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By The Right Honourable Tun Arifin Zakaria
Chief Justice of Malaysia

It is with great pleasure and privilege that I welcome the publication of the first Journal of the Malaysian Judiciary (JMJ). The birth of this Journal marks the Malaysian Judiciary's continuous effort to work towards achieving higher standards of excellence. The idea of publishing our own Journal was first mooted by the Judicial Appointments Commission (JAC) in its meeting on 18 September 2015.

Towards this end the JAC has established the Publication Committee of the Judicial Academy to initiate and oversee the periodical publication of legal literature which includes long and short texts such as monographs and articles on a variety of legal subjects. The primary aim of the establishment of the Committee is to encourage the publication of legal texts by members of the Malaysian Judiciary, apart from enhancing a culture of legal learning and writing within the Judiciary. It is intended that the publication would over time serve to showcase the legal skills and thinking as well as the expertise and character of the Judiciary. It is hoped that all this in turn would serve to enhance the image of the Malaysian Judiciary. In order to maintain and enhance the quality of these publications, the expertise of both local and foreign legal luminaries may be called upon, and this may include invitations to retired judges, law professors as well as renowned writers to contribute to the publication.

Our society is founded upon the principle that all persons, whether public or private, should adhere to the paramountcy of the rule of law. While underscoring the need to enforce the law without fear or favour, amidst the rise of sporadic unlawful activities, the first article emphasises the importance of strict adherence to due process. This issue of the Journal also contains another article on the rule of law in relation to the development of construction law in Malaysia. This is a topic of interest given its importance in the face of the rapid growth of the construction industry in the country which is undeniably an important sector that propels our economy forward. The essay on the impact of parallel legal systems on fundamental liberties in multi-religious societies attempts to highlight

some of the broader issues relating to religious freedom in a multi-religious societies. It recognises that where multi-religious views exist side by side, differences are bound to occur. The article thus discusses one of the biggest challenges facing multi-religious societies, which is how to deal with diversity. These broad array of subjects highlight some of the important contemporary issues which would provide a good starting point in the Journal's maiden publication. It is hoped that readers will find them interesting and thought provoking. The essay on judicial activism would also provide for interesting and pleasant reading.

I would like to express my utmost appreciation and thanks to all contributors who had responded to the invitations of the Publication Committee to pen down their thoughts for this inaugural publication. I hope to see more contributors to future publication of the Journal.

On a final note, I would like to express my sincere appreciation and thanks to the members of the Publication Committee of the Judicial Academy headed by Tan Sri Ahmad bin Haji Maarop for the challenging task undertaken. I also take this opportunity to thank the officers and staff of the Judicial Appointments Commission for their assistance and contributions in making the publication possible.

Tun Arifin Zakaria
Chief Justice of Malaysia

The Rule Of Law

by

Tun Arifin Zakaria[*]

The Opening of the Legal Year is an important event in our legal calendar. It is not simply a ceremonial occasion, but provides an opportunity for the legal community to take stock, and reflect on matters critical to the administration of justice within our legal system and the rule of law.

As is the case in most years, 2015 proved to be a challenging year for the legal community. A plethora of cases were adjudicated upon by our courts, which attracted comment and controversy. There is no doubt that the coming year will bring its own unique challenges to be faced by our legal community. In meeting these continuous challenges, it is of paramount importance that, regardless of external opinion, we continue to enforce the law without fear or favour. That is the cornerstone of the rule of law, which is the foundation of our society. It is the foremost insignia of good governance.

A uniform or cohesive definition of the rule of law has proved elusive, notwithstanding attempts by many great legal minds to grapple with this concept. My preferred definition or explanation of the concept is that of the late HRH Sultan Azlan Shah:

> The Rule of Law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it. The ideal of the Rule of Law in this sense is often expressed by the phrase 'government by law and not by men.'[1]

Ours is a nation and society which is unique in terms of its multi-racial constituency and diversity. We are now a nation of 31 million people, all of whom seek to attain a reasonable standard of living with dignity for themselves and their families. In the course of doing so, the very differing interests of the population are likely to clash and priorities to differ. It is

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* The Right Honourable Chief Justice of Malaysia. This article is adapted from the author's speech at the Ceremonial Opening of the Legal Year 2016.

1. Professor Dato' Seri Visu Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches* (Professional Law Books, Thomson Sweet & Maxwell Asia, 2004) 13-14.

here that the rule of law steps in to provide guidance and cohesiveness.[2] The rule of law ensures that these varying interests are balanced, such that there is respect for fundamental rights as well as the rights of the community.

How then is this achieved? To answer this question I shall attempt to encapsulate the core values that comprise the rule of law in Malaysia.[3]

Firstly, the cognisance and acceptance of the absolute supremacy or predominance of our Federal Constitution, particularly well-articulated in art. 4(1), namely that the Federal Constitution reigns supreme over Parliament, the executive and the Judiciary.[4] This ensures that we are governed by laws and not arbitrarily by the whims and fancies of the ruling Government. It comprises a cornerstone of democracy.

Secondly, the concept that all are equal before the law. Or to put it another way; that every man is subject to the ordinary law of the country. No one can claim to be above the law or entitled to preferential treatment in our courts.

Thirdly, the independence of the Judiciary - namely, not simply that the institution of the Judiciary subsists in a society, but that it operates as an institution to enforce fearlessly the law, without interference, or independently of extraneous influences, including the executive, the public or any section of the public or for that matter any particular individual who seems to be advocating his or her own perception of human right. This constitutional role of the judges is set out in the provisions of the Federal Constitution dealing with judicial function.

Fourthly, that the law is clear and accessible and applied predictably. This envisages that a citizen should be able to comprehend the nature of his or her obligations, as well as his individual rights and entitlements. This limb encompasses the twin pillars of natural justice and envisages that there should be due process and the presumption of innocence.

Fifthly, that there is access to justice for the public. This involves ensuring that legal costs are not prohibitive, the legal process is simplified or abridged, and that cases are disposed of without undue delay. [5]

2. See the Chief Justice of Hong Kong's speech at the Ceremonial Opening of the Legal Year 2015.
3. Tom Bingham, *The Rule of Law* (London: Penguin Books Ltd., 2011).
4. This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency be void.
5. See the speech of the Attorney General VK Rajah S.C. as delivered at the Opening of the Legal Year 2015.

It also encapsulates the concepts of moderation and proportionality in the construction and enforcement of our laws.

These key features comprise the utopian ideal of the rule of law in Malaysia and would appear to be straightforward enough. However, the practical reality is that constant vigilance, particularly on the part of the Judiciary, is required to uphold the rule of law.

There are several aspects about the rule of law and its application in Malaysia that require elaboration.

The rule of law takes its origins from the theory expounded by the 19th century British jurist, Dicey, in the context of quintessential England at that time. Its application even in the United Kingdom differs now when compared to the ideal prescribed in the 19th century. What more, upon importation through the legal system, to the colonies of Britain in the 19th and 20th centuries.

The law was expected to accommodate and meet the needs of its indigenous population in this developing nation, rather than meet standards prescribed by the First World countries, which enjoy a different climate and degree of economic, political and social development and cultural background, not to mention urbanisation and progress. This is a reality particularly when applied to the rule of law. It has been noted that the application of Eurocentric jurisprudential concepts to places with different legal traditions must be undertaken with caution, and the rule of law must always be placed in its historical and political context[6]. In our multiracial, multi-religious nation, this is particularly true. The application of Western norms which are not always in accord with the values of Malaysian society do not allow for a direct comparison of standards emanating from the West.

By contrast, Malaysia with its multi-cultural population, and diversity of legal and cultural traditions and economic and political structures, has evolved over centuries a value system, which differs considerably from the traditions of the West. As stated by Disraeli in his description of a nation:

> A nation is a work of art and a work of time. A nation is gradually created by a variety of influences – the influence of original organisation, of climate, soil, religion, laws, customs, manners, extraordinary accidents an incident in their history, and the individual character of their illustrious citizens. These influences create the nation – these form the national mind.

6. See Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam (London-Leiden Series on Law, Administration and Development)* (Martinus Nijhoff Publishers, 2007).

The national mind of a Malaysian necessarily therefore differs from that of his counterparts elsewhere. The existence of this gulf needs acknowledgement, in order that the rule of law is adapted to meet our own circumstances, and not blindly applied as if we were still in 19th century England. The rule of law as then expounded in 19th century Britain, extols the rights of association and expression, of assembly and peaceful demonstration, without limitation, as it were. Such unabridged rights are not necessarily feasible in a diverse, multi-racial and multi-religious country such as ours. These rights are, of course, of fundamental importance even today, but they do not subsist without limitation. The need for such limitation in our society is expressly provided for in our Federal Constitution. Ultimately the rule of law must deliver good governance, which meets the needs of the individual and civil society, as well as actively improves and protects the lives of Malaysians.[7]

The rule of law is today facing numerous challenges. Over the course of time we saw the rise of sporadic unlawful activities. Many of these activities saw their proponents put forward civil disobedience as justifiable means for conduct which was in breach of the law. While the majority of the nation supports and condones the importance of freedom of speech and assembly, it is of equal importance that these values are propagated within the ambit of the law. This is fundamental to preserve the rule of law.

Any constitutional development in these freedoms must be consistent with the provisions of our Federal Constitution. So long as laws are promulgated in accordance with, or *intra vires*, the Federal Constitution they should be adhered to. If indeed these laws encroach upon the fundamental rights set out in the Constitution, then the requisite steps should be taken to facilitate the adjudication of these laws by the Judiciary. The members of the Judiciary are bound, by constitutional oath, to ensure that these laws are effectively measured against the anchor of our Federal Constitution.

Resorting to unlawful means for the purposes of pursuing fundamental freedoms of expression and assembly without limitation is therefore unjustifiable, especially when the use of such unlawful means prejudices other people's rights and disrupts social order. It should be made clear that I am by no means opposing the right of individual citizen to dispute Government policies, acts and omissions when they feel that genuine

7. See K. Shanmugam, *The Rule of Law in Singapore* [2012] SJLS 357-365 quoting in turn Mr Lee Kwan Yew in an early speech entitled Foreign Equity Investment in Singapore in 2010.

wrongs are being perpetrated. However this does not validate the use of unlawful means to correct perceived wrongs. This would in effect encourage the populace to disregard the law as and when they see fit, which is converse to the letter and spirit of the rule of law.

Any breakdown or disintegration of the rule of law commences with a disregard for, or basic disobedience to the law governing the basic fundamentals of our lives. If the public, for example, refuse to adhere strictly to traffic laws and ignore stop signs and traffic signals the streets will become a chaotic and dangerous place. The rule of law functions because most of us agree that it is important to observe the law, even if a police officer is not present to enforce it. As aptly observed by Professor Goodhart:

> Fear may produce obedience to a command, as in the case of a bandit but it cannot bring about a sense of obligation. If we do not understand this distinction then we cannot differentiate between rule by force and rule by law.[8]

The prevailing lack of respect for adherence to the laws of the nation is well-illustrated by a simple example. In the past, recipients of traffic and other departmental summonses would routinely queue up at the Magistrate's Courts in the morning. This was the scene when I first started my career as a Magistrate at Bukit Mahkamah in Kuala Lumpur. They would number in the hundreds, seeking to pay up for a variety of road traffic offences including driving without a licence. Today, by contrast, the scenario is completely different. Hardly anyone appears in the Magistrate's Court for traffic offences. Traffic summonses remain unpaid because very few people own up or pay up on their summonses until the police threatens to issue warrants of arrest forcing them to appear in court. This reflects the complete lack of concern and respect the public has for the law relating to traffic offences.

The prevailing situation is best illustrated by statistics. For instance, between January and October 2015 there were a total of 72,677 registered traffic summonses and a balance of 539,126 summonses for the previous months. A total of 97,439 summonses were disposed off and a balance of 515,413 carried forward. As many as 831,742 summonses were pending the issuance of warrants of arrest. These statistics mirror the lackadaisical attitude of the public to traffic offences. For the rule of law to thrive it is essential that society adheres to the laws of a nation. This creeping disrespect for the laws of the nation requires urgent attention. If

8. A.L. Goodhart, *English Law and the Moral Law* (London: Stevens and Sons Ltd., 1953) 27.

not prevented, this form of negative culture will continue to spread into the fibre of our society. This lack of respect for the law signals the beginnings of the disintegration of the rule of law.

How then is this slow erosion in the rule of law to be halted? Efficient and fearless enforcement in accordance with due process must ensue, when such contraventions of the law occur. In other words prosecutions should be commenced where there is a contravention of laws, major or minor, provided there is sufficient admissible evidence. In other words, the stipulated punishment or penalties ought to be enforced (after due process) in order to ensure obedience to the laws. It is in the public interest that such prosecutions be brought. Such unbiased enforcement against all, which allows no consideration to be taken of a person's social status, political affiliations or political views, would greatly strengthen the rule of law in Malaysia. We in the Judiciary should be prepared to mete out appropriate punishments to those brought up to court to serve as deterrent to would be offenders.

It is therefore important that the people of Malaysia embrace once more the concept of the rule of law and cease to utilise or condone unlawful conduct and activities to express their dissatisfaction. Ultimately it is the nation itself that suffers both domestically and internationally when such unlawful activities are perpetuated.

Enforcement

On this auspicious occasion permit me to make some observations on the need for more stringent or comprehensive enforcement of the laws. Malaysia as a country has sufficient number of laws. The only issue is one of enforcement. Take for instance the legislation relating to the environment alone. We have no less than 38 primary and 17 subsidiary legislation. But our environment and our flora and fauna continue to be under threat due to lack of or inadequate enforcement.

Similarly the penalty for offences under those laws are pretty severe but that would not serve as a deterrent if the perpetrators are free to break the law without being detected or caught. This observation I must say applies equally for traffic offences. For instance, take Putrajaya, our administrative capital. We see written warning at the road junctions stating that a CCTV is in operation, and yet we see road users simply ignore traffic lights, and I presume with impunity. It is high time that a more stringent enforcement regime be put in place for all our laws so that the public will take the law more seriously. This is to instill in the public respect for the law, a prerequisite for the rule of law to prevail in this country.

The Judiciary

As I stated at the outset, 2015 saw the courts handing down a variety of decisions, some of which attracted considerable controversy. Decisions of the courts are not always to everyone's liking, whether private individuals, political groups or civil society or even the Government – but it is not the role of the courts to make popular decisions. The function of the courts is to adjudicate on disputes according to the law and its spirit.[9]

It is equally important to stress that in 'public interest' cases, the rule of law in the form of due process was strictly adhered to. Most of these cases were heard over a number of days. All parties were accorded full opportunity to present comprehensive submissions. Access to justice was ensured as all parties were represented by counsel of their choice and these cases were heard in accordance with legal procedure in the open court. Reasoned decisions were handed down within a reasonable time. In short there is a genuine adherence to the rule of law.

There was considerable criticism of some of the court decisions, particularly from civil society, as violating individual freedoms and curtailing freedom of speech and association. In making these criticisms, the standards applied by way of comparison are those of mature, Western orientated democracies. With respect, Western norms which are not always in accord with the values and culture of Malaysian society do not allow for a direct comparison.

The Malaysian value system or philosophy is encapsulated in our Rukun Negara, more particularly the pledge, which sets out the core principles by which our citizens abide, namely "Belief in God, Loyalty to King and Country, Upholding the Constitution, Rule of Law and Good Behaviour and Morality". In upholding these values, there is often a fundamental tension between protecting the interests of the community at large as against the constitutional protection of individual rights. In maintaining these values and the philosophy, which is all important in a multi-racial country, certainly peace and harmony and the stability of the nation stand paramount. Matters running counter to these objectives are restrained.

A continuing struggle for the nation is the fostering of a society that is stable, safe, tolerant and which respects diversity. Such an inclusive society, which effectively provides a society for all, is one in which every individual, each with rights and responsibilities, has a role to play. And integral to the role or responsibility of each individual as well as the

9. Taken from the speech of the Chief Justice of Hong Kong, The Right Honourable Geoffrey Ma.

collective whole, is the need to adhere to the rule of law. There can be no compromise on this issue. The strength of our institutions and ultimately the nation depend upon our observance of the rule of law.

Conclusion

Now I come to the end of my short speech. Permit me now to reiterate some of the salient points.

In this morning's proceedings, I have emphasised at length the importance of the rule of law and the role of the Judiciary in upholding the rule of law. I have also emphasised the need to instill among members of the public, respect for the law which is a prerequisite for the rule of law to prevail in this country. On the issue of human rights, it is important to note that Western norms and values are not necessarily in accord with the values and culture of our society and therefore those standards cannot be the ultimate yardstick. In Malaysia, human rights are defined under the Human Rights Commission of Malaysia Act 1999 as fundamental liberties as enshrined under Part 2 of the Federal Constitution. The Malaysian value system is further underscored by our Rukun Negara. Therefore, the standards for measuring our adherence to human rights ought to be measured against these benchmarks.

Suffice to say, that in order to meet the challenges of our plural nation, the core values of the rule of law I exemplified earlier bear repetition, namely:

(i) Adherence to the Federal Constitution;

(ii) Recognition that all are equal before the law;

(iii) Independence of the Judiciary;

(iv) Ensuring that the law is clear and applied predictably;

(v) Access to justice for the public; and

(vi) Incorporating moderation and proportionality in the construction and enforcement of our laws.

Saya akhiri ucapan saya dengan dua rangkap pantun:

Bunga Melor di tepi Tanjung,
Pohonnya rendang dihinggap rama-rama,
Perlembagaan kita sentiasa dijunjung,
Agar keadilan dinikmati bersama.

Sekapur sirih, buah bidara,
Masak sebiji lazatnya rasa,
Semoga hidup aman sejahtera,
Dan didoakan jua sihat sentiasa.

Judicial Attitudes Towards Malaysian Common Law Post 1956

by

*Tun Arifin Zakaria**

Introduction

The object of this lecture is to present a general view of judicial attitudes towards the Malaysian common law over a period spanning from just before Independence (Merdeka) to the present day. This is no easy task as the topic encompasses the complex issues of both the story of the origins and scope of Malaysian common law, as well as its development over a period of almost 60 years.

In order to accomplish this task of affording you a composite picture of the progress of Malaysian common law, it is insufficient for me to simply narrate a chronology of cases or case law encapsulating the historical evolution of the Malaysian common law. The life of the law is experience. The story of the evolution of our common law reflects and traces the felt necessities of the time, the prevalent moral and political theories, the intuitions of public policy and importantly, judicial attitudes throughout these years.[1]

The evolution of our Malaysian common law effectively embodies the story of our nation's development throughout this period. In order to comprehend its growth and progress, it is necessary to appreciate our history and prevailing theories of legislation.

The very term "Malaysian common law" in itself attracts considerable debate as to its precise definition. It carries a myriad of meanings, acquiring different connotations arising from the context in which it is utilised. The renowned Professor and jurist, Ahmad Ibrahim, was a prime mover of the notion that the Malaysian common law should be restricted

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* The Right Honourable Chief Justice of Malaysia. This article is adapted from the author's keynote address at the 3rd International Seminar On Syariah and Common Law 2015 (ISCOL 2015), Islamic Science University of Malaysia, Theme: 'Exploring Wasatiyyah Approach in the Harmonization of Syariah and Common Law' on 27 October 2015.

1. See Oliver Wendell Holmes, Jr., *The Common Law* (1881).

to the application of our very own laws, by giving priority to the local conditions and the local populace. More specifically, he referenced Malaysian common law as being premised primarily on Islam and Malay customs.

His call for the rejection of the English common law primarily through the repeal or amendment of ss. 3 and 5 of the Civil Law Act 1956 was echoed more recently during the tenure of my honourable predecessors, namely Chief Justices Tun Hamid Omar and Tun Ahmad Fairuz Sheikh Abdul Halim, who both took the view that our legal scholars ought to formulate and develop a legal system that independently rivaled that of the English common law. They both called for the common law of England, which was still applied in Malaysia, to be replaced by our very own common law. The stance adopted was that as an independent country, a continued reference to the English common law and rules of equity, again by reason of s. 3 of the Civil Law Act 1956 was politically indefensible.[2] In short these learned jurists embraced the ideology of a completely new and distinct philosophy of law, disparate from the English common law, which was based primarily on the religion of the land and customs of the Malays. It necessarily envisages a different system of law, both in terms of adjectival as well as substantive law.

But the definition espoused by Professor Ahmad Ibrahim was not the sole or accepted definition of Malaysian common law. Equally eminent jurists of our nation, namely Tun Suffian, and Sultan Azlan Shah, both advocated and championed a wholly distinct definition of the Malaysian common law.

Sultan Azlan Shah elucidated his perception of the Malaysian common law thus:

> Any reference to the common law in Malaysia must necessarily mean the common law of Malaysia which over the years had been applied in the country as part of the laws of Malaysia. Although in the early years of development Malaysian law might have relied on English law by virtue of the Civil Law Act, this was no longer the position. Although English law was applied when the Civil Law Act was first introduced in 1878 to the Straits Settlements on the grounds that there was no local law applicable, it was not applied blindly or in toto and was relevant only to the extent that it was made subject to modifications and adopted to suit local conditions. Once applied through this process, it became Malaysian Law. Therefore, His

2. See *Malaysian Common Law* by Institut Kefahaman Islam Malaysia.

> Royal Highness concluded that over the past one hundred years or so, through the judicial process, almost every branch of the law was developed in Malaysia and in some areas legislation was introduced.[3]

This alternative definition of Malaysian common law therefore subsumes and appropriates as its own, all judge made law which has been pronounced in Malaysia, notwithstanding that the genesis or primary rationale for such law emanates from the English common law or other sources. Thus the debate rages on.

For myself it must be said, particularly for the purposes of this lecture, that it is the latter definition or expression of Malaysian common law that is significant.

As I said at the outset, in order to trace judicial attitudes towards the evolution of the Malaysian common law, it is necessary to evaluate and analyse the manner in which judges have dealt with various aspects of the law in a multitude of cases over the past 60 years. The pattern of judicial reasoning and the philosophy and precedents relied upon by Malaysian judges in arriving at their decisions, when analysed, give us some indication of the substantive basis and content of judicial attitudes towards the formation and progress of the Malaysian common law.

I start the discourse therefore, with a consideration of the legal history and development of the law prior to British colonization. This is relevant because the Malaysian common law necessarily comprises elements of traditional or customary sources of law intertwined or interwoven into the fabric of the common law as received and incorporated from the British.

Traditional Sources Of Law[4]

Historical sources suggest that this geographical region, as it then was, displayed an excellent example of a land of pluralism where diverse cultures subsisted symbiotically in all spheres of life, in terms of religion, law, culture and society. The system then in place acknowledged, accepted and allowed diversity to flourish. This appears to have extended to the law. In Winstedt's *'The Malays – A Cultural History'*, he describes the Malay legal systems thus:

3. See newspaper article in the New Straits Times 2 April 1989 entitled *We Have Our Own Common Law: Sultan Azlan* – speech delivered by His Royal Highness at the second public lecture organised by the Institute of Engineers Malaysia.

4. *The Common Law Of Malaysia In The 21st Century*, speech by the Honourable Tun Dato' Seri Zaki Tun Azmi, former Chief Justice of Malaysia, at the Singapore Academy of Law Annual Lecture 2011; [2012] 24 SAcLJ 1.

