligible to register. Registration is not automatic and voting is not compulsory. As a result, 55% or so of the population does not take part in democracy's iconic electoral exercise. The electoral process suffers from gerrymandering. Constituencies have large disparities in population. As a result

of all these defects, Parliament's legitimacy to make law rests on shaky ground. Judges, likewise, lack popular mandate but have constitutional legitimacy to provide a check and balance within the system. The basic structure doctrine is an aspect of check and balance.

D. Indirect means for constitutional growth

1. Creative judicial interpretation

[59] A Constitution need not be amended formally. Its growth and change or regression are possible in innumerable other indirect ways. The most important one is a creative, prismatic, purposive, or historical interpretation of the glittering generalities of the basic law. Through creative interpretation of the lifeless clauses of the Constitution, judges can distil out of static clauses principles that are implicit but not explicit in the basic law.

[60] In the area of human rights, for example, courts in many countries have created the doctrine of unenumerated rights.[47] The doctrine holds that if an activity is an integral part of a named fundamental right or partakes of the same basic nature and character as the enumerated right, then the citizen ought to have a constitutional right to make a claim for this activity. Thus, the unenumerated right to an expeditious trial is necessary to give meaning to Article 5's promise of personal liberty. This liberty remains extinguished as long as a person languishes in a remand centre awaiting his day in court. The right of an unrepresented accused to legal counsel ought to be seen as part of Article 8's promise of equality before the law and equal protection of the law. The right to legal aid, the right to a speedy trial and protection to prisoners from degrading and inhuman treatment, though not specifically mentioned in the Constitution, ought to be treated as part of the fundamental right to personal liberty under Article 5 of the Constitution.

[61] This is the approach of the American[48] and Indian[49] Supreme Courts. In India, the courts have interpreted the "right to life" in

47 *Ryan v The Attorney General* [1965] IR 294.

48 *Hartodo v People of California* 28 Led 212; *Cox v New Hampshire* (1941) 312 US 569.

49 *Maneka Gandhi v Union of India* AIR 1978 SC 597; *Sunil Batra v Delhi Administration (No 1)* AIR 1978 SC 1675; *Sunil Batra v Delhi Administration (No 2)* AIR 1980 SC 1579; *H S Haskot v Maharashtra* AIR 1978 SC 1548; *Hussainara Khatoon v State of Bihar (No 1)* AIR 1979 SC 1360; *Hussainara Khatoon v State of Bihar (No 2)* AIR 1979 SC 1369; *Hussainara Khatoon v State of Bihar (No 3)* AIR 1979 SC 1377.

India's Article 21 to include the right to a healthy environment, right to pure drinking water, right to pollution-free air and right to good roads, etc. The expression "life" no longer means mere animal existence or continued drudgery but includes the finer graces of human civilisation. In *Maneka Gandhi v Union of India*,[50] the Supreme Court held that the combined effect of Articles 21 and 14 of the Indian Constitution (corresponding to Articles 5 and 8 of the Malaysian Constitution) was to ensure that all administrative action be carried out with procedural fairness.

[62] In the US, "personal liberty" can include a woman's right to abortion: *Roe v Wade*.[51] The Constitution, especially its chapter dealing with fundamental rights, is seen as "a living tree capable of growth and expansion". In the Republic of Ireland, likewise, courts have given constitutional protection to the following unenumerated rights: the right to strike, the right to disassociation, the right to privacy, the right to earn one's living, the right to communicate, the right of access to the courts, the right to legal representation on criminal charges, the right to protection of one's health, the right to travel, the right to marry and find a family and the right to fair procedures in decision-making.[52]

[63] There is some evidence that the superior courts of Malaysia, under the intellectual leadership of Gopal Sri Ram FCJ, distilled from the chapter on fundamental liberties, rights which are not explicitly guaranteed but which are implicit in the Constitution's promise of liberty and equality. Thus "life" in Article 5(1) could include the right to livelihood. Employment is a fundamental right within the expression of Article 5(1): *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*;[53] *Kanawagi s/o Seperumaniam v Penang Port Commission*.[54] In *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*,[55] it was held that native customary rights can be considered as "right to livelihood".

50 AIR 1978 SC 597.

51 410 US 113 (1973).

52 *Educational Co of Ireland Ltd & Anor v Fitzpatrick (No 2)* [1961] IR 345; *McGee v Attorney General* [1974] IR 284; *Landers v The Attorney General & Ors* (1973) 109 ILTR 1; *Murtagh Properties v Cleary* [1972] IR 330; *Kearney v Minister for Justice* [1987] ILRM 52; *Macauley v Minister for Ports and Telegraphs* [1966] IR 345; *The State (Healy) v Donoghue* [1976] IR 325; *Ryan v The Attorney General* [1965] IR 294; *The State (M) v The Attorney General* [1979] IR 73; *Garvey v Ireland* [1981] IR 75.

53 [1996] 1 MLJ 261.

54 [2001] 5 MLJ 433.

55 [2001] 6 MLJ 241.

"Life" includes reputation and deprivation of reputation would be a violation of Article 5(1): *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal*;[56] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*[57] ("*Sugumar Balakrishnan*"). Another facet of personal liberty guaranteed by Article 5(1) is the liberty of an aggrieved person to go to court to seek judicial relief: *Sugumar Balakrishnan*.

[64] In *Sivarasa Rasiah,* it was held that that the word "reasonable" should be read into Article 10(2)(*c*) to the effect that any legislative restrictions, besides falling within the permissible limits of Article 10(2), must also be reasonable and rational.

[65] In *Sivarasa Rasiah, Lee Kwan Woh v PP*[58] and *Shamim Reza Abdul Samad v PP*,[59] the Federal Court held that "fundamental rights provisions must be generously interpreted. A prismatic approach to interpretation must be adopted". "Provisions that limit a guaranteed right must be read restrictively. The provisions of part 2 contain concepts that house within them several separate rights; and the duty of the court in interpreting these concepts is to discover whether the particular right claimed is submerged within a given concept".

[66] As a matter of caution, one must note that judicial activism is a double-edged sword. Judicial construction of the static clauses of the Constitution can expand the horizons of freedom or constrict them. For instance, constitutional supremacy in Article 4(1) has generally been subordinated to Islam as the "religion of the Federation" in Article 3(1). In Syariah and civil court disputes, the powers of the Syariah courts have been interpreted extensively. Due to Article 121(1A), the civil courts tend to abdicate jurisdiction to the Syariah courts even when grave issues of constitutional law and human rights are involved: *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain*;[60] *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and Other Appeals*.[61] Muslims face severe thought control. They cannot speak about their religion publicly without accreditation from the religious authorities. The

56 [2000] 3 MLJ 281.
57 [2002] 3 MLJ 72.
58 [2009] 5 MLJ 301.
59 [2009] 6 CLJ 93.
60 [2007] 4 MLJ 585.
61 [2008] 2 MLJ 147.

courts find this stifling restriction to be within the Constitution on the ground that fundamental liberties must give way to Islam as the religion of the Federation: *Fathul Bari Mat Jahya v Majlis Agama Islam Negeri Sembilan & Ors*.[62] This judicial attitude is adopted despite Article 3(4) which states that "nothing in this Article derogates from any other provision of this Constitution".

[67] Fundamental rights are often interpreted narrowly. For example, Article 5(3) gives to every arrestee the right to consult and be defended by a legal practitioner of his choice. In *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis*[63] ("*Ooi Ah Phua*"), the court held that this constitutional guarantee applies only after police have completed their investigation. *Ooi Ah Phua* is undoubtedly a creative decision, though on the side of police power and with the effect of undermining an explicit constitutional guarantee.

[68] For much of our independent history the courts have interpreted the term "law" in the chapter on human rights to mean any law whatsoever, whether reasonable, unreasonable, harsh, cruel, oppressive or disproportionate. The result is that life, liberty, speech and property can be deprived as long as there was an enacted law empowering the executive to do so. Detention without trial for indefinite periods could be authorised. Mandatory death penalty could be imposed. Presumptions of guilt could be provided in drug laws. *Mens rea* could be excluded in sedition laws: *PP v Yuneswaran Ramaraj*.[64]

[69] There are court decisions that constitutional guarantees do not apply in the private sector: *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors*.[65] Even public sector employment can be excused from constitutional considerations: *Halimatussaadiah v Public Service Commission, Malaysia & Anor*.[66]

[70] Emergency powers of the Government and Parliament under Article 150 have been interpreted very broadly. The power of the Attorney General ("the AG") under Article 145 to commence or not to commence or to discontinue criminal proceedings has been interpreted by the courts to be absolute and not subject to judicial review: *Long*

62 [2012] 1 CLJ (SYA) 233; [2012] 4 CLJ 717.
63 [1975] 2 MLJ 198.
64 [2015] 9 CLJ 873.
65 [2005] 3 MLJ 681.
66 [1992] 1 MLJ 513.

bin Samat & Ors v PP.[67] Even though Article 145 does not say that the AG's power is exclusive, the courts have interpreted Article 145 to give to the AG a monopoly over prosecutions.

[71] In sum, whether the courts interpret citizens' rights and state powers literally or liberally, balance federal-state relations in favour of one or the other, and enforce the mandates of the Constitution, there can be no denying that the interpretative role of the courts can add new colours to the constitutional canvas and make the Constitution grow or wither.

2. *Ordinary legislation*

[72] Constitutional growth can take place without formal changes to the Basic Law. For example, free speech in Article 10(1)(*a*) can be fortified by the enactment of a Freedom of Information Act or curtailed drastically by the passing of an Official Secrets Act (as happened in 1972). The Judicial Appointments Commission Act 2009 (Act 695) ("the 2009 Act") (an ordinary law passed by a simple majority) has significantly contributed to the consultative processes for vetting and recommending nominees for superior court appointments. The constitutional provision on judicial appointment in Article 122B was not formally amended or repealed but its operation is significantly affected by the new procedures for judicial appointment as laid down in the 2009 Act.

[73] The new Malaysian Government elected after the 14th General Election ("GE14") is under popular pressure to use the ordinary legislative process to repeal or amend all laws that violate the Constitution or human rights. For example, there is a suggestion to restore judicial review by repealing 106 or so legislative provisions in Malaysia that contain "ouster clauses".

[74] An interesting issue requiring further investigation is whether the Constitution can be "impliedly amended" or repealed by a parliamentary enactment that does not declare itself to be a Constitution (Amendment) Act but which was passed by the requisite majority and contains provisions inconsistent with the Constitution.[68] One view is that "an uncontrolled Constitution" (i.e. one whose amendment

67 [1974] 2 MLJ 152.
68 *Mohamed Samsudeen Kariapper v SS Wijesinha & Anor* [1968] AC 717.

requires no special majorities) "could like any other Act of Parliament be altered simply by the enactment of inconsistent legislation".[69] The other view is that the description of a Bill as a Constitution (Amendment) Bill is a procedural requirement that must be complied with.[70] It is "necessary that an Act amending the constitution be declared to be a constitutional amendment act, so that when Parliament deliberates and passes it, Parliament is conscious of the ramifications of its actions".[71]

3. Emergency legislation

[75] Most constitutions provide for special powers to combat subversion and emergency. Subversion and emergency laws override constitutional safeguards and can have a crushing, adverse impact on constitutionalism in the country. This is especially so if the executive keeps the emergency going long after the conditions that gave it birth have ceased. An emergency proclamation or an emergency law that has no time limit under a sunset clause[72] can eclipse the Constitution and can construct a parallel legal system. This can bring about a state of affairs that, in practice, if not in law, is very different from the ordinary norms of the Constitution.

[76] In Malaysia, emergency legislation under Article 150 can suspend most constitutional guarantees other than six items mentioned in Article 150(6A). In view of the fact that an emergency proclamation has no time limit, some scholars argue that emergency legislative power can be used to amend the Constitution. With respect, this view ignores Article 150(7) which specifically provides that once an emergency ends, all emergency laws shall cease to operate six months after the end of the emergency. It is submitted that the correct legal position is that Article 150 can be used to suspend but not to amend the Constitution. Of course, if the suspension of a constitutional guarantee lasts several decades, that is as bad as destroying it by a permanent constitutional amendment. Nevertheless, the theory of Article 150(7)

69 Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia & Singapore* (Singapore: Lexis Nexis, 2010), p 151.

70 Ibid, at p 153.

71 Ibid, at pp 151–153.

72 In Malaysia, the sunset clause attached to Article 150(3) in the 1957 Constitution was subsequently repealed. The emergencies declared in 1964, 1966, 1969 and 1977 were never lifted and remained in operation till 2011! Except for the years 1962–1964 and 2011–2019, Malaysia has been in a state of emergency with many laws that curtail constitutional guarantees.

must be preserved. Emergency laws are temporary. They eclipse the Constitution and do not amend it. If the emergency ends, the eclipsed laws revive automatically.

4. Laws against subversion

[77] In Malaysia, Article 149 authorises exceptional powers to combat subversion. These laws can suspend fundamental liberties in Article 5 (personal liberty), Article 9 (movement), Article 10 (speech, assembly and association) and Article 13 (right to property). Laws against subversion have no time limit and constitute a parallel legal system that overrides some, though not all, fundamental liberties.

5. Constitutional conventions

[78] Constitutional conventions can supply the flesh to clothe the dry bones of the law. Growth of constitutional conventions can strengthen the rule of law and the Constitution. The "unwritten constitution" of the United Kingdom ("the UK") is a case in point.

[79] In Malaysia, the office of the Deputy Prime Minister is purely conventional. Description of Bahasa Melayu as Bahasa Malaysia and of Malays as Bumiputras is a political gloss on the law. The existence of cabinet committees; the various "readings" of Bills in Parliament; the daily question-time in the Houses of Parliament; and the conventional allocation of time to the opposition during parliamentary proceedings are matters of conventional, not legal practice.

6. Overthrow of Constitution in a revolution

[80] In revolutionary situations, *coup d'etat*, and popular revolts, the existing Constitution and laws are often overthrown and replaced by a law promulgated in a manner not dictated by the earlier Constitution. This poses complex problems for the judiciary. Should judges insist on the norms and procedures of the earlier, overthrown legal order or should they accept the new political realities? This question has faced judges in many countries around the world including our Asian neighbours, Pakistan, Thailand, Indonesia and the Philippines. Legal theory has no unanimous answer. From amongst many theories that exist, four can be outlined:

(a) Kelsen's theory of revolutionary legality;

(b) Eekelaar's principles of objective justice;

(c) Dias' reliance on judicial recognition; and

(d) The doctrine of state necessity.[73]

[81] Kelsen's view is that a judge should accept the validity of a "successful" revolution. "No jurist should maintain that even after a successful revolution the old Constitution and the laws based thereupon remain in force on the ground that they have not been nullified in a manner anticipated by the old order itself". According to Kelsen, the revolution can be deemed to have succeeded if the newly promulgated laws are generally obeyed by the populace, or sanctions attaching to them are applied successfully in a socially significant ratio. There should be some degree of permanence to the effectiveness of the new norms. If a judge believes that whatever he decides, the revolution is likely to succeed, if need be by his dismissal, then his decision is politically neutral. In Pakistan, Munir J in the case of *State v Dosso*[74] (which was overruled 14 years later in *Asma Jilani v Government of Punjab & Anor*[75] ("*Asma Jilani*")) and in Uganda, in the case of *Uganda v Commissioner for Prisons, Ex p Matovu*,[76] judges endorsed Kelsen's theory of revolutionary legality that validity is a function of efficacy.[77]

[82] However, Kelsen has received mixed reception in other courts. The judge, in *Madzimbamuto v Lardner-Burke*,[78] while giving partial recognition to some of the decrees of the revolutionary regime, was not prepared to endorse the destruction of the Constituti on under which he was appointed. In *Asma Jilani*[79] from Pakistan, *Sallah v Attorney General*[80] from Ghana and *Mitchell v Director of Public Prosecutions*[81] ("*Mitchell*") from Grenada, Kelsen's doctrine of the law-annulling effect

73 Raymond Wacks, *Jurisprudence* (Blackstone), pp 69–95; Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Universal Book Traders, 1997), pp 100–104.
74 PLD 1958 SC 533.
75 PLD 1972 SC 139.
76 [1966] EA 514.
77 Hans Kelsen, *General Theory of Law and State* (Clark, New Jersey: The Lawbook Exchange, Ltd, 2009), p 119.
78 [1968] 2 SA 284.
79 Note 75 above.
80 (1970) CC 54, 55; SC April 17, 20, (1970); Case No. 8 of 1970.
81 [1986] AC 73.

of revolutions was rejected. Jurists have argued that no purely formal or objective test of "efficacy" can be applied. In any case, efficacy is only one of the many conditions of validity and is not synonymous with validity. Eekelaar suggests other considerations for judges:

(a) Legitimate disobedience to improper laws;

(b) Necessity;

(c) The principle that the court should not allow itself to be used as an instrument of injustice;

(d) The right of self-determination; and

(e) Unacceptability of racial discrimination.

Haynes P, in *Mitchell* from Grenada, suggested similar objective tests.

[83] Dias says that effectiveness is not the criterion of validity. It is what courts are prepared to accept as the basis of validity. See, for example, *R v Secretary of State for Transport, Ex p Factortame Ltd*[82] on judicial recognition of the supremacy of European Community laws over English laws in community matters. The judicial decision resulted in a shift of the *grundnorm* in the UK.

[84] Then there is the doctrine of "State necessity" which accommodates an extra-constitutional step dictated by considerations of State necessity and the welfare of the people. It avoids the possibility that a State and the people should be allowed to perish for the sake of the Constitution. It faces political reality but allows the judiciary the right to impose limitations on the scope and duration of exceptional government powers. This doctrine was relied upon in *Begum Nusrat Bhutto v Chief of Army Staff*[83] in Pakistan; *Attorney General of the Republic of Cyprus v Mustafa Ibrahim*[84] in Cyprus; and *Special Reference No 1/1955*[85] also in Pakistan. State necessity offers a middle of the road doctrine between Kelsen's revolutionary legality and the objective criteria of Eekelaar and *Mitchell*.

82 (1989) 2 CMLR 353.
83 PLD 1977 SC 657.
84 (1964) CLR 195.
85 1955 FCR 439.

E. Procedures for constitutional amendments in Malaysia

[85] The Malaysian Constitution is a much-amended document. Between 1958 and 2007,[86] 57 Constitution (Amendment) Bills or Ordinances were enacted. As each Constitution (Amendment) Bill contained numerous clauses, the actual number of amendments is much larger than 57 and stands at a whopping 670! One hundred and eighty-nine Articles and all 13 Schedules have undergone periodic rewriting. A provision like Article 46 (dealing with composition of the House of Representatives) has been amended 12 times. The Eighth Schedule (dealing with Provisions to be Inserted in State Constitutions) has been modified 21 times. Such immoderation was possible because from 1959 to 2008, the ruling coalition enjoyed more than the necessary two-thirds majority in both Houses of Parliament.

[86] A look at Articles 159, 161E and 2(*b*) indicates the following five ways of bringing changes to the supreme law.

1. By a simple majority

[87] Under Article 159(4) paragraphs (*a*) to (*c*), some minor amendments to the Constitution can be passed by a simple majority of the members present and voting in the Dewan Rakyat and Dewan Negara and assented to by the Yang di-Pertuan Agong. The procedure for these amendments is similar to the procedure for enacting ordinary legislation. If the King withholds assent, then under amendments made to Article 66 in 1983, 1984 and 1994, the two Houses can bypass the King after 30 days. This simple majority procedure applies in the following cases:

(a) Amendments to Part III of the Second Schedule (supplementary provisions relating to citizenship);

(b) Sixth Schedule (forms of oaths and affirmations);

(c) Seventh Schedule (election of Senators);

(d) Incidental and consequential amendments to Parliament's legislative powers other than powers in relation to the States under Articles 74 and 76;

86 There have been no formal constitutional amendments since 2007 due to the loss of two-thirds majority by the governments since 2008.

(e) Matters relating to the admission of new States other than in relation to Sabah and Sarawak; and

(f) Any amendments consequential to an amendment under Article 159(4)(*a*).

[88] The simple majority procedure gave rise to an engaging controversy in 1963 when the Federation of Malaya sought to join Sabah, Sarawak and Singapore to create the Federation of Malaysia. The Government of Kelantan opposed the amendment vehemently for political as well as legal reasons but lost the case. The High Court held that Parliament in making amendments to the Constitution to effectuate the Malaysia Agreement by a simple majority acted within its powers under Article 159.

[89] In Ceylon (now Sri Lanka) and in Queensland, the simple majority procedure raised the issue of whether an amendment to the Constitution requires a special Constitution (Amendment) Act or whether it can be accomplished by simply enacting an Act of Parliament inconsistent with the Constitution.[87]

2. By a two-thirds majority

[90] In Malaysia, Article 159(3) provides the procedure applicable to most constitutional amendments. The bulk of the provisions of the Constitution can be altered by an Amending Act which has been passed by a special two-thirds majority of the total membership of each House on the second and third readings and assented to by the King.

3. By a two-thirds majority plus consent of the Conference of Rulers

[91] Under Articles 159(5) and 38(4), amendment Bills dealing with nine topics require a special two-thirds majority plus the consent of the Conference of Rulers. The nine provisions are:

(a) Restrictions on free speech prohibiting the questioning of "sensitive issues" in Article 10(4);

(b) Citizenship rights in Part III;

(c) Privileges, position, honours or dignities of the Rulers in Article 38;

87 *McCawley v The King* [1920] AC 691.

(d) Applicability of the law of sedition to legislative and parliamentary proceedings in Articles 63 and 72;

(e) Precedence of Rulers in Article 70;

(f) Rulers' rights of succession in Article 71;

(g) Special position of the Malay language in Article 152;

(h) Special position of the Malays and the natives of Sabah and Sarawak in Article 153; and

(i) The special procedure for amending the Constitution under Article 159(5).

[92] Any amending Bill that affects the above nine matters must be supported by a special two-thirds majority in both Houses at the second and third readings and receive the consent of the Conference of Rulers.[88] Judicial review is a distinct possibility if Article 159(5) is not honoured.

[93] Twice in history the Conference has withheld its consent to constitutional measures passed by the two Houses. It took several months to work out alternative drafts to satisfy the Rulers. The first time was in August 1983 over the proposal to amend Article 66 and section 11 of Schedule 8 to enable the King and the Rulers to be bypassed in the legislative process after 15 days.[89] The significantly revised compromise Amendment Bill was ultimately passed in January 1984.[90] The second stalemate was in January 1993 over the proposal to abolish royal immunities.[91] A compromise Bill was ultimately passed in March 1993.

[94] In relation to the consent of the Conference of Rulers to amendments under Article 159(5), a number of interesting issues have washed up on our shores from time to time:

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88 In any case where the Conference of Rulers is not unanimous it shall take its decisions by a majority of the members voting, subject however to the provisions of the Third Schedule and the Fifth Schedule, Section 8.

89 See Act A566 (1983); Act A584 (1984); Act A885 (1994).

90 Act 584 (1984). But the amendment itself was amended in 1994 by Act A885 through procedures whose *vires* is questionable from the constitutional point of view.

91 Shad Saleem Faruqi, "The Sceptre, The Sword and The Constitution at a Crossroad: A Commentary on the Constitution Amendment Bill 1993" [1993] 1 CLJ xlv. See Act A848.

(a) If an amendment curtails the powers of the Yang di-Pertuan Agong (but not of the Rulers), does it require the consent of the Majlis Raja-Raja? In *Phang Chin Hock v PP*,[92] the court held that the position of the federal monarch is distinct from the position of the State Sultans. As such, a constitutional amendment to abolish appeals in constitutional and criminal cases to the Yang di-Pertuan Agong (in actual practice to the Privy Council in England) does not have to be submitted to the Majlis Raja-Raja for consent.

