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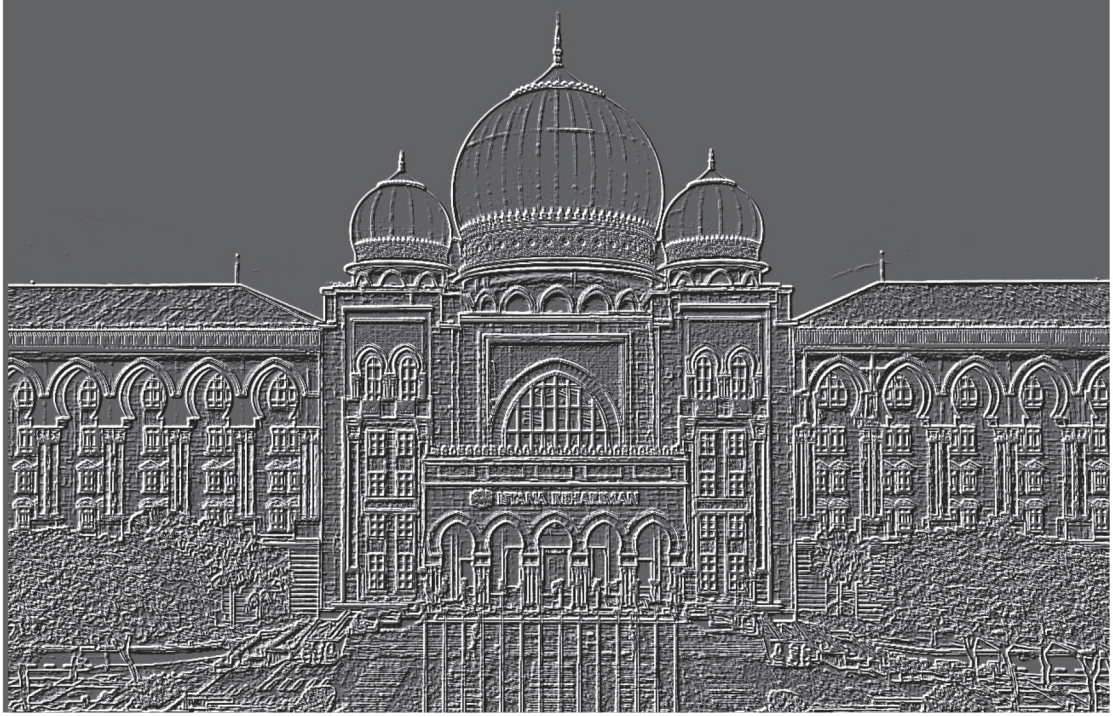

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PREFACE

It is with considerable pleasure that we present, on behalf of the Judiciary, this collection of legal essays which comprise the tenth edition of the Journal. It has been our privilege to curate this anthology of articles, and we express our genuine appreciation to the authors who expended considerable time and effort to produce their works. It is our hope that the reader will enjoy this collation of interesting legal commentaries, and feel sufficiently inspired to venture further into one or more of the varied subjects covered in this edition.

The issue commences, most appropriately, with the opening address of The Right Honourable The Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat on the year past, and the aspirations of the Judiciary for 2021. The Chief Justice's address affords the reader a comprehensive perspective of the difficulties the Judiciary faced and overcame, as well as the digital advances it made in 2020. The objectives sought to be enhanced and developed for the Judiciary in 2021, are summarised and provide a beacon for the year ahead.

We are most privileged to publish an illuminating article on judging and the judiciary in the age of technology by The Honourable the Chief Justice of Singapore, Sundaresh Menon which is very much in keeping with the digital theme. The legal concepts explored by The Honourable Chief Justice of Singapore enable the reader to explore the challenges posed by technology and the virtual world on substantive legal frameworks and doctrines in established areas such as contract law and land law. The role of technology in the pursuit of justice in both Singapore and other jurisdictions is examined through the still evolving dialogue in this area, concluding with the importance of espousing technology, the law and justice.

In similar vein, the thought-provoking article by Justice Dr Choo Kah Sing on the rule of law affords us another unique perspective on this inspiring and timeless theme, taking us through its historical underpinnings through to its application today, reminding us of its essential role in the administration of justice.

This is followed by a unique and fascinating essay on the law and transsexuality by Justice Mohd Radzi Harun, which examines the development of jurisprudence in this area over a thirty-year period in the United Kingdom between 1970 and 2000, and the influence it had on other jurisdictions including Malaysia.

Justice Christopher Chin writes on land law in Sabah and gives us an overview of the subject through the critical examination of case-law on indefeasibility (or defeasibility of interest in land), public reserves in the context of planning law, and procedure and dealings in native titles. Justice Chin's critique evokes questions and issues which deserve considerable deliberation.

We then move on to a more specialist area of the law, namely the applicability of section 154 of the Evidence Act 1950 on cross-examination of a party's own witness in the context of a criminal trial. Justice Muniandy Kannyappan has provided a complete and expert treatise on this subject, and it will, no doubt, serve as an eminently useful reference to those seeking guidance on this subject.

We conclude with an article by the erudite Dr Salahudin bin Dato' Hidayat Shariff, on the principle of the best interests of the child, which explores this essential and worthy subject from the perspectives of the law in England and Malaysia. This area is of particular importance in view of the rising number of incidents of child abuse, child marriages, child neglect, abandoned babies and child abductions. Dr Salahudin has favoured us with a wide-ranging and inclusive dissertation that is immensely informative and useful. Significantly, it reiterates the need for considerable improvement in our legal framework to alleviate the plight of children in Malaysia, and to enhance the fundamental rights of the child in Malaysia.

We trust you will enjoy this edition.

Justice Nallini Pathmanathan
Managing Editor

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Reflections on 2020 and Aspirations for 2021*

by

The Right Honourable The Chief Justice of Malaysia,
Tun Tengku Maimun binti Tuan Mat

Introduction

[1] New Year 2021 has dawned. On behalf of the Malaysian Judiciary, I wish you a very happy, safe, healthy and fulfilling New Year.

[2] It has always been our tradition to host the Opening of the Legal Year every year. However, the circumstances arising out of the COVID-19 pandemic do not permit us to do so in 2021.

[3] The COVID-19 pandemic has affected the lives and livelihood of many Malaysians. It has brought so many changes and challenges to our working lives that were all but impossible to foresee at the start of the year. It has changed the world of work. Across Malaysia and the world, workplaces and practices have had to adapt to a new norm to curb the spread of the virus. For millions of workers, this means having to work from home. Many others have continued to carry out their jobs under extremely trying conditions.

[4] The main challenge posed by the pandemic has been to ensure that the administration of justice does not grind to a halt as a result of the lockdown measures imposed to control it. Consequently, significant efforts have been made across the justice system to ensure progress in legal proceedings, despite the constraints. Our priority is to ensure continued access to justice to all members of the public while at the same time ensuring the safety of the public and the court staff.

[5] The advent of 2021 urges us to look back at the year past and to look forward to the year ahead.

[6] At the Opening of the Legal Year 2020, I spoke on the importance of synergy between the various stakeholders of the justice system and

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* New Year Message from The Right Honourable The Chief Justice of Malaysia, December 31, 2020.

the inevitable surge in the role of technology in access to justice. To augur in the New Year, I would like to reflect on our achievements in the year 2020 and what we have lined up for 2021.

[7] In this regard, the focus of this message is as follows. I shall first (A) briefly discuss the important role that technology has played and will continue to play in enhancing judicial processes. I will then (B) explain certain measures that we intend to put in place to increase efficiency. I will also (C) briefly touch on the Judiciary's efforts to heighten public relations. I shall then (D) reiterate our commitment to uphold the rule of law.

A. Capitalising on technology

[8] The full extent of the pandemic was felt in March of 2020 which is the period the entire nation was forced into lockdown. The Judiciary, not being enlisted for the most part as an essential service meant that it could not operate in the usual way. As a result, a certain portion of the public which included members of the Bar was seriously misguided to think that the courts refused to operate at all. In a breakaway from our usual practice, the Judiciary was compelled to react by issuing a statement in response to correct that misperception.

[9] Through the different phases of the Movement Control Order ("MCO") and the Conditional Movement Control Order ("CMCO"), the Judiciary remained steadfast in providing access to justice to the public, which led us to conduct proceedings through remote communication technology or better known as online hearings. At first, online hearings in civil cases were limited by consent of parties. If either one of the parties did not consent to an online hearing, the case would be postponed until it could eventually be heard in open court.

[10] In criminal cases, where the right to a fair trial assumes greater significance with the need for the accused to be present in proceedings against him, we faced some difficulty to hear those cases online.

[11] This was compounded by the lack of legislative framework expressly allowing online hearings. To overcome this difficulty, the Judiciary proposed certain amendments to our key legislation, i.e. the Courts of Judicature Act 1964, the Subordinate Courts Act 1948 and the Subordinate Courts Rules Act 1955, notwithstanding the fact that the notion of "open justice" is already embodied in these laws.

[12] Parliament was swift enough to effectuate the amendments to provide for express powers to conduct online hearings. These laws came into force on October 22, 2020 and since then, the consent of parties has not been as significant. In this regard, the Rules Committee has also recently approved amendments to the Rules of Court 2012, Rules of the Federal Court 1995 and Rules of the Court of Appeal 1994 to regulate and prescribe the procedure on the conduct of online hearings. The amendments came into force on December 15, 2020. To clarify the legislative framework and to ensure the continued momentum of online hearings, Practice Directions and necessary guidelines will be issued which will take effect in January 2021.

[13] Initially, lawyers – and I hope I can be forgiven for saying this – especially senior lawyers, were quite unreceptive to online hearings. The common objection against online hearings is the perceived inability to have a fair hearing and the loss of advocacy skills. Indeed, the initial phase of change and shift was not easy; many equate conducting cases with hearings in "open court" with the judge, counsel and all parties being physically present in the courtroom. However, upon deeper reflection and upon "giving the process a shot", we were eventually met with positive feedback.

[14] In fact, the technological infrastructure for the Judiciary has been in place for a while now. For example, e-Review has been in place since 2018 in major court complexes while e-Filing has been around for half a decade. Complete digitalisation is thus not a paradigm shift so to speak but another step forward in the same direction.

[15] We have targeted for all superior and subordinate courts in Malaysia to be equipped with the e-Courts platform by February 2021. This e-Courts platform is the base platform and attached to it are the various facets such as e-Review, e-Filing, *e-Lelong* and so on. Towards that end, all courtrooms in the superior and subordinate courts will be upgraded to accommodate the e-Courts platform.

B. Improving efficiency

e-Appellate

[16] The technological development mentioned earlier serves to enhance the efficiency of our court processes. Those who have been in the system for quite some time now will recall the horrors of the

yesteryears – having to rush to court to file documents in the hopes of dodging unnecessarily long lines and having to wait endlessly for their documents to be processed. For the most part, these experiences are now memories of the past.

[17] The e-Filing system has not only significantly reduced bureaucracy but it has also paved the way for smoother hearings. As announced in my speech at the Opening of the Legal Year 2020, just before the imposition of the MCO, we adopted the e-Appellate system for appeals heard by the Court of Appeal and Federal Court sitting in Sabah and Sarawak. By the e-Appellate system, hearings are conducted on an entirely paperless basis. This module has been extended to appellate hearings at the Palace of Justice.

[18] The e-Appellate mechanism has attracted rave reviews. In the past, lawyers would refer to their own bundles of documents and would wait for the judges to catch up to their point of reference. Now, both judges and counsel share a common screen with their documents ready and prepared beforehand. During the hearing, the lawyers – usually through their junior counsel – navigate the screen and refer judges directly to the passage in question. It saves both time and paper and ensures that everyone in the court is literally on the same page at all times.

[19] In December 2020, we piloted a similar project in selected courtrooms in the High Court at Kuala Lumpur. We call this project "*e-Bicara*" where all appeals – criminal and civil – emanating from the subordinate courts are heard on an entirely paperless basis. So far the project seems to be functioning well and in 2021 it will be extended to all branches of the High Court in Malaya.

[20] Insofar as trials are concerned, during the initial stage of the MCO and the CMCO period, we decided that it would be best to postpone trials until after we could stabilise online hearings. Particularly, since we faced vehement objections from stakeholders, foremost of which was the Bar Council.

[21] We appreciate the concerns that the Bar Council had on conducting trials online, such as the possibility of witness-coaching. Now, we have the newly inserted Order 33A of the Rules of Court 2012 which came into effect on December 15, 2020. Order 33A contains specific procedure on how online trials are to be conducted. But even before

the coming into force of Order 33A, the High Court at Kuala Lumpur had successfully conducted examination of witnesses online. No process is ever perfect but we have to move in tandem with the times.

[22] Also in December 2020, the Judiciary decided to hear petitions for admission to the Bar online. Naturally, aspiring lawyers were upset that they were unable to experience the same solemn yet grand setting of a courtroom as being one of the key defining moments of their career. However, having their proceedings aired online on platforms such as YouTube added a unique dimension to their "call to the Bar" which their seniors did not enjoy. Their special day was thus not only witnessed by their family and friends but by the nation and the world.

Judicial time

[23] In our efforts to further increase efficiency and productivity, beginning January 2021, we will be strictly enforcing previously issued directives in respect of the e-Filing of written submissions in the Court of Appeal and the Federal Court. We are also making changes in the manner motions for leave to appeal to the Federal Court under section 96 of the Courts of Judicature Act 1964 are heard.

[24] There is already in existence Practice Directions which require parties to file submissions 14 days prior to the hearing of their case.[1] However, in reality, majority of the lawyers – both private practitioners and from the Legal Service – do not comply with this requirement. Most file their submissions a day before or even on the morning of the hearing.

[25] Practice Directions are issued to facilitate the administration of justice. More importantly, if parties expect judges to deliberate and deliver sound decisions, ample time should be given to judges to read the written submissions which complement the oral submissions. I strongly believe that adhering to the Practice Directions and the timeline will boost judicial efficiency and will contribute towards judges rendering quality judgments.

[26] As such, we now seek to strictly abide by the timeline. All submissions filed outside the 14-day period without leave of court

1 Arahan Amalan Mahkamah Persekutuan Bil 1 Tahun 2018 and Arahan Amalan Mahkamah Rayuan Bil 1 Tahun 2017.

will be automatically rejected. To clarify, parties whose written submissions were rejected for their failure to comply with the timeline will nevertheless have the opportunity to address the court through oral submissions.

[27] As for applications for leave to appeal, we will be limiting oral submissions to 20 minutes per party (excluding any time taken by the Bench to ask questions). Motions for leave are not meant to operate as an appeal. However, on most occasions, arguments were advanced as if the motion was an appeal and it was not uncommon that submissions on motions for leave took more than half a day, when the law or principles concerning section 96(a) of the Courts of Judicature Act 1964 are well settled.

[28] As I have said on many previous occasions, judicial time is far too precious for us. That said, this strict timing rule is subject to exceptions. There may be cases where the court is minded to extend time if the circumstances so require.

[29] What we propose is not novel or extreme, and this approach is not unique to us. The Supreme Court of the United States is "notorious" for its reliance on a timer. The rule is that parties are required to submit written submissions or "briefs" after which counsel are allowed 30-minutes per side to make oral submissions on their respective cases. These strict procedures apply in relation to appeals proper, irrespective of the complexity of those cases and bearing in mind that the time includes the piercing questions asked by nearly all the nine members of the Bench sitting *en banc*.

[30] Lawyers in the United States are firmly aware of this and their adherence exemplifies the respect that they have for their apex court. A survey of the website of the United States' Judiciary shows that the court only accepts between 100 to 150 cases out of 7,000 cases filed for review each year from across all the 50 states.[2]

[31] What we propose to implement is thus a much more measured approach so that leave motions will no longer be confused for or treated like appeals. Further, this time requirement will only be imposed, for the time being, on physical hearings and not on online hearings.

2 See https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#:~:text=In%20fact%2C%20the%20Court%20accepts,court%20decided%20a%20Constitutional%20issue).

[32] As regards judicial time, those who appear regularly before the Federal Court would have noticed that panels have been reduced to three judges per sitting. Apart from public interest and constitutional cases which have seven- or nine-member panels, all other cases – civil and criminal cases – are now heard by a three-member panel.

[33] Further, leave applications arising out of interlocutory applications are heard by a single judge of the Federal Court pursuant to section 97(3) of the Courts of Judicature Act 1964.

[34] The rationale behind this is to allow non-sitting judges greater latitude to balance their hearing schedule with their duty to write judgments while at the same time to increase the number of panels to hear cases on a given day. We hope to better strategise and manage the use of valuable judicial time to further enhance judicial efficiency. And again, this is not an idea unique to us as even in the United States, four judges must first agree to take up a case before the full Bench eventually hears it on the merits. Our written law expressly allows a single judge of the Federal Court to hear leave applications. We are also looking into amending the Courts of Judicature Act 1964 to provide a higher threshold for leave to appeal to the Court of Appeal from decisions of the subordinate courts.

[35] As announced in my earlier speech, the Judiciary has also proposed amendments to the law to limit certain interlocutory appeals. We are accordingly working on a draft Bill to amend the Courts of Judicature Act 1964. The amendment seeks to bar appeals against dismissal of applications for summary judgment or striking out of pleadings. In prohibiting such appeals, we do not anticipate any prejudice or miscarriage of justice to the applicants as the matter would ultimately proceed to full trial where parties have the chance to prove their case. The right of appeal remains if such applications were allowed.

[36] In the newly amended Rules of Court 2012, we have provisions which restrict adjournments to a maximum of three times unless parties can satisfy the judge otherwise. The underlying reason behind these changes is to prevent inordinate delay in the disposal of full trials and to ensure that cases get started speedily.

[37] Another initiative we have taken to enhance efficiency is by delegating the work of High Court judges to the Sessions Court

judges where practicable. In this regard, I announced earlier that certain Sessions Court judges will be trained to hear uncontested family law matters. I am pleased to announce that trainings have been conducted for these Sessions Court judges and as of November 1, 2020, the selected Sessions Court judges have been appointed to hear such family law matters.

Other areas requiring digitalisation

[38] In Magistrates' Courts, a large bulk of the cases comprises road traffic cases, where most end up with a guilty plea and imposition of fines. In that sense, such cases do not require the exercise of a judicial mind as strenuous as the serious criminal cases heard in those courts.

[39] Regardless, given their sheer volume, traffic cases take up a considerable amount of judicial time. Between January and October 2020, a total of 882,013 traffic cases were registered in all Magistrates' Courts throughout Malaysia. Compared to 2019 which recorded a figure of 1,396,188 cases, the number of cases registered in 2020 is lower, possibly due to the lockdown. Be that as it may, the cases registered remain staggering. This warrants us simplifying the process of disposal of traffic cases in terms of digitalisation.

[40] The Judiciary's plan for 2021 is to digitalise the taking of guilty pleas in traffic cases and to allow the payment of fines electronically. At present, a mechanism exists in section 137 of the Criminal Procedure Code which enables an accused person to plead guilty to a summons by way of a letter. Through that mode, the magistrate is allowed to dispense with the personal attendance of the accused, to convict him and to impose a sentence of fine only. However, this provision is hardly utilised. Our statistics disclosed no recent instances of guilty pleas by way of letter.

[41] To reduce unnecessary foot traffic and to enhance access to justice and the efficiency of the Magistrates' Courts, we propose, in addition to the guilty plea by letter method, to allow the taking of pleas and to impose the sentence of fines only, *via* a prescribed electronic system. This method has been implemented in several other jurisdictions such as Singapore, England and Wales and Australia.

[42] The digitalisation of the traffic cases complements *e-Jamin*, a system that allows for the online payment of bail, and which has

been fully operational. We are also looking into introducing a feature which will allow an accused person against whom a sentence of fine is imposed to pay the fine *via e-Jamin*. This will save time and trouble for the accused to make payment. We have fully expanded our e-Courts Finance system, which is our online and cashless payment mechanism, throughout Peninsular Malaysia. For Sabah and Sarawak, the system will be completed in the later part of 2021.

[43] Once the electronic plea of guilt system is up and running, our next project is to integrate it with artificial intelligence ("AI") as a guideline for sentencing. The subordinate courts in Sabah and Sarawak have spearheaded integrating the use of AI in sentencing for certain common offences. To ensure consistency in sentencing, we seek to do the same in Peninsular Malaysia for certain cases and we aim to pair it with the online plea system. This project is in the pipeline for the later part of 2021 subject to the law regulating electronic system for guilty pleas being in place.

[44] In our endeavour to serve our stakeholders better, we propose amendments to the Criminal Procedure Code and the Courts of Judicature Act 1964, to allow for electronic delivery to the court of notices of appeal and records of appeal. The proposal is in line with our commitment to fully utilise technology, reduce expenditure and to be completely paperless. We also hope to do our bit to protect the environment.

[45] Another project which we will embark on in 2021 is the *e-Pesuruhjaya Sumpah*. This project entails a system which fully digitalises the application process for Commissioners for Oaths. Applications will be submitted and processed online and examinations as well as selection interviews will also be conducted online. The results of the examination will be announced within the same day. The system is expected to be fully operational by January 25, 2021 and the public and lawyers may also search for the nearest Commissioner for Oaths on the Judiciary's website.

[46] By the use of technology throughout the judicial hierarchy, lawyers and litigants no longer need to carry loads of documents to court. One only need to carry a laptop or an i-Pad.

[47] To ease over-the-counter transactions, we have also implemented the use of QR codes for authentication of court documents. The use of

QR codes will assist the clerical staff in verifying the authenticity of court orders by scanning the QR code imprinted on the order while generally mitigating the risk of scams and forgeries of court orders.

Physical infrastructure

[48] Digitalisation aside, improving efficiency also requires improving physical infrastructure and having a balanced distribution of work. In this regard, I would like, on behalf of the Judiciary, to express my heartfelt thanks to the Government of Malaysia for allocating a budget of about RM120 million for renovation and maintenance works. We aim to make full use of these funds to upgrade and maintain not only our electronic facilities but all aspects of physical infrastructure.

[49] In terms of access to justice, I had announced that new Sessions Courts will be established in Besut and Langkawi. They have since been established and are fully operational. We have also established another Sessions Court in Kuala Selangor. To allow for greater reach to those who live in areas without resident Sessions Court judges/ magistrates, we have enhanced Circuit Court sittings.

[50] Starting January 10, 2021, the Circuit Setiu Sessions and Magistrates' Courts in Terengganu will be operating at a new location at Taman Tarom Permai, Setiu. It is no longer practical to remain at the current location at Pusat Bandar Permaisuri which we have been occupying for the last 38 years as the premises are not only too small but also dilapidated. To ensure that court staff work in a conducive environment which will in turn result in better productivity, courts in Papar (Sabah), Mukah and Kapit (Sarawak) and Pengerang (Johore) will also be relocated to new premises.

[51] As for the newly established High Court at Sungai Petani, operations are running smoothly. Given the increasing number of cases, we will soon have a resident High Court at Klang so that cases in this locale need not be handled by a High Court judge from Shah Alam on a circuit basis. And to ease the workload of current judges in Penang, a High Court hearing criminal cases will be established in Butterworth. There will also be an additional judge for the High Court at Kota Bharu.

[52] Another major physical feature in our courtrooms will be the Recording & Voice to Text System – or in short: "RVT". This feature is to replace the Court Recording Transcription ("CRT") system. Notes

of proceedings comprise a very vital aspect of any case especially in trials. At present, particularly in the subordinate courts, much time is spent by the magistrates and Sessions Court judges in transcribing notes of proceedings. Lawyers and litigants too spend considerable sums of money to get professional transcribers to convert the CRT into a printed transcript. Consonant with access to justice, there is a need to reduce costs, hence the proposed implementation of RVT.

[53] RVT essentially requires the installation of specific hardware in courtrooms to replace CRT. The RVT hardware device is in turn equipped with a voice-to-text application which is capable of converting speech into a written transcript. We accept that such systems are not entirely fool proof but, it being a smart system, is capable of adapting and learning. The goal is that eventually the RVT system will be able to correctly and automatically transcribe witnesses testimonies and oral submissions into written form. Judges and lawyers will only have to sieve through the final product to confirm the accuracy of the transcription. Installation is presently under way and is expected to be completed in 55 locations across 320 courtrooms by January 2021 except in Ipoh. We expect to implement RVT by April of 2021.

C. Public relations

[54] The other major area of focus is public relations. I must state that the Judiciary, not being a political institution, does not crave praise or public recognition. The institution does however thrive and draw its strength from public confidence in it. It has always been the case that judiciaries in adversarial systems do not respond to criticisms except in a limited sense through their judgments.

[55] The pandemic has urged us to consider that the Judiciary must nonetheless play a proactive role in communication especially with the advent of social media. In such circumstances, the Judiciary is required to take a proactive and not a reactive role. Constant engagement with the public is necessary with the view to educate them and to keep them informed. Accordingly, through our website and through social media, the Malaysian Judiciary has constantly issued press releases to keep everyone informed of the latest developments on the operations of the courts during the pandemic.

[56] To ensure transparency and accountability, we have taken the step to broadcast court proceedings conducted online for the public to

watch and observe. In addition, we have also proceeded to broadcast ceremonies on the elevation of judges so that members of the public may appreciate the process, especially the oath taking, which is not merely ceremonial but a legal requirement under the Federal Constitution.

[57] In all this, we have not forgotten about our younger ones. The Courtroom to Classroom project or "MYC2C", launched not too long ago, is the Judiciary's tool to educate primary and secondary school students about the legal profession and the judicial institution. This is done by judges and judicial officers visiting schools to teach the students about the legal system. I am pleased to inform that this project has been well received by the public. In 2021, this effort will continue with greater vigour. We have planned a specific syllabus or module to be embarked on in at least at three different locations in Kedah, Johore and Sarawak.

[58] We remain committed to continue with the implementation of the mobile courts project through which judges and court staff bring the courts to the public – especially those in the remote areas – with greater force this coming year.

[59] In order to familiarise the public with the courts, we are working towards establishing a virtual courts platform. This platform is essentially a link in our online portal which enables members of the public to virtually visit the courts and to see for themselves the court's structure. For now, this medium of interaction is only in respect of the Palace of Justice. We plan to expand this to all courts throughout Malaysia.

D. Commitment to uphold the rule of law

[60] Quite apart from technological advancements and physical infrastructure, what remains paramount is human resource. Every member of the Judiciary must possess qualities of integrity, competency and efficiency while always keeping in mind that as judges, we are not beholden to anybody or anything but the law. Without these key qualities, justice would not be truly served and we would have failed in our duty.

[61] I reiterate our commitment to do justice according to the law, without fear or favour. Court decisions are based on what the law says and what the evidence proves; there is no place in court for suspicion,

bias or favouritism. Judges and all judicial officers are free to apply the law without regard to the wishes of any particular group or the weight of public opinion.

[62] We will endeavour to guarantee liberty, to resolve legal disputes efficiently and impartially, to provide for equal protection to all regardless of background and to ensure the due process of law.

[63] We will maintain a strong and independent Judiciary – a key source of the rule of law. We will continue our efforts to promote public confidence in the Judiciary, both through our rulings/judgments and impartial hearings.

Conclusion

[64] For the Judiciary, there is a ring of truth in the phrase "adversity breeds innovation". I would say that we have achieved more in one year than we have in the past decade if we compare the time taken to roll out our initial e-Court reforms. I thank all stakeholders, the Attorney General, officers of the Legal Service and members of the Malaysian Bar, the Sabah Law Society, the Advocates Association of Sarawak and the public who have been supportive of these positive changes.

[65] Allow me to share, briefly, the statistics in respect of online hearings for the period between March and December 2020.

[66] The High Courts in Malaya and in Sabah and Sarawak have disposed a total of 5,663 cases out of 7,544 cases fixed to be heard online. This gives a rather good disposal rate of about 75%.

[67] At the Court of Appeal, 484 out of 1,122 appeals fixed to be heard online were disposed of, which gives us a disposal rate of 43%.

[68] At the Federal Court, 345 cases (civil and criminal appeals including motions for leave) were fixed to be heard online and of those, 164 cases have been disposed of. In terms of percentage, that would be a disposal rate of 48%.

[69] As for the subordinate courts, the Magistrates' and Sessions Courts throughout Malaysia fixed 12,733 cases to be heard online, out of which 5,659 cases have been disposed of. The subordinate courts achieved a disposal rate of 44%.

[70] I trust that if everyone remains committed, we will achieve a better disposal rate *via* online hearings without compromising justice and the quality of our decisions/judgments.

[71] I wish to record my appreciation and gratitude to all my brother and sister judges for their continuous support and commitment. I would also like to thank all judicial officers who have supported the Judiciary in this major transition to cyberspace, in particular the officers who have assisted the judges in preparing softcopy files of cases for hearings and in setting up the equipment and ensuring a smooth process of the online hearings. The same goes to the support staff, including technicians and interpreters.

[72] There is obviously much work to be done. Due to the initial MCO and the reluctance of parties to have their cases heard online, we are now facing a backlog of cases. We hope to address the backlog by increasing the frequency of sittings and by increasing the number of cases fixed per sitting. And in this regard, the Judiciary certainly needs further support and synergy from all stakeholders.

[73] On that note and on behalf of the Malaysian Judiciary, I once again wish everyone a very happy New Year and may everyone stay safe and healthy.

Thank you.

Judging and the Judiciary: Challenges and Lessons in the Age of Technology*

by

*The Honourable the Chief Justice Sundaresh Menon***

I. Introduction

[1] More than two decades ago, at a conference on what must have seemed at the time to be the rather esoteric subject of cyberlaw, Justice Frank Easterbrook famously remarked that there is no more a "law of cyberspace" than there is a "law of the horse".[1] In other words, cyberspace did not require its own body of law any more than horses required a law unto themselves.[2] His hypothesis was that the rigorous application of existing laws and legal principles would adequately address the legal challenges posed by emerging technologies.[3] Perhaps unsurprisingly, this sentiment would have been met with much consternation, particularly by the participants at the conference who plainly were devotees of this field of special interest and who had just been told, two hours into a daylong conference, that there was little to be gained from the study of "cyberlaw".[4] The most famous riposte to Justice Easterbrook was posed by Professor Lawrence Lessig. In his seminal article titled "The Law of the Horse: What Cyberlaw Might Teach", Professor Lessig outlined his thesis that the architecture of cyberspace played an important role in influencing social conduct and in embodying societal values – a role that is akin to, and sometimes in tension with, that traditionally served by the law.[5] Therefore, he argued, it was not just valuable but indeed imperative for us, as a

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** Supreme Court of Singapore.

1 Frank H Easterbrook, "Cyberspace and the Law of the Horse" (1996) *University of Chicago Law Forum* 207 ("Easterbrook") at 207–208.

2 Ibid, at pp 207–208, 215–216.

3 Ibid.

4 Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1999) *113 Harvard Law Review* 501 ("Lessig") at 501.

5 Ibid, at p 507.

society and as a profession, to think carefully about how cyberspace ought to be used and regulated so that it might more closely reflect the values that we cherish.[6]

[2] The views of Justice Easterbrook and Professor Lessig are, of course, more complex and sophisticated than this brief summary will allow. But at the heart of the debate lies a fundamental question about the extent to which technology has transformed the role of the law, the traditional ways in which it is studied and practised, as well as the manner in which lawyers and legal institutions ought to respond to these changes. I have spoken on these issues on several occasions.[7] In this article, I will focus on how we, as judges, might approach the impact of technology on the work of the courts. There are, in my view, at least three important types of challenges: (a) first, in relation to substantive laws and legal doctrines; (b) second, in relation to the rules and processes of evidence; and (c) third, in relation to the Judiciary as an institution, including its processes, people, and values. I will elaborate on them in turn before raising a few suggestions as to how we might respond to these diverse challenges.

II. The law of the horse

A. Substantive legal challenges

[3] Let me begin by examining the challenges posed by technology to our substantive legal frameworks and doctrines. This is perhaps best illustrated by examining a few examples involving well-established areas of law familiar to both the civil and common law traditions.

(a) Law of contract in the age of automation

[4] The first example concerns the law of contract and challenges posed by the emergence of automated contracting, smart contracts, and other forms of machine-based contracts. One commentator has

6 Ibid, at pp 545–546.

7 See, among others, Sundaresh Menon, Chief Justice of Singapore, "Technology and the Changing Face of Justice", Negotiation and Conflict Management Group ADR Conference 2019 (November 14, 2019) ("Negotiation Conference 2019"); Sundaresh Menon, Chief Justice of Singapore, "Mass Call Address 2020", Admission of Advocates and Solicitors – Mass Call 2020 (August 25, 2020); Sundaresh Menon, Chief Justice of Singapore, "Mass Call Address 2019: A Profession of Learners", Admission of Advocates and Solicitors – Mass Call 2019 (August 27, 2019) ("Mass Call Address 2019").

suggested that these new technologies "mark the beginning of the end of contract law".[8] While I would not go so far, I think we will inevitably have to consider difficult issues such as whether parties contracting through machines have had a true meeting of the minds; how their intentions can be ascertained; and how existing doctrines involving the interpretation, breach, and vitiation of a contract should apply.[9]

[5] Automated contracting, of course, is *not* a new phenomenon. Contractual issues in relation to vending machines and automated carpark gantries have engaged the courts since more than half a century ago. Take for example one of the first cases that a common law student is likely to encounter in law school, *Thornton v Shoe Lane Parking*.[10] This landmark decision, delivered in 1971, involved wholly unremarkable facts. The plaintiff was on his way to a music event and wanted to park his car at a newly-built multistorey carpark operated by the defendant. *Outside* the carpark was a notice showing the parking charges and stating that cars were parked at the owners' own risk. The plaintiff drove past this display and turned into the carpark, where an automated machine dispensed a parking ticket. No one else was present. In small print on the ticket was a statement that the ticket was issued subject to conditions displayed *inside* the parking premises. And then on a pillar opposite the automated machine – which the plaintiff would only be able to see if he drove even further into the carpark – was a panel containing a long list of conditions, including a disclaimer of all liability for personal injuries to customers howsoever caused. Three hours later, when the plaintiff returned to collect his car, he met with an accident and was severely injured. The question before the English Court of Appeal was whether the disclaimers displayed *within* the defendant's premises had been properly incorporated into the contract by virtue of the small print on the parking ticket, such that it exempted the defendant from liability for personal injuries.

[6] It appears that at the time it was decided, this was one of the first cases where the ticket granting entry to the carpark had been dispensed by an automated machine instead of a human being. Lord

8 Maren K Woebbeking, "The Impact of Smart Contracts on Traditional Concepts of Contract Law" (2019) 10(1) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 106 at 106.

9 See, for example, Chamber of Digital Commerce, "Smart Contracts: Is the Law ready?" (2018) at p 17.

10 *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686 ("*Thornton*").

Denning MR, one of the most famous English judges of the last century, seized upon this distinction in his judgment. In his view, contracting using an *automated* machine made all the difference, because unlike the situation where the transaction was effected by a human booking clerk who would have been able to explain or highlight any significant term of the contract and if necessary provide a refund, a customer dealing with an inanimate machine became committed once the machine dispensed the ticket. In the language of the traditional doctrine of offer and acceptance – which is the basis upon which a contract is formed under the common law – Lord Denning explained that the defendant's *offer* came in the form of its notice outside the entrance of the carpark displaying the charges and the disclaimer of liability for property damage to the car itself, and the plaintiff's *acceptance* of that offer came when he saw this notice and turned into the carpark entrance. A contract was formed at that point.[11] Therefore, by the time the ticket was dispensed, the contract had been concluded, and any term written on the ticket itself could not be treated as part of the contract that had been formed an instant before that.

[7] At first glance, *Thornton* might suggest that rigorous analysis and the thoughtful application of traditional legal principles by the courts will suffice to meet the challenges posed by technology to the law of contract. I will examine this in greater detail below, but it may be noted that neither of the other two judges on the English Court of Appeal in *Thornton* were prepared to expressly agree with Lord Denning on his analysis of the precise time the contract was formed, and while they both similarly rejected the defendant's reliance on the disclaimer for personal injuries, they did so on other grounds.[12] This is understandable. Hard cases, it is said, make bad law. In the fast-evolving field of technology, while some judges might march boldly forward in the cause of justice, others might prefer to defer making broad pronouncements in a setting where it is so easy to be ignorant even about the extent of one's ignorance.

[8] A similar divergence in judicial philosophy may be discerned in a much more recent decision of the Singapore Court of Appeal, *Quoine v B2C2*,[13] where one of the issues was how the longstanding

11 *Thornton* at 689g, per Lord Denning MR.
12 *Thornton* at 690g, per Megaw LJ; and 693f, per Sir Gordon Willmer.
13 *Quoine Pte Ltd v B2C2* [2020] SGCA(I) 02 ("*Quoine*").

doctrine of unilateral mistake should apply to a contract concluded by the operation of algorithms.

[9] Quoine was the operator of an electronic trading platform that allowed its users to trade in cryptocurrencies. B2C2 was a trader using the platform and for this purpose, it used its own algorithmic software to buy and sell cryptocurrency with minimal human intervention, using data gleaned from orders placed on the platform to generate bids and offers. To cater for rare situations where such data was *not* available from the platform, the algorithm had a predetermined failsafe "deep-price" which would then be invoked to derive an appropriate conversion rate between the cryptocurrencies for the purposes of generating bids and offers.

[10] In 2017, Quoine failed to carry out certain steps and this affected the operating systems of its platform. As a result, the platform could not access external market data and could not generate any new orders. This created the false impression of a catastrophic lack of a market for cryptocurrency trades, and that activated the failsafe mechanism of B2C2's algorithm and concurrently triggered margin calls on several other platform users. The combined effect of all this was that B2C2's algorithm placed sell orders at the failsafe rates – which were approximately 250 times the actual market rate at the time – and which Quoine's platform then matched against buy orders that were automatically placed for the users whose accounts Quoine had erroneously force-closed. These transactions all occurred without any human intervention, and they resulted in B2C2 reaping a significant windfall. When Quoine realised this the next morning, it unilaterally cancelled and reversed the transactions. B2C2 then sued Quoine for breach of contract, but Quoine claimed that the transactions should be set aside on the basis, among other reasons, of the doctrine of unilateral mistake.

[11] Traditionally, the doctrine of unilateral mistake allows one contracting party to resist enforcement of the contract by establishing that it had concluded the contract under a mistake as to a fundamental term of the contract, and that the non-mistaken party had actual or constructive knowledge of this fact.[14] The doctrine is well established

14 *Chwee Kin Keong & Ors v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [33]–[34], [80]; Andrew Phang Boon Leong *et al*, *The Law of Contract in Singapore* (Academy Publishing, 2012), paras 10.141–10.146; *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm) at [87].

in most common law jurisdictions, but its application in this case presented a unique set of challenges because the transactions in question had been entered into by the *automated* interaction between B2C2's algorithm and Quoine's platform, which meant that none of the parties to those transactions knew, until *after* the transaction was effected, whether an offer would be made or accepted, or the terms on which they would be concluded.

[12] In considering how the doctrine of unilateral mistake ought to apply to automated contracts, the majority of the Singapore Court of Appeal took the view that existing legal principles could be extrapolated, albeit incrementally, to deal with the novel factual context at hand. According to the majority, the starting inquiry required an examination of how the contracts that were being challenged had been formed. Here, both B2C2's algorithm and Quoine's platform were *deterministic*. What this means is that that these were programmed to be non-discretionary and would always produce the same output given the same input. On this basis, the majority concluded that the relevant state of mind to be assessed in determining the existence and nature of any relevant mistake was that of the programmers of the algorithm who determined how the algorithm would function, and the relevant timeframe of that inquiry was from the time they wrote the algorithm to the time the contract was formed. Unilateral mistake would be established if it was shown that the programmer had programmed the algorithm with actual or constructive knowledge that the relevant offer would only ever be accepted by a party operating under a mistake, such that the programmer was acting to take advantage of that mistake.[15] It was *not* relevant to consider what the parties themselves might, would, or did think *after* the contracts were concluded because they had in fact intended to contract using the algorithms without the involvement of human judgment or assessment.

[13] Applying this test to the facts, the majority held that since the present transactions had been entered into pursuant to deterministic algorithms that operated precisely as they had been programmed to operate, there could have been no operative mistake as to the transaction price; at best, there was an erroneous assumption as to the manner in which the platform operated, which was *not* in fact a term of the contract.[16] In any event, the majority found that there

15 *Quoine* at [103].
16 *Quoine* at [83] and [115].

was no evidence of actual or constructive knowledge on the part of B2C2, when it designed its algorithm to generate offers at the failsafe rate, that the counterparties would be operating on this erroneous assumption. Accordingly, the majority held that unilateral mistake could not be established, and the transactions were upheld.

[14] The dissenting judge largely agreed with the majority, but he adopted a more expansive view of the doctrine of unilateral mistake in the context of automated contracts. Under his approach, relief ought to be made available to one asserting unilateral mistake so long as a reasonable party would have immediately perceived, once the automated contract had been entered into, that some fundamental error had occurred.[17] In a world of algorithms and artificial intelligence, the learned judge thought that existing contractual principles should be adapted in a way that would give rise to outcomes that were compatible with reason and justice.[18] On the facts, the judge explained that he would have set aside the transactions since any reasonable trader would have immediately identified that they were the result of a computer system breakdown.