... The digests of law collected from all the races of the Malay archipelago fill many large printed volumes. In the Malay peninsula they are of four main types:

(1) There are digests and tribal sayings that embody the mild indigenous matriarchal law of agricultural clans, the 'adat perpateh' or law of Ministers, cherished by the Minangkabaus of Sumatra and their colonists in Negri Sembilan;

(2) There are digests, containing traces of Malay indigenous patriarchal law, but mixed with relics of Hindu law and overlaid with Muslim Law. This patriarchal law is called 'adat Temenggong' or law of the Minister for War and Police. Evolved for the mixed population of ports, it was introduced largely from India along with commerce by traders and adventurers, at first Hindu and later Muslim. For our knowledge of this composite patriarchal law we are indebted especially to the Malacca digest of c.1450 A.D., the Pahang digest of 1596 with a later supplement, and to a Kedah digest dated 1650 and containing port rules adopted by countries like Acheh and Kedah from regulations of the kind India knew from the days of Chandra Gupta and embodied in the Mogul Tarikh - - Tahiri. Even the 18th century Ninety-Nine Laws of Perak belong to this composite class, although compiled by Sayids and exhibiting Shi'ite influence. The Johor digest is mainly based on that of Malacca, and in a M.S. known to de Hollander is dated 'about 1789;

(3) There are digests of maritime law, the earliest compiled for the last Sultan of Malacca in consultation with sea captains for Bugis and Macassar trading-ships;

(4) Lastly there are Malay translations of orthodox Muslim works of the school of Shafi'i, especially treatises on the law of marriage, divorce and the legitimacy of children, the only branch of Muslim canon law that Malays have adopted practically unchanged. …

There was therefore a system of law in place long before the common law was introduced by the British. This can be seen from the existence of the sultanates long before the common law arrived in the Straits Settlements between 1786 and 1824.

There was only one system of courts in the country, which was the Kadhi's Court or the Shariah Court.[5] The then applicable law was Islamic law and the Malay Rulers, assisted by a *Mufti* (juris consult), sat as judges in the court, where the Ruler was the highest court of appeal.[6]

5. See A.C. Milner (1981). *Islam and Malay Kingship*. Journal of the Royal Asiatic Society of Great Britain & Ireland (New Series), 113, pp. 46-70.

6. Shamrahayu A. Aziz, *The Malaysian Legal System: The Roots, the Influence and the Future* [2009] 3 MLJ xcii.

With this backdrop in place, I turn now to consider the introduction and reception of English common law in the Malay Archipelago.

English Law[7]

The English first arrived under the auspices of the East India Company in 1786 when Captain Francis Light took possession of Penang on behalf of the company. At that stage it brought no formal legal system. This period was described as one of "legal chaos" by Dickens J in *Palangee v. Tye Ang* and *In the goods of Ethergee, deceased* (1803) 1 Ky xix at xx. During this period each class of the population received full recognition and protection, according to its own laws and usages – in other instances the law of nature practically superseding any other.[8] While the English considered this to be a period of "legal chaos" it might well be viewed differently today in the post modern era, as several sets of legal orders subsisted and operated successfully within society.

Then in 1807 the First Charter of Justice was promulgated which is a document held to have introduced into Penang the law of England as it then existed. This statement is not without doubt as The Charter of 1807 nowhere stipulated that English law was to be the *lex loci* of Penang. It provided for the establishment of a Court of Judicature, but without specifically indicating what law the court should apply.[9]

Notwithstanding this, with the arrival of British lawyers in the region, the law of the land then practised in Penang was overlooked. In *Rodyk v. Williamson,* cited in *In the Goods of Abdullah* [1835] 2 Ky Ec 8 at 9, judges such as Malkin affirmed that the Charter introduced English law. They took the position that "all the leading provisions" of the Charter of 1807 "manifestly require that justice shall be administered according to English law, and it alone."

The existence of established local customary laws amongst the pluralist society, which had subsisted for some centuries prior to this was therefore simply ignored, or at best, overlooked.

7. *The Common Law Of Malaysia In The 21st Century*, speech by Tun Dato' Seri Zaki Tun Azmi at the Singapore Academy of Law Annual Lecture 2011.

8. See R.H. Hickling, *Malaysian Law* (Kuala Lumpur: Professional (Law) Books, 1987) 113.

9. See R.H. Hickling, *Malaysian Law* (Kuala Lumpur: Professional (Law) Books, 1987) 114.

In 1819 Sir Stamford Raffles, also of the East India Company negotiated with the Sultan of Johore to have Singapore ceded to the Company. In 1826 Penang, Malacca and Singapore were made into a separate Presidency of the Straits Settlement. In that year the Second Charter of Justice was promulgated, marking the introduction of English law, (again not without dispute) in Malacca and Singapore.

In any event English law then took root in Malaysia and if analogies are to be drawn then, as R.H. Hickling puts it: "… English law came into Malaysia as a tide, at first a gentle movement in a few places and then as a powerful surge challenging the entire coast and its estuaries." The common law, as it is understood in the context of English common law, was imported and received into our respective jurisdictions, as happened throughout almost three-quarters of the globe, in a region we now call the Commonwealth, and which is acclaimed as having contributed significantly, to global jurisprudence.

The English Common Law

This brings us to another intricate issue. What exactly is meant by the term 'English common law'? It is necessary to comprehend this term in its entirety in order to appreciate the effect and influence it has had on our legal system.

The term common law assumes different connotations depending upon the manner in which it is used. It can variously mean:

(a) A common law legal system which employs an adversarial fact finding process where the rules of natural justice and the rule of law prevail; and where trial by jury is significant. This definition comes into play when applied in the context of a state, in that it denotes a system based on the English legal system;

(b) The term is also used to describe the common law of England when it refers to the law common to all England. It has been described as '... the oldest body of law that was common to a whole kingdom and administered by a central court with a nation-wide competence in first instance ... This modernized law of England was essentially autochthonous, based on known rule and familiar practice. It owed very little to Roman Law …' (see Lord Bingham on *'The Future of the Common Law'* at The Chatham Lecture delivered on 30 October 1998 quoting D. Knowles, *'Archbishop Thomas Becket: a Character Study'*, Proceedings of the British Academy, 35 (1949); *The Historian and Character* (Cambridge, 1963));

(c) It is also used to denote judge made case law as opposed to Parliament enacted legislation;

(d) Finally it is also used to denote a common law legal system based on precedent, as opposed to a codified civil law system derived from Roman law practised throughout a great deal of Europe, Scotland, Thailand, Japan, Taiwan, Turkey and South Africa.

When the onset, inception and reception of the common law during this period are viewed comprehensively in this post-modern era, it is clear that pluralism in the region, as it then subsisted, was marginalised or discarded, for a common law legal system that was imposed upon this region as a consequence of the Malay States being colonies and Protectorates under British rule. However the position of Islam and Malay custom was to some extent left unaffected by the British, paving the way for a parallel court system to develop. The next stage in the development of the law is marked by the introduction of the Civil Law Ordinance.

Merdeka – Pre-Independence – 1956 – Post Independence

The common law of England and the rules of equity were incorporated and introduced into this region through the Civil Law Ordinance, the first one being in 1878.

The History of the Civil Law Act 1956

The Civil Law Ordinance of Penang, Malacca and Singapore formally invoked various fragments of the English Supreme Courts of Judicature Act 1873, together with the whole corpus of English commercial law.[10] In 1937, the Federated Malay States, through the Civil Law Enactment (Enactment No. 3 of 1937) adopted the common law of England and the rules of equity.[11] In 1951 the Enactment of 1937 was extended to the Unfederated Malay States,[12] and five years later came the Civil Law Act 1956. The Civil Law Act was to consolidate and replace the earlier enactment and to be applied throughout the Federation of Malaya.[13]

10. See R.H. Hickling, *Malaysian Law* (Kuala Lumpur: Professional (Law) Books, 1987) 125.

11. *Ibid.*; Hansard The Civil Law Bill, 1956, 15 March 1956, at p. 1056.

12. *Ibid.*, at p. 124; where it was written that the judges of Malay States "adopted freely … A great mass of English rules of law and equity, civil and criminal law and procedure, either directly or derivatively."

13. *Ibid.*; Hansard The Civil Law Bill, 1956, 15 March 1956, at p. 1055; Application of traditional legal sources and the passing of Civil Law Act 1956 continued after Malaysia achieved her independence to provide continuity and stability to the newly independent Malaysia.

To this day, the Civil Law Ordinance remains relatively intact, save for a revision in 1972 when it was renamed the Civil Law Act 1956, Act 67. *Vide* ss. 3 and 5, it provides expressly that the common law and rules of equity 'shall be applied in so far as the circumstances of the States of Malaysia and their respective local inhabitants permit and subject to such qualifications as local circumstances render necessary.' The latter phrase, it is documented, takes root from similar qualifications imposed by the British in treaties with the Malay Rulers. The words quite unequivocally restrain or renounce the wholesale adoption of English law, but require the adjudicator to ascertain to what extent the local populace and indigenous customs allow such importation and reception. In other words the phrase invokes a clear restriction in the application of English law.

In practice and reality however the result was somewhat different. Judges and barristers were largely trained in the United Kingdom and often the most expedient course to undertake was to simply apply English principles and case law. In *Yong Joo Lin Yong Shook Lin and Yong Loo Lin v. Fung Poi Fong* [1941] MLJ 63; [1941] 1 LNS 102 Terrell Ag CJ stated:

> … As the Common law of England has been in effect followed in the Federated Malay States since a Supreme Court was established and now has statutory recognition.

And at p. 64 the Chief Justice went on to say:

> Principles of English law have for many years been accepted in the Federated Malay States where no other provisions have been made by statute.

It must be said that the attitude continued and to some extent is prevalent even today, although considerably less so. The provisions of the Civil Law Act 1956 remain intact to this day.

Apart from the Civil Law Ordinance, the British introduced the common law in statutorily codified form, as it were, by procuring the Malay Sultans to adopt statutory laws from India, such as the Evidence Act, the Penal Code, the Criminal Procedure Code and the Contracts Act which are essentially English common law in codified form. These laws continue to form the bedrock of Malaysian adjudication notwithstanding changes made from time to time to meet ever-changing needs. The common law therefore prevails in much of what comprises the law of the land.

Based on s. 3 of the Civil Law Act, the English common law and rules of equity as administered in England on 7 April 1956, on 1 December 1951 and on 12 December 1949, are applicable in West Malaysia, Sabah and Sarawak respectively. Any developments or changes in English common law and equity after the stated dates do not automatically

become law in Malaysia. They are only of persuasive authority, in the sense that Malaysian courts may choose to either adopt or reject these new developments or changes.[14]

I should also add that under the Federal Constitution, the word 'law' is defined so as to include the common law in so far as it is in operation in the Federation (art. 160 Federal Constitution). By extension, the common law also forms part of the "existing law" referred to in art. 162 of the Federal Constitution.

This point is well-illustrated by the decision of the Court of Appeal in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1; [2003] 3 CLJ 378. In that case, the plaintiff – debtor had created a charge over certain pieces of land in the bank's (first defendant) favour to secure a loan to one Kredin Sdn Bhd. Kredin, however, had defaulted in repayment of the loan. The bank commenced foreclosure proceedings. Subsequently in 1999 the said loan became vested in a wholly owned subsidiary of Pengurusan Danaharta Nasional Bhd under the Pengurusan Danaharta Nasional Berhad Act 1998. The Danaharta subsidiary therefore continued with the foreclosure proceedings. The plaintiff – debtor applied to the High Court for an interlocutory injunction against the Danaharta subsidiary to restrain it from exercising its rights under the Pengurusan Danaharta Nasional Berhad Act 1998. In the Court of Appeal, one of the issues for consideration was whether the High Court had power to grant the injunction in the terms sought by the plaintiff – debtor. This issue arose by reason of s. 72 of the Danaharta Act which provides as follows:

> 72. Notwithstanding any law, an order of a court cannot be granted:
>
> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,

14. Tun Abdul Hamid Mohamad, *Review of Civil Law Act 1956 (Act 67) Comments*, 3 November 2013, at p. 2, tunabdulhamid@gmail.com, http//: www. tun abdulhamid.my; Norchaya Talib, *Law of Torts in Malaysia*, 3rd edn. (Sweet & Maxwell Malaysia, 2010) 6.

> any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

In short, the provision precluded the grant of any such injunction. The Court of Appeal considered whether s. 72 of the Danaharta Act is contrary to the Federal Constitution. It sought to ascertain whether access to justice is a guaranteed fundamental liberty, and if so, whether s. 72 denied such access. Reference was made to art. 8(1) of the Federal Constitution which stipulates that "All persons are equal before the law and entitled to the equal protection of the law." The Court of Appeal interpreted the meaning of the word "law" by reference to art. 160(2) of the Federal Constitution which includes the common law. Since "law" includes common law, it was held that an enacted law must satisfy the common law test of fairness if it is to pass muster under art. 8(1). One of the fundamental principles of the common law is access to justice.

Although this decision was reversed by the Federal Court, this portion of the judgment of the Court of Appeal relating to the interpretation to be accorded to the word "law" remains untouched. Therefore, the incorporation of common law principles in the definition of "law" in the Federal Constitution is firmly entrenched.

The Rationale For The Civil Law Act

Why, one might ask was the Civil Law Act necessary? A perusal of the Hansard records that the passing of the Civil Law Act was intended to provide continuity and stability to the newly independent Malaya. What then were judicial attitudes like after Independence?

One must imagine a newly independent nation state, entirely unique in its multi-racial composition, unified by a Federal Constitution that strove to achieve balance and moderation in meeting the varying needs of Malaya's population. This is indeed the *Wasatiyyah* approach embodied in our Constitution. The influence of the British prevailed, most conspicuously by the establishment of strong and secular institutions of law. The legal system the British had left in place served its purpose well in that it achieved stability and peace amongst a multi-racial population. The natural progression and evolution was such that the country continued to develop its own common law, Malaysian common law, along the lines of the English common law.

An additional factor which tipped the scales in favour of such progression was the fact that the earliest members of our legal fraternity, whether jurists, judges or lawyers largely studied law in the United Kingdom. As

such they were inculcated with the building blocks of the English common law as part of their education in the law and it was difficult notionally for them to completely divorce the English common law from developments in the law in Malaysia.

Having said that however, it would be equally wrong to characterise our early and very eminent judges as persons who simply unquestioningly adopted English principles of law with no thought for national needs or ideals. A perusal of the judgments during this time reveal that the judges at the time took considerable care to ensure that national ideals were met and that the common law was only to be applied to the extent that local conditions and customs allowed for such incorporation.

Criticisms Of Malaysian Judicial Attitudes

Many reviews have emerged, particularly in the last ten years or so, criticising Malaysian judges for failing or refusing to apply indigenous customs or laws in their adjudication of matters. The criticism is generally addressed at a failure to apply customary or religious precepts in the determination of a dispute rather than the English common law which is viewed as a 'foreign law'. This reproach however requires greater scrutiny. These critics fail to comprehend that the system of law that subsists, and which has been utilised for the past two centuries, in the country comprises a composite system of law that addresses the needs of the nation. The system of law specifically allows for variations or amendments to meet local needs and conditions. In other words it affords basis for the application of local customary laws and precepts where and when this becomes necessary. We have a system of law that we are able to mould to meet our precise needs.

The Evolution Of Malaysian Common Law

I now move on to consider how our judges have evolved and developed Malaysian common law. To my mind, this issue is best addressed by examining Malaysian judicial reasoning in various areas of the law over the years from Independence to date. In this context I propose to consider case law in the areas of contract, tort, trusts, land law, Islamic banking law, native customary rights and constitutional law in order to afford you an overview of judicial attitudes.

Law Of Contract

I commence with the law of contract. The Contracts Act 1950 and its predecessors in time are all codifications of the English common law in relation to the law of contract.

This piece of legislation takes its roots from the Indian Contract Act of 1872, and was introduced into the Federated Malay States *vide* the Contracts Enactment 1899. It was later extended to all component states including those which had previously applied the English common law. It was revised in 1974 without going through Parliament to become the Contracts Act 1950. There now subsists a large corpus of Malaysian cases dealing solely with this area of the law. This body of case law is representative of the progress of Malaysian common law in the area of contracts.

Notwithstanding the existence of the Contracts Act and the body of case law arising from judge made law in this area, there are still *lacunae* that arise from time to time in relation to the interpretation and application of the Act. It is in this context that the question arises, is recourse still had to the English common law to fill up these gaps? And if so, is consideration accorded to local needs and conditions?

To answer this question, it would be instructive to consider a range of cases from the 60s to date. In cases where there is a *lacuna* in the Contracts Act 1950, judges have had recourse to English law, pursuant to the Civil Law Act 1956.

In *JM Wotherspoon & Co Ltd v. Henry Agency House* [1962] 1 MLJ 86; [1961] 1 LNS 30, the issue that arose for consideration was whether the defendant firm in Kuala Lumpur was an *agent del credere* of the plaintiff company in London. As the Contracts (Malay States) Ordinance 1950 was silent on the subject of an *agent del credere*, Suffian J relied on the position in law in England and applied it in Malaysia *vide* s. 5(1) of the Civil Law Ordinance 1956.

This approach was adopted again in 1976, in *Royal Insurance Group v. David* [1976] 1 MLJ 128; [1975] 1 LNS 154, where Gill, Ag LP (Federal Court), held as follows:

> … the Contract Act 1950 is silent on *del credere* agent and due to that matter the application of English Law was used.

These cases demonstrate the fact that judges rely on English mercantile law where there is a void in our law. The use of such principles of English law ought not to be faulted as there is simply no equivalent legal rationale in our indigenous law that could fill in this void.

As I said earlier, another common misconception that is often touted is that Malaysian judges blindly adopt English law or other foreign sources of law without going through the due process of filtering and analysing the suitability of its application in Malaysia. This is not true as borne out

by the cases of *Wrigglesworth v. Wilson Anthony* [1964] 1 MLJ 269; [1964] 1 LNS 222 and *Tan Mooi Liang v. Lim Soon Seng & Ors* [1974] 2 MLJ 60; [1974] 1 LNS 171.

In *Wrigglesworth*, the plaintiff claimed an injunction to restrain the defendant from practising or carrying on the business or profession of an advocate and solicitor within a radius of five miles from Kota Bharu, Kelantan until 31 December 1965. The plaintiff referred to a string of English cases on the question of reasonableness in respect of the phrase "restraint of trade". Hashim J in dismissing the plaintiff's claim made the following remark:

> In my opinion this case should be decided on the interpretation of section 28 of the Contracts (Malay States) Ordinance, 1950, and on the first paragraph of plaintiff's letter to defendant dated 7th December, 1963. With great respect I do not think the English cases are applicable as the Contracts (Malay States) Ordinance, 1950, is not based on the English law of contract. Section 28 is quite clear.

In *Tan Mooi Liang* the question arose whether a member of a partnership might dissolve the partnership by giving notice of his intention to do so. The appellant gave notice of his intention "to dissolve the partnership" and subsequently applied for the order that the partnership be wound up, the taking of accounts and the appointment of a receiver. The respondents pleaded that the notice given by the appellant was ineffective to dissolve the partnership and that it amounted to a notice of intention to retire from the partnership. A dispute arose when the appellant sought to have a receiver and manager appointed to wind down the partnership. The dispute was heard in the High Court and on appeal in the Federal Court, Suffian CJ (Malaya) agreed with Azmi LP and Ong Hock Sim FJ that recourse ought not to be had to the English common law relating to partnerships, as there were sufficient provisions under the Contracts (Malay States) Ordinance 1950. It was held:

> Because of the many provisions relating to partnership in the Contracts (Malay States) Ordinance, 1950, which in my opinion constitute 'other provisions relating to partnership' within the meaning of the last few words in subsection (1) of section 5 of the Civil Law Ordinance, 1956, the English law of partnership does not apply to the matter in dispute here, and accordingly I would respectfully agree that this appeal be dismissed with costs.

Again this underscores the point I made earlier, namely that our jurists have always been cognizant of the need to utilise Malaysian legislation and law prior to resorting to the English common law.

The development of the Malaysian common law is a matter that is entirely within the control of the Malaysian judiciary. For example, in the case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ

356; [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, the Malaysian Supreme Court stipulated that since the concept that originates from the English common law has been incorporated into our Contracts Act 1950 *vide* s. 24, it is the Malaysian courts that will decide the ambit of public policy and any changes to be made to that law. In this context, changes in the United Kingdom in relation to their principles of the common law after 7 April 1956 are not binding and strictly speaking, not necessarily relevant. As succinctly stated by Hashim Yeop A Sani CJ (Malaya):

> The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England.

It is therefore evident that the Malaysian judiciary is ever vigilant of the need to ensure that the development of the Malaysian common law is in line with local circumstances.

In more recent times the superior courts in Malaysia have continued to follow the earlier rationale of applying English common law principles where there is a gap in our Malaysian legislation. In *Affin Bank Bhd v. Mohd Kasim Ibrahim* [2013] 1 CLJ 465, the Federal Court followed the position in English common law that personal contracts of employment could not be assigned by an employer without the express consent of the employee. Upon the transfer of a business which involves a change in the ownership of the same, an employee cannot be forced to work for a new employer. Equally the new employer cannot be forced to take him on. Any transfer of the employee to the new business must be achieved by consensus between the employee and the new employer. The Federal Court held that it amounts to a repudiatory breach of a contract to purport to change the identity of the employer without the consent of the employee. In so doing, the Federal Court applied English common law, as there is no legislation in Malaysia to deal with this precise situation.

Similarly in *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773, the Court of Appeal in allowing the appellant's appeal, followed the common law principle that does not recognise the implied duty of good faith and fair dealing in contract law, as opposed to the position in America where such a duty is recognised. The case in essence involved an action by appellants who were participant banks to a syndicated loan for recovery of the loan from the respondent borrower and developer who had, despite restructuring, refinancing, deferments and extensions of time, persistently defaulted in its repayment obligations resulting in the loan facility being terminated. What was so unusual about the case was that the respondent's sole pleaded cause of action against the

appellants in its counterclaim was that by terminating the loan facility, the appellants had breached "a duty to act in good faith and honesty" in granting and administering the syndicated loan.

This is an example of a situation where the court had the option of applying established common law principles or alternatively, expanding its approach so as to apply American principles of the imposition of a duty of good faith and fair dealing. However the court opted to adopt the more conservative English common law principle.

From the series of cases I have selected, it should be apparent that Malaysian judicial attitudes towards the application of the common law in relation to the law of contracts is unfettered by the need to comply with English principles of law. The judges have shown a remarkable resilience in seeking to apply the law so as to meet local needs and conditions.

Law Of Trusts

In relation to the law of trusts, the position in Malaysia was highly influenced by the British even after Independence. Prior to Independence, the law of trusts was regulated mainly by Malay customs and Syariah law (Wakaf).

The primary sources of Malaysian trust law are the Federal Constitution, local legislation, local case law and customs, and to the extent that the law is *pari materia*, cases from Singapore and other Commonwealth jurisdictions. The development of the principles of equity and trust law in Malaysia, appear to be heavily dependent on the application of the English common law.