(b) At what point in time must a Constitution Amendment Bill that attracts Article 159(5) be submitted to the Majlis Raja-Raja for its assent? Is it before the Bill begins its journey in Parliament or after the two Houses have given their seal of approval? Scholars and politicians are divided on the issue. It is submitted that the proper time for deliberation by the Majlis Raja-Raja is after a Bill has been passed by the two Houses and before it is presented to the King for his assent. To argue that before a Bill is submitted to the two Houses it must clear the Conference of Rulers, is to present the legislative chambers with a *fait accompli* and to sideline them in the amendment process. As the nation's legislative authority, Parliament should have the right to scrutinise any amendment proposal, debate and discuss it and, if need be, to amend it before forwarding it to the Conference of Rulers for its assent. The Conference must examine the finished legislative product, not the draft prepared by the Government that is not yet approved by the two Houses. Parliament is not a rubber stamp to the Conference despite the Conference's undoubted power to veto a parliamentary Bill in certain circumstances.

(c) A further issue exists about the duty of the Yang di-Pertuan Agong to act on Prime Ministerial advice to sign a Bill. If an amendment affects the privileges, position, honours or dignities of the Malay Rulers but the Bill is not presented to the Majlis Raja-Raja in disregard of Articles 38(4) and 159(5), is the King bound by the advice of the Prime Minister under Article 40(1) and (1A) to consent to the Bill (which His Majesty believes to be unconstitutional)? Should the King follow ministerial advice and let the courts handle the issue of unconstitutionality? Or should

92 [1980] 1 MLJ 70.

he, as a guardian of the Constitution, and part of the check and balance mechanism, demand that the Prime Minister refer the Bill to the Conference of Rulers before seeking his consent?

(d) If the King says "no" to a Constitution Amendment Bill, can the Government bypass the King after 30 days under Article 66(4A)? At this point it must be noted that in Malaysia, five separate procedures exist for bringing formal changes to the Constitution. First, some matters of detail can be amended by a simple majority of those present and voting. This is laid down in Article 159(4). Second, most provisions require a two-thirds majority under Article 159(3). Third, some deeply entrenched issues require a two-thirds majority plus the consent of the Conference of Rulers. Fourth, matters that impinge on the special rights of Sabah and Sarawak require a two-thirds majority plus the assent of the Governors of these States. Fifth, altering the boundaries of a State requires the federal parliamentary Bill to secure the approval of the State Assembly concerned plus the consent of the Conference of Rulers. This is required by Article 2(*b*). It is an unresolved issue whether Article 66(4A) which allows Parliament to bypass the Yang di-Pertuan Agong after 30 days in the passing of ordinary legislation, can be invoked if the King refuses to sign a Constitution Amendment Bill. It is respectfully submitted that Article 66(4A) is about ordinary legislative measures and has no relevance to Constitution Amendment Bills under Articles 159, 38(4), 161E and 2(*b*).

(e) A related issue is about the role of the Yang di-Pertuan Agong if the Bill is presented to the Conference of Rulers and is vetoed by the Conference. Is the King bound by the wishes of the Conference of Rulers to refuse assent to the Bill or is he obliged under Article 40(1) and (1A) to act according to the advice of the Prime Minister? If His Majesty refuses to give his assent, can he be bypassed under Article 66(4A) after 30 days? It is submitted, as above, that Article 66(4A) has no application to amendments under Article 159(5). In respect of such amendments, the Conference cannot be bypassed in any circumstances. This view is offered despite a controversial precedent in March 1993 relating to the Constitution (Amendment) Act 1993 (Act A848) to remove royal immunities. After the Bill was vetoed by the Conference in January 1993, the then Yang di-Pertuan Agong relied on Article 66(4A) to return

the Bill to Parliament with a written statement of his objections. The two Houses passed the Bill a second time with amendments to accommodate the wishes of the Yang di-Pertuan Agong. The Bill was then re-submitted to His Majesty who gave his consent within 30 days. With all due respect, once the Constitution Amendment Bill 1993 was vetoed by the Conference, it was killed. The procedures of the then Article 66[93] were not applicable. The process of amendment under Articles 38(4) and 159(5) should have begun all over again.[94] The possibility of bypassing the King after 30 days under Article 66(4A) has no relevance whatsoever to constitutional amendments under Articles 159(5) and 161E.

(f) Article 38(4) applies only if an amendment affects the privileges, position, honours or dignities of the Rulers directly. The exact meaning of "directly" is open to debate and it can be presumed that any indirect, collateral, minor, marginal or penumbral influence of a Bill on Their Majesties' privileges, etc. does not attract the procedure of Article 38(4).

4. Two-thirds majority plus consent of the Governors of Sabah and/or Sarawak

[95] In giving or withholding consent, the Governors are bound by the advice of their Chief Ministers. In *Robert Linggi*, one of the issues was that the Constitution (Amendment) Act 1994 (Act A885) had removed the Yang di-Pertua Negeri's power of appointment of judicial commissioners to the High Court of Sabah and Sarawak and transferred this power to the Yang di-Pertuan Agong. This affected the "make up or structure" of the High Court of Sabah and Sarawak. In a bold and innovative judgment on a number of constitutional and administrative law issues, Kota Kinabalu High Court judge David Wong Dak Wah J held that when the 1994 amendment was

93 Article 66 was amended in 1983 by Act A566 to impose a duty on the King to sign within 15 days or be bypassed. This was altered drastically in 1984 by Act A584. The King could delay signing a Bill by 30 days. If he objected to any provision, he could return the Bill to Parliament with his objections. Parliament could re-enact the Bill and send it back to the King. His Majesty would then have a second 30-day delay period. After the second 30-day period, the King could be bypassed. It is respectfully submitted that Article 66(4A) has no relevance to constitutional amendments under Articles 159(3), (5) and 161E.

94 Shad Saleem Faruqi, "The Sceptre, the Sword and the Constitution at a Crossroad: A Commentary on the Constitution Amendment Bill 1993" [1993] 1 CLJ xlv.

introduced without the consent of the Yang di-Pertua Negeri of Sabah or Sarawak it contravened Article 161E(2)(*b*) of the Federal Constitution. Accordingly, Article 122AB of the Constitution was null and void in so far as it concerned the removal of the Governor's power.

5. Consent of State Assembly plus Conference of Rulers

[96] This is required by Article 2(*b*). Parliament may by law admit other States to the Federation and alter the boundaries of any State, but a law altering the boundaries of a State shall not be passed without the consent of the legislature of that State and the Conference of Rulers.

6. Indirect means for constitutional change

[97] Creative judicial interpretation, ordinary legislation, emergency legislation, laws against subversion, constitutional conventions, and change of *grundnorm* situations during revolutions have been discussed in section D above. In the Malaysian context we can add an additional way of "amending" the Constitution – authorised translations under Article 160B.[95]

F. Issues at the periphery of constitutional amendments in Malaysia

[98] Some issues on the periphery of prescribed constitutional processes arouse considerable analytical discord.

1. Amendability of the basic structure

[99] Despite the recent decisions in *Semenyih* and *Indira Gandhi* that the basic structure cannot be tampered with, this issue will continue to haunt the legal system.[96] Concern about safeguards against the abuse of amending power is justified because we have made about 670 amendments in 61 years.

[100] Suppose a future government which is armed with the necessary two-thirds majority uses the procedures under Articles 2(*b*), 159(3), 159(5) or 161E to try to rewrite the Constitution in order to achieve the following extreme objectives:

(a) Repeal Articles 5–13 to remove the entire chapter on guaranteed personal liberties;

95 This is discussed in section F10 below.

96 See section C7 above.

(b) Increase the life of the Dewan Rakyat from five years to 25 years by amending Article 55(3) and substituting the word "five" with the words "twenty-five";

(c) Abolish general elections or provide for elections only after 25 years;

(d) Abolish the Dewan Negara;

(e) Transfer the powers of the apex court to the executive or to an executive-dominated tribunal thereby giving the executive the final say on judicial appeals;

(f) Convert parliamentary democracy to the American-style presidential system;

(g) Abolish constitutional supremacy by amending Article 4(1) and declaring the Syariah to be the supreme law of the Federation;

(h) Transfer all powers over Syariah legislation from the States to the Federal Parliament by transferring all topics in the Ninth Schedule, List II, Item 1 to List 1 (the Federal List);

(i) Convert Malaysia from a federal to a unitary state;

(j) Rewrite the chapter on citizenship to make Malaysia mono-ethnic and to allow the government to deprive citizenship on ethnic or religious grounds; and

(k) Amend Article 153.[97]

[101] Should formal compliance with procedures be sufficient to achieve the above changes? Or is there a need for a new jurisprudence to impose some substantive limits on a power that has in the last 61 years been employed 670 times, and not always for the good of the nation?

2. Can the Dewan Negara be bypassed?

[102] If a constitutional amendment is passed by the Dewan Rakyat by a simple majority under Article 159(4), and the Dewan Negara votes against it, can the Dewan Rakyat use its powers under Article 68 to bypass the Dewan Negara after one year? This is an untested issue. It is respectfully submitted that due to the express

97 All examples are purely hypothetical.

language of Article 68(5), Article 68 can apply to a constitutional amendment under Article 159(4) but not to any constitutive legislation under Articles 159(3), (5), 161E or 2(*b*).

3. Can the King be bypassed?

[103] If the King refuses assent to a constitutional amendment, can he be bypassed under Article 66(4A) after 30 days? Does Article 66(4A) apply only to the ordinary legislative process under Article 66 or does it also encompass constitutive law-making under Articles 159, 161E and 2(*b*)?

[104] It is respectfully submitted that Article 66(4A)'s exceptional provisions should be interpreted narrowly and should apply only to ordinary legislation and not to any constitutional amendments or constitutive legislation under Articles 159(3), (4), (5), 161E or 2(*b*). It is conceded however, that alternative views may exist. One view may be that Article 66(4A) may apply to simple majority amendments under Article 159(4). A second view may be that Article 66(4A) is applicable to any amendment under Article 159(3) and (4) because these do not involve the Conference of Rulers or the Yang di-Pertua Negeri of Sabah and Sarawak. A third extreme view may be that in Article 66(4) and (4A) the term "Bill" applies to all legislative proposals and the King can be bypassed in relation to all legislative measures. Questions of the constitutionality of the Bill for failure to obtain the consent of the Conference of Rulers under Article 159(5), the Governors under Article 161E or the State Assembly concerned under Article 2(*b*), are separate issues to be resolved in the courts.

4. At what stage must the Conference of Rulers be approached?

[105] This issue requires Articles 159(5) and 2(*b*) to be read in the light of Article 38(4). Article 38(4) states that "no *law* directly affecting the privileges, positions, honours or dignities of the Rulers *shall be passed* without the consent of the Conference of Rulers" (emphasis added). The term used is "no law" and not "no Bill" implying thereby that a Bill need not be cleared with the Conference before going through the two Houses and before being presented to the Conference. At the same time the words "shall be passed" may imply that prior to the passing by the Houses, there is a pre-legislation requirement of obtaining the consent of the Conference of Rulers. In February 2018, former Member of Parliament Taufik Ismail sued the Speaker of the

Dewan Rakyat for permitting the Syariah Courts (Criminal Jurisdiction) Amendment Bill 1965 (RUU355) to be tabled in the Dewan Rakyat without first obtaining the consent of the Conference of Rulers. The High Court's decision that there are triable issues indicates that there are live issues that deserve judicial examination.[98]

5. Meaning of "directly affecting"

[106] The Conference of Rulers has a right to veto a Bill if the "law *directly* affects the privileges, position, honours or dignities of the Rulers". If in its pith and substance the law is about something else and only indirectly, collaterally or marginally affects Their Majesties, then the consent of the Conference is not needed.[99]

6. No referendum

[107] Unlike in countries like Australia, there is no requirement of a public referendum to allow the voters to have a say in the amendment process.

7. Consent of States

[108] Except in two areas – amendments to the rights of Sabah and Sarawak (Article 161E) and amendments to the boundaries of the States under Article 2(*b*) – State Assemblies have no say in the amendment of the Federal Constitution. This reality was underlined in the famous case of *Government of the State of Kelantan* in which the Kelantan Government unsuccessfully sought to prevent the transformation of Malaya to Malaysia.

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98 "Court Refuses to Strike Out Suit Against Pandikar over Hadi Bill", *FMT*, February 22, 2018. Refer also to section E3 above.

99 The post GE14 proposal to repeal the Sedition Act 1948 (Act 15) *in toto* has been objected to by some royalists on the ground that the repeal will affect the position and dignity of the Rulers and must, therefore, get the green light from the Rulers first. The issue is unresolved. A few salient points can be noted: First, the Sedition Act 1948 is a pre-Merdeka law and was not enacted with the consent the Conference of Rulers. Second, it had been amended in 1958, 1964, 1969, 1970, 1975 and 2015 by Parliament without the consent of the Conference. Third, it is a general law about many acts of incitement and disaffection and is not solely about the position of the Rulers. It is arguable that the law does not "directly affect" the privileges of the Rulers. Fourth, there are many laws like the Penal Code (Act 574) and the Communications and Multimedia Act 1998 (Act 588) that adequately protect the special position of the Malay Rulers.

8. Amendment of amendment procedures

[109] The amendment process itself can be amended. However, any proposal to delete the provision for consent of the Conference of Rulers as required by Article 159(5) will itself have to go through the Conference of Rulers. Likewise, any tampering with the requirement to obtain the consent of the Governors of Sabah and Sarawak under Article 161E must be submitted to the Governors for assent. Law must be passed in accordance with law.

9. Retrospectivity

[110] Amendments can be retrospective and it is not uncommon for some amendments to be backdated to Merdeka Day![100]

10. Authorised translations under Article 160B

[111] In 1957 the Federal Constitution was drafted in English. Its sterling provisions, its political compromises, its federal-state division of powers and its human rights provisions were all expressed in the English language. The Constitution has since been translated into the national language. By the National Language Act 1963/1967 (Act 32) when there are two texts, the Malay one is authoritative unless the King prescribes otherwise: section 6. In the case of a law enacted before September 1, 1967 and translated into Malay thereafter, the Yang di-Pertuan Agong may declare the translation to be authoritative: section 7(1). There is no clear evidence that His Majesty has declared the Malay translation of the Constitution to be authoritative.[101]

[112] It is respectfully submitted that even if the Yang di-Pertuan Agong declares the translation of the Constitution to be authoritative, the executive-inspired translation of the Constitution cannot supersede the document of destiny of 1957 which launched our new legal order. The translation may contain subtle (and perhaps unintended) changes to the English text. For example, in Article 12(4) the word "parent" has been translated as "ibu atau bapa" and not as "ibubapa". The nuances are very different. The translation was the handiwork of the executive without any parliamentary scrutiny and without the

100 Refer, e.g. to Constitution (Amendment) Act 1976 (Act A354) which amended Article 5(4) as from Merdeka Day.

101 See the discussion on this point in the case of *Indira Gandhi.*

mandatory procedures applicable to constitutional amendments. It is submitted that Act 32 cannot use a mere administrative device to replace the constitutional text. A constitutional amendment under Articles 159(5) and 161E is needed to replace the existing Constitution with a new translated text. The translation must go through the legislative process of Articles 159(5) and 161E, i.e. a Bill to adopt the translated version must be passed by a two-thirds majority and submitted to the Conference of Rulers and the Governors of Sabah and Sarawak for their assent.

G. Post-GE14 amendment proposals

[113] In the era after GE14, many institutional and legal reforms have been promised. Some do not require any constitutional amendments. Others need constitutional legislation with a two-thirds majority and in some cases consent of the Conference of Rulers and the Governors of Sabah and Sarawak.

1. Appointments

[114] After GE14 of May 9, 2018, replacement of many top officials was done administratively. There were bold new appointments to the posts of Chief Justice, President of the Court of Appeal, Chief Judge of Malaya, Chief Judge of Sabah and Sarawak, the Attorney-General, Chief Secretary to the Government, Governor of Bank Negara, Chief of the Anti-Corruption Commission, Election Commission, Multimedia Commission, members of the Judicial Appointments Commission and some Vice-Chancellors of public universities.

2. Reform of Parliament

[115] Reform of Parliament is mostly possible through internal resolutions or non-legislative amendments to Parliament's internal Standing Orders. For example, the Public Accounts Committee is now headed by a member of the opposition. Some special sectoral committees have been appointed; Prime Minister's question time has been introduced. Top public service appointments will now be vetted by Parliament. However, creating a new Parliamentary Services Act may require a constitutional amendment with a two-thirds majority. This is because Article 65(2) requires the Clerk to the Senate and Clerk to the House of Representatives to be appointed by the Yang di-Pertuan Agong from among members of the general public service.

3. Composition of the Senate

[116] The Senate today has 44 Senators appointed by the Yang di-Pertuan Agong and 26 State Senators elected by the 13 State Assemblies, two for each State. Article 45(4) permits three major reforms. Parliament may, by law,:

(a) increase to three the number of members to be elected for each State;

(b) provide that the indirectly-elected members for each State are elected by a direct vote of the electors;[102] and

(c) decrease the number of appointed members or abolish appointed members.

[117] According to Article 45(4), these reforms can be accomplished "by law". A constitutional amendment is not necessary.

4. Electoral reform

[118] This is an immensely large and complex area and will not be covered here. Suffice to say that significant changes are needed to the Constitution's Thirteenth Schedule.

5. Anti-hopping laws

[119] Unprincipled party-hopping and mid-term crossovers lead to political instability and cause the downfall of elected governments. On the lines of many other electoral democracies, Malaysia must add an anti-hopping provision to Article 10(2)(*c*) of the Federal Constitution that deals with the right of association.[103]

6. Sabah and Sarawak

[120] Restoring the special rights of these restive States requires some constitutional amendments. However, much can be accomplished through compliance with existing laws which have been overlooked and changes to some administrative and financial policies.

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102 See also Article 120 of the Constitution.

103 See *Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors* [1992] 1 MLJ 343 which has to be overturned by constitutional amendment.

7. International treaties

[121] Acceding to many international treaties on human rights, including the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") (with some reservations if need be), requires no constitutional amendment.

8. Authoritarian laws

[122] Repeal or amendment of laws like the Official Secrets Act 1972 (Act 88), Security Offences (Special Measures) Act 2012 (Act 747), Prevention of Terrorism Act 2015 (Act 769), Prevention of Crime Act 1959 (Act 297), and Universities and University Colleges Act 1971 (Act 30) requires no constitutional alteration. However, the repeal of the Sedition Act 1948 is a more complex matter because the Sedition Act 1948 is generally believed to be a law under Article 10(4) and, to the royalists and Malay nationalists, its repeal may mandate the consent of the Conference of Rulers under Article 38(4) and 159(5).[104]

9. Local authority elections

[123] They were once a part of our political scene and can be restored without constitutional change.

10. Separating the Attorney General and Public Prosecutor

[124] This desirable development requires an amendment to Article 145.

11. Judicial and Legal Service

[125] Separating the judicial service from the legal service requires amendments to Articles 132 and 138.

12. Retirement age of judges

[126] Extending the retirement age of judges requires an amendment to Article 125.

H. Conclusion

[127] All in all, what reforms will be attempted and accomplished is more a matter of politics than of law. One must also remember that

104 See n 36 above.

reform is a journey, not a destination; a continuing process and not an isolated event.

[128] Further, reform of the law is not enough if society's values remain undemocratic, feudal, intolerant and racist. For a Constitution to thrive and to take roots, internalisation of constitutional values within society is needed. Here is where we all can play a role. We must improve our constitutional literacy, develop constitutional patriotism and stand up for constitutional values whenever and wherever the Constitution is breached.

[129] Sixty-one years into independence, the Constitution has not yet become the chart and compass, the sail and anchor of our nation's endeavours. Each one of us can help to change that by planting the seeds that will lead to the greening of the landscape of constitutional ideas.

Eastminsters:
Decolonisation and State-Building in British Asia

by

*Dr Harshan Kumarasingham**

[1] "*Vous l'avez voulu, George Dandin*", mischievously exclaimed the Soulbury Commission's report in 1945 implying that their recommendation of the British parliamentary system was at Ceylonese instigation if anything went wrong. The report quoted French playwright Molière's 1668 comedy *Dandin* and defended their counsel that Ceylon adopt a Westminster-inspired constitution on the grounds that not only was it best suited for the island, but it was also a regime type that "the majority – the politically conscious majority of the people of Ceylon – favour a constitution on British lines. Such a Constitution is their own desire and is not being imposed upon them".[1] Ceylon strolled towards independence on February 4, 1948 with an unabashed fervour for Westminster government. The Soulbury Commission dutifully served an institutional tiffin that satisfied in large measure the specific appetite of Ceylon's elite. A republic would have been as welcome as an Indian invasion and instead a unitary bicameral realm within the Commonwealth was established that self-consciously saw any other style of government as beneath the dignity of the Ceylonese elect. As such, the new Constitution was generally deaf to the apprehension from corners in the Colonial Office, old Ceylon Civil Service hands and a few local lawyers of loquacious and argumentative tendencies. The result was that precious few alterations were made of the Westminster model for the context, complexities and conventions of Ceylon.

[2] This system was more commonly associated with the British settler countries like Australia, Canada and New Zealand where "kith and kin" links with Britain seemed to make this appropriate.

Parts of this article are drawn from the writer's Smuts Memorial Lecture delivered at Trinity College, Cambridge on May 29, 2014 and an opinion piece on Sri Lanka for *Groundviews* on January 31, 2015.

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1 [Soulbury Report] Colonial Office, *Ceylon: Report of the Commission on the Constitution*, Cmd 6677 (London: His Majesty's Stationery Office, 1945), pp 108–109.

However, the British and the Asian indigenous elites saw advantages in applying this very British system to the very different context of the East. These Asian nations did not have centuries to interpret and adjust in order to develop their constitutions as the British had. Instead, within months they needed to formulate and design a constitution and therefore invariably drew upon the system of their imperial master. The local elites with the involvement of external actors like Sir Ivor Jennings determined that Westminster could work in the East. Since the Westminster system is based on convention and ambiguity and not rigid rules and clarity, the same Westminster system could be adopted and manipulated to produce diverse results and reactions that would shape their countries forever. These States therefore became *Eastminsters* that consciously had clear institutional and political resemblances to Britain's system, but with cultural and constitutional deviations from Westminster, five of which will be explored below.

[3] This article focuses on Westminster's trajectory through the Asian States of India, Pakistan, Ceylon, Malaya and Nepal where it became Eastminster. Analysis is centred on the period when these States adopted a parliamentary state modelled on the British example set at the colonial and metropolitan levels. The approach taken will be to understand much of the state-building that occurred through the work of Jennings.[2] This Cambridge-educated scholar advised all these States in their constitutional quests in the state-building period with the exception of India, where he instead acted in those transition years as a major constitutional authority and commentator. Jennings' work on India was highly cited in those early years when few others existed from his vantage as a world-famous, recognised English constitutional expert living and working in Asia.[3] For India, Pakistan

2 For a guide to Jennings' career, see my introduction in *Constitution-Maker – Selected Writings of Sir Ivor Jennings* (Cambridge: Cambridge University Press, 2015) (henceforth "*SWIJ*"); Jennings' posthumously published memoir, *The Road to Peradeniya – An Autobiography* (Colombo: Lake House, 2005) edited and introduced by HAI Goonetilleke; Mara Malagodi, "The Oriental Jennings: An Archival Investigation into Sir Ivor Jennings' Constitutional Legacy in South Asia", *Legal Information Management*, vol 14, no 1, 2014, pp 33–37; a special issue edited by Martin Loughlin on his Jennings' British influence in public law can be found in *Modern Law Review,* vol 67, no 5, September 2004 and individual articles in this volume.

3 Another key early foreign observer who was working in India during the early years of independence was CH Alexandrowicz who was Head of Law at the University of Madras from 1951.

and Ceylon, the key period observed was within the first five to 10 years of freedom in 1947–48. In Malaya, Jennings was active with the Reid Commission leading up to independence in 1957[4] while in Nepal he worked for a short, but crucial time in 1958 in preparation for the Himalayan Kingdom's first general election in February 1959. Though Nepal was never formally under British rule like the others, it was nonetheless very much part of imperial interests in the region from the nineteenth century and can be designated within the British "sphere of interference".[5] Through the role of Jennings, it is possible to gain a unique and comparative perspective of constitution-making and state-building in these key Asian territories. Jennings by no means fairly or comprehensively covered how these processes worked, but as an individual he was exclusive in linking these States constitutionally with his first-hand experience of them during the era of state-building in the wake of the British Empire. Never before has a study constitutionally linked these States to understand their constitutional lineage with Britain during their quest to craft a parliamentary state. Part I of this article examines the scholarly importance and present gap in the history, law and politics of examining the British constitutional legacy and Westminster model in Asia. Part II will place Jennings' work and role in the region in context and Part III will outline five interrelated deviations the Eastminster model historically had from the traditional settler States.