[15] The *Quoine* judgment is intricate and might be worth a read for those interested in the sort of issues that courts can expect to confront with greater frequency in the coming years. For the purposes of this article, it might be suggested that perhaps the majority and minority judgments in *Quoine* reflect differing philosophies as to how the law of contract ought to adapt to the growing role of technology in modern commerce. The majority decision aligned more closely with established contractual principles and opted for an approach that leaned in favour of legal certainty and respect for freedom of contract,[19] though some may criticise it for permitting a result where B2C2 retained an unmerited windfall. The minority decision would strip B2C2 of that windfall, but it arguably represented a bolder departure from traditional principles insofar as, among other things, it accepted that the doctrine of unilateral mistake need *not* be confined to mistakes as to contractual terms,[20] and it inquired into the non-mistaken party's state of mind by reference to the hypothetical question of what a reasonable trader *would have* thought upon realising what had transpired.

17 *Quoine* at [194].
18 *Quoine* at [193].
19 Goh Yihan *et al*, "Contract Law" in *Singapore Academy of Law Annual Review of Singapore Cases 2020* (Teo Keang Sood and Goh Yihan, forthcoming), para 12.98.
20 *Quoine* at [169].

[16] This leads to my broader point, which is that while judges may extrapolate existing law to respond to new technologies and factual paradigms, especially given the inevitable absence of direct authority governing these situations, this will *not* afford a universal solution to the challenges posed by technology. Instead, we can expect to face a number of practical and philosophical difficulties and we ought to be cognizant of them.

[17] First, as demonstrated in *Thornton* and *Quione*, judges will bring different philosophical approaches to the cases before them, and this can naturally lead to divergent doctrinal approaches and outcomes. This will especially likely be so in difficult cases involving unfamiliar technologies. While for the most part, reasonable disagreements may conduce to a more robust legal analysis, this does introduce a degree of indeterminacy which may not be desirable when resolving some quite fundamental issues in modern commerce. One such example is the proprietary status of cryptocurrency, which I will discuss below.

[18] Second, judicial determinations are by their nature confined to the facts before the court, and thus judicial responses to issues posed by technology will necessarily be piecemeal.[21] The increasing speed and scale at which technology's role and application in society evolve may understandably cause the courts to limit the scope of their pronouncements and thereby limit the implications or impact of their decisions. One example, as mentioned above, is the express caveat by the other members of the court in *Thornton* that they did *not* need to come to a conclusion, as Lord Denning did, on the precise time of contract formation when one interacts with an automated carpark gantry. In like vein, some commentators have noted that the majority decision in *Quoine* appears to be confined to automated contracts formed by the operation of *deterministic* algorithms, leaving open the position where stochastic and other non-deterministic algorithms based on some form of artificial intelligence or machine learning are at play.[22] While there are strengths in such an incremental ad hoc

21 One may point out, relatedly, that the courts of both common and civil law traditions generally have no control over the cases – and hence the issues – that are brought before it.

22 Norton Rose Fulbright, "Singapore court's cryptocurrency decision: Implications for cryptocurrency trading, smart contracts and AI" at <https://www.nortonrosefulbright.com/en/knowledge/publications/6a118f69/singapore-courts-cryptocurrency-decision-implications-for-trading-smart-contracts-and-ai> (last accessed on October 14, 2020).

approach, there are also legitimate concerns over consistency, the breadth of these decisions, and their adequacy in dealing with rapid technological advancements.[23]

[19] The third difficulty is that judicial pronouncements are limited in reach, in that they can only address issues within the court's particular jurisdiction, but this may not offer an adequate response to the many problems raised by technology that transcend geographical borders. The legal significance of electronic signatures and communications in the context of cross-border contracts, for instance, offers an example of an issue that might be more amenable to resolution by international consensus than by the pronouncements of a particular court.[24] Thus, recognising the need for international solutions to international problems, the UNCITRAL Convention on the Use of Electronic Communications in International Contracts[25] ("the Convention") was adopted to establish uniform rules that address a number of thorny issues in transnational commerce compounded by the advent of technology, such as the cross-border recognition of electronic signatures[26] and the standards for when electronic communications may be recognised in law as their physical equivalent.[27]

[20] These and other difficulties that may arise from leaving it to the Judiciary to fashion responses to the multifaceted challenges posed by technology lead one to wonder whether there are certain issues we can expect to encounter in this fast-evolving field that will be so novel and significant that they should be dealt with by some other modality, such as law reform effected by Parliament or pursuant to the recommendations of a law commission. Indeed, there is a strong case for this to be considered given the limits of judicial wisdom and of the litigation process in reflecting the full range of considerations and perspectives necessary to resolve such issues.

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23 See, for instance, the discussion in Bennett Moses Lyria, "Adapting the Law to Technological Change: A Comparison of Common Law and Legislation" [2003] UNSW LJ 33.

24 See, generally, Sarah E Smith, "The United Nations Convention on the Use of Electronic Communications in International Contracts (CEUCIC): Why It Should Be Adopted and How It Will Affect International E-Contracting" (2008) 11(2) *SMU Science and Technology Law Review* 133.

25 United Nations Convention on the Use of Electronic Communications in International Contracts (2005) (entered into force March 1, 2013) at <https://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> ("Convention").

26 Convention, Art 9(3); Explanatory Statement to the Convention, paras 146–165.

27 Convention, Art 9(2); Explanatory Statement to the Convention, paras 143–146.

(b) Law of property as applied in a virtual world

[21] The difficulties outlined above are not limited to the law of contract and will arise as well in other areas of substantive law where existing legal doctrines and principles will continue to be challenged by the advent of technology. One other example is a question that arises in the law of property, which goes to the very foundation of the concept – do cryptocurrency and virtual assets qualify as property in the eyes of the law?

[22] This deceptively simple question has assumed increased significance in today's financial markets given the growing presence of cryptocurrency and virtual assets. According to a global study conducted by the Cambridge Centre for Alternative Finance, cryptocurrencies now constitute billions in market capital and there are millions of active cryptocurrency wallets.[28] The proprietary status of virtual assets also carry implications for other fields of law, such as criminal law and tort law. Thus, in 2007, a 13-year-old player of an online game in the Netherlands was threatened with a knife and forced to transfer some virtual in-game items to the account of the perpetrator.[29] The issue before the court was whether the forceful taking of such virtual items constituted a property crime.[30] Similarly, in Korea, the Supreme Court has had to deal with the question of whether cryptocurrencies received by the operator of an illegal pornographic website constituted property capable of confiscation by the state.[31]

[23] The difficulty in addressing this legal question stems, at least in part, from the perceived novelty of holding that a purely digital code

28 Dr Garrick Hileman and Michel Rauchs, "Global Cryptocurrency Benchmarking Study" (2017) *Cambridge Centre for Alternative Finance*, p 2.

29 The Virtual Policy Network, "Virtual Items, Virtual Currency and Public Policy" (2012) ("Virtual Policy Network"), p 15.

30 Ibid.

31 Supreme Court Judgment 3619/2018 (South Korea) (May 30, 2018) at <https://glaw.scourt.go.kr/wsjo/panre/sjo100.do?contId=2252640&q=%EB%B9%84%ED%8A%B8%EC%BD%94%EC%9D%B8&nq=&w=total&section=&subw=&subsection=&subId=2&csq=&groups=&category=&outmax=1&msort=&onlycount=&sp=&d1=&d2=&d3=&d4=&d5=&pg=0&p1=&p2=&p3=&p4=&p5=0&p6=&p7=&p8=0&p9=&p10=&p11=&p12=&sysCd=&tabGbnCd=&saNo=&joNo=&lawNm=&hanjaYn=N&userSrchHistNo=&poption=&srch=&range=&daewbyn=N&smpryn=N&idgJyul=&newsimyn=Y&tabId=> ("Judgment 3619/2018 (South Korea)"); Chan Sik Ahn, "South Korea: Confiscation of Bitcoin Assets" at <https://www.iflr.com/article/b1lp1whss0ktny/south-korea-confiscation-of-bitcoin-criminal-assets> (last accessed on September 30, 2020) ("Chan Sik Ahn").

could constitute property.[32] Traditionally, the common law sought to define exhaustively the categories of rights or things that qualify as property. Cryptocurrencies and virtual assets do not fit neatly within any of these categories, and thus bear an uncertain proprietary status in law.[33] Similarly, in civil law jurisdictions, legislative definitions of property may not clearly include cryptocurrency and virtual assets. For example, Article 98 of the Korean Civil Act identifies as property "corporeal things, electricity, and other natural forces which can be managed",[34] which appears to leave open the status of purely virtual assets.

[24] As with the law of contract, there is a strong case to be made that the controversy surrounding the status of digital currencies may be addressed by the courts carefully extrapolating from existing laws. Indeed, a brief survey of the history of property law lends credence to this, as it shows that the concept of property is not immutable and has in fact evolved in response to societal innovations and advancements. We have already seen this with shares and bonds, commercial instruments, and intellectual property.[35]

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32 Traditionally, common law categorises personal property into two groups, being *choses in possession* and *choses in action*. *Choses in possession* essentially refer to tangible personal property capable of physical possession, whereas *choses in action* refer to enforceable legal rights such as debts and shares. In *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285, Fry LJ famously remarked, "All personal things are either in possession or action. The law knows no *tertium quid* between the two". See further on the topic, Katie Szilagyi, "A Bundle of Blockchains? Digitally Disrupting Property Law" (2018) 48 *Cumberland Law Review* 9 at 10.

33 See *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Ltd (in liquidation)* [2020] NZHC 728 at [122(a)].

34 Civil Act 2013 (Act No 11728) (Korea), Art 98.

35 The origin of property rights began with the concept of possession. Simply put, a person had property rights in an asset if he possessed it and could exclude others from the asset. This definition of property was radically expanded by the courts in the Middle Ages with the recognition of *choses in action*, where, for the first time, proprietary status was conferred upon things that one did not and could not physically possess. Between the 16th and 19th centuries, courts further expanded the definition of property by finding that certain physical documents evidencing a legal right also qualified as *choses in action*. This development gave rise to many of the key instruments used in modern commerce, including bonds, negotiable instruments, policies of insurance, and bills of lading. In more recent legal history, there has also been significant development in the area of intellectual property, with judicial recognition of proprietary rights in trade secrets and statutorily accorded proprietary rights to copyright, trademark, and patents; see also Krier, James E, "Evolutionary Theory and the Origin of Property Rights" (2009) 95(1) *Cornell Law Review* 139 at 146–159; W S Holdsworth, "The History of the Treatment of 'Choses' in action by the Common Law" (1920) 33(8) *Harvard Law Review* 997 at 997–1011, 1015.

[25] The difficulty, however, is *not* with the *impossibility* of a judicial solution but rather with the *limitations* that will almost necessarily be inherent in such a response. There are several concerns in this regard. First, decisions of the court are themselves open to interpretation. As the Singapore court in *Quoine* recently observed, most Commonwealth decisions that have thus far accepted the property status of cryptocurrency have done so implicitly, without identifying the precise nature of this right.[36] While such an approach allows justice to be done in the instant case, it makes it difficult to assess the true jurisprudential scope and impact of the decision. Thus, in the earlier example raised, the Korean Supreme Court while recognising that Bitcoins received by an illegal pornographic website constitute assets amenable to confiscation, appears to have left open the question of whether this extends beyond the context of criminal confiscation.[37] Second, not all digital currencies share the same features, and therefore judicial pronouncements as to a particular type or class of such currency may not necessarily clarify the position or standard in general.[38] Third, the status of cryptocurrency implicates complex technical and important policy concerns, including fiscal policy, which raises a legitimate question as to whether the judicial forum is the most appropriate for its resolution. Fourth and most importantly, given the function of cryptocurrency as a global medium of exchange transcending national borders, judicial discussion of the issue in some jurisdictions may simply not be the answer needed by an interconnected world seeking a clearer international consensus.

[26] Of course, many of these concerns over the limitations of judicial responses are not unique to the field of technology. But the critical point of distinction lies in the astounding pace and scope of the technological revolution that has and will surely continue to fundamentally alter the way we live, work, and interact.[39] In *Thornton*, the contract at issue was

36 See *Quoine* at [139]–[140].

37 Judgment 3619/2018 (South Korea); Chan Sik Ahn; Jung Min Lee *et al*, *The Virtual Currency Regulation Review* at <https://thelawreviews.co.uk/edition/the-virtual-currency-regulation-review-edition-3/1230201/south-korea> (last accessed on October 14, 2020).

38 Some commentators have suggested that cryptocurrency based on a private block-chain could theoretically be issued limitlessly, and also have unrecognisable property value due to its limited usage, see Chan Sik Ahn.

39 Mass Call Address 2019, paras 12 and 15.

a simple one between a human and an automated gantry. Some half a century later in *Quoine*, the human face had entirely disappeared in the context of a contract formed automatically between two algorithms against a considerably more complex factual and technical setting. And one cannot even begin to imagine how contracts and commerce will continue to be revolutionised in the decades ahead. Thus, against this backdrop, courts should remain cognizant of the limits of judicial wisdom and of the legal process. As we contend with the difficult substantive law issues raised by technology, we should be alive to the real possibility that there may be alternatives to a judicial response that are more appropriate for the resolution of these issues.

B. Evidentiary challenges

[27] I turn next to the second category of challenges posed by technology, and this is in the context of the rules and processes of evidence. The essential concern here relates to the use of, and ease of access to, increasingly advanced technological tools that facilitate the forgery, falsification, and manipulation of files and documents that may come to be passed off as evidence for use in court. This directly threatens the fact-finding process that is fundamental to the discharge of our adjudicative function.

[28] The problem of false evidence is, of course, not new. Indeed, it is perhaps as old as lying itself. The authenticity of written contracts, for instance, has been a problem in the common law since at least 1000 AD.[40] To resolve these disputes, contracting parties would write the same contract thrice on the same piece of paper, before cutting it into three along a jagged edge, with symbols drawn along the jagged edge.[41] The two contracting parties each kept one piece, with the third to be kept by a witness or by the court. The pieces were referred to as "indentures" – a term familiar to common lawyers, though they might not have appreciated its origins. And that term means jagged teeth. The logic was that only the original and authentic indentures would fit perfectly along the jagged edge aligned with the matching symbols. The solution was ingenious even if tedious.

40 Kenneth O Morgan, *The Oxford History of Britain* (Oxford University Press, 2011), p 126.

41 W Scott Stornetta, "The Blockchain: Past, Present, and Future" (September 24, 2018), lecture delivered at NYU Stern.

[29] But the advancement of technology has exponentially complicated matters with its unprecedented ability to distort reality. Take for example the emerging phenomenon of deepfake technology. In simple terms, deepfakes are digital files, such as pictures and videos, created using artificial intelligence, usually to depict real individuals saying or doing something that they did not in fact say or do.[42] But these depictions are so realistic that the untrained eye cannot discern their lack of authenticity.[43] In 2017, a group of researchers from the University of Washington showcased the technology by presenting a lip-synced video of President Obama giving a speech, created using an algorithm they developed that imposed audio against visuals of the President with hyper-realistic AI-refined facial movements.[44] While this technology has thus far been used mainly in politics, art and pornography, there have been growing concerns over its potential to be used to create false digital evidence in legal proceedings. Indeed, some have predicted that within just a few years, deepfake technology will advance to a stage that will allow its users to create *realtime* fake videos, such that a different person will be able to testify through a video-link imitating the likeness and voice of an actual witness.[45]

[30] The implications of deepfakes and similar technologies on our evidential rules and processes of proof are profound, and there is no doubt that courts will need to respond before the insidious attack

42 Kyle Wiggers, "Deepfakes and deep media: A new security battleground" at <https://venturebeat.com/2020/02/11/deepfake-media-and-detection-methods> (last accessed on October 1, 2020).

43 Neil Rose, "'Deepfake' warning over online courts" (July 29, 2020) at <https://www.legalfutures.co.uk/latest-news/deepfake-warning-over-online-courts>.

44 Jennifer Langston, "Lip-syncing Obama: New tools turn audio clips into realistic video" at <https://www.washington.edu/news/2017/07/11/lip-syncing-obama-new-tools-turn-audio-clips-into-realistic-video/> (last accessed on October 14, 2020). There have been several other high-profile instances of the use of deepfakes. In 2018, a Belgian political party used similar technology to create a video of President Trump urging Belgium to withdraw from the Paris Climate Accord, which prompted outrage on social media until it was revealed that the video was nothing but high-technology forgery: see Politico, "Belgian socialist party circulates 'deep fake' Donald Trump video" at <https://www.politico.eu/article/spa-donald-trump-belgium-paris-climate-agreement-belgian-socialist-party-circulates-deep-fake-trump-video/> (last accessed on October 14, 2020).

45 Neil Rose, "'Deepfake' warning over online courts" at <https://www.legalfutures.co.uk/latest-news/deepfake-warning-over-online-courts> (last accessed on October 1, 2020).

on truth takes root.[46] To this end, there are some possible solutions both in the field of *technology*, such as the tools that help detect false evidence,[47] and in the *law*, such as a revision of the rules on authentication of electronic evidence. I do not propose to go into the details, but I make a few broad points. First, in thinking about the appropriate response, we ought to be conscious of the impact that changing our evidential rules might have on fundamental policies and priorities of the justice system. We may, for instance, need to weigh the benefits of more stringent processes for authentication against the need to avoid over-complicating our evidential rules, in order to preserve access to justice and mitigate the effects of any inequality of arms between litigants. The short point is that not all litigants will be able to afford an army of experts. Second, the enmeshed policy considerations and the extra-legal nature of the problem suggests that a more holistic legislative response is probable and likely desirable. Courts will need to be prepared to work closely with other experts and stakeholders in shaping this response which affects the performance of one of our core adjudicative functions. And third, a critical aspect of any response will involve some expectation as to the technological competence of the judges, who will need at least to appreciate the pitfalls of electronic evidence and remote testimony. This goes to the issue of judicial learning which I will elaborate on below.

III. Technology's impact on the administration of justice

[31] I turn finally to examine the third category of challenges, and this concerns those posed by technology to the Judiciary as an institution. It

46 Danielle K Citron & Robert Chesney, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 *California Law Review* 1753; Matt Reynolds, "Courts and lawyers struggle with growing prevalence of deepfakes" at <https://www.abajournal.com/web/article/courts-and-lawyers-struggle-with-growing-prevalence-of-deepfakes> (last accessed on October 14, 2020).

47 Some technical solutions include counter-deepfake technologies to discern deepfakes by analysing the lighting, shadows, blinking patterns, and real-world facial movements of the subject; reverse video-searches to locate the original digital media for comparison; and blockchain-based verification to preserve digital evidence and ensure that they remain unaltered from the time of lodgment onto the blockchain. See for example, Drew Harwell, "Top AI researchers race to detect 'deepfake' videos: 'We are outgunned'" at <https://www.washingtonpost.com/technology/2019/06/12/top-ai-researchers-race-detect-deepfake-videos-we-are-outgunned/> (last accessed on October 1, 2020).

is here that I think our most significant responsibilities lie, and where technology also bears its greatest transformative potential.

A. The evolving dialogue on technology

[32] In the preceding sections, I have discussed the challenges that technology poses to our substantive and evidential laws and offered some suggestions on how we might think about the possible responses. But our laws do not exist in a vacuum; they stand in service of our enduring pursuit of *justice*. The fundamental role of the courts in both our traditions is to translate the legal framework into a system able to deliver justice fairly and effectively to its users. Technology, in this context, is a powerful enabler that allows the courts to rethink, reengineer, and perhaps reinvent themselves as institutions, so that they might better achieve that goal.

[33] It is apt here to recall that my predecessor, Chief Justice Chan Sek Keong, spoke at length about the utility of technology a decade or so ago at a conference in Seoul.[48] His speech, titled "Pursuing Efficiency and Achieving Court Excellence – the Singapore Experience", described the slew of measures introduced in Singapore from the early 1990s to clear the backlog of cases that had accrued in the decades following our nation's independence.[49] One of the tools he mentioned was the Integrated Electronic Litigation System,[50] which we had then just introduced as a single platform and access point for the commencement and management of civil cases in the State Courts and the Supreme Court. Today, this system, commonly known as eLitigation, has become part and parcel of the litigation landscape in Singapore and the backbone of our national case management system.

[34] In the decade since Chief Justice Chan's address, the dialogue on technology has radically changed. Today, technology has far transcended its initial role as a tool of convenience of considerable, though ultimately limited, utility; it should now be seen as fundamental to an entire reconceptualisation of how justice should be delivered in the age of technology.

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48 Chan Sek Keong, Chief Justice of Singapore, "Pursuing Efficiency & Achieving Court Excellence – The Singapore Experience", speech at the 14th Conference of Chief Justices of Asia and the Pacific, Seoul, South Korea (June 13, 2011) ("Pursuing Efficiency").

49 Ibid, paras 4–6.

50 Ibid, para 25.

[35] This will readily become evident upon a survey of the recent tech-driven judicial reforms around the world. The courts in the United Kingdom, for example, are undergoing significant transformation, with around £1 billion committed to a program that hopes to see most civil disputes being resolved using online courts by 2022.[51] And Utah, in the United States ("US"), has seen the establishment of one of the first online courts in that country, with a pilot launched in late 2018 for the vast majority of claims involving not more than US$11,000.[52] The online court is accessible through any electronic device. As a first port of call, it will endeavour to assist parties to settle their disputes amicably with the help of facilitators who answer basic legal questions, offer mediation, and assist in drafting settlements. If amicable settlement is not feasible, the facilitators will assist the parties to prepare their documents for trial, and the matter is then transferred to a judge who may hear the parties orally or, if they agree, decide the matter based on the documents on record.[53] The shift from physical to online courts in Utah has seen a fall in default rates from 71% to 53%.[54]

[36] Our experience in Singapore has been no less ambitious. One example is the Community Justice and Tribunals System, which is an online filing and case management system with dispute resolution capabilities that was first launched in July 2017 in the Small Claims Tribunals.[55] The positive user experience there led to it being rolled out in the Community Disputes Resolution Tribunals in February 2018 and the Employment Claims Tribunal in January this year.[56] By the end of February 2019, more than 1,700 claims filed in the Small Claims Tribunals had undergone e-Negotiation using the online platform, with about 35% reaching amicable settlement.[57] Another example is the Authentic Court Orders system launched earlier this year, under which any party who receives a copy of an eligible court

51 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) ("Susskind"), p 166.
52 Ibid, at p 175.
53 Ibid, at pp 175–176.
54 Ibid, at p 176.
55 Sundaresh Menon, Chief Justice of Singapore, "Deep Thinking: The Future of the Legal Profession in an Age of Technology", Gala Dinner Address at the 29th Inter-Pacific Bar Association Annual Meeting and Conference (April 25, 2019) ("Deep Thinking"), para 8.
56 Ibid.
57 Ibid.

order – whether by email, fax, or even a screenshot – may use the QR Code or reference number on it to verify the authenticity of the order using a secured database, free of charge.[58] This dispenses with the old, rather tedious system where applicants had to physically travel to the courthouse to obtain a certified true copy of the court order. There are also other initiatives afoot, including our plans to launch an online dispute resolution platform that will deal with a significant portion of motor accident claims in phases over the course of the coming years.[59]

B. Rethinking our model of justice

[37] There is no doubt that these judicial reform efforts will continue apace in the decade ahead, especially as courts endeavour to navigate the new normal of the post-pandemic world. But as we design these new systems and processes, I suggest that the first step is to critically examine the model of justice to which we subscribe and the societal role that our courts should serve. Only if we properly understood these "ends", would we be able to appropriately design the "means" necessary to achieve them.

[38] I raised this in a lecture I delivered last year, where I proposed the need to reimagine the modalities for the delivery of justice in the age of technology.[60] I suggested there that we should recognise, as one of the overarching values of the justice system, the concept of *proportionality*, which emphasises the importance of ensuring that the nature, complexity, and cost of the *solutions* offered by the legal system bear a suitable relation to the nature, complexity and size of the legal *problems* before it.[61] I also explained why technology can be such an effective agent for the delivery of this vision of proportionate justice.[62]

[39] I had taken that view not just because technology offers the practical tools and platforms needed to effectively pursue proportionate justice; but more importantly, because technology enables and empowers us to question, and indeed jettison where appropriate,

58 Supreme Court of Singapore, "Media Release: Authentic Court Orders", media release on Authentic Court Orders at <https://supremecourt.gov.sg/news/media-releases/media-release--authentic-court-orders-aco> (last accessed on October 14, 2020).
59 Deep Thinking, para 8.
60 Negotiation Conference 2019.
61 Ibid, para 57.
62 Ibid, paras 61–66.

the very premises and assumptions that have long undergirded the design of our existing court processes. Three examples will illustrate the point.

[40] The first is the assumption held by some that fairness demands that all cases before the court should receive the same procedural treatment. But the real purport of the principle of equal justice requires, in my view, that *like* cases be treated alike, and not necessarily that *all* cases should be treated the same regardless of their nature, value, or complexity. This calls for an effective system for the triage and categorisation of cases so that targeted and appropriate types of procedures are employed for the corresponding types of cases, and this is an area in which technology has proven exceptionally effective.[63]

[41] An archetypal example of this calibrated approach to case management is the streamlined processes that many jurisdictions adopt in relation to small value claims. But this approach can also be utilised in other areas. For example, in Singapore's Family Justice Courts, divorces are streamed into simplified or non-simplified tracks. In 2019, 58% of divorces were resolved on the simplified track. This meant that these parties agreed on all matters without needing additional court intervention. The system identified these divorces, applied simplified processes appropriate for the problem at hand, and in so doing, spared the parties the costs, emotional turmoil, and procedural complexities that typically accompany contested adjudications.[64]

[42] The second assumption that warrants examination is that every grievance demands an exhaustive inquiry. While perfection is ideal, it cannot stand in the way of the good. In a world of limited resources, our justice system must recognise and accept the reality that it is impractical and ultimately undesirable that every complaint be pursued with an unlimited devotion of public and private resources.

[43] One system that has truly challenged this assumption with great success is the private online platform established by eBay to manage

63 See Ernest Ryder, Senior President of Tribunals of England and Wales, "The Modernisation of Access to Justice in Times of Austerity", 5th Annual Ryder Lecture: University of Bolton (March 3, 2016) ("Ryder"), para 43.

64 See, for example, Justice Debbie Ong, Presiding Judge of the Family Justice Courts in Singapore, "Family Justice Courts Workplan 2020", Address, (May 21, 2020), para 9.

disputes between traders using the eBay marketplace. Sixty million disputes are resolved each year using this platform.[65] The turnover of cases is high, and the process is extremely efficient. The outcome, undoubtedly, may not achieve *perfect* justice in every single case, but as I have explained elsewhere,[66] it has achieved practical and effective justice that is *good enough* for its purpose and context.

[44] The third assumption we should challenge is the belief that disputes are inherently confrontational and therefore, that solutions must be adversarial in nature. The advent of alternative dispute resolution methods in recent decades has, to some extent, already undermined this premise. Indeed, there is a growing recognition that not every dispute is a zero-sum game and that there are often interests that remain aligned even in the most fractured relationships. The strong show of support for the Singapore Convention on Mediation, coming into force and gathering signatures from more than 50 states within a year of its opening for signature is evidence of this trend.[67] And technology will only accelerate this development as courts increasingly recognise and tap on its potential to design processes that help the parties see past the emotions that cloud their common interests.

[45] One example of this is the concept of an "online continuous hearing" outlined by Sir Ernest Ryder, the Senior President of Tribunals of England and Wales.[68] Interestingly, there are some similarities between the key features of this concept and the practice of the civil law courts. The concept, first and foremost, requires one to reframe one's view of litigation from an adversarial dispute in search of a winner to a problem in search of a solution. The judge therefore takes on an inquisitorial and problem-solving role, guiding the parties to explain and understand their respective positions, rather than serving a purely adjudicative function. And instead of having tranches of physical hearings, the case is heard through a single online hearing

65 Susskind, p 98.

66 Negotiation Conference 2019, para 46.

67 See Ministry of Law, "Singapore Convention on Mediation Enters into Force", Media Release at <https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force> (last accessed on October 14, 2020).

68 Ryder, para 29.

that spans an extended period of time, during which all parties, including the judge, are able to comment iteratively and informally on the case documents in order to clarify the issues and to explore possible resolutions.

[46] One may or may not agree with all the features of this concept, but it will be difficult not to appreciate the aspirations expressed by Lord Justice Ryder. In his words, "[d]igitisation presents an opportunity to break with processes that are no longer optimal or relevant and at the same time to build on the best […] we have to eliminate structural design flaws and perhaps even the less attractive aspects of a litigation culture".[69] I wholeheartedly agree.

C. Challenges to substantive and procedural fairness

[47] With a new vision of the justice system in mind, the next question is how we ought to go about in achieving this. In this regard, Professor Richard Susskind has saliently observed in his recent book that critics of online courts – and of most other technologically-driven changes to the justice system – often point to the imperfections in the new processes as reasons why these changes should not be embraced.[70] Of course, some of these criticisms are exaggerated and almost always they miss the woods for the trees. Importantly, as Professor Susskind rightly points out, we ought not to allow the presence of *some* injustice to deter us from our pursuit of *less* injustice.[71] But it would be equally foolish to deny the risks that technological tools may bring if we are not careful with the way they are used in our court processes. In this final section, I will discuss a few of the threats to procedural and substantive justice of which we should be wary.

(a) Procedural fairness

[48] The first concern is that a greater use of technology within our adjudicative processes may threaten the procedural fairness and accountability of our judicial decisions. The reasons for this are complex and multifaceted, but I will mention just two that have direct relevance to the courts' discharge of our judicial function.

69 Ibid, para 32.
70 Susskind, p 89.
71 Ibid, at pp 89–90, 182–184.

[49] The first reason is that technological tools are often accompanied by a significant degree of opacity.[72] It is difficult to fully understand technology and its limitations unless one is an expert in that field, and sometimes even to them, the workings of technology can be elusive. The opacity may in some instances arise out of specific interests in protecting the source codes from disclosure, such as for reasons of trade secrecy.[73] But opacity can also be a consequence of the very nature of the relevant algorithm.[74] Many forms of modern technology, such as automated vehicles and sentencing algorithms, employ deep machine learning. In other words, the machine does not simply execute pre-set instructions or operate within pre-defined parameters; it develops its own cognitive framework and produces assessments or opinions autonomously.[75] Neither the machine nor its programmer would be able to articulate its reasoning to a judge. It's rather like the parent who is unable to explain the thought processes of her child.[76] In effect, the algorithm becomes what is referred to as a "black box",[77] and its use in court proceedings introduces a significant risk of tainting the accountability of judicial decisions.

[50] Second, there is a well recorded but unquantifiable human tendency to place undue reliance on the predictions and findings of intelligent machines. This is referred to as the "automation complacency".[78] This phenomenon has been well documented in many fields. For instance, a Royal Majesty cruise ship was grounded because its crew blindly followed a malfunctioning radar plotting system;[79] and aircraft pilots continue to face documented difficulties in managing such complacency as reliance grows on intelligent machines to steer complex airplanes.[80] In the judicial context, studies have also shown a tendency among judges to "defer to the results of actuarial

72 Ethan Katsh *et al*, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 2017), p 49.
73 Andrea Roth, "Trial by Machine" (2016) 104 Geo LJ 1245 at 15 ("Roth").
74 The Law Society of England and Wales, *Algorithms in the Criminal Justice System* (June 2019), lead author: Dr Michael Veale, para 5.4.3.1 ("Veale").
75 Ibid.
76 Roth, 15.
77 Ibid.
78 Parasuraman, Raja and Manzey, Dietrich, "Complacency and Bias in Human Use of Automation: An Attentional Integration. Human factors." (2010) *Human Factors: The Journal of Human Factors and Ergonomics Society* ("Parasuraman") at 381.
79 Ibid, at p 382.
80 Ibid.

instruments or to allow the availability of such results to inflate the importance of recidivism risk in their sentence calculation".[81] The dangerously unknowable extent of such reliance highlights the need for one to critically and continually assess one's own biases and thinking processes, and for all significant decisions to be clearly reasoned so that any sign of error is addressed at first instance.

(b) Substantive fairness

[51] In the same vein, technology may also pose a threat to our ability to deliver substantive justice that is fair, explicable, and rational. Our history of experimenting with the use of technological aids to guide adjudicative decisions have yielded some failed examples that stand as reminders of the heightened caution that is needed when navigating this area.

[52] One such example is the controversy arising from the use of the Correctional Offender Management Profiling for Alternative Sanctions system, also known as COMPAS, that was deployed in the US. This essentially is a risk-assessment algorithm that purports to predict recidivism and the risk of an accused person skipping bail. In recent years, it has been referred to by some US courts in a variety of judicial contexts, including in applications to set bail and grant parole. In 2016, when COMPAS' risk assessment of arrested individuals was compared with how those people *actually* performed in reality, three findings emerged: first, the algorithm "correctly predicted recidivism for black and white defendants at roughly the same rate"; second, when the algorithm was wrong, it was wrong in different ways for black and for white defendants with the former "almost twice as likely … to be labeled a higher risk but not actually re-offend"; and third, the algorithm was far more likely to assess false negatives for white offenders.[82] These results illustrated an unappreciated trend of *algorithmic bias*, which refers to the algorithm's tendency to import the biases and prejudices of the dataset on which it was trained. Put in blunt terms, "rubbish in, rubbish out". Indeed, subsequent research showed that when 400 volunteers were given seven pieces of information about an offender, on a pooled basis, they achieved a 67% accuracy

81 Roth, p 19.

82 Julia Angwin *et al*, "Machine Bias", ProPublica (May 23, 2016) at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (last accessed on October 1, 2020).

in predicting the offender's likelihood of recidivism within two years, which was somewhat higher than COMPAS' accuracy rate of 65%.[83]

IV. Lessons for the learning judge

[53] As I approach the end of this article, it will be evident that I, for one, do not think that there will be easy solutions to many of the issues that lie ahead of us. Indeed, the challenges that arise from technology will prove varied, controversial, and multifaceted. To fully understand and address them, we will need to go far beyond the law and the courts. Yet, it is inevitable that we *will* have to contend with these issues at some point, since it is simply inconceivable that we can live in a world without technology. To this end, there are three suggestions I wish to offer that I hope might help courts and judges in thinking about the way forward.

[54] First, I suggest that in incorporating technology into our systems and processes, we ought to adopt an attitude of vigilance and be wary of pursuing technology for technology's sake. As I mentioned elsewhere recently, a serious complexity problem is becoming endemic in adversarial models of dispute resolution, including court litigation.[84] Cases are becoming so rich in facts and evidence that they challenge the physical and cognitive limits of judges and indeed of the justice system. In common law jurisdictions, there is a further problem with the number of legal authorities brought before the court indiscriminately for little if any marginal value. If this is not managed properly, such unnecessary and excessive complexity may degrade the quality of justice that we deliver and impede access to justice by those who do not have the same resources to engage in such a legal arms' race. Technology must not add to the problem, but must form part of the solution, by helping us trim the excess and focus on what is important. We are already seeing hints of this, for instance, in electronic discovery. To address this, we will need to have a firm grasp on the profile of our court users, and be willing to discuss,

83 Ed Yong, "A Popular Algorithm is No Better at Predicting Crimes Than Random People", *The Atlantic* at <https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646/> (last accessed on October 2, 2020).

84 Sundaresh Menon, Chief Justice of Singapore, "Dispelling due process paranoia: Fairness, efficiency and the rule of law", Chartered Institution of Arbitrators Australia, Annual Lecture (October 13, 2020).

honestly and critically, the rationale, benefits, and limitations of the various tech-driven changes that we implement and how they will ultimately help advance our mission.

[55] Second, just as many of the concerns outlined fall in the intersection between law, technology, and other fields of study, their solutions will also likely require a blend of knowledge and expertise. It follows that the usual self-contained working style of the legal profession is unlikely to be helpful in equipping us to confront these challenges. Instead, we should be prepared to learn from and work with experts from other fields, as well as our allied professionals, as we endeavour to develop holistic solutions to the anticipated problems arising from technology.

[56] Third, and most importantly, we must accept that more than ever before, judgeship is a role that demands a lifetime of learning. Many of us were educated at a time when computers were the special preserve of governments and large corporations. Learning to type with ten fingers may have represented the peak of our personal technological achievements. But today's society has vastly changed, and it will only continue to do so at an accelerating rate. The expectation is no longer just that we know how to *use* a handphone, or laptop, or even to turn on Zoom; instead we will need to *understand*, at least minimally, the technologies commonly used in modern commerce and in society – their systems, their logic, and their limits. Otherwise, not only will we encounter issues in trying to harness and use the technological tools available to us, we may also be blind to the fallacies in our reasoning or find it difficult to articulate coherent reasons for the decisions we make. In some situations, we may even be the unfortunate cause of a miscarriage of justice.

[57] It is with these in mind that I take a strong view that it is both the judge's *personal* responsibility, and that of the Judiciary as an *institution*, to ensure that *every* judge – senior or junior; civil, family, or criminal – is sufficiently familiar with the knowledge and language of technology. To this end, the Singapore Judiciary recently announced the establishment of a Judiciary Competency Framework to identify and anchor competency-based training for all judges and judicial officers at all levels of our courts. While the details are still being worked out, there is no doubt that *technological* competency will feature heavily in this framework.

V. Conclusion

[58] I return in conclusion to where I began – the Lessig-Easterbrook debate. There, the question was whether a rigorous application of established laws will suffice to meet the challenges posed by the advent of technology. For reasons I have explained, the answer I would offer, so far as substantive laws and evidential rules are concerned, is "possibly, and perhaps partially". We should bear in mind that just as there are limits to how much one may stretch a new pair of shoes to make it fit, there will also be limits to the courts' ability to extrapolate existing law to fit these new technologies and factual paradigms.

[59] The inquiry does not, however, end with the *law* itself. Technology also facilitates, and indeed calls for, a systemic review of the Judiciary as the institution that is charged with the responsibility to deliver and dispense *justice*. Here, technology offers us a precious opportunity to think deeply about the justice system, the assumptions that underlie our court processes, and their purpose and relevance in a technological era. It also challenges us to consider carefully the use of technology in our decisions and processes, and to keep abreast of key developments in this field so that we are not intimidated or overwhelmed by the presence of novel technology in any case before us. It is this, I suggest, that represents the greatest challenge and the true transformative potential of technology.

Rule of Law: A Conspectus

by

Justice Dr Choo Kah Sing∗

> *You shall do no injustice in judgment. You shall not be partial to the poor, nor honour the person of the mighty. In righteousness you shall judge your neighbour.*
>
> Leviticus 19:15

Introduction

[1] Speeches of great leaders often quote the phrase "rule of law". Very often it is used to impress upon the realisation of a fair and just system of governance. The phrase "rule of law" ordinarily appears in socio-political and legal literature, and is "routinely invoked by judges in their judgments," said Lord Bingham.[1] What does it connote? Rule of law is often quoted to counter tyrannical rules or arbitrary laws. Its notion is like an "antidote" to strike down unjust rules or laws. The notion of rule of law has survived for many centuries, and it still serves as the bedrock to safeguard the peoples' right to civil liberties against unjust regimes and despotic or totalitarian states in this modern world.

[2] At this present time, the notion of rule of law is still very much alive and relevant.[2] The notion has survived many centuries owing to its universal and unchangeable values. These values sit at the pinnacle of the rules of good governance in a state. Although rule of law has

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1 Lord Bingham, "The Rule of Law" (2007) 66(1) *The Cambridge Law Journal* 67–85 at 67.

2 Lord Goldsmith, "Justice and the Rule of Law" (2009) 43(1) *The International Lawyer* 27–31 at 28 wherein the author wrote, "We had to face and are still facing what is the greatest challenge for the democratic countries based on the Rule of Law: how to balance the issue of the protection of the lives of our citizens-national security if you will – and the basic values and fundamental freedoms on which our societies are founded: civil liberties and fundamental values. It is in finding that balance that this shared common heritage, this shared set of values of justice and the Rule of Law, is so relevant."

many guises, it steadfastly strives for one interest which is to achieve the closest to a utopian state of good governance. An ideal state is a society free from arbitrary rules and tyrannical governments.

[3] This article does not intend to define[3] or redefine what rule of law is; it is neither an attempt to set out an argument for or against what rule of law could offer nor what challenges rule of law could encounter.[4] The object of this paper is to recapitulate some of the principles and values which are commonly found in the notion of rule of law. This exposition is to refresh the different perceptions of rule of law which have been popularised by different legal jurists in the past.

Rule of law – An opaque subject matter?

[4] What rule of law truly holds is still subject to much debate. As mentioned, rule of law has many guises. Perhaps, this is due to its content, which could be traced to many, yet kindred, values. Over the years, legal philosophers and scholars have attempted to describe what rule of law is in their own distinct ways.

[5] The discussion of rule of law often starts with the work of AV Dicey. Dicey, an English jurist and professor of law,[5] popularised the term "rule of law" in one of his most celebrated works, *Introduction to the Study of the Law of the Constitution*, which was first published in 1885. In his book, Dicey meticulously distilled the characteristics of the English constitution and examined the ideas and writings of foreign jurists, such as Voltaire,[6] Jean-Louis De Lolme, Tocqueville[7] and Heinrich Rudolf Hermann Friedrich von Gneist, particularly in relation to their studies of the supremacy of the English law as opposed to other jurisdictions. These foreign jurists had observed how the supremacy of law governed the English society in an organised manner as opposed to its neighbouring states.