Recently the Federal Court has in two different cases endorsed the essentially English common law concept of constructive trusts as a formula for the grant of equitable relief. In so developing the law of constructive trusts, the Federal Court referred to a plethora of English cases and utilised common law principles.

In *PECD Bhd (in liquidation) v. Amtrustee Bhd* [2014] 1 MLJ 91; [2013] 9 CLJ 841, the Federal Court deliberated upon the principle of a Quistclose trust in the Malaysian legal system after considering a series of English common law authorities particularly *Barclays Bank v. Quistclose Investments Ltd* [1968] 3 All ER 651 and *Twinsectra Ltd v. Yardley and others* [2002] 2 All ER 377. The Federal Court followed and applied the primary-secondary trust analysis of Lord Wilberforce in the *Quistclose Investments Ltd* case as the proper legal basis for the reception and incorporation of the concept of a Quistclose trust in Malaysia.

Although there have been criticisms on the application of the Quistclose doctrine in this case, nevertheless, one cannot deny the efforts of the Federal Court in bringing in this doctrine to Malaysia. It ought to be borne in mind that such legal concepts and mechanisms afford a further expansion of our Malaysian common law. This serves to keep the nation abreast of current legal thinking in the rest of the modern world. In an era of globalisation, it is important for the Malaysian judiciary to maintain standards in tandem with the rest of the globalised world. The advantages afforded by such expansion cannot therefore be denied.

In another landmark decision, namely *RHB Bank Berhad v. Travelsight (M) Sdn Bhd & 3 Ors And Another Appeal* [2015] 1 AMR 433; [2015] 1 CLJ 309, the Federal Court in approving the utilisation of constructive trusts by way of remedy in Malaysia, relied on a series of English cases to introduce the concept here. The Federal Court took into consideration the fact that remedial constructive trust has been accepted in many other Commonwealth countries and ought therefore to be utilised in similar fashion in this jurisdiction. In so saying the Federal Court accepted the general common law test or principle to determine in what situations a constructive trust could arise.

In the area of the law of trusts therefore it may be observed that the Malaysian judiciary has taken great pains to ensure that it remains in tandem with the rest of the Commonwealth in relation to the development of the law. In so doing it has been necessary to incorporate or adopt essentially English common law principles. However, this has merely served to enrich the scope and ambit of our case law in relation to trusts. It has also served to afford litigants new and alternative reliefs in the face of inequitable treatment. The incorporation of such common law concepts has not served to detract from our local laws or customs.

Land Law

In relation to land law, it is pertinent that s. 6 of the Civil Law Act 1956 ("CLA") specifically provides that English land law relating to the tenure or conveyance of property or assurance or succession does not apply in Malaysia. It essentially prohibits the importation of any part of English land tenure system into Malaysian land law.[15]

15. Section 6 of the CLA states: "Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

Instead the Torrens system was introduced in the Malay States to replace the English deeds system governing land matters.[16 & 17] Uniformity was achieved in 1965 for all States in Peninsular Malaysia with the National Land Code. The Code is to that extent indubitably Malaysian, notwithstanding that its underlying concepts are taken from "foreign law".

The key characteristic of the Torrens system is its recognition that "the register is everything". An estate or interest in land can only be acquired by virtue of due conformity with the statutory procedure as enshrined in the Code. Arulanandom J in *Verama v. Amarugam & Anor*[18] stated:

> … in interpreting land laws in this country, one should always bear in mind that land laws are governed by the National Land Code which does not allow the law to be tempered by equity.

However, judicial attitudes towards this theory of registration being 'everything' differed somewhat in practice. Judges continued to recognise equitable estates and equitable interests, thereby giving cognisance to the English common law. For example Raja Azlan Shah J concluded in *Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh*[19]:

> It has not been shown that there are express words in the statutes which preclude me from enforcing the equitable rights of the applicants.

These two views reflect the differing ways in which Malaysian judges have treated the application of English common law and equitable principles to land matters domestically under the National Land Code. In many instances judicial attitudes have tended towards an adherence to such principles.

In *Devi v. Francis,*[20] the issue related to the applicability of English equitable rules relating to licences by estoppel. It was contended that such equitable rules were not applicable in view of the prohibition in s. 6 of the then Civil

16. The Perak Land Enactment 1897 (No 17), the Selangor Land Enactment 1897 (No 15), the Negeri Sembilan Land Enactment 1897 (No 22) and the Pahang Land Enactment 1897 (No 28).
17. The Perak Registration of Titles Enactment 1897 (No 18), the Selangor Registration of Titles Regulation 1891 (No 4), the Negeri Sembilan Registration of Titles Enactment 1898 (No 3) and the Pahang Registration of Titles Enactment 1897 (No 29).
18. [1982] 1 MLJ 107; [1981] CLJ 180B; [1981] CLJ (Rep) 296 HC.
19. [1969] 2 MLJ 196; [1969] 1 LNS 106 HC.
20. [1969] 2 MLJ 169; [1968] 1 LNS 34 HC.

Law Ordinance 1956. Chang Min Tat J, however applied the doctrine of equitable estoppel and stated:

> The other objection is based on section 6 of the Civil Law Ordinance, 1956 which excludes the application of the law of England relating to tenure or conveyance or assurance of or succession to any immovable property or any estate right or interest therein. The answer to this objection is that the land law of England is one thing and equity another matter and it is expressly provided in section 3(1) of the same Ordinance that the court shall apply the common law of England and the rules of equity and in section 3(2) that in the event of conflict the rules of equity shall prevail.

Similarly in *Woo Yok Wan v. Loo Pek Chee,*[21] the issue of the enforceability of an agreement for a 12-year lease was raised. One of the contentions was that the English equitable doctrine in *Walsh v. Lonsdale* was not applicable in view of s. 6 of the Civil Law Act. In addressing this contention, Ajaib Singh J stated:

> In my opinion the provisions of section 6 of the Civil Law Act, 1956, do not exclude the English equitable principle that a lease which is void at law for not having complied with legal formalities can be treated as an agreement for a lease which may be enforced in equity … What is precluded by section 6 is the English law relating to tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein but the section does not in any way preclude the application of the English principles relating to equitable interests in land.

It is therefore evident that Malaysian judges have displayed an independent and unfettered discretion in determining when and how to apply relevant principles of English common law and equity. The position in law now recognises that equitable principles are applicable under the Code. As stated by Professor Visu Sinnadurai in his book entitled *Sale and Purchase of Real Property in Malaysia*[22]:

> The Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects.

The acceptance of the application of English equitable principles in relation to the Code was given further support by Edgar Joseph Jr J in *Alfred Templeton & Ors v. Low Yat Holdings Sdn. Bhd. & Anor.*[23] His Lordship further stated:

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21. [1975] 1 MLJ 156; [1974] 1 LNS 192 HC.
22. Butterworths & Co (Publishers) Ltd, 1984.
23. [1989] 2 MLJ 202; [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC.

> Despite the misgiving expressed by Professor Haji Salleh Buang as to the *locus standi* of equity under the Code, in his well-researched and interesting article entitled *'Equity and the National Land Code – Penetrating the Dark Clouds'* (1986) 1 MLJ cxxv, it seems to me, that it is too late now, to question the proposition that the English doctrine of equitable estoppel applies and, that as a result, equitable rights or interests in land may arise outside the statutory system of registration of title. In other words, the Torrens system does not prevent the court from doing equity where the rights of third parties have not intervened: *Loke Yew v. Port Swettenham Rubber Company* [1913] AC 491.

The Federal Court case of *Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors* [1974] 2 MLJ 45; [1974] 1 LNS 175 affords yet another example of an instance where the Malaysian courts have applied English equitable principles, notwithstanding the existence of the Torrens system of law in place in Malaysia in relation to land law.

Briefly stated, the appellants in this case had paid the full purchase price of land to the vendors, who had executed due transfers of the land in favour of the appellants. Delivery of the issue documents of title was given to the solicitors for purposes of registration of title in the appellant purchasers' names. The documents were duly presented for registration. Possession of the said land was also given to the appellants.

However, soon after this, the Government of Malaysia obtained judgments against the vendors for income tax due from the vendors to the Inland Revenue Malaysia. Prohibitory orders were then obtained by the Government and registered on the register documents of title. The appellants were then informed that registration of their documents had been rejected on the grounds that a Registrar's caveat had been entered.

The main ground of appeal before the Federal Court was whether the caveat was rightly and properly entered. The court concluded that the caveat had been wrongly entered. In so concluding the Federal Court resorted to equitable principles under English law in its reasoning. This is what they said:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat. Section 320 speaks of entry of a caveat in respect of any land wherever desirable for protecting the interests of the Federation. It does not, in our view, extend to a contingent claim, or a right to execution thereafter, solely by reason of the fact that the Federation is interested in the collection of a debt, … But can it be maintained with any legal justification

> that these lands, after September 22, 1972 were still property of the debtor available for satisfaction of those claims? Have the vendors, now bare trustees for the purchasers, any interest in the lands which can be caveated? …

Thus equitable principles were accepted as part of the Malaysian common law in relation to land.

It is apparent that Malaysian judges therefore took into account critical views and dissenting voices when determining whether to adopt English equitable principles. One would go so far as to say that they were fiercely independent in this context and even distinguished Privy Council cases where necessary in order to make their point. This is borne out by the Supreme Court case of *Tan Khien Toong & Ors v. Hoong Bee & Co.*[24] where Wan Suleiman SCJ distinguished the earlier principle established by the Privy Council in *United Malayan Banking Corporation Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi & Another Case*[25] which had held that there was no room for the importation of any rules of English law in the field of land tenure in Malaysia except where the Code itself expressly provided for it. The learned judge went on to reject the contention that the principles of proprietary estoppel were not applicable in view of the Privy Council decision in UMBC. Again the independent intellectual reasoning of the Malaysian judiciary is evident. It bears repeating that Malaysian judges therefore sought at all times to analyse and apply the law in its truest or purest form for the benefit of Malaysian land law.

In more recent case law too, the Federal Court has continued to recognise the interplay of equitable principles in adjudicating land matters. In *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 MLJ 149; [2015] 4 CLJ 1 FC, Abdull Hamid Embong FCJ reiterated the earlier principle established in *Chuah Eng Khong v. Malayan Banking Bhd* [1998] 3 MLJ 97; [1999] 2 CLJ 917 which recognised that an absolute assignment is in effect an equitable mortgage whereby the mortgagee acquires ownership of a chose in action and not the land. This is a clear example of the continued application of English equitable principles, notwithstanding the statutory provisions of the National Land Code.

Again, in *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173, the Federal Court recognised the application of the common law rule of *nemo dat quod non habet* (no one can transfer what he has not got) in relation to land transactions. It was held that forgers could

24. [1987] 1 MLJ 387; [1987] 2 CLJ 17; [1987] CLJ (Rep) 353 SC.

25. [1984] 2 MLJ 87; [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC.

not pass good title to innocent purchasers. The mere claim of being a *bona fide* purchaser for value without notice, which generally affords sufficient basis under the Code for a subsequent purchaser to acquire good title, (ie, deferred indefeasibility) was insufficient to avoid the application of the *nemo dat* rule. The purchasers could not therefore obtain good title to the land as it was defeasible and was liable to be set aside on the grounds that it had been obtained under an invalid or void instrument of transfer.

However judicial attitudes in this aspect have not been entirely consistent. Malaysian judges have expressly departed from common law and equitable principles where they considered it necessary to do so.

In *Malayan United Finance Bhd v. Tay Lay Soon* [1991] 1 MLJ 504 SC, Jemuri Serjan SCJ rejected the wholly English doctrine of the "equity of redemption" in relation to statutory charges under our National Land Code. Such a doctrine or phrase was simply inapplicable in the context of the National Land Code. The learned judge relied on an earlier Privy Council decision in *Haji Abdul Rahman v. Mohamed Hassan* [1971] AC 209 where the Privy Council had pointed out that our local judges had been overly swayed by the doctrines of English equity and had paid insufficient attention to the fact that they were dealing with a system of registration of title contained in a codifying enactment.

In *T Damodaran v. Choe Kuan Him,*[26] the Privy Council, on an appeal from the Federal Court of Malaysia, had to consider whether a *lis pendens* could be entered on a register document of title to land. Again this is an example of the application of an essentially English land law doctrine to the codified system of land law prevalent in this jurisdiction. In determining that the common law doctrine of *lis pendens* in English law had no application in Malaysia the Privy Council relied heavily on s. 6 of the Civil Law Act. It was held that English land law should be expressly excluded from the construction and interpretation of the National Land Code.

What we can glean from the foregoing line of cases is that Malaysian judges and judicial attitudes have been independent and unfettered to the extent that legislation allows them, in construing and adjudicating on land matters. They have not hesitated to apply common law and equitable principles where that has been necessary to provide a complete remedy or relief in any particular case. To achieve that end they have carefully analysed the effect and purpose of our Code and its interaction with equitable principles founded in English law. The carefully thought through

26. [1979] 2 MLJ 267b; [1979] 1 LNS 107.

rationale in all these cases establishes the fact that the Malaysian judiciary has adopted a carefully analytical, prudent and circumspect attitude towards the incorporation and reception of English law principles.

Law Of Tort

Historically, tort is a creature of the common law.

In this area of the law, the application and incorporation of English common law principles is readily noted. This can be ascribed in no small part to the fact that tort law has not, by and large, been codified in the manner of the Contracts Act. There is no specific statute for the law of tort in Malaysia, save for the Defamation Act. It is apparent from a consideration of the case law in this region over the past 60 years or more, that Malaysia adopts and incorporates common law principles in adjudicating on the law of tort. This has been the case in most parts of the Commonwealth that adopted the English system of law. However Malaysian courts have ensured that such adoption and incorporation is in keeping with local conditions.

Like English law, tort law in Malaysia has developed incrementally and in distinct domains, for example, negligence, nuisance, defamation, economic loss etc. This very approach of determining categories of "intentional wrongs" that give rise to a cause of action in tort is essentially a common law approach.

Case law bears out the fact that local judges have adopted the basic building blocks of tort actions from the common law, while not necessarily developing or extending the law to the extent that it has developed in the United Kingdom. In other words, there has been no routine or mechanised development of the law. The courts have remained conscious of local conditions and needs in developing tort law.

The earliest known case premised on the tort of negligence can be traced to the year 1913. The case of *Lauder Watson v. The Government of Perak* [1913] 2 FMSLR 98 related to a claim for damage caused by the overflowing of a canal onto the plaintiff's property. This was prior to the establishment of the *Donoghue v. Stevenson* [1932] AC 562 principle. After Lord Atkin had expounded his famous principle, it was followed locally by Ong J in *Sathu v. Hawthornden Rubber Estate Co Ltd* [1961] 1 MLJ 318; [1961] 1 LNS 117. The learned judge followed the neighbour principle and applied the foreseeability test, both key common law elements in establishing liability in tort.

These cases have been followed by a plethora of similar cases. As such the common law concepts of proximity, the existence of a duty of care, foreseeability, breach of the duty of care resulting in injury or damage have all been incorporated as part of the Malaysian common law in relation to tort.

More recently in the well-known case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, more popularly known as the "Highland Towers" case, the Federal Court adopted and followed the three-fold test enunciated in *Caparo Industries plc v. Dickman and Others* [1990] 1 All ER 568. Notwithstanding this, the Federal Court chose however not to follow the position adopted in the United Kingdom in relation to the liability of public authorities. The reason given was that conditions in Malaysia differed considerably from those in the United Kingdom, and that numerous private law claims for liability against local authorities would effectively render the local authorities' coffers impecunious. As such the immunity provisions of the relevant statute exempting the public authority from liability for negligence was given full effect, notwithstanding the fact that breaches of statutory duty had been established. The case is instructive because it demonstrates once again that Malaysian judges do not blindly or unquestioningly apply common law principles.

More recently however, some inroads have been made into the liability of local authorities, as seen in the case of *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861. Here the question before the Federal Court was whether the local authority had been negligent in failing to ensure that the public road where an accident had occurred had been kept safe from trees that lined the road. The Federal Court identified the relevant statutory provision that imposed a statutory duty on the local authority to remove any tree likely to cause danger to public safety. It went on to hold that there had been a clear abdication of duty on the part of the local authority, amounting to a breach of such duty.

This case demonstrates the incremental evolution of the law of tort in Malaysia in accordance with local conditions and needs.

Similarly in relation to the law of nuisance the Malaysian courts and judges have adopted English common law concepts including the rule in *Rylands v. Fletcher* etc. In *Au Kean Hoe v. Persatuan Penduduk D' villa Equestrian* [2015] 4 MLJ 204; [2015] 3 CLJ 277 a claim in nuisance was brought against the respondent community for obstructing a public road by constructing two boom gates and a guard house. The Federal Court applied common law principles to conclude that actionable obstruction or actionable private

nuisance was not available for inconvenience. In order to be actionable the conduct had to amount to unreasonable conduct in all the circumstances of the case.

The continued use of common law principles in the law of tort is particularly well illustrated in relation to defamation. Notwithstanding that we have a Defamation Act, a consideration of the case law in this area will show that judges routinely consider both statutory requirements and defences as well as common law defences. The use of the common law provisions is of course subject to any modification by the statute.

The Malaysian courts continue to apply relevant common law principles and cases where the legal rationale and relief afforded are suitable for incorporation locally. In *Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan* [2012] 8 CLJ 885 the Federal Court had to determine whether to apply the English common law rationale adopted in *Macintosh & Anor v. Dun & Ors* [1908] AC 390. In that case it was held that the defence of qualified privilege was defeated where information is supplied by a corporate defendant formed solely or substantially for the purposes of disseminating commercial and financial information relating to a third party to its members on payment of a fee. The Federal Court held that the principle in *Macintosh v. Dun* was indeed applicable in relation to the appellant, which was nothing more than a credit agency trading for profit. As such it was held that it could not be accorded the immunity of qualified privilege in publishing the defamatory information on the respondent.

Islamic Banking

I now move to a uniquely Malaysian aspect of the law, namely Islamic banking and finance. Islamic banking contracts are no different from any other contracts in that the interpretation of such contracts is governed by the Contracts Act 1950. A common thread underlying the law of Islamic banking and contracts under the common law is the principle that parties are free to choose the law with which to govern their contracts.

Islamic banking and finance is an area where the law is entirely separate and distinct from the common law substantively. It is premised on Islamic law. Notwithstanding this, a consideration of the manner in which the law in this area has developed will show that common law principles have and are being utilised in the practice and adjudication of the law.

This is well illustrated in the early case of *Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd* [1987] 2 MLJ 192; [1987] 1 CLJ 447; [1987] CLJ (Rep) 396. The core issue for consideration before the Supreme Court was whether the High Court was correct in issuing an injunction, which is a common

law remedy, in deciding on an Islamic transaction. Bank Islam had provided facilities for the purchase of printing equipment which was leased to the appellant for a period of seven years. The appellant had defaulted in the payment of monthly instalments due. Some attempts at settlement followed with the bank executing a lease printing equipment agreement with the appellant with new rental payments due per month. Once again the appellant defaulted whereupon the bank sought to take possession of the equipment. The appellant locked the premises containing the equipment.

The bank then filed an application for a mandatory injunction, which was granted by the High Court. The appellant sought to argue that the transaction was a loan agreement and not a lease agreement. The Supreme Court considered the contents of the lease agreement and concluded that it was in fact a lease agreement whereby the property in the equipment remained that of the bank at all times. In so doing the court looked at the nature of the transaction. The court did not consider or analyse the transaction as being in compliance with or contrary to Shariah, or whether under Shariah principles it was in fact a loan. The court applied common law principles of construction of the contract between the parties to determine the nature of the transaction, rather than applying Shariah principles, notwithstanding that it was an Islamic transaction.

Similarly in *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd.* [2003] 1 CLJ 625, the appellant had granted the respondent a loan facility of RM20 million under the Islamic banking principle of *Al-Bai Bithaman Ajil* under two agreements. Upon default the appellant bank issued the relevant notices under the National Land Code. When the borrower failed to comply with the notice the bank sought an order for sale of the security charged under the loan facility. The borrower sought to challenge the sale. The Court of Appeal held that notwithstanding that the case involved an Islamic banking facility, this did not mean that the applicable law was any different than if the facility had been granted under conventional banking principles. Therefore applying conventional law and the provisions of the National Land Code in relation to charges, the court held that the borrower had failed to establish cause to the contrary. This case illustrates the same principle, namely that notwithstanding that the facility offered was one premised on Islamic banking principles, this did not preclude the utilisation of ordinary contractual principles in relation to the enforcement or recovery provisions. Put another way, the law applicable in relation to Islamic banking facilities is the law of contract. The law of contract takes its origins from the common law. Notwithstanding this, it is the law that is utilised in dealing with Islamic banking facilities.

Another interesting aspect of Islamic banking law is that the doctrines of binding precedents and *stare decisis*, which are cornerstones of the common law system, are accepted and incorporated as part of the system of law. Decisions of the superior or higher courts are therefore binding on all the courts below it.

The introduction of these essentially common law concepts into an area of law founded entirely on Islamic principles has been found to be necessary in order to provide certainty and predictability in the enforcement of Islamic banking and financial instruments and facilities. It would not lend to confidence in the Islamic financing market if there was a real risk of certain facilities or instruments being rendered or held to be invalid by the judiciary by reason of "non-compliance" with the Shariah.

A consideration of Islamic banking cases in Malaysia discloses that we have created a set of legal principles in this area of the law that truly qualify as Malaysian common law. In so doing the Malaysian judiciary has not hesitated to apply common law principles in construing and giving effect to Islamic law based banking transactions. More importantly the application of such common law principles to Islamic banking matters has been achieved harmoniously, according greater predictability and certainty to the adjudication of such matters. This has led to the establishment of the Muamalat (Islamic Banking) court.

Native Customary Rights – Common Law Native Title

Another area where Malaysian common law has uniquely come into its own, as it were, is in the area of native customary rights, particularly in Sabah and Sarawak. These rights refer to the rights to land of these natives. In Peninsular Malaysia such similar claims to land rights are made by the Orang Asli (the aborigines).

In granting recognition to the rights of these people to their native lands the Malaysian courts have used, *inter alia*, common law principles, apart from statutory law and the Federal Constitution.

For example in *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418; [1997] 3 CLJ 885 the courts recognised that the Jakun community in the Sungei Linggiu area had common law customary rights over their traditional and ancestral land which they depended upon to forage for their livelihood. It was further held that their rights under both the common law and statute were also protected under art. 13 of the Federal Constitution.

For Sarawak's Native Customary Rights (NCR) common law principles are applicable for such rights acquired in Sarawak before 1 January 1958. These rights based on common law have been codified in the Sarawak Land Code (Cap 81).

The application of common law principles in recognising customary rights over land in Sarawak was affirmed by the Federal Court in *Superintendent of Land & Surveys Miri Division & Anor v. Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2007] 6 AMR 290; [2007] 6 CLJ 509 where it was stated:

> … the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation. By common law the Court of Appeal must be referring to the English common law as applicable to Sarawak by virtue of s. 3(1)(c) of the Civil Law Act 1956. In this regard it should be emphasised that the common law is not a mere precedence for the purposes of making a judicial decision. It is a substantive law which has the same force and effect as written law. It comes within the term of 'existing law' under Article 162 of the Federal Constitution (see *MBf Holdings Bhd & Anor v. Houng Hai Kong & 2 Ors* [1993] 2 AMR 3012; [1993] 2 MLJ 516 (HC: Anuar J); …).