[4] Eastminster happened in a context when South Asian decolonisation captured international attention. India's first ambassador to Washington, M Asaf Ali, told the *New York Times* that his country's independence was in the "spirit of the American revolution" and for the benefit of his American audience that the "battle cry of India's revolutionaries was also, curiously enough, Abraham Lincoln's everlasting and inspiring dictum, 'Government of the people for the people and by the people'".[6] The Government in India was still very

4 Singapore was initially part of and then expelled from the Federation that the Commission recommended and crafted a Constitution that drew heavily on the Malayan Federation. Due to space and coherence Singapore will not be covered in this article.

5 A handy term John Darwin borrowed from WC Sellar and RJ Yeatman to use in his work on Britain's "informal empire" to cover places like Iran and South America that were never part of the British Empire. See John Darwin, *The Empire Project – The Rise and Fall of the British World System 1830–1970* (Cambridge: Cambridge University Press, 2009).

6 August 16, 1947, *New York Times.*

much, however, drawn from the British and not the American model. Woodrow Wilson had believed in 1884 at the height of the British Empire that the Westminster model had become the "world's fashion"[7] and it remained so as the Empire decolonised. Sir James McPetrie and Sir William Dale as Legal Advisers to the Colonial and Commonwealth Offices respectively recorded an enormous international appetite for Whitehall constitutional devices. McPetrie noted of the "exceptional activity" of the post-war era where in the short period between June 1959 and June 1960 alone 92 constitutional instruments were drafted by the Colonial Office for territories around the world.[8] Dale wryly commented that very often the colonial-era legislation endured after independence since even though "there was a new emperor … his suit of clothes was far from new".[9]

[5] However, despite such activity there was no uniformity of approach even within regions. The 1956 colonial law of *Loi Cadre* dictated by the French metropolitan state that provided a detailed institutional framework for an almost blanket application of major governance reforms across the French African Empire would find no equivalent in the British decolonisation process in Asia or elsewhere.[10] The 1931 Statute of Westminster may have provided a critical constitutional milestone for the few settler dominions by clarifying their political independence, but with just four and a half pages it could not, and did not, claim constitutional homogeneity as the diversity of dominions and their individualist political temperament made any such attempt undesirable. Compared with continental cases, the British Westminster model was malleable, moveable and mendacious. As Sartori assessed, unlike Britain most States could ill "afford the luxury of not formalising their constitutions" and observed that it was better to see the British Constitution as "written differently" than "unwritten". British constitutionalism unlike its European and American counterparts was not meant to be "prescriptive", but

7 Pippa Norris, "The Twilight of Westminster? Electoral Reform and its Consequences", *Political Studies*, vol 49, no 4, 2001, p 877.

8 JC McPetrie, "Survey of Constitutions Drafted at the Colonial Office since 1944" in JND Anderson (ed), *Changing Law in Developing Countries* (London: Allen & Unwin, 1963), pp 29–30.

9 William Dale, "The Making and Remaking of Commonwealth Constitutions", *The International and Comparative Law Quarterly*, vol 42, no 1, 1993, p 68.

10 See Frederick Cooper, *Africa since 1940 – The Past of the Present* (New York: Cambridge University Press, 2002), pp 76–84.

instead practical.[11] This analysis lends weight to the view that British "institutions prove themselves capable of adaptation to new conditions; and this arises in large measure from a refusal to define. The task of definition is left to academic lawyers who, being independent, are *ipso facto* irresponsible". One of those "irresponsible" academic lawyers and author of the above quote was Sir Ivor Jennings.[12] The flexibility of the "refusal to define" features of Westminster allowed liberties and possibilities for the model to drift away from its moorings both geographically and theoretically, leaving great scope for individuals to influence the constitutional character of their States more than any statute could. Jennings sought to explain why Westminster travelled East:

> The one common characteristic of all these Constitutions was that they were all based on the unwritten British Constitution. This was a deliberate choice by the local politicians and it has, I suppose, several explanations. First, all the countries concerned had been under British rule, were familiar with British methods, and knew no other. Secondly, all the politicians concerned had been educated in British universities, or called to the English Bar, or educated in local institutions using an English medium … There was thus a familiarity with English ideas and, perhaps, a lack of familiarity with other ideas. Certainly it was always difficult to persuade local politicians to accept anything for which there were not British precedents. This seemed surprising at first, but we soon realised that all the antagonism to British rule was due to a nationalism imported from Britain. Though a great deal was said in public speeches about indigenous culture, there was little that could go into a Constitution, because the concepts of democracy, parliamentary government, and the rule of law which are the basis of constitutional government were all imported. I do not mean that one can take a Constitution from stock and hand it over. Clearly every Constitution must relate to local conditions. What I mean is that inevitably the framework of ideas was supplied from Britain; and when we borrowed, for example from Australian or India, we were inevitably borrowing from Britain at second-hand.[13]

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11 Giovanni Sartori, "Constitutionalism: A Preliminary Discussion", *American Political Science Review*, vol 56, no 4, December 1962, p 862.

12 Ivor Jennings, *Constitutional Laws of the Commonwealth, Volume 1: the Monarchies* (Oxford: Oxford University Press, 1957), p 2.

13 Text of Speech by Ivor Jennings given in Nepal on "Constitutional Experiences in Asia", c 1958, C16.9, ICS 125, Sir Ivor Jennings Papers, University of London (henceforth "IJP").

Part I: The search for State-building in British Asia

[6] History, once the leading discipline on the subject, has almost completely abandoned the field of constitutional history of the British Empire and thus provides few contemporary works that expose the Westminster model in Asia to the searching traditions available within the subject. CA Bayly's *Recovering Liberties* (2012) does, however, revive the interest in South Asian historic political liberalism. This work persuasively animates the ideology and ideals behind many of the Asian elites that wrestled with anti-colonialism on one hand and forging a State imbued with the liberal traditions of the colonising power.[14] Ronald Hyam and John Darwin have in their expansive and erudite literature on British decolonisation done much to place elements of constitutional history in the larger account of imperial withdrawal. Historic works on Asian governance and state-building remain, however, scarce.[15] David Arnold has recently implored scholars of India to look at German involvement in colonial India in the hope to more broadly understand global influences on India and move away from trends that lately have British-centric views of Empire: "The view of empire as externally competitive and internally homogenous has been accentuated in recent years by histories of the 'British World' and through such works as the *Oxford History of the British Empire* and its 'companion series' in which the British identity of the Empire is assumed to be paramount, almost to the exclusion of any other alternative or external influence".[16] A similar case can be made of the Westminster model.

[7] *Comparing Westminster* (2009), *Democratic Decline and Democratic Renewal* (2012), *Understanding Prime Ministerial Performance* (2013), and *Constitutional Conventions in Westminster Systems* (2015) are four recent theoretically sophisticated and deeply researched volumes

14 CA Bayly, *Recovering Liberties – Indian Thought in the Age of Liberalism and Empire* (Cambridge: Cambridge University Press, 2012).

15 Rohit De and Arvind Elangovan have recently provided compelling impetus for Indian constitutional history. Joseph M Fernando and Kevin YL Tan have also done this for Malaysia and Singapore.

16 David Arnold, "Globalization and Contingent Colonialism – Towards a Transnational History of 'British' India", *Journal of Colonialism and Colonial History*, vol 16, no 2, 2015; <https://muse.jhu.edu/≥ (online only).

from comparative politics on the Westminster model abroad.[17] These accounts have contemporised and enriched analysis of the system in contexts that are not limited to Britain. However, the contexts selected are as traditional as ever in their concentration on Britain with a selection of Australia, Canada, New Zealand and South Africa as the "great self governing dominions". Despite the comparable links to be made between non-settler States, such cases are absent from the above volumes. Though there has been a welcome recent interest in "Westminster Lilliputs" of the Pacific and Caribbean,[18] even a cursory examination of recent articles in leading political science journals show an almost automatic and unquestioned belief that "Westminster Democracies" or "Westminster Systems" are confined to the problematically termed "old" or "white" States of Australia, Canada and New Zealand *if* the "model" is examined at all outside of the British Isles.[19] It is interesting to note that almost all the authors of the works above are not based in Britain. The situation described by Graham Wilson over 20 years ago, echoing Leon Epstein earlier still, remains largely true that for most British political scientists "far from seizing the opportunity to study the essentials of their system of government in different settings" they instead "turned inward" and most courses on British politics in British universities "are taught as

17 RAW Rhodes, John Wanna and Patrick Weller, *Comparing Westminster* (Oxford: Oxford University Press, 2009); Ian Marsh and Raymond Miller, *Democratic Decline and Democratic Renewal – Political Change in Britain, Australia and New Zealand* (Cambridge: Cambridge University Press, 2012); Paul Strangio, Paul t'Hart and James Walter (eds), *Understanding Prime Ministerial Performance – Comparative Perspectives* (Oxford: Oxford University Press, 2013); Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems – Controversies, Challenges and Changes* (Cambridge: Cambridge University Press, 2015).

18 See for example, Dag Anckar, "Westminster Lilliputs? Parliaments in Former Small British Colonies", *Parliamentary Affairs*, vol 60, no 4, 2007, pp 637–654; and Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean – A Contextual Analysis* (Oxford: Hart, 2014).

19 Recent political science literature for instance seems to indicate that Westminster "systems" or "democracies" implies looking beyond England, but adding in other parts of the United Kingdom. See Eggers, Andrew Eggers and Arthur Spirling "Ministerial Responsiveness in Westminster Systems. Institutional Choices and House of Commons Debate, 1832–1915", *American Journal of Political Science*, vol 58, no 4, 2014, pp 873–87; Torun Dewan and Arthur Spirling, "Strategic Opposition and Government Cohesion in Westminster Democracies", *American Political Science Review*, vol 105, no 2, 2011, pp 337–58.

if the Westminster model existed only in Britain".[20] The forerunner volumes and their authors covering the Governments of the British Empire and Commonwealth of the early twentieth century to the 1980s were arguably more open and more expansive in their analysis by incorporating cases beyond the "great self-governing dominions". Instinctively covering history, law and politics, James Bryce, AB Keith, RJ Moore, DA Low, Margery Perham, KC Wheare, Kenneth Robinson, SA de Smith, Nicholas Mansergh, AF Madden, RTE Latham, Martin Wight and Ivor Jennings, for example, all used illustrations from a combination of Asia, Africa, the Mediterranean, the West Indies or the Pacific as well as the "traditional" settler cases to explain their arguments covering the developments of the Westminster model overseas *and* in Britain.

[8] Turning eastwards, the welcome rise of attention given to India and to a lesser extent on the rest of South Asia and South East Asia has seen a great manifestation of scholarly accounts covering the political institutions and constitutional cultures of individual States.[21] Comparative politics and history covering governance and democracy in what was British Asia is less available in a single volume – and very rarely providing coverage of both South Asia and South East Asia (some recent texts have contained elements of this for parts of each).[22] Law has primarily produced the closest recent Asia-wide equivalents. *Asia-Pacific Constitutional Systems* (2002), *Emergency Powers in Asia* (2010), *Fates of Political Liberalism in the British Post-Colony* (2012), *Constitutionalism in Asia* (2014), *Constitutionalism in Asia in the Early Twenty First Century* (2014) are texts that valuably document an impressive range of constitutional and legal issues that undoubtedly contribute to a better understanding of the contemporary governance

20 Graham, Wilson, "The Westminster Model in Comparative Perspective" in Ian Budge and David McKay (eds), *Developing Democracy* (London: Sage Publications, 1994), p 190.

21 For example, Hart's series *Constitutional Systems of the World* edited by Peter Leyland and Andrew Harding provide valuable volumes on individual countries and their constitutions.

22 Once again the field of constitutional law is where such accounts are found. A leading example covering South Asia is Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam, *Comparative Constitutionalism in South Asia* (New Delhi: Comparative Constitutionalism in South Asia, 2013), and Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 3rd edn (Singapore: Lexis Nexis, 2010) provides beneficial coverage of these two South East Asian States.

of key Asian States.[23] Nonetheless they do not attempt to provide a systematic concentration on the British parliamentary model's intervention into Asian governance. By naturally being directed towards courts and cases, these legal volumes cannot do justice to a political system that more than any other democratic type relies on politics and its personalities to inform with history its distinctive "studied ambiguity".[24] Ran Hirschl reminds comparative constitutional law scholars of "a simple yet powerful insight … often overlooked: constitutions neither originate nor operate in a vacuum"[25] a view endorsed by the pioneering work of Granville Austin that firmly established the value of using context and leading personalities as a means to understand the creation of republican India's Constitution.[26] Unlike contemporary volumes, older works on individual States' experiences by scholar-civil servants such as HM Seervai, RH Hickling, S Namasivayam, Chaudhri Muhammad Ali and the brothers BN Rau and B Shiva Rao consciously drew not only on British parliamentary history and politics, but also from settler and colonial cases of the British Empire to place their accounts in a constitutional context of where they came from, where they were currently, where they hoped to go and also what they wanted to avoid. Their training, often legal, in the colonial system made such Empire-wide assessments almost inevitable. Their accounts thus carried a mixture of perspectives that included observer, scholar, apologist, critic, participant and sometimes obituarist for the system they helped build and understand.

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23 Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge: Cambridge University Press, 2002); Victor V Ramraj and Arun K Thiruvengadam (eds), *Emergency Powers in Asia – Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2010); Terence C Halliday, Lucien Karpik and Malcolm M Feeley (eds), *Fates of Political Liberalism in the British Post-Colony – The Politics of the Legal Complex* (New York: Cambridge University Press, 2012); Wen-Chen Chang, Li-ann Thio, Kevin YL Tan and Jiunn-rong Yeh, *Constitutionalism in Asia – Cases and Materials* (Oxford: Hart, 2014); Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014).

24 Peter Catterall, "'Efficiency with Freedom'? Debates About the British Constitution in the Twentieth Century" in Peter Catterall, W Kaiser and U Walton-Jordan (eds), *Reforming the Constitution—Debates in Twentieth-Century Britain* (London: Frank Cass), p 2; H Kumarasingham, "Exporting Executive Accountability? Westminster Legacies of Executive Power", *Parliamentary Affairs*, vol 66, no 3, 2013, pp 579–596.

25 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), p 152.

26 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 1966).

[9] *Westminster Legacies – Democracy and Responsible Government in Asia and the Pacific* (2005) is the first text for many years that has made an attempt to focus on the parliamentary system derived from Britain that covered both settler and non-settler cases. In the edited collection, Rhodes and Weller make the distinction between the British settlers' populated "transplanted" cases and the "implanted" cases where the Westminster system was imposed and had a legacy of imperialism.[27] This typology goes some way to providing a comparative framework for understanding Westminster abroad, but the distinction proves less useful when assessing the reasoning of building new Jerusalems in the tropics and the non-British leaders behind them. It cannot be forgotten that any implanting or constitutional design of Westminster in Asia followed a heavy period of colonialism that was largely bereft of representative government on Westminster lines. Harding has from a legal perspective charted the "transplantation" and "adaption" of the Westminster in Commonwealth States and gives an important and lively legal account of a system that he astutely observes can be convincingly seen as both a "spectacular failure" and "remarkably durable", but definitely not a "tame reiteration of British ideas".[28]

[10] The field of constitutional design has flourished after the fall of the Berlin Wall and the demise of the Soviet bloc. The literature has covered Asia also, especially concerning the constitutional measures that could accommodate the prevalent diversity and complexity of the region's societies. Key collections such as *Constitutional Design for Divided Societies* (2008) and *Comparative Constitutional Design* (2012) have undoubtedly increased our understanding and appreciation of the complexity and trajectory of legal and institutional choices when creating a modern constitutional framework.[29] Tom Ginsburg, with key colleagues, has undertaken an immeasurably beneficial and ambitious

27 RAW Rhodes and Patrick Weller, "Westminster Transplanted and Westminster Implanted: Exploring Political Change" in Haig Patapan, John Wanna and Patrick Weller (eds), *Westminster Legacies – Democracy and Responsible Government in Asia and the Pacific* (Sydney: University of New South Wales, 2005), pp 2–6.

28 Andrew Harding, "The 'Westminster Model' Constitution Overseas: Transplantation, Adaption and Development in Commonwealth States", *Oxford University Commonwealth Law Journal*, Winter 2004, p 164.

29 Sujit Choudhry (ed), *Constitutional Design for Divided Societies – Integration or Accommodation* (Oxford: Oxford University Press, 2008); Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012).

database that collates written constitutions across the world since 1789.[30] However, as Ginsburg, Elkins and Blount recognise, the "former UK colonies whose independence constitutions were negotiated at elite level" are difficult to categorise.[31] Asian decolonisation certainly created state-building situations not easily explained in data sets or quantitative schemata. The longest piece of legislation ever passed by the British Parliament, the Government of India Act 1935, also happened to be the effective constitution for the independent States of India and Pakistan. The Indian Independence Act also came via the British Parliament for British India and the legally distinct Princely States created two new countries with the same person as their Head of State wearing different crowns who formally assented to the creation of two Constituent Assemblies for each Dominion, one of which created a new constitution while the other ultimately failed to do so. Ceylon became independent without even having an Act passed. Ceylon's Constitution was instead delivered by a mere Order in Council from Buckingham Palace and even explicitly mentioned the need "as far as may be" to follow the constitutional conventions of another country – the United Kingdom – and did not bother with a Constituent Assembly. The British Queen and the Malay rulers jointly commissioned a group of eminent Commonwealth persons without a single member from Malaya to recommend the form of their Constitution. No Constituent Assembly was required here also. Nepal, never formally part of the British Empire, nonetheless was unquestionably affected by the gravitational pull of colonial and independent India. The elite-led constitutions that flowed through the Himalayan Kingdom bore the debris of British and Indian influence. The above is mentioned on India, Pakistan, Ceylon, Malaya and Nepal not to confuse, but instead remind of the pronounced esoteric nature of Eastminster. This was an era that was dominated by unrepresentative and miniscule band of men – they were almost entirely men – that interpreted, wrought, and personalised government to an extraordinary degree. There is almost an unsavoury absence of the people, and thus gender, class and culture are lacking unless the gender was male, the class an educated or landed one and culture of an elitist style. This was the reality of

30 <www.comparativeconstitutionsproject.org>.

31 Tom Ginsburg, Zachary Elkins and Justin Blount, "Does the Process of Constitution-Making Matter?", *Annual Review of Law and Social Sciences*, vol 5, note 2, p 205.

Eastminster government during this historical period and therefore will be the focus of the article.

[11] The legacy remains, to rephrase Ginsburg's work, the endurance of Eastminster culture rather than constitutions in Asia. India, Pakistan, Sri Lanka, Malaysia and Nepal have all had either several Constitutions and governance models or at least multiple changes to their political infrastructure. Despite this, not only do the relics of colonialism remain, but so do the effects of the constitution-making period that followed the liberation from imperial tutelage and the system thence crafted from Britain and translated for Asian consumption. This article focuses on this period and conceptualises the historical Eastminster[32] to uncover the institutional traditions, commonalities and distinctions of the newly-forged Asian States that rose from British colonialism.

Part II: The Context for an Asian constitution-maker

[12] To navigate the road to Jennings successfully requires the map of AW Bradley. Bradley's reflection of his former Master at Trinity Hall on what would have been his centenary is invaluable and mandatory reading as an academic life of Jennings, the English public law scholar. Bradley's article is reproduced without alteration in this volume with a preface penned for this volume. In it, Bradley reflected that it was his hope that beyond the English work covered in his original article, further work would have been done to understand Jennings' constitution-making role across the world. I have recently edited a collection of previously unpublished documents of Jennings', including letters, notes, diaries and memoranda that cover much of his worldwide constitution-making role with the hope that it will provide scholars with a critical primary source to assist in their appraisals of constitutions, politics and history.[33] This article attempts to utilise Jennings' material on India, Pakistan, Ceylon, Malaya and Nepal to fulfil its ambition to explore and expose the historic Eastminster credentials of these States. It concentrates on Jennings' contribution in understanding the Westminster model in Asia.

32 The concept of Eastminster was originally outlined from a comparative politics perspective for India and Sri Lanka in H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013).

33 See n 3 above.

[13] In his posthumously published memoir, Jennings claimed to share that his attitude "was that of an ordinary Englishmen, who thinks it reasonable that a colony should obtain independence as soon as it can carry the burden".[34] Possibly his self-proclaimed "Fabian outlook" contributed to this view along with his term as Secretary of St Catharine's Labour Club where he was apparently known as "a 'Bolshevik' in the College".[35] His obituary thought "in politics he was left of centre", but recognised that his work academically and professionally was not fuelled by any political or party ideology.[36] Jennings lecturing and writing on the British Empire in the interwar years at the London School of Economics ("LSE") believed, as he did on the British Constitution,[37] a pragmatic approach was necessary seeing both black-letter law and a philosophically abstract view as unhelpful to state-building. This extended to when should power be transferred for indigenous rule. As Jennings bluntly put it: "To the question, when is a people fit for self-government, the answer is, never". He continued:

> You have only to watch the behaviour of British politicians during a general election to raise doubts whether the British people are not fit for self-government. They are fitter than most peoples, but it is always a question of degree. Self-government cannot be refused to the British dependency, Arcadia, on the grounds that the Arcadians are not fit for self-government. You can say only that they are not fit enough. To the question, when can power be transferred to the people of Arcadia – that is, when can British rule and jurisdiction be withdrawn – the answer is, as soon as an acceptable substitute to British rule has been provided.[38]

[14] Jennings sincerely believed – perhaps through the remarkable international array of graduate students at the LSE at that time as well his experience with Asia's educated elite – that the nationalism

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34 Jennings' posthumously published memoir, *The Road to Peradeniya – An Autobiography* (Colombo: Lake House, 2005) edited and introduced by HAI Goonetilleke, p 165.

35 Ibid, at pp 74–77.

36 December 20, 1965, *The Guardian.*

37 For Jennings' theoretical legal view on the British Constitution, see Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992), pp 167–176.

38 *SWIJ*, p 258.

of major parts of Asia "was not unfamiliar to the British. On the contrary, it was fundamentally English and was expressed in English terms. Its background was English constitutional history. In preaching self-government the politicians were converts preaching to the major prophets".[39] Perhaps this view of his goes someway to answer the question of why Gandhi merits just one brisk mention in his memoir.[40]

[15] Early in the war, Jennings had moved to Ceylon in 1941 to become Vice-Chancellor of the island's newly-established university. Almost immediately he offered and took the opportunity to contribute not only to war effort, but also to the Ceylonese effort to quicken the approach to self-government. He now had the occasion to see his academic work beyond the lecture theatre. "Go anywhere, do anything" – this was the unofficial motto of Ceylon's Civil Defence Department during World War II when a Japanese invasion was expected and feared. Jennings was the Deputy Civil Defence Commissioner during much of the war and this telling motto was attributed to him.[41] It can with greater amplitude serve as an aphorism for Jennings' relentless and near omnipresent influence across the constitutions and politics of British Asia during the transfer of power that was launched from Ceylon. Whitehall recognised constitutional change was inevitable "On a longer view … the pre-war system does not seem capable of adjustment to the promotion of broad-based governing institutions in accordance with our proclaimed purpose in Colonial policy".[42] Jennings never became a Colonial Office man.[43] Instead his services were sought from the locals – unofficially at first. Lord McNair in his

39 Jennings' posthumously published memoir, *The Road to Peradeniya – An Autobiography* (Colombo: Lake House, 2005) edited and introduced by HAI Goonetilleke, p 162.

40 Ibid, at p 108.

41 Charles Jeffries, "*O E G" A Biography of Sir Oliver Ernest Goonetilleke* (London: Pall Mall Press, 1969), p 49.

42 "'Future constitutional policy for British colonial territories in South East Asia': Memorandum by Mr Stanley for War Cabinet Committee on Malaya and Borneo", January 14, 1944, CAB 98/41, CMB (44)3 in SR Ashton and SE Stockwell, *Imperial Policy and Colonial Practice 1925-45, Part I, British Documents of the End of Empire Project* (henceforth "*BDEEP*"), series A, vol 1, p 371.