3 See Aharon Barak, "Begin and the Rule of Law" (2005) 10(3) *The Right in Israel* 1–28; Brian Z Tamanaha, "The History And Elements of the Rule of Law" (2012) *Singapore Journal of Legal Studies* 232–247.

4 For example, see W Burnett Harvey, "The Challenge of Rule of Law" (1961) 59(4) *Michigan Law Review* 603–613.

5 Albert Venn Dicey was appointed as the first professor of law at the then newly established London School of Economics in 1895. Prior to this prestigious appointment, Dicey was the Vinerian Professor of English Law at the University of Oxford.

6 François-Marie Arouet, popularly known by his *nom de plume* of Voltaire.

7 Alexis Charles Henri Clérel, colloquially known as Tocqueville.

[6] In his works, Dicey isolated the characteristics found in the English constitution. He precisely determined what the term "rule, supremacy, or predominance of law" meant when these expressions were used in the context of the English constitution. He said the phrase "rule of law" generally includes one expression, yet it could relate to "at least three distinct though kindred conceptions".

[7] The first conception was said by Dicey to be as follows:

> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[8]

[8] The epitome of this first conception is that there should be "absence of arbitrary power on the part of the government."[9] It is observed that Dicey's first conception is built upon two important foundations of law to achieve a system of good governance. First, there must be an established law. Secondly, that law has to be tried in a court of law. These two foundations must co-exist before one could be found guilty and punished by the state. It is on this accord that it could be said that there would be absence of arbitrary power on the part of the government.

[9] What could Dicey have meant when he said "law established in the ordinary legal manner?" Did he mean that every piece of legislation which has gone through the motion of legislation is a piece of "good" law? A law that is established in the ordinary legal manner which violates the fundamental civil liberties of the people could still be a law in the minimal legal positivism sense. But, it could not be "good" law in the classical and modern natural law sense, and it could also be frowned upon if examined through the lens of other legal theories. Perhaps, it is on this account that Dicey qualified his statement by saying "before the ordinary Courts of the land." This denotes that the law could be questioned and challenged in the court of law. In his first conception, Dicey captured the very essence of the eminent French

8 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (Liberty Classics, 1982), p 110.

9 Ibid, cited from the side notes.

judge and philosopher Montesquieu's noble idea of "separation of state powers", commonly known as the doctrine of separation of powers. His idea was explained in his work written in the French language, *The Spirit of Laws*, which was first published in 1748, and later translated into English in 1750. According to the doctrine, the Judiciary is a branch of the organs of state. The Judiciary stands side by side with two other organs, namely the Legislature and the Executive. They all hold equal stature. While the Executive may through the Legislature pass laws, it is the Judiciary who scrutinises the essence of the law. If the law is found to have violated the fundamental civil liberties of the people, the court could strike it down on the premise that it goes against the rule of law within the Constitution of the state. The court in exercising its judicial role must be free from Executive influence. Dicey did not expand on the concept of judicial independence. Conceivably, judicial independence was well recognised and developed in the English legal system. The independence of the Judiciary had long been recognised as one of the essential features of the English legal system at that time.

[10] Dicey's first conception seems to have two aspects. One is to restrain the Executive from passing arbitrary laws or exercising arbitrary powers. The other one is to promote and protect the people's right to civil liberties. The right to civil liberties is often entrenched in a constitution of a state. Rule of law was and is indeed a fundamental feature of the British Constitution, although the Constitution was and still is an unwritten one.

[11] On the second conception, Dicey had this to say:

> We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[10]

[12] The message in Dicey's second conception is more straightforward. Basically, it talks about the idea of legal equality – every man subject to ordinary law administered by ordinary tribunals.[11] He went on to say:

> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by ordinary Courts, has been

10 Ibid, at p 114.
11 Ibid, cited from side notes.

> pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

[13] Dicey's second meaning of rule of law is that no man is above the law. Although Dicey's second meaning of rule of law seems virtuous, this second meaning has received criticism. It is said "That the statement is of doubtful value."[12] One legal text highlighted "the Crown enjoys immunities under the law, that the government acting in the name of the Crown may exercise prerogative powers which may defeat the rights of individuals, that Members of Parliament have immunity from the law of defamation under the privileges of parliament, and that diplomats enjoy immunities not available to citizens."[13] All these are found to be directly contradictory to Dicey's second idea of rule of law. A careful analysis of his second conception will reveal that Dicey directed his focus on those who held authority (power) in the society. Those who exercise authority must act within the power granted, otherwise, they will be accountable for their actions and be subject to the same law under the same ordinary courts, like any other ordinary men in the street. Dicey explained further his second conception when he said:

> The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.[14]

[14] A balance has to be struck between the exercise of official power and accountability for the power exercised. An official who exercises

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12 Jackson and Leonard, *Constitutional and Administrative Law*, 8th edn (Sweet & Maxwell, 2001).

13 Hilaire Barnett, *Constitutional & Administrative Law*, 10th edn (Routledge, 2013), p 59.

14 AV Dicey, n 8 above, p 114. See *Mostyn v Fabregas* Cowp 161; *Musgrave v Pulido* 5 App Cas 102; *Governor Wall's Case* 28 St Tr 51; *Entick v Carrington* 19 St Tr 1030; and *Phillips v Eyre* LR 4 QB 225, as cited by Dicey in reference to the colonial governor, secretary of state and the military officer.

his power within the permitted boundary could not be held personally liable even where his action could have violated fundamental human values. Notwithstanding what has been said, it is collectively true that "with great power comes great responsibility."[15] To surmise, the practice of legal equality befalls on those who judge. For those who judge shall judge by the scales of justice. The wise words from the past form the guiding compass of wisdom for the judge.

[15] The final conception in Dicey's rule of law was this:

> There remains yet a third and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals result, or appears, from the general principles of the constitution.[16]

[16] The third conception is peculiar to England because England does not have a written constitution, in contrast with many countries around the world governed by written constitutions. The rights of the citizen are often entrenched in the written constitution. A written constitution as the supreme law of the land appears as the legally clearest and most satisfactory embodiment of democratic legal principles.[17] In England, at that time, the rights of the people were mostly protected by the common law. At the present, many of these rights are found in statutes as part of the English law. Notwithstanding that the degree of relevance of Dicey's third conception in today's context has moderated, it could still offer us an important and relevant lesson for the role played by the Judiciary. The rights written in a constitution are merely black letter law. They cannot illuminate by themselves. The rights glow and come alive only if judges are willing to breathe meaningful values into them.

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15 Voltaire, Adrien Jean Quentin Beuchot and Pierre-Auguste-Marie Miger, *Œuvres de Voltaire*, Vol 48 (Lefèvre, 1832).

16 AV Dicey, n 8 above, p 115.

17 W Friedmann, *Legal Theory*, 5th edn (Columbia University Press, 1967), p 423.

[17] To sum up the meanings of rule of law, Dicey wrote as follows:

> That "rule of law", then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.
>
> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
>
> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (*droit administratif*) or the "administrative tribunals" (*tribunaux administratifs*) of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.
>
> The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.[18]

[18] Dicey's idea of rule of law was a reflection of the English constitution in the 19th century. A century later, John Finnis remodelled the idea of rule of law. In his work, *Natural Law and Natural Rights*,

18 AV Dicey, n 8 above, pp 120–121.

which was published in 1980, Finnis said, "The name commonly given to the state of affairs in which a legal system is legally in good shape is 'the rule of law'."[19] He further said:

> A legal system exemplifies the rule of law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders, applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[20]

[19] Finnis called those expressions above as the *desiderata* (something that is needed) in rule of law. The list is not exhaustive. He went on to say:

> Obviously, much more could be said about this institutional aspect of the rule of law – of what historical experience has shown to be further desiderata, such as the independence of the judiciary, the openness of court proceedings, the power of the courts to review the proceedings and actions not only of other courts but of most other classes of official, and the accessibility of the courts to all, including the poor.[21]

[20] "The fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The rule of law is thus among the requirements of justice or fairness,"[22] Finnis wrote. Finnis' *desiderata* is echoed from the idea of "law's inner morality" which was propounded by Lon L Fuller in his writing, *The Morality of Law*, first published in

19 John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series, edited by HLA Hart, 1988), p 270.
20 Ibid, at pp 270–271.
21 Ibid, at p 271.
22 Ibid, at p 273.

1964. Chapter II – *The Morality That Makes Law Possible* –[23] is devoted to the argument that there are eight demands in the law's inner morality. The demands are (i) the generality of law; (ii) promulgation; (iii) avoid retrospective laws; (iv) the clarity of laws; (v) avoid contradictions in the laws; (vi) avoid laws requiring the impossible; (vii) constancy of the law through time; and (viii) congruence between official action and declared rule. Fuller received criticism of his eight *desiderata* of inner morality of law, or the *desiderata* of rule of law, as Finnis had described them, "as an efficient instrument which, like a sharp knife, may be good and necessary for morally good purposes but is equally serviceable for evil."[24] Finnis swiftly defended his idea and said:

> Adherence to the rule of law (especially the eighth requirement, of conformity by officials to pre-announced and stable general rules) is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government's freedom of manoeuvre. The idea of the rule of law is based on the notion that a certain quality of interaction between ruler and ruled, involving reciprocity and procedural fairness, is very valuable for its own sake; it is not merely a means to other ends. It is not just a "management technique" in a programme of "social control" or "social engineering".[25]

[21] Thus far, we have caught a glimpse of the many guises of rule of law. In fact, rule of law has a rich historical heritage which could be traced back to the work of Aristotle sometime in 350 BC. Aristotle argued that it was preferable to have government by laws rather that government by men. "While this statement appears to contradict itself, what Aristotle really meant was that in any state of community, law and order is preferred over anarchy and mayhem. In that sense, government must be conducted according to law, and not according to the arbitrary whims and fancies of the government."[26] Two important characters of rule of law are revealed through the work of Aristotle in the ancient time to the work of Fuller and Finnis in the modern time – a basic character and a procedural character. The basic

23 Lon L Fuller, *The Morality of Law* (Yale University Press, 1969), pp 33–94.
24 John Finnis, n 19 above, p 274.
25 Ibid.
26 Kevin YL Tan and Thio Li-Ann, *Constitutional Law in Malaysia and Singapore* (LexisNexis, 2010), p 42.

character sets the minimum standard for the law to govern both the people and the governor. As such, all men are equal before the law, and no man is above the law. On this accord, therefore, every law has to fulfil this minimum standard. Fuller termed this as the inner morality of the law. The procedural character envisages the process by which this inner morality of the law is being administered by the institutions, particularly the organs of state.[27] The recognition of separation of powers is to be respected. The Judiciary plays a pivotal role in upholding the idea of rule of law in a state.

Conclusion

[22] The ultimate discourse in the notion of rule of law could be surmised from various perspectives. From a political perspective, rule of law keeps the governor in check when it is exercising its powers, and restricts how these powers are to be exercised on those who are being governed in that there is zero tolerance for arbitrary rule. From a legal perspective, rule of law stands as the guiding principle to ensure that legislation is a good, legitimate and just law. All men shall have access to justice administered by the Judiciary, and all men before the judge shall be treated equally. For those who judge shall judge without fear or favour. The Judiciary is the institution dynamically guarding the people's rights to civil liberties; there shall be no unlawful encroachment on the people's rights to freedom of movement, speech, assembly and association, religion, education and property. From a constitutionalism perspective, rule of law promotes adherence to the doctrine of separation of powers *vis-à-vis* judicial independence. From the societal perspective, rule of law is a means to an end, an end that the governed shall be governed in an utmost just and equitable manner based on all the above.

27 For further reading, see Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2011) 50 *American Society for Political and Legal Philosophy* 3–31.

Legal Construction of Transsexuality*

by

*Justice Mohd Radzi Harun***

Abstract

[1] Medical authorities had, since the turn of the 20th century, agreed that transsexualism is a congenital physical disability that arises from a hormonal imbalance that could be medically treated by medical and surgical interventions.

[2] In the legal sphere, be it jurisprudential or legislation, similar recognition was slow.

[3] This article examines briefly how the development of the jurisprudence pertaining to transsexuality for a 30-year period in the United Kingdom ("UK"), starting in the 1970s up to the critical period of around 2004, had influenced other jurisdictions, including its effect on the legal construction of transsexuality through judicial pronouncements in Malaysia. It will briefly observe the most recent development in the United States of America ("US") and will conclude with suggestions as to how and where we can progress and evolve in this area of the law.

Introduction

[4] The dichotomy between men and women or the discursive male-female figure is socially, not legally, constructed.

[5] Medical authorities had, for a long time, agreed that transsexualism is a congenital physical disability that arises from a hormonal imbalance

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* This article is a revised version of one of the mandatory qualifying papers submitted by the writer for a LLM thesis at the University of Nottingham in 2004. The writer is aware of the various terms used denoting transsexuals, which include "transpeople", "transgender" and "trans". For purposes of this article, the terms "transsexual" and "transgender" are used interchangeably referring to people whose gender identity and expression differ from the sex they were assigned at birth, and whether such person had undergone sex reassignment surgery or not, depending on the context of the discussion.

** Judge of the High Court of Malaya.

while the child is *in utero*, and which results in incongruent brain and genital formation, meeting the requirements for medical classification as an intersex condition that could be medically treated by medical and surgical interventions. There exists an abundance of literature detailing the works of the German physician Magnus Hirschfeld and his team way back in 1918 at his Institute of Sexual Science in Berlin by offering his patients the means to achieve sex change either through hormone therapy, sex change operations, or both. Dr Hirschfeld termed his patients that required such treatment as "transvestite" (a term which later was regarded as antiquated and demeaning) to ensure a person medically regarded as a transvestite would be protected and receive appropriate treatment, including sex reassignment surgery.

[6] This scenario was recognised by the European Commission on Human Rights in *Rachel Horsham v UK*[1] where it held:

> … the medical profession has reached a consensus that transexualism is an identifiable medical condition, gender dysphoria, in respect of which gender-reassignment is ethically permissible and can be recommended for the purpose of improving the quality of life.

[7] Early transgender jurisprudence in the West was said to be "partially masked through a preoccupation with heterosexual capacity … that displayed the law's phallocentric imperative".[2]

[8] As early as 1957 in the Scottish case of *Re X*,[3] the court took the chromosomal factor as a decisive element in sex determination and rejected a male-to-female transsexual application to alter the applicant's birth certificate to reflect her (?) sex reassignment. In Australia, the court held in 1988 that the law has no place for "the third sex".[4] In the US, the 1965 Change of Sex on Birth Certificates for Transsexuals Report by the New York Academy of Medicine's Public Health Committee that concluded "male to female transsexuals are still

1 *Rachel Horsham v UK* Application No 23390/94, European Commission of Human Rights (report adopted on January 21, 1997).

2 Andrew N Sharpe, "From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence" (2001) 8(1) *Murdoch University Electronic Law Journal*, at <http://www.murdoch,edu.au/elaw/issues/v8n1/sharpe81.html> ("Sharpe 2001") (accessed on July 1, 2013).

3 *Re X, Petitioner* [1957] Scot LT 61; Scot L Rev 203, quoted from Andrew N Sharpe, *Transgender Jurisprudence – Dysphoric Bodies of Law* (2002), Chs 3–4 ("Sharpe 2002").

4 *R v Harris and Mc Guiness* (1988) 17 NSWLR 158 at 194, per Mathews J.

chromosomally males while ostensibly females" was referred to with approval by numerous cases as recently as 1996.[5] The legal position in the US, however, was permanently changed with the *locus classicus* on sexual orientation laid down by the US Supreme Court in *Romer v Evans*[6] that was subsequently followed by three other landmark US Supreme Court decisions of *Lawrence v Texas*,[7] *US v Windsor*[8] and *Obergerfell v Hodges*.[9] This development will be discussed separately in a section below.

[9] The development of jurisprudence on transsexuality in the UK, Australia, the US, and New Zealand can be traced through three legal approaches adopted by the courts, namely, the "biological approach", the "psychological and anatomical harmony approach" and the "psychological, social and cultural harmony approach.[10]

The three approaches

Biological

[10] The English decision of *Corbett v Corbett*[11] is regarded as the quintessence of the first approach and effectively "inaugurated transgender jurisprudence in the common law world".[12]

[11] When the petitioner (Arthur Corbett) and the respondent (April Ashley) married in September 1963, the petitioner knew that the respondent had been registered at birth as a male and had in 1960 undergone an operation for the removal of the testicles and the construction of an artificial vagina. Three months after, in December 1963, the petitioner petitioned for a declaration that the marriage was null and void as at the time of the marriage the respondent was a person of the male sex, or alternatively for a decree of nullity on the ground of non-consummation. The law in England at that time

5 *Hartin v Director of the Bureau of Records and Statistics, Dept of Health of the City of New York* 347 NYS 2d 515 (1973); *Re Ladrach* 32 Ohio Misc 2d 6 (1987); *Anonymous v Weiner as the Director of the Bureau of Records and Statistics, Dept of Health of the City of New York* 270 NYS 2d 319 (1996). All references taken from Sharpe 2002.

6 517 US 620 (1996).

7 539 US 558 (2003).

8 570 US 744 (2013).

9 576 US 644 (2015).

10 Sharpe 2002.

11 *Corbett v Corbett (Otherwise Ashley)* [1970] 2 WLR 1306; [1970] 2 All ER 33.

12 Sharpe 2001.

did not allow for a dissolution of marriage on mutual consent, and a divorce could be granted by the court only upon proof of adultery or cruelty. The respondent refused to be divorced.

Ormrod J decided that in law, a marriage is a union between a man and a woman. Thus, the sex of a person is an essential determinant of a valid marriage. Medically, the learned judge said that assessment and determination of the sex of a person would involve two tests:

(i) biological test, comprising three factors, *viz* –

(a) chromosomal factor (nucleus of individual cells of the body on which the genes of a person are carried, that also determine the sex (male or female) of a person);

(b) gonadal factor (presence of testes or ovaries); and

(c) genital factor (including internal sex organs), and

(ii) psychological test.

But legally, the judge held further that the court should adopt only the biological test comprising the three factors. If all three are found to be consistent and compatible, that should determine the sex of a person for the purpose of marriage. The psychological test, including any operative intervention, should be ignored. This is simply because the biological sexual constitution of a person is determined at birth, and cannot be altered either by natural development of the organs of the opposite sex, or by medical or surgical means.

[12] The central theme of Ormrod J's decision is the certainty posed by the chromosomal test in determining a person's biological sex, where no amount of medical intervention can alter a person's chromosomal pattern. Thus, he concluded that the sex of a person for purposes of a marriage is that which he belongs at birth.

[13] *Corbett*'s biological approach was followed in a landmark South African case of *W v W*[13] decided in 1976. However, the South African court in that case extended the test laid down in *Corbett* and held that when there is no congruency in the biological factors, then the factors that must be considered are:

13 *W v W* (1976) 2 SALR 308.

(i) chromosomal;

(ii) gonadal;

(iii) genital;

(iv) psychological;

(v) hormonal; and

(vi) secondary sexual characteristics.

[14] Ormrod J was explicit in his pronouncement that the test and approach he applied was meant for the issue before him pertaining to marriage law. However, because of the somewhat open-ended stance taken by Ormrod J when he said, "… the question of the effect of surgical operation in such cases of physical inter-sex, must be left until it comes for decision", other judges implied the possibility of applying the test in *Corbett* in the determination of sex of transsexuals for non-marriage purposes. Thus, *Corbett* was applied with extension to areas such as criminal law,[14] birth certificates,[15] and sex discrimination and unfair dismissal in employment.[16]

Psychological and anatomical

[15] This so-called second approach was not developed as an answer to *Corbett*'s biological approach. In fact, this approach had been in existence earlier than *Corbett*. Although it has been commented that this approach found its origin in the US case of *Re Anonymous*,[17] Chisholm J in *Re Kevin*[18] concluded that this radical and progressive legal approach could be credited to the 1945 Swiss decision of *Re Leber*[19] where the judge in that case held:

> … There is an absolute contradiction between the anatomical sex and the cerebral sex, a difference which it will perhaps be possible in the future to establish anatomically because we already know there are differences between male and female brains …

14 *R v Tan* [1983] QB 1053.
15 *Re P and G* [1996] 2 FLR 90.
16 *EA White v British Sugar Corp* [1977] IRLR 121; *Re P and G*, ibid.
17 *Re Anonymous* 293 NYS 2d 834 (1968). See also Sharpe 2001.
18 *Re Kevin and Jennifer v Attorney General for the Commonwealth of Australia (Validity of Marriage of a Transsexual)* [2001] Fam CA 1074.
19 *Re Leber*, Neuchatel Cantonal Court, Switzerland, 2 July 1945.

> … When there is a discord between body and mind, one must see which of these two elements predominates. Leber, being neither a perfect man or a perfect woman, must be placed in the category of human beings which he most resembles … In the unanimous opinion of doctors and experts he is nearest, as a whole, to a woman …
>
> In granting him the civil status of a woman we are satisfying the most profound desire of this being while consolidating his psychic and moral equilibrium.[20]

[16] It was apparent that the judge in *Re Leber* applied the psychological test, apart from the biological test, both conducted by medical experts, and decided that the determinant factor shall be which state of mind that the person is most suitable to be in.[21]

[17] The post-operative prerequisites, which includes the psychological test, was accepted in the Australian case of *R v Harris*[22] where the New South Wales Court of Criminal Appeals rejected the test laid down in *Corbett* and held that Lee Harris, a post-operative male-to-female transsexual was not a "male" person for the purposes of section 81A of the Crimes Act 1900.[23] Demonstrating the crucial factor of sexual reassignment surgery, the court convicted Lee Harris, a post-operative male-to-female transgender person of the offence of procuring another male person, McGuiness, to commit an act of indecency, as "he" was held to be female for the purposes of criminal law. The post-operative factor was affirmed by the Federal Court of Australia in a case relating to social security.[24]

[18] In *M v M*,[25] the court decided that *Corbett* does not represent the law in New Zealand when Aubin J adopted *R v Harris* (supra) and

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20 Quotation extracted from judgment of Chesholm J in *Re Kevin*.

21 "Once surgical intervention has taken place … anatomical sex is made to conform with psychological sex", per Pecora J in *Re Anonymous* 293 NYS 2d 834 (1968) (New York, United States). Source: Sharpe 2002, p 58.

22 *R v Harris and Mc Guiness* (1988) 35 A Crim R 146.

23 Section 81A of the Crimes Act 1900 pertains to the crime of indecency with another male.

24 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467. But in *Re SRDD v Secretary, Department of Family and Community Services* (1999) 56 ALD 777, the Australian Administrative Appeals Tribunal went further by holding that the post-operative surgery must be a complete sexual reassignment surgery, not mere castration. See the discussion on this case in Sharpe 2002, p 72.

25 *M v M* [1991] NZFLR 337.

placed emphasis on post-surgical reality. The New Zealand court in *Attorney General v Otahuhu Family Court*[26] stretched the test further when Ellis J held:

> … there are many forms of sexual expression possible without penetrative sexual intercourse. … for purposes other than marriage, a transsexual who has not had reconstructive surgery or only minimal surgical intervention … could be classified in his or her chosen sex.

[19] In *Re Kevin*,[27] Chisholm J held that *Corbett* shall not form the basis of Australian law *vis-à-vis* marriage involving post-operative transsexuals. His Lordship sharply criticised Ormrod J's biological approach, which, he said, was propounded without any relevant legal principle or policy and created a false impression that social and psychological matters had been shown to be irrelevant. Granted with the opportunity to combine comprehensive and detailed evidence from the infertility experts, psychiatrists, and numerous other experts in myriad fields of medicine, and evidence from Kevin's family, friends and work colleagues, Chisholm J concluded that the determinant factors were not just biological but equally important was the psychological sex or the mental sex or the brain sex of the person concerned. His Lordship held that Kevin, a transgender man who had not done phalloplastic surgery (phalloplasty is a surgical construction of a penis), was a man for purposes of Australian marriage law after it took into consideration that Kevin had undergone irreversible surgical procedures, which included hormone therapy, breast reduction procedure and total hysterectomy.

In that decision which was affirmed by the full-bench of the Federal Family Court, his Lordship further held that all relevant matters needed to be considered, including the person's life experiences and self-perception. Post-operative transsexual people will normally be members of their reassigned sex.

On the Attorney General's assertion that the recognition of the applicant's marriage would be radical, and if any it should be an issue

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26 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.

27 *Re Kevin and Jennifer v Attorney General for the Commonwealth of Australia* (*Validity of Marriage of a Transsexual*) [2001] Fam CA 1074. The decision was affirmed by the Australian Family Court of Appeal in *The Attorney General for the Commonwealth v Kevin and Jenifer, Human Rights and Equal Opportunities Commission (Intervener*) 30 Fam LR 1 (2003).

of law reform and for the Parliament to legislate and not for the court to decide, Chisholm J concluded that, having accepted that Kevin was in fact a man, the declaration of the validity of the applicant's marriage would in fact be orthodox, rather than radical, as it would apply to a marriage the ordinary meaning of the terms "man" and "woman", as set out in the Australian law.[28]

[20] It can be concluded that the psychological and anatomical harmony approach requires the transsexual person to succeed in the psychological test, aside from the biological test, for that person to be recognised as a person of the other sex. The combination of these two tests would envisage a situation where that person must complete the belief of belonging to the other sex through the non-reversible sexual operation (anatomical) to reconstruct genitalia to resemble that of the other sex, never mind if that reconstruction was incomplete.

Psychological, social and cultural approach

[21] The psychosocio-cultural harmony approach has been mainly confined to Australia and Canada, and especially in social security cases.[29]

[22] Although the placing of psychological, social, and cultural gender identity above the biological element was first elucidated in the Australian case of *HH*,[30] the applicable test for this approach was laid down in *Secretary, Department of Social Security v SRA*.[31] The Australian Administrative Appeals Tribunal, in this case, decided that

28 James McConvill and Eithne Mills, "*Re Kevin* and the Right of Transsexual Persons to Marry in Australia" (2003) 17(3) *International Journal of Law, Policy and the Family* 251. Chisholm J's decision was "a contribution towards a greater recognition of the rights of transsexual persons across the world [as it] not only bring the law more into line with social reality, but … narrowing the divide between the operation of the law and principles of humanity". *Re Kevin* was also followed by the Circuit Court of the Sixth Judicial Circuit in Florida, USA in *Re Marriage and Micheal J Kantaras v Linda Kantaras* (2003) Case No 98-537 CA.

29 Sharpe 2002, p 75.

30 *Secretary, Department of Social Security v HH* [1991] 13 AAR 314. Brennan J held the fact that HH had undergone sexual reassignment surgery was immaterial as "the respondent's psychological and social/cultural gender identity are the matters of primary importance, not sex chromosomal confirmation or gonadal or genital factors".

31 *Secretary, Department of Social Security v SRA* (1992) 28 ALD 361.

a pre-operative male-to-female person was a female for the purposes of an Australian social security legislation, and was subject to the fulfilment of three tests:

- Firstly, the person's "femaleness" is authenticated through acceptable medical reports, which would also differentiate the psychological sex of a transsexual with that of a homosexual.
- Secondly, the existence of genuine and continuing belief on the part of the SRA (person that had undergone sexual reassignment) that the person is a female.
- Thirdly, social and community acceptance that the person is a female established through relevant supporting evidence.[32]

[23] When the Australian Federal Court reversed the Tribunal's decision on social security eligibility,[33] Lockhart J reaffirmed that socio-cultural considerations were important elements in the determination of the sexuality of a transsexual.

Development in the UK: Post *Corbett*

[24] *Corbett* was regarded by human rights activists as the landmark decision that allowed the widespread practice of legal discrimination against transgenders throughout Britain. The decision had also judicially prohibited the actions of the UK authorities to "correct" the birth certificates of transsexuals for a period covering 30 years.

[25] The situation "worsens" for transsexuals in the UK when the European Court of Human Rights ("ECtHR") had consistently upheld *Corbett* and decided that as transsexuals do not have the right to a valid marriage, the UK's refusal to recognise the validity of their marriages does not constitute any breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR").[34]

32 A similar decision was made by the Federal Court of Canada in *Canada v Owen* (1993) 110 DLR (4th) 339. Source: Sharpe 2002, p 79.

33 See cases cited in n 42 below.

34 *Rees v UK* (1986) 9 EHRR 56; *Cossey v UK* (1991) 13 EHRR 622; and *Sheffield and Horsham v UK* (1998) 2 Commission of Human Rights in X, *Y, Z v UK* (1997) 23 EHRR 143.

[26] In 2002, the ECtHR finally ran out of patience with the UK and its courts[35] when it decided in *Goodwin v United Kingdom*[36] to depart from its earlier decisions in *Rees*, *Cossey*, and *Sheffield and Horsham*[37] that had upheld *Corbett*. The ECtHR held that apart from biological criteria, the determination of the sex of a transsexual person must take into consideration three other major aspects, namely:

(i) the increased social acceptance of transsexuals;

(ii) the international trend towards legal recognition of transsexuals; and

(iii) dramatic changes brought about by developments in medicine and science.

It then ruled that the UK Government's refusal to allow amendment of Ms Goodwin's birth certificate to reflect her new gender, and the refusal to allow her to marry as a female, violated Articles 8 and 12 of the ECHR.[38]

[27] The ECtHR's decision in *Goodwin* was meant to end the 30-year "reign" of *Corbett*'s biological approach but the House of Lords in *Bellinger v Bellinger*[39] decided in the following year not to follow *Goodwin*. The House's rejection of the appellant's (post-operative male-to-female transsexual) claim for a declaration of the validity of her marriage, however, was not totally based on the biological approach, but rather on the classic constitutional doctrine of separation of powers. In an attempt to put into effect the principle laid down by the ECtHR in *Goodwin*, the House of Lords declared that section 11(c) of the UK Matrimonial Causes Act 1973 was incompatible with section 4 of the UK Human Rights Act 1998. The House of Lords further held that any change or reform to the legal position announced by the ECtHR in *Goodwin* was pre-eminently a matter for Parliament, and not for the courts, to determine.

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35 Ralph Sandland, "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights" (2003) 11 *Feminist Legal Studies* 191.

36 *Goodwin v United Kingdom* [2002] 2 FLR 487.

37 See n 34 above.

38 ECHR, Arts 8 (right to respect for private life) and 12 (right to marry).

39 *Bellinger v Bellinger* [2003] UKHL 21; [2003] 1 FLR 1043. Justifications laid down by the House of Lords are in the main repeating those of the findings of the Court of Appeal.

[28] The position taken by the House of Lords in *Bellinger v Bellinger* was one of the first instances when it was judicially pronounced that "… legislation is needed to enable transsexual people to marry in their new gender"[40] which culminated into the promulgation of the UK Gender Recognition Act ("GRA") that came into effect on April 4, 2005.

[29] The GRA, with aims, among others, to provide transsexual people with legal recognition in their acquired gender, enables transsexuals in the UK to apply to receive a Gender Recognition Certificate ("GRC"), a document that shows that a person has satisfied the criteria for legal recognition in the acquired gender. Transsexuals granted a full GRC are considered in the eyes of the law to be of their "acquired gender" in most situations. The GRC is issued upon the fulfilment of the set criteria as assessed by a Gender Recognition Panel comprising, among others, medical and legal experts.[41]

[30] The GRA, which was the first in the world when it was introduced in 2004, had attempted to settle the legal construction of transsexuals in the UK. It was copied in many jurisdictions, albeit with further enhancements. In 2016, the Government of UK received a proposal from transsexual activist groups for the introduction of a mechanism in the GRA to enable for self-determination of their sex status without the need for a "diagnosis" of gender dysphoria. This proposal received support even from the Church of England. The proponents relied on to the resolution of the Parliamentary Assembly of the Council of Europe on April 22, 2015 which stated:

> … This resolution addresses issues including access to healthcare, depathologisation and anti-discrimination legislation. In relation to legal gender recognition, the Assembly calls upon Member States to develop quick, transparent and accessible procedures, based on self-determination.

[31] Feminists campaigners had vehemently objected the idea, specifically in relation to those who were assigned male at birth. The consultation on the proposal was meant to close in mid-2019. But due

40 Explanatory Notes, Gender Recognition Bill before the House of Lords, para 3, at <http://www.parliament.the-stationer-office.co.uk/pa/ld200304/idbills/004/en/04004x--htm> (accessed on July 1, 2013).

41 Ibid, para 7.

to the political situation in the UK at the time of the writing of this article, the proposal is still under consideration by the newly elected Secretary in charge of the matter.

Recent developments in the USA

[32] Job discrimination against transgender workers is legal in many parts of the US. In October 2019, the US Supreme Court heard arguments on three consolidated cases before it answered the question on whether the 1964 Civil Rights Act bars employment discrimination based on sexual orientation and transgender status.[42]

[33] In these three cases, Bostock was a child welfare services coordinator for the Clayton County, Georgia, juvenile court system, who said he was fired for his sexual orientation after his employer learned he joined a gay men's softball league. Zarda, who died before his case got to the Supreme Court, was a skydiving instructor who lost his job after he told a female student he was gay. Stephens was a funeral director for Harris Funeral Homes who got fired after coming out as a transgender woman. Stephens' employer said she was in violation of the dress code, which required men to wear suits.

[34] Title VII of the said Civil Rights Act provides that no employer can dismiss any employee based on race, religion, national origin and, sex. The key deliberations by the Supreme Court justices were on the actual meaning of the word "sex", whether it included sexual orientation and gender identity.

[35] Chief Justice John Roberts brought up his "other concern" that must be adressed – the issue of religious liberty. A number of major evangelical groups, including the National Association of Evangelicals, the Billy Graham Evangelistic Association, and the Council for Christian Colleges and Universities ("CCCU"), had also added that expanding the definition of "sex" to protect lesbian, gay, bisexual and transgender ("LGBT") rights could interfere with the employment practices of churches and Christian institutions. They argued that there should

42 *Bostock v Clayton County, Georgia*, US Supreme Court Case No. 17-1618, decided on June 15, 2020; *Altitude Express, Inc, et al, Petitioners v Melissa Zarda and William Allen Moore, Jr, Co-Independent Executors of the Estate of Donald Zarda*, US Supreme Court Case No. 17-1623, decided on July 17, 2020; *RG & GR Harris Funeral Homes, Inc, Petitioner v Equal Employment Opportunity Commission, et al*, US Supreme Court Case No. 18-107, decided on July 17, 2020.

be laws to protect LGBT people in the workplace, but those needed to be balanced with protections for religious groups.[43]

[36] If the court decides that the answer to the question before it is in the affirmative, the basic protection currently enjoyed by others would be extended to the group involved in the suit, which includes transgenders. This is one of the most anticipated decisions out of the US Supreme Court since its landmark quartet decisions of *Romer v Evans, Lawrence v Texas, US v Windsor* and *Obergefell v Hodges*.[44]

Developments in Malaysia

[37] The first case dealt with by our court reported in the law journals related to a post-surgery transsexual was the decision of VT Singham J on November 4, 2004 in the case of *Wong Chiou Yong v Jabatan Pendaftaran Negara*.[45] In this case, VT Singham J referred to and followed a 1991 Singapore High Court decision of *Lim Ying v Hiok Kian Ming Eric*,[46] which essentially endorsed *Corbett.*

[38] About six months later, on May 25, 2005, James Foong J (as his Lordship then was) decided on *J-G v Pengarah Jabatan Pendaftaran Negara*.[47] His Lordship referred to *Wong Chiou Yong* but the outcome in *J-G* was in direct opposite of *Wong Chiou Yong*. The Singapore case of *Lim Ying* was not referred to by his Lordship.

[39] There was a hiatus on reported cases pertaining to transsexuals post *J-G*, until the decision of the Court of Appeal seven years later on October 5, 2012 in *Kristie Chan v Ketua Pendaftar Jabatan Pendaftaran Negara*.[48]

[40] The other reported decisions of our courts pertaining to transsexuals or "persons of the other sex" were the decisions of Zaleha

43 Extracted mainly from online media reports accessible at <https://www.christianitytoday.com/news/2019/october/scotus-lgbt-rights-religious-liberty-bostock-zarda-harris.html> and <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html>.

44 See nn 6, 7, 8 and 9 above. At the time this article was written in April 2020, the decision of the US Supreme Court had not been delivered yet.

45 *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 CLJ 622.

46 *Lim Ying v Hiok Kian Ming Eric* [1992] 4 CLJ (Rep) 442.

47 *J-G v Pengarah Jabatan Pendaftaran Negara* [2005] 4 CLJ 710.

48 [2013] 4 CLJ 627.

Yusof J (as her Ladyship then was) in *Fau En Ji v Ketua Pendaftar Jabatan Pendaftaran Negara*,[49] the decision of the Federal Court in *Muhamad Juzaili Mohd Khamis & Ors*,[50] and the decision of Nantha Balan J (as his Lordship then was) in *Tan Pooi Yee v Ketua Pendaftar Jabatan Pendaftaran Negara*.[51]

[41] The Singapore High Court in *Lim Ying* (supra) dealt with the status of the marriage of a post-operative transsexual. On July 26, 1990, the petitioner, Lim Ying, a Malaysian residing in Singapore, was married to the respondent under the Singapore Women's Charter, which provides for the solemnisation and registration of a monogamous marriage between a man and woman.

The birth certificate of the respondent who was born in 1953 showed "his" sex as a female. When the respondent attained the age of 34 years in 1987, "he" underwent a sex-change operation which, among others, resulted in an artificial penis being implanted into "his" body. On "his" application, the Commisioner for National Registration changed the particulars in "his" identity card to state the sex as male. "His" name was also changed to Hiok Kian Ming Eric. These facts were unknown to the petitioner and the Registrar of Marriages at the time of the marriage solemnisation and registration. The respondent then admitted to the petitioner that "he" had undergone sex-change operation.

The facts showed that the respondent and petitioner had attempted cohabitation and repeated attempts at consummating the marriage had failed as the respondent's artificial penis did not sustain an erection for sexual intercourse.

Although no medical evidence was adduced before the court, the learned judge accepted the evidence pertaining to the background facts as these were not challenged by the respondent. Referring to *Corbett* affirmatively, the learned judge accepted the fact that the petitioner did not freely consent to the marriage and issued a decree to nullify the marriage and decided that a post-operative transsexual cannot be recognised as belonging to the sex for which reassignment surgery

49 [2015] 1 CLJ 803.
50 *State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975, FC.
51 [2016] 8 CLJ 427.

was undertaken for purposes of a monogamous marriage under the Women's Charter. The learned judge decided further that "it was not open to the Court to take a new approach to marriage and that biological criteria should be adopted for determining a person's sex for the purpose of marriage."

[42] In *Wong Chiou Yong* (supra), VT Singham J was dealing with the applicant whose gender in the birth certificate and national registration identity card ("NRIC") was shown as female. On December 31, 2002, upon reaching the age of 25 years, the applicant applied to the Registrar General of Births and Deaths at Petaling Jaya to alter the birth register and the NRIC details from female to male so as to indicate her post-operative sex on the ground that there was an error in the entry at the register book. The applicant also averred in her affidavit that she was born with two sex organs but did not provide the support of any medical evidence to this effect. Although there was a letter from the psychiatrist, it did not state or confirm that the applicant was born with two sex organs but merely stated that she required the reassignment operation on psychiatric evaluation.

[43] Whilst his Lordship distinguished the facts and the purpose of the application before him with that in *Lim Ying* (supra), his Lordship agreed with and followed Rajah J's affirmation of *Corbett* and decided that:

(a) there was no error in the sex of the applicant as initially entered in the register of births and the birth certificate which was issued and accordingly in the NRIC;

(b) there was no mistake of fact as to the sex when it was registered under the Births and Deaths Registration Act 1957 and when the NRIC was issued and it did not reveal that further medical examination showed there was a mistake as to the fact or in the substance at the time of the registration of the birth. The fact relating to change of organs on the applicant by medical or surgical means was supported only by the applicant's own evidence;

(c) the person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for the purpose of correcting the registration of sex of the applicant on the register of births or the NRIC which was already issued;

(d) the fact that the sex-change operation was permitted did not require the word "male" and "female" in the NRIC to be changed to the reassigned sex and contrary to the biological characteristic when the applicant was born; and

(e) the court had no power to declare the applicant who was born as female as male and consequently to direct the Registrar General to alter the register of births and the NRIC on the ground that there was a gender reassignment surgery as there were insufficient materials to support this application.

Following the decision of the House of Lords in *Bellinger v Bellinger*, his Lordship held that "there is no express legislation to re-register the gender of a transsexual person or under the disguise of any error or fact or substance in the register … as it would be contrary to the object and whole spirit of statutory interpretation and legal principle on which the judicial system is built."

[44] In *J-G* (supra), the plaintiff was born a male in 1974. In 1996, the plaintiff underwent a female gender reassignment surgery in Thailand. After the surgery, the plaintiff successfully applied to the defendant to effect a change of name to the plaintiff's identity card to reflect the plaintiff's newly acquired female gender. However, when the plaintiff applied for a MyKad, the plaintiff was informed that the MyKad would state the plaintiff's gender as male. The plaintiff thus applied to the High Court to be declared a female and to direct the defendant to change the MyKad to reflect the plaintiff's female gender. The plaintiff was a much sought after model and alleged that in some assignments, the plaintiff suffered embarrassment when the plaintiff's identity was revealed as male. Also, the plaintiff had a boyfriend of 10 years, and they intended to marry. The plaintiff's identification as male would prevent this. The plaintiff adduced medical evidence to substantiate that the plaintiff was not suffering from any mental or psychological disability, had been living a full and satisfying life as a woman, and possessed female genitalia. In fact, a consultant obstetrician and gynaecologist confidently asserted in his medical report that the plaintiff "is now female". The defendant opposed the application solely on the ground that the sex of a person could not be changed and had to follow that as stated in the birth certificate.