In so concluding the Federal Court examined judicial decisions and reasoning in various other Commonwealth jurisdictions including Australia,[27] Canada[28] and Nigeria.[29] The Federal Court adopted the reasoning of Lord Denning in the Privy Council decision of *Amodu Tijani v. Secretary, Southern Nigeria*[30] which held that the Crown may acquire a radical or ultimate title to the land but did not acquire absolute beneficial ownership of the land that displaced any presumptive title of the natives. This provides an example of the application of common law reasoning and rationale to what is essentially a Malaysian dispute relating to native customary rights. The highest court of the land has upheld the position that common law protects the pre-existing land rights of natives and Orang Asli unless expressly taken away by clear and unambiguous language in a statute.

It is therefore evident that even in uniquely Malaysian matters such as native customary rights, the courts will not hesitate to utilise the common law to interpret and afford relief to litigants.

27. *Mabo and Others v. State of Queensland* [1992] 107 ALR 1.

28. *Calder v. A-G of British Columbia* [1973] 34 DLR (3d) 145.

29. Privy Council case of *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399.

30. *Supra.*

Administrative Law

It would not be possible to explore the area of administrative law in Malaysia without quoting from Sultan Azlan Shah, who as a Federal Court Judge encapsulated the heart of the law thus:

> "Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship." *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprises Sdn Bhd* [1979] 1 MLJ 135

And in order to control or rein in such powers, modern constitutional law dictates that it is the judiciary that determines and decides on the constitutionality of legislation. This foundation to the law of judicial review was laid down as early as 1803 by Chief Justice Marshall in the renowned case of *Marbury v. Madison* [1802] 1 Cranch 137.

The statutory basis of judicial review action is provided for in s. 25(2) read with para. 1 of the Schedule to the Courts of Judicature Act 1964. Paragraph 1 expressly grants the power to the High Court to issue writs of, *inter alia*, *certiorari*, *mandamus*, prohibition and *quo warranto* for the enforcement of rights conferred under Part II of the Constitution or for any purpose.

It is in adjudicating and determining judicial review applications that the common law plays a key role. Malaysian administrative law has adopted the grounds for judicial review as are used under the English common law. Previously, the case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223 CA specified the relevant criteria, namely "Wednesbury unreasonableness" and a breach of the rules of natural justice. More recently, this famous case has been replaced by the House of Lords decision in *Council of Civil Service Union & Ors v. Minister for Civil Service* [1985] AC 374. It set out three grounds for the purposes of adjudicating on such reviews, namely "illegality", "irrationality" and "procedural impropriety". There is a possible additional ground of review based on "proportionality". These grounds have been adopted in Malaysia as comprising the basis for the grant of judicial review. In *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 the Federal Court fully endorsed these three heads as comprising the correct basis for determining whether an act of the executive or independent statutory body is beyond their powers or amounts to an abuse of their powers. This is a clear example of the incorporation of English common law principles in developing Malaysian jurisprudence in relation to administrative law

Although the Malaysian courts have adopted the legal rationale and basis in terms of the criteria or grounds for the grant of remedies afforded in administrative law, the similarity ends there. The Malaysian judiciary has acted in accordance with local conditions unique to our multiracial country in determining matters relating to security. In *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; 2014] 6 CLJ 541 (better known as the '*Kalimah Allah*' case) the Minister of Home Affairs had banned the use of the word 'Allah' by the Catholic Church in its weekly publication which was circulated online. The Minister declared that he had imposed such a ban in the interests of security. The applicant church sought to quash the decision of the Minister, questioning *inter alia* whether the decision was reasonable, constitutional and in accordance with the law. What was essentially a matter of security quickly morphed into an issue of religion.

The church succeeded at first instance. The decision of the High Court was reversed by the Court of Appeal, which meant that the Catholic Church was effectively prohibited from producing publications for circulation on line with the words "Allah". The Federal Court in refusing to grant leave, applied the English common law principles set out above, namely a consideration of the procedural and substantive fairness of the decision of the Minister.

On the issue of the constitutionality of the Control and Restriction of the Propagation of Non-Islamic Religious Enactments of the relevant states, the Federal Court held that the challenge on the constitutionality of State Enactments must comply with the procedural requirements as set out in art. 4(4) of the Federal Constitution. Such non-compliance was held to be fatal to the applicant's case.

Constitutional Review Of Legislation

The Federal Constitution in art. 4 expressly allows for the validity of legislation to be challenged.

Recently, in the case of *Public Prosecutor v. Azmi bin Sharom* [2015] MLJU 594, the Federal Court had occasion to examine whether s. 4(1) of the Sedition Act 1948 contravenes art. 10(2) of the Federal Constitution and is therefore void. In dismissing the challenge the Federal Court adhered to and relied on the common law test of proportionality. This test was enunciated in the Privy Council decision of *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Ors* [1998] UKPC 30 by Lord Clyde:

> In determining whether a limitation is arbitrary or excessive he (Gubbay CJ) said that the court would ask itself:
>
> whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

However it must be said that notwithstanding the application of English common law tests, the net result of these decisions shows that the Malaysian judiciary has departed somewhat from Western based "spirit" of the English common law. Our courts have adopted reliefs that are suited to the local conditions and needs of the nation.

Conclusion

It should be evident from the content of this paper that Malaysian common law has progressed extensively since its introduction through the British in colonial times. It must be said that a considerable quantity of our law, both statute and common law encapsulate concepts from the English common law and equity. The Civil Law Act by adopting almost the entirety of the commercial law of England with the concession that it be adapted to meet the needs of our society, has placed us well globally in terms of commerce. The common law, as variegated to meet our needs, ie, Malaysian common law, is embedded as part of the local legal system. It has provided us with an adequate system of adjudication which has worked satisfactorily through the years.

However it would be extremely limited and short-sighted to imagine that Malaysian common law remains wholly tied to, or reliant upon the English common law. The judge of today no longer borrows blindly or follows the dictates of the English courts. The modern judge in Malaysia is routinely exposed to jurisprudence from Singapore, Australia, New Zealand, Canada, South Africa and to a lesser extent, the United States. Although most of these jurisdictions take root from the English common law, they have each developed the law to meet their own unique local conditions. We in Malaysia have the benefit of studying, analysing and choosing from the best of this diverse choices of legal rationale, in determining that which suits Malaysia best. As a consequence our legal rationale and ensuing jurisprudence is "variegated". This can only contribute to the richness of our Malaysian jurisprudence and law.

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Judicial Activism In Malaysia: *Quo Vadis*

by

Tan Sri Dato' Seri Raus Sharif *

What Is Judicial Activism?

There is no single definition of what 'judicial activism' is. The *Webster's Dictionary of Law* defines judicial activism as:

> the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent.

And according to *Black's Law Dictionary*, judicial activism is:

> a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

The definition prescribed by the dictionaries aside, for me judicial activism simply means innovative interpretation of the law. Hence, it is not wrong to say that judicial activism equals judicial creativity. Simply put, the pro-active approach of the judiciary in interpreting the law giving regard to particular socio-economic conditions prevailing in the country is judicial activism.

According to the former Chief Justice of the Supreme Court of India, Justice JS Vermeer, judicial activism is:

> The role of the judiciary in interpreting existing laws according to the needs of times and filling the gaps appears to be the true meaning of judicial activism. This is a continuous process that helps to advance the cause of law in the wider interest of the public.

Another former Chief Justice of the Indian Supreme Court, A M Ahmadi, in his article, *Dimensions of Judicial Activism*, advanced the following concept of judicial activism:

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* The Right Honourable President of the Court of Appeal. This article is adapted from the author's keynote speech at the 7th Universiti Utara Malaysia International Legal Conference 2013.

> Simply put, judicial activism depicts the pro-active role played by the judiciary in ensuring that rights and liberties of citizens are protected. Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the system of the country, laying down principles and guidelines that the executive must carry out. In performing its activist role the court is required to display fine balancing skills. While protecting the fundamental human rights of the people, the judiciary must take care to ensure that its orders are capable of execution, for no amount of judicial activism is useful if its orders are incapable of execution; they then remain "paper tigers" only. This places an awesome responsibility on the court, which must ensure its directions are effective.[1]

Justice Michael Kirby, an eminent jurist and also a world renowned judicial activist had this to say about judicial activism:

> It is the very essence of the brilliant system of law that the ancient English judges developed and bequeathed to us. The real debate is, and should be, when faced with inescapable choice, whether judges should take this step or that. Whether they should prefer this meaning to the other. Whether they should accept this interpretation and reject the opposite.[2]

Whatever definition we may give, the concept of judicial activism is not new. Its origin dates back to nineteenth century America propounded in that *locus classicus,* the case of *Marbury v. Madison*.[3] Chief Justice Marshal in that case observed that the Constitution was the fundamental and paramount law of the nation and it is for the court to say what the law is. His Lordship emphasised that if there was a conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. Historically speaking, this case stands as a landmark in American history and remains one of the cornerstones of the American constitutional system to date.[4]

1. www.iosworld.org/J_ahmedi.htm.
2. Michael Kirby, *Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming To Duty*, Melbourne University Law Review, 2006 Vol 30 p 576.
3. US Report vol 5 at p 137.
4. Cliff Sloan and David Mckean, *The Great Decision* [2009] RHYW vii.

Judicial Activism: The Malaysian Scenario

Within the Malaysian context, judicial activism is not measured by the number of judicial decisions being made against the Executive. Instead it is the level of judicial alacrity and intrepidity in dealing with executive abuses which infringe the rule of law and fundamental liberties of the citizens. In this respect, we have seen the seeds of judicial activism fructify in Malaysia.[5]

Of course in dealing with the mundane, run of the mill sort of cases, judges in Malaysia merely interpret and apply the law to the facts of the case.[6] Nothing more nothing less. But there are occasions where a judge is confronted with a peculiar situation where the written law is ambiguous, or where there is a gap in the law, and there are no precedents to guide him; or where there is a strong conviction on his part for a need to propound a new principle of law in order to do justice to the case. It is in such situation that judicial activism comes into play. As for the apex court, judicial activism will come into play when there is a need to depart from precedents in keeping with the time and the prevailing social values. And we do have judges in the past and present who have displayed stellar examples of judicial activism in their judgments.

Time constraints do not permit me to dwell into those cases in great detail. However for today's purpose, allow me to share my own experience on how the Malaysian courts at various levels have displayed judicial activism. The first case is *Puncakdana Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & 50 Others*.[7] I was then a judge of the High Court at the Appellate and Special Powers Division in Kuala Lumpur.

In *Puncakdana*, a housing developer had sought an order of *certiorari* to quash the awards handed down by the Homebuyers Tribunal (tribunal). The homebuyers had earlier entered into sale and purchase agreements with Puncakdana. The agreements were entered into before the

5. Roger Tan, *The Role of Public Interest Litigation In Promoting Good Governance in Malaysia and Singapore*; www.malaysianbar.org.my/administrative_law.

6. Mohd Hishamudin Yunus, *Judicial Activism-The Way To Go*? [2012] 6 MLJ xvii.

7. [2003] 5 AMR 570; [2003] 7 CLJ 350.

amendment to the Housing Development (Control and Licensing) Act 1996 by the Housing Development (Control and Licensing) (Amendment) Act 2002. One of the amendments was a provision setting up the tribunal. The tribunal is an additional avenue for homebuyers to seek redress for their grievances, such as late delivery, against housing developers. The issue in that case was whether the tribunal had the jurisdiction to hear and adjudicate where the sale and purchase agreements were entered into before the coming into force of the Act. Puncakdana submitted that the tribunal had no jurisdiction because Part IV of the Act did not operate retrospectively as it would affect their substantive rights because the new s. 16N of the Act made non-compliance with an award of the tribunal a criminal offence. The Attorney General on behalf of the Government argued otherwise and submitted that the clear words of Parliament indicating that the Act would operate retrospectively was in s. 16N(2) of the Act.

I had the misfortune to disagree with the Attorney General. I was of the view that s. 16N(2) of the Act could not be read so as to confer retrospective jurisdiction to the tribunal. In my considered view, if it was true that Parliament intended the tribunal to have retrospective jurisdiction over the sale and purchase agreements entered into before the enforcement date, Parliament would have said so in clear words. My view was that the intention might be there but it was not properly drafted in the Act. Under the circumstances, I held that the tribunal had no jurisdiction to hear and adjudicate cases where the sale and purchase agreements were entered into before December 1, 2002. I further held that to permit the tribunal to exercise its jurisdiction over the sale and purchase agreements entered into before December 1, 2002 would be to allow retrospective criminal laws to operate against housing developers. That would be in contravention of art. 7 of the Federal Constitution.

The effect of my decision was that the tribunal that was set up for that purpose would have no cases to hear for quite some time. That caused an uproar. And the case made headlines in the local media and was a topic of public debate for quite some time. Nevertheless, the debate died down when the Court of Appeal shot down my reading of s. 16N of the Act as well as art. 7 of the Federal Constitution. The Court of Appeal's decision was later affirmed by the Federal Court. So if you want to find out whether I was right or wrong please read the judgment of the Court of Appeal which can be found at [2004] 3 MLJ p. 17 and the Federal Court judgment at [2006] 1 MLJ p. 339.

The second case that I want to discuss is the case of *PP v. Kok Wah Kuan*.[8] It was a case before the Court of Appeal presided over by Justice Gopal Sri Ram with Justice Zulkefli Makinudin and I as the wingers. This was a case where the accused (Kok Wah Kuan) was convicted for murder which he had committed when he was 12 years and 9 months old. His conviction was entered on 1 July 2003 and he was ordered to be detained at the pleasure of the Yang di-Pertuan Agong pursuant to s. 97(2) of the Child Act 2001. Before us it was argued on behalf of the accused that s. 97 of the Child Act 2001 was *ultra vires* the Federal Constitution in that it violated the doctrine of separation of powers. Learned counsel submitted that the power to impose punishment in a criminal case was a judicial power. As such what s. 97 did according to him was to vest this judicial power of punishment in the arms of the Executive i.e., the Yang di-Pertuan Agong who acted on the advice of the Executive. Thus, the issue before us was firstly, whether the doctrine of separation of powers was an integral part of the Constitution and secondly whether s. 97 in pith and substance violated the doctrine of separation of powers. In allowing the appeal, we held that in applying the doctrine of separation of powers, the powers given to the Yang di-Pertuan Agong to detain the youth found guilty of murder at His Majesty's pleasure was unconstitutional. We were of the view that s. 97(2) clearly contravened the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence that was to be served by the accused. On appeal, our decision was reversed. His Lordship Abdul Hamid Mohamed, PCA (as he then was) speaking for the Federal Court ([2008] 1 MLJ 1) held that there was nothing unconstitutional in the scheme of s. 97 of the Child Act 2001. His Lordship made the following observations:

> Our Constitution does have the features of separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with

8. [2007] 5 MLJ 174; [2007] 4 CLJ 454.

> the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy.
>
> So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers.

However, the Chief Justice of Sabah and Sarawak Richard Malanjum CJ in a separate judgment appeared to agree with us on the doctrine of separation of powers. He had come out with a strong statement holding that notwithstanding the amendment to art. 121 of the Federal Constitution, the judicial power of the Judiciary remained intact in the Constitution. According to him the jurisdiction and the powers of the court could not be confined to federal laws and that the doctrine of separation of powers and the independence of the Judiciary were the basic features of our Constitution. The following portion of his judgment merits reproduction:

> [37] At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> [38] The amendment which states that 'the High Court and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment of our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

Despite the above pronouncement, His Lordship unfortunately did not come to the same conclusion as ours that s. 97 of the Child Act 2001 was unconstitutional. To some critics, the decision of the Federal Court in *PP v. Kok Wah Kuan* presented a missed opportunity for the apex court to rule on the real effect of the amendment to art. 121(1) of the Federal Constitution.

The third case I wish to highlight is the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors*.[9] It was a Court of Appeal case which was again presided over by Justice Gopal Sri Ram. Justice Hasan Lah and I were the wingers. The main issue in that case was whether the Federal Court case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [10] (*Adorna Properties*) which was followed by the High Court judge was correct. To refresh, I will state briefly the facts of the famous case of Adorna Properties. In that case Mrs Boonsom Boonyanit a Thai national owned two valuable pieces of land in Tanjung Bungah, Penang. A rogue forged her signature, and sold and transferred her two valuable pieces of land to *Adorna Properties*. She discovered the fraud only after Adorna Properties was registered as the owner of the two pieces of land. She brought an action against Adorna Properties in order to have her name restored on the register as the owner of the properties.

At the trial, Adorna Properties argued that as an innocent purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer. Adorna Properties relied on s. 340(3) of the National Land Code (NLC). The High Court ruled in favour of Adorna Properties. Mrs Boonsom Boonyanit lost her two pieces of valuable land.

On appeal, the Court of Appeal held that the words 'any purchaser' in s. 340(3) of the NLC referred to a subsequent purchaser and not an immediate purchaser. Given that Adorna Properties was an immediate purchaser, the Court of Appeal decided in favour of Mrs Boonsom Boonyanit. On paper Mrs Boonsom Boonyanit got back her properties. I said on paper because she lost it again when the Federal Court decided in favour of Adorna Properties. Eusoff Chin, CJ reasoned as follows:

> The provision to sub-(3) of s. 340 of the NLC deals with only class or category of registered proprietors for the time being. It excludes from the main provisions of sub-(3) this category of registered proprietors so that these proprietors are not caught by the main provision of this sub-section. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provisions of sub-s(3). For this category of registered proprietors, they obtained

9. [2007] 4 CLJ 526.

10. [2001] 1 MLJ 241; [2001] 2 CLJ 133.

> immediately indefeasibility notwithstanding that they acquired their titles under a forged documents. We therefore, agree with the High Court judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained indefeasible title to the said land.

Much criticism had been levelled against the decision of the Federal Court in *Adorna Properties*. To some, the Federal Court's decision was plainly wrong and should be disregarded. There were also calls for the NLC to be amended. And it was a known fact that as a result of the Federal Court decision, a number of landowners were losing their land due to fraud. The case of *Au Meng Nam & Anor* is a clear example. In that case, the plaintiffs (Au Meng Nam and Au Ming Kong) were the registered proprietors of a piece of land at Mukim Pulai, Johor. Two rogues who claimed to be the proprietors of the said land entered into a sale and purchase agreement of the said land with the first defendant. The plaintiffs lodged a police report stating that the transfer of the said land was fraudulent. They subsequently brought an action against the first defendant and two others. The first defendant contended that he was a *bona fide* purchaser of the said land for valuable consideration and thus protected by the proviso to s. 340(3) of the NLC and therefore had obtained an indefeasible title to the said land. The High Court guided by and in applying the principles propounded in *Adorna Properties*, dismissed the plaintiffs' case. Like in *Adorna Properties*, the landowners in *Au Meng Nam* also lost their land. Justice Gopal Sri Ram and I wrote separate judgments in this case with the same objective: that the injustice that happened to Mrs Boonsom Boonyanit would not happen to Au Meng Nam.

Justice Gopal Sri Ram in his judgment thus declared that the decision in *Adorna Properties* was decided *per incurriam* and no court in this country need to follow it. To put it mildly, he declared that the Federal Court's decision in *Adorna Properties* was plainly wrong. I was not as bold as Justice Sri Ram. In a judgment supported by Justice Hasan Lah, whilst I agreed that the decision of the Federal Court was wrong, I was not ready to ignore or disregard the decision of the Federal Court in *Adorna Properties*. To do so would be tantamount to going against the doctrine of *stare decisis*. I believe that judicial hierarchy must be observed. To me, any failure to observe judicial precedent would bring chaos in the judicial system. So what I did was to distinguish *Adorna Properties* on the facts. For the reasons given in the judgment I found the first defendant was not a *bona fide* purchaser. So

the plaintiffs, unlike in *Adorna Properties*, got back their land. It is interesting to note that leave to appeal by the first defendant to the Federal Court was denied. In short the Federal Court agreed with us. One satisfying thing about *Au Meng Nam*'s case is the fact that in my judgment I made a suggestion that the Federal Court should review the interpretation accorded to s. 340(3) of the NLC as propounded in *Adorna Properties*. My clarion call was heard and accepted in the Federal Court case of *Tan Ying Hong v. Tan Sian San & Ors.*[11] In that case the Federal Court revisited *Adorna Properties* and declared that the interpretation of s. 340(3) of the NLC by the earlier panel of the Federal Court was wrong. The decision in *Tan Ying Hong* finally buried the ghost of *Adorna Properties* which had been haunting innocent land owners for quite some time.

I must stress that judicial activism must not be allowed unchecked, otherwise there is always the fear that a judge will impose his own preferences in his decision, to such an extent as to ultimately negate the very intent and purport of the law. In the context of judicial activism, the general perception is that courts should lean in favour of the aggrieved party against an overbearing Executive if it is necessary to do so. Detractors of judicial activism would argue that it usurps the power of the elected branches of Government or appointed agencies, damaging the rule of law and democracy.[12] Defenders of judicial activism would argue that in many cases it is a legitimate form of judicial review, and that the interpretation of the law must change with changing times.

In Malaysia, I would be forgiven to say that we as judges play a more conservative role as interpreters of the law as it is. There are some who express their personal views on the pretext of judicial activism over certain matters, and more often than not those views do not find favour with their colleagues.[13] Although judicial activism in the realm of statutory interpretation may be good and necessary in some instances, one must not lose sight of the fact that there is always a danger of judges becoming too activist-minded.

11. [2010] 2 MLJ 1; [201] 2 CLJ 269.

12. Justice Antonin Scalia's dissent in *Romer v. Evans; Romer, Governor of Colorado.* At al, v. Evans et al (94-1039), 517 U.S 620 (1996).

13. Zaki Azmi, *'Judicial Activism or Judicial Interpretation?'*, The Commonwealth Lawyer, Vol 19, No 2, August 2010.

In my considered view a much controlled judicial activism is preferred to bring about changes; and these changes should come as and when they are necessary. Probably at times some of us tend to be too persuaded by courts of other jurisdictions like the Indian courts which are more idealistic and radical in their approach without actually deliberating whether such change is suitable for our social and political climate. In this respect, the apex court plays an important role in towing the line and setting the right tone when judges tend to be overzealous in the name of activism.

In this regard I would like to quote from the paper presented by the then Chief Justice, Tun Zaki Tun Azmi, at the 15th Malaysian Law Conference in the year 2010. Tun Zaki in highlighting the dangers of judges being too 'activist-minded' and 'creative' in the legal interpretation of Parliamentary statutes had this to say:

> Activist judge are looked up by some lawyers, particularly academicians and law students because in their view this is a form of development of the law. It is also for them to analyse and discuss. Which law student has not heard of Lord Denning? He was popular because of the decisions, sometimes controversial, that he decided. While it may be good and necessary some instances, in my opinion it can be dangerous weapon in the hands of a too activist judge.

I cannot agree with him more on this. Courts should be wary in exercising its powers in the name of judicial activism. As I have alluded to earlier, we are more conservative in our approach in the interpretation of the Parliament-enacted laws. This is no different with the Constitution which is the supreme law of the Federation.