43 For an example of what the Colonial Office thought of Jennings, see Charles OH Parkinson, *Bills of Rights and Decolonization: the emergence of domestic human rights instruments in Britain's overseas territories* (Oxford: Oxford University Press, 2007), pp 79–80.

address at Jennings' memorial service commented that the years he spent in Asia, 1942–55, witnessed a critical period for the region's political complexion. Borrowing Harold Macmillan's lasting phrase, McNair observed that "The wind of change was beginning to blow with some force in Asia during that period" and that Jennings quickly found himself in "great demand for professional advice on the constitutional problems of other new and emerging Commonwealth countries". This meant his "private academical interests eventually coincided with the public need".[44]

[16] Jennings was one individual that constitutionally tied South Asia with South East Asia. Through his active involvement; constitutional breadth and dexterity; and scholarly influence both as an authority and recorder, Jennings provided a life, which permitted a unique and telling perspective on early state-building in British Asia, that no other single person can provide. India, Pakistan, Ceylon, Malaysia and Nepal would have all, obviously, constructed Westminster-style constitutions without Jennings and as such his influence must not be exaggerated. Nonetheless, through his constitutional travails in Asia, we can chart the path and impression of Westminster in the continent and track this through his work the distinctions and characteristics of it in these related, but individual States. Eastminster was not his to bestow or to shape. Yet, all these States in some form or another drew from him and his work to build their constitutional edifices. From a scholarly perspective also, the works of Jennings were a natural port of call for those seeking to understand the constitutional development of these States following British withdrawal and remain so to this day. His scholarship remains at times argumentatively flawed, factually incorrect, arrogantly judgemental and overreaching in its conclusions in terms of authority and validity. One account of Jennings' work on India levels him with "a big burden of errors of facts and interpretation".[45] His work in Pakistan drew open ire while his role in Sri Lanka and Nepal had attracted enduring controversy.[46] However tempting,

44 Lord McNair's address reproduced in *The Cambridge Law Journal*, vol 24, no 1, April 1966, pp 1–3.

45 Ram Sharma, "Sir Ivor Jennings and the Constitutional Laws of India", *Indian Journal of Political Science*, vol 14, no 2, 1953, p 145.

46 On Pakistan see for example AG Noorani, "Court martial: the great betrayal", *Dawn*, October 27 and November 1, 2008; Allen McGrath, *The Destruction of Pakistan's Democracy* (Karachi: Oxford University Press, 1996). For Sri Lanka and Nepal, see respectively Welikala and Malagodi's articles in this volume.

instances such as describing a fellow commissioner in Malaya as "a stupid fellow, third class in ability and fourth in imagination";[47] telling a student in Colombo that he would struggle in Britain as "Ceylonese students … never learn to read";[48] or shambolically thinking that Mahatma Gandhi was Indira Gandhi's father-in-law,[49] should not detract from Jennings' qualifications, energy, intellectual range and political intimacy in assessing Asian state-building.

[17] Post-1918 Europe experienced a precarious vista where constitutional professor-advisers like Germany's Hugo Preuß or Austria's Hans Kelsen operated in what Mark Mazower described as a "heady post-war decade" when the "jurist was king". These constitutional professor-advisers were tasked with rebuilding States from feudal and denounced edifices, and saw an opportunity to "subordinate politics to law" and create a constitutional utopia that would rationalise power by conditioning it to law.[50] Jennings was not quite in that mould, conceptually or temperamentally, as the European professor-advisers, but he did face a context that also sought to promote constitutional optimism and idealism to replace despotic rule and dismantle local parochialism. Weimar was no Westminster, at the beginning or the end, but nonetheless there was a similar sense at the foundation that this system crafted from both the past and hope for the future would entrench democracy guided by invented traditions for Asia and elsewhere. Unlike the European professor-advisers, however, Jennings reversely believed that law should be subordinated to politics. The Cambridge-trained scholar saw that "everything depends on the behaviour of human beings and especially … homo … politician".[51] Jennings was ready to do what needed doing, however challenging. This also meant, as the *Manchester Guardian* observed, that "Sir Ivor is not appalled by difficulties, or ready to abandon a sound principle because of inevitable imperfections in practice".[52]

47 *SWIJ*, p 69.
48 Note May 18, 1954, A1, IJP.
49 *SWIJ*, p 241.
50 Mark Mazower, *Dark Continent – Europe's Twentieth Century* (London: Allen Lane, 1998), pp 5–6.
51 *SWIJ*, p 265.
52 December 21, 1956, *The Manchester Guardian*.

[18] Jennings was one of the "constitution mongers" of Asia[53] and his learning, experience and disposition led him to engage in conspicuous constitutional borrowing. When presenting his advice or illustrating his work, Jennings naturally used precedents from across the world – particularly those parts once shaded pink. Malaya, for example, at Jennings' instigation saw its Constitution openly included provisions formed from the experiences, documents and constitutional histories of India, Pakistan, Ceylon, Burma, Ghana, South Africa, Newfoundland, Canada, Australia, New Zealand and Ireland. When he referred to the constitutions of Asia being British in their "context and texture" it can be presumed "British" meant historic and imperial parts of the Empire and not just the metropole. Asia did not necessarily need Jennings to do this. India's 1950 Constitution openly pulled precedents from across the world and its learned adviser BN Rau collated an insightful collection of historical and contemporary international precedents and conventions. The section of the republican Constitution dealing with the Council of Ministers for example owes considerable debt for its wording from Canada and Australia.[54] It is interesting to speculate if Lord Mountbatten had followed his staff's advice in the run up to independence and held confidential briefings from "Sir Ivor Jennings, who is at present Vice Chancellor of Ceylon University" who was seen as "a real expert on the question of the structure of the Commonwealth".[55] Whether a republic, realm or traditional monarchy Jennings believed that almost all the senior Asian leaders studied constitutional issues, even if in criticism, "through the English language and through English eyes" and this, naturally, coloured their views and explained their choices.[56]

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53 A term used in AJ Stockwell, "Princes and Politicians: The Constitutional Crisis in Malaysia, 1983-4" in DA Low (ed), *Constitutional Heads and Political Crises – Commonwealth Episodes, 1945–85* (London: Macmillan, 1988), p 183.

54 H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), p 84.

55 "Memorandum from Lieutenant Colonel VF Erskine Crum to the Governor General of India, proposing that the Governor General should discuss with Sir WI Jennings the question of the structure of the British Commonwealth", January 17, 1948, D132, MB1/D, Papers of Earl Mountbatten of Burma, University of Southampton.

56 Ivor Jennings, *The Commonwealth in Asia* (Oxford: Oxford University Press, 1949), pp 59–60.

[19] Jennings was aware of both the opportunities and dangers this implied for the Westminster model. Jennings' role and that of his indigenous interlocutors was therefore crucial for Eastminster's "complex of personal relationships", but this could also be its downfall.

> It is much easier to draw a formal constitutional putting into words the outline of the Westminster model than it is to create the environment and the complex of personal relationships which make the Westminster model work. Indeed, it is to be expected that where democratic government works well it will work with a different set of political conventions from those observed in Westminster…Those countries which have succeeded in maintaining the democratic system, the Rule of Law, and constitutional government have shown that different forms may be used in political institutions and political conventions. Variations from the Westminster model must be expected; what one hopes is that they will be variations which do not infringe fundamental principles.[57]

Part III: Historical Eastminster in British Asia

[20] Jennings' legal contemporary, de Smith, explained in the framing of Westminster constitutions, a "blueprint has never been part of the Commonwealth constitutional lawyer's equipment".[58] Without a blueprint the draftsmen were left trying to translate the political expectations into constitutional form. As Madden described of historic exports of British Government and rule, it "was natural for men to create in the image they knew". Importantly, it was not just a matter of the British intention in "charter, statute or instruction" but how those on the ground "regarded the instruments they received and how they worked them" because how they interpreted their powers and institutions in "one generation became the constitutional orthodoxy for the next".[59] The first generation of the Asian political leaders created their own Eastminsters and their own orthodoxies projected well beyond their terms of office just as the settlers had done on the frontiers of "Greater Britain".

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57 Ivor Jennings, *Magna Carta and its Influence in the World Today* (London: Her Majesty's Stationary Office, 1965), pp 35–36.

58 SA de Smith, "Westminster's Export Models: The Legal Framework of Responsible Government", *Journal of Commonwealth Political Studies*, vol 1, no 1, 1961, p 3.

59 AF Madden, "'Not for Export': The Westminster Model of Government and British Colonial Practice", *Journal of Imperial and Commonwealth History*, vol 8, no 1, 1979, p 11.

[21] A review of Jennings' *The Approach to Self-Government* commended two key constitutional elements that stood out about new States from British rule.

> The first is the profound degree in which the emergent countries have become impregnated with British constitutional thought. The second is the degree of modification or acclimatisation which the British model undergoes as it is adapted to the exotic setting.[60]

[22] The British "post-colony", as Halliday and Karpik argued, struggled with the "inherent contradictions of colonialism" and the "liberal-legal heritage" that Britain sought to "pass on".[61] This also highlights the critical distinction between colonial government and post-colonial government. However, the distinction should not be such as to remove the need to assess one to understand the other. Local political leaders under colonial rule while denied "responsibility" for governing their lands were trained culturally and politically to articulate and manipulate their demands for freedom using the language and method of Westminster-style responsible government. In Asia, Westminster-style government was not effectively tried till after the British left. As Arvind Elangovan observes, the Indian Constitution is often misleadingly viewed as "the successful culmination of the story of Indian nationalism".[62] The stance of seeing India's Constitution as explicitly linked to nationalism and the end of colonialism unsurprisingly understates the continuities and borrowings from not only British India, but also the imperial world.

[23] The Eastminster stage was also the transition stage – not only from colonial to post-colonial, but further ahead for some States from democracy to authoritarianism or a key stage in regime change. Earlier currents pushed the Asian States in the early post-war era to experience comparable transitions from colonial authoritarianism.[63] Fresh from the battle for independence, the Asian political actors were not only

60 December 21, 1956, *The Manchester Guardian.*

61 Halliday and Karpik, "Political Liberalism in the British Post Colony: A Theme with Three Variations" in *Fates of Political Liberalism*, p 4.

62 Arvind Elangovan, "The Making of the Indian Constitution: A Case for a Non-Nationalist Approach", *History Compass*, vol 12, no 1, 2014, p 2.

63 H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), pp 14–18.

operating in a fluxing hell where the governance of their State needed to be tested to be true, but also under an Eastminster system already sold with few rules that quickly became hotly contested. These political conflicts could and did in some cases like Pakistan and Nepal lead to regime collapse. Jennings warned: "Those that have been bred under settled and ancient political systems cannot realise the short distance that lies between settled government and chaos".[64]

[24] Assumptions were often made that were difficult to uphold. Jennings in preparing one of many memoranda for the Reid Commission in Malaya confidently stated that for the new country and its units: "The ordinary conventions of Cabinet Government would apply. This system is well understood throughout the Commonwealth and will be used in the Federation".[65] He predicted after watching the first year of deceptive tranquillity in Ceylon that "communalism seems unlikely to obstruct the smooth operation of responsible government".[66] A predication that was tragically wrong. Not all were so convinced of Westminster's viability in the region. In 1958, just a year after Malayan independence and over a decade after India's, the Labour politician and former South East Asian proconsul, Malcolm MacDonald wrote from Delhi as Britain's High Commissioner:

> None of the Asian peoples are by nature fitted to govern themselves by a system of Parliamentary Democracy on the Western model. For many centuries they have all been used to authoritarian rule in one form or another; and in spite of a certain enthusiasm for demanding their democratic rights (without much corresponding zeal to assume their democratic responsibilities) the large majority in most countries are probably still inclined in acquiesce in being governed by others rather than governing themselves.[67]

64 Ivor Jennings, *Problems of the New Commonwealth* (London: Cambridge University Press, 1958), p 9.

65 *SWIJ*, p 93.

66 Ivor Jennings, *The Commonwealth in Asia* (Oxford: Oxford University Press, 1949), p 67; and H Kumarasingham, "'The Jewel of the East yet has its Flaws' – The Deceptive Tranquillity surrounding Sri Lankan Independence", *Heidelberg Papers in South Asian and Comparative Politics*, Working Paper No 72, June 2013.

67 High Commissioner to Viscount Kilmuir, October 6, 1958, PREM 11/2359, British National Archives. For a fuller version of McDonald's despatch see H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), pp 202–203.

[25] Whatever its manifest failings, Eastminster was a political fixture in Asia. Thanks to works on the settler States like *Comparing Westminster*, scholars have a relevant and practical guide to discern the important "beliefs" required to belong to the broad church of Westminster. The concept of beliefs is certainly more useful than rules when seeking to compare and categorise *New Westminsters*.[68] Like all faiths, there are different sects within and this article does not seek here to challenge its lessons.[69] Instead, the article and the section below in particular seeks to examine the deviations found in Asia. Rather than try and explain every difference and find every commonality, the article, using the period selected and the involvement and assessment of Jennings, concentrates on how these States differed from "traditional" expectations of how the Westminster model was supposed to work. The Eastminsters historically had five key inter-related deviations from the traditional settler cases of the model. These deviations will be explored below to provide a brief explanatory and introductory portrait of Eastminster conditions historically. The table below set the Eastminster deviations against five key Westminster attributes found in the settler States.

Westminster	**Eastminster**
1. Settler States	1. Asian Raj
2. Ceremonial Head of State	2. Interfering Head of State
3. Prime Ministerial and Cabinet Executive	3. Selective Dictatorship
4. Majoritarian System	4. Minority Rights
5. Reliance on Conventions and Flexibility	5. Colonial Continuities and Invented Conventions

68 H Kumarasingham, "Exporting Executive Accountab!ility? Westminster Legacies of Executive Power" in *Parliamentary Affairs*, vol 66, no 3, 2013, pp 579–596.

69 Readers can usefully examine table 1.1 on the three clusters of "beliefs" about the "constitutional framework", "structure and conventions of the core executive" and "party system and the electoral process". Rhodes, Wanna and Weller, *Comparing Westminster*, p 7.

1. Asian Raj

[26] The Eastminster States contained no substantial settler population that sought to build a "Better Britain". Instead civilisations, governance traditions and social factors existed that clearly made a British-inspired political system's reception problematic to say the least. "No Englishman can enjoy the prestige of the Brahmin",[70] Jennings remarked and the political leaderships across Asia was drawn from those who frequently held important social rank in their societies. As Bayly and Harper argue, the "British tended to see it, as they preferred to see all colonial nationalism, in terms of culture of a responsible middle class, united by English education and the values it carried".[71] In terms of imperial policy, this meant British interests in Asia were "staked on the creation of a new elite in its own image: Anglophone, Anglophile in outlook and committed to the Commonwealth connection".[72] This remarkable Asian elite contained a much higher proportion of Oxbridge-trained leaders. When examining the decade following independence in India, Pakistan, Ceylon, Malaysia (and Singapore), it is striking to record that nine of the twelve men who served as Prime Minister attended Oxbridge.[73] This fact is particularly bold when compared to their "white" counterparts. An analysis of the 10-year period following ratification of the politically empowering Statute of Westminster, which gives a comparable juncture to independence in the Asian cases, shows that in Canada, Australia, New Zealand, South Africa and Ireland only one of the twelve heads of government, Jan Smuts, went to Oxbridge, and half of them could not claim any tertiary education at all. This illustration, of course, does not hide the

70 *SWIJ*, p 241.

71 CA Bayly and TN Harper, *Forgotten Wars – The End of Britain's Asian Empire* (London: Allen Lane, 2007), p 100.

72 Ibid, at p 504.

73 The Prime Ministers with this educational background for the 10-year period following independence were, India: J Nehru (Trinity College, Cambridge); Pakistan: Liaquat Ali Khan (Exeter College, Oxford), K Nazimuddin (Trinity Hall, Cambridge), HS Suhrawardy (St Catherine's College/New College, Oxford); Ceylon: Dudley Senanayake (Corpus Christi College, Cambridge), Sir John Kotelawala (Christ's College, Cambridge), SWRD Bandaranaike (Christ Church College, Oxford); Malaysia: Tunku Abdul Rahman (St Catharine's College, Cambridge); and Singapore: Lee Kuan Yew (Fitzwilliam College, Cambridge). Jennings regarded Chaudhri Muhammad Ali "as a typical Cambridge man" though he was educated at the "degree factory" of University of the Punjab. *SWIJ* p 237.

deeply unrepresentative nature of Asia's political leaders or necessarily their intellectual talents. The overwhelming majority of the governed during these years could scarcely write the names of the favoured few that *naturally* held power. As a Vice-Chancellor in Asia, Jennings saw the peculiar reception English education must have had even for the privileged who had access to it.

> For those who had access to was determined by syllabuses drafted in London for the benefit of English students. Latin was compulsory, and so nearly every educated Ceylonese has a vague recollection of the conjugation of docere but few know anything of Sanskrit and Pali. English was English for English students and that meant (in London) mainly Anglo-Saxon and linguistics, not English literature. I have no doubt that in "English Literature" the following colloquy was common:
>
> > "TEACHER: 'O daffodil we weep to see you fade away so soon'
> > PUPIL: What is a daffodil?
> > TEACHER: Just an English flower, but the examiners will not ask questions on that."[74]

[27] Tully believes that the imperial constitution-making in colonial and post-colonial regimes created a manufactured climate of "low intensity democratization", which nonetheless during and following decolonisation allowed for "modifying the imperial dimensions of constitutional democracy from within".[75] The institutions and idealisms subsequently changed and chopped, but this was because the system had new masters "within" who could now do the manipulating instead of the colonial power whatever the intensity. For those kept out of the negotiation for power the drama of independence could be frustrating as the Malayan Progressive Party viewed it "As the terms of reference of the Constitutional Commission do not call for recommendations for convening of a Constituent Assembly it would appear that unlike India and Pakistan, the people of Malaya cannot adopt, enact and give to themselves a Constitution but can only be granted one …".[76]

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74 Ivor Jennings, "Universities in the Colonies", *Political Quarterly*, vol 17, no 3, 1946, p 234.

75 James Tully, "The Imperialism of Modern Constitutional Democracy" in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism – Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), p 335.

76 People's Progressive Party of Malaya memorandum for Commission, July 18, 1956, B10/5/2, IJP.

[28] In Ceylon where early Prime Ministers rotated the *sherwani* with Privy Counsel uniform, DS Senanayake was no less successful in taking a different approach from India and Pakistan. A "friendly" method of reasoning towards the British was used to help him become the anointed one despite lacking island-wide support for his scheme.

> His line of approach, too, was quite different from what they had expected. He was far too experienced a politician to tell them that they were knaves and fools. What he said in effect – in language which I cannot reproduce – was: "We are an ancient people, accustomed to governing ourselves before England was heard of. We are a friendly people. We welcomed you in 1795. We vested the Sinhalese Crown in your King in 1815. You have done things of which we do not approve, but we have also learned much from you. You gave us a most difficult Constitution, but we have worked it successfully. When you lost Malaya and Burma and met antagonism in India, you came to friendly Ceylon, and we helped you. We do not ask independence as a reward. We ask it because it is in your interest as well as ours. We want to keep your friendship. Do you not want to keep ours?" Such an appeal was both unexpected and unanswerable except by a gesture of equally friendly a nature.[77]

[29] Jennings famously wrote of the supposed socialist leanings of the Indian Constitution that "The ghosts of Sidney and Beatrice Webb stalk through the pages of the text",[78] but the shadows of other English figures including Sir Henry Maine, AV Dicey, AB Keith, Edwin Montagu, Sir Samuel Hoare and Harold Laski[79] can be glimpsed too and all persons familiar to the legal-political elite that dominated India and its constitution framing. It could be argued that "The lawyer-politician has … played a more important part in Indian politics than

77 Ivor Jennings, "Donoughmore to Independence – A Contribution to the Constitutional History of Ceylon, 1931–1948" in H Kumarasingham (ed), *The Approach to Power – Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Colombo: Centre for Policy Alternatives) (forthcoming).

78 Ivor Jennings, *Some Characteristics of the Indian Constitution – Being Lectures given in the University of Madras during March 1952 under the Sir Alladi Krishnaswami Aiyer Shashtiabdapoorthi Endowment* (Madras: Cambridge University Press, 1953), p 31.

79 Jennings remarked "It is odd to reflect that, though he never passed Suez, Laski had greater influence in India than Lord Curzon"; *SWIJ*, p 223.

in the politics of any country in the world".[80] This possibly helped create within India a legal cosmopolitanism at just the time that Rohit De argues its members were prevented from participating at the imperial-Commonwealth level.[81]

[30] Though the members of India's Constituent Assembly were unrepresentative of the population at large in their caste, westernised education and social milieu, it is not as Bhargava argues helpful or accurate to brand them or their counterparts across Asia as "alien".[82] Sir Kenneth Roberts-Wray believed the constitutions the Colonial Office produced were ones that it "can justly be claimed … gives the people what they ask for".[83] Many scholars have criticised such sentiments since the people were never represented in the modern sense at the constitution-making table. However, it can be surmised that Roberts-Wray was trying to convey that constitutions from Britain were not imposed, but negotiated with people who the British expediently portrayed as representing the will of their people however difficult to see how this was so. Constitutional commissions in Ceylon and Malaya accepted submissions from all manner of groups – though it is difficult to gauge any actual effect these had overall other than their admission since the main game remained in the hands of the accepted local elite.[84] The leadership of India and Pakistan's negotiations with the British were extensive, complex and exhaustive and even the colossal twelve volume *Transfer of Power* series did not capture it all and nor could it.[85] The elites operated in a "complex interplay of

80 Ivor Jennings, *Some Characteristics of the Indian Constitution*, p 24.

81 Rohit De "'A Peripatetic World Court' Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council", *Law and History Review*, vol 32, no 4, 2014, pp 821–851.

82 Rajeev Bhargava, "Introduction" in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (New Delhi: Oxford University Press, 2009), pp 1–40.

83 Kenneth Roberts-Wray, "The Legal Machinery for the Transition from Dependence to Independence" in Anderson (ed), *Changing Law in Developing Countries*, p 61.

84 Parkinson observes of the Reid Commission in Malaya and its framing of provisions regarding fundamental rights: "There is no evidence to suggest that this draft incorporated any specific measure from the plethora of submissions, although the annotation on many of the submissions do suggest that they were at least read", Parkinson, *Bills of Rights and Decolonization*, p 91.

85 Nicholas Mansergh (editor-in-chief), *Constitutional Relations between Britain and India – The Transfer of Power 1942–7* (London: Her Majesty's Stationary Office, 1970–82).

conflicting promises and constraints", but mostly united in the goal for independence.[86]

[31] All of this cannot remove the astonishing reality of a situation such as in Nepal in 1959 where the population with barely 6% having literacy skills were given the right to vote in a national election for the first time based on a constitution framed by an Englishman that was released less than a week before the poll. A British correspondent covering the election ventured that the majority of the "pocket valley" candidates knew "about as much about politics as the flying squirrel bouncing through the rhododendron bush". Underneath the title "Nepal goes to the poll", the article was thus accurately sub-headed "Guided by King Mahendra".[87] The "guided democracy" Bogdanor describes of early twentieth century Britain[88] was also in evidence in Asia following independence. Whether using the *Ramayana* or *R v Halliday* as inspiration, the indigenous elites were the ones doing the interpreting and the ones doing the ruling for *their* Eastminster. As Nehru prophesied during revolutionary times, "Caesarism is always at the door".[89] India and its neighbours now had Caesars of the soil once more.

2. Interfering Head of State

[32] British and settler accounts of the Westminster model almost uniformly relegate the Sovereign or their representative solely a ceremonial role, if the Head of State is mentioned at all.[90] As Rhodes, Wanna and Weller argue that while the Australian Constitution states: "The executive power of the Commonwealth is vested in the governor-

86 Jost Düffler and Marc Frey, "Introduction" in Jost Düffler and Marc Frey, *Elites and Decolonization in the Twentieth Century* (London: Palgrave Macmillan, 2011), p 3.

87 Taya Zinkin, February 18, 1959, *The Manchester Guardian.*

88 Vernon Bogdanor, "Magna Carta, the Rule of Law and the Reform of the Constitution" in Robert Hazell and James Melton, *Magna Carta and its Modern Legacy* (Cambridge: Cambridge University Press, 2015), p 40.