James Foong J at the outset made it unequivocally clear that the authorities had laid down two schools of thoughts – "traditional" and

"progressive" – although these were "indicative terms to represent the approach taken by the courts in the Commonwealth as well as those by the European Union and has no bearing to suggest preference".

Disagreeing with *Corbett*, deviating from the decisions that leave the issue at hand to be dealt with by Parliament, and applying both the psychological and the biological factors, his Lordship allowed the plaintiff's application, and held:

> Of course there are fears of uncertainty and the lack of "a clear coherent policy" as well as criteria or pre-conditions to be satisfied before legal recognition can be given to alter the sex of a person. These are comprehensively set out by Lord Nicholls in the judgment of the House of Lords in *Bellinger v Bellinger* (supra) when confirming the continuing adherence to the test as set out in *Corbett v Corbett* (supra) to determine the sex of a person. And in the end, like in most of these cases favouring the *Corbett v Corbett* (supra) test, the garnet is thrown back at legislative body to make the necessary laws for the court to follow if Parliament so wishes. But then again, the legislative body would depend on the medical opinions. And here, in this instant case, the medical men have spoken: the plaintiff is female. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.

[45] In *Kristie Chan* (supra), the Court of Appeal was also dealing with a rejection of an application by a male-to-female post-operative transsexual to change the gender detail in his identity card. Due to the existence of two conflicting decisions of the High Court in *Wong Chiou Yong* (supra) and *J-G* (supra), the Jabatan Pendaftaran Negara issued a circular in 2007 which requires a court order declaring and recognising the newly assigned sex to be included as part of the application for a change of registration of gender in the NRIC.[52]

The applicant had furnished medical certificates from doctors who had attended to the applicant before, during, and after the sex reassignment surgery that was conducted at a hospital in Thailand.

The court was not satisfied that the exhibits were only documents from doctors from Thailand and Hong Kong, and held that there must be

52 Arahan Jabatan Pendaftaran Negara Bil 9/2007, para 5.7.2(a).

evidence, medical or psychiatric, from experts in Malaysia to inform the court on what constitutes gender, what makes a person a male or female, and whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card. Such dereliction, the court held, was tantamount to the applicant's failure to discharge the burden of proof required to warrant the grant of the declaration or order sought.

[46] In *Fau En Ji* (supra), the High Court was again dealing with an application for a change of NRIC particulars by the applicant, a female-to-male post-operative transsexual. Having scrutinised the medical reports, Justice Zaleha Yusof decided that those reports merely showed to the court the presence of the gonadal factors that had confirmed the applicant's transition from female to male. The learned judge remarked that there were no evidence pertaining to the applicant's chromosomal and genital factors. Following *Kristie Chan* (supra), the learned judge held that the applicant had failed to provide evidence on what constitutes gender, what makes a person a male or female, and whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card. Such failure, the court held, was tantamount to the applicant's failure to discharge the burden of proof to warrant the grant of the declaration or order sought, as the mere submission of psychological or gonadal factors are insufficient. The crux of Justice Zaleha's decision reflected the words of Lord Nicholls Birkenhead in *Bellinger v Bellinger* that self definition is not acceptable.

[47] In *State Government of Negeri Sembilan & Ors v Muhamad Juzaili & Ors* (supra), the respondents, who were all male, were arrested for cross dressing in public and were charged under section 66 of the Syariah Criminal Enactment (Negeri Sembilan) 1992 ("Enactment No 4/1992"). The respondents filed for judicial review to request, *inter alia*, for a declaration that the impugned section 66 was inconsistent with Articles 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution and was thus null and void. Alternatively, a declaration that the said section 66 did not apply to the respondents who were psychologically women and were suffering from gender identity disorder ("GID").

The High Court dismissed the application. The Court of Appeal allowed the respondents' appeal and declared section 66 unconstitutional and inconsistent with Articles 5(1), 8(2), 9(2) and 10(1)(a) of the Federal Constitution. The State Government appealed to the Federal Court.

The Federal Court reversed the decision of the Court of Appeal mainly on the ground that the application to question the validity or constitutionality of section 66 by way of judicial review should not have been entertained by the High Court and the Court of Appeal to begin with as such an application contravened Article 4(3) and (4) of the Federal Constitution. As such, the proceedings before the High Court and the Court of Appeal were without jurisdiction or power and were declared null and void *ab initio.*

Although the decision of the Court of Appeal was overturned, this writer must highlight that in the course of delivering the decision of the court, Hishamudin Mohd Yunus JCA in no uncertain terms rebuked the state legal advisor's submission that the respondents by their GID condition were persons of unsound mind where his Lordship held:

> … in the absence of medical evidence it is absurd and insulting to suggest that the appellants and other transgenders are persons of unsound mind.

Although the respondents had failed in their attempts to nullify the impugned section 6, the remarks of the learned judge sent a strong message that the courts would and shall not tolerate demeaning aspersions, in words or otherwise, against transsexuals, post-operative or otherwise.[53]

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53 It is interesting to note that when the High Court dealt with the application in 2012, evidence were provided before the learned judge on the medical condition of the respondents by two doctors. One of them, Dr Deva Dass, a consultant psychiatrist, confirmed the evidence of the other government psychiatrist that diagnosis of the respondents showed they were suffering from GID and explained by making reference to the 4th edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* published in 2000. In that edition, GID was placed in the category of mental disorder. In 2013, the American Psychiatric Association released the 5th edition of *Diagnostic and Statistical Manual of Mental Disorders* which replaced the outdated entry of "GID" with "gender dysphoria", and changed the criteria for its diagnosis, and displaced GID in the category of mental disorder. The evidence relating to the 5th edition of *Diagnostic and Statistical Manual of Mental Disorders* was not before their Lordships at the Court of Appeal and the Federal Court. Hence, the term GID was used throughout the proceedings as seen in the judgments.

For an analysis of *Muhamad Juzaili*, see Low Hong Ping, "Civil Administration of Islamic and Criminal Law: An Analysis of the cases of Borders Bookstore and Muhamad Juzaili" [2018] 3 MLJ xxxiii; Wilson Tay Tze Vern, "The Use and Misuse of Article 4(3) and 4(4) of the Federal Constitution" [2015] 2 MLJ cliv; and also Usharani Balasingam and Saifullah Qamar bin Qamar Siddique Bhatti, "Between

[48] In *Tan Pooi Yee* (supra), Justice S Nantha Balan was dealing with a post-operative female-to-male transsexual. In allowing the applicant's prayer for a declaration that "he" was a male and for consequential orders to the respondent to give effect to such declaration, his Lordship succintly traced the development of the law pertaining to transsexuals since *Corbett* through *Goodwin*, *Bellinger*, *Otahuhu*, *Re Kevin* and the enactment of the UK GRA. His Lordship also revisited *Wong Chiou Yong*, *J-G*, *Kristie Chan* and *Fan Eu Ji* and held:

> For now, based on the facts and circumstances, it is my ruling that the plaintiff in the present case, who was born as a female, has grown up behaving and living like a male and has undergone gender re-assignment surgery and has obtained validation of the medical profession that he is a male person, has in my view, satisfied the threshold or criteria that was set out in *Kristie Chan*'s case.

Citing a phrase from Professor Dr Shad Saleem Faruqi's book, *Document of Destiny – The Constitution of the Federation of Malaysia*, "… the word 'life' does not refer merely to the animal existence of breathing and living. It covers the right to live with human dignity". His Lordship held:

> In my view, the plaintiff has a precious constitutional right to life under art 5(1) of the Federal Constitution of Malaysia and the concept of "life" under art 5(1) must necessarily encompass the plaintiff's right to live with dignity as a male and be legally accorded judicial recognition as a male.

On January 5, 2017, the Court of Appeal allowed the appeal by the National Registration Department and reversed the High Court's decision.[54]

[49] The main criticisms against the decisions of our courts that "disfavoured" transsexuals as mentioned in the section above are the heavy reliance on the biological approach laid down by *Corbett* and

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Lex Lata and *Lex Ferenda*: An Evaluation of the Extent of the Right of Privacy in Malaysia" [2017] 4 MLJ xxix. See also criticisms on the Federal Court judgment by Justice Hishamudin Mohd Yunus, "Federal Court decision on transgender case 'disturbing'", *Free Malaysia Today*, December 5, 2015, accessible online at <http://www.freemalaysiatoday.com/category/nation/2015/12/19/federal-court-decision-on-transgender-case-disturbing/>.

54 Unreported decision of the Court of Appeal, see media report <https://www.malaysiakini.com/news/368192# ixzz4k51d9To6>.

Bellinger, which are both long regarded as old and archaic law. A report published by Asia-Pacific Transgender Network ("APTN") concluded that the predominant trend in Malaysian jurisprudence is to follow archaic chromosomal requirements in 1970s English law, that biological sex is fixed at birth and cannot change.[55] This report suggested that instead of relying on those outdated English decisions, the Malaysian courts should make reference to the legal reforms that have taken place in recent times which have done away with biological criteria altogether as a requirement for legal gender recognition, including in Argentina, Sweden and Denmark, among others. Aside from that, the courts are encouraged to consider granting recognition of each person's self-defined gender identity, with no medical requirements or discrimination on any grounds.[56]

[50] Despite the fact that the UK is bound by its obligations under the ECHR, for a period that lasted over 30 years the ECtHR had endorsed *Corbett*. Why is that so? The existence of the concept of margin of appreciation for Member States of the ECHR.

[51] In essence, although *Corbett* infringed Articles 8 and 12 of the ECHR, taking into consideration the nature of the rights of transsexuals in the UK and weighing it together with the legislative framework and the societal norms pertaining to transsexuals in the UK at that time, the infringements were allowed. This is termed as the margin of appreciation introduced by the ECtHR in 1968.[57] That was the reason why even

55 "Legal Gender Recognition in Malaysia, A Legal & Policy Review in the Context of Human Rights", a UNDP-endorsed report by Asia Pacific Transgender Network, in partnership with Pertubuhan Pembangunan Kebajikan dan Persekitaran Positif Malaysia (SEED Malaysia) 2017, at <https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications /hiv_aids/Malaysia-APTN_Publication_OnlineViewing.pdf>.

56 See also "Study on Discrimination Against Transgender Persons Based in Kuala Lumpur and Selangor (Right to Education, Employment, Healthcare, Housing and Dignity) by SUHAKAM published in 2019. Full report at <https://www.ohchr.org/Documents/Issues/SexualOrientation/SocioCultural/NHRI/Malaysia%20Human%20Rights%20Commission.pdf>.

57 The effect of the concept of margin or appreciation is almost akin to derogation, which under Art 15 of the ECHR is only allowed in emergency situations. However, in 1968 the ECtHR in *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Application No 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, (1968) 1 EHRR 252 (better known as "*Belgian Linguistic Case (No 2)*") introduced a margin of appreciation to circumstances that fell outside emergency situations.

when the ECtHR finally decided in its decision of *Goodwin* in 2002 to "uplift" the margin of appreciation it had so generously accorded to the UK the past 30 years, the House of Lords decided in *Bellinger* in 2003 to ignore *Goodwin*, on grounds that the UK legislation recognising transsexual rights was not yet in place at that time as technically the infringement must be addressed by way of a legislation. A year after that, the GRA 2004 was passed by the British Parliament which had effectively placed *Corbett* in the textbooks.

[52] With that legal landscape set out, this writer concludes that the cynical criticisms leveled against our courts that favoured the so-called "archaic chromosomal requirements in 1970s English law" were misleading and fallacious, to say the least. Litigants – be they transgender, cisgender notwithstanding – can be rest assured that even when the outcome of a case disfavoured them, the judges had carried out their duties in accordance with the oath they had taken, adhering to the principle of upholding the Constitution as laid down by the then Supreme Court in *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad*:[58]

> The Courts have a constitutional function to perform and they are the guardian of the constitution within the terms and structure of the constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review – a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of Judges over legislators but of the constitution over both. The Courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the Courts have a duty to perform in accordance with the oath taken by Judges to uphold the constitution and act within the provisions of and in accordance with the law.
>
> We trust that any misunderstanding as to the role of the Courts will accordingly be dispelled, and in this context and against the background of what we have just said, there is no call to be overly

58 *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad* [1987] CLJ Rep 168; [1987] 1 CLJ 40, per Salleh Abas LP.

> hypersensitive and to overact impetuously as the impugned remarks do not *ex necessitate* connote, with in the requisite of the strictest burden of proof for proceedings for contempt, an attack on the judiciary in the way suggested by the applicant but rather tend to ventilate, perhaps understandably, the vexation of the executive in not being able to get through some desired objective or end without curial intervention.

Our way forward

[53] This section will attempt to reflect on some initiatives and proposals that may be considered in dealing with the issue as a way forward for us.

Multidisciplinary committee

[54] In 2013, the government established the National Unity Consultative Council ("NUCC"), comprising members from multiple backgrounds. The NUCC's mandate then, among others, was to prepare a blueprint for national unity and social cohesion. One of its proposals to the government then was the enactment of a legislation which, among others, provides for prohibition against gender discrimination. The NUCC was rebranded as People's Harmony Consultative Council in 2019. A multidisciplined and apolitical body of experts such as this could be utilised as one of the key sources of valuable information, input and recommendations for policy-making, including the enactment of appropriate legislations. Due to the vast potential of a consultative body on unity affairs and social wellbeing such as this, the continued existence of this mechanism will certainly be applauded.

[55] Malaysian non-governmental organisations ("NGOs") had taken a bold initiative in 2017 by proposing to the government for the enactment of the Gender Equality Act and the establishment of a Gender Equality Commission.[59] In April 2019, it was reported that in its written reply to a Parliamentary question on the status

59 Refer to the proposal for the establishment of the Gender Equality Commission by Women's Aid Organisation that had been submitted to the Ministry of Women, Family and Community Development in 2017, at <https://wao.org.my/wp-content/uploads/2018/11/WAO-Policy-Brief-2017-1-Gender-Equality-Commission.pdf>. Refer also the brief proposal on Gender Equality Act by a collaboration of NGOs, Joint Action Group, in 2017, at <https://wao.org.my/wp-content/uploads /2018/11/JAG-Policy-Brief-May-2017-Main-Elements-of-GEA.pdf>.

of the law on gender equality, the Ministry of Women, Family and Community Development had stated that a special team comprising representatives from various agencies including the AG's Chambers, the Department of Syariah Judiciary, NGOs and individuals had been set up. The team was in the midst of forming an outline on gender equality, taking into consideration religious, social, and community aspects, provisions of Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (to which Malaysia is a party), and also examples from existing gender equality laws in India, Vietnam and the Philippines.[60] The SUHAKAM had recently called on the government to hasten its efforts to enact the legislation.[61] Together with the works of the now disbanded NUCC as briefly mentioned above, the authorities should revisit the works of the NGOs and not let the laborious enterprises of these entities go to waste.

[56] Although the relevant Malaysian civil society has been working closely with certain agencies throughout the years, as seen in the earlier paragraph, the collaboration had been mostly ad hoc in nature. Some form of a permanent set up, akin to the now defunct NUCC, must be considered. Appropriate membership comprising apolitical group of persons which include professionals in the field of medicine, religious and social studies, and representatives of the civil society, with clear terms of reference must be established.

Part II of the Federal Constitution

[57] The experiences in the UK and South Africa amply disclosed two different impetus that critically influenced policy and legislative changes on transsexuals in those countries. In the case of the UK, the regional ECHR formed the main thrust of the changes in its legal and policy landscape. In South Africa, the existence of the Equality Clause in its post-apartheid Constitution played a key role.

[58] Although there exist a regionally-adopted ASEAN Charter and ASEAN Declaration on Human Rights ("ADHR") with provisions on the promotion and protection of human rights, there is a yet a

60 See report in *NST*, April 8, 2019, at <https://www.nst.com.my/news/nation/2019/04/477645/special-projects-team-set-ensure-gender-equality-laws>.

61 See media report on statement by Malaysian Commission on Human Rights (SUHAKAM) on March 8, 2020, accessible at >https://www.freemalaysiatoday.com/category/nation/ 2020/03/08/enact-laws-on-gender-equality-suhakam-urges-putrajaya/>.

regionally-adopted legally binding human rights treaty with provisions similar to those found in the ECHR. In fact, the ASEAN Charter provides clearly that whilst ASEAN and its Member States shall respect fundamental freedoms and promote and protect human rights, at the same time it must respect the different cultures, language and religions of the peoples of ASEAN. With that background, it would pose inconsiderable challenges if the UK model is replicated into our system in its entirety.

[59] Is the South African model closer to us then? The post-apartheid South African Constitution promulgated in 1996 contains a specific Chapter 2 on Bill of Rights. The said Chapter 2 is fundamentally similar with Part II of our Federal Constitution, except on two essential provisions.

Firstly, Article 8(1) of the said Bill of Rights provides:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

a similar provision of which is not found in ours.

Secondly, provisions collectively termed as the Equality Clause are built into the Bill of Rights with the intent to guarantee that the most vulnerable groups (which include transsexuals) will not be discriminated against in all fields. The crux of the Equality Clause that is of relevance for the purposes of the issues in this article are those found in Article 9(3),(4) and (5) as below:

> 9. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Compare that to the relevant provision in our Federal Constitution, Article 8(1) and (2), which provides:

> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[60] The word "gender" was added into Article 8(2) of our Federal Constitution by the Constitution (Amendment) (No 2) Act 2001 (Act A1130), which came into force on September 28, 2001. The word "gender" instead of "sex" was carefully and consciously chosen. It was specifically inserted to deal with non-discrimination against women to ensure Malaysia's compliance with its obligation under the CEDAW, as demonstrated in the Minister's speech in the *Hansard* for 2nd and 3rd Reading of the Bill to amend the Constitution on August 1, 2001 at page 69 as follows:

> Saya maklum tentang konvensyen tersebut dan Malaysia sebagai salah satu daripada anggota konvensyen CEDAW pada tahun 1995 memang akur kepada keputusan tersebut dan memasukkan perkataan "jantina" dalam Perkara 8(2) ini adalah sedekat-dekat mungkin bagi kita memberi penjelasan dan kesempurnaan kepada tuntutan CEDAW itu.

[61] The word "gender" was chosen in preference to "sex" as the latter, as seen in many court decisions in the earlier paragraphs, had been interpreted to be wide enough to cover the "third sex" other than men and women. In 1994 the UN body, the Human Rights Committee, had decided that the word "sex" shall include sexual orientation of a person.[62]

62 In *Toonen v Australia*, the UN Human Rights Council decided in 1994 that the word "sex" in Arts 2(1) and 26 of the International Covenant on Civil and Political Rights was to be taken as including sexual orientation. Following that decision, Tasmania outlawed all of its penal laws deemed discriminatory to the LGBT community.

[62] With that legislative intent on the insertion of the word "gender" in Article 8(2), and the principle laid down by the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*[63] that in order to determine whether a law is discriminatory under Article 8, "the validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group", any attempt to stretch the meaning of the phrase "gender" in Article 8(2) to include transsexuals or such other meaning would certainly face insurmountable difficulty for it not to be be declared as unconstitutional. Similarly, this writer would maintain that until and unless Article 8(2) of the Federal Constitution is amended, any legislation that purports to have the effect of recognising rights of transsexuals may have the effect of its constitutionality being challenged.

[63] This is where the fundamental similarities between Part II of our Federal Constitution and Chapter 2 of the South African Constitution end. If the South African model in dealing with the issue at hand is to be adopted, this forms the core issue that must be resolved through ongoing engagements amongst the stakeholders. The proposed Multidisciplinary Committee must not overlook the need to study the viability of amending Article 8(2) or expanding Part II of our Federal Constitution taking into account the development in the South African Constitution as shown earlier. In fact, this is the central issue that must be addressed even before embarking on the enactment of any specific legislation or regulations.

Policy and legislation versus litigation

[64] The groundbreaking provision in the Equality Clause of the post-apartheid South African Constitution passed in 1996 was hailed by many across the globe as the epitome of modern-day Constitution founded on human rights-based approach. With the Constitutional guarantee afforded by the Equality Clause, many were optimistic that any setbacks inflicted on the most vulnerable group of persons, including the transsexuals, would be rectified. But the fundamental question that South African transsexual activists initially had to confront was whether and how the transsexual communities fit into the textual promises of the Equality Clause. They then decisively adopted a non-confrontational and less litigious approach, which avoided intense convergence on the Judiciary and courtroom battles, and instead

63 [2004] 1 CLJ 701; [2004] 2 MLJ 257.

focused on policy and statutory changes through collaboration with governmental machineries. This synergy witnessed the promulgation of the Commission for Gender Equality Act 1996, enacted pursuant to the Equality Clause, and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. Since then, they have been working closely with their government and taken active part as a partner in policy-making processes affecting transsexuals.

[65] This proven strategy must be favourably considered by our stakeholders.

Religious-sensitive domain

[66] At the core of many religious and spiritual canons addressing assigned birth sex and gender is a conceptualisation of beliefs and mandates from which it follows that no individual may change their assigned birth sex, unless religious parameters had been complied with. On this premise, discussions and policy-making decisions affecting transsexuals shall involve the religious authorities at every level.

[67] In the context of transsexuals professing the religion of Islam in Malaysia, many applicable *fatwa* emerged from the discussions at the National Fatwa Council and the State Fatwa authorities, out of which two *fatwa* issued by the National Fatwa Council are most significant. The first one was issued in 1982 which ruled that a person born a male shall remain a male, and a person born a female shall remain a female despite that person having successfully undergone sexual organ surgery. Sex change of a male to a female, and vice versa, through surgery is *haram* under Shariah laws (*hukum Syarak*). A person born as "*khunsa musykil*", a condition where the person was born with both male and female genitalia, is permitted to undergo surgery to retain the functional genitalia. The second fatwa was issued on April 14, 2005 and stated that the change of gender status in the MyKad is permitted for a holder who had undergone sexual organ surgery permissible under Shariah laws but any change of gender status in the MyKad for a holder who had undergone sexual organ surgery under conditions not permissible by Shariah laws is not permitted.[64]

64 Irsyad Al-Fatwa Siri Ke-467: Hukum Menukar Nama Mak Nyah dengan gelaran wanita, Pejabat Mufti Wilayah Persekutuan, March 20, 2020, at <https://muftiwp.gov.my/artikel/irsyad-fatwa/irsyad-fatwa-umum/4358-irsyad-al-fatwa-siri-ke-467-hukum-menukar-nama-mak-nyah-dengan-gelaran-nama-wanita>.

[68] Due to the religious issues involved in cases affecting transsexuals coupled with the existence of *fatwas* as shown above, in-depth submissions and arguments on religious viewpoints, akin to what we had seen earlier before the US Supreme Court,[65] should be adopted as an accepted practice in our courts, particularly in cases involving Muslim transsexuals.

Conclusion

[69] We must reflect upon the obvious fact that the Judiciary in the more developed jurisdictions do take time to progress in this area of law. Many jurisdictions are still developing this area of the law. In doing so, they take into consideration all aspects of life, including socio and cultural norms in their regions. We too must allow ourselves the time and space to develop our own Malaysian jurisprudence in this area of the law, taking every aspect of our multi-faceted and plural society into consideration, including the religious norms.

[70] The policies and laws on the issue must be addressed comprehensively and methodically by the authorities. In the meanwhile, the Judiciary will continue to discharge its duties in the administration of justice premised on the principles and values enshrined in the Federal Constitution.

The *fatwa* can also be viewed at JAKIM's e-SMAF (Sumber Maklumat Fatwa) at <http://e-smaf.islam.gov.my/e-smaf/index.php/main/mainv1/fatwa/pr/15567> and <http://e-smaf.islam.gov.my/e-smaf/index.php/main/mainv1/fatwa/pr/15227>.

See also Transeksualiti: Suatu Analisis daripada Perspektif Islam dan Perspektif Keluarga dalam Konteks Kesejahteraan Sosial (Transexuality: An Analysis from Islamic and Family Perspectives in Social Well-being Context) Amran Hassan, Fatimah Yusooff, Khadijah Alavi Pusat Pengajian Psikologi dan Pembangunan Manusia, Universiti Kebangsaan Malaysia, Jurnal Perspektif Jil 5 (2013) Bil 1 (39-52) at <http://www.myjurnal.my/filebank/published_article/30103/3.PDF>.

65 *Bostock v Clayton County, Georgia*; *Altitude Express v Zarda*; and *Harris Funeral Homes v the Equal Employment Opportunity Commission* as discussed earlier.

Understanding Sabah Land Law Through Current Land Issues

by

*Justice Christopher Chin**

Objective

[1] The objective of this article is to give the reader a quick overview of the operation of the Sabah Land Ordinance through the discussion of three topical issues being:

A. Defeasibility of interest in land;

B. Public reserves in the context of planning law and procedure; and

C. Dealings in native titles.

[2] It is immediately conceded that this article is of limited application to the land laws and procedures both in Peninsular Malaysia, the Federal Territory of Labuan, as well as in Sarawak.

[3] As part of the Malaysia Agreement, the State of Sabah reserved the right to legislate on all matters relating to natural resources and local government. This is enshrined in the Federal Constitution:

> Article 95D
>
> Exclusion for States of Sabah and Sarawak of Parliament's power to pass uniform laws about land and local government.
>
> Article 95E
>
> Exclusion of States of Sabah and Sarawak from national plans for land utilization, local government, development etc.

[4] Hence laws relating to land and interest in land in Sabah are principally embodied in the following state legislation:

---

* Judicial Commissioner of the High Court of Sabah & Sarawak.

(i) Land Ordinance (Cap 68) ("SLO") – in relation to land, alienation of land, dealings in land, interests in land including native customary rights. See also Land Rules (GN 505 of 1930).

(ii) Land (Subsidiary Titles) Enactment 1972 ("LSTE") – in relation to subsidiary titles or known as strata titles in Peninsular Malaysia.

(iii) Land Acquisition Ordinance (Cap 69) ("LAO") – provision for compulsory acquisition of land for public purposes and the consequences of such acquisition.

(iv) Local Government Ordinance 1961 ("LGO") – local government.

(v) Town and Country Planning Ordinance (Cap 141) ("TCPO") – town and country planning and the provision for master planning or approved schemes relating to the orderly development of land.

(vi) Forest Enactment 1968.

(vii) Mining Ordinance 1960.

(viii) Housing Development (Control and Licensing) Enactment 1978 ("HDE") – providing for the Controller of Housing to protect buyers' interests in respect of residential (only) development in the course of construction.

[5] The state legislation referred to herein can be sourced online at "sabah lawnet".

Basic land law regime – (modified) Torrens – Alienation by way of lease from state

[6] Similar to most Commonwealth jurisdictions, all land is state land. Ownership of land is by way of the state alienating a parcel of land to the "owner" to be held as lease from the state complete with tenure, annual rent, identification of the land, etc.

[7] All documents of title in Sabah are formalised in the form of a lease agreement from the state to the "owner". Hence, it is no coincidence that the documents of title are all categorised as leases. The categories of leases are mainly country leases, town leases, provisional leases, native titles and field register. Save for native titles (and field register which are issued in perpetuity, the leases are generally for a term of

99 years though there are leases created in the pre-colonial era for 999 years and which are still on the register. Recent industrial lands were alienated for a term of 60 years.

[8] Subsidiary titles are titles for parcels of air space and are, in most respects including regime and legal effect, identical to strata titles. They are issued subsidiary to the parent title and therefore named as such. However there is at present no legislation in Sabah equivalent to the Strata Management Act 2013 applicable in Peninsular Malaysia.

[9] Field register is also a native title with all the ingredients of a lease except that the tenure is in perpetuity as the interest is derived from established native customary rights.

[10] The system of registration of dealings is the basic Torrens system of land registration. There are numerous attempts by academicians as well as the Judiciary to suggest that Sabah land law is a "modified" Torrens system owing to the absence of a provision on indefeasibility of title as appearing in section 340 of the National Land Code 1965 or section 132 of the Sarawak Land Code (Cap 81).

[11] Section 340 of the National Land Code 1965 in Peninsular Malaysia provides for a system of deferred indefeasibility whereas the Sarawak model is direct indefeasibility.

[12] Provisional leases and field registers do not have clearly established boundaries yet. Hence, if the outcome of a properly sanctioned survey reveals a reduction in the land area when compared to the area disclosed in the earlier document of title, there can be no claim for compensation against the state (Article 13 of the Federal Constitution).

Documents of title are actually lease agreements with the state

[13] The format of the documents of title in Sabah are structured in the form of a lease agreement between the state and the (current) owner. All the components normally found in a tenancy or lease agreement are found and in like order in the document of title. It is therefore no coincidence that all titles are called "leases" for the plain reason that they are structured formally as leases. See Schedule VIII to the SLO:

SCHEDULE VIII

(*Sections 48 and 57*)

FORM OF LEASE

Title No.

THIS TITLE made this day of 19, between the Director of Lands and Surveys for and on behalf of the Government of the State of Sabah (hereinafter called "the Director"and

Name No. Name Decimal Share

(hereinafter called "the Owner(s)" which term shall include executor(s), administrator(s) and assignee(s));

WITNESSETH that, in consideration of the payment to the Government of the State of Sabah of the
premium of RM (ringgit) and
annual rent of RM (ringgit)
the Director hereby demises to the said Owner(s) all that piece of land as survey lot No. and containing more or less which said land is delineated on the diagram drawn on these presents and more particularly on plan No.
deposited in the office of the said Director,
TO HAVE AND TO HOLD for the period
from day month year
to day month year
subject to the provisions and conditions contained in the Land Ordinance and to the special terms described herein.
SPECIAL TERMS:

DIAGRAM

District of
Locality:
Scale: Chains per inch
Ref. No.
Geo Code No.
Registration Fees RM
Receipts Nos.
Examined for survey Lot
by:
dated:
terms
by:
dated:

payments
by:
dated:

IN WITNESS WHEREOF, I the said Director and I/we the said Owner(s) have hereunto set our hands this day of 19
Signature(s) of Owner(s) Director

Signatures of attestors to the signatures of Owner(s) and Director above, as authorised under section 97 of the Land Ordinance

Name and Designation of attestors:

(BLOCK LETTERS)

REGISTERED this day of 19

Registrar of Titles

[14] The same applies to native titles and field registers save that their tenure is in perpetuity and not for a term of years as the interest is derived from constitutionally protected native customary rights.

[15] This fact becomes very significant when we explore the planning process in Sabah leading to the development of land. This form of the lease has legal significance when it comes to the conversion and amalgamation process.

A. Indefeasibility of interest in land

[16] In the case of *Borneo Housing Mortgage Finance Berhad v Time Engineering Berhad*[1] ("the *Time* case") Edgar Joseph Jr FCJ delivered the decision of the Federal Court (which coram was made up of Mohd

1 [1996] 2 CLJ 561.

Eusoff Chin CJ and Wan Yahya Pawan Teh FCJ) which included the following words (paraphrasing):

> The system of land tenure in Sabah is not an absolute Torrens system but a modified Torrens system of Land Registration. Unlike the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring indefeasibility of title … there is no provision in the (Sabah Land) Ordinance conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of Land Registration.

[17] This case was to seal the notion that the SLO embodies an imperfect Torrens system of land registration. This concept has resulted in immense continued confusion and uncertainty in the administration of land matters in Sabah. For example, what is the effect of a "modified Torrens system" on registered interests? Does it negate the efficacy of section 88 of the SLO (quoted below)?

[18] In the *Time* case, a purchaser signed an agreement to acquire an industrial building/lot from a developer who had earlier charged the entire project land to Borneo Housing Mortgage and Finance Berhad ("BH") for a RM15 million facility which was secured by a registered charge over the project's parent title. The developer defaulted on the loan and BH then sought to auction off the project land by virtue of the registered charge against the interest of the purchaser manifested only by his sale and purchase agreement.

[19] This case led the development of equitable land interests in Sabah arising under the concept of bare trustee and evidenced by way of a sale and purchase agreement, and that such equitable interests may routinely override the priority and legality of registered interests.

[20] More recently another Federal Court panel made up of Arifin Zakaria CJ, Abdul Hamid Embong, Ahmad Maarop, Hasan Lah and Mohamed Apandi FCJJ applied the now accepted "modified Torrens" system of Sabah and decided in *Sia Hiong Tee & Ors v Chong Su Kong & Ors*[2] that the landowners' registered interests was defeated by the fact that the power of attorney which was used to transfer the registered ownership to them was a forgery.

2 [2015] 4 MLJ 188.

[21] The final outcome of fate of the parties in these cases pale in comparison by the law which has developed in relation to the interpretation of the SLO. In the *Sia* case, there was detailed discussion on section 88 of the SLO which states simply (paraphrasing):

> Section 88 of the SLO
>
> No new title and no dealing with, claim to or interest in any land except land … shall be valid until it has been registered in accordance with the provisions of this part.

[22] The learned Justices opined that the absence of the word "indefeasible" in section 88 distinguished the SLO from the National Land Code (section 240) and the Sarawak Land Code (Cap 81) (section 132). The Federal Court held:

> [31] We are of the view that section 88 of the SLO must be considered on its own without being unnecessarily influenced by the provisions of the NLC because they are poles apart …
>
> [32] The fact that the appellants found their way on the register of title does not automatically confer on the appellants an indefeasible title. In other words, it is open to enquiry as to how the appellants got themselves registered as owners of the land. This was what the courts below did in the present case and came to the conclusion that the appellants could not get valid title to the land on the ground that the power of attorney which was used as authority to transfer the land was a forgery.
>
> [33] We agree with the findings of the Courts below that the instrument of transfer in the present case was an invalid or void instrument of transfer as it was executed on the authority of a forged power of attorney, therefore it could not give rise to a valid title in law and the SLO does not seek to give validity to such a title even though the appellants were *bona fide* purchasers for value without notice. There is nothing in the SLO giving protection to such purchasers. Such statutory protection must be expressly provided in the SLO (*Gibbs v Messer* [1891] AC 248).

[23] This development has caused the concept of indefeasibility in Sabah to diverge from the similar concept in Peninsular Malaysia as well as in Sarawak. It is suggested that the fact that the word "indefeasible" was not included in section 88 should not dilute

the substance and functionality of section 88 which in effect says, "registration is everything", which in itself is the underlying basis for indefeasibility of title.

[24] Uncertainty is bred from the term "modified Torrens" system. Does this mean registered interests are not sacrosanct? If it is not Torrens then what is it?

[25] Does it mean that the system of equitable interests and the concept of bare trustees which were developed from the "modified Torrens system" (which is not provided for in the SLO and hence no dedicated system of giving notice, registration of such interests or of search) can routinely override a registered interest? It is not difficult to see the uncertainty these cases have caused to matters relating to interests in land in Sabah. See the practical requirements of "bare trustee" to be created in *Hiew Min Chung* (below) at [30].

[26] The position taken by the apex court may have been different had it been apprised of certain issues affecting land administration in Sabah, such as:

(a) The Uniform Procedure for the Redemption of titles 1988 (drafted by Valentine Willie as the then President of the Sabah Law Association) which addresses the accepted practice of allowing purchasers to acquire units of development in the course of construction and where the document of title of the project land (like the *Time* case) is subject to a prior registered charge;

(b) The Uniform Procedure for the Redemption of Properties Without Titles 1990 (drafted by Tan Sri Richard Malanjum as the then President of the Sabah Law Association), again addressing the issue of transactions of properties where documents of title have not been issued and which the property is assigned to a bank as security for certain banking facilities;

(c) The importance of the system of private caveats to notify of contingent interests in land, where the duty to notify the whole world of one's acquisition of interest in land falls squarely and naturally on the purchaser;

(d) The provisions of statutory sale and purchase agreements in Schedules G (landed properties) and H (subdivided buildings) which require mandatory disclosure by the registered landowner

and/or the developer of prior encumbrances (such as charges in favour of bridging financiers as in the *Time* case) over the project land, thus again dealing with the purchaser buying property constructed on encumbered project lands (Housing Development (Control and Licensing) Rules 2008);

(e) Under the entrenched Central Land Office's digitised system for the registration of land dealings called "LaDess" there is no room for a "memorandum of transfer-in-escrow" to be signed as a judicially established ingredient for a bare trustee relationship to arise;

(f) That powers of attorney can be noted under the SLO and registered under section 83 of the Stamp Ordinance of Sabah (Cap 137);

which for all intents and purposes adequately deal with the peripheral issues which arose particularly in the *Time* case, among others. Hence, section 88 can and ought to operate to make "registration as everything".

[27] The issue of fraud can be dealt with in the same manner as any other points of law are decided and developed in our adversarial system of jurisprudence. The provisions of section 240 of the National Land Code can be persuasive in Sabah, particularly on the point of allowed deferred indefeasibility.

[28] The mechanics of the registration of interests in land in Part V of the SLO is not dissimilar to the provisions in both the National Land Code as well as the Sarawak Land Code. The following sections of the SLO point towards a Torrens system despite the absence of the word "indefeasible".

Section 89 – how registration is effected, that is, by the prescription of a memorial number to the memorandum evidencing the dealing being entered into the register whereupon registration is deemed to have taken place.

Section 100 – the system of registration of the memorandum of a dealing in both the owner's copy and the Land Office's copy of the documents of title.

Section 103 – the provision for priority based on the time of the presentation of the dealing and not the date of the memorandum.

> Section 116 – the provisions to allow private caveats to notify of contingent interests which are pending and capable of being registered.
>
> Section 123 – the provision to allow for a system of an official search on the register of interest in any particular document of title.

[29] It would not be impossible for the Federal Court in some future case to be persuaded to judicially introduce greater certainty into the system and allow a scheme of deferred indefeasibility not unlike what is in force under the National Land Code and at the same time be consistent with the existing pronouncements in the *Time* and *Sia* cases above.

Bare trustee

[30] The idea that "registration is NOT everything" in Sabah has strengthened the concept of "bare trustee". This is best illustrated in the Sabah (Tawau) case of *Hiew Min Chung v Borneo Housing Mortgage Finance Bhd & Ors*[3] in the judgment by Richard Malanjum J (as he then was):

> The second defendant ("HFR") was the property developer of a housing estate. By a sale and purchase agreement, one Hiew Min Chu & Sons Sdn Bhd purchased from HFR one unit of a shop-house. No memorandum of transfer was executed by HFR in favour of the purchaser or its nominee.
>
> HFR proceeded to apply and obtained a bridging loan from the 1st defendant, Borneo Housing Mortgage Finance Berhad ("BHMFB") by way of creation of three charges on the said land that were duly registered on 15 February 1986 ("the charges").
>
> By a separate sale and purchase agreement the purchaser sold the said property to the plaintiff. HFR defaulted in its payment for the bridging loan and went into receivership. As a result thereof BHMFB has proceeded to commence action to enforce the charges duly encumbered on the said land which are now subdivided into various lots. The plaintiff opposes the action.
>
> The plaintiff argued that HFR was a bare trustee for the purchaser at the time of the creation of the charges and hence had no title, right or interest whatsoever in the said property to create the charges in

3 [2001] 1 MLJ 21.

favour of BHMFB; and that BHMFB had actually notice of the interest of the purchaser who is the plaintiff's predecessor and thus it would be unconscionable in equity for it to have taken the said property as part of the security for the charges.

Held:

[1] Since it is not in dispute that there was no memoranda of transfer executed in connection with the two sales of the said property the inevitable conclusion is that the doctrine of bare trustee is yet to be attained.

[2] The court is inclined to agree with 1st defendant that the least the vendors could have done in this case was to execute the memoranda of transfer in escrow regardless of the fact that the subdivision was yet to be carried out.

[3] The relationship of the plaintiff with the purchaser and the relationship between the purchaser and HFR are contractual in nature. There is no merit in the plaintiff's contention to have the charges declared null and void.

[4] In this case the solicitors acting for the parties may or may not be from the same firm at the material time. Therefore the plaintiff could not rely on the principle of knowledge of a solicitor to be imputed upon the client.

[31] In this case, the learned judge cited with approval the judgment of Edgar Joseph Jr FCJ in the *Time* case.

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, *upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.*
>
> In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in *Ahmad bin Salleh*, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

> We cannot, however, give unqualified approval to the view of Prof Visu Sinnadurai, found at p. 219 of his well-regarded book on *Sale and Purchase of Real Property in Malaysia* which, it will be recalled, was the "sheet anchor" of the judgment of the court below that "on the date of completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made" as this proposition, if applied universally, could cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration as in Sabah contained in a codifying enactment. Take this very case, where between the execution of the sale and purchase agreement and completion, the interest of the finance company chargee had intervened in the circumstances mentioned, so that to transfer into the law of vendor and purchaser, the law governing the rights and duties of trustees, statutory or otherwise, would give rise to considerable difficulties (per Jacobs J in *Chang & Anor v Registrar of Titles* (1976) 8 ALR 285 at 295).
>
> (Emphasis added.)