In general, more often than not an over-activist judge in the guise of interpreting the law may go a step beyond, and end up giving the country a new binding law, which is usually different from the existing one. I do not think it is desirable that judges should 'renovate' the law. That is not their province, and it must be avoided as it is not in tandem with the spirit of judicial activism.

Striking The Right Balance

There is definitely a place for judicial activism, as a facet of judicial independence, provided it is not used to defeat executive powers in matters within the domain of the Executive or to usurp Parliamentary

powers.[14] It is always important to maintain a proper balance between the will of Parliament and that of an individual. Self-discipline is to be practised strictly by members of the Judiciary and judges must refrain from commenting on policy matters. An overzealous Judiciary will certainly put the Executive and the Judiciary on a collision course.

Speaking for the Federal Court in the recent case of *Dr Michael Jeyakumar v. Peguam Negara Malaysia*[15] I had reiterated the court's stance that in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the Executive is inconsistent with the Constitution and the law, or in any manner arbitrary or irrational, or there are elements of *mala fide* and abuse of power, the court is duty bound to interfere.

In that case the appellant, Dr Jeyakumar who was the member of Parliament for the Sungai Siput constituency applied by way of notice of motion under O. 53 of the Rules of the High Court 1980 for leave to apply for judicial review seeking an order of *certiorari* to quash the decision of the Director of the Perak State Development Office and an order of *mandamus* to compel the same to grant the appellant's application for the 2010 Special Constituency Allocation. We at the Federal Court unanimously held that the disbursement of the Special Constituency Allocation was a policy matter, which was not within the purview of the courts. We emphasised that Government policies are drawn up after consideration of a number of technical factors that are often non-legal and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness of a particular policy. We further reiterated that unwarranted usurpation and transgression by the Judiciary into the realm of the Executive would bring about disrepute to our system of Government, which upholds the separation of powers between the three main components: namely, the Executive, the Legislature and the Judiciary. However, we placed a rider to our decision, in that the court is duty bound to interfere where the particular policy or action of the executive was inconsistent with the Constitution or there were elements of *mala fide* and abuse of power. In this case we found none of the aforesaid circumstances existed for us to

14. Steven Thiru, *Strengthening The Independence And Efficiency Of The Judiciary.*

15. [2013] 2 MLJ 321; [2013] 2 CLJ 1009.

intervene. This case is one example of a situation where we were reluctant to overstep our boundaries and encroach into the realm which belonged exclusively to the executive.

To sum up, the Malaysian Judiciary, I must say, subscribes to judicial activism, *albeit* to a limited extent. The display of activism by the Malaysian courts may vary from other jurisdictions. Judicial activism, in the United Kingdom or in India for example, may not be the same as in Malaysia. But judicial activism is a reality and the Malaysian Judiciary is no exception to it.

Ultimately, any Act of Parliament and the Constitution should be interpreted to achieve the intention of the legislators. A proper balance must be maintained between the will of Parliament and that of an aggrieved party. Judicial activism will appear to be at its best when the judiciary's primary concern is the upholding of justice and ensuring that the domestic law is developed justly.

Legal Writing In Malaysia

by

Tan Sri Dato' Seri Zulkefli Ahmad Makinudin[*]

Firstly, I would like to extend on behalf of the Chief Justice his utmost apology for not being able to attend today's auspicious event due to his prior other commitment. He wishes everyone the very best and hope that today's event will be a memorable one. It is a great honour for me to be given the opportunity to deliver a speech acknowledging authors who had contributed tirelessly to the jurisprudence in our beloved country, Malaysia. Before I begin my speech, I would like to take this opportunity to say my thanks to Ms Ella Wang and Mr Amitabh Srivastava and their LexisNexis team for organising this event and inviting me to deliver today's keynote address.

Writing has always been seen as a means to record an event or ones' views on a subject matter that would create a lasting impression on one's readers. To prepare a good and comprehensive writing is indeed an arduous task. The writer has to get the facts right, be attentive to sensitive issues and disseminate the information in the best possible way that can be understood.

As regards legal writing, the Federal Constitution of Malaysia which came into force in 1957 is a good example of a historical piece of writing. It is seen as a strong tool that has shaped our legal system and allowed it to adapt to the changes that have taken place over the years. Court judgments and authoritative texts on the other hand have always been the impetus to the development of law. It is noted that not only the way legal writings are constructed has changed but the focus on the subject matter has also evolved. And what all of you as authors have done is placed a strong foundation for the laws to be further developed.

The art of writing judgments has changed over time. If we were to compare the style of writing in the grounds of judgment of judges and academic literatures some 50 years ago with the style today, it differs significantly. In many instances legal jargons and Latin terms were then

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* The Right Honourable Chief Judge of Malaya. This article is adapted from the author's keynote address delivered at the LexisNexis Author's Appreciation Day on 23 March 2016.

associated with legal writing. Today, with the younger generation, the question that arises is whether this style of writing is still relevant and desired.

On this point there are two schools of thoughts. The first is that simple, direct and plain language will be sufficient as it will get the message across and it is unnecessary to write complicated sentences. On the other hand, there are still traditionalists who strongly believe that these legal jargons and Latin terms add beauty to legal writing. The art of legal writing will lose its mystical essence if the traditional style is avoided.

This is what I regard as one of the challenges a legal writer faces. Probably the best way to tackle this issue is to first identify who are the readers. A student's textbook may contain a simpler version of text, for easy comprehension, as compared to official legal publications and documents.

The Judiciary, however, holds the view that judgments should be written in plain language and legal jargons should be used only if necessary. This is because the Judiciary is of the view that judgments would have to be read also by the parties in dispute instead of solely by counsel representing them. Judges are encouraged to write a speaking judgment, which can be understood, and to provide reasons of the decision in plain language so that the public can understand and appreciate the decision and the reasons for the decision.

One of the key contributions of our judges and local legal writers is developing the local laws and precedents. The origin of the Malaysian legal system dates back to the first Charter of Justice in 1807. Due to that Charter our precedents had largely revolved around the principles and precedents of the English common law. Legal writers play a role in explaining and developing these principles and making them comprehensible to the local legal forum and students of law. Today, with the growth of our legal system and with the support of each and every one of you gathered here today, we can proudly call our system – our own.

Although foreign legal texts and case authorities are still being referred to, it is, however, done minimally and the weight attached is only persuasive. Foreign case authorities and legal texts are now being referred to more as a comparison rather than an authoritative precedent. Counsel submitting before the superior courts now rely more on decisions and case authorities delivered by our own Federal Court and Court of Appeal.

I must say that your work as legal writers played a major role in these developments. Legal writers have the responsibility to comment on and explain the judgments made by the court. As judges, we do not have the luxury of explaining the details of each law in a particular case as cases are often convoluted with various issues of law. This is where legal writers would play their part. They would shed light on the rationale of, as well as detailing the issues of law in, various cases. This would enlighten the students, practitioners and even judges, enabling them to see the broader aspects of the subject matter.

In whatever capacity we serve our Malaysian legal community, one is beholden not to allow the law to stand still while the rest of the world moves on. I look to the words of Lord Denning in *Packer v. Packer*[1] to amplify this view. His Lordship said:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.

Laws are expected to meet and accommodate the needs of modern society, and in doing so the *indicia* of a sophisticated legal system are developed. On this premise, I dare say that legal writing is *sine qua non* for the development of laws and maturing of a legal system.

Without doubt legal writings and literature play an integral role in the development of laws in this country. On this note, I must say a few words on the educational aspect of legal writing. Judges and lawyers are only as good as how they were taught when they read their law.

I strongly believe that a subject or a special course dedicated to legal writing should be conducted. This is to ensure that the art and quality of legal writing and even legal academic writing will be further enhanced. Good legal writing is indicative of clear legal thinking which in turn enhances the quality of arguments, improves decision making and increases accountability in the administration of justice. As such, it follows that legal writing should be made an integral part of all continuing legal education programmes.

1. [1953] 2 All ER 127 at 129.

The contribution by all of you as legal writers to the development of laws and jurisprudence are of great value. Inevitably, it begins with an idea which may be ignited by a multitude of reasons that finally ends up in your legal writings.

For some, it may be sparked by a court's decision, an impassioned plea from a client or an engaging discussion with the members of the legal fraternity. For others, it may be to galvanise legal norms to meet societal changes. From thought to paper, your legal writing is a dialectic that justifies, challenges, expands or limits existing legal norms through research, creative and critical thinking and analysis. As such, legal writing is essential to the development of legal reasoning and judicial decision-making.

In a broader context, the promulgation of laws, rules or norms into legislation or their acceptance into common law is necessarily affected by the process from which they evolved. Your contribution as legal writers to the Malaysian jurisprudence is part of this evolution. It will necessarily have an impact in the drafting of laws which are reflective of societal needs. Here, I must say, each one of you have, through your writing, played a remarkable role in the advancement of the rule of law.

I now come to the end of my speech. I would like to place on record our utmost appreciation and heartiest congratulations to all of you authors and legal writers who have contributed to the successful production of legal writings in Malaysia. The law must be guided to be what is just and on that note, I implore all of you to continue writing.

The Impact Of Parallel Legal Systems On Fundamental Liberties In Multi-Religious Societies

by

*Tan Sri Azahar bin Mohamed**

Introduction

The focus of this article is on the right to freedom of religion in multi-religious societies. In particular it looks at some of the legal issues of the impact of parallel legal systems on the fundamental right to enjoy individual religious freedom and to lead varied lives as well as the responsibility to respect the rights of others to live as they choose according to their faiths. My aim is to explain and create a deeper understanding of some of the important legal issues and the growing challenges of legal pluralism and religious diversity in contemporary Malaysia and Britain.

Even though the constitutional history, the religious demography and the legal setting of both countries are very different, yet to a certain extent they both face similar challenges in the quest to build a more just and cohesive society in a multi-racial and multi-faith democracy. Life in both countries is based on common core values which include rule of law, respect and tolerance of different faiths. It is beyond the scope of this paper, however, to examine comprehensively all legal issues that arise in a multi-religious society. Nonetheless, it is hoped that this paper may shed some light on some of the broader issues around religious freedom within multi-religious societies.

In the domestic setting as well as at the international level, religious freedom has always been one of the most contentious of fundamental liberties. We live in a world today where religious diversity is a reality that many contemporary societies are forced to deal with. When multiple religious views exist side by side, differences are bound to occur and it can be the root causes of disharmony. One of the root causes of disharmony is discrimination as well as marginalisation in its many forms and facets.

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It is against this background that the following questions are always being asked: How can a society effectively accommodate multiple and sometimes competing worldviews within its midst while at the same time upholding social cohesion and harmony? Is it possible to allow religious groups the complete freedom to reaffirm their identity and practise their diverse rituals and traditions without leading to resentment and conflict within the society? To what extent is the religious freedom of minorities protected in multi-religious societies? These are some of the challenges confronting a multi-faith democracy. At the heart of this is the need in a democratic society to reconcile the interests and respect the beliefs of the population as a whole. Balancing the diverse interests in such a multi-faith democracy can be enormously challenging. Hence, one of the biggest challenges facing multi-societies is how to deal with diversity.

Malaysia: A Multi-Religious Society

Let me first explain these challenges by reference to my own jurisdiction of Malaysia, which is a multi-cultural and multi-religious society. As of 1 January 2015, the population was estimated to be 30 million people the majority of whom are Muslims (60%) with the remainder being Buddhists (19%), Christians (9%), Hindus (6.3%) and others living side by side. We have a parallel legal system in which the Syariah legal system exists alongside the civil legal system.

Malaysia as a nation has always been able to showcase itself as a living thriving role model founded on the experience of moderation and pluralism among the people of various races and religions. It is a land where many faiths and ethnicities freely prosper and thrive.[1] Diversity has always been its way of life. As a nation, we have attempted to embrace a more pluralistic approach in our treatment of cultural and religious groups rather than the assimilation methodology.

Although it has been said that religion has been a divisive force in society, peaceful co-existence has always been its way of life. But the reality is that Malaysia's diversity brings obvious challenges and inherent difficulties. Although there has been religious harmony and tolerance for a very long time, a number of controversial issues have emerged which undermined religious ties between the different religious groups during recent years and raised difficult practical issues and challenge of legal pluralism. Over the years, the country has seen incidents of intolerance.

1. See the statement by Najib Razak, Prime Minister of Malaysia at the General Debate of the 70th Session, General Assembly of the United Nations, New York, 1 October 2015, http://gadebate.un.org/70/malaysia

Our courts are also on a regular basis confronted with the questions of how to deal with religiously related disputes. In particular, there was a long and protracted legal tussle between religious authorities and a Catholic's organisation over the word "Allah". More recently, the issues of constitutionality of criminalisation of conduct on the basis of religion and legislation governing faith have generated much intense debate. The recurring case surrounding the unilateral conversion of a child by one parent who has converted to Islam and the ensuing tussle over the custody of the child between the disputing parents in the civil court and the Syariah Court cannot have passed unnoticed. Some of these strictly legal issues have, unfortunately, been much politicised and dominated the political scene. Events and issues like these had pushed the question to the sharp end of the debate.

Against a backdrop of these controversies, Malaysia's identity had become a topic of much debate in recent years. The complexity of a parallel Syariah legal system that exists alongside the civil justice system loomed large when clashing jurisdictions every now and then left disputing parties with no straightforward answers to their sensitive legal disputes.

As we shall see, overlaps and inherent conflicts not only occurred in a parallel court system but also on multi-Legislature arrangement. I would venture to say that when the makers of the Federal Constitution provided a parallel system of law, no one could have foreseen that it would result in these controversies. Little did the makers envisage those caught in between the civil and Syariah dichotomy.

Let me give you a brief historical background and the legal setting that have led to the present day position so that you can understand its distinctiveness.

Constitutional Position

Malaysia is a federation and has a written constitution which is the supreme law of the land. The doctrine of the supremacy of Parliament does not apply and the power of the Federal Parliament and of the State Legislatures is limited by the Federal Constitution.[2] Any action or decision of the Government or any law passed by any Legislatures which is inconsistent with the Federal Constitution is void to the extent of such inconsistency. Azlan Shah FJ (as His Royal Highness then was) when delivering the judgment of the Federal Court in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 said:

2. *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 LNS 3.

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of Government, compendiously expressed in modern terms that we are a Government of laws, not of men.

The Constitution is the cornerstone of our social order and the symbol of national unity.[3] Despite its colonial origins and its continually disputed interpretation and relevance, the Federal Constitution has achieved, due to its longevity and in spite of its colonial origins, a status quite rare in the contemporary world – that of an autochthonous constitution.[4] The Federal Constitution exemplifies clear essential values that were held dearly by the founding fathers. The social contract is a salient characteristic of the Malaysian Constitution. It forms the substratum of the Constitution, which provides strength to the country. On this, in 2003 Sultan Azlan Shah stated:

> We then embarked on a journey as a constitutional democracy with the full realisation that we were a multi-racial people with different languages, cultures and religion. Our inherent differences had to be accommodated into a constitutional framework that recognised the traditional features of Malay society, with the Sultanate system at the apex as a distinct feature of the Malaysian Constitution.
>
> Thus there was produced in August 1957 a unique document without any parallel anywhere. It adopted the essential features of the Westminster model and built into it the traditional features of Malay society.
>
> This Constitution reflected a social contract between the multi-racial peoples of our country.
>
> It is fundamental in this regard that the Federal Constitution is the supreme law of the land and constitutes the grundnorm to which all other laws are subject. This essential feature of the Federal Constitution ensures that the

3. See Tan Sri Abdul Gani Patail, Attorney-General of Malaysia in a speech *Upholding Sovereignty, Respecting Diversity* on 9 April 2015 at the Intan Public Policy Insights Series 2015, http://www.agc.gov.my/agcportal/uploads/files/Publications/Speech/intan_public_policy_insights_series2015_upholding sovereignty_respecting_diversity_ag-09042015-final.pdf

4. See Andrew Harding, *The Constitution of Malaysia, A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing Ltd., 2012) 2.

> social contract between the various races of our country embodied in the independence Constitution of 1957 is safeguarded and forever enures to the Malaysian people as a whole for their benefit.[5]

The Constitution adopts a Federal character that stipulates for a Federal system. The system establishes duality of Government consisting of a strong Federal Government at the centre and State Governments at the State level enjoying a measure of autonomy.

The crucial element in this system is the division of legislative and executive powers between the Federal and State Governments. The Constitution outlines the scope of the legislative powers of the Federal and State Governments by referring to three lists, the Federal List, the State List and the Concurrent List.[6]

The division of Federal and State executive powers follows the division of legislative powers; the executive authority of the Federal Government extends to all matters where the Parliament may make laws and the executive authority of a State extends to all matters where the State Legislature may make laws.

The Constitution also outlines the scope of the judicial powers. Though a federation, Malaysia's court system is principally Federal in nature. Among others, civil and criminal laws along with the administration of justice are placed under the jurisdiction of the Federal Government while Islamic law and the administration of Syariah Courts under the jurisdiction of the respective State Government.

Indeed, legal pluralism in Malaysia is mirrored by the dual parallel court systems of civil and Syariah that co-exist side by side. It is somewhat a unique and complicated arrangement because two different and unequal levels of Government are administering the two systems separately.

As a matter of broad general rule, the civil courts being courts of general jurisdiction administer laws which are of general application, namely legislation passed by the Federal Parliament and the common laws and rules of equity. Whereas, the Syariah Courts, which operate outside the civil

5. See *Evolving a Malaysian Nation* (10 December 2003) in Professor Dato' Seri Visu Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches* (Professional Law Books, 2004) 330-332.

6. See JC Fong, *Constitutional Federalism in Malaysia* (Thomson Reuters Sweet & Maxwell Asia, 2008) and LA Sheridan and Harry E. Groves, *The Constitution of Malaysia,* 5th edn (Malayan Law Journal Pte. Ltd., 2004).

system, administer the Syariah family and Syariah criminal Enactments passed by the respective State Legislatures. The Syariah Courts, which predated the civil court system, have jurisdiction only over persons professing the religion of Islam.

Prior to 1988, the Syariah Courts did not have exclusive jurisdiction as the civil courts had power to review, and quite regularly reviewed, the decisions of the Syariah Courts by *certiorari* which in the process had overturned the decisions of the Syariah Courts. There were instances where the civil courts entertained applications that sought to re-adjudicate matters that the Syariah Court had determined.[7] There was also a case where the civil court had applied laws of general application which are contrary to Islamic law.[8]

In 1988, a new clause was added to the Constitution which provides that the civil courts shall have no jurisdiction with respect to matters within the jurisdiction of the Syariah Courts. The amendment was made in order to avoid the conflict between the decisions of the Syariah Courts and the civil courts, to give the Syariah Courts exclusive jurisdiction over matters relating to Islamic law, to protect the integrity and enhance the status of the Syariah Courts and to free the Syariah Courts from interference by the civil courts.

The amendment was to prevent the civil court from exercising its powers of judicial review over the decisions of the Syariah Court.[9] It would appear that the amendment is clear-cut but in reality nothing is straightforward. In fact, the very question whether a matter is within the jurisdiction of the Syariah Courts can be a contested issue thus giving rise to the issue of jurisdiction and casting doubt on the efficacy of the new clause in ensuring that the Syariah Courts enjoy exclusive jurisdiction over Syariah matters.[10]

7. *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265; [1971] 1 LNS 88, *Tengku Mariam binte Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Trengganu & Ors* [1969] 1 MLJ 110; [1968] 1 LNS 156.

8. *Ainan bin Mahamud v. Syed Abu Bakar bin Habib Yusoff and Others* [1939] 1 MLJ 209; [1938] 1 LNS 10.

9. *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481.

10. *Shahamin Faizul Kung Abdullah v. Asma Haji Junus* [1991] 3 MLJ 327; [1991] 3 CLJ 2220; [1991] 3 CLJ (Rep) 723, *Mohamed Habibullah Mahmood v. Faridah Dato' Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793.

Despite its obvious challenges and inherent practical difficulties, the existence of a dual legal system has no doubt enriched the legal jurisprudence of the country.[11]

Place And Role Of Religion

Malaysian legal history can be traced back to the beginning of the 15th century. Historically, religion played a significant role in the development of the nation's legal system. Syariah law was generally applied and in fact practised in the Malay States.[12]

In the later part of the 18th century, the British came and ever since the colonial rule has had the most important impact on the legal development of this country with the introduction of common law, rules of equity and their legal as well as judicial system. The attitude of the British towards Islam and local customs was one of extreme caution and not to intervene in all matters related to Islam or even local customs and traditions. The British judges recognised Syariah law as the law of the land.[13] Interestingly, legislation on Syariah criminal law was introduced during the British administration. This is very evident in the numerous legislation enacted that contained matrimonial offences as well as offences relating to religious belief and faith, including apostasy and conversion to Islam.[14]

It can be said that during the period of colonisation, Muslims were not deprived of practising Syariah laws although it had resulted in its marginalisation. During the colonial period, Syariah law was applicable only as family law. However, some aspects of Syariah criminal law operated side by side with the English style of administration of criminal justice. Thus, Malaysia's dual judicial system of civil and religious is a product of colonialism which introduced a secular order substantively

11. See Jiunn-RongYeh and Wen-Chen Chang (eds), *Asian Courts In Context* (Cambridge Press, 2014) 382.

12. See Professor Ahmad Ibrahim, *Towards A History of Law in Malaysia and Singapore* (Dewan Bahasa dan Pustaka, 2011).

13. *Ramah binti Ta'at v. Laton binti Malim Sutan* [1927] 6 FMSLR 128, *Shaik Abdul Latif & Ors v. Shaik Elias Bux* [1915] 1 FMSLR 204, Mohammed Imam, *Making Laws Islamic in Malaysia: A Constitutional Perspective* [1994] 2 CLJ vii.

14. A. Aziz, Shamrahayu, *Islamic Criminal Law in the Malaysian Federal Structure: A Constitutional Perspective*, [2007] 15(1) IIUM Law Journal 101-120.

restricting Syariah law to personal or private law.[15] There can be no doubt that Syariah law would have ended by becoming the law of Malaya had the British law not stepped in to check as the British relegated Syariah law primarily to personal matters.[16] Concerning the place and role of religion, the Constitution essentially entrenched the position that had applied under the British rule.[17] As a result, Islam remained influential in the public life and the administration of justice in Malaysia. The Constitution's treatment of religion is a fundamental defining element in Malaysia's multicultural and multi-religious environment. In 1976, Parliament amended the Constitution. It substituted, *inter alia*, for the expressions "Muslim", "Muslim religion" and "Muslim court" wherever they appear in the Constitution the words "Islamic", "religion of Islam" and "Syariah Court".[18]

There has been included in the Federal Constitution a declaration that Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation. Every person has the right to profess and practise his own religion and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the religion of Islam.

The position of Islam as the religion of the Federation imposes certain obligation on the Government to promote and defend Islam as well as to protect its sanctity.[19] The recognition of State religion in the supreme law of the land upholds the significant position of religion in the legal realm and the religious character of this nation. Islam, a religion that

15. See further Thio Li-Ann, *Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and art. 121(1A) of the Federal Constitution* in Andrew Harding and H.P. Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 years 1957-2007* (Malaysia: Malayan Law Journal, 2007).