89 See H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (Lon5don: I B Tauris, 2013), pp 46–47.

90 Two volumes of enduring exception to this that cover settler and non-settler cases are Low (ed), *Constitutional Heads and Political Crises*; and David Butler and DA Low (eds), *Sovereigns and Surrogates – Constitutional Heads of State in the Commonwealth* (London: Macmillan, 1991).

general", "[n]o one takes it literally".[91] Blackburn has sought to "bury, not praise" any reference to the British monarch having "independent" personal powers and forever remove Jennings' "unfortunate" phrase and philosophy of the Monarch having "personal prerogatives".[92] Arguing "[n]or is it absolutely necessary that the Governor-General should act on the advice of the Prime Minister" would be received as ludicrous in the settler States.[93] In contrast in the Eastminster the preceding argument made by Jennings would have been seen as highly credible. Successor Heads of State in British Asia, professedly modelled on the settler and especially British royal template, actually engaged in political activism to say the least and did see themselves as having "personal prerogatives" that encouraged them to intervene in politics. The Yang di-Pertuan Agong (and Sultans in the States) in Malaysia or the King in Nepal as traditional monarchs saw their duty to defend not only their inviolable religious status, but also their historic monarchical powers despite being posited in their modern national documents as constitutional Heads of State. The mystic powers of Malay kingship described in the *Sejarah Melayu* had great nationalistic influence on Malays and how they viewed their rulers and themselves. This was important in drawing up the new Constitution and in Tunku Abdul Rahman's view, "the Rulers have been given more rights than they had once enjoyed in British colonial days" and their influence certainly endures.[94] Meanwhile the Governors-General of India, Pakistan and Ceylon saw themselves as indispensable from the affairs of State. Sacking and selecting Prime Ministers and Ministers; commanding the military; formulating policy; chairing major committees; directing the cabinet and civil service; ignoring the legislature; and playing very dangerous politics were all examples of political activism almost unheard of in Britain or the settler States. The principles of responsible government in some instances were overturned, reducing the Prime Minister as a sort of *chef de cabinet* instead of the principle agent of power.

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91 Rhodes, Wanna and Weller, *Comparing Westminster*, p 48.

92 Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law*, 2004, pp 562–563.

93 Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1958), p 121.

94 Hugh Hickling, "Malaysia" in Butler and Low (eds), *Sovereigns and Surrogates*, pp 206–207.

[33] As Jennings recounted from his time in Pakistan under Governor-General Ghulam Mohammad: "The decisions of primary importance were taken by the Governor-General himself. He regarded Cabinet decisions as advice to him which he was free to reject, and the Cabinet acquiesced in that interpretation".[95] Jennings was supported by Jinnah replying to Mountbatten's question of why not become Prime Minister since as Governor-General he would have to listen to advice, "In my position it is I who will give the advice and others will act on it".[96] Ghulam Mohammad did follow that advice and used the vice-regal office to sack the Prime Minister Khawaja Nazimuddin (himself a former Governor-General), recall and install a serving diplomat in Washington to take his place, and then proceed to summarily dissolve a Constituent Assembly that dared to circumscribe his powers and all of this carried out in the Queen's name.[97] A particularly eccentric imagination would be required to see Elizabeth II do that at Westminster – even with advice, which was absent in Pakistan.

[34] Pakistan, admittedly, stands at the extreme, as will be further argued below, but the Heads of State in Ceylon and even India were no shrinking violets when it came to politics. Harding calls these proclivities "dyarchical malfunctions".[98] The Governors-General of India and Ceylon were politically active and this was robustly the case during constitutional and political predicaments such as over the controversial selection of the first Prime Minister's successor in March 1952 and dealing with the virulent ethnic riots in 1958 as the government had ceased to take leadership on the crisis. In India, Mountbatten, no longer Viceroy, welcomed Nehru's invitation to influence and interfere in the post-partition policies of India while his successor as Governor-General C Rajagopalachari, a senior politician in his own right, continued the vice-regal office's prominent interventions over the vexed issue of Hyderabad's inclusion by military means into the Indian Union in September 1948.[99] Sovereignty in

95 *SWIJ*, p 138.

96 Viceroy's Personal Report No 11, July 4, 1947 in Mansergh (ed), *Transfer of Power 1942–7*, vol XI, pp 898–899.

97 See McGrath, *The Destruction of Pakistan's Democracy* for greater detail.

98 Andrew Harding, "The 'Westminster Model' Constitution Overseas: Transplantation, Adaption and Development in Commonwealth States", *Oxford University Commonwealth Law Journal*, Winter 2004, p 159.

99 See AG Noorani, *The Destruction of Hyderabad* (London: Hurst, 2014).

constitutional monarchs resides with the Crown and in Asia this was no mere piece of legal flummery. Eastminster legally and politically provided the capacity for its Heads of State to act as political and not just ceremonial leaders. In some cases, roles and expectations were reversed, which Jennings neatly posed as "Can you imagine the British Constitution with Winston Churchill as King and George VI as Prime Minister?"[100] One of the reasons for this can be surmised that the pre-eminent political figures in India, Pakistan, Ceylon, Malaysia and Nepal either held, were considered or substantially linked to the position of Head of State in a manner unseen in the settler States.[101] In addition, all of these States had seen the awesome authority of the colonial agent and "viceregalism"[102] was a term connoting autocratic power held by the Crown's representative in South Asia before and after independence as opposed to the limited and legally esoteric expression of "vice-regal powers" used in the traditional settler States for their Governors-General.[103]

[35] In some ways the post-colonial successors were more assertive than their colonial-era predecessors. The unhinging from the India or Colonial Office and trappings, nationalist realisations and political opportunities of their new position of Head of State created fertile conditions for gubernatorial interference. These constitutionally problematic conditions at the centre of an interfering Head of State was very often replicated in the less scrutinised sub-state level of the federal polities of India, Pakistan and Malaya. In discussing the origins of parliamentary responsibility, Przeworski, Asadurian and Bohlken argue, using historical case studies from constitutional monarchy States, that the actions of the Sovereign "could not be predicted by reading their constitutions". Constitutions "construct a game" for

100 *SWIJ*, p 228.

101 Nehru and Senanayake were considered for the Governor-Generalship and in Pakistan Jinnah was in fact Governor-General and never Prime Minister. Mahendra as King was the most important political figure in Nepal and Tunku Abdul Rahman's father had been the Ruler of Kedah and this Sultanate would provide monarchs for the office of Yang di-Pertuan Agong.

102 A term used in Pakistan for its "formative" years by Khalid bin Sayeed for the colonial period and afterwards by Ian Talbot. Ian Talbot, *Pakistan – A Modern History* (London: Hurst, 2009), p 54.

103 See for example Peter Boyce, *The Queen's Other Realms – The Crown and its Legacy in Australia, Canada and New Zealand* (Sydney: Federation Press, 2008), article 3.

the actors involved.[104] This realisation is inherently applicable for not only the Heads of State in the Eastminsters during their time of state-building, but also those who formally served at their pleasure.

[36] The maxim made by Sir Lewis Namier and Vernon Bogdanor that the "influence of the sovereign was in inverse relation to the growth of the party" in Britain[105] held true afar in the Eastminsters where all political parties that took office had limited if not non-existent experience of government, thereby giving the Crown's representative or equivalent a real influence over politics. Even the most organised and powerful parties in Asia, such as the Indian National Congress founded in 1885, due to colonial detention and obstruction as well as boycotts, had shallow depth of government involvement and consciously relied on Mountbatten and Rajagopalachari to assist in the administration and direction of the executive after August 1947. The republican Constitution that followed did not transform this situation greatly. The presidential successors were still expected to model themselves on their erstwhile liege at Buckingham Palace. However, the combination of active party politics experience, (indirect) national election and a new Constitution devised under his chairmanship gave Rajendra Prasad a sense of legitimacy as the first president of the republic that was lacking in his predecessors. Rajni Kothari thought, and others afterwards, that the Constitution in fact made the President "incomparably more powerful than the British monarch" despite opposite expectations from the leading politicians.[106] Differing interpretations were exacerbated by the new President regarding every mention of "President" as conferring personal powers for himself rather than an abstract constitutional term like "Crown", which the republic had to replace. Contained in Prasad's papers was a passage by Jennings on his new office, which outlined the potential problems.

> The Indian Constitution provides for an elected President who is apparently intended to be a Constitutional monarch without the

104 Adam Przeworski, Tamar Asadurian and Anjali Thomas Bohlken, "The Origins of Parliamentary Responsibility" in Ton Ginsburg (ed), *Comparative Constitutional Design* (New York: Cambridge University Press, 2012), p 111.

105 Vernon Bogdanor, "Introduction", Vernon Bogdanor (ed), *The British Constitution on the Twentieth Century* (Oxford: Oxford University Press/British Academy, 2003), p 7.

106 Rajni Kothari, "Form and Substance in Indian Politics III – Parliamentary Government – Law and Usage", *Economic Weekly*, May 20, 1961, p 787.

> trappings of monarchy. This is perhaps a somewhat hazardous experiment. Constitutional monarchy has evolved in Great Britain by a long and at times stormy process of evolution. It is easy to translate this system through the appointment of a Governor-General, but it may be less easy where an elected President, presumably a politician of some ambition, assumes royal functions. We have trained our kings, and Governors-General copy kings. There is some risk that a President will desire to set his own precedents and the Council of Ministers will not always agree with him. Rather than accept allegiance to the former Emperor of India, the Constituent Assembly prefers to run the risk.[107]

[37] When Prasad was taking his role too assertively and threatening intervention in policy areas Nehru thought out of bounds, the legal expert Sir Alladi Krishnaswami Aiyer advised the Cabinet in classic Westminster terms of how the President should react if he was to receive a Bill not to his liking: in growing tension with the "In the felicitous language of … Bagehot, the King has no alternative to signing his death warrant if the Parliament chooses to pass a measure in that behalf".[108] This, of course, was just another interpretation, but one the Cabinet preferred.

[38] In Nepal, Jennings gave the Head of State the interpretation requested. The Constitution "provided for Cabinet Government so long as it was practicable, but gave the King ample powers to suspend Cabinet Government; or even the whole Constitution, if it proved unworkable".[109] This was no dead letter as the King did indeed suspend the brief experiment of parliamentary democracy and prove the Crown's powers in Eastminster was anything, but dormant.

3. Selective dictatorship

[39] In 1976, the British Conservative grandee Lord Hailsham evocatively termed British Government as an "elective dictatorship"

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107 "President's Status vis-à-vis Council of Ministers", January 24, 1951, in Valmiki Choudhary (ed), *Dr Rajendra Prasad: Correspondence and Select Documents*, vol xiv (New Delhi: Allied Publishers, 1984), p 289.

108 H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), p 88.

109 *SWIJ*, p 103.

that was "absolute in theory, if hitherto thought tolerable in practice".[110] Hailsham was explaining to his British audience that long-observed tendency of Westminster to fuse together substantial powers and vest them in the executive. Ten Downing Street, however, was far from being the only *locus* of this political phenomenon.[111] The model's institutional inclination to centralise power was prominently evident in British Asia from the beginning.

[40] At the transfer of power the deviation was especially pronounced, as even the "elective" part needs qualification. Both India and Pakistan's Constituent Assemblies were indirectly elected from provincial legislatures prior to independence. Tasked with drawing up a constitution rather than holding the executive to account or representing the people was the objective, though even this was not achieved in Pakistan. The executive dominated by the Governor-General and their placeman was largely untroubled by the Assembly and the country had to wait till 1970 before a general election. Government in Pakistan often resembled a game of "musical chairs" where key figures in this era danced between seats at the cabinet table, desks in the civil service and the Governor-General's throne.[112] Though India fared better in terms of elections and constitution-making, the fact that a general election only occurred in 1952 was enough for the first President of the republic to query the Assembly's legitimacy and the executive's validity.[113] In Malaya's 1955 Legislative Council election, which preceded independence, the governing coalition held every single seat, but one. The statistics have somewhat altered since, but the UMNO's grip on the executive remained impassive with Tunku Abdul Rahman alone staying in power till 1970. Ceylon's 1947 general election almost posted an upset by failing to deliver a majority to the UNP as the ordained party of power, but independents and others were convinced of their duty to support the planned itinerary for independence. While in Nepal, elections, like constitutions, came at the King's behest and were withdrawn just as quickly. BP Koirala on

110 Quentin Hailsham, *Elective Dictatorship – Richard Dimbleby Lecture 1976* (London: British Broadcasting Corporation, 1976), p 5.

111 H Kumarasingham, "Exporting Executive Accountability? Westminster Legacies of Executive Power" in *Parliamentary Affairs*, vol 66, no 3, 2013, pp 582–583.

112 Ian Talbot, *Pakistan – A Modern History* (London: Hurst, 2009), p 139.

113 H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), p 82–83.

becoming Prime Minister after the first ever parliamentary election in 1959 was not only out of job just over a year later but was arrested while the Constitution and Parliament were suspended all on the King's command. The above points to the precarious nature of electoral legitimacy. It also shows that selective nature of the executive. Therefore the democratic chain of delegation from elector to executive was either non-existent, irrelevant or subverted in formalising an executive of clear accountability to the electorate and Parliament.

[41] Historically, the two-party system was seen as critical to the practice of Westminster government. Eastminster, like much of the Commonwealth, did not exhibit such conditions to make a two-party system operable. As Harding states, political parties in the Westminster export variety are almost never mentioned though "their existence is implied" despite conditions often making them "inimical".[114] This situation was not helped by minimal thought to alternative voting systems in place of the traditional majoritarian "first past the post" method. More often, one party-dominated politics such as the Muslim League and Indian National Congress or coalition of elites such as the Alliance or UNP were created with the purpose of accepting power from the colonial masters. The selection came with risks. The British were worried that Abdul Rahman was not up to the serious problems his new State faced.[115] Pakistan learned quickly the problem of relying on a single selected person as Jennings sardonically observed: "We can appreciate the revenue to which Jinnah was entitled without approving the process of establishing a Caesar. Caesar is unfortunately mortal".[116]

[42] Jennings' description on how to build a functioning political class in Nepal did not evoke confidence. Jennings hoped a "Court Party" could emerge that could carry out the wishes of the King since he assessed that the "one stable element is the monarchy" in Nepal.[117] A view shared by others such as one reporter speculating that if "the King would stand as the leader of a divine Royal Socialist

114 Andrew Harding, "The 'Westminster Model' Constitution Overseas: Transplantation, Adaption and Development in Commonwealth States", *Oxford University Commonwealth Law Journal*, Winter 2004, p 160.

115 "The outlook in Malaya up to 1960": note by the Commissioner-General's office, May 1957, FO 3711129342, no 8 in AJ Stockwell (ed), *Malaya*, series B, part III, *BDEEP*, p 392.

116 *SWIJ*, p 228.

117 Ibid, at p 102.

party he would undoubtedly win".[118] For King Mahendra, however, parties did not possess "Nepaliness" unlike the monarchy and the principle that all sovereignty emanated from the King was not one of legal abstraction.[119] In case that was not enough, Jennings gave the King other options.

> To give the King a buffer against popular discontent, I invented a Council of State, which he could "pack" if he so desired, or use as an assembly of Kathmandu politicians if he thought that preferable.[120]

[43] SWRD Bandaranaike believed that Ceylon "adopted lock, stock and barrel the British machinery" and while Prime Minister he argued before a joint select committee the need to move away from the British-inspired Constitution since, using words that prefigured Hailsham's, "the British System is in effect a dictatorship clothed in democratic forms".

> In my opinion, what appears to some people as the breakdown of Democracy itself in certain countries recently, is really not a failure of Democracy but of the particular democratic machinery adopted … In the first place, there is the dictatorship of the Party which has obtained a majority at the elections, without the Opposition or even the back-benchers of the Government having any important voice in the conduct of affairs; secondly, there is the dictatorship of the Cabinet over the Government party; and thirdly, there is the dictatorship of a small Inner Cabinet over the Cabinet.[121]

[44] The selective dictatorship was far from being merely conceptual in the Eastminster as all the States experienced their own version of dictatorship both bad and benevolent from the view of their hapless citizenry. Jennings words that in "many countries … the success of 'democracy' depends upon the character of the oligarchy at the top" for the Eastminsters are almost dull in their obviousness.[122]

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118 February 18, 1959, *Manchester Guardian.*

119 Richard Burghart, "The Formation of the Concept of Nation-State in Nepal", *Journal of Asian Studies*, vol 44, no 1, 1984, pp 119–120.

120 *SWIJ*, p 103.

121 Memorandum submitted in January 1959 to the Joint Select Committee to Revise the Constitution in *Speeches and Writings – SWRD Bandaranaike* (Colombo: Government Press, 1963), pp 442–444.

122 Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1958), p 83.

4. Minority rights

[45] The Indian Constitution opens in very un-Westminster style with the preamble, "We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic".[123] The major departure, however, was its symbolically powerful and legally actionable section on fundamental rights. Jennings had been for much of his career in common with his British legal and academic brethren against the need for Bills of Rights with entrenched status in constitutions. Leaving aside whether such a legislative device is critical for British liberty, the demographic facts and contemporary fissures of decolonising Asia made Bills of Rights highly discussed as a tool to assure minorities and restrain executives. Between Ceylon and Malayan independence, Jennings' attitude changed. He had attacked India's Constitution publicly in the early 1950s for its fundamental rights provisions as being restrictive and cumbersome.[124] The common law, in his view, and some non-discrimination clauses, were substantial enough to defend the liberties and rights of citizens and as such Ceylon with his guidance did not follow the Indian style of rights protection. However, by the time Jennings was working in Malaya in 1956 he had seen the autocratic excesses of Pakistan and the linguistic and ethnic firestorm in Ceylon. In both cases, the Constitution was unable to prevent or reverse draconian executive powers in Pakistan or majoritarianism chauvinism in Ceylon.

[46] His work in Malaya therefore revealed evidence of rethinking his ideas on Bills of Rights not seen in his published works. Showing pragmatic agility over intellectual pride, Jennings saw how Asia was turning and for Malaya, was able to craft a fundamental liberties draft Bill that not only drew directly from articles in India's Constitution and its courts that he had previously criticised, but also from several other Commonwealth States as well as Burma and Ireland. Alongside this, he still had to balance the political needs on the UMNO to give special protection to the Malays while not impairing the rights of the Federation's numerous and well-established minorities.[125] Perhaps

123 The 42nd Amendment in 1976 changed this to "We, the people of India, having solemnly resolved to constitute India into a Sovereign *Socialist Secular* Democratic Republic" (emphasis added).

124 Ivor Jennings, *Some Characteristics of the Indian Constitution.*

125 Joseph M Fernando, "Sir Ivor Jennings and the Malayan Constitution", *Journal of Imperial and Commonwealth History*, vol 34, no 4, 2006, pp 589–590.

as Parkinson argues, Jennings' Bill of Rights was not as critiqued as expected by the UMNO due to them not having any "legal luminaries" or external legal experts to fully explore whether it was compatible for Malays to have special rights and all other communities their own rights.[126] Constitutionalising Islam, which the Reid Commission saw as pragmatic to win the favour of the Sultans and UMNO, produced considerable concern expressed in piles of memoranda pleading either complete equality and secularism or specific constitutional protection for individual ethnic, religious, linguistic and sometimes professional identity.[127] Writing just before he died, Jennings admitted his views on India in the early 1950s were "misconceived" and his earlier "criticisms to have been exaggerated". His reasoning for India's surprising "success" was due to the Indian judiciary's grounding and felicity in common law since "a body as able and as well trained in the common law as the Supreme Court of India can make use even of so complicated a bill of rights to defend the liberties of citizens". Thus,

> The Indian Constitution came not to destroy the common law but to fulfil it, by applying some of the eternal principles to Union and State legislation.[128]

[47] Jennings was clearly thinking of Pakistan where the military discarded his short-lived Constitution with the Bill of Rights he devised there as its adviser in 1954–55 when he said, "No bill of rights could, however, have prevented a military *coup d'état*". The work in Malaya to instil constitutional status for the Bills of Rights should not, however, be confused with a new wave of enthusiasm. Jennings was no born-again convert. From Kathmandu, he complained in 1958 when advising the Nepali leaders, that "A Article of before was forced upon me", conspiratorially adding "but it will be easy for the King (but not the politicians) to suspend them if they prove too restrictive".[129] By 1965 as he wrote his piece on constitutionalism in the Commonwealth, he

126 Parkinson, *Bills of Rights and Decolonization*, p 91.

127 See memoranda in B10 IJP and on Malaya's experience of constitutionalising Islam in Kristen Stilt, "Contextualizing Constitutional Islam: The Malayan Experience", *International Journal of Constitutional Law*, vol 13, no 2, 2015, pp 407–433; and Joseph M Fernando, "Special Rights in the Malaysian Constitution and the Framers' Dilemma, 1956–57", *Journal of Imperial and Commonwealth History*, vol 43, no 3, 2015, pp 535–556.

128 *SWIJ*, p 280.

129 Ibid, at p 103.

appreciated that Bills of Rights were becoming the norm for States emerging from colonial rule in contrast to the views that flowed through the English legal mind.

> The contemplation of the problems of the newly independent countries has led to a changed view of bills of rights. The combination of a common law suffused with the principles of Magna Carta and a Parliament active in the defence of the liberties of England was thought by English lawyers to provide all that the Englishman needed, especially when every village had its Hampden and every town its cohort of Pyms.[130]

[48] Throughout Asia, political realities dictated that minority rights were ultimately secondary to majority ambitions and realities. As the British observed in Malaya,

> The Tunku has clearly made up his mind that while the Chinese must be given reasonable opportunities, he cannot afford to ignore the Malay demand for the best place in the sun. Present indications are that, if the present Alliance leadership does not move towards a more extreme position in support of purely Malay demands, it might very well fall from power and be replaced by more extreme Malay leaders.[131]

[49] With different degrees of severity, the same feeling was felt across Asia. Politically, the majoritarian mechanics embedded into Westminster suited the Eastminster leaders who invariably came from the dominant group in their society. Minority rights whatever their legal status owed their success or failure to the precarious realm of the political exigencies of the centre, which often functioned without credible minority representation. Eastminster worked with the damoclean threat of allowing a suspension of reality and rights.

5. Colonial continuities and invented conventions

[50] A fascinating table exists in the Jennings archive that contains three columns of constitutional articles.[132] The first has articles from the Government of India Act 1935, the second the Republic of

130 Ibid, at p 276.
131 "The outlook in Malaya up to 1960" in Stockwell (ed), *Malaya*, part III, *BDEEP*, pp 390–391.
132 B15, IJP.

India's Constitution and the third Pakistan's. Though de Smith with derisive justification exclaimed that "the comparison of constitutions by tabulation is perhaps the bleakest form of scholastic aridity", this tabulation of Jennings shows a remarkable endurance under new headings.[133] Almost two-thirds of the Republic of India's 1950 Constitution's articles consciously and acquiescently transferred provisions from the Government of India Act, which, of course, was initiated, debated, scrutinised and assented without any real Indian involvement. The most controversial elements appropriated were the emergency provisions, which Indian Nationalists had with good reason spent much time and ink decrying the colonial power for using to retard Indian rights and suffocate the democracy. Winston Churchill and his allies across the House thought the emergency provisions in what would become the Government of India Act would give the Viceroy "power similar to that of Lenin, Hitler or Mussolini".[134] The Indian Constituent Assembly debated these powers with keen interest as the majority of its members had experienced the Viceroy's and Provincial Governor's exercise of these autocratic provisions to frustrate and criminalise their political activities. The Republic of India's freshly-minted Constitution contained in its Part XVIII a rebranded version of pertinent Schedules from the Government of India Act 1935. Powers such as those in Article 356 giving the Centre provisions for "suspending in whole or in part the operations of any provisions of this Constitution relating to any body or authority in the State" are more than reminiscent of the colonial era. Though the Indian Constitution's protagonist BR Ambedkar argued that the emergency provisions "would remain a dead letter", they have in fact been used over 100 times since 1950, the majority of which the 1988 Sarkaria Commission found to be politically motivated against provincial opponents.[135]

[51] The "Malayan Emergency" against Communist rebellion against British rule from 1948 had as Harper argues clearly intensified and

133 SA de Smith, "Westminster's Export Models: The Legal Framework of Responsible Government", *Journal of Commonwealth Political Studies*, vol 1, no 1, 1961, pp 9–10.