Take home points

[32] In conclusion:

(a) Although cases have decided that the SLO represents a modified Torrens system, the working and functionality of the SLO is nevertheless a system of registration of interests in land where registration is everything.

(b) Fraud in the instrument of transfer may defeat a registered interest.

(c) The system of deferred indefeasibility does not currently apply in Sabah but there is no reason why the apex court could not introduce such a concept if it does not go against the flow of the existing decisions (the *Time* and *Sia* cases above).

(d) The test for the creation of "bare trustee" relationship to arise in Sabah is as per *Hiew Min Chung* (above) save that the memorandum of transfer must be contracted or promised to be given at a future date and is a mere formality with no attached terms or conditions for its delivery.

(e) Owing to the digitalisation of dealings in Sabah, it is now not possible to pre-sign a memorandum of transfer where a

subdivided title has yet to be issued and therefore does not exist.

B. Public reserves in the context of planning law and procedure

[33] Confusion and uncertainty have arisen in relation to the use by the public of government reserves such as road and drain reserves as well as open spaces ("the Reserves").

[34] When the individual documents of title are issued for a project, the Lands and Survey Office will expressly stipulate in the documents of title for the Reserves stating therein the nature of the public reserves approved in the development plan for that plot of land within the approved development plan. The documents of title for such Reserves would be in the name of the original owner but would typically carry restrictions by way of special terms in the document of title itself, for example in the case of a road reserve:

(a) This land shall only be used as a road reserve; and

(b) transfer and sublease of this title is prohibited save to the relevant authority.

[35] This part seeks to explain the project planning approval process with a view to address the use and ownership of the Reserves.

Local authorities as the planning authority

[36] Local authorities are created by the Tuan Yang Terutama, The Governor by virtue of an instrument under section 3 of the LGO. The functions and powers of the local authorities are listed in the instrument with reference to the LGO (in particular section 49 of the LGO).

[37] In addition to the powers and functions listed in the local authority's instrument as well as in the LGO, there may be other powers or functions stipulated by statute. An example is the local authority's duties relating to the sewerage treatment and abatement of nuisance contained in the Public Health Ordinance.

[38] One of the mandatory functions is the regulation and control of all building operations. Section 4A of the TCPO states:

4A. The local authority shall be the planning authority in its area.

[39] Section 49(1) of the LGO states:

> 49. (1) The Instrument shall provide that subject to the provisions of any written law and subject to limitations and conditions as may be specified therein, an Authority either shall perform or may perform all or any of the following functions in respect of all or any part of its area.
>
> *Buildings*
>
> (23) regulate and control all buildings and building operations and the repair and removal of ruinous and dangerous buildings and subject to any written law relating to town planning, prohibit the erection of a building of a particular class, design or appearance in particular districts, localities or streets or portions of streets;

Approved Schemes or the lack of it!

[40] The development of land in Sabah is supposed to be well planned and structured through the TCPO. The TCPO lays down a procedure for the local authorities to work with the State Planning Council ("Planning Council") established under the TCPO for the drawing up of master planning schemes for the area falling within the jurisdiction of that local authority.

[41] Once a scheme drawn up by the local authority and having undergone public scrutiny and objections is approved by the Planning Council, steps would then be taken to gazette the scheme into what is defined in the TCPO as an "Approved Scheme".

[42] An Approved Scheme is a powerful planning document which conclusively narrows down and stipulates the permitted use for any particular alienated land.

[43] Section 18(4) of the TCPO states (paraphrasing):

> 18. (4) Any written law relating to development or building operations inconsistent with the provisions of an approved scheme or the application of which would tend to hinder the carrying out of an approved scheme shall not apply to the area to which an approved scheme relates.

[44] In the absence of an Approved Scheme, the discretion as to the proposed use of any alienated land vests with the Planning Council

thus defeating the planning functions of local authorities as intended by the legislature in the LGO.

[45] Section 15 of the TCPO provides what can be done if an Approved Scheme has *not* been gazetted but is in (eternal) progress (also called the period of prohibition):

> 15. (1) Subject to the succeeding provisions of this section, as from the material date no person shall, within the jurisdiction of any Local Authority, carry out any development of land or any construction, demolition, alteration, extension, repair or renewal of any building until six months after an approved scheme takes effect for the area containing such land or building.
>
> (2) A Local Authority may with the approval of the [Planning] Council during any period of prohibition under the provisions of subsection (1), do all or any of the following things, that is to say –
>
> (a) grant to any person applying therefor permission in writing to develop land, construct, demolish, alter, extend, repair, or renew a particular building in the area to which such scheme is proposed to relate;
>
> (b) prohibit the further proceeding with the development of land or construction, demolition, alteration, extension, repair, or renewal of any particular building situate in the said area, stating in writing their reasons for such prohibition.
>
> (3) The [Planning] Council may authorise or instruct a Local Authority to attach to a permission granted under this section such conditions as it thinks proper.

The start of a development – Land owner applies for planning permission for his proposed development

[46] In general, a development starts with the landowner submitting a proposed development plan ("DP") to the local authority having jurisdiction over the territory where the proposed project is sited.

[47] The DP is usually a single plan stipulating the layout of the project, the intended use (e.g. residential, commercial or mixed residential and

commercial), density and especially the exact location, area, routing and configuration of the Reserves.

[48] The landowner who must sign the proposed DP *applies to* the local authority for planning permission.

[49] The local authority seeks comments from the relevant authorities (such as the water department, Jabatan Kerja Raya ("JKR") – traffic, drainage and irrigation, bomba, electricity supplier, JKR – sewerage treatment, etc.) and may ask the landowner to relocate or redesign the Reserves based on the comments by the respective department.

[50] The landowner amends the DP accordingly and resubmits the amended DP seeking approval of his amended scheme.

[51] As the land is not within an "Approved Scheme" its permitted use is not already defined. Therefore a copy of the DP is required to be sent to the Planning Council for approval of land use on the basis of section 15 of the TCPO (see paragraph [45]).

[52] When the amended plans have met the approval of all the departments as well as the Planning Council, the local authority issues planning permission evidenced by a letter from the local authority to the landowner to such effect together with an endorsement or stamp on the approved DP.

[53] What it is critical to realise at this stage is that the local authority has approved the project scheme on the basis of what the landowner has applied for. Put simply, the Reserves appearing in the approved DP are part of the scheme applied for by the landowner.

Conversion of land use

[54] The landowner must next convert his land use to correspond with the intended use of his project. If his land is evidenced by a country lease then it is implied that the use is agriculture. If the proposed project is, say, residential, then he has to apply to convert the permitted use of his lease from agriculture to residential.

[55] Sections 54 and 31(1)(e) of the SLO are relevant (paraphrasing):

> Section 54
>
> Land which has been alienated under this Part [Part II Country Lands] shall not be used for other than agriculture purposes except

with the permission of the Minister [of Natural Resources] who may impose additional premium or rent or add or substitute such terms and conditions as he may think fit.

Section 31(1)(e)

Any owner of alienated land shall not commence any development on the land which shall change the use of the land except with the permission of the Minister [of Natural Resources].

The conversion process and underlying legal implications

[56] A project normally sits on two or more titles and in majority of cases, the original titles will be of agricultural use. Hence there is a need for the landowner to (1) amalgamate the titles; (2) convert the land use from agriculture to, say, residential; and (3) subdivide the land to the individual plots based on the scheme of the landowner's project.

[57] The terms "conversion" and "amalgamation" do not appear in the SLO. They are administrative terms adopted by the Lands and Survey Department. However,

(a) conversion is a requirement as a result of the provisions in section 31(1)(e) above (see [55] above);

(b) section 39 of the SLO provides for "Combination of titles" or amalgamation:

39. *Combination of titles*

In the absence of an express condition to the contrary in the document of title any owner of two or more contiguous lots may, subject to the provisions of any written law for the time being in force relating to Town Planning or governing the size, shape or area of land to be held under any single title, combine the same in one lot, and the title to such one lot shall be subject to such of the conditions set forth in the documents of title to the several lots as the Director may select.

(c) section 40 of the SLO provides for the subdivision of titles:

40. *Subdivision of titles*

(1) If the owner of any land comprised in any document of title is desirous of dividing or partitioning such land,

> application shall be made to the Collector to accept a surrender of such title and to issue new leases or make new entries in the Register relating to the land comprised therein in such lots as the owner may desire. The Collector shall thereupon in lieu thereof and subject to the provisions of any written law for the time being in force relating to Town Planning or governing the size, shape or area of land to be held under any single title, issue such titles as may be required, on the terms of the original title:
>
> Provided that all arrears of rent and charges, if any, due under the original title shall have been satisfied:
>
> And provided further that the Director shall impose additional premium and the rent payable to the Government in respect of each of such sub-divisions and shall enter such amounts on the new titles and also impose special conditions in respect thereof to be set out in the titles. The rent, if any, reserved on each parcel shall not be less than fifty sen in the case of a lease or twenty sen in the case of a Native Title.

[58] The application of conversion is simply made by the landowner again personally applying through his appointed surveyor, advocate or architect to the Director of Lands and Survey.

[59] The Lands and Survey Department, on behalf of the state government, has no planning function and has little or no right to comment or question the DP approval. Planning function is reserved to the local authority. The Lands and Survey Department can interfere only on technical matters relating to land. For example, when the project land has, unbeknown to the landowner, been gazetted for ridge conservation, water catchment, as foreshore reserve or has wholly or partially been compulsorily acquired by the state for a public purpose.

[60] The approval of the conversion under section 31(1)(e) is manifested by a "letter of offer" from the state, through the Director of Lands and Survey. This offer is conditional ("the offer"). The conditions typically include:

- the imposition of premium;
- enhanced annual rent;

- requirement to surrender the document of title;
- the restoration or reduction of the tenure of the original title to 99 years; and
- the requirement to accept the offer by signing and returning the letter (including paying the premium) within a limited period, usually of six months, failing which the offer would lapse.

Conversion and tenure of converted subdivided titles

[61] As per section 40 of the SLO, "the Collector accepts a surrender of title and issue new leases or make new entries in the register" (see [57] above). The titles would have a tenure of 99 years as provided by section 48 of the SLO:

> 48. Subject to any special exceptions made by the Minister in particular cases every lease under this part shall be substantially in the form of Schedule VIII, and shall be for a term not exceeding ninety-nine years.

[62] This conversion process is frequently ignored by the landowners because of several reasons. Firstly, the lengthy time taken by the Minister of Natural Resources to issue the offer of conversion and secondly, the quantum of premium, payable in cash, is usually high and developers would want to delay this payment till its cash flow improves when sales of the units to be developed is underway.

[63] The state government has in 2017 under what is now known as a "Quick Fix Circular" taken steps to prevent landowners from ignoring this crucial step by requiring the local authority to ensure such conversion process is completed by prohibiting the issuance of the certificate of fitness for occupation of the completed project unless the conversion is done.

[64] Failure to convert land use is blamed for many ills that plague the state as well as the purchasers. Examples are:

(a) documents of title to evidence ownership take years to be issued if at all;

(b) in the case of high rise developments involving proposed subsidiary (strata) titles, the mechanics and legal regime for a management corporation cannot be enforced, leaving the purchasers helpless and in the hands of the developer;

(c) loss of short term and long term revenue by the state in the form of premium (short term) and revised annual rent (long term).

[65] It is important to note here that the conversion process is applied for by the landowner to the Director of Lands and Survey, based on the landowner's own Approved Scheme of development and over which the Director has no overriding control (save for technical land issues). As mentioned earlier, the land authorities have no planning function. They merely follow what the planning authority has already approved.

[66] Hence, the conditions and limitations contained in the documents of title of the Reserves are not imposed by the local authority or by any authority but are as a mirror of the terms of the local authority-approved DP drawn up and signed by the landowner.

The surrender of the project lands for conversion and subdivision pursuant to the acceptance of the offer

[67] Surrender is provided in section 38 (paraphrased):

> 38. Land held under a title issued either before or after the commencement of this Ordinance may at any time be surrendered to the Government in accordance with the procedure laid down in section 112 and the document of title delivered up, and *upon registration of such surrender as hereinafter provided, the land* ***shall vest in the Government free of all encumbrances*** …
>
> (Emphasis added.)

[68] Although the form of surrender makes express reference to the offer and hence the surrender is in the acceptance and performance of the offer which by then is a contract between the state and the landowner, it must be noted that once the surrender is registered under section 38 above, for a moment, no matter how fleeting, the project land reverts back to the state free from all encumbrances (see embolden words in section 38 above).

[69] Hence it can convincingly be argued that even though the SLO provides for "Combination of Titles" or amalgamation in section 39 and "Sub-division of titles" in section 40, any fresh titles following such amalgamation and subdivision must necessarily mean a new alienation as that is the only way state land (as a result of surrender) can become titled land.

[70] Put simply, the subdivided titles can be considered practically to be fresh alienation. With a fresh alienation, section 48 binds the state to limit the lease to 99 years even if the original lease was originally of a tenure of 999 years.

[71] Section 48 is a necessary clause to resolve practical problems relating to tenure of subdivided titles. If the entire project sits on a single title then there is no issue.

[72] What happens if the project sits on two parcels of land, one is of 999 original tenure and the other has a residue of a 99-year tenure? What tenure should the subdivided titles have? A more extreme but very common example is where a native title held in perpetuity is sought to be amalgamated and converted with a title of say 99 years (or its remainder)? What tenure would the subdivided titles have? Section 48 levels all these issues with a grant of at least a uniform lease of 99 years across the board. However in a recent case of *Chin Kim Phin v Director of lands and Survey, Sabah & Anor*[4] Justice Tuan Wong Siong Tung JC ruled in the High Court at Kota Kinabalu that in an application for land development including subdivision amalgamation and conversion in the use of land, the Department of Lands and Survey is not seized with the power to impose the condition that leasehold tenure for titles to be issued be reduced from 999 to 99 years. Justice Wong's reasoning was that land tenure had no relation to town planning considerations.

[73] It is contended that all the lands, upon surrender, necessarily revert to the state, otherwise amalgamation and subdivision cannot take place. See section 38 at [67] above where, "… *upon registration of such surrender as hereinafter provided, the land* ***shall vest in the Government free of all encumbrances*** …".

[74] The transition from state land to subdivided titles, albeit by virtue of contract through the acceptance by the landowner of the letter of offer issued by the state (for amalgamation, conversion and subdivision), necessarily is a form of alienation as there is no other procedure in the SLO for titles to be issued.

4 [2020] 6 CLJ 23.

Why are the documents of title to the reserves issued in the name of the landowner?

[75] I believe there are two main reasons for this.

[76] Firstly, the Lands and Survey Department now takes the stand that if the project lands total say, 10 acres, then upon completion of the exercise of amalgamating, converting the land use and subdividing, the sum total area of all the subdivided titles must also equal 10 acres. If the Reserves are issued with documents of title in the name of the relevant authority, e.g. to the local authority in relation to open space and road reserves, then the landowner will get back a total land area which is less than what he originally surrendered, thus exposing the state to a claim for compensation (see Article 13 of the Federal Constitution).

[77] Secondly, the Reserves are part of the landowner's project's infrastructural scheme manifested in his approved DP.

What do the local authorities say about the Reserves

[78] In the letter granting planning permission to the landowner for his DP, the local authority stipulates in writing as a standard term that the Reserves are to be transferred to the local authority upon the completion of the project. Previously, the local authorities would insist that the landowner execute a memorandum of transfer for the Reserves in favour of the local authority as transferee. This is no longer possible as the Central Land Office has implemented LaDess (Land Dealing Electronic Submission System).

[79] It follows that the Reserves are beneficially owned by the relevant authority consonant to that Reserve's use. For example, the local authority is the beneficial owner of the open Space, road and drain reserves, the electricity sub-station reserve would be beneficially owned by SESB, the utility provider.

[80] The landowner therefore holds the registered ownership in the documents of title for the Reserves as bare trustee for the local authority or other authority concerned.

[81] The Reserves was part of a scheme of development proposed and applied for by the landowner. The local authority accepted the landowner's scheme which approval was manifested in the planning

permission and which the land authorities honoured with the amalgamation (as the case may be), conversion and subdivision into the scheme applied for by the landowner and approved by the local authority as the planning authority. It was a fundamental term of the approval of the DP that the Reserves be transferred to the relevant authority upon completion of the project.

Take home points

[82] In conclusion:

(a) Planning functions and powers are the exclusive reserve of the local authority. The land office has no planning function and must process land conversion and subdivision (with amalgamation where necessary), if the intended use, planning or project scheme and subdivision scheme has been approved by the local authority;

(b) The creation and establishment of Reserves has its origins in the application by the landowner for planning permission for his project or scheme;

(c) The Reserves form part of the landowner's applied for and approved development;

(d) In commencing the development based on the approved DP, the landowner has accepted that the Reserves would belong to the relevant authorities;

(e) The amalgamation, conversion and subdivision of the project lands by the land authorities must follow the approved DP;

(f) The converted subdivided titles are derived as a result of a contract between the landowner and the state to amend the lease agreements (as per the documents of title) being the titles for the project lands; and

(g) The landowner holds the Reserves as bare trustee for the authority concerned as the sole unencumbered beneficial owner and as such is legally obliged to complete the final formality by transferring the registered ownership of the Reserve to the same authority upon the issuance of the document of title and when the project is completed in accordance with the local authority-approved plans.

C. Dealings in native titles

[83] Dealings in native titles (that is land derived originally from native customary rights) by non-natives are expressly prohibited in the SLO. This is provided for in section 17 of the SLO:

> *Land dealings with natives*
>
> 17. (1) Except with the written permission of the Minister *all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden* and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.
>
> (5) Notwithstanding the provisions of this section and of section 64, it shall be lawful for the owner of land held under the provisions of Part IV to grant a sublease of such land to a non-native for a term not exceeding thirty years.
>
> (Emphasis added.)

[84] Section 64(2) of the SLO goes on to reinforce section 17 above by disallowing a native to grant a power of attorney to a non-native where the subject-matter of the power is the native title:

> 64. (1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.
>
> (2) Notwithstanding the provisions of any written law, *any power of attorney whereof the donee or any donee is a non-native, if it relates to any land held under this Part, shall be null and void.*
>
> (Emphasis added.)

[85] An aspect of the definition of "native" is that the Native Court under the Interpretation (Definition of Native) Ordinance (Cap 64) allows to Native Court the power to declare, after enquiry, a person to be a native. Such declaratory order from the Native Court is in the form of a "*Sijil Anak Negeri*" ("SAN").

[86] Owing to widespread intermarriage between the kadazandusun race and Chinese and other races, it is extremely common to find

persons with pure Chinese names (or other non-native sounding names, including Caucasian names) being of native blood and thus entitled to own and deal with interests in native titles. Such persons would in most cases be in possession of a SAN.

[87] The wide declaratory powers of the Native Courts in issuing SANs led to rampant abuse with persons having very remote connection to Sabah or to the Sabah native culture being issued with (a "purchased") SAN and then buying up huge swaths of land held under native titles either for future development but more often than not, for speculation.

[88] Such abuse resulted in Datuk Harris Salleh (now Tan Sri) the then Chief Minister of Sabah ordering, in 1983, a moratorium to all Native Courts from issuing any further SANs and such order subsists till today. The lure of ill-gotten gains meant that SANs continued to be issued despite the moratorium by back dating the SAN to pre-1983, though the numbers were limited.

[89] Owing to the scarcity of land closer to the urban areas, native titles became the favoured project lands till today. Like country leases, native titles are for agricultural use.

[90] An entire industry then emerged (with the lawyers as the architects) of non-natives using a native nominee to purchase native titles and that the native would hold the land on trust for the *de facto* owner, the developer. The modus included that the native nominee pre-signing an undated memorandum of transfer and a power of attorney to an unnamed transferee/attorney to be used if the nominee becomes "naughty" or is ill, insane or is close to bankruptcy.

[91] The Federal Court fairly recently rightly declared this nefarious practice to be illegal and the apex court upheld the decision of Rahman Sebli J (as he then was) at the High Court. This was in the case of *Malayan Banking Berhad v Neway Development Sdn Bhd & Ors*.[5] The effect of sections 17 and 64 referred to above is clearly illustrated in this case:

> The appellant granted a term loan to the fourth respondent "to part finance the purchase" of a native title in the District of Penampang, Sabah ("the native land"). The second and third respondents, the directors of the first respondent, guaranteed the term loan and the bridging loan facility given by the appellant to finance the development

5 [2017] 9 CLJ 401.

project on the native land and other native lands. As the fourth respondent was not a native by definition in law in Sabah and thus prohibited to buy directly any native land, a native nominee was used to hold the native land in her name in trust for and on behalf of the fourth respondent. It was the native nominee who entered into the sale and purchase agreement for the purchase of the native land and had also executed a power of attorney giving absolute power to the fourth respondent to sell, dispose of, charge or in any way deal with the native land. By a deed of assignment, the term loan was absolutely assigned by the fourth respondent to the first respondent and in turn, the fourth respondent stood as the corporate guarantor for the first respondent. The assignment was with the full knowledge and consent of the appellant. However, when the project was abandoned, the appellant cancelled the facility. The appellant's claim against all the respondents was for the outstanding sum of RM2,178,105.28 as at 31 October 2008. The High Court dismissed the appellant's claim on the grounds that the term loan was for an illegal purpose in that it was given for the purchase of the native land in contravention of *ss 17(1)* and *64(1) of the Sabah Land Ordinance (Cap 68) ("SLO")*. It was held that *s 17(1) of the SLO* clearly prohibits any dealing between a native and a non-native in respect of a native land. It was thus ruled that since the transaction was tainted with illegality, the sale and purchase agreement as a whole was void by virtue of *s 24(a) and (b) of the Contracts Act 1950*. In turn, all the other instruments connected with the sale and purchase agreement such as the deed of assignment and the letters of guarantee were also tainted with illegality. The Court of Appeal agreed with the findings of the High Court and dismissed the appellant's appeal. Hence, the appellant obtained leave to appeal on the sole question of law of whether a deed of trust is a "dealing" within the meaning of *s 4 of the SLO* and therefore is illegal under *ss 17(1)* and *64(1) of the SLO* where the subject matter is a native title.

Held (dismissing appeal)

Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The leave question was academic and misconceived. It simply ignored the first stage of the transaction, namely, the purchase of the native land by the fourth respondent through the native nominee, which was obviously done in order to circumvent a clear statutory prohibition. The fact was confirmed by the execution of a successive power of attorney, an instrument prohibited by

s 64(2) of the SLO. As such, the purchase of the native land itself was illegal ab initio. By virtue of *s 24(a) and (b) of the Contracts Act 1950,* any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with illegality. (para 22)

(2) There was a deception practiced on the relevant land office in registering the native land under the name of the native nominee, when in truth, the real owner/buyer was the fourth respondent and thereafter registering the charge in favour of the appellant. The appellant could not say that it was a bona fide lender without any knowledge on the purpose of the term loan. It knew the purpose of the term loan and knew well that it was the fourth respondent who was the actual owner/purchaser of the native land using the native nominee in order to circumvent the prohibition of *s 17(1) of the SLO.* Indeed, the appellant came to court with unclean hands. Such a deception was contrary to public policy and the registration was therefore illegal and invalid. (para 23)

[92] Any investor of plantation-based stock of companies listed on the KLSE would note the numerous companies having vast estates in Sabah and actually listing these estates in their annual reports posted with the stock exchange as "native titles". In fact, these companies own leases over native titles which was allowed to non-natives for a tenure, initially of up to 99 years and subsequently limited by the state legislature to 30 years. (see section 17(5) at [83] above).

[93] Another unfortunate conveyancing practice is the attempted sale of state lands which had been applied for and were thus under "land applications". Until the land is alienated as evidenced by the issuance of a document of title in the name of the land applicant, the land remains state land. A "land application" is merely an application which can be rejected (and is frequently so) and there may be any number of overlapping applications over the same land claimed on the basis of native customary rights or otherwise.

[94] It is common for land applicants to "sell" the rights to their land applications to third parties and would, as part of the modus, grant a power of attorney to the "buyer" to deal with land authorities to procure that a title is eventually issued for the land application concerned and thereafter to execute a transfer of the title in favour of the buyer/attorney by virtue of such power.

[95] As the acreage of land per applicant is limited, a long list of *kampong* folk would apply for individual contiguous parcels of land and appoint one among them (again by the dreaded power of attorney) to represent all of them in the sale of their applications to the proverbial "Chinaman".

[96] This is best illustrated in the Court of Appeal's decision in *Kwan Ngen Wah & Ors v Hiew Kon Fah & Ors and Other Appeals*,[6] where Tengku Maimun Tuan Mat JCA (as she then was) sat in a coram with Mary Lim JCA and Yaacob Md Sam JCA. The facts are somewhat convoluted and are produced here in full from the CLJ report.

> The dispute in the present appeals concerned an oil palm plantation ("the lands") which were originally the subject of land applications in 1984 by 46 natives led by one Hadji Nur Sakandal ("Sakandal"). In 1988, the land applications were approved for logging. Sakandal, who had a power of attorney ("POA") granted by the natives, entered into a sale and purchase agreement ("SPA") with Kwan Ngen Wah and Kwan Ngen Chung ("Kwan brothers") in 1992 ("the 1992 SPA"). By a substituted POA, Sakandal granted a POA to the Kwan brothers who, through their company, Kwantas Development Sdn Bhd ("Kwantas"), entered and cultivated the lands. In 1999, land titles were issued to Sakandal and the 45 natives and these titles were collected by one Abdul Hamid Dullih ("Hamid"), on the basis of a POA granted by the natives. The Director of Land and Survey Department gave permission to the natives to transfer the lands to Hamid. The Kwan brothers wrote to the Assistant Collector of Land Revenue ("ACLR"), requesting the Land Office not to register the transfer of the lands to Hamid pending the resolution of their rights over the lands. However, in 2001, the transfer from the natives to Hamid was registered. Hamid later transferred the lands to one Julita who then entered into an SPA with one Hiew Kon Fah ("Hiew") to sell the lands ("the 2005 SPA"). Julita also executed a valid and registrable memoranda of transfer ("MOT") and all other documents to transfer the lands to Hiew. In 2005, Hiew subleased the lands to Gabungan Saga Sdn Bhd ("Gabungan") for a period of 90 years. Hiew and Gabungan executed an MOT in favour of Bumiputra-Commerce Bank Bhd ("the bank") for a loan facility of RM48 million. The loan, which was to finance the purchase price to Julita, was released in October 2005. Hiew and

6 [2019] 6 CLJ 722.

Gabungan filed a suit at the High Court, against the Kwan brothers and Kwantas, for an order of possession of the lands, damages and an account of all the proceeds of the oil palm fruits harvested by the Kwan brothers from 14 February 2005 ("the original action"). Resisting the original action, the Kwan brothers argued that (i) Julita was never the registered owner of the lands and Hiew could not have purchased the lands from her; and (ii) the endorsements of the transfer and/or the sublease was null and void or, in the alternative, such endorsements were forgeries or tainted with fraud. The Kwan brothers counterclaimed against Hiew, Gabungan, the bank, Vun Yun Lau ("Vun"), Julita, the ACLR of Kinabatangan, the Registrar of Native Titles, Kinabatangan and the State Government of Sabah ("the defendants in the counterclaim") on grounds of fraudulent transfer of the lands to Hiew ("the counterclaim"). The High Court dismissed the original action and allowed the counterclaim in part. Hence, the present appeals by (i) the Kwan brothers against the part of the decision of the Judicial Commissioner ("JC") in dismissing their counterclaim against the bank and the State Government of Sabah ("Appeal No 742"); (ii) Hiew, Gabungan, Vun and Julita against the decision of the JC in dismissing the original action of Hiew and Gabungan and in allowing the counterclaim ("Appeal No 3134"); and (iii) Hiew and Gabungan against the order of the JC in allowing the Kwan brothers' and Kwantas' application for, *inter alia*, an accounts of the proceeds of harvesting the oil palm fruits on the lands. The issues that arose for adjudication were (i) whether the counterclaim was barred by limitation; (ii) whether the Kwan brothers proved their case of conspiracy, collusion, fraud or forgery; and (iii) whether Julita's counterclaim ought to be allowed.

Held (allowing Appeal No 742; dismissing Appeal Nos 3134 and 3135) Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) No consideration had passed from Hamid to the natives, neither was there any from Julita to Hamid or Hiew to Julita. The transfer of valuable lands to the buyer, without payment of the purchase price at the insistence of the purported seller could not be anything but a sham. Hiew had not proved his case that he was a bona fide purchaser of the lands for value. It followed that Hiew and Gabungan had no rights over the lands. The JC was correct to dismiss both Hiew and Gabungan's claim against the Kwan brothers and Kwantas. (para 64)

(2) The Kwan brothers had the locus to sue under the 1992 SPA. There was a valid sale and purchase of the beneficial interest in the lands by the natives to the Kwan brothers and, given the express provision in the 1992 SPA that the transfer to the Kwan brothers was conditional upon the approval of the Director of Lands and Survey, the 1992 SPA was not void for illegality under s 24 of the Contracts Act 1950. Neither did the 1992 SPA offend s 88 of the Sabah Land Ordinance ("Land Ordinance"). The issue of *nemo dat quod non habet* was answered by considering the totality of the terms and conditions of the 1992 SPA. Rule 2(4) of the Land Rules applied to the land office and the land applicants and it could not be the basis to find that the 1992 SPA is illegal or bad in law. (para 77)

(3) The Kwan brothers' cause of action in the counterclaim was to impugn the ownership of Hiew and the sublease to Gabungan which interests were only acquired by Hiew and Gabungan in 2005. The earliest time that the Kwan brothers had knowledge of Hiew's claim that he was the legal owner of the lands was in March 2005. The counterclaim filed on 14 February 2006 was thus well within time. The JC did not err in holding that the counterclaim of the Kwan brothers was not barred by limitation. The same reasoning applied to the other defendants in the counterclaim in that no cause of action would have arisen against any of them until the final act of registering the title to the lands in Hiew/Gabungan. Until then, the cause of action was neither complete nor actionable. (para 88)

(4) There were merits in the Kwan brothers' grievance and much force in their submission that the registration of the charge without the written permission of the Director of Lands and Surveys was bad and that there was no provision in the Land Ordinance for the retrospective application to cure a defect except by a fresh memorial. Even if the submission of Kwan brothers' could not be sustained, the belated written permission in itself, coupled with the other facts and surrounding circumstances, was indicative of something terribly amiss in the transaction. Furthermore, the solicitor, as the agent of the bank, had notice of the Kwan brothers' interest and/or that possible fraud or suspicion had been aroused and yet he failed to make further enquiries. On this ground, with the solicitor's knowledge imputed to the bank, the bank could not be said to be a bona fide chargee and

the registration of the charge would be defeasible unless the solicitor himself is not complicit in the fraud. (paras 98 & 103)

(5) There was sufficient evidence to show that Vun, Julita, Hiew and Gabungan had acted dishonestly, such as to deprive the Kwan brothers of the lands. Having regard to the sequence of events and the irregularities in the transaction and the whole circumstances of the case, the Kwan brothers had, on the balance of probabilities, established their pleaded case against the defendants in the counterclaim. (para 113)

(6) Although no reason was given by the JC on why Julita's counterclaim was dismissed, there was no reason to depart from the said decision. Julita was privy to the sham transaction and, undoubtedly, the lands were cultivated by the Kwan brothers. Julita would be unjustly enriched if her claim for profits from the lands, which were not developed through her efforts, was allowed. (para 114)

Take home points

[97] In the premises:

(a) In Sabah, people with Chinese names or distinctly non-native sounding names can be legitimate natives as defined in law;

(b) The practice of a non-native using a native nominee to purchase native titles is contrary to public policy and is void. It follows all other supporting transactions (such as a charge to a bank for a loan to finance the deal) would also be ruled as illegal and thus void *ab initio*;

(c) Native titles are of agricultural purpose and any development other than agriculture would require the land use to be converted with the approval of the Minister in charge of natural resources;

(d) A land application holds no interest in land at all. Interest in land arises only when the land alienation process is completed upon the issuance and registration of a document of title in the name of the land applicant.

Conclusion

[98] The above article seeks to discuss certain common and topical land issues in Sabah which has traversed the courts and continue to do so. It is hoped that the reader will gain some insight into the underlying principles at play when profit-orientated transactions tax the limit of what is permissible in law.

Cross-Examination of a Party's Own Witness – What it Entails?

by

*Justice Muniandy Kannyappan**

Abstract

[1] This paper looks at the applicability of section 154 of the Evidence Act 1950 [Act 56] on cross-examination of a party's own witness in the context of a criminal trial. The general notion of cross-examination is to get the truth from a witness on a fact in issue or relevant fact, being proof in a criminal case. It is rarely the liberty of the party who had called that witness for examination-in-chief to also cross-examine him. However, the court in its exercise of judicial discretion may allow such cross-examination. The *raison d'etre*, mode and manner in which leave is granted by the court would be explored. In the context, necessary reform in this area of law would also be considered.

Prelude

[2] Proof in a criminal case rests on the oral testimony of witnesses.[1] Proof beyond reasonable doubt is the standard of proof expected of the prosecution in a criminal trial.[2] Witnesses for the prosecution offer testimony on a fact in issue and relevant facts.[3] Ingredients of the offence alleged to have been committed by an accused which is the subject-matter of the charge against him shall be the mainstay of the prosecution when proof is afforded during a criminal trial, in order to establish a *prima facie* case against the accused.[4]

[3] From the viewpoint of the prosecution, a criminal case is established when a charge against an accused is proved. It is proved

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* Judicial Commissioner of the High Court of Malaya.

1 See Evidence Act 1950 ("EA"), s 60. It includes oral evidence as well as documentary and real evidence (see s 60(3) of the EA).

2 See Criminal Procedure Code [Act 593] ("CPC"), ss 173(m)(i) and 182A(1).

3 Ibid, ss 173(c), (d), (e) and 179(2). Reference is also made to s 3 of the EA on the interpretation of the terms "fact", "proved", and "relevant".

4 Ibid, s 173(f)(i) read together with s 173(h)(i) and (iii), and s 180(3) and (4).

when all its legal ingredients have been proved based on the evidence adduced by the prosecution. The evidence adduced has got to be credible.[5] Credible evidence which is accepted as proof of ingredients of an offence establishing case of the prosecution is ultimately evidence which has been filtered by the court and has survived the process of maximum evaluation by the trial judge. By that evaluation, evidence which is doubtful, *viz*. *cow jumping over the moon*, or not safe to be acted upon, would be rejected. Doubtful evidence would be highly improbable, inherently incredible, unreasonable and riddled with material discrepancies and contradictions, and the evidence of a witness whose credibility has been successfully impeached, rendering it unsafe to be accepted and acted upon by the trial judge. Thus, credible evidence must be free from reasonable doubt.

[4] Recently, our Chief Justice Tengku Maimun binti Tuan Mat, speaking for the Federal Court in the case of *Abdullah bin Atan v PP and Another Appeal*[6] on credible evidence proving each ingredient of the offence with direct reference to section 180(4) of the Criminal Procedure Code [Act 593] ("CPC"), decided as follows:

> … Section 180(4) of the CPC must be read in the light of its context and legislative purpose. By so doing, the phrase "credible evidence proving each ingredient of the offence" in section 180(4) means that the prosecution may prove each ingredient of the offence either:
>
> (i) By adducing credible direct evidence of that ingredient;
>
> (ii) By drawing inferences of fact, i.e. adducing credible circumstantial evidence, from which the ingredient can be inferred; or
>
> (iii) By invoking presumptions of law, i.e. adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists. …

[5] At close of the case for prosecution, the offence committed by accused forming subject-matter of the charge against him is proved by the prosecution *vide* credible evidence and in the absence of evidence to the contrary refuting the said proof, a case is established in order

5 Ibid, ss 173(h)(iii) and 180(4).
6 [2020] MLJU 1244.

for the accused to be called upon to enter his defence and when he opts to remain silent[7] and not call any evidence, he may be found guilty and lawfully convicted by the court on the case and it shall pass sentence according to law.[8] Hence, the decision as to whether the accused is guilty of the offence as charged has to be postponed until the court goes through the motion of calling the accused to enter his defence. It is only at the conclusion of a criminal trial, if he fails to raise a reasonable doubt on his guilt or the case of the prosecution, that the court would be legally correct to find him guilty and convict him; otherwise, he shall be acquitted of the charge against him.[9]

[6] On issues in a criminal trial, J Cropper[10] had said this in a nutshell:

> … In every criminal trial there are two issues. They are, whether or not a crime has been committed and, whether or not the accused person or persons committed it. It is, in the main, knowledge of the facts which enables those issues to be determined. Such knowledge, as presented to the court, is termed evidence. It includes all legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. All legal means imply that the evidence adduced must be that which is legally admissible, in other words, evidence which the law will allow to be presented.
>
> The law of evidence is derived from statutes[11] and from cases decided by High Court judges.[12] It governs:
>
> (a) what facts may or may not be proved;
>
> (b) what sort of evidence must be given of facts which may be proved; and
>
> (c) by whom and in what manner the evidence must be produced by which any fact is to be proved.

7 See CPC, s 173(ha)(iii).
8 Ibid, ss 173(m)(ii), 182A(2) and 183.
9 Ibid, ss 173(m)(iii) and 182A(3).
10 J Cropper, *Criminal Evidence and Preparation of Case for Prosecution* (London: Butterworths, 1965), at pp 1-2.
11 Locally, it is the EA and other relevant legislation containing evidential provisions.
12 In Malaysia, it would be the superior court judges, including the Federal Court, Court of Appeal and High Court.

> Fact is something which has happened, a deed, something done, an event. In short, assuming an offence has been committed, the fact "in issue" in a criminal case is whether the accused committed it or not.
>
> A "fact relevant to the issue" is one which tends to prove the existence or non-existence of the fact in issue.
>
> A "material fact" is one which it is necessary to prove to establish the case for the prosecution. For example, in a charge of housebreaking it is material to prove a breaking, by the accused, of the continuity line of the building.
>
> Facts proved must be both "relevant" and "admissible".
>
> To be relevant, a fact must be so connected, directly or indirectly, with the fact in issue that, either by itself or with other facts, it tends to prove or disprove the fact in issue. Whether or not a fact is relevant is frequently a matter of argument. It is permissible to prove attendant circumstances so that the court may see the material facts in the right setting, and facts which are not in issue can be given in evidence if they establish or rebut the facts in issue. In addition, facts which affect the weight of evidence, or its admissibility, may be proved. There are limitations to the evidence of facts which a witness can give. He can only give evidence of what he knows. For instance, a witness in a case of larceny[13] may give evidence that he saw the accused take the article, but not that he saw him steal it. There are six elements constituting larceny and of these, taking is but one. The other elements still have to be proved to substantiate the charge.
>
> A fact is admissible if the law allows it to be proved by evidence.
>
> Certain facts may not be proved. For example, the accused person's bad character or his predisposition to commit crime; hearsay evidence or opinion as to facts in issue. The former is not relevant and the latter not evidence of facts. There are exceptions to the general rule. Certain facts need not be proved because they are judicially noticed.[14] …

Examination of witness

[7] When a party examines a witness called by him, such an examination is called the *examination-in-chief*.[15] The witness may be

13 In English law larceny was replaced as a statutoy crime by theft.
14 In the Malaysian context, see ss 56 and 57 of the EA.
15 EA, s 137(1).

cross-examined after his examination-in-chief when he is examined by the adverse party.[16] After a witness has been cross-examined, he may be *re-examined* by the party calling him to testify.[17]

[8] The usual practice in a criminal trial is to examine a witness chronologically. This approach is beneficial, as the witness would be more comfortable in answering questions in a chronological sequence. The trial judge too would appreciate a chronological approach, as it is easier to follow the facts in the order they occurred. As it is chronological, this approach leads to clear, simple, credible and coherent answers from a witness.

[9] To adopt such an approach, the prosecutor embarking on an examination-in-chief has to bear in mind the following factors:

(i) What are the important facts which are necessary to be elicited from a particular witness? The guide shall be the ingredients of the criminal offence which is the subject-matter of the charge against an accused.

(ii) The order in which the evidence by witnesses will be presented to the trial judge.[18]

(iii) A natural way of conversation with the witness when asking questions has to be adopted.

(iv) An orderly manner of examination-in-chief ought to be the approach, so that exhibits which are tendered in court as evidence could be introduced appropriately, and not haphazardly, without a bearing.

No leading questions

[10] Generally, during examination-in-chief, a witness shall not be asked leading questions. Section 141 of the EA defines a leading question as one which suggests the answer to the witness. There are however exceptions when a witness may be led. With permission of the court (rarely done in practice, as it is assumed that it can be done), a witness can be asked leading questions during examination-in-chief,

16 Ibid, s 137(2).
17 Ibid, s 137(3).
18 See also ss 134 and 135 of the EA.

by virtue of section 142(1) of the EA. The court shall permit leading questions as to matters which are introductory or undisputed or which have already been sufficiently proved or established through other witnesses.[19] Thus, leading questions are only allowed by the court as an exception.

[11] The basic rule of advocacy is for the prosecutor to ask short and simple questions to a witness. By doing so, leading questions can be avoided during examination-in-chief. Such questions too will elicit short answers which are required from the witness. Short and simple questions with short answers form a witness' story. The story is in fact broken down without leading questions being asked. This technique of examination of a witness promotes clarity and precision of testimony of a witness, enabling it to be easily followed by a trial judge.