16. See R.J Wilkinson (ed), *Papers on Malay Subjects* as cited by Constance Chevallier-Govers in *Shari'ah and Legal Pluralism in Malaysia* (International Institute of Advanced Islamic Studies Malaysia, Kuala Lumpur, 2010) 6.

17. *Supra,* n. 4, at 229.

18. See commentary on this amendment by Professor Tamir Moustafa of Simon Fraser University, Canada in *Judging in God's Name: State Power, Secularism, and the Politics of Islamic law in Malaysia*, [2014] 3(1) Ox. J Law Religion 152-167.

19. See Abdul Aziz Ab Rahim JCA in *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468; [2013] 8 CLJ 890.

embraces diversity, is recognised as one of the basic features of the Constitution but at the same time it does not establish the nation as a theocratic country.[20] Hence, for more than 50 years, secular and Islamic traditions have shared a co-existence that permitted Malaysia to modernise and democratise.[21]

The Supreme Court in the case of *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55 took the position that it was the intention of the framers of the Federal Constitution that the word 'Islam' in art. 3(1) be given a restrictive meaning, substantively restricting Syariah law to personal or private law. The Supreme Court said:

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through his prophets and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered. (See S. Abdul A'la Maududi, *The Islamic Law and Constitution,* 7th Ed., March 1980).
>
> The question here is this: Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.

The Supreme Court added:

> … it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. (See M.B. Hooker, *Islamic Law in South-east Asia*, 1984.)
>
> In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

20. See Mohamed Suffian bin Hashim Tun and ASEAN Law Association, *An Introduction to the Legal System of Malaysia: Written for the ASEAN Law Association,* 2nd edn (Penerbit Fajar Bakti Sdn. Bhd., Petaling Jaya, 1989) 10.

21. See Alima Joned, *On Modernity, Democracy, and Secularism: Reflections on the Malaysian Experience* [2008] 35(1) JMCL 158.

Fundamental Liberties

The Federal Constitution, which provides for specific provisions on human rights, is one of the earliest document safeguarding and protecting human rights of the people of Malaysia. Part II of the Constitution guarantees all those rights and freedom that are inherent in every human being. Consisting of arts. 5 to 13, it is the Malaysian bill of rights, which is referred to as fundamental liberties. These are, among others, the right to life and personal liberty; equality before the law; freedom of speech and expression; the right to assemble peaceably and the right to form associations; freedom of religion; rights to property and to be compensated on expropriation. But at the same time, the Constitution also recognises the Federal Legislature's power to legislate restrictions to these fundamental liberties.

The parallel legal system and human rights challenges have resulted in a complicated overlapping web of jurisdictions. May I illustrate this by reference to *Berjaya Books Sdn Bhd & Ors v. Jabatan Agama Islam Wilayah Persekutuan & Ors* [2014] 1 MLJ 138. In this case, the first applicant owned the Borders Bookstore (Borders), the second applicant, a non-Muslim, was its General Manager and the third applicant, a Muslim, was a store manager at a branch of Borders which was raided by religious enforcement officers. Several copies of books were seized. The officers questioned both the Muslim and non-Muslim staff and ordered some of them to go to the first respondent's office for further questioning and to provide written statements. At the time of the raid and seizure, the Home Ministry had not banned the publications. The third applicant was prosecuted in the Syariah Court under the relevant Syariah criminal offence for selling publications deemed contrary to Syariah law. In their judicial review application, the applicants sought to quash the various decisions made and actions taken by the religious authority.

In allowing the application, the High Court held that it had jurisdiction to hear the application which involved the interpretation of laws concerning fundamental liberties as enshrined in the Federal Constitution and that the prosecution of the third applicant in the Syariah Court infringed art. 7 of the Federal Constitution as she was being punished for an act which was not punishable by law at the time it was allegedly committed.

In affirming the decision of the High Court, the Court of Appeal held that the High Court in exercising its supervisory civil jurisdiction is at liberty to interpret laws on fundamental liberties and to adjudicate on unconstitutional conduct by public authorities and that the civil court has the jurisdiction and power to judicially review the improper institution of

criminal proceedings when the impugned conduct is in fact not criminal in nature. It was further held by the Court of Appeal that it is the duty of the court to 'uphold, protect and to ensure that justice is administered in a regular and effective manner according to law'. On 25 August 2015, the Federal Court dismissed the religious authority's application for leave to appeal against the decision of the Court of Appeal. In the context of the civil and Syariah dichotomy, such a clear pronouncement by the Court of Appeal underlined the duty and powers of the civil courts in protecting the fundamental liberties of the citizens.

In the landmark constitutional law case of *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765, the Archbishop was granted a publication permit by the Federal Minister of Home Affairs to publish the 'Herald', the Catholic Weekly, subject to the condition that he was prohibited from using the word "Allah" in the publication which was circulated online. The applicant applied for judicial review in the High Court to quash the decision of the Minister questioning whether the decision was reasonable, constitutional and in accordance with the law. In opposing the judicial review application, the Minister put forward various State Enactments which seek to control and restrict the propagation of non-Islamic religious doctrines and belief amongst Muslims. The Minister declared that he had imposed such a ban in the interests of security and that these provisions provide for an offence relating to the use of certain words and expressions which includes the word "Allah".

The High Court upheld the challenge, granted an order of *certiorari* to quash the Minister's decision and declared that the Archbishop has a constitutional right to use the word "Allah" in the Herald. What was essentially a matter of security had turned into a constitutional issue of freedom of religion. The Court of Appeal set this decision aside when it upheld the right of the State Legislature to enact laws to ensure the protection and sanctity of Islam. The effect of the decision of the Court of Appeal is that the Catholic Church was effectively prohibited from producing publications for online circulation with words "Allah" as the word for the Christian God in its Malay language version. The Federal Court then dismissed the applicant's application for leave to appeal on the ground that the case involved an issue of judicial review of administrative action rather than issue of freedom of religion. The Federal Court held that the central issue was whether the Minister was acting within the powers under the legislation and that the concern in judicial review cases is not with the merits of the decision but with the manner in which the decision was made.

These cases show the fundamental challenge that affects all Malaysians, namely how to reconcile a liberal democratic constitution that protects all citizens and people within Malaysia and yet grants recognition to the status of Islam.[22]

Multi-Legislature Conflicts

As mentioned earlier, the Constitution demarcates the extent of the legislative powers of the Federal and State Governments. The Federal Parliament may make laws only on Federal subjects and a State Legislature only on State subjects. If there is any inconsistency between the Federal law and the State law, the Federal law prevails.

This may appear at first sight to be a straightforward distribution of powers. However, a little careful observation reveals that the situation is in fact more complicated than this. In particular, the State Legislature may make laws, among others, on creation and punishment of offences by persons professing the religion of Islam against precepts of that religion except in regard to matters included in the Federal list. The law governing the Islamic faith is enacted pursuant to this provision of the Federal Constitution which regulates day-to-day practices of Malaysian Muslims such as conversion and apostasy, false doctrine, propagation of religious doctrine, sanctity of the religion of Islam and its institution, offences relating to decency and other miscellaneous offences.

There is no definition of the word 'precepts' in the Federal Constitution. The type of offences and punishments that can be enacted by the State Legislatures were duly considered by the Federal Court in *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54. In this case, the court was asked to consider the issue of whether the non-compliance of a fatwa (religious edicts) issued by the religious authority is an offence against the precepts of Islam. The Federal Court in addressing the issue held that the term 'the precepts of Islam' is very wide covering the three main domains namely creed or belief (aqidah), law (Syariah) and ethics or morality (akhlak) and that it also include the teachings in the Qur'an and Sunnah. It was further held that it would be incorrect to conclude that only the five pillars of Islam form the precepts of Islam.

22. See Philip TN Koh, *Plea for a Rethink over The Herald case: The Courts and Democracy*, PRAXIS (Oct-Dec 2013).

In *Fathul Bari bin Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281; [2012] 4 CLJ 717, the first petitioner was arrested by the religious enforcement officers for conducting a religious talk without a tauliah, an offence under the State Syariah Enactment, and he was accordingly charged for the said offence at the Syariah Court. The petitioners filed a petition in the Federal Court contending that the Syariah offence is invalid on the ground that the Syariah offence is not against the precepts of Islam. The Federal Court dismissed the petition. Arifin Zakaria CJ in delivering the judgment of the court held that the State Legislature had acted within its legislative powers, that the purpose of that provision was clear namely to protect the integrity of the aqidah (belief), Syariah (law) and akhlak (morality) which constituted the precepts of Islam and that the requirement of tauliah was necessary to ensure only qualified persons are allowed to teach the religion. It was further held that the term 'precepts of Islam' must be accorded a wide and liberal meaning.

Under the Malaysian Federal system, the Syariah criminal law has been placed under the State jurisdiction whereby all States are given a degree of independence and autonomy although Federal law limits punishment by the Syariah Courts. It is to be noted that under Syariah Courts (Criminal Jurisdiction) Act 1965 [Act 355], the Syariah Courts could only impose a maximum of RM5,000 fine, six strokes of whipping and three years of jail for Syariah offences. The Federal Constitution guarantees the States' legislative powers over offences and punishments against the precepts of Islam. In the case of *Mamat Daud & Ors v. Government of Malaysia* [1988] 1 MLJ 119; [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197, the exclusive right of the State to enact Syariah-based criminal law was affirmed. In this case, the plaintiffs were charged with doing an act likely to prejudice unity amongst Muslims, namely acting as unauthorised mosque officials at Friday prayers. The charge against them were framed under s. 298A of the Penal Code, which was enacted by the Federal Legislature, an offence of doing an act on the ground of religion which was likely to cause disunity or prejudice harmony between people professing the same or different religion. The Supreme Court, by a majority, held that s. 298A was *ultra vires* art. 74 of the Federal Constitution because in pith and substance it deals directly with religion and not public order, a State matter, which was outside the power of the Parliament to legislate.

In recent years, criminalisation of conduct on the basis of religion has given rise to much debate and at times tense emotions in a largely secular environment. The question is much deeper and more complex than meets the eye. Opinions are deeply divided on this issue and are signs of things to come. Some would argue that Islamic law should not be used to

regulate private lives of Muslims in areas like praying, drinking, dressing and reading.[23] It is argued that the Constitution never meant to confer powers to the States to make all sins in Islam criminal offences. According to these views, faith does not need a regulatory authority.

But there are others who offer an alternative view. They pointed out that in Islam the central view is that the State has a clear-cut duty to foster morality and to promote all that is right and forbid all that is wrong and that the criterion is objective, impersonal and external.[24] According to this view, States Enactments should contain provisions restricting and/or limiting any acts and conducts of any individual Muslim professing the religion of Islam which is contrary to the precept and injunction of Islam based on the Quran and Sunnah, being the main sources of the Islamic principles. The proponents of this view would argue that the Islamic philosophy of Syariah law is that an act may be criminalised if it has negative implication on the public or the religion and the victimless argument is unacceptable because the public is the true victim of such crimes as the act affects others in a society.

The rising challenge in court in recent times has raised major constitutional issues concerning the power and role of the civil courts in safeguarding fundamental liberties. Questions have now been raised as to whether State Legislatures can enact laws to deprive Malaysian Muslims of fundamental liberties embodied in the Constitution or whether Syariah criminal laws must be consistent with the clauses that guarantees the fundamental liberties of all Malaysians irrespective of their faiths.

It was against the backdrop of this uncharted water that these issues were put before the court. In early 2014, a challenge was mounted to question the constitutionality of a Syariah Enactment that criminalised cross-dressing. In *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 AMR 248; [2015] 8 CLJ 975, the appellants are Muslim men. Medically, they are not normal males as they have a medical condition called 'Gender Identity Disorder' (GID) whereby they desire to dress and be recognised as a females. Cross-dressing is intrinsic to their nature. In 1992, the State Legislature enacted a law that provides any male person who in any public place wears a

23. See Zaid Ibrahim, *The Hypocrisy of Leaders: Malaysia, Islam and Fundamentalism,* Commonwealth Lawyers' Association and Contributors (2012).

24. See Dr Shad Saleem Faruqi, *Beauty Contests And Syariah Law in Selangor* [1997] 4 CLJ i.

woman's attire or poses as a woman shall be guilty of an offence. Pursuant to this provision, the transgender women were prosecuted in the Syariah Court for cross-dressing.

The appellants then applied for a judicial review in the High Court for a declaration that the impugned provision violated their fundamental rights. Their application was dismissed by the High Court and they subsequently appealed to the Court of Appeal who ruled in their favour. The Court of Appeal struck down the impugned provision as unconstitutional and void noting that it contravened their personal liberty, freedom of movement and freedom of expression. The court held that the law in question was discriminatory in nature as it failed to recognise transgender women diagnosed with GID. However, on 8 October 2015, the Federal Court reversed and set aside the decision of the Court of Appeal on the sole ground that the legal challenge against the impugned provision was void from the very beginning. The Federal Court reiterated the important point that constitutional challenge of this nature should have been filed straight to the Federal Court. Hence, the conflict in this contentious issue remains.

The next example is a case that challenged the constitutionality of a Syariah Enactment that criminalised the selling of books deemed unIslamic. In *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621, the first petitioner published a Malay translation of a book written by a Canadian author. The religious enforcement officers raided the first petitioner's office and confiscated copies of the book on the basis that they were contrary to the State Syariah law. The second petitioner was charged before the Syariah Court with offences for his involvement in the publication of the book under the impugned provision. The petitioners then filed a petition in the Federal Court seeking for a declaration that the impugned provision is invalid on the ground that it restricts freedom of expression enshrined in the Constitution, a matter upon which only the Federal Parliament has the power to legislate.

On 28 September 2015, the Federal Court held that it was within the power of the State Legislature to legislate the impugned provision because it was an offence against the precept of Islam. Applying the principle of harmonious interpretation, it was held that no one provision in the Constitution can be considered in isolation and that the impugned provision must be considered with all the other provisions bearing upon that particular subject.

The Federal Court declared in no uncertain term that Muslims in Malaysia were not only subjected to the general laws enacted by Parliament but also to State laws of religious nature enacted by the State Legislature. This is a truly landmark decision as it signifies that fundamental liberties for Malaysian Muslims are not simply to be judged in accordance with the entrenched clauses but must also be considered from the Islamic perspective as a consequence of the constitutional provisions enacted exclusively for the Muslims.

Freedom To Live Under Syariah Law

As we have seen, the parallel legal system essentially means that Muslims have the right to be governed by the Syariah law as allowed under the Federal Constitution. It is the legitimate expectation of Muslims to be governed by their own laws.[25] The right to practise Islamic law for Muslims is a contentious issue in Malaysia and at times is a source of so much anxiety. It was said that the disputes are rooted in the tension created by the marginalisation of Islamic law and administration in the Federal Constitution as State matters with very limited jurisdiction which goes against the wishes of Muslims, who constitute the majority in Malaysia, to live under the Syariah law.[26] According to these views, the Muslims in Malaysia have been deprived of the right to follow and practise their religion and their laws and all they are asking is that they be given the right to profess and practise their religion and their way of life.[27] It was said that just as the Muslims would like the non-Muslims to be free to follow their own religions and customary laws, the Muslims too would like to have the freedom to follow their religion and laws. It was observed that the recent trend towards Islamisation in Malaysia is only an attempt to restore the Muslims' right to profess and practise their religion which they have long been deprived of.[28]

25. See Farid Sufian Shuaib, *Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years On (1988-2008)* [2008] 5 MLJ xxxiii.

26. See *Response to the 25 prominent Malay figures on position of Syariah Law - 31 Muslim Scholars* (16 December 2014) - See more at: http://www.themalaymailonline.com/what-you-think/article/response-to-the-25-prominent-malay-figures-on-position-of-syariah-law-31.

27. Ahmad Ibrahim, *Towards an Islamic Law for Muslims in Malaysia* [1985] 12 JMCL 37, at 50.

28. *Ibid*, 52.

It was against this background and in such an atmosphere that in March 2015 the Kelantan State Legislative Assembly passed amendments to the Syariah Criminal Code (II) Enactment 1993 (Amendment 2015) to pave the way for the State to implement the Syariah law which now has, among others, provisions such as death penalty by stoning for adultery with married partners, whipping of between 40 and 80 lashes for consumption of alcohol, and amputation of limbs for theft. To this end, a private member's bill has been tabled in Parliament to amend the Syariah Courts (Criminal Jurisdiction) Act 1965. As noted earlier, under the legislation, the Syariah Court could only impose a maximum of RM5,000 fine, six strokes of whipping and three years of jail for committing Syariah offences. The private bill seeks to widen the scope of punishments meted out by the Syariah Court in order to facilitate the implementation of the Islamic penal law or hudud in the State of Kelantan. In the meantime, four litigants filed an action in the High Court seeking a declaration that the private member's bill in the Federal Legislature is against the Federal Constitution. At the same time, a petition was filed by three individuals pursuant to art. 4(4) of the Federal Constitution for a declaration that Amendment 2015 is null and void as being contrary to the Federal Constitution. Opinions have been given that Amendment 2015 is null and void because it is unconstitutional as it creates hudud offences which include offences that are under the Federal jurisdiction besides legislating on other Federal criminal law offences. Views have also been advanced that for offences which are within the jurisdiction of the State, it is also null and void because it conflicts with the Federal law that is the Syariah Courts (Criminal Jurisdiction) Act 1965.[29]

Jurisdictional Conflicts Between The Civil And Syariah Courts

Although the administration of justice by the Syariah Court is confined to personal law for Muslims and certain offences against the precepts of Islam which constitute a small proportion of the entire legal system, they nevertheless raise issues which concern public interest and fundamental liberties that affect not only the Muslims but the non-Muslims as well.

In recent years, difficult issues have arisen which sparked jurisdictional conflicts between the Syariah Court and the civil court. Many issues are involved in this thorny state of affairs. In such cases, the jurisdictional

29. Tun Abdul Hamid Mohamad, *Implementation of the Islamic Criminal Law (Hudud, Qisas, Ta'zir) in Malaysia – Prospects and Challenges* [2015] 3 CLJ (A) ix.

demarcation between the civil and Syariah Courts became blurred. There have been a number of instances where the same subject matter was brought before both the civil and Syariah Courts resulting in increased costs, conflicting interpretation and painful uncertainty.

Difficult questions arise when there is a change of personal status in cases of conversion into Islam or conversion out of Islam. In a multi-religious society as in Malaysia, conversion from one religion to another is not a new occurrence. The issues involved are multifaceted, namely, whether a deceased died a Muslim and application by a Muslim to leave Islam. The issue of conversion involving a Muslim and non-Muslim always involves the jurisdictional conflict between the Syariah Courts and the civil courts. When a dispute arises over a person's faith or more specifically whether a person has become a Muslim convert, questions are often raised on whether the Syariah Courts have exclusive jurisdiction to hear it. As Islamic matters belong to the State jurisdictions, Muslims who intend to leave the Islamic faith are subjected to provisions in relation to apostasy that are under the exclusive jurisdiction of the Syariah Courts, which the human rights advocates argue to have violated the liberty clause of the Federal Constitution. A number of Muslims look to the civil courts to uphold their right to religious freedom. When a dispute arises over the person's faith or more specifically whether a Muslim has left Islam, questions are often raised on which court that has exclusive jurisdiction to hear it. The case of *Lina Joy v. Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119; [2004] 6 CLJ 242 upheld the proposition that only Syariah Courts can decide if a person is apostasied from Islam even though the Constitution guarantees all citizens the freedom of choice of religion. It was held that the issue of an act of conversion out of Islam must be subjected to the relevant Syariah law which is to be determined by the Syariah Courts.

In one of the most high profile and long drawn-out child custody cases, *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281; [2011] 1 CLJ 568, an ethnic couple was married in a Hindu ceremony, got separated and the father converted to Islam. He then secretly converted his two children to Islam without the mother's consent and obtained custody through the Syariah Court. The father subsequently filed for child custody and obtained custody through the Syariah Court. The Hindu mother was also granted guardianship, but through the civil courts. This is a recurring family dispute although it is well settled law that civil courts continue to have exclusive jurisdiction in respect of divorce as well as custody of the children notwithstanding the conversion of one of the parties to a non-Muslim marriage to the religion of Islam (see *Subashini Rajasingam v.*

Saravanan Thangatoray and Other Appeals [2008] 2 MLJ 147; [2008] 2 CLJ 1 and *Tang Sung Mooi v. Too Miew Kim* [1994] 3 MLJ 117; [1994] 3 CLJ 708).

Those cases highlight a growing practical problem with Malaysia's dual parallel legal system and those caught in between the two systems. Syariah law on offences against the precepts of Islam as well as personal matters such as marriage and custody rights binds the Muslims while members of other faiths follow the civil law. Some would argue that cases of this nature show that the non-Muslims may be obliquely subjected to the Syariah Court.

Britain, A Multi-Religious Society

Contemporary Britain is a more pluralistic and multi-faith society than ever before in its history. According to the 2001 census, the population of Britain was estimated to be 57 million people the majority of whom identified themselves as Christian, with the remainder being Muslim (2.8%), Hindu (1.0), Sikh (0.6%), Jewish (0.5%), Buddhist (0.3%) and others. The fact that the population is increasingly religiously diverse is described by Munby J in *Singh v. Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075 in the following words:

> There have been enormous changes in the social and religious life of our country. The fact is that we live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Our society includes men and women from every corner of the globe and of every creed and color under the sun.

There is a strong association at the State level between national identity and the Church of England. The head of State, Her Majesty the Queen, is the head of the Church and 26 of her bishops have seats in the House of Lords. No representatives from other religious organisations have a right to membership in the House of Lords. The Queen's coronation oath in which she promised to maintain the Protestant religion in the country mirrors the unique constitutional position of Christianity in Britain. Anglican prayers are said at the start of each day in both the House of Lords and the House of Commons. The Judiciary of England and Wales begin each legal year with a spectacular service in Westminster Abbey. In 2004, the Prime Minister stated that 'we are a Christian country'.[30] Blasphemy, later narrowed to scurrilous vilification, is an offence restricted

30. See *Church Times*, 16 April 2014. Reiterated in his 2015 Christmas message.

to attacks on Christian religion. In *R v. Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury* [1991] 1 All ER 306, the court rejected the right of a person to bring criminal action against the author and publisher of "The Satanic Verses" for "a blasphemous libel concerning Allah, the common deity to all religions of the world". Historically, the significant relationship between Christianity and the application of law can be seen in *Taylor's* case [1675] 1 Vent 293, 86 ER 189 where Hale CJ in convicting the accused of blasphemy said:

> To say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.

The English law is treated as a legal system that applies to everybody equally irrespective of his or her faith or religion.[31] So far as the law is concerned, those who live in this country are governed by the English law and are subjected to the jurisdiction of the English courts. According to this notion of 'legal centralism', the English law is and should be the law of the State, uniform for all purposes, exclusive of all other laws, and administered by a single set of State institutions.[32] While the predominant view is that different legal systems cannot exist within the one-nation-state structure, common values of tolerance of religious differences and diversity is a characteristic that is frequently cited as British values. Other faiths are allowed to co-exist alongside the Church of England. Indeed tolerance is the most important aspiration of pluralism. It accepts genuine difference, including deep moral and faith disagreement. People are free to practise their religion and differing religious laws and practices are free to operate unless restrained by the law.[33] The lack of formal prohibitions and disabilities now means that people are in general free to worship in churches, synagogues, mosques and temples when, where and how they please.[34]

31. See Nicholas Phillips, *Equal before the law* in Robin Griffith-Jones (ed), *Islam and English Law, 1st edn* (Cambridge: Cambridge University Press, 2013) 286-293.