134 HC Deb, March 13, 1935, vol 299, cols 457–68.

135 H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), p 106.

expanded colonial authority not long after the "second colonial occupation" following the Japanese defeat.[136] Emergency powers remained at forefront on Malaysian political thinking and their use did not greatly trouble their users. As the British observed of Abdul Rahman,

> He has an overwhelming Parliamentary majority, the local forces and police are largely Malay, and for his own ends he will keep legal powers to detain without trial. He is therefore serenely confident of his ability to absorb the Chinese terrorists into the community and to deal with any who give trouble (an assessment which incidentally betrays his lack of experience and which, in my view, is highly questionable).[137]

[52] The trade union-backed Labour Party of Malaya in their written submission to the Reid Commission questioned the axiomatic nature of Commonwealth membership and saw the need for an elected Head of State and constitutional provision for the "Declaration of Fundamental Human Rights". They also went ahead to advise other institutional recommendations highly in line with Eastminster credentials such as the "supremacy of parliament", "bicameral legislature", "unitary state", "common nationality", "equal rights", "strong central government" and remarkably advocated an unwritten constitution – a feature seen nowhere in the Commonwealth outside Britain except New Zealand – since they believed the country "must not be unduly subject to such constitutional fetters as written Constitution must necessarily create".[138] This thinking, however, was not blindly trying to follow British modes. Instead there was a genuine fear, particularly among minority groups, that the Constitution would favour the Malays and Islam to the detriment of the rights and freedoms enjoyed by other groups.

[53] Ceylon's emergency laws were used during riots of 1958 as a result of the Sinhala Only Act legislation and its effect on the

136 TN Harper, *The End of Empire and the Making of Malaya* (Cambridge: Cambridge University Press, 1999), p 358–362.

137 "Inward telegram no 140 from Sir R Scott to Sir A Eden assessing the risks", October 23, 1955, CO 1030/27, no 1 in Stockwell (ed), *Malaya*, part III, *BDEEP*, p 177.

138 Memorandum submitted to the Reid Commission from the Labour Party of Malaya, September 25, 1956, B10, IJP.

Tamil minority. However, it was not the Prime Minister, SWRD Bandaranaike, who utilised them, but instead as in colonial days the Queen's Representative, Sir Oliver Goonetilleke, who actively gave directions to the Cabinet, Police, Civil Service and Military using emergency provisions of the Constitution to ultimately preserve security during the first ethnic riots in Ceylon for almost 50 years. As if this was not enough, he wished to dispense with the long-held Commonwealth convention that the Governor-General's additional title of Commander-in-Chief was ceremonial in order to buttress his supremo status to the utter bewilderment of the Commonwealth Relations Office. Though the same officials privately commended the Governor-General's administrative and political skill in preventing fatalities and avoiding a major breakdown of law and order.[139]

[54] In Nepal, the monarchy was viewed by the British, Jennings and the locals as the only reliable political institution in the country and as such, emergency powers at the whim of the King was seen as defensible. Even leading Gurkha Parishad politician Randhir Subba who had "major criticisms" of placing too much power on the monarchy admitted that due to emergency precedents from British India, "agreed that in time of emergency power must be left with the King".[140] The conventions and provisions surrounding Nepal's parliamentary monarchy were crafted to aid the King and not the democrats.

[55] Emergency laws were revived to an even more extraordinary degree in Pakistan. In the newly-forged Dominion, these powers were exercised effectively at the Governor-General's discretion. Jinnah took this "unexpected bonus"[141] and sacked within weeks of Pakistan's existence the Chief Ministers of the North-West Frontier Province and Sindh, pushing out even further the "bounds of the constitutional limits" of his office.[142] Many have argued that the internal and external emergencies of Pakistan's creation justified these extraordinary powers. Yet even if it is accepted as Jalal argues that Jinnah "intended

139 H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), pp 166–167.

140 *SWIJ*, pp 116–117.

141 Ayesha Jalal, "Inheriting the Raj: Jinnah and the Governor-Generalship Issue", *Modern Asian Studies*, vol 19, no 1, 1985, p 50.

142 McGrath, *The Destruction of Pakistan's Democracy*, pp 45–47.

such concentration of power in the hands of a single individual as a temporary measure and not as a norm for the future" this did in fact become the custom his successors almost uniformly followed.[143] In October 1954 the Governor-General, without responsible advice, dissolved Pakistan's Constituent Assembly as an attempt to forestall the body and especially its President, Maulvi Tamizuddin, from circumscribing his power. Jennings was summoned as paid advocate of the Ghulam Mohammad to defend his actions as Governor-General against a petition presented by Tamizuddin charging the Head of State for the illegal dismissal of the Assembly. Jennings, as quoted below, privately believed the action was also illegal, but was able to invent conventions in the defence of his client's indefensible actions. [144]

> There is no provision in the Government of India Act for the dissolution of the Constituent Assembly. The action taken was therefore both unconstitutional and illegal. This raised certain problems, which seem to have been solved at least temporarily with considerable success … There is thus initial dictatorship. It seems very unlikely that either the Governor-General or the Prime Minister would wish to perpetuate this position: but, now that there has been departure from strict legal principles, there is no great practical difficulty about going further.[145]

[56] Drawing on seventeenth century English precedents that included Oliver Cromwell, James II and the co-regents William and Mary to convince the Federal Court of a twentieth century South Asian State of the validity of decisions taken in the name of the Queen of Pakistan. The ability to conjure conventions was useful. However, it was historically inappropriate, legally suspect and politically fantastical to use such conventions to cover such incredible situations and in turn created modern precedents and conventions that made a mockery of democracy.

[57] In Ceylon, conventions employed by nineteenth century Liberal, Tory and Whig grandees were distributed in the late 1940s to Cabinet

143 Ayesha Jalal, "Inheriting the Raj: Jinnah and the Governor-Generalship Issue", *Modern Asian Studies*, vol 19, no 1, 1985, pp 52–53.

144 Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: Cambridge University Press, 1957), pp 50–53; and McGrath, *The Destruction of Pakistan's Democracy*, pp 165–166.

145 *SWIJ*, pp 140–141.

Ministers on collective responsibility, but unsurprisingly struggled, despite the presence of political hostesses and country estates, to meaningfully craft the political culture intended. In fact Ceylon, like its neighbours, better resembled culturally the days when England was run by old families and not party functionaries.[146] It is a moot point how well the conventions Jennings, and the Eastminster States he advised, crafted would pass his famous and still-cited test on the existence of conventions: were there any precedents for these conventions; did the actors in those precedents believe they were bound by them; and what was the reason behind such conventions[147] since the precedents were often far-fetched and hastily cited; the actors did what was expedient; and reasons could be made to measure. "To speak of 'African' conventions is perhaps misleading, for it assumes that the conventions must be the same from Bathurst in The Gambia to Dar es Salaam in Tanzania".[148] The same, of course, is true of any grouping of "Asian" conventions. Manor's chapter title "Setting a Precedent by Breaking a Precedent" on the controversial succession in Ceylon following the death of the first Prime Minister which Jennings was instrumental in justifying describes very well the conditions that conventions and precedents operated in historical Eastminster.[149] There was a "provisional" nature of conventions during the period covered that intensified constitutional questions that proved valuable in its flexibility, but also handicapped in its ability to provide guidance for very different contexts of Eastminster indigenous rule that British and colonial conventions could not necessarily clarify.

[58] The Eastminsters historically at times could be classified as fulfiling Tushnet's concept of "Authoritarian Constitutionalism" where the State uses the rule of law for its benefit, formally operates within the constitution, dominated by a single party, imposes political and legal sanctions with low-intensity coercion, but still sensitive to public

146 See the observations of Patrick Gordon Walker and Harold Macmillan on this in H Kumarasingham, *A Political Legacy of the British Empire – Power and the Parliamentary System in Post-Colonial India and Sri Lanka* (London: I B Tauris, 2013), p 133.

147 Ivor Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1959), p 136.

148 Sir Ivor Jennings, *Magna Carta – And its Influence in the World Today* (London: HMSO, 1965), pp 35-36.

149 "Setting a Precedent by Breaking a Precedent: Lord Soulbury in Ceylon, 1952" in Low (ed), *Constitutional Heads and Political Crises.*

opinion and the appearance of democratic normalcy.[150] As Tan argues, those Asian nationalist leaders who protested against emergency powers during the colonial era were also quick to "accept and adopt" the same powers and thus the process of decolonisation created a "structural legacy that treats as normal the exceptional situation of emergencies".[151] If as Lee argues, the Malaysian Constitution has weathered a "storm of exigencies"[152] following independence then the Eastminsters were all battered by a monsoon of emergency that remains in seasonal and regional danger.

Conclusion

[59] An enormous constitutional cornucopia of British imperial and colonial precedents to legitimise or situate what appeared for some without precedent or inappropriate forged a powerful formula for adaptation of Westminster to all parts of the globe. Westminster may have travelled light, but it travelled often and in so doing provided transnational routes to avoid or follow in the quest for independence.

[60] Justice Krishnar Iyer in a judgment made over a quarter of century after Indian independence remarked,

> The law of our Constitution is partly eclectic but primarily an Indian-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions – basically a blended view of the British parliamentary system, and the Government of India Act 1935 and near-American, nomenclature-wise, and in some other respects.[153]

150 Mark Tushnet, "Authoritarian Constitutionalism – Some Conceptual Issues" in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2014), pp 44–46. Interestingly, Tushnet's key example is Singapore, a State that has heavy Eastminster characteristics.

151 Kevin YL Tan, "From Myanmar to Manila: A Brief Study of Emergency Powers in Southeast Asia" in Ramraj and Thiruvengadam (eds), *Emergency Powers in Asia*, p 151.

152 HP Lee, "Constitutionalised Emergency Powers: A Plague on Asian Constitutionalism" in Ramraj and Thiruvengadam (eds), *Emergency Powers in Asia*, p 395.

153 Krishna Iyer J in *Samsher Singh v State of Punjab* AIR 1974 SC 2192, 2212 cited in William Dale, "The Making and Remaking of Commonwealth Constitutions", *The International and Comparative Law Quarterly*, vol 42, no 1, 1993, p 71.

[61] In 1950 in terms of population, the United Kingdom, Canada, Australia, South Africa and New Zealand combined was even then just a fraction of Asia's size, with only a fifth of the population of the Asian States of India, Pakistan, Ceylon, Nepal and Malaya. Yet, the study of their common constitutional heritage and place in the Westminster corpus has been largely invisible. The examination of historical Eastminster is an attempt and approach to rectify this large gap. It is not claimed that the method above and its reliance on Jennings gives a full picture of the British constitutional legacy in Asia, but the argument is strongly proffered for the inclusion in the study of the Westminster model from history, law and politics especially. The five deviations outlined above only give a small flavour of Eastminster's conceptual and empirical distinction from the "traditional" settler cases. The inter-related deviations show how commonplace assumptions and "beliefs" of Westminster can be challenged and interpreted differently when seen in the Asian context. Ivor Jennings has been utilised here heavily since he connected the Constitutions of the selected States like no other figure through his writings, interests and as the Englishman "on the spot" who was intimate with many of the generation that forged independent Asia. His interpretations must be viewed cautiously, but they still add a compelling perspective on the state-building enterprise of Eastminster.

[62] Just as Susanne Hoeber Rudolph rightly criticised how the term "Oriental despotism" "implies an undifferentiated condition from Constantinople to Edo",[154] the meaning of Eastminster differs from Kathmandu to Kuala Lumpur. Borrowing from Rudolph again, it is hoped that this article will be a "prolegomenon to a comparative study" of Eastminster and to expand it further to case studies like Singapore, Burma, Mauritius and the Maldives and into the Pacific. Though it has not been possible here, it is hoped that this article generally will lead to further research firstly, on periods that followed this state-building phase to understand Eastminster's reach in the contemporary era and secondly, to open new comparative avenues to properly evaluate multi-regionally the *New Westminsters* and evade the present temptation to examine just Britain or "traditional" cases when analysing the Westminster model and its extraordinary global

154 Susanne Hoeber Rudolph, "State Formation in Asia – Prolegomenon to a Comparative Study", *Journal of Asian Studies*, vol 46, no 4, 1987, p 737.

personality. Eastminster was a powerful political, historical and constitutional phenomenon in Asia and it deserves further scholarly attention to help scrutinise the tribulations of democracy in a region that still struggles to understand the multiple legacies of colonialism.

Berjaya Times Square Revisited: What's in a Name?

by

*Dr David Fung Yin Kee**

"What's in a name? That which we call a rose,
By any other name would smell as sweet."
Romeo and Juliet (II, ii, 1-2)

Introduction

[1] This article to revisit the Federal Court's decision in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd*[1] ("*Berjaya Times Square*") after almost a decade is felt necessary because its controversial parts on breach of contract and remedies are having a negative effect in the way this area of law is understood. Being a Federal Court decision on a common area of dispute and traversing an area of law requiring the application of general principles, it would have much influence on the court itself and is of course binding on the courts below which means that its true reach should be fully understood.

[2] I hope to provide clarity and a way to deal with the various doctrinal issues that were in fairness not created solely by the decision but were certainly stirred up in its wake. There are three sections to this article. Section I identifies the dispute and the issues involved and furnishes the present understanding of the decision including the views of its fiercest critic. Section II, by far the longest one, submits what the decision actually decides and its limits by using five chosen criteria: (1) Different bases for discharge of contract; (2) Breach of contract (and fundamental breach); (3) Repudiation; (4) Election of rights and remedies; and (5) Unjust enrichment. Section III concludes by heralding the virtues of the consistent use of most commonly understood names and the pathway that such usage produces.

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1 [2010] 1 CLJ 269.

I. The dispute, issues, and present understanding of the decision

The dispute in a common fact-situation

[3] The dispute arose from a sale transaction in a scenario common to many who had bought a landed property off-plan. The appellant/defendant is a developer of a mixed development in Kuala Lumpur known as Berjaya Times Square. Commercial units of shop-lots were opened to the public to purchase and own. By a sale and purchase agreement dated August 24, 1995, the appellant agreed to sell the shop-lot duly completed and with vacant possession to the purchaser, the respondent/plaintiff, at the price of RM1,149,771 within 36 months. This was expressly provided in clause 22. The same clause also provided an automatic extension period of three months, failing which liquidated agreed damages was payable for the period of delay until vacant possession of the property was delivered. Under clause 32 time was of the essence for the contract. The last day for vacant possession of the property was November 23, 1998. The appellant did not deliver within time but could only four years and four months later.

[4] Despite the appellant's failure to deliver the property, the respondent continued to pay the instalments towards the purchase price through the loan with a financial institution as and when they were due. There were meetings and correspondence between representatives of the parties in which assurances were given that delivery would be by end of 2001. On December 27, 2001 the respondent's solicitors wrote to terminate the sale agreement and asked for refund of the instalments paid. The appellant quickly denied that the respondent was entitled to terminate the agreement but only to payment of liquidated agreed damages for the period of delay. Another assurance was given on October 1, 2002 that it would be done by year end 2002. None of the assurances were kept. The appellant was only able to deliver vacant possession on July 1, 2003. By the time the respondent commenced action against the appellant, the purchase price had been fully paid.

[5] In the action, the respondent claimed for a declaration that the agreement was validly terminated by the appellant's breach of contract on December 27, 2001, refund of the purchase price, and damages sustained for loan costs. The appellant did not dispute it had breached the agreement in its failure to complete and deliver the property within time but contended that this breach did not give rise

to the respondent's right to terminate and it would only be liable to pay the liquidated agreed damages for the period of delay.

The courts' decisions in the case

[6] The High Court found in favour of the respondent and awarded all its different heads of claim. Mohd Hishamudin Mohd Yunus J (as he then was) found the failure of the appellant to deliver the property after an unreasonably long period of delay, over four years, was a fundamental breach of the contract and this entitled the respondent to terminate the agreement. The appellant had breached its obligation to deliver vacant possession of the property within the stipulated period when time was of the essence. The breach of this obligation to perform within time where time was of the essence under the agreement entitled the respondent to terminate the contract under section 56(1) of the Contracts Act 1950 (Act 136). There was also the appellant's argument that the respondent was estopped from terminating the agreement because of the respondent's conduct in continuing to pay the instalments as they became payable and in allowing more time. The court rejected this argument since the appellant was in breach and had come to equity with unclean hands. However, without further deliberation on the remedies claimed, the court awarded all the respondent's remedies.[2]

[7] On the appellant's appeal, the Court of Appeal unanimously confirmed the High Court decision. Zaleha Zahari JCA (as she then was) and Raus Sharif JCA (as he then was) gave one judgment affirming the High Court decision for the same reasons.[3] They referred in particular to the High Court decisions in *Tan Yang Long & Anor v Newacres Sdn Bhd*[4] and *Law Ngei Ung & Anor v Tamansuri Sdn Bhd*[5] in support of their decision.[6] They also noted that another two High Court decisions in *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd*[7] ("*Chye Fook*") and *Kang Yoon Mook Xavier v Insun Development Sdn Bhd*[8]

2 [2004] 4 CLJ 852 at 855–856.
3 [2010] 1 CLJ 309 at 314–319.
4 [1992] 1 CLJ 211.
5 [1989] 2 CLJ 181.
6 [2010] 1 CLJ 309 at 317–318.
7 [1989] 1 MLJ 308.
8 [1995] 2 CLJ 471.

("*Xavier Kang*") decided similarly.[9] In a separate judgment, Abdul Malik Ishak JCA also referred to *Chye Fook* and *Xavier Kang* to support the respondent's right to terminate the agreement and emphasised that since time was expressed to be of the essence, the respondent could terminate as provided under section 56(1) of the Contracts Act 1950 and also claim liquidated agreed damages for the delay.[10]

[8] The Federal Court disagreed with both the High Court and the Court of Appeal and reversed the courts below it and set aside their respective orders. The Federal Court dismissed the respondent's action. Gopal Sri Ram FCJ gave the main judgment, with whom Zulkefli Ahmad Makinudin FCJ (as he then was), who also gave a short judgment in support, and Mohd Ghazali Yusoff FCJ agreed.

[9] Since the main point and part of this article is in interpreting what the Federal Court had set as a principle in its decision, I would only at this stage state what was the bare decision without any comment. Their Lordships, as justified by the facts of the case, applied section 40 of the Contracts Act 1950 to be read together with section 56(1) in determining whether the respondent had the "common law right to rescind" and they decided that it did not. In doing so, they read the words "fails to do any such thing" in section 56(1) with "any such thing" as referring to the "promise in its entirety" stated in section 40. Since they had already interpreted "the promise in its entirety" to mean that the promisor's performance must have been a total failure of consideration, a concept used in the law of restitution, they were able to reason that there was no total failure of consideration on the facts to entitle the promisee, the respondent, to "rescind" the contract under the common law.[11] This is the most controversial part of the decision and is discussed in greater detail in Section II below. The Federal Court also found, as a matter of construction, time was not of the essence of the agreement and the respondent had wrongfully terminated the agreement under section 56(1) of the Contracts Act 1950. Although time was expressed under clause 32 to be of the essence, the appellant's obligation to complete and deliver the property within the stipulated time was not of the essence since its obligation to pay liquidated agreed damages under clause 22 showed that the

9 [2010] 1 CLJ 309 at 318.
10 Ibid, at 328 and 329.
11 [2011] 1 CLJ 269 at 277, 282–284, 285–287.

contract parties did not intend it to be of essence. Consequently, the respondent's action was dismissed.

Professor Sinnadurai's critique

[10] Writing shortly after the Federal Court's decision in *Berjaya Times Square*, Professor Visu Sinnadurai gave it extensive treatment.[12] In dealing with the case, he helpfully surveyed the many decisions on this issue of "whether a purchaser may rescind a sale and purchase agreement and recover the purchase price in the event of late delivery of the property by the vendor", which he described as commonplace.[13] He lamented that although the Federal Court had acknowledged that for the past 150 years there had been much discussion on this question and the cases decided during this period have settled the principles, the court had then proceeded to restate these settled principles and in so doing the judgment as applied in subsequent cases indicated "the difficulties in following the exact principles of law enunciated by the Federal Court".[14] After he had carefully traced the trilogy of earlier Court of Appeal decisions in *LSSC Development Sdn Bhd v Thomas Iruthayam & Anor*[15] ("*LSSC Development*") (per Gopal Sri Ram JCA), *Tan Ah Chong v Chee Pee Saad & Anor*[16] ("*Tan Ah Chong*") (per Gopal Sri Ram JCA) and *Araprop Development Sdn Bhd v Leong Chee Kong & Anor*[17] ("*Araprop Development*") (per the dissenting judgment of Zaleha Zahari JCA (as she then was)) which laid the foundation,[18] he proceeded to show the confusion that parts of the Federal Court's judgment had caused (and as his critique is quite extensive, I will only select the ones that are most pertinent).

[11] First, he said the Federal Court's approach was wrong. There was no necessity to restate principles with regard to termination of a contract. The Malaysian courts may have referred to termination as rescission but the judges knew the two different senses of the word "rescission". In the first sense, as rescission *ab initio* in which the contract

12 Visu Sinnadurai, *Law of Contract*, 4th edn, Vol 2 (Kuala Lumpur: LexisNexis, 2011), pp 1003–1052.
13 Ibid, at p 1003.
14 Ibid, at pp 1003–1004.
15 [2007] 2 CLJ 434.
16 [2010] 6 CLJ 560.
17 [2008] 1 CLJ 135.
18 Visu Sinnadurai, *Law of Contract*, 4th edn, Vol 2 (Kuala Lumpur: LexisNexis, 2011), pp 1021–1028.

is set aside for vitiating factors of free consent in the formation of the contract such as misrepresentation, duress, coercion or fraud and the remedy sought is *restitutio in integrum,* the parties being restored *status quo ante* as though the contract was never entered into. And in the second sense, in the promisee terminating the contract for the promisor's breach of contract where the promisor had committed a "fundamental breach" or "breach going to the root of the contract" by electing to bring the contract to an end and claiming damages suffered, or affirming the contract and claiming specific performance.[19] Having surveyed the Malaysian High Court decisions in the cases as cited, he listed the typical reliefs (i.e. remedies) granted following a rescission (i.e. termination) of the contract as the following: (i) Declaration the purchaser is entitled to rescind (i.e. terminate) the contract; (ii) Refund of the purchase price paid to the vendor; and (iii) Damages, either general or liquidated as provided in the agreement, for late delivery.[20]

[12] There was therefore no necessity for the Federal Court to delve into these settled principles and that in so doing the Federal Court had confused rather than clarified those principles. For instance, the discussion of terms such as "common law right to rescind", "equitable right to rescind", "total failure of consideration", in a context of a claim for damages arising from termination of a contract for breach of contract was bewildering. He noted that even in identifying the issue, Gopal Sri Ram FCJ had confusingly said that since breach of contract was admitted by the appellant and the only remaining issue was whether the respondent was "entitled to rescind the contract, that is to say, to have the parties restored to a position where they will stand as if the contract had never been made". As for section 40, its scope has already been firmly established for over 100 years since the Contracts Act 1950 and its predecessor have applied in Malaya.[21]

[13] Second, Professor Sinnadurai showed that the scope of section 40 was wrongly restricted by the Federal Court's undue emphasis on the words "refused to perform its promise in its entirety" by taking the view that a party is only entitled to terminate the contract for breach under section 40 if there is no performance at all. He explained that

19 Ibid, at pp 1028–1031.
20 Ibid, at p 1030.
21 Ibid, at pp 1032–1033.

on this view, any part performance of contract obligation, no matter how defective, would not allow the promisee to terminate the contract under section 40. And as there is no precedent for this view, the Federal Court then "erroneously equated this interpretation to the doctrine of total failure of consideration."[22]

[14] Third, he observed that before the trilogy of Court of Appeal cases of *LSSC Development*, *Tan Ah Chong*, and *Araprop Development* and the Federal Court's judgment in *Berjaya Times Square*, the concept of total failure of consideration would not be part of the discussion when the issue is on breach of contract. The concept of total failure of consideration belongs to the law of restitution and only enters into the discussion when the issue arises as to whether restitution should be awarded after an agreement has become void. He therefore remarked that the Federal Court "went off tangent".[23] He then showed the several inconsistencies displayed by the Federal Court and by his Lordship Gopal Sri Ram JCA (as he then was) in *LSSC Development* when they tried to explain past decisions with this restitutionary concept.[24]

[15] Fourth, he remarked the fact that the Federal Court had in the context of section 56(1) interpreted the agreement which contained a time stipulation of completion and delivery of vacant possession of the property expressed to be of the essence together with an obligation to pay liquidated damages for any delay to mean that time is not of essence should not be taken to say that "in every situation" such similar agreements would be similarly construed. He noted that their Lordships' construction was based on the strength of one precedent, the Indian Supreme Court judgment in *Hind Construction Contractors v State of Maharashtra*[25] ("*Hind Construction*"). He noted that this is an exception to the general rule that where time is expressed to be of the essence in the performance of a contract the breach of this condition would give rise to the right to terminate the contract and that in *Hind Construction* there was no express provision making time of the essence.[26]

22 Ibid, at p 1034.
23 Ibid, at pp 1038–1039.
24 Ibid, at pp 1040–1043.
25 AIR 1979 SC 720; (1979) 2 SCC 70.
26 Visu Sinnadurai, *Law of Contract*, 4th edn, Vol 2 (Kuala Lumpur: LexisNexis, 2011), p 1045.