[12] The rule on admissibility of evidence of a witness in a criminal proceeding is anchored on the quality of evidence proffered. In that regard, credibility of the said witness who can offer credible evidence on the ingredients of the offence charged against the accused is the mainstay. Essentially, evidence of the witness would point to the fact in issue in a criminal trial, to wit, whether the offence alleged is committed and did the accused commit it.[20] Aside from evidence pointing towards the facts in issue and relevant facts, the remaining evidence *via* testimony of witnesses would serve to be corroborative evidence, which effectively has the effect of supporting the facts in issue and relevant facts.[21]

[13] In that regard, when a witness testifies in his own words in response to the short questions asked, such evidence would be more credible than when he responds to leading questions from the prosecutor. Such response would seem to be a validation of the prosecutor's own viewpoint or theory of the case he is prosecuting. In any event, asking leading questions to a witness would also prompt objections[22] from the opposing counsel which may have its ramifications, such as tendency for the trial to be derailed on incidental issues and more importantly, the said objections raised may affect the witness's composure.

19 EA, s 142(2).
20 The rule on admissibility of evidence is entrenched in s 136 of the EA.
21 See EA, s 157.
22 Ibid, s 142(1).

[14] With the approach of an answer to one short question henceforward leading to the next question and so forth, it forms a linkage and connection. This connection may be enhanced by referring to previous answers by a witness before asking a new question. Thus, testimony of the witness would be developed gradually in a logical, coherent and precise manner. Such a technique has the effect of fortifying the testimony of a witness who is in court offering credible evidence. It would also avoid the witness's testimony from being choppy and chaotic.

Significance of examination-in-chief

[15] In a criminal trial, a vital tool employed to handle a witness is *via* examination-in-chief. It is through that process the case of the prosecution is advanced to the trial judge. When the prosecutor examines his witness in chief, his demeanour is patently important to relax the witness. It will ensure one credible witness offering credible testimony. Patience is paramount when answers are being elicited from a witness. This would be particularly important if a lay witness testifies. He would testify to cogent facts, on what he saw, heard or perceived through his five senses. This is common in cases involving street crimes, where the witness has to state categorically on what he saw and observed, for example, in a snatch-theft cum robbery. His testimony has the greatest effect of buttressing the case of the prosecution. It can be achieved if the prosecutor who is conducting the examination-in-chief exhibits confidence and interest in what the witness has to say. Each thread of evidence has to be listened to carefully, thus attaching importance to his testimony, by which the said witness would be categorical in his subsequent answers. Otherwise, the witness will feel ill in the court room. Ease in testimony of the witness would enable the court to essay and comb through the evidence available swiftly, with no gaps and leaving no proverbial stone unturned.

[16] Simple questions could be starters before going for the jugular. The witness should face the judge when testifying and be audible so as to enable a rapport to be established. With these basic yet essential rules followed, a presiding judge recording the evidence of a witness may, at the conclusion of such evidence and at the notes of evidence, record such remarks which are material respecting the demeanour of such witness whilst under examination. The law dictates that a general reference to demeanour of witnesses, without condescending to any particulars, gives rise to suspicion that an attempt is being

made to bolster up a verdict which is contrary not only to the weight of evidence but to the probabilities, and which cannot be supported on a detailed examination of the evidence.[23] Demeanour constitutes the look or manner of a witness – his hesitation, doubts, variations of language or his precipitancy, his calmness or consideration. These would be remarks as to the demeanour of a witness to be recorded at the conclusion of the trial judge's evidence. Absence of such details may render conviction against the accused person a nullity. Thus, on appeal, the said conviction is liable to be set aside or the case may be remitted for retrial before another trial judge. The basis being, the trial could have been peppered with likelihood of bias.[24] Weighing the importance of demeanour, the mode and manner of recording the demeanour of a witness by a trial judge goes to show the importance of the judge having a direct rapport with the witness who is testifying. This is only possible if the prosecutor assists the court by the manner of the examination-in-chief, as alluded to above. Although demeanour is not always the touchstone of truth, it is definitely one ingredient in arriving at a finding of credibility.[25] The mode and manner of testimony by a witness and his conduct in the witness box and his riposte to questions put to him by the prosecutor in examination-in-chief fortifies the importance of his demeanour and temperament as a witness.[26] It affects the judgment of a trial judge regarding the credibility of witnesses.[27] The number of witnesses testifying on a fact or matter may not necessarily add weight to truth of the evidence given;[28] it is the credibility or truthfulness of each witness that must be considered. Hence, it is quality of testimony of a witness testifying and never the quantity of witnesses called that proves a case in court.

Basis for examination-in-chief

[17] Examination-in-chief of a witness by the prosecutor is primarily premised on the out of court statement[29] given by the said witness to the investigation officer ("IO") or recording officer ("RO") in the course of police investigation or investigation by any other law enforcement

23 See CPC, s 271 and the case of *R v Low Toh Cheng* [1941] MLJ 1.
24 See the case of *David Anthony v PP* [1985] 1 MLJ 453.
25 See the case of *Tengku Mahmood v PP* [1974] 1 MLJ 110.
26 In this regard, see also the case of *Tara Singh & Ors v PP* [1949] MLJ 88.
27 See again the case of *R v Low Toh Cheng*, n 23 above.
28 See EA, s 134. See also cases like *Jamaludin bin Md Kassim v PP* [2010] 3 MLJ 221, CA; *Hari Bahadur Ghale v PP* [2011] 5 MLJ 785, CA.
29 It is referred to also as a police statement, or a 112 statement.

agency pursuant to the written law enforced by them.[30] The source of power of investigation by the police pertaining to statement taking is section 112 of the CPC. A statement recorded under section 112 of the CPC has its attendant safeguards. The witness who renders a statement to the police is one who is acquainted with the facts and circumstances of the case which is being investigated.[31] He would be asked questions and the answers given by the witness is recorded.[32] At times, the question could just be one, which is, "could you tell what you know of the case involving the suspect or in reference to a police report." In such situation, the answer by the witness would be a narrative. But whatever the mode and manner of questioning, the answer proffered by the witness has to be the truth. The witness is legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.[33] Before a 112 statement is recorded, the witness would be warned by the recording officer to speak the truth,[34] as otherwise, he could be prosecuted for an offence of perjury under the Penal Code [Act 574] ("PC").[35] The witness may opt to remain silent during questioning. Currently, during statement taking, it is commonplace for a witness to remain so, especially if he is a suspect of a crime who may or may not be caught red-handed with the incriminating or offending exhibits. He would exercise his right to remain silent but reserves his right to have his day in court when he testifies. Such move may not serve well for him, as ultimately, if he takes that option, any explanation or defence advanced by him later in court but not said earlier during statement taking would tantamount to belated disclosure.[36] This is because it smacks of after-thought and the bona fides of his later explanation is susceptible to review by the court. But of course, this does not relieve the prosecution of its burden to prove the case against him beyond reasonable doubt. An accused person bears no burden to

30 Focus of this article is on police investigation, which equally applies to investigation by other law enforcement agencies, subject to the written law creating such law enforcement agency.

31 See CPC, s 112(1) read together with s 111(1).

32 Oral statement made is not excluded by s 112(1) of the CPC but shall be reduced into writing.

33 CPC, s 112(3).

34 Ibid, s 112(4).

35 See PC, s 193 read together with s 191.

36 As propounded in the case of *PP v Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, FC.

prove his defence, aside from only raising a reasonable doubt on his guilt or the case of the prosecution.[37] But if the case of the prosecution is premised on proof with aid of rebuttable presumption, then the accused bears the burden to displace it *vide* balance of probabilities, which is a burden higher than raising a reasonable doubt.[38] A witness may refrain from answering questions posed to him during statement taking, if answers to be given may be incriminating or expose him to a penalty or forfeiture of property.[39] The statement given shall be signed or affixed with a thumbprint of the maker after it has been read to him in the language in which it is made and also after he has been given an opportunity to make any correction he may wish.[40] The safeguards entrenched in section 112 of the CPC, *viz*. the right to remain silent; the rule against self-incrimination; the right to make a statement free from force, compulsion, pressure, undue influence and the rule *audi alteram partem,* are indeed constitutional guarantees preserved and protected by Part II of the Federal Constitution ("FC") on fundamental liberties, specifically Article 5(1).

[18] Flowing from the above, preparation for a criminal trial by a prosecutor is anchored on the following:

- A complete and comprehensive 112 statement.
- To fill in the gaps (in accord with necessities of the case of the prosecution) by way of further statement when trial of the case is imminent or even underway.[41]
- To engage the good office of the IO to refresh memory of the witness before he takes the stand in court to testify.[42]
- IO to revert to the prosecutor on composure, slant, preoccupation or fear of the witness who is yet to testify.

37 See cases like *Mah Kok Cheong v PP* [1953] MLJ 46; *Mat v PP* [1963] MLJ 263; *Nagappan v PP* [1988] 1 CLJ 283, SC; *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, SC.

38 See the case of *PP v Yuvaraj* [1969] 2 MLJ 89, PC; *Akin Khan bin Abdul Khanan v PP* [1987] 1 CLJ 348. See also the latest case of *Abdullah bin Atan v PP and Another Appeal* [2020] MLJU 1244, FC.

39 CPC, proviso to s 112(2).

40 Ibid, s 112(5).

41 See the case of *Ng Yiu Kwok & Ors v PP* [1989] 3 MLJ 166.

42 See the case of *Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1.

- Prosecutor to arm himself with the necessary tools and ammunition if the witness turns "turtle" or hostile, uncooperative, unfavourable to the prosecution or possibly would have selective memory when testifying in open court, albeit his revealing 112 statement to the investigator.

Cross-examination

[19] Cross-examination must relate to relevant facts, but it need not be confined to the facts to which the witness testified on his examination-in-chief.[43] Pursuant to section 143 of the EA, leading questions may be asked in cross-examination, subject to qualifications, *viz*. the question may not be put into the mouth of the witness the very words he is to echo back again and the question may not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact. However, the court in its discretion may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party.

[20] Sir Rupert Cross[44] had stated this on cross-examination of witnesses:

> … There are two main types of cross-examination, cross-examination to the issue and cross-examination to credit.
>
> Cross-examination to the issue is designed to elicit statements concerning the facts in issue, or relevant to the issue, which are favorable to the cross-examiner's case. If it is conducted on behalf of the plaintiff or prosecutor, it is subject to a rule of practice that the evidence on which a party wishes to rely should normally be in before the close of that party's case. Accordingly, it is only in unusual circumstances that the cross-examiner is allowed to put questions about matters concerning which his witnesses have not said anything in chief – *R v Rice* [1963] 1 All E.R. 832. When cross-examination to the issue is conducted on behalf of the defence, the witness under cross-examination must normally have his attention drawn to any point on which he is likely to be contradicted by the defence witnesses, so that he can have an opportunity of commenting on it – *Browne v Dunn* (1893), 6 R. 67.

43 EA, s 138(2).

44 Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence*, 4th edn (London: Butterworths, 1975), pp 74–75.

> The exclusionary rules apply just as much to evidence elicited in cross-examination to the issue as they do to evidence in chief. If a witness under cross-examination says he was told something by someone, the rule against hearsay applies to the same extent as it does to the evidence in chief of the party on whose behalf the cross-examination is being conducted …
>
> Cross-examination to credit, as its name implies, is designed to suggest that a witness is not the kind of person whose evidence can be regarded as trustworthy.
>
> There is a third kind of cross-examination which may or may not be regarded as separate from the second. It is sometimes called "cross-examination to credibility". The questions do not suggest that the witness is deliberately lying, but merely that, for a variety of reasons he may be mistaken.
>
> Much greater latitude is allowed to the cross-examiner than is accorded to the person conducting the examination-in-chief. Leading questions may be put in cross-examination to the issue as well as in cross-examination to credit. The cross-examination to credit may include questions suggesting that the witness has made statements inconsistent with his present testimony, that he has a criminal record, is biased or had been guilty of disreputable conduct such as to suggest that he is a liar. But the judge has a discretion to disallow questions in cross-examination, and it is contrary to professional etiquette for counsel or a solicitor to put disparaging questions to a witness unless his instructions give him reasonable grounds for supposing that they are justified.[45] Moreover, an over-rigorous cross-examination may redound against the cross-examiner. This is partly because it may arouse the antipathy of the tribunal of fact, and partly because it may render evidence admissible in re-examination which would not have been admissible in chief.
>
> …
>
> The great difference between cross-examination to the issue and cross-examination to credit is that, whereas the witness's answers to the former may always be contradicted by other evidence adduced in due course by the cross-examiner, answers in cross-examination to credit are usually final. The distinction between the two types of

45 In the Malaysian context, see ss 149, 151 and 152 of the EA.

cross-examination is not always easy to draw because it sometimes depends on the degree to which a particular question is regarded as relevant to the issue …

Hostile witness

[21] A witness called by the prosecutor may not be challenged as to his credit. If during the examination-in-chief it becomes apparent that a witness is not testifying in the way he is expected or testifies in support of the case of the defence and not the prosecution, then the court has to make a ruling that the witness is *hostile*. A witness becomes hostile when in the opinion of the judge he bears a hostile intent or motive to the prosecution and so does not give his evidence fairly and with a desire to tell the truth. A witness will not be classified as hostile merely because he fails to cooperate. The prosecutor claiming that the witness is hostile must demonstrate to the court that the witness has some improper motive or reason for turning against the prosecution. If the trial judge refuses to rule the witness as hostile, then his testimony cannot be challenged. However, if the trial judge rules the witness as hostile then his evidence may be contradicted by other evidence.[46] An instance is for the prosecution to prove that the witness has made a 112 statement inconsistent with his testimony in court. This can only be done with leave of the court. It is allowed by section 154 of the EA. The provision allows only a restricted form of cross-examination in that a hostile witness may be asked leading questions and any previous inconsistent original statement may be put to him and read over to him in evidence. This does not authorise the prosecutor to embark on a general attack against the credit of the said witness, for example, by proving that he is of a bad character.[47] This is where it proves beneficial to have the 112 statement taken by the police officer during investigation recorded in writing and signed by the said witness after he is allowed to make corrections, pursuant to section 112(5) of the CPC.

[22] In a nutshell, a hostile witness is not necessarily a false witness. He does not turn hostile on his own accord, and the only test which a court can apply is the question as to who is the beneficiary when a

46 Source of reference – Stephen Seabrooke, *Evidence in a Nutshell* (London: Sweet & Maxwell, 1981), pp 13–14.

47 See the case of *R v Thompson* 64 Cr App R 96.

witness resiles and the inevitable answer is that the accused who is facing the trial is the only direct beneficiary.[48]

Avenues open to the prosecutor

[23] If the prosecutor is confronted with a hostile witness who had resiled from his 112 statement, he may emerge disorientated whilst pursuing with the examination-in-chief. It is damning if the witness is testifying on a material fact for the prosecution which is vital for the case of the prosecution. Thus, it could mean that without that material proof, the prosecution would not be able to establish a *prima facie* case against the accused to answer. The effect would be dire if he is the sole witness who can offer that testimony.

[24] Hence, the test of materiality may be towards a fact in issue in the case or a relevant fact which has to be proven by the prosecution. If the hostility touches on incidental issues, it would not matter a jot to the prosecutor. If the contradiction, inconsistency, or omission, as a consequence of the hostility of the witness, relates to a material issue, then it has dire consequences necessitating the prosecutor to consider wisely as to his next move. It has to be a prudent move on his part in accordance with the law.

[25] That does not mean he pursues with the ultimate which is to impeach the credit of the said witness as allowed by section 155(c) read with section 145(1) of the EA. Subsection 155(c) allows the credit of the witness to be impeached by the party who calls him *by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted*. The prosecutor should always ask himself this question, *is that move beneficial to the case of the prosecution*?

[26] Impeachment of a witness may also serve as a sword of Damocles for the prosecution. Thus, it has to be the last resort, and only if all other attempts to salvage the credit and creditworthiness of the witness fail and do not bear fruits.

[27] Impeachment of a witness could be fatal, as his testimony is subject to curial scrutiny by the trial judge. In the exercise of the court's judicial discretion, his evidence would be erased altogether from the

48 See *S Krishna v State of Karnataka* 1998 Cr LJ (Kam) 785 (DB) at 790.

court's record, as it becomes worthless.[49] But of course there is another view that once a witness has been successfully impeached, it is not imperative for the court to disregard all of his evidence. The court is entitled to reject certain parts of his evidence, while still accepting others. The court must carefully scrutinise the whole of the evidence to determine which aspect might be true and which aspect should be disregarded.[50] In the case of *PP v Kalpanath Singh*,[51] Yong Pung How CJ (Singapore) (as he then was) held that it is open to a trial judge, having considered the circumstances of a case, to believe the evidence of any witness, so far as its essentials are concerned, without having to accept as true everything which that witness says. In the subsequent case of *Kwang Boon Keong Peter v PP*,[52] it was reiterated that a successful impeachment of a witness's credit goes only to the weight of his oral testimony in court and not to its admissibility and it does not mean that his oral testimony will be expunged. It was also held that the witness's credit stands to be assessed as a whole together with the rest of the evidence. It was also decided so in *PP v Mohd Ali bin Abang & Ors*[53] and *Safri bin Koboy v PP*.[54] Thus, it is ultimately the discretion of the court to either reject *in toto* the evidence of the said witness or consider some parts of it, enabling support for the case of the prosecution. Be that as it may, it is only natural and logical for the trial judge to adopt a stricter view on the testimony of such witness who stands impeached, as for all intents and purposes, his credit and creditworthiness as a witness is questionable, and what is the assurance he may not be lying too on his remaining testimony. The credit of a witness refers to his character and moral reliability. The purpose of impeaching a witness's credit is to undermine his credibility by showing that his testimony should not be believed because he is of such a character and moral make-up that he is incapable of speaking the whole truth under oath and should not be relied on.[55]

49 See the case of *Ong Joo Chin v R* [1946] MLJ 1, where it was held that the testimony of the witness would be erased from the record of the court.

50 See the cases of *PP v Somwang Phatthansaeng* [1992] 1 SLR 138; *Garmaz s/o Pakhar & Anor v PP* [1995] 3 SLR 701.

51 [1995] 3 SLR 564.

52 [1998] 2 SLR 592.

53 [1994] 2 MLJ 12.

54 [2000] 1 MLJ 656

55 *Kwang Boon Keong Peter v PP* [1998] 2 SLR 592, *per* Yong Pung How CJ.

[28] So, when would impeachment of the witness's credit take place?

[29] As it is the last resort and risky for the prosecutor, it takes place when all other avenues for the prosecution have failed and the doors are all closed. It is a calculated risk taken by the prosecutor after considering the following factors:

- Aside the hostile witness, there is another witness or other witnesses who could afford oral testimony on the same material fact which has to be proven *via* oral evidence. The reason why he was in fact called as witness is purely for the reason that he has come out frank and open in his 112 statement and proximate to the required proof by the prosecution as opposed to another witness who may not be able to rhyme the same. It could also be a tactical move by the prosecution so as to test the waters on the strategy of the defence, when a particular witness is called to testify, to wit, the content and extent of the cross-examination.

- There is documentary evidence available which has the effect of sustaining proof so as to establish the case of the prosecution albeit circumstantially. This may be onerous as the court has to be convinced of such indirect proof.

- To serve as a grim lesson to the hostile witness as after impeachment he would be charged for giving false evidence (perjury) in open court.[56] This too has the desired effect of demonstrating to the public that the prosecutor is extremely serious with its prosecution of the offender and specifically to witnesses who have rendered 112 statement to the investigator to be wholly truthful. If not, they have to face the proverbial music, as a person has been accused and charged in court for committing an offence under penal law, pursuant to his revelation to the law enforcement agency.

- In some criminal cases, like offences under the Capital Markets and Services Act 2007 [Act 280], there could have been a civil case pending, wherein the standard of proof to be employed is on a balance of probabilities and the cause of action is for the commission of a civil wrong entitling relief in the form of exemplary damages and disgorgement of profits enjoyed by the

56 See the case of *PP v Datuk Hj Sahar Arpan* [1999] 3 CLJ 427, HC.

accused resulting from the crime. Thus, there is another option available to the prosecution to enforce justice against the accused.

[30] After taking into consideration some or all of the above factors, the prosecutor would embark on the process of impeachment of the said witness's credit. When doing so, the prosecutor has to be mindful of the expectation of the court. It is anchored on the dictates of the law embodied in the sequel of cases like *Muthusamy v PP*,[57] *Husdi v PP*[58] and *Dato Mokhtar Hashim v PP*.[59]

[31] The impeachment process and procedure is cumbersome and it takes up lots of judicial time. It is painstaking for the presiding judge to appraise the whole episode before he pens down his finding as to credibility of the hostile witness. Any iota of error or omission on that score may favour an order of retrial on appeal, if it has prejudiced the accused person, thus occasioning failure of justice which is incurable. [60]

[32] Since an impeachment proceeding would render a devastating or crippling effect on the case of the prosecution, it is only wise for the prosecutor to utilise other avenues under the law.

What are those avenues?

[33] One such avenue is to embark on a process to refresh the memory of the witness before his examination in court. A witness is allowed to see his 112 statement made before trial, as it was made at some period reasonably close to the time of the event which is the subject of the trial.[61] It has been decided that failure of the prosecution to inform the defence that witnesses had seen their statements before giving evidence in open court can be no bar to conviction.[62]

[34] Such mode may be looked at in askance by the defence as well as the court, as it is only natural to expect the witness who is in the witness box to remember what had happened after a refresh of

57 [1948] MLJ 57.
58 [1980] 2 MLJ 80.
59 [1983] 2 MLJ 232, FC.
60 CPC, s 422.
61 See the case of *Lim Hong Yap v PP* [1978] 1 MLJ 154.
62 See the case of *PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 at 69. Reference is made to the case of *R v Westwell* [1976] 2 All ER 812.

memory. It is this fact that invites objection by the defence, as it may render semblance that the witness is unsure of his testimony or there is a slant that the witness may not be telling the truth. Otherwise, why does reference have to be made to an out of court statement to refresh his memory. To that end, an argument could be advanced by the defence that the weight of the evidence of a witness who gives evidence after having seen his 112 statement may be affected. This argument could be easily countered on the premise that the witness could be cross-examined at length in order for the court to determine whether the defence or accused has been prejudiced by the witness having seen the statement. The cross-examination has to go beyond asking the witness whether he had seen the statement. In the premise, weight of the witness's evidence who testifies in the witness box after having seen his 112 statement may only be affected on the facts of a particular case and it shall not be a general rule that such witness's testimony is suspect.[63]

[35] In any event, a witness cannot be expected to have a photographic memory of the entire spectrum of events in the case. If that takes place, it may also not reflect well for the witness, as it would seem he is telling all as though he has been coached to testify in open court.

Cross-examination of own witness

[36] If the situation or circumstance permits and when the need arises, the prosecutor may apply to the presiding judge for leave to cross-examine his own witness as the witness has shown a fair degree of hostility towards the prosecution. The litmus test is for the prosecutor to determine the degree of hostility, which is to see if the said witness is not forthcoming with his evidence replicating what he has rendered in his 112 statement.

[37] Once again the premise is the 112 statement. For the prosecution, the 112 statement is sacred akin to an encyclopedia, since it contains the full account of what the witness has said and declared to the RO. The 112 statement could also be the sole premise upon which the accused is charged for an offence in court. In that regard, what he had said to the RO is material to the case prosecuted *via* an open court trial. The statement is of considerable value as it is made under oath,

63 See again the case of *PP v Dato' Seri Anwar Ibrahim (No 3)* as referred to in n 62 above.

with the incantation provided in section 112(2) and (3) read together with section 112(4) of the CPC, as alluded to above.

[38] The utilisation of the 112 statement is fortified by the fact that the witness is allowed to read back the statement made by him and make any corrections as he may wish before signing it as his own statement or affixing his thumbprint on it, which allows him the latitude to make corrections to his statement before signing it. With all the entrenched safeguards pursuant to the law, he is bound by his 112 statement and shall not resile when he testifies in open court against the accused.

[39] If he resiles from it when testifying in court, the prosecutor who is allowed leave of court would embark on cross-examination of his own witness by confronting him with the inconsistency, contradiction or omission in his testimony with his 112 statement. Once again when the prosecutor embarks on this mode, the court is at liberty to order disclosure of that statement or its relevant part referred to by the prosecutor to the defence, as there cannot be a trial by ambush.

[40] The net effect of this process is a win-win situation, *viz*. the prosecution would benefit by getting what it expects from the hostile witness, as essayed in his 112 statement. This has the effect of buttressing the case of the prosecution. Furthermore, the credit of the hostile witness is not in jeopardy, as he may have finally come to his senses to be a consistent and material witness for the prosecution. Consistency of his testimony after cross-examination by the prosecutor would be demonstrated by his own testimony under oath.

[41] Hence, both avenues to refresh the memory of the witness as well as to treat him as hostile do not dent the credibility of the witness, thus saving his evidence under oath in its entirety, which has the gainful effect in sum total to the prosecution to have established a *prima facie* case.

[42] On impeachment of credit of his own witness, Sir Rupert Cross[64] has this to say:

> A party may not impeach the credit of his own witness; but if the witness proves unfavorable, he may contradict him by other

64 See n 44 above.

evidence relating to the issue and, if given leave by the judge to treat the witness as hostile, he may also ask whether he has made a statement inconsistent with his testimony and contradict him with that statement if it is denied.

Explanation – A witness is to some extent regarded as being "on the side of" the party calling him, or a member of that party's team. Accordingly, however uncooperative the witness may be, the party calling him may not cast doubt on his credit by, for example asking him about previous inconsistent statements, previous convictions or disreputable conduct. A witness who simply fails to prove the fact which he is called to prove is said to be "unfavorable", and an unfavorable witness must be distinguished from a "hostile" or "adverse" witness. A hostile witness is one who shows that he is not desirous of telling the truth at the instance of the party calling him. It is necessary for the party calling a witness to obtain leave from the judge to treat the witness as hostile, if the circumstances warrant the adoption of such a course.

(1) Unfavorable witnesses

The rule that a party may not impeach his own witness does not prevent him from calling other witnesses to give evidence contradicting that of his earlier witnesses …"

(2) Hostile witnesses

When leave has been given to treat a witness as hostile he may be asked about previous inconsistent statements, and these may be proved if they are denied. The witness may also, like an unfavourable witness be contradicted by other evidence relevant to the issue. Although, even a hostile witness may not be discredited by general evidence of bad character, the examination becomes more like a cross-examination once the leave has been granted. It has been said that, if counsel for the prosecution is aware of a contradictory statement made by a Crown witness, he should always show it to the judge and ask leave to treat the witness as hostile – *R v Fraser and Warren* (1956) 40 Cr App Rep 160. Leave to treat a witness as hostile is probably given more sparingly in civil than in criminal cases. In criminal cases, it is not unheard of for a Crown witness to contradict his deposition, as well as statements made by him to the police.

> If, in a criminal case, the witness is treated as hostile, and the statement or deposition is proved or admitted, it does not become evidence of the facts stated. It merely neutralizes the witness's adverse testimony – *R v Golder, Jones and Porritt* [1960] 3 All ER 457 …

Court's perspective

[43] The prosecutor claiming that the witness is hostile must show that he has some improper motive or reason for turning against the prosecution.

[44] According to *Sarkar on Evidence*,[65] a hostile witness exhibits an opposite feeling, *viz*. when he by his conduct, e.g. attitude, demeanour or unwillingness to give answers or to disclose the truth, shows that he is hostile or unfriendly to the party calling him. Before a court exercises its discretion in declaring a witness as hostile, there must be some material to show that the witness has gone back on his earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides. Merely giving unfavourable testimony cannot be enough to declare a witness adverse, for he might be telling the truth which goes against the party calling him. *He is hostile if he tries to injure the party's case by prevaricating (evading) or suppressing or concealing the truth*. In this regard, it is noteworthy that the witness who is legally bound to tell the truth is supposed to have rendered a truthful 112 statement to the investigator pursuant to section 112(4) of the CPC.

[45] In the case of *Muniandy & Anor v PP*,[66] it was decided that in order to treat one's own witness as hostile by cross-examining him, the only possible means is *to confront the witness with his previous contradictory statement*.

[46] Chin Tet Yung[67] (now Emeritus Professor at the National University of Singapore) is of the view that surely this is overly restrictive as there are other means of impeaching one's own witness under section 154 of the EA. It is not disputed however that it may be good policy to restrict impeachment as the witness is one called by the party himself. The English position is more restrictive and is based

65 15th edn (1999), p 2247.
66 [1973] 1 MLJ 179, FC.
67 In his work, *Evidence* (Butterworths, 1988), p 197.

on a distinction between "unfavourable" and "hostile" witnesses. In the case of the former, other witnesses may be called to contradict the witness. A hostile witness may be asked leading questions but this is virtually all that is allowed.

[47] The court must be satisfied that the witness has resiled from a material statement which he has previously made to the IO or the witness is not speaking the truth and it may be necessary to cross-examine him to elicit the truth.

[48] The cue to be taken from Brown J in the case of *Re Wee Swee Hoon, deceased; Lim Ah Moy & Anor v Ong Eng Say*,[68] is that *it is sufficient that the witness had contradicted what he had said in his former statement in relation to a material issue in the case*. This case, which is one of the leading authorities on the invocation of section 154 of the EA, illustrates the following:

- When a witness has given an answer or answers which the party calling him knows to be in conflict with some statement or evidence which he has previously made or given, thus, fails to come up with proof as expected.
- The proper procedure is for the party calling him then to ask whether he had made a statement (or given evidence) at a certain place on a certain date.
- Having heard his answer (whatever it may be) no further questions should be put at that stage.
- The prosecutor then informs the trial judge that he wishes to embark on the procedure allowed under section 154 of the EA, which allows the court discretion to permit the party who has called its witness to put to him questions which may be put in cross-examination by the defence.
- Before the procedure can be adopted, the party wishing to cross-examine its own witness must formally ask and obtain the court's permission.[69]

68 [1953] MLJ 123.

69 See decision of Siti Norma Yaakob J (as she then was) in the case of *S Lourdenadin v M Ratnavale* [1986] 1 CLJ 228, HC at 241 on the manner in which a court should exercise its discretion in granting leave to a party to cross-examine its own witness.

- Hand over to the judge the statement (or record of evidence), and apply for leave to cross-examine his own witness under section 154 of the EA.

- Take note that the trial judge has to peruse the statement first and not allow the defence a copy of the statement immediately. This ought to be done only if the trial judge allows leave under section 154 of the EA.

- The judge, after having given the other side an opportunity of seeing and perusing the document and making submission on the application, will then rule whether leave is to be granted or not to be granted. In this regard, the party calling the said witness has to be mindful of submission advanced by the defence to oppose application for leave, as slant of the submission made, may serve as a hint on the reason why the said witness had turned hostile.

- If leave is granted, cross-examination of the said witness will be pursued.

[49] Section 154 of the EA itself does not state how such cross-examination should take place but a restricted form of cross-examination is allowed in that a hostile witness may be asked leading questions and any previous inconsistent statement may be put to him.

[50] Example of questions that can be put to the witness are:

- *Did you make a statement to the investigation officer with regard to this case (against the accused/report No …);*

- *For the same question [repeat the question on the material issue asked during examination-in-chief (EIC)] also asked by the IO of this case when he recorded statement pursuant to section 112 of the CPC, what was your answer;*

- *Why are you saying something else now / why is your answer different now?*

- *Are you aware of section 112(4) of the CPC which has been told to you before the statement was taken from you which reads as …?*

- *Do you wish to correct your testimony?*

- *If so, are you now sticking to your answer given by you to the IO when you made the 112 statement to him?*

[51] The cross-examination permitted is not to allow a general attack against the credit of the witness, for example, by proving that he is of bad character. This is important, as save for the cross-examination permitted, the evidence of the witness has to be saved as it would come up to proof of the case for the prosecution, consistent with or corroborated by other evidence available for the prosecution.

[52] Section 154 of the EA is not limited to any particular stage of examination of a witness. In fact, in the Indian Supreme Court decision of *Dahyabhai v R*[70] it was decided that the court's discretion under section 154 of the EA can even be exercised at the re-examination stage, provided the defence is allowed to further cross-examine the witness.

[53] Though it is so, it is only prudent for the prosecutor to embark on the section 154 procedure there and then, when it is obvious that the witness has turned hostile. It is prudent not to wait until the stage of re-examination. If it is at the stage of re-examination, the defence may object and submit that it is prejudiced, although it is allowed to view the inconsistent or contradictory statement when permission was granted to cross-examine the said witness.

[54] It is submitted that the state of the law of evidence is such that during the examination-in-chief, proof of the prosecution case is emphatic but not during re-examination. This is because re-examination is purposeful in order to expand, explain on matters raised in cross-examination and to re-establish the credit of a witness just cross-examined. It ought to be resisted unless there is some real advantage to be obtained. Moreover, matters of inconsistency, contradiction or omission of the witness's testimony with his 112 statement which arise during the examination-in-chief shall be immediately dealt with at that opportune juncture and not to be postponed to the stage of re-examination. Thus, a party is not allowed to ask questions in re-examination which he should have asked in examination-in-chief, and it would be mandatory to obtain leave of court before embarking on fresh or new questions. Substantive matters of that nature ought to be dealt with during the examination-in-chief and not during re-examination. There could also be a situation where leave may be refused, pursuant to section 138(3) of the EA, to permit questions if a new matter is introduced during that stage.

70 AIR 1964 SC 1563.

[55] In fact, in the case of *Yuen Chun Yii v PP*[71] it was decided that an application to treat a witness as hostile should be made as soon as it was obvious that he was hostile. The reasoning of the court is that having elected not to go into the procedure available under section 156 of the EA (the Singapore equivalent provision with our section 154) when the apparent inconsistency was first raised, it appeared to be unfair for the prosecution to only refer him to the statement in re-examination. It was held that by permitting the prosecution to dictate both when the statement could be produced and whether the defence should be allowed to view it, there were serious irregularities which resulted in the improper admission of evidence which had operated unfairly to the defence.[72]

Effect of cross-examination

[56] When a witness has been treated hostile it is not open to the court to accept as true only that part of his evidence which is in favour of the prosecution and disregard that which is unfavourable. This was the traditional approach adopted in cases like *PA Anselam v PP*,[73] wherein Horne J adopted the principle laid down in the case of *R v Harris*[74] and decided that the evidence of the witness who was cross-examined on a previous unsworn statement should have been treated as negligible and the verdict to be found on the rest of the evidence. This is referred to as the "*all or nothing*" approach which was exemplified in *R v Golders*.[75] *Golders* was reconsidered in the case of *R v Pestano & Ors*,[76] where a witness was treated as hostile. The witness did not return to the account given in his deposition but the prosecution thereafter continued to rely on his evidence in so far as it advanced their case. In dismissing the appeals, the Court of Appeal held the evidence was for the jury to consider subject to proper warning from the judge as to the weight which could be attached to it. Hence, it was a modification of the decision of the "all or nothing" approach in the case of *R v Golders.*

71 [1997] 3 SLR 57.
72 *Per* Yong Pung How CJ. Reference was made in that case to *R v Pestano* [1981] Crim LR 397.
73 [1941] MLJ 157.
74 (1927) Cr App R 144.
75 [1960] 1 WLR 1169.
76 [1981] Crim LR 397.

[57] Further, the High Court of Australia in the case of *Driscoll v R*[77] decided that it cannot be accepted that in a case where a witness has made a previous inconsistent statement there is an inflexible rule of law or practice that the jury should be directed that the evidence should be regarded as unreliable. The same conclusion was arrived at in the Supreme Court case of *Prafulla v R*.[78] In *R v Thomas*,[79] the Court of Appeal held that a judge misdirected the jury by telling them to disregard the evidence of a defence witness who was treated as hostile and who gave some evidence, albeit reluctantly, which supported the defence's case.

[58] On our shores, a flexible approach was adopted by Wan Adnan J (as he then was) in *PP v Tan Chye Joo & Anor*[80] when his Lordship decided that the *object of cross-examination under section 154 of the EA is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination*. In that case the issue revolves around the prosecution witness PW10. After he had given evidence the learned deputy public prosecutor applied to the court for permission to cross-examine him under section 154 of the EA on the ground that his evidence differed from his earlier statement to the police. The judge, after having read the witness' statement to the police and found there were discrepancies, permitted the prosecution to cross-examine the witness. The witness did not deny the statement he made to the police. He maintained that his evidence in court was the truth. He explained that he said he never entered the room upstairs because he was frightened as something had been recovered there. The judge found his explanation to be reasonable and therefore did not wholly reject his evidence.

[59] The salutary purpose of cross-examination is to elicit admission of facts which have the effect of augmenting the case of the prosecution. When the prosecutor, with leave of the court, confronts the witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory

77 (1977) 51 ALJR 731.
78 35 CWN 731 FB.
79 (1985) Cr LR 445.
80 [1989] 2 MLJ 253.

or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him. In short, the rule prohibiting a party to put questions in the manner of cross-examination, or in a leading form, to his own witness, is relaxed not because the witness has already forfeited all rights to credit, but because from his hostile attitude or otherwise, the court feels that, for doing justice, his evidence will be given fully. The truth will be more effectively obtained, and his credit will be more adequately tested by the questions put in a more pointed, penetrating and searching way.[81] It was decided in the case of *Sat Paul v Delhi Administration*[82] that the discretion conferred by section 154 of the EA on the court is unqualified and untrammeled, and apart from any question of "hostility", it is to be liberally exercised whenever the court from the witness's demeanour, temper, attitude, bearing or from the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth, and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness.

[60] Hence, the evidence of a hostile witness need not necessarily be rejected in full. The courts can believe his testimony, depending upon the circumstances of each case.[83] If a witness has turned hostile, it does not mean that his entire statement is to be discarded. The rule of prudence is that his statement has to be considered with due care and caution. In other words, explicit reliance cannot be placed upon him, but, if he is duly corroborated by other evidence his statement can certainly be availed of in favour of the prosecution or the accused, as the case may be.[84]

[61] Thus, the present state of law is for the court to adopt a flexible approach as opposed to the "all or nothing" approach when treating

81 Reference is made to R Dayal, *Commentary on Sexual Offences with Special Reference to Law of Rape* (Premier Publishing Co, 1999), p 117.

82 AIR 1976 SC 294. In the same case it was decided that when a witness is cross-examined and contradicted with the leave of court by the party calling him, his evidence cannot be washed off altogether. The judge may, after reading and considering the evidence as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his statement which is creditworthy (*Prafulla v R* approved).

83 See *Gurbachan Singh v Satpal Singh* AIR 1990 SC 209.

84 See *Harpal Singh v State of Himachal Pradesh* 1976 Cr LJ (HP) 162 (DC Cal J).

the testimony of a hostile witness who underwent cross-examination by the prosecutor who had called him as witness. Adopting a flexible approach is favoured as the evidence proffered by the hostile witness has to be viewed in combination with the other credible evidence available for the prosecution. Moreover, permission allowed by the court to cross-examine one's own witness does not change the examination-in-chief to cross-examination, as section 154 of the EA in effect only allows a certain latitude to the prosecutor to ask questions which would have been asked by the adverse party when cross-examining the said witness and the sole purpose is to extract the truth from the said witness who has shown hostility to the prosecution. Hence, even if a witness has turned hostile and is cross-examined, the value of his evidence would depend upon all the circumstances, and would not merely because of the cross-examination[85] become suspect. Thus, testimony of the hostile witness is to be assessed for the value it deserves, and not to be disregarded and ignored *in toto*.

[62] If the prosecution chooses not to challenge the concerned witness by invoking section 154 of the EA, it is not open for them to later submit at the end of case of the prosecution how incredulous the witness is with regard to his evidence. The court would then be left with no alternative but to accept the evidence of the said witness. It was decided in the case of *PP v Chua Seng Huat*[86] that if there is a challenge and the witness has been questioned by the prosecution invoking section 154 or 143(2) of the EA, then the defence would have the opportunity to further cross-examine on the matter in order to elicit evidence that may support their assertion and case. Bereft of that, the prosecution cannot be excused for their failure to resort to those provisions of the EA, and then to submit not to accept the evidence of the said witness, as that would mean depriving the defence of the right to cross-examine on the matter and such an event would amount to a miscarriage of justice.[87]

Conclusion

[63] Section 154 of the EA speaks of permitting a party to put to his own witness questions which might be put in cross-examination.

85 See *Sarkar on Evidence,* 15th edn (1999), p 2258.
86 [1999] 3 MLJ 305 at 326–327.
87 *Per* Ian Chin J (as he then was).

Hence, it does not tantamount to "cross-examining" the witness as cross-examination is by the adverse party and not the party calling the witness. Latitude to cross-examine is circumscribed pithily by section 154 of the EA.

[64] In view of the above, in summation, it can be forcefully stated[88] that:

(i) The evidence of a prosecution witness who has been hostile should not be discarded on the basis that his evidence is unreliable.

(ii) That much of the evidence of a hostile witness can be relied upon by the prosecution if that statement is in conformity with other evidence.

(iii) Likewise, that much of the evidence may be used by the defence if, at all, it comes to their aid.