32. See John Griffiths, *What is Legal Pluralism?* [1986] 24 Journal of Legal Pluralism & Unofficial Law 38.

33. *A.G. v. Guardian Newspapers (No. 2) (H.L.(E.))* [1990] 1 AC 109.

34. See Tom Bingham, *Law in a Pluralist Society* in *The Business of Judging: Selected Essays and Speeches 1985-1999* (Oxford University Press, 2000) 111.

There is nothing in the English law that prevents people to abide by the Syariah law if they wish to, provided they do not conflict with the English law. The court here generally recognises that in a tolerant society of contemporary times there is a need to guard against the tyranny which the majority opinion may impose on the minority.[35] Concerning the role of the Judiciary in a pluralistic society, Munby J in *Sulaiman v. Juffali* [2002] 1 FLR 479, said:

> Although historically this country is part of the Christian west, and although it has an established church which is Christian, I sit as a secular judge serving a multi-cultural community of many faiths in which all of us can now take pride, sworn to do justice 'to all manner of people'. Religion – whatever the particular believer's faith – is no doubt something to be encouraged but it is not the business of Government or of the secular courts. So the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity. A secular judge must be wary of straying across the well-recognised divide between church and State. It is not for a judge to weigh one religion against another. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms.

In 2004, the Home Office stated that 'integration' is not about assimilation into a single homogenous culture and there is space within the concept of "British" for people to express their religious and cultural beliefs.[36] In its *'Counter-Extremism Strategy'* released in October 2015, the British Government noted:

> 1. Life in our country is based on fundamental values that have evolved over centuries, values that are supported and shared by the overwhelming majority of the population and are underpinned by our most important local and national institutions. These values include the rule of law, democracy, individual liberty, and the mutual respect, tolerance and understanding of different faiths and beliefs.
>
> 2. All people living in Britain are free to practise a faith or to decide not to follow any faith at all. We are free to build our own churches, synagogues, temples and mosques and to worship freely. We are free to establish our own faith schools and give our children – boys and girls alike – the best education possible.

35. *Singh v. Entry Clearance Officer New Delhi (supra)*; *Matadeen v. Pointu* [1999] 1 AC 98; *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.

36. See Home Office Communication Directorate June 2004, *Strength in Diversity: Towards a Community Cohesion and Race Equality Strategy.*

In 2013, the Woolf Institute (an academic institute in Cambridge that specialises in interfaith relations) convened an independent commission, namely Commission on Religion and Belief in British Public Life, to undertake the first systematic review of the role of religion and belief in Britain today. The objectives of the commission are to:

(a) Consider the place and role of religion and belief in contemporary Britain, and the significance of emerging trends and identities;

(b) Examine how ideas of Britishness and national identity may be inclusive of a range of religions and beliefs, and may in turn influence people's self-understanding;

(c) Explore how shared understandings of the common good may contribute to greater levels of mutual trust and collective action, and to a more harmonious society; and

(d) Make recommendations for public life and policy.

The Commission was chaired by the Rt. Hon. Baroness Elizabeth Butler-Sloss of Marsh Green GBE (the first female Lord Justice of the Court of Appeal) and has taken two years to prepare its 104 pages report entitled *"Living with Difference"* which was released on 7 December 2015. The Commission included Christian, Muslim, Sikh and Hindu representatives as theological experts. The report called for a change to public policy on religion and belief to take account of the increasing impact of religion around the world and the more diverse nature of society in Britain. Its aim was to suggest practical ways for Government and people to respond to social change to ensure a shared understanding of the fundamental values underlying public life that guarantee religious freedom while protecting the liberties and values of non-believers.

According to the report, Britain has seen a general decline in its Christian affiliation. Only two in five British people now identify themselves as Christians. The report noted that Islam, Hinduism and Sikhism have overtaken Judaism as the largest non-Christians faiths in Britain. The proportion of people who do not follow a religion has risen from just under a third in 1983 to almost half in 2014. The report recommended that the time has come for public life to take on more 'pluralist character'. It said that the pluralist character of modern society should be reflected in national forums, such as the House of Lords, so that they include a wider range of worldviews and religious traditions and of Christian denominations other than the Church of England. The report noted that major State occasions such as coronation should be changed to be more inclusive while the number of bishops in the House of Lords should be

reduced to make way for leaders of other religions. The report recommended scrapping the law requiring schools to hold acts of collective worship and reducing the number of children being given places at schools based on religion. It recommended for new protections for women in Syariah Courts and other religious tribunals including a call for the Government to consider requiring couples who have a non-legally binding religious marriage to also have a civil registration.

The Recognition Of Religious Law

As a matter of general rule, the courts are by and large reluctant to become involved in judging internal disputes within religious groups regarding religious laws.[37] Lord Hope of the Supreme Court in *R (on the application of E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS and others; R (on the application of E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue intervening)* [2009] UKSC 15 said, "it has long been understood that it is not the business of the courts to intervene in matters of religion". Nonetheless, His Lordships emphasised the important exception that "It is just as well understood, however, that the divide is crossed when the parties to the dispute have deliberately left the sphere of matters spiritual over which the religious body has exclusive jurisdiction and engaged in matters that are regulated by the civil courts". This was underlined by the Court of Appeal's decision in *C and another v. City of Westminster Social and Community Services Department and another* [2008] EWCA Civ 198 concerning a purported marriage by telephone link between England and Bangladesh and a lack of mental capacity of one party. The Court of Appeal held that while this was a valid marriage under Islamic law and Bangladeshi law it was not valid under English law: the circumstances made the marriage sufficiently offensive to the conscience of the English court that it should refuse to recognise it.

The Impact Of Human Rights Act 1998

Britain does not have a written constitution protecting fundamental rights. There is no constitutional clause guaranteeing religious freedom. In 1998 the Human Rights Act was passed paving the way for the incorporation of the European Convention on Human Rights. Under the Human Rights Act 1998 (HRA 1998), everyone in Britain has the right to freedom of thought, conscience and religion. The HRA 1998 created a new legal

37. *Blake v. Associated Newspapers Limited* [2003] EWHC 1960 (QB); *His Holiness Sant Baba Jeet Singh Ji Maharaj v. Eastern Media Group Ltd and another* [2010] EWHC 1294 (QB).

regime and represents a significant change in the legal system. It undoubtedly has an important impact on the fundamental rights of the individual because it is the first time that legislation recognises a general positive legal right to religious freedom, enforceable in domestic courts. This development is of particular interest as European jurisprudence as well as national law affect the individuals. Article 9.1 of the European Convention on Human Rights, which is made part of the HRA 1998, provides that everyone has the right to freedom of thought, conscience and religion which includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance. Freedom of thought is absolute and unqualified whereby anyone can believe what he or she likes.

But art. 9.2 provides that the freedom to manifest one's religion or belief can be subjected to limitations, though only to those which are "prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". Article 14 of the European Convention also provides that the enjoyment of the rights protected by the Convention, such as the right to liberty or the right to freedom of expression, must be secured without unjustified discrimination on a wide variety of grounds, including religion or belief. In *Kokkinakis v. Greece* (App no 14307/88) [1993] ECHR 14307/88, the European Court of Human Rights said:

> As enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset to atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

On the right to freedom of religion, the Research Division of the European Court of Human Rights in its updated document on 31 October 2013 entitled *'Overview of the Court's Case-Law on Freedom of Religion'* Stated:

> 14. In a democratic society, in which several religions or branches of the same religion coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. However, in exercising its regulatory power in this sphere and in its relations with the

> various religions, denominations and beliefs, the State has a duty to remain neutral and impartial. What is at stake here is the preservation of pluralism and the proper functioning of democracy (*Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, §§ 115-16, ECHR 2001-XII).
>
> 15. In this sensitive area involving the establishment of relations between the religious communities and the State, the latter in theory enjoys a wide margin of appreciation (*Cha'are Shalom VeTsedek v. France* [GC], no. 27417/95, § 84, ECHR 2000-VII). In order to determine the scope of the margin of appreciation the Court must take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society. Moreover, in exercising its supervision, the Court must consider the interference complained of on the basis of the file as a whole (*Metropolitan Church of Bessarabia and Others*, cited above, § 119).

In *Young, James and Webster (applicants) v. The United Kingdom (respondents)* [1981] IRLR 408, the European Court of Human Rights said:

> Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

Domestic case law on freedom of religion is developing as a result of the implementation of the HRA 1998. In cases brought under art. 9, the court has to consider whether there has been an interference with the right to manifest a religion or belief and, if so, whether the interference is justified. In *Ahmad v. United Kingdom* (Application 8160/78) [1981] 4 EHRR 126, a teacher was forced to resign because the school refused him permission to leave work 45 minutes early to attend a mosque during working hours. The European Commission on Human Rights found that his art. 9 rights had not been interfered with because he had freely entered into his contract. Moreover, he had not notified his employer of his religious observance needs neither at the time of his recruitment nor the following six years. The Commission ruled that Mr. Ahmad had been free to resign and find employment elsewhere on terms that reflected his religious needs.

A similar approach was adopted in *Stedman v. The United Kingdom* [1997] 23 EHRR CD 168 where an employer required a Christian applicant to work on Sundays sometime after she had been in the job. The Commission dismissed her art. 9 complaint and ruled that she 'was dismissed for failing to agree to work certain hours rather than for her religious belief as such and was free to resign and did in effect resign from her employment'.

As noted by Samantha Knights, *Freedom of Religion, Minorities, And the Law,* the European Court of Human Rights on a number of occasions has made references to the particular need to protect minorities. In *Connors v. United Kingdom* [2005] 40 EHRR 9, the court made reference to the vulnerable position of Gypsies as a minority which meant that some special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases. In *Chapman v. United Kingdom* [2001] 33 EHRR 18, the court noted that there was an emerging international consensus recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle although it was not persuaded that the consensus was sufficiently concrete for it to derive any guidance as to the conduct or standards which contracting States considered desirable in any particular situation.

The domestic courts have tended to follow this approach. For example, in *Copsey v. W.W.B. Devon Clays Ltd* [2005] I CR 1789, the Court of Appeal found that the claimant's rights had not been interfered with when his employer changed his working days to include Sunday, as he could find another job, which would enable him to attend Sunday religious services. Similarly, in *Regina (S.B.) v. Governors of Denbigh High School* [2007] 1 AC 100, the House of Lords found that the application of a school's uniform policy did not breach the art. 9 rights of the Muslim claimant as majority of the court took the view that there was no interference with the claimant's rights. Shabina Begum, a 16-year-old Muslim girl, was sent home from her school in Luton, Bedfordshire, for wearing a full-length 'jilbab' rather than the school uniform which the school had introduced following consultation with local mosques, community leaders and parents. Ms. Begum remained out of education for two years before she began to attend another school which allowed her to wear the jilbab. A majority of the House of Lords found that the school's uniform policy did not constitute an interference with her art. 9 rights. Following the approach of the European Court of Human Rights, the majority stated that a rule does not infringe the right of an individual to manifest his or her religion 'merely because the rule does not conform to the religious beliefs of that individual. And in particular this is so where the individual has a choice whether or not to avail himself or herself of the services of that institution' or 'other public institutions offering similar services, and whose rules do not include the objectionable rule in question'.

Towards A Broader Recognition Of Plurality

In the treatment of ethnic and religious groups, the approach employed is the rule and exemption model which is a form of pluralist recognition to reflect the multi-religious realities. On this basis, applicable laws are generally passed to accommodate the cultural and religious value systems of the minorities. For instance, the law has granted exemptions to turbaned Sikhs from wearing motorcycle helmets. Chapter 62 of the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976 States that s. 32(2A) of the Road Traffic Act 1972 shall not apply to Sikh motorcyclists, provided they are wearing turbans while riding motorcycles. This approach is reaffirmed by s. 139 of the Criminal Justice Act 1988 under which Sikhs are now allowed to carry knives and daggers (kirpans) in public places for religious purposes. Similarly, the law has exempted Jews and Muslims from being subjected to rules requiring the stunning of animals before they are slaughtered for food in recognition of their religious needs regarding halal and kosher meat. The Slaughter of Poultry Act 1967 and the Slaughterhouses Act 1974 recognised the rights of Muslims and Jews to slaughter animals according to their religious practices without stunning them first.

Place Of Religion In Public Life In An Increasingly Plural Society

Against the background of increasingly plural society of modern Britain, in recent years, there has been a revival of interest on the place and role of religion. There are ongoing debates in Britain relating to parallel legal system and legal pluralism and the main issue in these debates revolve around the question as to what extent the personal law of religious minorities might be accommodated into the domestic legal system.

On 7 February 2008, the Archbishop of Canterbury, Dr. Rowan Williams, gave a lecture in the Great Hall of the Royal Courts of Justice entitled *'Civil and Religious Law in England: A Religious Perspective'* which largely dealt with the relationship between religious law and civil law in England and Wales. In that lecture, which was to be a reflection to all religious groups, the Archbishop sought to bring to a higher level of public debate the question of 'what it is like to live under more than one (legal) jurisdiction' and how far the civil law of the land should recognise or accommodate a legal pluralism based on religious adherence.

The Archbishop presented his idea that the State should consider moving beyond the present legally positivist system which he characterised as an 'unqualified secular legal monopoly' to a system in which there would be some form of accommodation of religious or cultural norms. He saw individuals in modern society as having multiple and sometimes

overlapping allegiances. By this accommodation, individuals would be able to choose whether they want certain limited matters to be dealt with by secular or by religious principles. He pointed out that it is possible for individuals to conduct their lives in accordance with Syariah principles without them being in conflict with the rights guaranteed by English law.

The subjects the Archbishop stipulated as possibly able for this accommodation were some features of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution. Controversy flared up when the Archbishop implied that the British commitments to pluralism might necessitate the legal system to recognise certain aspects of Islamic law. It was his discussion of Islam that attracted much attention. This idea was acknowledged as very controversial. It triggered a storm of protest when he suggested that some accommodation between British law and Islam's Syariah was 'inevitable' even though he did not call for its accommodation as some kind of parallel jurisdiction to the civil law.

This debate was later intensified when Lord Phillips (the then Lord Chief Justice of England and Wales), in a lecture entitled *"Equality before the Law"* delivered at the East London Muslim Centre on 3 July 2008, reiterated the English law principle that every citizen has a right to do what he likes unless restrained by the common law or by statute. It was this freedom, Lord Phillips stated, that allowed people to exercise their religions freely and concomitantly there could be, and indeed there already is, some accommodation for dispute resolution in accordance with religious principles based upon the consent of the parties. Based on this he added, "There is no reason why principles of Syariah Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution". However any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from English law. He suggested that there should be some accommodation made to religious communities within the existing legal framework and supported by legislation. Lord Phillips, however, did not advocate that the Syariah, or indeed any other religious system of law, should apply in the UK as a separate system of legal rules with its own officially sanctioned courts and tribunals.

Emerging Parallel Legal System

It is worthy of note that religious courts have already operated in this country for over a period of time alongside civil courts in England and Wales. There are a number of separate religious courts which have jurisdiction over a variety of matters relating to religious law. In the

Church of England a series of ecclesiastical courts have jurisdiction over matters dealing with the rights and obligations of church members, church doctrine and ceremony or ritual. The ecclesiastical courts are part of the English court system.[38]

A number of other religious communities also have their own network of adjudicating mechanism which the community may choose to call 'courts'. These are informal religious courts systems or forums for dispute resolution. They do not have the legal status of courts. Many Syariah Courts, mostly unofficial, have emerged and currently operating mainly on a voluntary basis in Muslim communities to help deal with and resolve family and family disputes using Islamic law instead of local or formal court system.[39] As far as civil law is concerned the council's decision have little binding power. The councils have no official jurisdiction over divorce settlements, property matters, custody of children cases or any criminal matters. These informal courts, which are often based in mosques or Muslim schools across the country, deal with marital disputes and even child custody as well as financial matters in line with religious teaching and applied Islamic principles within the British legal system. They offer mediation and reconciliation rather than adjudication but the proceedings are conducted like courts with religious scholars or legal experts sitting in a manner more akin to judges rather than counsellors. The parties abide by the decisions which they accept as obligatory but which are not enforced by the civil courts.

There is a perception that this is a parallel justice system that discriminates women. Critics say that the unacceptable and arbitrary religious courts are treating large numbers of Muslim women as second-class citizens. Its defenders, however, claim Muslim women are better off with the Syariah Courts than with a vacuum.

The religious communities have also made use of private arbitration for the resolution of intracommunal family disputes in accordance with their understanding of their respective religious laws. The UK is broadly accommodative of ADR processes such as conciliation and arbitration,

38. See *Moore's Introduction to English Canon Law, 4th edn* (Bloomsbury Publishing, 2013) and Mark Hill, *Ecclesiastical Law,* 3rd edn (Oxford University Press, 2007).

39. See Mohamed Keshavjee, *Alternative Dispute Resolution in a Diasporic Muslim Community in Britain* in Prakash Shah (ed), *Law and Ethnic Plurality: Socio-Legal Perspectives* (Leiden [etc] : Nijhoff, 2007) 145-175.

whether commercial or private disputes, and allows parties to choose the law that they wish to apply to their agreements. For example, the activities of London Beth Din deal with vast and cover all areas of Jewish law encompassing marriages, divorces, conversions, adoption and resolution of civil disputes. In Jewish law, civil disputes between Jewish parties are required to be adjudicated by a Beth Din adopting Jewish law to be applied to the dispute. The London Beth Din sits as an arbitral tribunal in respect of civil disputes. The parties to any such disputes are required to sign an arbitration agreement prior to a hearing taking place. The effect of this is that the award given by the Beth Din has the full force of an Arbitration Award and may be enforced (with the prior permission of the Beth Din) by the civil courts. At a hearing before the Dayanim, the parties do not require legal representation though they are allowed to have one.

A number of Muslim arbitration tribunals, which is a form of alternative dispute resolution for the Muslim community, have also been set up by private individuals to resolve civil and commercial disputes as well as personal religious law (other than divorce, child custody and criminal matters) in accordance with Syariah laws. These so called tribunals are not authorised under the Arbitration Act 1996 to give legally binding rulings but they may operate under the Act which provides that parties are free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

There are no special provisions for the awards of religious tribunals in general or Syariah tribunals in particular. Some of their decisions, such as arbitration award, may be enforced through the English court system in the same way and are subjected to the same defences and challenges as an ordinary arbitral award.[40] In this respect, a court has a general duty to consider whether an arbitral award complies with public policy and is in the public interest. The requirements of public policy would mean that the civil court would not enforce any arbitral award that failed to comply with the provisions of the Human Rights Act 1998 and the European Convention on Human Rights.

It is a point of debate whether these religious courts and tribunals create a parallel legal system in the UK and operate within the framework of the UK law. In June 2011, Cardiff University published a report of a research study on *'Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts'*.

40. *Cohen v. Baram* [1994] 2 Lloyd's Rep 138; *Kastner v. Jason and Others* [2004] EWCA Civ 1599; *Bhatti v. Bhatti* [2009] EWHC 3506 (Ch); *Al Midani v. Al Midani* [1999] 1 Lloyd's Rep 923.

The aim of the research was to collect information on the role and practice of religious courts in England and Wales in order to contribute to debate concerning the extent to which English law should accommodate religious legal systems. The report examines the existence of religious courts in the UK, with special reference to Judaism, Islam and Christianity. It is an important research which contributed greatly to public debates about the absorption of plural approaches into the English legal system. Some of the findings are as follows:

(i) There is no monolithic community representing the entire body within any of the three faiths we studied.

(ii) There is a multiplicity of religious tribunals within the different communities in terms of the basis of their authority and adherence by those using these tribunals. Different communities within these faiths may have their own religious tribunals ruling on matters relevant to their adherents.

(iii) There is no 'hierarchy' of tribunals within the Jewish and Muslim communities, and no appeal structure. This has led to an interesting element of 'forum shopping' by litigants. The absence of a hierarchy in the Muslim and Jewish communities means that litigants can, to some extent, choose which tribunal they go to according to the way in which (they think) the law will be applied to them or by what they perceive will be the extent of recognition of the tribunal's decision across their community.

(iv) A commonality between all the tribunals in relation to staffing is the degree to which their operation rests upon volunteers and the services of those who usually have other professional religious roles within their communities. There is clearly a fusion of religious and legal roles.

(v) Process and procedure vary as between the three tribunals, reflecting the different approach to the role that each takes.

(vi) None of the tribunals has any legal status afforded to them by the State or the civil law, and ther rulings and determination in relation to marital status have no civil recognition either. They derive their authority from their religious affiliation, not from the State, and that authority extends only to those who choose to submit to them.

(vii) All of the institutions studied see their work as a religious duty. They regard themselves as providing important mechanisms for the organisation of community affairs and the fulfillment of community

> need. The structural framework, organisation, resourcing and staffing of each of the tribunals in many ways reflect the history, economic resources and social development of the communities they serve.

The research by Cardiff University did not cover how the Kurdish community developed and continued to practise alternative dispute resolution when they migrated to London. Dr Latif Tas in his book *'Legal Pluralism in Action: Dispute Resolution and the Kurdish Community'* investigated the Kurdish diaspora's system method to resolve conflicts in London from a legal pluralism point of view which he called the Kurdish Peace Committee (KPC) Model, a more secular alternative system which was founded in 2001. According to Dr Latif, the Kurds have adapted their customary legal practices to create unofficial legal courts and other forms of legal hybridisation. The research highlighted that the Kurdish community opted to follow their own customary legal practices while at the same time adapting to the new conditions rather than just simply recognising the British legal system.

The model proved to be a reliable mechanism to resolve inter and intracommunity disputes among Kurds as well as disputes with other groups such as Turks and Iranians. The services of the KPC are not only used by members of the community who cannot afford to use State-based legal system or who lack education but also by well-educated members of the Kurdish diaspora. It is interesting to note that the Kurdish community's own ways of dealing with disputes have been accorded recognition by the authorities. In some cases, members of the police force took part in meetings held by the KPC and the Home Office granted some funding to cover its expenses.

In March 2004, the Law Society which represents solicitors in England and Wales, had written a guide on Syariah succession rules that will be used in British courts. This guidance detailed the manner in which a will should be drafted to fit Islamic traditions while still being valid under British law. The President of the Law Society was quoted to have said that the 'Syariah compliant' guidance would promote 'good practice' in applying Islamic principles into the British legal system. One effect of the guidance is that children born outside of marriage and adopted children could be denied their shares as they are not Syariah heirs. It has been said that the ground breaking guideline has made Islam to be effectively enshrined in the British legal system for the first time. To some the guidance represented a major step on the road to a parallel legal system for Britain's Muslim communities. The Law Society guideline represents, for the first time, that an official legal body has recognised the legitimacy of some Syariah principles.