[16] In conclusion, he said that the decision and grounds of the Federal Court's judgment are flawed and it would have been "more convenient to relegate the decision to as a mere footnote" were it not for it being a decision of the Federal Court on an important area of contract law.[27]

Damansara Realty: Federal Court's *obiter dicta* on *Berjaya Times Square*

[17] In *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor*[28] ("*Damansara Realty*"), the dispute over the right to terminate a Property Development Agreement ("the PDA") after a long period of inactivity gave an opportunity for the Federal Court to reconsider its decision in *Berjaya Times Square*.

[18] By the PDA, the plaintiff/appellant allowed the defendant/respondent 15 years to develop a track of land measuring 15.5 acres. When after 13½ years and the plaintiff had not commenced any development of the land, the defendant sent a termination notice giving the plaintiff a 30-day notice that the PDA would be terminated for the plaintiff's material breach and/or repudiation of the PDA as it had not commenced any work to develop the land. It was only after the termination notice was received that the plaintiff took some steps to initiate development works. The plaintiff disputed that the defendant had the right to terminate since the plaintiff's stance was that it had the liberty as and when it wished to develop the land so long as it commenced work within the allocated 15-year period. The defendant's stance was that the plaintiff was obligated to continuously develop the land within the span of 15 years. The plaintiff commenced an action against the defendant and others for wrongful termination of the PDA. The High Court dismissed the plaintiff's action and the Court of Appeal by a majority upheld the decision. It was decided that the termination notice was valid and had effectively discharged the contract.

[19] The Federal Court dismissed the appeal and affirmed the decision that the termination notice was valid and had discharged the PDA. One of the other issues arose in the course of argument as to whether the principle enunciated in *Berjaya Times Square* should be applied to

27 Ibid, at p 1046.
28 [2011] 9 CLJ 257.

the case. The plaintiff contended it should and the defendant it should not. The issue considered was whether or not the innocent party (the promisee) could treat the contract as having been repudiated.

[20] Richard Malanjum CJ (Sabah and Sarawak) (as his Lordship then was), who gave the judgment for the court, understood the principle in *Berjaya Times Square* to be the evaluation of whether there has been a total failure of consideration in the plaintiff's performance of the PDA. This evaluation is made in the context of whether the plaintiff has performed "his promise in its entirety" as those words are contained in section 40 of the Contracts Act 1950.[29] He was of the view that although the decision in *Berjaya Times Square* could be supported on its facts, "the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled" cannot be right.[30]

[21] His Lordship explained that ultimately whether there is a total failure of consideration or not is a question of fact to be resolved by looking at the circumstances of the case, and each case would be different. He illustrated by the example of a promisor who had completed the foundation of a building, which is of no good to the promisee, and this would mean the promise has not been performed in its entirety.

[22] His Lordship then noted *Berjaya Times Square* did not rule as wrong the conclusion reached by the cases considered by it (*Tan Yang Long*, *Chye Fook*, and *Law Ngei Ung*) where it was found that though the works were partly completed the contract was correctly terminated. He then expressed the view that the principle of total failure of consideration should be viewed from the perspective of "the reasonable and commercially sensible man". If this omnibus person views the performance of the promise as of some value then there is no total failure of consideration. It then follows that there is no failure to perform the promise in its entirety, and hence no right to terminate the contract. On the contrary, if the performance was viewed by this omnibus person to be of no value, there is total failure of consideration, leading to failure to perform the promise in its entirety, and hence a right to terminate the contract.

29 Ibid, at 279.
30 Ibid, at 280.

[23] His Lordship then noted that the factual matrix of *Berjaya Times Square* where work was almost completed but delayed in completion was so different from the case at hand – no work done for 13½ years within the 15-year period – that it could not answer the question whether this delay before the time expired amounted to a fundamental breach.

[24] His Lordship had to turn to the doctrine of repudiation, which includes the incident of anticipatory breach, to answer the question whether the prolonged delay before expiry of the 15-year period amounted to a refusal or disability of the appellant to perform the PDA.[31] Following the orthodoxy of the doctrine of repudiation, as explained by Cockburn, CJ in *Frost v Knight*,[32] he found that the appellant was in repudiation of the PDA, had committed a fundamental breach, and was also in anticipatory breach.[33] The appellant's conduct – prolonged delay for 13½ years – was evidence that it was not ready and able to perform the promise in its entirety, which was to develop the land under the PDA. The appellant had refused to perform its contractual promise in repudiation of the contract.

[25] I would respectfully submit that the inability to use the concept of total failure of consideration to determine whether there is valid termination to discharge a contract for repudiation in *Damansara Realty* is testament to it being, in the first place, inappropriately inducted as a test for this purpose. It is a very unfortunate consequence of the Federal Court's decision in *Berjaya Times Square*.

[26] It is to be regretted that the Federal Court did not address the question of whether total failure of consideration can in the first place be used as a principle to determine the issue of a repudiation or breach of contract that entitles the promisee to elect termination of the contract. By simply applying the principle to the issue of the right of termination for repudiation or breach of contract, the Federal Court in *Damansara Realty* indicated that such use is correct albeit difficult to apply to the facts at hand. It is plain that the courts below had understood *Berjaya Times Square* to enunciate the concept of total failure of consideration as a principle to apply *in general* to a case

31 Ibid, at 280–284.
32 [1872] LR 7 Ex 111.
33 *Damansara Realty* [2011] 9 CLJ 257 at 281–284.

in which the right to terminate a contract for breach of contract or repudiation is in issue.[34]

II. What *Berjaya Times Square* actually decided and its limits

[27] The names used for different doctrines, which used in a distinct context would yield different remedies, have been employed in a manner that had led to the confusion witnessed in *Berjaya Times Square* and the other cases in this context. To avoid heartbreak in litigation and for certainty in discourse, I propose to understand what in fact was decided in *Berjaya Times Square* by employing the five criteria indicated in the introduction.

1. Different Bases for discharge of contract

[28] Discharge of contract was the main issue in *Berjaya Times Square* and the other cases considered in this context. This was also the main issue in *Damansara Realty* save it was the plaintiff there who contended the termination was invalid. In these cases, the plaintiff would pray for a declaration that the contract is rescinded (more accurately, terminated) for breach of contract or repudiation on the defendant's part. Then the plaintiff would normally pray for the remedies or relief following on from such a declaration depending on what loss he had sustained.

[29] A contract has to be performed by the contract parties unless and until it is discharged. A contract, of course, can be discharged by full performance. In the life of a contract containing reciprocal promises and dependent on each other in their performance (contracts in this fact situation), at different stage of the contract some would have been performed and others to be performed in the future. By discharge of

34 For example, see the following: *Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo* [2010] 5 CLJ 427, CA; *Seven Seas Computers Sdn Bhd v Puteri Hotels Sdn Bhd* [2011] 1 LNS 22, HC; *Swiss-Garden International Vacation Club v Swiss Marketing Corp Sdn Bhd* [2011] 9 CLJ 581, HC; *Foo Yee Construction Sdn Bhd v Vijayan Sinnapan* [2014] 8 CLJ 979, CA (reversing the High Court); *Medallion Development Sdn Bhd v Bukit Kiara Development Sdn Bhd* [2015] 4 MLJ 350, CA (reversing the High Court); *Paramaha Enterprise Sdn Bhd & Ors v The Government of the State of Sabah & Anor* [2015] 2 CLJ 268, CA; *Mok Yii Chek v Sovo Sdn Bhd & Ors* [2015] 1 LNS 448, HC; *TDDI Jaya Sdn Bhd v Yew Hong Teng & Anor* [2017] 1 CLJ 436, CA (reversing the High Court); *Tan Kok Siang v Kemuning Setia Sdn Bhd* [2018] 8 CLJ 546, CA (reversing the High Court).

contract, I mean the contract parties are discharged of their respective obligations under the contract to be performed in the future, those yet to be performed. For those that have been performed by the promisor, accrued right or rights could have vested in the promisor for which she has a claim against the promisee.

[30] The contract can be discharged by a breach of contract or repudiation. It can also be discharged by frustration of the contract by a supervening event without default by any of the contract parties making it impossible for the contract to be performed. These principles are established under the common law since at least the middle of the nineteenth century. The Contracts Act 1950, a progeny of the Indian Contract Act 1872,[35] encapsulates these principles except for minor differences. For the promisee's right to terminate the contract for breach of contract or repudiation, the Contracts Act 1950 could use words to this effect: "put an end to the contract", "becomes voidable at the option of", "rescinds it", "becomes void".[36] Where the contract is discharged for frustration the contract is automatically discharged, that is, there is no requirement for termination by a contract party.[37]

2. Breach of contract (and fundamental breach)

[31] As seen above, *Berjaya Times Square* started life as one for termination of contract based on a breach of an obligation for which time was of the essence. The appellant had delayed the completion and delivery of the shop-lot for over four years and breached clause 22 of the agreement. Since section 56(1) of the Contracts Act 1950 states that the promisee in this situation has the right to elect whether to terminate the contract or affirm the contract, the appellant elected to terminate by its letter dated December 27, 2001 and for a refund of the money paid. The appellant promptly stated its position that

35 RR Sethu, "The History, Impact and Influence of the Indian Contracts Act 1872" (2011) 28 JCL 31.

36 See ss 40, 56(1), 65, 66, and 76. See also illustration (*a*) under s 40, (*c*) under s 66, and under s 76; J W Carter, "Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)" (2011) 28 JCL 85 at 95–97.

37 The contract "becomes void": Contracts Act 1950, s 57(2); *Hirji Mulfi & Ors v Cheong Yue Steamship Company Ltd* [1926] AC 497 at 503 and 505, PC; *HA Berney v Tronoh Mines Ltd* [1949] MLJ 4 at 5, HC.

the respondent had no right to terminate and only a right to claim liquidated damages for the delay as provided in the agreement.

[32] In a jurisdiction where the courts would habitually and systemically follow an analysis based on the tripartite of classification of contract terms – conditions, warranties, and intermediate (innominate) – it would have found, as a matter of construction, that the contract obligation to perform on time where time is essential is a breach of a condition. It would then follow, being a condition, the promisee has the right to terminate if he so chooses. In *Eng Mee Yong & Ors v V Letchumanan*,[38] Lord Diplock in the Privy Council on a Malaysian appeal treated the time of essence stipulation in the sale agreement for payment of purchase price to be a condition, breach of which entitled the vendor to terminate the contract. A breach of warranty would not give rise to a right to terminate the contract. There are terms which cannot be classified as either a condition or a warranty but are treated as intermediate (or innominate) terms which may give rise to the right to terminate by looking at the contract terms and the breach in the manner done by the English Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[39] ("*Hongkong Fir*"). The question is determined, in essence, from the perspective of the consequences of breach upon the whole contract.[40]

[33] The approach taken in *Hongkong Fir*, which was contained in the separate judgments of Upjohn LJ and Diplock LJ, was fully adopted by the Malaysian Court of Appeal in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd*[41] ("*Ching Yik Development*") (per Gopal Sri Ram JCA (as he then was)) and *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor*[42] (per Zainun Ali JCA (as she then was)). In *Ching Yik Development*, Gopal Sri Ram JCA (as he then was) adopted and followed the *Hongkong Fir* doctrine when he stated:[43]

38 [1979] 2 MLJ 212 at 218.
39 [1962] 2 QB 26.
40 See *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 at 296–298, CA; *Abdul Razak Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 3 CLJ 231 at 236, CA; *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 at 177–179, CA.
41 [1997] 1 CLJ 287.
42 [2008] 4 MLJ 157.
43 [1997] 1 CLJ 287 at 297–298.

In *Hong Kong Fir Shipping (supra),* the same test was propounded, by Upjohn LJ in the following way (at p 64):

> "In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, *depend entirely upon the nature of the breach and its foreseeable consequences.* Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he ever so hard to remedy it. In that case the question to be answered is, *does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?* If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only." (Emphasis added.)

In the same case, Diplock LJ, formulated the test in these words:

> "There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties,' if the late 19th century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen v Taylor, Sons & Co.* [1893] 2 QB 274, at p. 280 be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and *the legal consequences of a breach of such a undertaking, unless provided for expressly in the contract depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.* For instance, to take Bramwell B's example in *Jackson v Union Marine Insurance Co. Ltd.* LR 10 CP 125, at p. 142 itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charterparty,

> but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect." (Emphasis added.)
>
> (Underlining is my emphasis.)

[34] The *Hongkong Fir* doctrine, therefore, comprises an approach to determine the right to terminate, and hence discharge the contract, for breach of a contract obligation by considering three factors: (i) the nature of the breach; (ii) its foreseeable consequences; and also (iii) the occurrence of an event resulting from the breach which will have an impact on the future performance of obligations under the contract.

[35] Of the third factor, Diplock LJ in *Hongkong Fir* explained it as follows:[44]

> The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

[36] The *Hongkong Fir* doctrine is a doctrine of general application in the context of breach of contract. By metaphor such as a breach of a term which goes "to the root of the contract", or words such as breach of "fundamental terms" or "fundamental breach", the reference is to a serious breach or a breach of such serious consequences which will give the promisee a right to terminate the contract and claim damages.[45] In such instances, it is most likely that the approach to be taken by the Malaysian courts is to apply the *Hongkong Fir* doctrine or elements of it as a basis for the contract to be discharged by the election to terminate and claim damages. In *Berjaya Times Square*, this is what would have been done after the Federal Court followed the Indian Supreme Court's decision in *Hind Construction.* After construing the whole contract Gopal Sri Ram FCJ found, despite the expression that time was of the essence of the contract, the contract obligation to

44 [1962] 2 QB 26 at 66.

45 JW Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011), pp 234–235.

pay agreed liquidated damage for each day of delay meant the parties did not intend time to be of the essence for the promise which was breached. The respondent therefore could not rely on section 56(1) to terminate the contract, and if the respondent was to be able to terminate for the breach it would have to show a fundamental breach of the contract which the Federal Court, unlike the two courts below, found not to be established.[46]

[37] The more pertinent point concerning this discourse on the promisee's right to terminate the contract for breach of contract (and fundamental breach), however, is because Gopal Sri Ram FCJ in *Berjaya Times Square* had conflated the right to restitution of the benefit conferred for a consideration which had failed, as was recognised in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[47] ("*Fibrosa*"), with the Diplock test for fundamental breach in *Hongkong Fir* as the basis for what he named "the common law right to rescind" and which he expounded as follows:

> [17] That said, it is now settled that there is, at common law, a right to rescind a contract in very limited circumstances. In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. *In Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48, Viscount Simon LC said:
>
> > "… in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.
> >
> > If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled … ."

46 [2010] 1 CLJ 269 at [27], [37]–[44].
47 [1943] AC 32.

[18] What has to be added to the learned Lord Chancellor's view is the qualification:

> "… that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract … but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due." (*Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, per Lord Goff of Chieveley).

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety … .

…

[20] Absent a total failure of consideration, the common law right to rescind does not exist. Goff & Jones '*The Law of Restitution*' (6th edn) which is the leading text on the subject has this to say at p. 502, para. 20-007:

> "A breach of contract may be so fundamental that it deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.' (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26]. The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, *as an alternative to claiming damages*, sue for recovery of the money *provided that the consideration for the payment has wholly failed; if the consideration has partially failed*, his only action is for damages." (Emphasis added.)

In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages. What is important is that this limited common law right

> to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See, ss 34 to 37 of the Specific Relief Act 1950.

[38] One could see that the *right to terminate* a contract for breach of contract under the *Hongkong Fir* doctrine and the *right to claim damages or alternatively restitution* have been, with respect, unprincipledly collapsed into one named the "common law right to rescind" to restore the contract parties to the *status quo ante*. Five points are referenced to show this was what was done and why it ought to be avoided.

[39] First, by the term "the common law right to rescind" his Lordship could have meant one of three things. It could simply mean, by another name, the right to restitution of the benefit conferred upon a consideration which had failed. In short, the right to restitution of benefit conferred under the contract following the discharge of the contract. The second possible meaning could be the common law version of the right to restore the parties to the position as if the contract was never made, rescission *ab initio*, for which equity grants such relief to achieve *restitutio in integrum* so that the parties are restored to their *status quo ante*. Lastly, it could mean the right to terminate the contract for breach *and* a right to restitution are combined into one "common law right to rescind" in which the contract is "rescinded" in the sense that the contract is terminated and discharged, and restitution of the benefit also effected, but the rights are conflated as a basis for remedies to restore the contract parties to their *status quo ante* (i.e. as if the contract had never been made).

[40] In my view, it is unlikely that his Lordship meant the first two senses of the right he was purportedly exercising. If he had meant the first sense, the right to restitution, he would only need to call it that and end with the citation of *Fibrosa*. If he had meant the second sense, the right to rescind the contract, rescission *ab initio*, and achieve *restitutio in integrum*, he would have relied on neither *Fibrosa* nor *Hongkong Fir* since both are *not* authorities for what he had sought to establish. He had also distanced the "common law right to rescind" from equity's jurisdiction to rescind *ab initio* a contract vitiated by factors affecting free consent.

[41] Of the third sense, this is the most likely meaning of the ambiguous term. The extensive use of authorities on the termination of contract for breach together with authorities on the right to restitution upon a total failure of consideration as support for the proposition that there "is, at common law, a right to rescind a contract in very limited circumstances" point to this as his focus. The right to terminate for breach of contract under section 56(1) of the Contracts Act 1950 is an issue for the appeal. Moreover, he had also framed the issue for determination in the appeal as one as to whether the respondent can rescind the contract, that is, "to have the parties restored to a position they will stand as if the contract had never been made." Zulkefli Ahmad Makinudin FCJ (as he then was) in agreeing with the views of Gopal Sri Ram FCJ would have understood the phrase to mean the third sense when he remarked:

> A reference to ss 40 and 56(1) of the Act clearly showed that *the right to rescind a contract by way of termination* only arises when there has been a total failure of consideration. (Emphasis added.)

[42] Second, the principles governing the right to terminate a contract for breach of contract or repudiation cannot be emasculated to accommodate the remedy that was sought. The issue whether the promisor's breach is one that would give the promisee the right to terminate the contract is one to be independently handled from the issue of the type of remedy which is appropriate in the context of the cause of action. Since the issue of termination, following the approach of the Malaysian courts and also as stated in the passage from *Goff & Jones*, was guided by the *Hongkong Fir* doctrine, all that is required is for the principles established there to be applied. The concept of total failure of consideration, therefore, ought not to have been applied to the question of whether the breach gave rise to the right to terminate the contract.

[43] Third, the common law as it stands now in fact does not recognise a "common law right to rescind" as espoused by the Federal Court in *Berjaya Times Square*. To say that there is such a right to rescind, as the quoted passages above show, his Lordship relied on *Fibrosa* and *Stocznia Gdanska SA v Latvian Shipping Co*[48] ("*Stocznia Gdanska*"). There is no issue

48 [1998] 1 All ER 883.

on the right to terminate in *Fibrosa* since the contract was automatically discharged for frustration caused by the supervening event of the Second World War.[49] In *Stocznia Gdanska* the right to terminate the design-and-build contract for the vessel following termination under the contract clause was not in issue. The issue concerned was if the shipbuilder could claim for instalment payments under the contract as an accrued right prior to termination, then it would be an unjust enrichment in its hand since there was a total failure of consideration for its retention. It follows that their Lordships' speeches in both *Fibrosa* and *Stocznia Gdanska* on the application of the concept of total failure of consideration were in respect of the right of restitution of the money paid *after* the contract was discharged. Therefore, those speeches do not lay out any legal proposition under the common law which says there is a right to rescind based on a merger of contract principles governing the right to terminate a contract for breach or repudiation with restitutionary principles as a response to an unjust enrichment.

[44] Fourth, the fact that in some cases it might well be there is also a total failure of consideration on the facts but that is a result after breach which is not a test for a "fundamental breach" or breach of fundamental term or breach of a term which goes "to the root of the contract" that would give the promisee the right to terminate if he so elects. The emphasis is on the nature of the breach, foreseeable consequences of the breach, and any event resulting from the breach which would have deprived the promisee from obtaining a substantial part of the benefit if the contract obligations *in futuro* were not performed under the *Hongkong Fir* doctrine. One would discern that for the third factor, the focus is on *the promisee not obtaining the benefit of the contract* because of the breach. Whereas, for the test of total failure of consideration, the focus is on whether it is unjust if *the benefit already conferred on the promisor is retained* since the basis (or condition or consideration, all synonyms in this context) for the transfer of the benefit by the promisee has failed, or failed totally for those who insist on a total failure of consideration.

[45] Fifth, the Federal Court's examination of the words in sections 40 and 56(1) of the Contracts Act 1950 for justifying its application of

49 See text to n 37 above.

the concept of total failure of consideration in a context where the issue is whether the events there give rise to the right to terminate or affirm the contract. Sections 40 and 56(1) do not even vaguely touch on whether a benefit ought to be returned. By interpreting the words "in its entirety" unnecessarily restrictive to accommodate the concept of total failure of consideration in a discharge of contract context is unjustified and has also added confusion to the application of the doctrine of repudiation expressed in section 40. This will be dealt with immediately below.

3. Repudiation

[46] The doctrine of repudiation deals with the idea of what can be done by a promisee where a promisor refuses or will refuse to perform the contract. Since the performance of contract obligations in a bilateral contract of reciprocal promises, which are mutually dependent, the promisor must be ready and willing to perform his contract obligations. That is to say, he must not refuse to perform his part of the contract.[50] Upjohn LJ's first example in the passage already quoted is a good description of repudiation.[51] Repudiation as an incident of contract occurs when a promisor shows that he is not ready and willing to perform the contract and the common law gives the promisee the choice either to accept the repudiation and terminate or to affirm the contract. If he elects to accept the repudiation (i.e. terminate the contract), the contract parties are discharged from performing the contract obligations to be performed in the future and the promisee can claim damages suffered as a result of the promisor's conduct in refusing to perform the contract.

[47] If the incident of repudiation happens at a time prior to the arrival or expiry of the time for performance of the promisor's obligation and the promisee validly terminates the contract, an anticipatory breach occurs.[52] If the incident occurs when the promisor ought to have performed or started performing his contract obligation, a breach of contract and depending on the seriousness of the breach and its

50 JW Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011), p 298.

51 Text to n 43 above.

52 JW Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011), pp 300–301.

consequences, a fundamental breach or *Hongkong Fir*-type of breach might have occurred.[53]

[48] The language of section 40 of the Contracts Act 1950 allows for the incidents of contract related above to occur.[54] Section 40 reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[49] Quite apart from the argument presented above that breach of contract giving rise to the right to terminate is determined by its own body of doctrine, the use of the concept of total failure of consideration had been employed to interpret the phrase "his promise in its entirety" in section 40 by the Federal Court in *Berjaya Times Square*. After quoting from the relevant passages in the speech of Lord Wilberforce in *Johnson v Agnew* and the separate speeches of Lord Wilberforce and Lord Diplock in *Photo Productions* on the legal effects of terminating a contract for breach, [55] Gopal Sri Ram FCJ declared that the position in Malaysia is no different and that section 40 is a restatement of the English common law position. However, he then remarked:

> Special attention should be paid to the phrase "his promise in its entirety". Under the section the right in a non-defaulter to repudiate a contract only accrues *when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract*. (Emphases added.)