Way forward

[65] In the upshot, it is apparent that when the witness is treated as hostile and his 112 statement is proved against him to show inconsistency between his oral testimony in court and out of court statement, that statement does not form the evidence of the facts stated in it by the witness. The proof of statement made by the witness during cross-examination pursuant to section 154 of the EA only neutralises his adverse testimony.

[66] The nagging issue would be, what is the benefit of invoking such procedure under section 154 of the EA against the witness, since his 112 statement does not form part of the evidence in court. The party calling him as a witness to support its case would gain an advantage, as the hostile witness would have come to his senses after being confronted with his own 112 statement to veer his testimony to the truthful 112 statement which he had made to the investigator. Hence, the credit of the hostile witness is saved and the proof expected by the prosecution comes to fruition.

[67] But the 112 statement is not substantive evidence in the case against the accused. Ultimately, what is available on record is the record of proceeding under section 154 of the EA embarked upon by the prosecutor against his own witness, the ruling of the court, and

88 See *Ramchit Rajabhar v State of West Bengal* 1992 Cr LJ (Cal) 372 (DB).

the series of questions asked by the prosecutor which the defence counsel may have asked in cross-examination. The 112 statement forming the basis of cross-examination is not substantive evidence as it is inadmissible pursuant to section 113(1) of the CPC.[89] Albeit it being a general rule with exceptions stipulated in section 113(2), (3), (4) and (5) of the CPC, a 112 statement utilised for the purpose of cross-examination under section 154 of the EA is not embraced as an exception.

[68] Hence, upon invocation of a section 154 procedure against a hostile witness, there are two sources of evidence forming the case of the prosecution against the accused. Firstly, the witness's oral testimony in court, and secondly, his 112 statement which is proved in court to be made by him and that its contents are true. These two sources are reliable pieces of evidence. The oral testimony of the hostile witness given under oath is subjected to cross-examination by the defence, thus truth is filtered. The 112 statement made by him is also under oath, as he is warned to state the truth. Additionally, before him signing the statement, he had the opportunity to make corrections as he may wish and upon signing he is rendered the maker of that statement. As it is meant to be a truthful statement, secured by constitutional guarantees, reliance on it is emphatic. But, unfortunately, it is not admissible as evidence, since there is no legal avenue available for its admissibility under our EA or CPC. As such, the statement is worthless, albeit after cross-examination it supports the oral testimony of the hostile witness thus erasing inconsistency between his oral testimony in court and his out of court 112 statement. The 112 statement serves as a valuable piece of evidence as it was made before the witness rendered his testimony in open court; it was made much earlier in time and proximate to the time of commission of offence by the accused.

[69] In the premise, it is interesting to refer to section 147(3) of the Singapore Evidence Act ("SEA").[90] Our EA is *in pari materia* with that

89 Section 113(1) of the CPC says: "Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used as evidence."

90 *Cross-examination as to previous statements in writing*

147.—(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved; but if it is intended to contradict him by

of Singapore, save for some variations, like section 147(3), (4), (5), (6) and (7). In fact, the equivalent of section 147 of the SEA is section 145 of our EA. Section 145 of our EA consists of merely two subsections, whereas section 147 of the SEA consists of seven subsections. Pertinently, section 147(3) of the SEA relates to the admissibility of a previous inconsistent or contradictory statement made by a witness where if proved, that statement shall be admissible as evidence of any fact contained in the statement, provided there is direct oral evidence on those facts.[91] The evidential value of that statement is provided for in section 147(6) of the SEA. It renders that in estimating weight to the

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the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.

(3) Where in any proceedings a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of this section, that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(4) Where a person called as a witness in any proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings.

(5) Where a document or any part of a document is received in evidence by virtue of subsection (4), any statement made in that document or part by the person using the document to refresh his memory shall by virtue of that subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(6) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of this section regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

(7) Notwithstanding any other written law or rule of practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement which is admissible in evidence by virtue of this section shall not be capable of corroborating evidence given by the maker of the statement.

91 The direct oral evidence emanates from the witness who made the statement.

statement admissible in evidence, which is its probative value, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy of the statement,[92] particularly to the issue of contemporaneity of the statement with the occurrence or existence of the facts stated therein[93] and also to the issue if the maker, i.e. the hostile witness, had any oblique motive or incentive to conceal or misrepresent on the facts contained in the said statement. Thus, the said provision is comprehensive when dealing with weight to be attached to the statement made by the hostile witness after it is rendered admissible as substantive evidence in court.

[70] On the applicability of section 147(3) and (6) of the SEA to a hostile witness who has been cross-examined pursuant to section 154, it was decided in the case of *Rajendran s/o Kurusamy & Ors v PP*[94] that where counsel asks leading questions of his witness with a view to showing his lack of cooperation or adversity, it is regarded as cross-examination, as ultimately whether a witness gave evidence during his examination-in-chief or cross-examination was dependent not by who called him but rather by the procedure in which the examination was conducted. It was further decided in that case that once the witness was successfully treated as hostile witness, whatever his testimony which the prosecution sought to elicit from him came about as a result of cross-examination, as it was done through the use of leading questions. Consequently, it was held in that case that the trial judge was correct when he allowed the prosecution to adduce the witness' statement made to the investigator under section 147(3) of the SEA for the truth of the contents as stated in it.

[71] Provisions like section 147(3) and (6) of the SEA or akin to it could be introduced into our EA, as a 112 statement made by a hostile witness constitutes a valuable and reliable source of evidence which can enable the court to determine the truth, *vis* credible evidence concomitant with oral evidence of the witness in court under oath. It would assist

92 In the context of a s 154 procedure, it would include the entire evidence given by the witness upon cross-examination by the prosecutor who had called him as a witness for the prosecution.

93 As there is a strong assumption of consistency. See cases like *Morgan a/l Perumal v Ketua Inspektor Hussein bin Abdul Majid* [1996] 3 MLJ 281 as well as *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621, CA; *PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 at 85.

94 [1998] 3 SLR 225.

the court a great deal in assessing the reliability of testimony of the hostile witness in order to determine the truth of the case against the accused, ultimately. This would also sync with section 136(1) of the EA, as the court during a criminal trial would only admit evidence of the facts contained in the 112 statement made by the witness, if proved, which would be relevant to the fact in issue. Moreover, in order for the court to admit the facts contained in the 112 statement, it must be receivable under the EA or by virtue of a specific provision in any other written law, which would also include the CPC. It is not open to any trial judge to exercise a dispensing power, and admit evidence not admissible by the statute because it appears to him that the irregular evidence would throw light upon the issue.[95] Further, in the case of *PP v Hj Kassim*[96] it was decided in all our courts that the Evidence Ordinance (as cited then) provides a complete code on the subject. If any fact is sought to be introduced in evidence it must be relevant and admissible under section 5 or one of the other sections following. Thus, in the absence of a statutory avenue *vide* a provision in our EA or CPC, the said 112 statement of the hostile witness is to be excluded.

[72] Alternatively, if a provision in the EA, like section 147(3) and (6) of the SEA, is not favoured, then the exceptions entrenched in section 113 of the CPC ought to be extended to include a 112 statement made by a witness who has been cross-examined by the party calling him pursuant to section 154 of the EA as on a cogent basis, there is consistency of evidence.

[73] In this regard, it is wise to take note of the advice given by Jeffrey Pinsler[97] on the necessary safeguard when admitting a statement under section 147(3) of the SEA:

> … The argument made in this article is that s 147(3) (EA) does not admit a witness's previous inconsistent statement as substantive evidence where that witness does not testify to facts which are the

95 See the case of *Sris Chandra Nandy v Rakhalananda* AIR 1941 PC 16 at 20, PC, *per* Lord Atkin.

96 [1971] 2 MLJ 115, *per* Ong CJ (Malaya) (as he then was).

97 Professor, Faculty of Law, National University of Singapore, in his article "Previous Inconsistent Statements: Scope of Section 147(3) of the Evidence Act and its Applicability where the witness does not testify to the facts mentioned in his previous statement" Singapore Academy of Law Journal (SAcLJ) (2001) at 32–33.

subject of that statement. The existence of testimony concerning those facts is fundamental to the operation of the section which requires the court to compare the alleged inconsistency between the previous inconsistent statement and the testimony. Such an exercise would be purposeless if the previous inconsistent statement is the only source of evidence available as when the witness disclaims any knowledge or memory of the facts referred to by that statement. Section 147(3) was never intended to allow the previous statement to *replace* the testimony of the reluctant or forgetful witness. Rather, its purpose is to ensure that testimony in court is properly assessed in the context of what the witness has said about the facts on a previous occasion. The previous inconsistent statement is made evidence by s 147(3) so that the court can consider evidence in addition to what is stated by the witness in court in relation to the facts.

A more lax construction of s 147(3) (EA) would render it a dangerous weapon in the hands of any party, who would be able to rely on the full substantive effect of an unverified and potentially unreliable out of court statement by merely having to show that his witness is not responsive in court. Indeed, by making the admission of the previous statement *mandatory* (Section 147(3) states: "the statement shall by virtue of this subsection be admissible as evidence of any fact stated therein") rather than discretionary … the assumption in s 147(3) is that the two contradictory sources of evidence (the testimony concerning the facts … and the previous statement of those facts) offer the court a sufficiently reliable basis on which to make the proper finding as to the facts (subject to appropriate weight to be attributed pursuant to s 147(6) (EA)). Where, however, the court does not have the luxury of competing sources of evidence – as when the witness's previously recorded statement is the only source of evidence available concerning the facts to which it refers (the position in *Heah Lian Khin*)[98] – particular caution is necessary

98 The issue raised in this case *PP v Heah Lian Khin* [2000] 3 SLR 609 was whether a previous statement of a witness who claimed to have forgotten, or denied knowledge of, the facts to which the statement refers can be admitted as substantive evidence pursuant to s 147(3).

The main concern of the article by Professor Jeffery Pinsler (at pp 10 and 11 of his article), is "whether a previous statement of a witness concerning the facts in the case can be put to a witness in cross-examination (pursuant to s 147(1) or (2) by the party who call him when the witness is unwilling to testify to those facts (whether on the basis of feigned loss of memory or lack of knowledge, so that the previous statement becomes evidence of the facts it refers to (pursuant

as revealed by the safeguards in the statutory provisions governing the admissibility of hearsay evidence …

[74] Thus, it is now for the Legislature to take the necessary steps to consider the proposal to either amend section 145 of the EA or section 113 of the CPC so that the beneficial outcome derived from cross-examination of a party's own witness pursuant to section 154 of the EA stays and a biting effect is rendered to the case of the prosecution and against the accused. Simultaneously, there would be credible evidence available so that the court is able to ascertain and determine the truth of the fact in issue in a criminal case swiftly and justly. Ultimately, justice should prevail and no one guilty accused should escape on mere technicalities. Our criminal justice system should also strive to minimise erroneous acquittals, premised on witnesses turning hostile towards the prosecution who had summoned them to testify to support their case in a court of law. Crime resolved *vide* investigation ought to bear its fruits after an open court trial, and a witness who is acquainted with the facts and circumstances of a criminal case who comes forward to render a statement to the investigator has to be truthful and consistent throughout and not to veer in favour of one party midway as he has to remember that the statement that he has rendered has in fact caused a charge to be preferred against an accused, by which justice is enforced for the victim.

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to s 147(3)) in lieu of the testimony which the witness refuses to give. This is only possible if the previous statement can be construed to be 'inconsistent' or 'contradictory' within the meaning of s 147 … The High Court ruled that the previous statement can be put to the witness in such a situation and that it would become evidence pursuant to s 147(3). The court was of the view that there was 'support for adopting a flexible as opposed to a rigid, semantic interpretation of the phrase 'previous inconsistent or contradictory statement'. According to the court, these terms are satisfied even where a witness refuses to give evidence in court about the facts to which the statement refers …"

The Best Interests of the Child Principle in England and Malaysia

by

*Dr Salahudin bin Dato' Hidayat Shariff**

> *The history of childhood is a nightmare from which we have only recently begun to awaken.*
>
> deMause[1]

Introduction

[1] The statement above was the first sentence in the seminal paper by Lloyd deMause, written in 1974. The life of a child from childhood to adulthood was fraught with trials and tribulations in the past[2] and sadly this all too often remains the case today. There have been many positive developments in most parts of the developed world, such as the right of a child to be heard in cases involving them as well as the prohibition of child marriages.[3] Unfortunately, the same could not be said of the less developed nations in Africa, Asia,[4] Latin and South America. Although Asia is one of the fastest developing regions economically, this is not reflected in social development and more specifically in children's rights.

[2] Malaysia epitomises the archetypical Asian state mentioned earlier, and it also has another Asian factor because it professes to practise a certain format of governance but with adaptations or

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1 Lloyd deMause, *The Evolution of Childhood* (Northvale, New Jersey and London: Jason Aronson Inc, 1974).

2 This is illustrated later in this article, specifically at n 11.

3 This was highlighted in an article celebrating 25 years of child rights titled "Turning 25: The UN Convention on the Rights of the Child", November 7, 2014, at <https://www.sos-childrensvillages.org/publications/news/uncrc-25-year-anniversary>, as well as the recent developments in Malaysia last year with the Ministry of Women, Family and Community Development ("MWFCD") looking at the possibility of creating a law prohibiting child marriages.

4 Australia, Japan and New Zealand should be exempted from this grouping.

modifications it claims are essential due to the ethnic/religious make up of the population. Added to that, Malaysia's dual/plural legal system is quite common for the region. As such, Malaysia's perspective will provide a good example of an Asian perspective on children's rights under the Convention on the Rights of the Child ("CRC").

[3] Returning to Lloyd deMause's statement above which paints a grim picture of what children faced in the past and comparing it with the current situation in Malaysia, there are a number of reasons why it is suggested that in some respects the nightmare may still be occurring here. Malaysia is facing issues with the rising volume of cases involving child marriages,[5] child neglect, abuse, abandoned babies and child abductions. For example, in a statement issued by the Royal Malaysia Police ("PDRM") in 2016, it was reported that up to 10,000 children had gone missing since 2011.[6] Prior to 2011, the cases of missing children averaged 500 per year.[7] Just recently, there have been a number of cases involving violence towards children by parents,[8] teachers[9] and peers[10] alike. As a result, it is suggested that

5 Besides Malaysia, there are now international organisations also looking into it at the Commonwealth Law Ministers' Meeting and the Commonwealth Senior Officials of Law Ministries Meeting. It has also been raised by the African Asian Legal Consultative Organization ("AALCO") which is discussing the issue of child, early and forced marriage ("CEFM").

6 The statement was reported in several local newspapers one of which was the *Malay Mail*, at <http://www.themalaymailonline.com/projekmmo/berita/article/polis-10000-hilang-659-kanak-kanak-masih-gagal-ditemui>, January 4, 2016. In a recent report, the number has increased to four children a day as reported in this newspaper article titled "Four children reported missing in Malaysia every day", *The Star*, November 2, 2017, at <https://www.thestar.com.my/news/in-other-media/2017/11/02/four-children-reported-missing-in-malaysia-every-day/>.

7 This was provided for in the PDRM website prior to 2011 which listed the missing persons annually. However, it is no longer available.

8 An article reporting the comments of the Minister for the MWFCD after a case of abuse by parents titled "Parents in child abuse cases may be compelled to attend counselling", *FMT News*, October 8, 2017, at <http://www.freemalaysiatoday.com/category/nation/2017/10/08/parents-in-child-abuse-cases-may-be-compelled-to-attend-counselling/>.

9 An article highlighting the issues relating to the abuse by school teachers and how the Ministry of Education treats these cases titled "Suspend teachers accused of child sexual abuse", *Malay Mail*, November 4, 2016, at <http://www.themalaymailonline.com/opinion/boo-su-lyn/article/suspend-teachers-accused-of-child-sexual-abuse#324svqjBQMrq0hg0.97>.

10 Some cases of bullying involving peers or other children have been highlighted in this newspaper article titled "MRSM bully case: Mum seeks justice for son", *New Straits Times*, May 19, 2017, at <https://www.nst.com.my/news/exclusive/2017/05/240656/mrsm-bully-case-mum-seeks-justice-son>.

there is insufficient emphasis on children and their rights in Malaysia and more needs to be done.

[4] The importance of child rights and more specifically the best interests of the child principle cannot be understated. Normally, children are under the care of their parents and it is the duty of the parents to raise them as they see fit. However, one must understand the state of affairs of children throughout the world, then and now. The status of children during ancient times was bleak. This has been highlighted in the article but the following statement would suffice:

> The early written histories which discuss children are characterised by children being considered as the raw material for successful adulthood in society rather than as individuals with interests separate from those of the adult population. In Plato's dialogues children, or at least those who would become guardians of the state or philosopher kings, are considered objects to be moulded by education rather than persons in their own right. The Aristotelian concept of child was likewise that the child is "important not for himself but his potential". Within this context, there are very few first-hand accounts of childhood and the place of children in the early historical record, which record contains only glimpses of the position of children in society. Gaius considered that "children have no intellect" and were completely incapable under the law. The Emperor Hadrian sought to address the practice by which a father had the right under Roman law to kill his children by subjecting it to some form of judicial control.[11]

[5] Historically, the child was not deemed to be an individual with rights in any shape or form. In fact, the child was a mere chattel in the eyes of society. It is not surprising that when the realisation occurred that a child had rights, it also came with the sense of guilt and determination to correct those mistakes. Child rights are still in a period of infancy as compared to other facets of human rights.[12] Yet, even the more recent rights-based treaty, the Convention on the Rights of Persons with Disabilities ("CRPD") which came into effect on May 3, 2008 seems to be gaining more prominence in the public

11 Alistair MacDonald, *The rights of the child: Law and practice* (Bristol: Jordan Publishing Limited, 2011).

12 The exception is the CRPD and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").

sphere than child rights.[13] Difficult as it seems, the efforts of the few in trying their utmost to ensure that child rights are protected are not only to be welcomed but indeed necessary.

Brief background on the best interests of the child principle

[6] The CRC is the fundamental instrument for child rights and there are several pillars or guiding principles as stated by the United Nations Children's Fund ("UNICEF").[14] According to UNICEF, there are four guiding principles and this article will concentrate on one of those, namely, the best interests of the child.[15] The best interests of the child principle is not only a guiding principle but also an international human rights law principle with some historical significance. "The literature on 'best interests' is voluminous, and the criticisms of the concept are well-rehearsed. Robert Mnookin pointed out in 1975 that, 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself'."[16]

[7] The best interests of the child principle was first introduced into the human rights sphere in 1959 through the United Nations Declaration on the Rights of the Child, which mentioned as follows:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[17]

13 This observation is based on the practice and application of the CRC in Malaysia whereby the government puts visibly more effort into protecting people with disabilities as compared to children.

14 As stated on their website at <https://www.unicef.org/crc/index_30177.html>.

15 The other three principles are non-discrimination; the right to life, survival and development; and the right to participate. All these rights are provided for in Malaysia albeit indirectly through the Federal Constitution though these rights may not be exactly as prescribed in the CRC.

16 Michael Freeman, "Article 3. The Best Interests of the Child" in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden and Boston: Martinus Nijhoff Publishers, 2007), p 1.

17 Geneva Declaration, Principle 2.

[8] This was merely a declaration and as decided by international and domestic law, a declaration is not binding but merely persuasive.[18] The principle has been further enshrined in and superseded by the CRC through Article 3, the full text which reads as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

[9] This forms the basis of the best interests of the child principle, but a more comprehensive background is required to understand the debate surrounding this particular principle. For the purposes of this article, the concentration would be specifically on Article 3 paragraph 1. The article proceeds on the assumption that paragraphs 2 and 3 are quite straightforward and need no further clarification. Therefore, the article focuses on paragraph 1 and a presentation of the history of the creation of the CRC will also be focused on paragraph 1 to enable the principle to be understood clearly.

The best interests of the child principle

[10] Among the best and concise explanations on what is the best interests of the child was provided by Joachim Wolf who had stated as follows:

> What, therefore, is meant by "the best interests of the child"? Is there a legally binding concept for the care and protection of children

18 Please refer to the cases of *Merdeka University Berhad v Government of Malaysia* [1981] 1 CLJ 175 and *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Ors* [2002] 4 CLJ 309. Both cases specifically referred to the Universal Declaration of Human Rights ("UDHR") but the same applies to all declarations.

> underlying this Convention? It seems that there might be three possible answers to the question raised. The first possibility is: yes, there is a legally binding concept to be defined in terms of the wording and the structure of the Convention. A second option is: no, a legally binding concept may be envisaged as a political aim but has not yet been elaborated within the framework of the Convention. The third possibility is: only to some extent may one speak of a coherent legal concept, shaped by contextual relations and different categories of individual human rights and different state obligations.[19]

[11] The passage above succinctly encapsulates the legal issues relating to the best interests of the child principle. Joachim Wolf's opinion illustrates three legal positions of the best interests of the child principle. The possibilities raised are firstly that the principle is binding. Secondly, that the best interests of the child principle has not been deemed binding but that is the ultimate aim of the CRC. Finally, the third position is, in his view, the most conducive of all the possibilities suggested as it seems to be a convergence of the first and second points, or the mutual concept.

[12] The quote above may seem simplistic but this article was published in 1992, three years after the CRC was formalised, and the points he made merit further analysis. Several decades later and after countless discussions, debates, interpretations, articles, case laws and even books have been written on the principle of best interests, there is still ambiguity in the definition of the actual principle as well as its degree, whether binding or non-binding, primary or paramount. The principle is widely accepted as one of the main pillars of the CRC. However, it is interesting to note that Wolf's opinion does not differ greatly from the current situation.

[13] The status of the principle is important because it has become the basis of the State Parties adherence and commitment to the CRC. Most common law states have accepted that the principle is binding and this can be seen in both the United Kingdom ("UK") and Malaysia. However, the degree of the application of the principle has varied and it is important to understand why the acceptance of the principle has varied and how it has affected the application of the said principle domestically. Malaysia is a party to the CRC and the provisions are

19 Joachim Wolf, quoted in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights*, Vol 23 (Martinus Nijhoff Publishers, 1992), p 126.

binding with the exception of the reservations that Malaysia has placed. The best interests of the child principle is also binding for Malaysia, however the application of the principle does not meet the standards set by other states. This article will look at some of the development of the differences.

[14] There are several aspects of Wolf's article that are agreeable and the most salient point is that the CRC and its apparatus lead one to assume the same, that the principle is both binding and non-binding at the same time. It is this ambiguous form that has clouded the best interests of the child principle for not only Member States but it seems the CRC Committee as well. This article will try to shed some light on the ambiguity that is shrouding the best interests of the child principle especially that surrounding the CRC Committee.

[15] Before that, it is essential to clearly define the best interests of the child principle based on the historical background and drafting process of Article 3 of the CRC with the intention of understanding the purpose of the principle and hopefully how it should be defined. Besides the historical background of the principle, an analysis of the development of the principle based on all the above information and as applied by the CRC Committee conforming to the CRC will be referred to in developing an understanding of the best interests of the child principle.

Definition of the child

[16] Any discussion on the best interests of the child principle should begin with the subject-matter, which is the child. Legally, the CRC has provided the definition of a child in Article 1, which states as follows:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

[17] The United Nations High Commission for Refugees ("UNHCR") Guidelines also provide an extension to that definition, stating:

> A "child" as defined in Article 1 of the Convention on the Rights of the Child (CRC), means "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". In terms of actions by UNHCR, the word "child" refers to all children falling under the competence of the Office, including asylum-seeking children, refugee children, internally displaced

children and returnee children assisted and protected by UNHCR and stateless children.[20]

[18] In all probability, the definition was drafted to allow some flexibility for Member States to insert their own definition of "child". In addition to that, within the CRC, the term "children" carries additional meaning in that it implies that children are also protected as a group and that there would be collective as well as individual rights. The importance of the definition of the child is given more credence especially involving states that practice a pluralistic legal system like Malaysia. Since the Islamic law or *Shari'ah* is the prevalent law of the land, it is necessary to understand the definition of "child" in Islam.

The definition of child in Islam

[19] The definition of a child in Islam is different from that found in the CRC and other Western jurisdictions. The Organization of Islamic Conference ("OIC") came together and drafted the Covenant on the Rights of the Child in Islam (the "Covenant") seemingly in response to the CRC. The Covenant defines the child as, "… every human being who, according to the law applicable to him/her, has not attained maturity."[21] The selection of the term "maturity" and not "majority" is significant.

[20] It connotes a specific point in time where everyone attains majority and, in the case of the CRC, is 18 years.[22] However, the term is defined as "(mental development) the quality of behaving mentally and emotionally like an adult and (full growth) the state of being completely grown physically." The terminologies used indicate different meanings with the latter describing a person that becomes an adult both biologically and mentally. This best defines the adult under Islamic law.

[21] The difference with the above definition is the cut-off point for the age of majority or in Islamic terms, *baligh*. The *Shari'ah* in Malaysia has not defined the child in any written law. However, there is a *fatwa*

20 UNHCR Guidelines on Determining the Best Interests of the Child at <http://www.unhcr.org/4566b16b2.pdf> as at September 30, 2016.

21 The Covenant, Art 1.

22 The Western concept is determinate based on the age of the individual, i.e. as stated in Art 1 of the CRC. Whereas in Islam, the concept is flexible and based on the biological clock and physiology of the individual as illustrated above.

that states that the foetus is "breathed life" at the age of 120 days and therefore includes a baby still in the mother's womb. Therefore, the definition of a child in the context of the *Shari'ah* in Malaysia is from a 120-day old foetus until the child comes of age or *baligh*. Although the rights of the foetus are not as developed as those of the child, the foetus still has rights.[23] Although this is not an ideal definition and could be termed a "divine based" provision, it cannot be specific taking into consideration that different people come of age (or reach maturity) at differing ages.

[22] Looking at other perspectives, including the Islamic perspective, a foetus' right to life is subject to a woman's right to an abortion.[24] Even in the definitions above, the beginning of the existence of the child has never been fully accepted by all. In Islam, the issue is clear that the child in the womb is an individual with every right to live.[25] The only exemption to the said maxim is if the bearing of the child endangers the life of the mother, and thence an abortion becomes a necessity or when the child has no chance of survival, for example, an anencephalic baby.[26] This is basically the definition of a child in Islam.

Article 3: Best interests of the child in the CRC

[23] Now to look at the overall definition of the principle. There is no clear definition of what is meant by "the best interests of the

23 The rights of an unborn child is not a complete right. It has the right to life during the time they are in their mother's womb and even the right to be considered for *faraidh* or succession. For further reading, see Majdah Zawawi, "Assisted Reproductive Technologies in Malaysia: Balancing Rights and Responsibilities", an unpublished PhD thesis, International Islamic University, Kuala Lumpur, Malaysia, 2007, p 303. See also, Yasein Mohamed, "*Fiĭrah* and Its Bearing on the Principles of Psychology" (1995) 12(1) *The American Theories of Islamic Law Journal of Islamic Social Sciences* 12.

24 This article will not debate on a person's right to have an abortion because it is not part of this thesis and is subject to the laws of the relevant state. The abortion law in Malaysia is very strict but this in turn has given rise to "illegal" abortion clinics being run by medical professionals. In a meeting with the representatives of the Malaysia Medical Council, the medical professionals feel that the woman's right not to be burdened/humiliated by the presence of the child supersedes the law. Section 315 of the Penal Code specifically states that an abortion is illegal unless it is to save the mother (there are more explanations and exceptions).

25 At the very least, from when the foetus is 120 days old.

26 In Malaysia, most medical practitioners have ruled that the child has no chance of survival, although in Western civilisations there have been cases of successful birth and survival after medical surgery.

child" either within the CRC or from the CRC Committee. However, for a more legally acceptable definition there must be more clarity especially when the group has no specific representative to express their interests. According to Michael Freeman who is a child specialist in his own right, the best definition of the principle is provided by John Eekelaar who stated that the definition of the best interests of the child is as follows:

> … revolve around children's "basic" interests (to physical, emotional and intellectual care); their "developmental" interests (that their potential should be developed so that they enter adulthood as far as possible without disadvantage) and their "autonomy" interests (the freedom to choose a lifestyle of their own).[27]

[24] Most other interpretations are of similar ilk although some other explanations or descriptions regarding the best interests of the child have arisen in different circumstances. One example was provided by the former EU Commissioner for Human Rights who defined the best interests of the child as follows:

> … that it is in the best interests of the child to: receive education;[28] have family relations;[29] know and be cared for by his or her parents;[30] be heard in matters concerning him or her[31] and to be respected and seen as an individual person.[32]

[25] In the same way, the CRC states what is not in the best interests of the child, for instance, to be exposed to any form of violence;[33] to be wrongly separated from his or her parents;[34] to be subjected to any traditional practices prejudicial to the child's health;[35] to perform any work that is hazardous or harmful,[36] or to be otherwise exploited or abused.[37]

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27 John Eekelaar, "The Importance of Thinking that Children have Rights" (1992) 6 *International Journal of Law and the Family* 221–235.
28 CRC, Art 28.
29 Ibid, Art 8.
30 Ibid, Art 7.
31 Ibid Art 12.
32 Ibid, Art 16.
33 Ibid, Art 19.
34 Ibid, Art 9.
35 Ibid, Art 24.
36 Ibid, Art 32.
37 Ibid, Arts 33–36.

[26] In summary, the best legal definition for "the best interests of the child" is achieved by providing an inclusive list of things that can be part of the definition and those specifically linked to child protection. It may not be as clear as most other legal definitions but it is one that allows a considerable amount of flexibility for Member States to manoeuvre and on the positive side, it creates parameters as to what the principle covers.

[27] Besides the discussion above, the terminology used, i.e. either "primary" or "paramount", is still ongoing. The CRC uses "primary" whilst the 1959 Declaration used the term "paramount." However, as the records attest, the accepted terminology is "primary". The differences in the terminologies and thresholds used for the principle directly affect the best interests of the child principle because both terms connote different meanings. The issue stems from something much deeper, and relates to the practice of other jurisdictions. In this case, the English position regarding the best interests of the child principle or as it is known in England, the welfare or paramountcy principle, forms part of the issue.

[28] The welfare principle has a higher degree of application than the CRC where the principle is paramount and not primary, thus the term "paramountcy" principle. In England, the paramountcy principle forms part of the common law and has developed independently without any external encouragement[38] and will be discussed later in this article. The English courts have maintained that the paramountcy principle is the same as the requirement under the CRC and the European Convention on Human Rights ("ECHR") provisions but this position has been questioned.

[29] The literature has swung back and forth with no concrete end in sight. The situation is not helped by the fact that there are some who suggest that the CRC's primacy consideration is "diluted" and that England should lead the way in developing a different or stronger standard. This could be true but it is not how international treaties operate. If the CRC is truly diluted, any change ought to be made through amendments to the CRC.

38 Whereas Malaysia needed an intervention from the CRC by becoming a party to the CRC and it had to implement and apply the CRC principles in Malaysia.

[30] Furthermore, the CRC Committee seems to agree with the fact that there is a difference between "primary" and "paramount". This is illustrated through Article 21 of the CRC and the General Comment No 14, which states, "In respect of adoption (art 21), the right of best interests is further strengthened; it is not simply to be 'a primary consideration' but 'the paramount consideration'."[39] Furthermore, the debate might be specific but it illustrates the general feeling that surrounded the drafting of the CRC and still lingers today within the CRC Committee.

[31] The degree involved in Article 3 paragraph 1 was drafted specifically to allow for flexibility giving all Member States room to comply. The importance here is that the application "shall be a primary consideration" and not "shall be the paramount consideration". This article agrees that the meaning of "primary" as first or main but it is not the only consideration and is of the view that if the intention of the drafters was for the best interests of the child to be the only consideration then Article 3 paragraph 1 would have read differently.

[32] Despite the consensus by the Member States to accept a lower threshold, the CRC Committee seems reluctant to abide by the said consensus. The principle is accepted but *what* is applicable and how it is to be defined in order to apply it in practical terms and acceptable to all parties remains unclear. The principle was defined loosely but the application has been narrowed through the comments made by the CRC Committee on Member States that have used their own interpretation on the said principle. The problem arises when the CRC Committee insists on it being harmonised into what it deems acceptable with the result that the principle becomes rigid again.

[33] This is deduced based on the CRC Committee's own publications. The first is in General Comment No 14 where it describes the phrase "shall be a primary consideration" as follows:

> 36. The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests

39 General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3 para 1), July 19, 2017, at <http://www2.ohchr.org/English/bodies/crc/docs/,GC/CRC_C_GC_14_ENG.pdf>, p 10.

are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.

37. The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

38. In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "a primary consideration" but "the paramount consideration". Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.

39. However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

40. Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.[40]

40 Ibid, paras 36–40, p 10.

[34] Based on the above, specifically paragraphs 36 and 37, the CRC describes the importance of "a primary consideration". However, the level described does not reconcile with the description in paragraphs 38 and 39. In paragraph 38, the principle is described as important but if it is to be the determining factor then it should be "the paramount consideration", as described earlier in this article. Therefore, it is natural to conclude that there has to be differing levels of application based on the terminologies used.

[35] Furthermore, in paragraph 39, the CRC describes possible conflicts if the best interests of the child principle is applied in isolation. The application should look at the facts of the case as well as other factors that are also principles existing within the CRC albeit not having the same status as the best interests of the child, but important nonetheless. It is this article's humble view that if consideration is to be given to other elements and aspects of the CRC, then the best interests of the child is not the paramount consideration because there will be conflict between the different considerations.

[36] This reaffirms the position based on the understanding that if the best interests of the child principle is to be applied, all factors must be considered before any decision can be made. It does not matter whether the consideration is based on an individual child or a group of children; it has to be done completely. The fact that the child's issues must be studied on a case-by-case basis is agreed, after which the other factors must be reviewed. The elements that have to be considered have already been provided by the CRC and are further entrenched by the CRC Committee,[41] and these include the child's view,[42] protection of the child's identity,[43] the preservation of the family environment and maintaining relations,[44] care, protection and safety of the child,[45] situation of vulnerability, the child's right to health[46] and the child's right to education, all of which must be considered based on the best interests of the child.

41 Ibid, at pp 12–17.
42 CRC, Art 12.
43 Ibid, Art 8.
44 Ibid, Arts 9, 18 and 20.
45 Ibid, Arts 3(2), 19 and 32–39.
46 Ibid, Art 24.

[37] Furthermore, if the principle is based on primary consideration, then the privacy of the family institution would be protected. Taking into consideration Malaysia's socio-legal complexities where the general rule has always been conservatism is the norm, the paramountcy principle would be almost impossible to enforce in Malaysia. When Malaysia acceded to the CRC, it was under the notion that the principle was of primary consideration and not paramount. This would allow a gradual implementation of the principle on the family institution and the government authorities at an acceptable pace for Malaysia. It would also allow the Malaysian Government flexibility in determining the degree of the test to be applied, when the child's best interest would be the primary consideration and when the interests of others may be considered without damaging the interests of the child.

[38] What this implies is that any decision taken would still be for what constitutes the best interests of the child, but the interests of others like siblings, parents and even close family members would also be considered before that decision is made. The concept that the EU practices – what some call proportionality and which Jonathan Herring refers to as balancing all interests –[47] provides that the child's interests are not the only interests to be considered. Under the paramountcy principle, the only consideration is that of the interests of the child in question, even at the cost of other children or members of the family.

[39] However, in summarising the discussion above, had the terms been more determinate it would have made the principle too rigid and probably impossible to be effected. Michael Freeman's statement perfectly illustrates the issue of a rigid approach as follows:

> The child's best interests are to be *the* paramount consideration. They are not therefore one factor among others. They are not even the first consideration. Under this test they are not merely the most important consideration. They are simply determinative.[48]

[40] According to Michael Freeman, the principle had to be drafted in such a way as to make it acceptable to all. Therefore, a compromise was reached that made it acceptable to all and where each would have their own interpretation based on the Member State's situation. Freeman continues as follows:

47 Jonathan Herring, *Family Law*, 5th edn (Longman Law Series, 2011).
48 Michael Freeman, n 16, p 25.

> The best interests concept is indeterminate. And there are different conceptions of what is in a child's best interests. Different societies, different historical periods will not agree. … It may be that the decision one comes to, say in a disputed custody, or the policy a legislator adopts, will depend on which aspect of a child's welfare is dominant in the minds of the judge or legislator.[49]

[41] This then begs the question as to why the CRC Committee continuously reminds Member States to follow other countries that they feel are more adaptive to the principle and where it has been interpreted to the extreme or higher threshold. Surely, the Member States have accepted these principles and have interpreted them in their own way, bearing in mind the customs and historical background of their own country – that is, unless the answer is that the CRC is heading towards a harmonised definitive principle. Legally, it makes sense to have a definitive principle to eradicate all ambiguity, however, this is not the situation in international law or the human rights forum.

[42] International law and the human rights forum is a conundrum of layer upon layer of interpretive issues, exemptions, negotiations, and most importantly, it has the inability to be clear to ensure Member States are not bound or obligated to follow provisions, which are deemed politically unviable for a specific state. To explain further, if states felt cornered or obligated to perform in a situation against their wishes, they would feel the need to withdraw from the said treaty or convention. Even worse, as the US has done before, they would unsign from a treaty or convention.[50] In an international instrument, whilst disagreements or disputes can be negotiated, the worst-case scenario is a complete withdrawal. As long as the states remain within the treaty, the relevant committees and states would be able to negotiate a compromise.

[43] Nonetheless, the bar has been set whereby the best interests of the child principle has been defined as above and the principle is one of the main or "primary" considerations but not the definitive or absolute or "paramount" consideration. The discussion above has

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49 Ibid, at pp 27–28.

50 The US Government under the Clinton administration had signed the Rome Statute and informed the incoming Bush Jr administration. The Bush Jr administration immediately upon taking over the leadership unsigned the Rome Statute in 2002.

also illustrated the debate surrounding the principle that it is not "*the* primary consideration" but "*a* primary consideration". This is the principle as set out in the CRC, the one that should be accepted by all Member States and also the position that this article supports.

[44] Finally, the best interests of the child principle has been applied throughout the world and it is apt that this quote from 1994 illustrates the principle quite accurately:

> … although the principle has often been recognized in international instruments it has yet to acquire much specific content or to be the subject of any sustained analysis designed to shed light on its precise meaning. The most important formulation is clearly that contained in Article 3(1) of the Convention on the Rights of the Child. …
>
> Yet despite its very limited jurisprudential origins, the principle has come to be known in one form or another to many national legal systems and has important analogues in diverse cultural, religious and other traditions. This apparent commonality contrasts sharply, however, and potentially very revealingly, with the very diverse interpretations that may be given to the principle in different settings. Thus, to take one example, it might be argued that, in some highly industrialized countries, the child's best interests are "obviously" best served by policies that emphasize autonomy and individuality to the greatest possible extent. In more traditional societies, the links to the family and the local community might be considered to be of paramount importance and the principle that "the best interests of the child" shall prevail will therefore be interpreted as requiring the sublimation of the individual child's preferences to the interests of the family or even the extended family.[51]

The best interests of the child principle in England

[45] Next is a brief historical overview of the principle as applied in the common law of England. Innately, the application of the principle should be similar no matter which country is involved but Article 3 paragraph 1 has not been applied uniformly throughout. This occurs because the principle has been interpreted differently in Malaysia, which sees it as an international human rights principle, as compared to England which applies it as a family law principle. However, to

51 Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" (1994) 8(1) *International Journal of Law and the Family* 1–25.

have any semblance of understanding the application of the principle in England, one needs to look at the history and development of the principle. As mentioned earlier, the best interests of the child is known as the welfare or paramountcy principle in the UK.

Origins of the welfare principle

[46] According to Eekelaar, the origins of the welfare principle originated from the case of *R v De Manneville*.[52] It was in this case that the court had to consider whether a father who would put his child in bodily danger should be allowed to claim possession of his child. The court decided that it was for the welfare of the child that custody was not awarded to his father if to do so would put him in bodily danger. This was the origin of the "welfare principle" of the Chancery courts.[53]

[47] However, the principle as it was practised then is not the same as the principle that is being practised in England today. The welfare principle today is child-orientated or child-friendly whereas the principle then was totally different, being more patriarchal. One need only compare the principle by looking at some of the decisions taken in cases that illustrate the application of the principle as it was first understood in the 19th century. They show that the principle was directly linked to the parents or as another stated, "… the private family sphere English Law continued to view children as the property of their father."[54]

[48] These following cases were referred to both by Eekelaar[55] and MacDonald[56] to illustrate the welfare principle in its infancy. In *Wellesley v Duke of Beaufort*,[57] the "… filial affection and duty towards their father operate the utmost." So, the child's interests were best met by showing duty to the father. Then in *Symington v Symington*,[58]

52 (1804) 5 East 221.
53 John Eekelaar, "The Emergence of Children's Rights" (1986) 6(2) *Oxford Journal of Legal Studies* 161.
54 Alistair MacDonald, *The Rights of the Child: Law and Practice* (Family Law Jordan Publishing Limited, 2011), p 9, quoting Clarke Hall, W *The Queen's Reign for Children* (Fisher Unwin, 1897).
55 Ibid.
56 Ibid.
57 (1827) 2 Russ 22.
58 (1875) LR 2 Sc & Div 415.