[50] With respect, this is a statement that does not represent English and Malaysian common law on the doctrine of repudiation. Three points must be made.

[51] First, although his Lordship did not mention the concept of total failure of consideration by name, it is plain the legal proposition made is that for repudiation to be established the promisor must

53 Text to n 45 above.

54 JW Carter, "Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)" (2011) 28 JCL 85 at 96.

55 [2010] 1 CLJ 269 at [21], [22], [23].

have refused to perform the whole of his promise, and therefore if he had partly performed the promise the promisee cannot terminate the contract. In other words, unless there is a total failure of consideration – consideration being equated to performance by his Lordship – on the promisor's part, there is no refusal to perform the contract, and thus no repudiation and the promisee has no right to terminate the contract.

[52] I am, with respect, unable to agree with the legal proposition presented, for the phrase "his promise in its entirety" in the context of the doctrine of repudiation does not mean whole or total non-performance of his promise. Instead, the idea behind the phrase emphasises that the promisor had refused to perform the contract in the sense of the substance bargained for under the contract. It is also relevant that under the Contracts Act 1950, an accepted offer constitutes a promise, central to contract.[56] The promise is the substance of the bargain. Illustration (*a*) under section 40 communicates this idea well. The promise or contract (and it means the same thing in this context) is for *A* to sing at *B*'s theatre at an agreed rate for each performance for two nights each week for the next two months. After five performances, *A* refused to perform on the sixth night. Although she had partly performed her contract, by the sixth night she was not ready or willing to perform her entire contract, i.e. to perform twice a week for a period of two months, and thus *B* is entitled to elect to terminate the contract. With the termination, both *A* and *B* are discharged from performing their contract obligations in the future: *A* is not obligated to sing every two nights of the week for the remainder of the two months and *B* is not obligated to keep that performance place for her and pay for her remaining performances. Of course, *B* the promisor can claim for any loss suffered, i.e. loss-of-bargain damages, arising from *A*'s repudiation: see the same illustration used under section 76 of the Contracts Act 1950 which states the common law principle of compensation for the promisee following lawful termination of the contract.

56 Contracts Act 1950, s 2(*b*); D Fung, "Contracts for the Benefit of Third Parties in Malaysia" in Chen-Wishart, Loke, and Vogenauer, *Studies in the Contract laws of Asia Vol II: Formation and Third Party Beneficiaries* (Oxford: OUP, 2017), Ch 7, p 146.

[53] Illustration (*b*) under section 40 emphasises the point that if *B* elects to affirm the contract (or acquiesces in its continuance), which he did by assenting to *A* singing on the seventh night, then the contract obligations remain binding on the contract parties – as the contract is not discharged – and both *A* and *B* have to perform their obligations in the future (the eighth night and onwards until the two months are up) but for the breach of obligation to sing on the sixth night, *B* can claim damages resulting from that breach of contract.

[54] The editor of the classic text on the Indian Contract Act 1872, *Pollock & Mulla: The Indian Contract and Specific Relief Acts*, commenting on the phrase promise "in its entirety" in the identical Indian provision, section 39, remarked:[57]

> A refusal to perform any part of a contract, however small, is a refusal to perform the contract "in his entirety"; but the kind of refusal contemplated in this section is one which *affects a vital part of the contract, and prevents the promisee from getting, in substance, what he bargained for.* (Emphasis added.)

[55] So far it is clear that the phrase focuses on the promisor's refusal to perform his contract (or promise). The focus on "his promise in its entirety" therefore captures the element that for there to be a repudiation of the contract, he refuses to perform his promise which strikes at the substance of what was bargained for. However, by introducing the concept of total failure of consideration in what is already a crowded and difficult area of law, it had not helped. A case on point is the recent Court of Appeal's decision in *Tan Kok Siang v Kemuning Setia Sdn Bhd*[58] ("*Tan Kok Siang*"). Mary Lim Thiam Suan JCA had applied the comment from *Pollock & Mulla* on section 40 to say it is relevant to examine the importance of the term in the agreement to see if the refusal to perform is superficial or substantial on the part of the defaulting party. She then rightly reasoned that if the term concerned is not a fundamental term and there is substantial performance then there is no right to terminate. In support, her Ladyship referred to the passage on part performance from *Berjaya Times Square* in support. However, the passage from *Berjaya Times Square* says part performance

57 Nilima Bhadbhade, *Pollock & Mulla: The Indian Contract and Specific Relief Acts*, 14th edn, Vol 1 (Bombay: LexisNexis, 2013), p 785.

58 [2018] 8 CLJ 546.

would mean the promisee has no right to terminate. In any event, not having been influenced by that passage, she was correctly directed by her reason on substantial performance and found that the manager of the project, the appellant, had on the evidence substantially performed the oral employment contract with the respondent and even if, which she agreed, he had breached his contract in leaving his employment earlier, the respondent did not have a right to terminate the contract for repudiation under section 40 because of the appellant's substantial performance.

[56] Second, the passage on part performance in *Berjaya Times Square* is *obiter*, not supported by either Malaysian or English authorities, and it is better not to follow it as the reasoning does not assist to determine the issue whether the breach of contract gave rise to the right to terminate. This has been seen in *Damansara Realty* and *Tan Kok Siang*. In *Berjaya Times Square* itself the useful summary of the English position on repudiation represents the law. Malaysian authorities at the highest court which follow the orthodoxy are *Ban Hong Joo Mines Ltd v Chen and Yap Ltd*,[59] *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd*[60] and *Damansara Realty*.[61]

[57] Third, if the orthodox doctrine of repudiation had been applied to the facts of *Berjaya Times Square* it would have yielded the result that the appellant did not commit repudiation of the contract. An absolute refusal by the appellant to perform its contract would be hard to establish. It follows, the way the doctrine operates is to determine whether there is evidence the appellant was ready and willing to perform the contract. The evidence showed a much-delayed performance of the contract. However, this would have been insufficient to show that the appellant did not intend to perform the contract, for by the time the action was filed 90% of the contract had been performed. At the time of the purported termination of the contract, the appellant had quickly responded to the notice to terminate by stating its readiness and willingness to perform the contract and for its delay would pay the respondent the liquidated agreed damages.

59 [1969] 2 MLJ 83, FC.
60 [1985] 2 MLJ 291, SC.
61 [2011] 9 CLJ 257.

4. Election of rights and remedies

[58] Since by "the common law right to rescind" the Federal Court had most likely used the term in the third sense explained above, what had started life as a cause of action for determination of the right to terminate the contract for breach and damages consequent on the breach of contract, had metamorphised into an astonishing hybrid. It is one perceived by the Federal Court as where the respondent was claiming for termination of the contract and seeking for remedies to be placed in a position as if the contract never existed but by relying on a right to restitution as a response to an unjust enrichment. From the perspective of election of rights, this simply cannot be achieved for inconsistent rights have been unprincipledly merged to innovate "the common law right to rescind". I give three reasons.

[59] First, the right to rescind *ab initio* the contract is not a right to terminate the contract for breach of contract or repudiation. This much has been acknowledged at numerous places in Gopal Sri Ram FCJ's judgment.[62] They are inconsistent rights, that is, mutually exclusive.[63] By rescission *ab initio* the contract is vitiated or set aside from inception as if it had never existed. By termination of a contract for breach of contract or repudiation, the contract is acknowledged and only rights *in futuro* are discharged from the date of termination and the right to damages resulted from the contract. Moreover, accrued rights under the contract are recognised and not divested by the termination.[64] Since the reasoning employed by his Lordship is one which merges the inconsistent rights, there is thus no occasion for election.

[60] Second, and following from the first, the fact that that is a merger, or in another word, conflation, of inconsistent and alternative rights into one "common law right of rescind" demonstrates that that right cannot work in logic or practice. *A priori* the "right" cannot exist. It is unstable.

[61] Third, there remains to be considered a different type of election: the election between alternative remedies which is presented to the

62 [2010] 1 CLJ 269 at [13]–[16].

63 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641–642, per Stephen J of the High Court of Australia.

64 JW Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011), pp 600–601.

plaintiff at the time she enters final judgment for the cause of action.[65] In *Berjaya Times Square*, the fact situation, the existence of which, gives rise to the remedies remains as one for breach of clause 22 of the sale and purchase agreement which the respondent claimed gave rise to the right to terminate the contract which it did by notice of termination dated December 27, 2001 and the remedies of refund of purchase price paid and loan costs wasted. It is at once noted that the damages claimed following from the breach of contract is not the normal contract measure, i.e. loss of bargain damages.

[62] However, it should also be noted that although loss of bargain damages is the normal measure of a damage claimed after termination of the contract for breach or repudiation, this need not be the only measure.[66] The promisee may wish to recover his losses incurred in reliance of the promise and this would include the money paid under the contract. In this instance, the money paid being a loss incurred by the promisee corresponds exactly to a benefit received by the promisor.[67] The promisee will be entitled to establish and prove his claim for damages on this compensatory basis as a remedy. In this instance, there is no election to be made but the amount claimed in damages would entail no recovery in restitution to prevent double recovery for the same sum.[68] In any event, there is no claim for restitution in *Berjaya Times Square* as the respondent had claimed for damages caused by the appellant's breach of contract. Any lingering confusion by the use of the word "refund" of money paid with the right of restitution can be avoided by dropping the use of that word and naming that part of the damages as a loss incurred in performing the contract. The High Court through David Wong Dak Wah J (as his Lordship then was) in *Trade Mode Sdn Bhd & Anor v A C Property Development Sdn Bhd*[69] did not have any problem assessing the purchaser's loss, comprising part payment of purchase price as damages claimed in accordance

65 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30, per Lord Atkin; *Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149, PC; *Tan Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, PC.

66 JW Carter, *Carter's Breach of Contract* (Sydney, Australia: LexisNexis Butterworths, 2011), pp 626, 679–680; K Mason, JW Carter, and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd edn (Sydney, Australia: Lexis Nexis Butterworths, 2016), paras [1809]–[1811].

67 K Mason, JW Carter, and GJ Tolhurst, ibid, paras [1405], [1410], [1819].

68 Ibid.

69 [2010] 10 CLJ 628.

with the compensation principle following a breach of contract under section 76 of the Contracts Act 1950.

5. Unjust enrichment

[63] Gopal Sri Ram FCJ had highlighted and analysed the Privy Council decision in *Muralidhar Chatterjee v International Film Co Ltd*[70] ("*Muralidhar Chatterjee*") since the respondent relied on it but there was no rendition of what the respondent's argument was. Given that the case's main legal proposition was that the promisor (or defaulting party) can have restitution of benefit conferred under the contract discharged for breach of contract by the promisee (or innocent party) under section 64 of the Indian Contract Act 1872 (Malaysian section 65), I assume that this case was used by the respondent in *Berjaya Times Square* to support its argument on restitution of the money paid on the contract. At the outset, it ought to be noted the utility of the principle embodied in the section is that despite the breach which led to the discharge of the contract, the defaulting party may yet have a right to restitution of the benefit conferred under the contract. In *Berjaya Times Square*, the fault of the party was the other way round as it was the appellant who had breached because it had delayed performance of its obligation. Despite this fact, the relevance for the present purpose is that the Federal Court's understanding of *Muralidhar Chatterjee*, though *obiter*, would be troubling if it were to be applied in future cases calling for the application of the principle contained in section 65.

[64] *Muralidhar Chatterjee* is a case where the plaintiff, a distributor of films in India for showing in cinemas, had a contract with the defendant, a company which had the right to import films into India. Under the contract the plaintiff had to pay an advance payment to the defendant for each film he requested and intended to show in India. He had paid the advance payment of approximately Rs2,000 each at different times for two films he intended to show. A dispute occurred between them and after only one film was delivered to the plaintiff, he proceeded to terminate the contract for the defendant's alleged breach and claim refund of the Rs4,000 advance payment, costs expended, and general damages. It was conceded in the legal proceedings that the plaintiff's termination of contract was wrongful,

70 (1943) UKPC 36; AIR 1943 PC 34.

and which consequently constituted his repudiation of the contract that was duly accepted by the defendant with the attendant right to claim damages for repudiation against the plaintiff. The issue on appeal to the Privy Council was whether the plaintiff, nevertheless, was entitled to claim restitution of the advance paid from the defendant.

[65] The advice of the board was delivered by Sir George Rankin. In resolving the issue, the board recognised that sections 39 and 64 of the Indian Contract Act 1872 are particularly relevant. Since the Contract Act 1872 uses language of "voidable", "put an end to", "becomes void", "rescinds" in various parts of the Act, their Lordships had to be satisfied that section 64 is not restricted to the incidents where the contract is rescinded *ab initio* for lack of free consent because consent was vitiated by fraud, undue influence and so on. Illustration (*c*) in section 65 also appears in sections 39 and 75. Their Lordships found that the illustration is a prominent feature of the Act and would also be applicable to section 64. And section 53 is also relevant to show if one party to the contract prevents the other from performing his promise, the contract "becomes voidable at the option of the party" who may "elect to rescind" and is entitled to claim damages. It was also the same with section 55 where the breach of the time stipulation is of the essence, the contract "becomes voidable at the option of the promise". They were of the view that section 64 (Malaysian section 65) applies to a contract that was put an end to, i.e. terminated, under section 39 (Malaysian section 40) by the innocent party and if he has received any benefit from the defaulting party, the latter is entitled to restitution of the benefit.[71] They were also of the view that the innocent party, the defendant, is entitled to claim damages against the defaulting party, the plaintiff, for repudiation of the contract. Their Lordships, therefore, declared that the plaintiff has the right to restitution of the money paid of Rs4,000 subject to the defendant's right to set off such amount of damages as found to have been suffered by it.

[66] In *Berjaya Times Square*, Gopal Sri Ram FCJ, after having correctly stated that the Privy Council in an appeal from Malaysia in *Linggi Plantations Ltd v Jagatheesan*[72] had agreed with and followed *Muralidhar*

71 The Malaysian equivalents to the Indian sections discussed above are the numerical figure of the Indian sections with the addition of the figure one, for example, Indian section 39 is Malaysian section 40 and so forth.

72 [1972] 1 MLJ 89, PC.

Chatterjee on its reasoning concerning the equivalent Malaysian sections 65 and 75, proceeded to consider two separate decisions of the Madras High Court of India, *VK Kumaraswami Chettiar v PASV Karuppuswami Mooppaner*[73] and *Rama Rao v Bashu Khan Saheb*.[74] However, he did not consider the Federal Court's decision in *Yong Mok Hin v United Malay States Sugar Industries Ltd*[75] ("*Yong Mok Hin*") which approved of and followed the principle recognised in *Muralidhar Chatterjee,* that following termination of the contract for breach, section 40 applies and if the innocent party has received any benefit under the discharged contract, restitution of the benefit should be rendered to the defaulting party as provided under section 65, with the added observation that under section 66 the right to restitution is extended to not only the defaulting party but the other party who had conferred a benefit under the contract.

[67] Gopal Sri Ram FCJ, whilst not saying *Muralidhar Chatterjee* is wrong, sought to restrict the principle of restitution contained in section 65 of its general application by reasoning that it only applied to the facts of *Muralidhar Chatterjee* where the defendant there, having terminated the contract for the plaintiff's breach, had a damages claim and the contract-breaker plaintiff was then entitled to have the money paid (not being a deposit) set off against the damages he had to pay. His Lordship reasoned that were it otherwise the contract breaker will be in a position to take advantage of his own wrong and this was against principle and the policy of the law.

[68] I have three points to make concerning what is, I respectfully submit, the unwarranted restriction to the principle of restitution contained in section 65 of the Contracts Act 1950.

[69] First, in *Muralidhar Chatterjee*, their Lordships in the Privy Council were fully aware that they would be declaring on the contract breaker having a right to restitution against the innocent party on the strength of the words of section 65 and the nascent recognition of the right to restitution at the time. Sir George Jenkin reasoned:[76]

73 AIR 1953 Mad 380.
74 [1998] 2 CTC 363.
75 [1967] 2 MLJ 9 at 15.
76 (1943) UKPC 36.

> *Their lordships are not concerned to make the Act agree in its results with English law*. It may be that in such a case as the present the defendants could not in England be made liable to refund any portion of the Rs4,000 paid on account, even upon proof that they had sustained no damage by the plaintiff's breaches. That the matter is not quite clear may be inferred in *dicta* in *Mayson v Clouet* [1924] AC 980, 987 and in *Dies v British and International Mining and Finance Ltd* [1939] 1 KB 724. It is at least certain that if the party who rightfully rescinds a contract can recover damages from the party in default and have been afforded proper facilities of set-off, the Indian legislature might well have thought his just claims have been met. The fact that a party is in default affords good reason why he should pay damages, *but further exaction is not justified by his default*. Where a payment has been made under a contract which has – *for whatever reason* – become void *the duty of restitution would seem to emerge*. *A cross claim for damages stands upon an independent footing*, though it arises out of the same contract and can be set off. (Emphases added.)

[70] This passage beautifully portrays the delicate position of the common law in England and at the time its colony, India, which might be different because of the provisions in the Contract Act 1872. What is clear from the language of section 65 (Indian section 64) read in the context of the Act is as follows: (i) termination of a contract for breach or repudiation means the contract parties do not have to perform contract obligations yet to be performed in the future for the contract is discharged in this respect; and (ii) if a benefit has been transferred from the defaulting party in performance of the contract, restitution of the benefit should be rendered from the innocent party who had terminated the contract in accordance with restitutionary principles.

[71] What it does not say is that the innocent party has her right to claim damages against the defaulting party for the breach of contract or repudiation. The common law of England and the expression of it in sections 40, 54, 56, and 76 of the Contracts Act 1950 have amply provided for the right of the innocent party (the promisee) to claim damages as a result of the breach of contract or repudiation. And as expressed and judicially explained in *Yong Mok Hin*, the right of restitution is also provided for in relation to each party to the contract under section 66.[77]

77 See also *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at 431, FC.

[72] Second, the English common law development of the law of restitution – and it is now preferable to refer to it by its causative event, unjust enrichment – has had a chequered history. Undoubtedly *Goff & Jones*, 1st edition in 1966 and now in its 9th edition (2016) with a change of title from the 8th edition by substituting "Restitution" for "Unjust Enrichment", and the late Professor Peter Birks's immensely important analytical work to understand the subject's internal structure, have contributed immeasurably to its continual development and we have now seen in England the firm recognition of the law of unjust enrichment as the third of the three common law bases for the private law of obligations. There have long been proponents of the view that the prevention of unjust enrichment by a legal response to restitution of the benefit conferred lies behind the legal response contained in sections 65, 66, 71, and 73 of the Contracts Act 1950.[78] By implication these provisions, which are curt legal statements that a right to restitution can be afforded in the fact situation contained in those sections, suggest that such a right is protected and recognised under the common law. By the time the Federal Court gave its decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*[79] ("*Dream Property*"), it put paid to this notion, for his Lordship Azahar Mohamed FCJ declared "there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts".

[73] Third, with the common law's recognition of unjust enrichment as a basis for legal obligation, it is of critical importance that the elements of the cause of action named unjust enrichment are understood and coherently developed. As part of the law of obligations, unjust enrichment is understood in its subtractive sense: the value being subtracted from the plaintiff and unjustly retained by the defendant is to be transferred back to the plaintiff. It would not help at all if the elements in unjust enrichment are indiscriminately used and conflated with contract principles developed for breach of contract and repudiation. The four basic elements which would inform any inquiry on a cause of action located in unjust enrichment to give rise to the legal response called restitution are as follows:[80]

78 Nilima Bhadbhade, *Pollock & Mulla: The Indian Contract and Specific Relief Acts*, 14th edn, Vol 2, pp 1041–1044.

79 [2015] 2 CLJ 453 at [118].

80 Ibid, at 492–496.

(a) Is the defendant enriched (i.e. did he receive a benefit)?

(b) Is the benefit transferred at the expense of the plaintiff?

(c) Is the defendant's retention of the benefit unjust (i.e. one transferred on the absence of basis)?

(d) Does the defendant have a defence which will extinguish or reduce his liability to render restitution?

[74] As to the third element, the concept of total failure of consideration is used to establish that the retention of the benefit is unjust. At present the preponderance of opinion is that failure of consideration is preferred. And what "total" seeks to achieve can be off set with counter-restitution from the defendant/recipient to the plaintiff when restitution of the benefit is granted.[81] This is very much an intuitive argument and the law is very likely to develop in this manner. Following *Dream Property*, the High Court in *Monument Lining Sdn Bhd v Emas Kehidupan Sdn Bhd*[82] granted restitution of the money paid to the promisor (contract breaker) by the promisee who had rightly terminated the contract for breach of contract. Restitution was granted because the benefit was retained on an absence of basis: the "near total failure of consideration" for the money paid meant restitution for its value is granted. The High Court decision illustrates how the right to restitution after a discharge of contract has worked in a coherent manner.

III. Conclusion: Names and pathways

[75] To hope for uniformity of terminology in this area of contract law may be to "cry for the moon".[83] To not try would be to resign oneself to the present morass. I have in this article used the term "termination" for the discharge of the contract for breach of contract or repudiation to mean the contract parties are discharged of their obligations to be performed in the future. If one still insists in using "rescind" for terminating the contract or putting an end to the contract then one has to be careful in ensuring that this use of the word is to be distinguished from rescinding *ab initio* for lack of free consent in formation of the

81 A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012), pp 88–89, 128–129.

82 [2016] 8 CLJ 109 at 134, per Lim Chong Fong JC (as his Lordship then was).

83 [1980] AC 827 at 844.

contract. The Federal Court in adopting and following the clear explanation of termination of a contract for breach or repudiation by Lord Wilberforce and also by Lord Diplock in *Photo Productions* and *Johnson v Agnew* is good for the passages followed show the unity of principles developed by the common law in the Commonwealth.

[76] The doctrine of repudiation should be seen as embedded in section 40 of the Contracts Act 1950. The recitation of the history for the development of the doctrine by the Federal Court in *Berjaya Times Square* is useful[84] and that part is not affected by what followed afterwards in the court's, with respect, misjudged development of what was named "the common law right to rescind".

[77] However, the use of "the common law right to rescind" in the manner done by the Federal Court in *Berjaya Times Square* and by the Court of Appeal in *LSSC Development* and *Tan Ah Chong* is not supported by authority. It was the unprincipled merger of principles governing breach of contract and repudiation, in particular the *Hongkong Fir* doctrine, with principles governing restitution as a legal response to an unjust enrichment. The Federal Court had done this through the deployment of the restitutionary concept of total failure of consideration into an analysis for whether there is a breach of contract or repudiation which gives rise to a right of termination. This must be avoided. The spate of reported cases post *Berjaya Times Square* which showed an inordinate volume of litigation on a common transaction yielding inconsistent decisions are perhaps further evidence that the concept of total failure of consideration is not the test to be used in the determination of whether there is a right to terminate the contract and achieve *status quo ante* for the contract parties.

[78] The use of the concept of total failure of consideration in the determination of whether there is a breach of contract or repudiation has the effect of wrongly curtailing the ambit of both sections 40 and 56 of the Contracts Act 1950. This is extremely harmful as these doctrines have separate ancestry and principles to determine the question of whether the right to terminate is available.

[79] The Federal Court's decision in *Berjaya Times Square* is to be strictly restricted to the fact situation where the promisee wants to

84 [2010] 1 CLJ 269 at [13].

rescind *ab initio* a contract for breach of contract or repudiation so that the contract parties would be restored to a position as if the contract had never been made. Only such a case would attract "the common law right to rescind" espoused by the Federal Court in *Berjaya Times Square* and prior to that by the Court of Appeal in *LSSC Development* and *Tan Ah Chong*. However, it has been argued here that that legal proposition is unstable: an erroneous merger of two inconsistent rights. The innovation is also not needed, for orthodoxy already supply the answers.