Selborne LC said, "[it is] in the material and moral interest of boys to leave them in the care of their natural and legal guardian." It is assumed that the position is the same for girls. The best case to sum up the principle as it was then is the case of *Re Agar-Ellis*.[59] It was stated that, "… when by birth the child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interests of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father but leave it to him the responsibility of exercising that power which nature has given him by birth of the child." This could be said to be a naturalist view of the status of children at that time and seemed to ignore the need to acknowledge the role of the mother or wider familial care. The extremity referred to was not defined but could be seen on a case-by-case basis.

[49] Nonetheless, despite this initial approach taken by the courts and the government to leave the welfare of the child purely in the hands of their father or legal guardian, this situation did not last. It was during the late 19th century that the child protectionist movement gained momentum in Europe. Similarly, in England a new law was passed to that effect, namely the Prevention of Cruelty to, and Protection of, Children Act 1889. Section 1 provided that it would be an offence to ill-treat and neglect children:

> Any person over sixteen years of age who, having the custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of a misdemeanour, and, on conviction thereof on indictment, shall be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition to payment thereof, to imprisonment, with or without hard labour, for any term not exceeding two years, and on conviction thereof by a court of summary jurisdiction, in manner provided by the Summary Jurisdiction Acts, shall be liable, at the discretion of the court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition

59 (1883) 4 Ch D 317.

> thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

[50] It is interesting to note that while the Act above created an offence for any person above 16 years old, against boys under 14 years old and girls under 16 years old, no definition of the child was provided for in the said Act. It is assumed that childhood ended at the age of 16 in the late 19th century.[60] This shows that childhood ended earlier then, before the developments in the late 19th century. This also shows that the current generation is accorded more time to mature and develop than their ancestors.

[51] The above provision also listed the categories of offences, namely, that one, "ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health". This was clearly a paradigm shift from leaving the care, protection and development of the child entirely to the child's parents and legal guardian. The shift from the extreme case scenarios before state intervention was quite clear, although it took some time before the implementation was completed by all interested parties (both administrators and the courts).

[52] The courts also began leaning more closely to a welfare principle that was more child-centric. For example, in *Re McGrath*,[61] Lindley J held that:

> The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical wellbeing, nor can ties of affection be disregarded.

[53] Subsequently, not only was the welfare principle established, there was also an enhanced level or importance of the principle since the welfare of the child had to be the paramount consideration in the case. In the case of *F v F*,[62] Farwell J held that, "The court in considering the

60 There are other legislation that use 16 years as the cut-off period. Section 8(1) of the Family Law Reform Act 1969 states that 16-year-olds can give consent for any surgical, medical or dental treatment without obtaining consent from their parents or legal guardians, whilst Malaysia has 18 years as the general rule with some notable exceptions.

61 [1893] 1 Ch 143.

62 [1902] 1 Ch 688.

question of guardianship has regard before all things to the infant's welfare; it has regard, of course, to the rights of the father and the mother, but the essential requirements of the infant are paramount." This case followed an earlier American case that had coined the phrase that everyone knows today. The Kansas Supreme Court held that the courts' *paramount* consideration was to be the child's welfare.[63]

[54] Despite Eekelaar stating that the courts' motives may not be purely for the child's best interest,[64] the enactment of the 1889 Act and the courts' actions marked the advent of the welfare principle in England. This sowed the seeds of the welfare principle espoused in the English courts to this day, in cases involving children. Although other aspects may be considered, it is the welfare of the child that must be given the paramount consideration. While the principle did not begin with that express intention, it has developed into that condition. The paramountcy principle basically means that in cases involving aspects of the child that are listed in section 1 of the 1889 Act, the most important consideration must be the welfare of the child.

Is the welfare (or paramountcy) principle in the English Children Act 1989 similar to the best interests of the child principle in the CRC?

[55] Now that it has been established that the welfare principle is embedded in the English common law, the main question is whether the welfare principle is equivalent or fulfils England's obligations under Article 3 of the CRC, which speaks of the best interests of the child principle. The best interests of the child principle is not expressly stated in the English Children Act 1989. This is so despite the fact that the UK and England are parties to the CRC.

[56] In England, the best interests of the child principle has been construed as part of its well established welfare principle, which is enshrined in the Children Act 1989. The welfare principle has been defined in case law to be as follows:

> … a process whereby, when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term

63 *Chapsky v Wood* (1881) 26 Kan 650, per Brewer J.
64 John Eekelaar, n 53, p 169 paras 2 and 3.

has now to be understood. That is the first consideration because of its first importance and the paramount consideration because it rules upon or determines the course to be followed.[65]

[57] This is also why the welfare principle is also called the paramountcy principle. The historical reasoning behind this has been discussed above. In addition to that, an event closer in time could be studied, that is, the repealed Children Act 1975 from England which used the term "first and paramount consideration"; numerous case laws that have interpreted this term. The welfare of the child is the first and ultimately only consideration that the courts should entertain when dealing with the child's best interests. The drafting of the repealed Children Act 1975 was probably on the above quoted case, thereby codifying the common law *ratio* at the time.

[58] Nonetheless, the welfare or paramountcy principle is a rather ambiguous term since the literature on the matter is divided, even in England. Some claim that the principle follows the principle as laid down in the CRC.[66] However, others claim that it is the main and only test to be administered in cases involving children.[67] This has led to it being deemed contradictory with another English law – the Human Rights Act – that will be explained later.

[59] The welfare or paramountcy principle is not only ingrained in the English common law but according to case law, it is part of the court's inherent powers. This inherent power of the court was there even before the welfare or paramountcy principle was expressed in the Children Act 1989. The welfare principle takes the child's welfare as its paramount consideration and therefore this is also the child's best interest. The welfare principle is provided for in section 1 of the Children Act 1989, which states as follows:

1. Welfare of the child.

(1) When a court determines any question with respect to –

(a) the upbringing of a child; or

65 *J v C* [1970] AC 688 at 710–711.

66 Brenda Hoggett, Richard White, Paul Carr and Nigel Lowe, *Clarke Hall & Morrison on Children: Law Relating to Children and Young Person Special Bulletin A Guide to the Children Act 1989* (London: Butterworths, 1990), p 2.

67 Shazia Choudhry, and Helen Fenwick, "Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act" (2005) 25(3) *Oxford Journal of Legal Studies* 453–492.

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to –

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that –

(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(b) the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

(Emphasis added.)

[60] Section 1 has been interpreted to include the best interests of the child principle in that it considers the child's welfare as the primary concern in determining what is best for the child. This section goes on to explain when and how to use the principle. The elements that form the welfare principle have been provided for in paragraphs (a) to (g) of subsection (3). There is no mention of referring to the parents or guardians of the child in question. Similarly, there is no referencing to siblings in the provisions. There is a glaring propensity for supporting the child and the child's needs only.

[61] As with any other general principles of law or maxims, there are of course exemptions to the said principle. These exemptions are provided for in subsections (4) and (5). This law and the exemptions are part of the welfare and paramountcy principle, but the main question is whether it also falls within the ambit of the best interests of the child principle provided for in the CRC.

[62] England, of course, has an obligation to ensure that the provisions of the CRC are fulfilled, especially those that are deemed to be the general principles of the CRC.[68] However, since the Children Act 1989 came into force before the CRC, the courts have taken the role of incorporating the principles of the CRC into English law since Parliament itself has not done so. Again, the question arises as to whether that meets the requirements of the CRC. The last CRC Committee recommendations to the UK do not really answer this but they do seem to show that the Committee feels that whatever the rule that has been placed to fulfil these obligations has not been executed completely. The Committee's recommendations regarding the best interests principle in the UK were as follows:

> **Best interests of the child**
>
> 26. The Committee regrets that the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the area of juvenile justice, immigration and freedom of movement and peaceful assembly.

68 Jane Fortin, *Children's Rights and the Developing Law*, 3rd edn (Cambridge University Press, 2009).

> **27. The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of criminal justice and immigration.**[69]

[63] The paragraph above has been emphasised in bold type exactly as done by the CRC Committee in their recommendation report. It should be pointed out that the report above is for the UK as a whole and includes the position of Scotland, Northern Ireland and Wales.[70] This article will limit the focus on England. The recommendation stated that the UK has not fully incorporated the best interests of the child principle in all legislative and policy matters involving children. The CRC Committee illustrated three areas of concern, namely, criminal justice, immigration and freedom of movement and assembly. However, the CRC Committee recommended that the best interests of the child should be more integrated especially in specific areas, namely, criminal justice and immigration. The CRC Committee did not elaborate further than that and one can assume that the transgressions were not major ones.[71] It merely mentioned that the UK should address and integrate the principle into UK policies and law.

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69 Concluding Observations: United Kingdom of Great Britain and Northern Ireland 2008.

70 The point of variance between Scotland and England is quite clear and that is the youth justice system, as stated by Raymond Arthur, "Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland" (2010) 18 *International Journal of Children's Rights* 217–231 who stated as follows, "Although section 1 of the Children Act 1989 requires that when a court determines any question with respect to the upbringing of a child 'the child's welfare shall be the court's paramount consideration', statutory *Guidance* states that this welfare principle only applies to proceedings under the 1989 Act. Thus, the overarching welfare principle of the 1989 Act does not extend to provisions dealing with young offenders. … In Scotland, the overriding and paramount principle is the welfare of the child and all decisions must be made in the interests of safeguarding that welfare. … The advantages of the Scottish youth justice system include its child-centeredness and its focus on welfare. The Scottish system adopts a holistic approach, looking beyond the deeds of young offenders and provides a multi-disciplinary assessment of children under the age of 16 years." Therefore, Scotland has been absolved from a large portion of the comments made by the CRC recommendation for the UK.

71 This is compared to Malaysia's recommendations and not with other Member States.

[64] In the current global climate the issue of immigration is a sensitive one,[72] especially for this current government with all the election campaigns revolving around the issue of immigration. The fact that the courts have tended to allow the Secretary of State considerable discretion in dealing with immigration cases even those involving children has not helped matters. Nonetheless, the CRC Committee had specifically mentioned the immigration policies of the UK as a specific area of concern and clearly some effort needs to be made to address the recommendations, such as reviewing the said policies.

Malaysia and the best interests of the child principle

[65] The CRC came into force in 1989 and is one of the nine main human rights treaties. Malaysia ratified the CRC on February 17, 1995 and enacted the Child Act 2001 [Act 611] as part of her commitment to the CRC.[73] It is important that the principles of the CRC are implemented not only to ensure that the rights of the child are protected but to ensure that the child is allowed or given the opportunity to develop to their full potential. Malaysia as a Member State ought to be able to fulfil her commitments as required under the CRC. However, becoming a party to, and fulfilling the commitments are two different things. There is, arguably, no Member State that can claim to fulfil all the obligations required of the CRC, as it is a statement of principles that can be, and is, seen from different perspectives and angles. However, implementation is particularly complicated in Muslim and Islamic states[74] such as Malaysia, with dual legal systems in which civil and *Shari'ah* law share jurisdiction on certain issues.

[66] The CRC Committee's report on Malaysia in 2007 found that it was complying with the CRC in some ways.[75] For example, the

72 The US presidential election in 2016 and the current US Government's policies on immigration and migrant workforce is referred.

73 Malaysia has ratified two optional protocols, namely, the Optional Protocol to the CRC on the involvement of children in armed conflicts and the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography. Malaysia has yet to ratify the Optional Protocol to the CRC (Individual Complaint Procedures).

74 In the context of this article, Muslim states refer to countries where the population is majority Muslim or ruled by predominantly Muslims rulers, whilst Islamic states refer to states that implement the Islamic law or *Shari'ah* in full. Malaysia is an example of the former whilst Saudi Arabia is an example of the latter.

75 Concluding Observations: Malaysia, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/MYS/CO/1.

Committee commended the Government of Malaysia for adopting the Child Act 2001 and other laws that affect the child, and the creation of child protection teams under the Child Act 2001. Other positive aspects include the expansion of the Ministry of Women and Family Development to the Ministry of Women, Family and Community Development ("MWFCD") in 2001 and the MWFCD's responsibilities including gender equality, family well being, child issues and social development in general.

[67] However, it also had concerns about non-compliance. Specifically, the perceived conflict between civil and *Shari'ah* law, differences in the definition of the child in the various laws of Malaysia,[76] non-discrimination of all children,[77] and the application of the best interests of the child principle which is still not a primary concern in administrative and judicial decisions, programmes, policies and several other issues on child rights and development. It made a number of recommendations regarding Malaysia's dual legal system and its application to family law disputes.

[68] This article looks briefly at Malaysia's dual legal system whenever relevant. In the actual thesis, a study was done between the application of the best interests of the child principle in both the civil law and *Shari'ah* in Malaysia. However, this article will concentrate only on the civil aspect of the principle specifically. This will be done by looking at some of the laws applicable to children and one cannot go astray without venturing into the Child Act 2001.

The Child Act 2001 [Act 611]

[69] Generally, the Child Act 2001 criminalises certain acts such as the reporting and publication of children in the media,[78] ill treatment, neglect, abandonment and abuse of children. In addition, it provides rehabilitation measures for children who have transgressed certain laws, but it does not provide specific rights that should be awarded to children. This gives the Child Act 2001 a semblance of a penal statute with offences for omission or commission of an act but does not seem to be in tandem with the CRC which, like all other international

76 This does not include the differences between civil and *Shari'ah* laws.
77 Notwithstanding their race, religion or gender.
78 The first time such acts have ever been criminalised in Malaysia.

human rights instruments, is a rights-based Convention, only in this case providing for children's rights. While some rights have been incorporated through the Federal Constitution, they are not absolute.[79] Before proceeding further, let us look at the definition of the subject-matter at hand in Malaysia.

The child: Definitions

[70] Another effect of the diverse background that Malaysia has is found in the definition of the term "child". Though (as a legacy of colonialism) Malaysia uses the English common law, it was not uniformly accepted into Malaysia, i.e. the different cut-off points for the different regions. This has created regional differences on the application of Malaysian law. There are also inconsistencies in how children are defined and treated for different purposes in the law. This can be illustrated through the example of the age of maturity or majority. The Child Act 2001 defines a child as any person under the age of 18,[80] with the exception of those in criminal proceedings where the jurisdiction is governed by section 82 of the Penal Code [Act 574]. Section 82 of the Penal Code provides that a child below 10 years of age will not be liable for any offence whilst section 83 provides that a child between 10 and 12 years old can be liable if there is sufficient evidence of the child's maturity. Section 376 of the Penal Code also provides that sexual intercourse involving any girl below 16 years of age is deemed statutory rape.[81]

[71] Meanwhile, the Children and Young Persons Act (Occupation) 1966 [Act 350] defines a child as any person who has not completed his fifteenth year of age where the Act allows children above this age to work. Yet another definition is provided under the Adoption Act 1952 [Act 257] which defines a child as being unmarried and under 21 years, which is also the age of majority under the Age of Majority Act 1971 [Act 21].[82] The age of majority is also the legal age at which a person can

79 The Federal Constitution provides for fundamental liberties for all, including children. These liberties include the rights to life, freedom of speech, freedom of assembly, freedom of religion and other liberties and rights.

80 Child Act 2001, s 2.

81 Statutory rape simplified is that the girl's consent is not a defence against rape.

82 This is mainly used for when voting rights are allowed and the age of entering into a contract.

validly enter into a contract under the Contracts Act 1950 [Act 136].[83] However, according to the Law Reform (Marriage and Divorce) Act 1976 [Act 164], no marriage can be solemnised if either party has not attained the age of 18 years.[84] However, there is an exception for girls who have reached 16 years who may marry with the consent of the Chief Minister of the state.

[72] The differences also affect the regional application in Sabah and Sarawak. The native law in Sarawak allows the headsman of a village to conduct marriages of girls as young as 11 years old. The marriage would be validated by the native laws and neither the federal nor state laws would be able to invalidate it. When acceding to the CRC, Malaysia knew that it had areas of concern that did not fulfil the CRC obligations. Therefore, the accession was merely the beginning of a process requiring further action to be taken in order to harmonise Malaysian laws and customs in accordance with the CRC.

The best interests of the child in the Child Act 2001

[73] The Child Act 2001 is enacted but where is the best interests of the child principle placed in the Act? It should be at the beginning of the Act applicable to all provisions in the Act (as in the UK), or at the very least in the preamble to note the significance of the test and hopefully for the courts to infer its significance. However, this is not the case in the Child Act 2001 whereby the principle is only mentioned in one part of the Act. Besides that, the CRC requires that the best interests of the child principle is applied as a primary consideration in all cases involving children. However, the application and execution of the Act does not have the desired effect.

[74] Since its enactment, the Jabatan Kebajikan Masyarakat ("JKM") officers who were either gazetted or appointed as Protectors,[85] probation

83 Contracts Act 1950, s 11. Although after the celebrated case of *Government of Malaysia v Gucharan Singh* [1971] 1 MLJ 211, the Contracts Act 1950 was amended to make scholarship contracts an exception for competency when entering into an agreement. The case had determined that the scholarship contract between the Government of Malaysia and Gucharan Singh was void because the latter was a minor at the time of entering into the contract.

84 Law Reform (Marriage and Divorce) Act 1976, s 10. This law is applicable to non-Muslims only.

85 Child Act 2001, s 8(1).

officers[86] and Social Welfare Officers[87] had to make small adjustments but otherwise it was business as usual. The reason for this was that the following three Acts – the Juvenile Courts Act 1947 [Act 90], the Women and Girls Protection Act 1973 [Act 106] and the Child Protection Act 1991 [Act 468] – were also under their jurisdiction. The Child Act 2001 was supposed to be the manual for all things related to children. However in reality, the JKM continued in their customary way and read the Child Act 2001 as three separate Acts that are not inter-related or connected.

[75] The legal opinion prevalent at that time was that JKM was correct in their interpretation of the Child Act 2001. This was because there was no commonality between the three amalgamated Acts. They all had separate functions but had some overlap in the method of redress.[88] This was specifically concerning the places of refuge or rehabilitation centres for children with problems. The differences were minor enough to be disregarded until an unreported case came up in 2008.

[76] In this case, the parents of an Indian girl felt that they could no longer control their teenage daughter and sought counselling from the JKM. It was agreed that the child be placed under the protection of the JKM under the provision of children beyond control[89] pursuant to section 46 of Part VII of the Child Act 2001. The parents brought the child voluntarily to the JKM and subsequently brought the matter to the Court for Children who issued an order pursuant to section 46(2)(aa) and (bb) of the Child Act 2001. This entailed a supervision period of up to three years in one of the JKM's institutions. This provision was taken from the abolished Women and Girls Protection Act 1973 [Act 106].

[77] The problem arose when the case was compared with cases under children in need of care and protection (Part V), children in need of protection and rehabilitation (Part VI) and criminal procedure in court for children (Part X). These would involve children who were involved in more dangerous scenarios or even crime. Technically, most of them

86 Ibid, s 10(1).
87 Ibid, s 2.
88 The term "redress" is used, as the concept of the Child Act 2001 was that children would not be punished.
89 Beyond control here means that the parents or guardians could no longer control the child within the reasonable means associated with the upbringing of the said child.

were caught and were involuntarily brought to court. Children that were given orders under these conditions had no specific term or provision regarding their term of rehabilitation. Therefore, they would be subject to the general provision under section 67(2) of the Child Act 2001 where the term is also up to three years, the difference being that section 67(2) is also read with section 67(3) which states that the Board of Visitors[90] may shorten the period of detention.

[78] In the case of the Indian girl above, she was so dejected with her detention that she sought her parents' forgiveness and pleaded to go home. Her parents requested the JKM to release her but were told that they were unable to since detention under section 46(2)(aa) and (bb) of the Act had no provision for the shortening of her detention period. After hearing the news, the distraught girl ran away from the institution and was caught. The effect was worse for her, since running away from a JKM institution is an offence punishable as a crime.[91] She had unforeseeably added time to her incarceration[92] or reformation since the crime was a separate matter from the control issues. She would have to be brought before the Court for Children for an order under the relevant provision in the Child Act 2001 based on the institution she was placed in.

[79] The anomaly is that children detained for a criminal offence, for example, stealing, would be eligible for the shortening of their time in the institutions. In the criminal cases that are definitely not voluntary; the Board of Visitors may review their cases. In the Indian girl's case, she may only be allowed review for the order for running away from the institution but not for section 46(2)(aa) and (bb). The JKM had requested politicians or Members of Parliament to amend the Child Act 2001 to remedy the situation. They wanted the Board to have the power to review a matter where there was ample proof of support from the parents. The JKM had foreseen this problem but without the approval to amend the Child Act 2001, they were powerless to act.

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90 Appointed by the Minister under s 82 of the Child Act 2001.

91 Most child offences under the Child Act 2001 are not deemed to be criminal but in cases where there is a court order, the offence is not the actual violation of the Child Act 2001 but the fact that she had disobeyed a court order, therefore bringing her in contempt of the court order. Based on that, she was deemed to have committed a crime.

92 This term is used loosely since technically no child can be incarcerated under the Child Act 2001.

[80] Clearly, the implementation of the Child Act 2001 leaves much to be desired. There should be mechanisms in place to correct these mistakes. This is merely regarding the general application or implementation of the Child Act 2001. It should be noted that this was not what the Child Act 2001 had envisaged. The Child Act 2001 was supposed to enhance development of child rights or more specifically the issues around or interpretation of the best interests of the child principle. The case illustrated that the best interests of the child principle was not applied uniformly.

[81] The best interests of the child principle has been provided for in the Child Act 2001 but, as stated earlier, it is not in the opening, closing, preamble, miscellaneous or general application provisions of the Act. Rather, it is stated 13 times in different parts of the Child Act 2001, namely, in Parts V, VI, IX and X. The relevant provisions are sections 18(a), 30(5), 35(3) and 37(5), section 30(6)(a) and (13)(aa) in Part V; sections 40(5) and (12)(aa), 42(7)(a) and (b)[93] in Part VI; section 80 in Part XI; and sections 84(3), 89 and 90(13)(a) in Part X. As mentioned earlier, most of the Parts in the Child Act 2001 are read disjunctively so each of these Parts are read separately and illustrate that since there is no universal application, it is only applicable in specific situations.

[82] This is only the criminal aspect of the best interests of the child principle but one that is the norm in Malaysia. Since the test is not of universal application, it can only be applied through judicial interpretation and *stare decisis*.

The application of the test in decided cases

[83] There are several instances where child matters arise in cases that have been decided using the best interests of the child principle by the courts in Malaysia. Most of these cases are in custodial and divorce proceedings as well as instances of inheritance cases. Other than that, children are not involved directly in judicial proceedings. Looking at the cases involved, the courts have not used the test universally as accepted by law but rather applied it only on a case-by-case basis and not in its truest form.

93 Although s 42(7)(b) is not exactly worded "best interest" but it does involve the interests of the child.

[84] The Federal Constitution does not specifically mention the status of international law and conventions, thus giving them a merely persuasive authority. The courts can only refer to these laws when there is a lacuna in the current law and when there are no other sources of law. The other method that was mentioned earlier is when the international law has been domesticated, that is, through an enabling act or a local law that adopts the international law into the domestic legal system. This is unlike some other countries where the acceptance of international law could be done through judicial notice of the same without the requirement of an enabling law. In a vibrant legal tradition this should not be too much of an obstacle. Malaysia has had the luxury of almost a century of practising and applying the common law.

[85] Furthermore, the Judiciary has always been rather conservative in its approach to international laws. This could be attributed to the fact that the Judiciary is steadfast in upholding the two-tier approach whereby all international laws will have to be localised before there is any inference. Malaysia's obligation in Article 3 of the CRC clearly states that the best interests of the child is a primary consideration in child matters. Malaysia has made no reservations to Article 3 and therefore it is mandatory for Malaysia to implement this principle. The courts await the enactment of an enabling law to implement the provisions.

[86] Looking at certain cases on custodial matters, there are some judgments that have used the principle without actually referring to it as a specific and recognised test. One of the first reported cases on the introduction of the best interests of the child principle was *Jeyasakthy Kumaranayagam v Kandiah Chandrakumaran*.[94] The husband, a British citizen, and the wife, a Sri Lankan citizen, had filed a joint petition for the dissolution of marriage in the Kuala Lumpur High Court. The family had moved to Malaysia in July 1991 with their two children. The High Court's full decision is not related to this article, however, it highlights the fact that the judge did mention in his judgment the principle of the best interests of the child when he stated as follows:

94 [1996] 5 MLJ 612.

> Secondly, a duty is imposed on the courts by the Act to ensure that whatever terms which may have been agreed upon by the parties in the joint petition are fair to each of the parties, and more importantly to the welfare of the children (if any). The court has full powers under the Act to vary any of the terms which in the opinion of the court are not in the best interest of the wife or the children.
>
> It is generally an accepted principle that children should not be separated from one another, and yet in many joint petitions, provisions are made for the "distribution" of the children between the spouses without any consideration for their welfare. In such cases, it is important that the judge considers in detail these provisions, and be satisfied that in the best interest of the children, particularly their welfare, the agreed arrangement between the parties for the children are acceptable (see generally ss 88 and 89 of the Act).[95]

[87] Despite the case above, which was decided in 1996, very little development has taken place specifically on this matter. There is also a plethora of cases that make no inference or even try to make any inference whatsoever to the principle. These cases also include those that have gone all the way to the Federal Court. Amongst these is the case of *Sean O'Casey Paterson v Chan Hoong Poh & Ors*.[96] In the Court of Appeal, one of the reasons for their decision was "(f) The granting of any other prayers requested by the plaintiff would not be in the best interest of the child concerned."

[88] The Federal Court however did not go into the merits of this reasoning as they decided based on a technicality, and upheld the Court of Appeal's decision without mentioning the best interests of the child. If the Federal Court had referred to the test it would have been binding on all the courts in Malaysia. Up until 2018, the Court of Appeal decision is still binding on the lower courts so it is to be hoped that the application of the best interests of the child principle has been laid to rest. The Court of Appeal decision is as follows:

> [21] Having arrived at the aforesaid finding it should logically follow that all the prayers except for prayer (a) asked for by the appellant in his application before the High Court below are unsustainable, as

95 Law Reform (Marriage and Divorce) Act 1976.
96 [2011] 3 CLJ 722.

granting of those orders, in our view would not be in the best interests of the child concerned. In this regard we quote a passage from the decision of Lindley LJ in *In Re McGrath* [1893] 1 Ch 143, which states:

> "The duty of the Court is, in our judgment, to leave the child alone, unless he is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded … The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child."[97]

[89] The Court of Appeal above referred to the same case that introduced the welfare principle to Western jurisdictions.[98] The one referred to was a 19th century English case[99] that was decided more than a century ago. However, at the very least, the courts are trying to bridge the divide. This is evident with numerous other cited cases regarding custody, which state that when deciding the custody of children, the welfare and best interests of the child are important factors. Although the added emphasis does seem to create two separate concepts, one being welfare and the second, the best interests of the child, the best interests of the child principle has to be taken into consideration in all aspects relating to the child and it encompasses welfare.

[90] In fact, the principle was slowly being developed by the Judiciary. This was shown in the case of *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik*[100] which acknowledged the best interests of the child principle whereby the judge held as follows:

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97 *Sean O'Casey Patterson v Chan Hoong Poh & Ors and Another Appeal* [2010] 5 CLJ 409.

98 Case quoted was *Re McGrath* [1893] 1 Ch 143.

99 Based on s 3 of the Civil Law Act 1956 [Act 67], all laws applicable in England prior to April 7, 1956 shall be applicable to Malaysia.

100 [2013] 4 MLJ 272.

Held, ordering the defendant to undergo DNA testing to determine the child's paternity:

(1) In the exercise of judicial discretion and the inherent power of the Court and having regard to article 3 of the CRC, it was in the best interests of the child that the defendant be ordered to undergo DNA testing to determine the child's paternity.

(2) Article 7 of the CRC, which "inter alia" stated that as far as possible a child had the right to know and be cared for by his or her parents, was also applicable as it did not contradict but was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia. Article 7 was consistent with the provisions of fundamental liberties in the Federal Constitution. The minor had the right to know whether the defendant was his father.

(3) The decision in *Peter James Binsted v Juvencia Autor Partosa*'s case[101] was distinguishable as the court there did not consider the issue of the best interests of the child. The issue there was whether the father of the child would be subjected to hurt if DNA testing was ordered.

…

[91] The case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*[102] went further and acknowledged not only the existence of the CRC but the guiding principles, as well as the fact that Malaysia is bound by the principles in that it has not made any reservation. However, the Federal Court's decision of the same case in 2018 which will be discussed later in the article provides the law in Malaysia today. Nonetheless, this development has been achieved by case law and there is no standardisation through any of the written laws. Therefore, the application, though a welcome development, is not uniform.

[92] The development has evolved a step further with more enlightened judges drawing direct inference from the CRC. They

101 [2000] 2 MLJ 569.

102 [2013] 5 MLJ 552. This is the High Court case. The Court of Appeal citation is *Pathmanathan Krishnan v Indira Gandhi Mutho and Other Appeals* [2016] 1 CLJ 911, which amalgamated five other cases which were related. The Federal Court had decided on January 29, 2018 and overturned most of the Court of Appeal's ruling.

are still the minority and their cases are few and far between. One of those cases is the High Court case of *Lai Meng v Toh Chew Lian*.[103] This is one of the first ever cases where the presiding judge referred to the CRC. The judge stated in his judgment as follows:

> Both Articles 3 and 9 of the CRC state that the best interests of the child shall be the consideration for the matters provided therein. This is consistent with the welfare principle that I had earlier dealt with.

[93] The court adopted the principle in 2012 but this is still only a High Court case. As mentioned earlier, all the above is the position in Malaysia as at 2018. After which came the leading case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals*.[104] The Federal Court referred to some of the same cases that have embedded the welfare or paramountcy principle in England, namely, *J v C*,[105] *Re Agar-Ellis*,[106] *Re Curtis*[107] and *Re McGrath (Infants)*.[108] As regards the welfare or paramountcy principle, the Federal Court stated the following:

> What can be discerned from the above is that, the law has come a long way from the days when one parent's claim could be considered superior to the other. Where the child's religion or religious upbringing is in issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all circumstances of the case. In so doing the court does not pass judgment on the tenets of either parent's belief. Conversion to another religion is a momentous decision affecting the life of a child, imposing on him a new and different set of personal laws. Where a decision of such significance as the conversion of a child is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought.[109]

[94] The judgment above clearly spells out that the best interests of the child principle or welfare or paramountcy principle are applied in determining matters of religion for the child. Additionally, the Federal Court used the paramountcy principle, which is a higher

103 [2012] 8 MLJ 180.
104 [2018] 1 MLJ 545.
105 [1970] AC 668.
106 (1883) 24 Ch D 317.
107 (1859) 28 LJ Ch 458.
108 [1893] 1 Ch 143.
109 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 1 MLJ 545 at 603, [163].

threshold than primary consideration. The negative aspect of the welfare principle is the use of a higher threshold than the CRC, namely, the "paramount consideration" instead of the "primary consideration". This is illustrated by the CRC Committee themselves in their recommendations to Malaysia. The CRC Committee, regarding the best interests of the child principle in the CRC Committee's Concluding Remarks: Malaysia, stated in paragraph 36 as follows:

> … The Committee also notes that the Law Reform (Marriage and Divorce) Act 1976 [Act 164], as well as the Islamic Family Statutes, are based on a primary presumption that a mother is the best person to take care of a child, leaving the consideration of the best interests of the child as a secondary concern.[110]

[95] This higher threshold points the welfare principle towards having a different meaning as highlighted by the numerous authors and articles referred to earlier. Clearly, the English position is neither similar nor the same as the CRC. What can be construed is that the best interests of the child principle for religious matters are based on a paramount consideration. Therefore, the interests of others are secondary. That is the position of the best interests of the child principle in Malaysia as it is.

The different application in England and Malaysia

[96] The application of the best interests of the child principle in England differs considerably from the application in Malaysia. In particular, there are differences in how the principle has been implemented, the scope of the principle in the respective jurisdictions, the level of understanding within the Legislature and Judiciary in both countries, and the possibility of change in the near future for both countries. These differences are due to the different backgrounds and levels of understanding in these respective jurisdictions.

[97] First, both jurisdictions have used differing methods in the implementation of the principle. In England, it is applied through the provision of the Children Act 1989. This difference is not only limited to the instrument used in facilitating the application of the principle, but also the common law approach in England using the paramountcy

110 Concluding Observations: Malaysia, Item No 36, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/MYS/CO/1.

or welfare principle well before the drafting of the CRC. It could be said that England is far more advanced in the field of child protection than others. However, despite this seeming advantage, England still has an issue specifically with the scope of the principle. The fact that the UK is still lagging in the fields of criminal justice and immigration should be more of a concern for UK authorities, especially since the UK had a head start in child issues.

[98] The next issue is regarding the level of understanding of the principle. Since the principle is embedded in the common law, the appreciation of the legal fraternity is quite high. It is a legal maxim that is used in family law practice at the very least. In contrast, Malaysia, despite supposedly adopting the same common law principles from England before 1956, does not use the principle as a rule that should be referred to in all child matters. The Child Act 2001 was passed but the principle has limited scope and is not even applicable to the entire Act. The difference in scope between Malaysia and UK is very wide in the field of child law. In Malaysia, the legal fraternity does not use the principle as often as it should or could have done. There are some changes as mentioned above with recent cases incorporating the said principle, but the development of child rights in Malaysia is tedious. Family law practices have begun to use the principle more often in custodial cases, so it is to be hoped that there will be further changes. These changes are necessary to ensure that Malaysia keeps abreast with the development of child rights globally.

[99] The fundamental issue here is that Malaysian policy makers have missed a significant opportunity to draft a law that is conceivably more CRC compliant as compared to being merely CRC friendly. Instead of drafting an entirely new law with provisions mirroring the CRC and the English Children Act 1989, the MWFCD took the relative safer option of using existing provisions and amalgamating them into one Act, the Child Act 2001. Although it was a momentous occasion because it was the first ever law to be enacted to fulfil Malaysia's obligations under an international human rights treaty, alas, it did not meet most of the requirements of the CRC.

[100] Merely comparing the Introductory Text[111] and the Long Title[112] illustrates the difference. Despite being the enabling law for Malaysia,

111 Children Act 1989.
112 Child Act 2001.

no reference is made to the CRC and it also refers to a narrower scope in child rights and law when compared to English law. Both have omitted criminal matters, although Malaysia has incorporated its criminal youth system into the Act under the scope of the rehabilitation of the child. The English law covers all areas of custodial issues and civil law cases where the child is likely to be involved as well as local authorities' dealings involving children. The Malaysian law only covers care and protection as well as rehabilitation whilst some other areas have yet to be tested. This directly affects the application of the principle in both jurisdictions.

The CRC Committee's views on Malaysia's implementation of the principle

[101] Furthermore, Malaysia has to consider the CRC Committee's views on Malaysia's implementation of the principle. This is provided in Concluding Observation: Malaysia:

> **Best interests of the child**
>
> 36. The Committee notes with appreciation the provisions of the Child Act 2001 [Act 611] which incorporate the principle of the best interests of the child, and takes note of many other national laws that enshrine this principle. However, it is concerned that this general principle is not fully applied and duly integrated in the implementation of the legislation, policies and programmes of the State party as well as in administrative and judicial decisions. For example, while the State party has expressed its firm intention not to separate migrant children from their migrant parents to be deported, the implementation of current provisions of the Immigration Act 1959/63 [Act 155] has resulted in detaining and deporting migrant workers without effective efforts to prevent the separation of children from their parents. The Committee also notes that the Law Reform (Marriage and Divorce) Act 1976 [Act 164], as well as the Islamic Family Statutes, are based on a primary presumption that a mother is the best person to take care of a child, leaving the consideration of the best interests of the child as a secondary concern.
>
> **37. As regards article 3, paragraph 1, of the Convention, the Committee emphasizes that the Convention is indivisible, that its articles are interdependent and that the best**

> **interests of the child is a general principle of relevance to the implementation of the whole Convention. The State party should ensure that the best interests of the child is a primary concern, taken into account in all revisions of the legislation as well as in judicial and administrative decisions, and in projects, programmes and services that have an impact on children.**[113]

[102] The emphasis in bold above is part of the format by the CRC Committee and has been quoted as is. The recommendation was based on Malaysia's only submission to date, in 2007.[114] Clearly, the CRC Committee was concerned that Malaysia was not doing enough to implement the principle. The comments are rather blunt and seem to be more of an admonition than a recommendation with the CRC Committee suggesting that Malaysia conducts a major review of the best interests of the child principle as applied in Malaysia in order to fulfil the obligations under the CRC.

[103] Since the report in 2006, significant steps have been taken but whether they fulfil the requirements remains to be seen. The recommendation also indicates that there must be significant developments when Malaysia submits the next report.[115]

[104] The government agencies are in the midst of compiling their reports which provide the status of Malaysia's commitments and whether it has fulfilled or complied with all the observations made by the CRC Committee. The report evolves and as time goes by, Malaysia is completing most of the observations. However, there is a caveat as the interpretation of Malaysia's completion of a particular observation may be seen otherwise. The situation is very fluid and with time so does the application of the observations.

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113 Concluding Observations: Malaysia, Item Nos 36 and 37, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/MYS/CO/1.

114 The report itself was submitted in early 2006 and the hearing was scheduled for January 1, 2007 by the CRC Committee.

115 Malaysia was supposed to submit the next report in 2012 but till today it has not done so. So this year, 2021, Malaysia has to submit her Second to Fifth Country Reports which was due until 2017. It is understood that Malaysia is trying to submit the report this year, but should there be unforeseen circumstances and the report is not submitted, then by 2022 the Sixth Country Report becomes due. Malaysia must then accept the stern rebuke from the Committee.

Conclusion

We all breathe the same air. We all cherish our children's future.[116]

[105] The quotation above was taken from one of John F Kennedy's most famous speeches. It was given in a totally different context – on world peace – but the words ring true for the situation of children today especially in light of the best interests of the child principle. Nevertheless, the same is aspired for all our children in Malaysia. Attaining this will need an understanding of the best interests of the child principle. The relevant government agencies have tried their level best to domesticate the CRC principles into Malaysian law, including the principle. Analysing all the information above, the actions taken by the Malaysian Government would require time before results materialise.

[106] Despite the seemingly obvious notion of child rights, there are still abuses of the rights of children no matter where it is in this world, including Malaysia. Malaysia has tried to incorporate the CRC principles through the Child Act 2001 but it has been deemed insufficient. One of these deficiencies that needs to be reiterated is the CRC Committee's recommendation regarding Malaysia's dual legal system and its application.[117]

[107] The CRC Committee under the subtopic "Principal subjects of concern and recommendations" has listed several recommendations, including that an international study be conducted on the question of the dual legal system of the civil and *Shari'ah* systems; that there should be a comprehensive review of the national legal framework to ensure compatibility with the CRC; and to expedite the process of necessary law reforms. While there is still much work to be done in Malaysia to fulfil these recommendations, Malaysia's compliance with the CRC was analysed in the initial research. It is a step in the right direction towards fulfilling the said recommendations.

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116 Excerpt from John F Kennedy's famous speech on peace delivered on June 10, 1963 in the American University, Washington DC, USA at <http://www.humanity.org/voices/commencements/john.f.kennedy-american-university-speech-1963>.

117 Concluding Observations: Malaysia, Item No 16, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/MYS/CO/1.

[108] There are factors that have not been explained in this article that are deemed not essential to the application of the best interests of the child in England and Malaysia. The scope of the application of the principle in Malaysia has been limited to the civil law. A large portion of the initial research analysed the application in both civil and *Shari'ah* laws in Malaysia and made findings thereto. This was done because of the bad light the *Shari'ah* has been painted. The research clearly illustrated that despite the obvious differences between the CRC and the *Shari'ah* principles on child rights, there are more similarities. These are noticeable in the best interests of the child principle where despite not being expressly provided in any of the major sources of the *Shari'ah*, there is no denying the existence of an inherent principle leading towards the same. This would mean that the CRC principles and the *Shari'ah* are generally compatible. Nonetheless, this article has limited itself to only the civil law aspect.

[109] The development of child rights in Malaysia may not be as fast as child rights groups have envisioned. Since becoming a party to the CRC in 1995, several principles in the CRC have not been fully incorporated into the Malaysian legal system nor the Child Act 2001. The best interests of the child principle, as an example, is one of the most basic principles of the CRC but the application in Malaysia has taken a long time to be absorbed into the legal system, which reflects the paucity in which the authorities perceived the importance of child rights.

[110] Besides the Child Act 2001, the Malaysian Government should also utilise the Federal Constitution to further strengthen child rights advocacy. The rights are already enshrined in the Federal Constitution, but what is needed is better publicity of the rights and to make them accessible to all children. Until that has been done, the fear is that the recommendations from the next CRC Committee would be similar to the last.

[111] There is definitely room for improvement. The question that begs an answer is, where must we begin to accelerate the changes relating to child rights in Malaysia? As a start there should be the acceptance of the most fundamental principle, and that is the best interests of the child principle. The whole purpose of this article is to highlight the importance of the principle and suggest methods that can significantly lead to a more positive and direct development in the law.

[112] Clearly, the current standards applied to the best interests of the child principle in Malaysia may not be as envisaged by the CRC Committee. Nonetheless, upon the presentation of Malaysia's next Cumulated Country Report to the CRC Committee (which is eight years overdue), that it will be sufficient to fulfil the required threshold as provided for in the CRC and not the threshold thrust upon by other jurisdictions like England.

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