However, concerns have been raised recently over the rise of religious tribunals and their unfettered and unregulated activities, particularly about Syariah Courts on the allegations that the courts discriminated the women and failed to protect them from violent husbands. Baroness Cox, a member of the House of Lords has been a leading voice over the years speaking out against certain aspects of the Syariah Courts. On 1 June 2015, she introduced her Private Members' Arbitration and Mediation Services Equality Bill into the House of Lords for the fifth consecutive year which is intended to tackle religiously sanctioned gender discrimination in arbitration proceedings and informal mediations. Among others, the Bill sought to state expressly that any criminal or family matter cannot be the subject of arbitration proceedings. The Bill, according to Baroness Cox, seeks to address the unacceptable position of a parallel *quasi* legal system which threatens the fundamental principle of democracy, namely one law for all.

At present, the debate gained momentum when the British Government released its 'Counter-Extremism Strategy' on 19 October 2015 which sets out strategy to defeat extremism in all forms across the country. The Government has ordered an independent inquiry into Syariah Councils amid concerns that they operate a parallel system of justice that discriminates against women. The strategy said, "Syariah is being misused and applied in a way which is incompatible with the law". It went on to state:

> Alternative systems of law
>
> 17. Many people in this country of different faiths follow religious codes and practices, and benefit from the guidance they offer. Religious communities also operate arbitration councils and boards to resolve disputes. The overriding principle is that these rules, practices and bodies must operate within the rule of law in the UK. However, there is evidence some Syariah Councils may not follow this principle and that Syariah is being misused and applied in a way which is incompatible with the law.
>
> 18. There are reports of men and women being charged different fees for using the same service, and women facing lengthier processes for divorce than men. Most concerning of all, women are unaware of their legal rights to leave violent husbands and are being pressurised to attend reconciliation sessions with their husbands despite legal injunctions in place to protect them from violence. There is only one rule of law in our country, which provides rights and security for every citizen. We will never countenance allowing an alternative, informal system of law, informed by religious principles, to operate in competition with it.

The strategy added:

> 48. In some cases there is evidence of a problem, but we have an inadequate understanding of all the issues involved. As set out in paragraph 17, one example of this involves the application of Syariah law. We will therefore commission an independent review to understand the extent to which Syariah is being misused or applied in a way which is incompatible with the law. This is expected to provide an initial report to the Home Secretary in 2016.

Concluding Comments

This paper has attempted to show that it is the dichotomy between the private and public aspects of the religious freedom which has always given rise to practical and legal complications. While the freedom privately to hold particular religious views is unlikely to give rise to practical difficulties, it is the position of religion in the public sphere and the extent of the right to express and manifest religious views that have always created considerable challenges for any contemporary multi-religious societies.[41] It is this dichotomy between the private and public aspects of religion that is likely to give rise to legal difficulties.

In Britain, the individual freedom to privately hold and profess particular religious views is not likely to give rise to legal problems. There is a concern, however, that a parallel legal system, which applies religious law and traditions in the public sphere, would lead to serious undermining of national cohesion. Parallel laws, which result in different laws for different groups, are thought to foster the growth of separate societies within society. It demonstrates an on-going tension between the appearance of tolerance and the maintenance of values deemed to be British.[42]

There is particularly an overall disquiet surrounding the application of Syariah law, as it is perceived not to be substantially comparable and equal to the applicable rule of the common law, especially in the light of the majority judgment of the European Court of Human Rights in *Refah Partisi (Welfare Party) and Others v. Turkey* (App nos 41340/98, 41442/98, 41343/98 and 41344/98) [2003] ECHR 41340/98 where it was held that it is difficult to declare one's respect for democracy and human rights

41. See Samantha Knights, *Freedom of Religion, Minorities, And The Law* (Oxford University Press, 2007 (reprinted 2011)) 19.

42. See Cerian Charlotte Griffiths, *Sharia and Beth Din Courts in the UK: Is Legal Pluralism Nothing More Than A Necessary Political Fiction?,* Studia Iuridica Toruniensia (TOM XV) 39.

while at the same time supporting a regime based on Syariah which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in spheres of private and public life in accordance with religious precepts. It is perceived that certain aspects of the implementation of Syariah law would violate gender equality within the family. The Syariah law and the English law often differ irreconcilably in substantive law, procedural law, concept of justice and worldviews.

The presence of different interpretations of Syariah principles and prevalence of divergent religious beliefs and practices among Muslims further exacerbates the problem of family law pluralism within the Muslim community because it reinforces the gap between the norms of an objective legal system (whether or not nominally Islamic) and the subjective norms of individual Muslims.[43]

However, there is no evidence to suggest that Muslims in Britain are asking for a wholesale introduction of the application of Syariah law. The work of the Syariah Councils suggest that they are asking for a formal recognition of the Syariah aspects relating to Islamic personal law, namely marital law. A formal recognition of such institutions would facilitate their regulation which would ensure, among other things, the adoption and maintenance of good practices and alternative access to justice for many Muslim women in the UK who might prefer an Islamic settlement for their disputes rather than going to litigation in the civil courts.[44]

The rise and increasing importance of religious courts, alongside English law, represents an effectively emerging legal system within the British's minority communities running in parallel or interlocked with British justice system. The minorities have a keen interest in preserving and structuring their family life within their own family law regime. To have to forgo a traditional or religious practice may be portrayed as tantamount to the surrender of cultural identity and ultimately to the denial of a human right.[45] Although they are unregulated and unauthorised with little

43. See Mohammad Fadel, *Political Liberalism, Islamic Family Law and Family Law Pluralism: Lessons from New York on Family Law Arbitration* (18 June 2009).

44. See Mashood A Baderin, *An Analysis of the Relationship between Sharia and Secular Democracy and the Compatibility of Islamic Law with the European Convention on Human Rights* pp.72-93 (Cambridge University Press) 92.

45. See Sebastian M. Poulter, *English Law and Ethnic Minority Customs* (Butterworth-Heinemann (Sd), 1986) v.

accountability, these courts have been touted as the minorities' rights to religious freedom and to be governed by their own religious beliefs and practices that would reflect the changing religious composition of the British population today.

The limitations of these religious courts are due to their private nature operating outside of public view and meaningful independent oversight. Their rulings have ignited an apprehension for duality of law which arises from concern that their decisions might be inconsistent with English law and family law practice.[46]

There remains a great deal of uncertainty about what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes.[47] The debates continue as to what extent a more pluralist legal system can be accommodated in which people can choose which law they wish to comply with: religious or English.

In Malaysia, the position and application of Islam in the public sphere is embedded in the Federal Constitution. As decided by the Federal Court in the case of *ZI Publications Sdn Bhd (supra)*, Muslims in Malaysia are not only subjected to the general laws enacted by Parliament but are also subjected to State laws of religious nature enacted by the State Legislature. As far as the Malaysian Muslims are concerned the private realm of faith is being regulated by Syariah criminal legislation. However, there is no uniformity as these Enactments are passed by the respective State Legislatures.

The legal demarcation of jurisdiction between the Syariah Courts and the civil courts has seen an interaction between Syariah and civil law and in the process firmly establish what we see today as a parallel system of justice. It is within this dual system that people of various races and religions live side by side in harmony. But as the country continues to modernise and democratise and in a more secular environment, the limitations and practical difficulties of the dual system have at times arisen.

46. See Ashley Nickel, *Abusing The System: Domestic Violence Judgments From Sharia Arbitration Tribunals Create Parallel Legal Structures in the United Kingdom,* Arbitration Brief 2014, Vol. 4 Issue I art. 6.

47. See Rowan Williams, *Civil and Religious Law in England: A Religious Perspective* in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities And The Place of Sharia* (Cambridge University Press, 2013) 21.

The judicial decisions highlighted in this paper have recognised that the Syariah Courts have jurisdiction in matters relating to Islam but the decisions have also revealed inadequacies and shortcomings not only in the State Enactments but also Federal law. At times the issue of jurisdiction of the Syariah Courts involves jurisdictional conflict between the Syariah Courts and the civil courts. This is especially true on the difficult and challenging issue of conversion into Islam or conversion out of Islam. This issue can be sensitive and controversial as the disputes involve one's faith, status, family and parties of different faiths. The problem is further compounded by the fact that Islam and the constitution, organisation and procedure of Syariah Courts are State matters which make any enactment of legislation and exercise of executive authority on the same outside the purview of the Federal legislative and executive authorities respectively. There are undoubtedly limitations within the system. Through judicial pronouncements, improvement in the law either by way of amendments or enactment of new legislation as well as effective enforcement thereof the system can be strengthened and improved further.

In a dispute over a person's faith, especially when he dies, often one party who is not a Muslim is involved thus raising the question whether the Syariah Courts have jurisdiction to hear the matter. The non-Muslims may not feel comfortable to appear before the Syariah Courts even as witnesses. On the other hand, the determination of the matter before the civil courts is governed by strict rules of evidence and procedure which may prolong the proceedings, hence a delay in burial of the deceased person. Taking into account the fact that apostasy and the issue of a person's faith are sensitive to Muslims and non-Muslims, a solution has to be found. It is appropriate to consider forming a consultative body as an alternative to the Syariah Courts and the civil courts to determine the religious status of a deceased person. The consultation process shall take the form of private mediation route in which a neutral and independent person helps the parties to reach a negotiated settlement.

It is to be noted that all State Enactments relating to the administration of Syariah law contain provisions on conversion including the requirement that the newly convert registers his conversion and the issuance of a certificate to him. To avoid any future dispute on the status of his religion especially when the convert dies, a provision requiring the convert or the religious authority to notify the family of the convert of his conversion should also be added to these Enactments.

Generally, there are no provisions on conversion out of Islam in State Enactments, neither are there any provisions on remedies or relief such as injunction and declaration therein. In order to avoid any challenge in the future on the ground of lack of jurisdiction on the part of the Syariah Courts to determine the question of conversion, clear and adequate provisions should be incorporated into the State Enactments to confer jurisdiction on the Syariah Courts.

Custody of children and inheritance can be a contentious issue in conversion cases involving a spouse of a non-Muslim marriage. One possible solution to this problem is by way of a requirement in the law for the converting spouse to fulfil at the time of his conversion all his or her obligations and responsibilities under the non-Muslim marriage in accordance with the law governing such marriage.

Our constitutional arrangements have worked well in practice but as Malaysia continues to modernise and democratise, more practical problems will undoubtedly appear that could cause societal tension and threaten to disturb the prevailing harmony between the various religious groups. As a majority Muslim country, it is necessary that Malaysian Muslims fully understand that Syariah law is for Muslims only and that there is no legal basis of imposing Syariah law and Islamic morality on non-Muslims. For the non-Muslims, it is also essential that they appreciate the Muslims' rights to be governed by Syariah law as permissible under the Federal Constitution.

Endnotes

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The Rule Of Law And Judicial Discretion

by

Datuk Dr. Badariah Sahamid[*]

Abstract

In this article the author seeks to address a number of jurisprudential issues in respect of the judicial function and its relation to the rule of law. Among the questions raised are: What is the meaning of the rule of law in respect to judicial function? Do judges make law or merely declare existing law? What are the limits of judicial discretion? Should judges give weight to social values, policy considerations? Is "judicial activism" a legitimate exercise of judicial function? Does judicial activism spell the death of the rule of law?

The Meaning Of "The Rule Of Law"

The origins of the classic exposition of the rule of law can be attributed to A.V. Dicey in 1885:[1]

> 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 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…
>
> 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 forms part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the

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1. Albert Venn Dicey, *An Introduction to the Study of the Laws of the Constitution,* 10th edn (London: Macmillan, 1959) 202.

> courts, that in short, the principle 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.

The concept of Dicey's Rule of Law in essence asserts the constitutional doctrine of adherence to established laws of general application and the absence of arbitrariness or wide discretionary authority on the part of officials, including judges. The ideal of the rule of law has often been expressed by the phrase, "Government by law and not by men".

There has been considerable controversy regarding the scope and meaning to be attached to the term. Jurisprudentially, distinctions have been made between a "literal or formal" rule of law, which has in turn been distinguished from a "substantive rule of law".

According to Raz, the literal sense of the rule of law has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.

> It is evident that this conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities or any other way. It says nothing about fundamental rights, about equality or justice.[2]

In addition, the meaning of the concept of the 'rule of law' has evolved and been expanded to incorporate normative values, which according to Raz, was absent from Dicey's writing.

The concept of the rule of law does not yield a precise definition, in part due to the negative value that it upholds, primarily the absence of arbitrariness of official action.

Nevertheless, the concept of the rule of law has an enduring significance. Lord Bingham, in the Sixth David Williams Lecture had stated thus:

> … the statutory affirmation of the rule of law as an existing constitutional principle and of the Lord Chancellor's existing role in relation to it does have an important consequence: that the judges, in their role as journeymen judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so.[3]

2. Joseph Raz, *The Rule of Law and its Virtue* [1977] 93 LQR 195, 196.

3. Lord Bingham, the Sixth Sir David Williams Lecture, *The Rule of Law* (2006).

The Judicial Function Under The Rule Of Law

The judiciary is institutionally a branch of the Government. In constitutional terms, the separation of powers between the Legislature, the Executive and the Judiciary underpins the classic democratic process envisaged by Montesquieu.

The rationale for circumscribing the powers of each branch and the danger of a transgression into the other branches are expressed thus by Montesquieu:

> Again there is no liberty, if the power of judgment be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.
>
> Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.[4]

The separate and distinct exercise of the different branches of the Government is to prevent the danger of the abuse of powers which are untrammelled by any legal constraints.

The genesis of the rule of law, propounded by A.V. Dicey in 1885 in similar vein to Montesquieu, is expressed thus:

> The rule of law means the supremacy and predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or even of wide discretionary authority on the part of the government.

The Judiciary plays a pivotal role in the maintenance of the rule of law. In respect of the Legislature, the Judiciary is entrusted with the task of the interpretation of laws as well as the Constitution. In respect of the executive, the process of judicial review by the courts acts to ensure that Government agencies and tribunals exercise their powers in compliance with due process.

The Limits Of Judicial Discretion

The American Justice Benjamin N. Cardozo succinctly expresses the complexity underlying judicial decision making thus:

4. Baron de Montesquieu, *The Spirit of the Laws* (Legal Classics Library, Gryphon Editions Ltd, 1984).

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions.[5]

The Right Honourable Beverly McLachlin PC, Chief Justice of Canada, admits that judges frequently face difficult questions when there is a lacuna in the law for which there is no single clear and correct answer. Judging is not merely a process of applying abstract principles since a judge's decision impacts directly and indirectly not just on the litigants before the court, but also the public at large. In such situations, judges may be guided by reference to four sources: historical context, current context, recognised methods of logical reasoning and an appeal to what is just.[6]

The starting point would be to consider the historical evolution of the law on the particular issue and to consider possible solutions consistent with the historical development of law in that area.

The second source of guidance is the current context in which the particular issue arises. The socio-economic realities in which the decision is made then becomes pertinent. A judge is minded to ask himself or herself what would be the repercussions of the decision in the real world. In considering alternatives, a judge relies on expert evidence, experience and common sense.

The third source of guidance is recognised methods of judicial reasoning. Judges arrive at a decision by an objective consideration of various alternatives in past cases as well as hypothetical cases to determine how far a particular norm should be extended.

In the final analysis, when faced with a difficult problem a judge is guided by his or her sense of fairness or justice. The justice referred to here is not the vague notion of justice in a general sense but justice in a narrower

5. Benjamin N. Cardozo *The Nature of the Judicial Process* (Yale University Press, 1921).

6. *Judicial Impartiality: The Impossible Quest?* in *A Matter of Judgment: Judicial decision making and judgment writing* (2003).

sense: that is, justice concerned with the distribution of benefits and burdens (distributive justice) as well as the justice concerned with the rectification of rights violations (corrective justice).

Nevertheless, Justice McLachlin admits that utilisation of any or all of the four sources of guidance does not necessarily guarantee the influence of subjective elements in the decision making process. Faced with alternative choices, a judge would necessarily be predisposed to lend weight to some alternatives rather than others, based on the individual judge's personal inclinations. This underscores the complexity of the process of judicial decision making.

Do Judges Make Law Or Declare Existing Law?

The jurisprudential debate as to the meaning and extent of judicial discretion has notably been highlighted in the well-known jurisprudential debate between H.L.A Hart and Ronald Dworkin.

Hart's Concept Of Law[7]

Hart's concept of a legal system is the union of primary and secondary rules. According to Professor Hart, law when formulated as rules is necessarily general in nature to enable their application to the general public. In addition, however clearly rules are expressed, at some point their application becomes indeterminate. The Legislator cannot anticipate and provide for all the circumstances and fact situations to which conduct applies. Thus it is open to judges to fill in the 'gaps' left by the rules by using their discretion. Hart refers to these "gaps" as the "penumbra of uncertainty". This "indeterminate" area is sometimes referred to by Hart as "the open texture of law" which allows judges to exercise discretion.

> In every legal system a large and important field is left open for the exercise of discretion by the courts and the other officials in rendering initially vague standards determinate.[8]

Hart has stipulated three main reasons for the indeterminacy.

First, the indeterminacy of language which gives rise to a "penumbra of doubt". Hart gives the example of a rule in a bye-law which prohibits the admission of "vehicles" into parks. What is meant by the term "vehicle"? While it is clear that a literal interpretation of the term would include trucks, cars, buses, and motorcycles within the prohibition; would it also include baby prams, wheelchairs, skateboards, roller skates, child scooters?

7. H.L.A. Hart, *The Concept of Law,* (Oxford University Press, 1961).

8. H.L.A. Hart, *The Concept of Law*, 124.

A judge would determine the scope of "vehicles" prohibited under the statute not by a mere literal meaning of the term "vehicle", but by seeking the intention of the Legislature in enacting the particular statute. What is the purpose of the rule? What is the mischief it seeks to avoid?

If it was the intention of the statute to safeguard the safety of users of the park, then the prohibition against wheelchairs, baby prams, roller skates and skateboards would be beyond the intention of the Legislature. Therefore, much of conduct is not regulated by rules but depends on the judicial interpretation of those rules to particular fact situations.

The generally accepted view is that the proper judicial function is to construe a statute in accordance with the intention of Parliament.

However, questions have been raised as to what is meant by "legislative intent". Does it exist, is it discernible? It has been viewed as a construct, a fiction, or at best a presumed, or attributed intention of Parliament based on the legislative purpose revealed through the rules of statutory construction. That attribution is made by judges who interpret the statute and this entails a certain amount of discretion.[9]

According to Mason,[10] the legislative intent may be elusive and in such circumstances judges are often engaged in a creative exercise, spelling out a legislative intention on an issue to which the Legislator did not direct their minds.

Sometimes, judges would take a middle stand: express the need for law reform but underscore that this is a matter best left to the Legislature.

The argument against allowing judges to as it were, "fill in gaps in legislation" is the familiar argument of encroaching into the jurisdiction of the Legislature. However, the contrary argument is that statutes are only workable if there were some judicial freedom in this respect. It would appear that this represents a legitimate and necessary exercise of the judicial functions. Difficult questions of course remain on the proper limits of this exercise of the judicial function.

Second, Hart refers to indeterminacy arising from the use of general standards in statutes or case law. Notable examples are "reasonableness", "standard of due care", "just and equitable", "safe system of work". Also references to "fair rate" and "reasonable period" gives a wide discretion to judges to determine the scope of the terms.

9. French RS, *Judicial Activists-Mythical Monsters?* (2008) 12 Southern Cross University Law Review.

10. Sir Anthony Mason, *The Judge as Lawmaker* (1996) Mayo Lecture, James Cook University.

According to Julius Stone, the legal standards are developed not just by the application of logical reasoning to the facts, but by a consideration of value judgments.

> When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, just cause or excuse, sufficient cause, due care, adequacy or hardship, then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case.[11]

Third, according to Hart is the indeterminacy inherent in the common law system of precedent, which allows judges to depart from precedent if the instant case can be distinguished. Judges would by such technique extend or narrow the scope for the application of the precedent.

Dworkin's Interpretive Theory Of Law[12]

Ronald Dworkin objects to Hart's suggestion that judges have absolute discretion to "create law" where there is a "penumbra of uncertainty". Dworkin subscribes to the view that the judicial role is not to make law but to declare existing law. Judges hold office by appointment, not election. If judges were to make the law, they would be acting as "Deputy Legislator" and transgressing into the jurisdiction of the Legislature.

Dworkin offers a constructive interpretation of laws. Law is not comprised of a mass of disconnected rules and decisions but is envisaged as an organised and coherent structure embodying the rights and values of the community in a coherent and systematic way. This view is based on the premise that laws were all created by a single author (the community) adopting a common conception of values.

Dworkin uses the analogy of a chain novel in which a number of authors contribute a chapter each in the proposed novel. Each author is "constrained" to write a chapter that "fits in" with the rest of the chapters, but is not free to write a chapter that pursues a different direction from the rest of the chapters in the novel. The law is thus a seamless web in which even in "hard cases" there is always a right answer which accords and is consistent with established law.

11. Stone J, *Legal System and Lawyers' Reasonings* (Sydney: Maitland Publications Pty. Ltd., 1964) 263-264.

12. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

Applying the analogy to judges, a judge is therefore committed or obligated to decide particular cases according to principles that are consistent with and fit into the structure of established law. Thus what emerges from Dworkin's thesis is the predictability, consistency and orderly development of judicial decision making:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties … on the assumption that they were all created by a single author - the community personified-expressing a coherent conception of justice and fairness.[13]

For Dworkin, even in the so-called "hard cases", judges are obligated to follow certain standards:

> Discretion like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.

The judicial discretion exercised by judges, is at best discretion in a "weak sense". Dworkin demonstrates the difference between discretion in a "weak sense" and discretion in a "strong sense" by the following analogy:

A lieutenant orders his sergeant to select five of his most experienced men on patrol. The exercise of discretion by the sergeant is in a "weak sense". Discretion in a "strong sense" exists only if the sergeant has the discretion to select any five men. Judges do not have discretion in a "strong sense" as judges are obliged to decide in accordance with precedents, standards as well as values accepted by the community.

The Hart-Dworkin debate which prevailed in the 1950's has engendered much debate on the limits of discretionary power vested in the judicial office. Contemporary opinion however does not support the view that judges merely declare the law. The idea of the judge as merely declaring existing law is regarded as unrealistic, "a fairy tale". This was famously declared by Lord Reid in the following oft quoted words on the judicial function:

> There was a time when it was thought indecent to suggest that judges make law- they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him the magic words, "Open Sesame". Bad decisions are given when the Judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore.[14]

13. Ronald Dworkin, *Law's Empire* (Harvard University Press, 1987) 225.

14. *The Judge as Lawmaker* [1972] 12 JSP.T.L.

Social, Ethical, Moral Values And Policy Considerations

There is ongoing debate as to whether judges should be concerned with social values and policy considerations. What values and considerations should govern judicial decision making? How do judges determine what social values and policy considerations are applicable? In a multi-cultural society values may differ between communities. The arguments against their applicability are multifaceted. Are judges equipped to make a determination based on policy considerations when the nature of judicial decision making is circumscribed to the pleaded case of the litigants before the court and the particular facts and circumstances? The procedures and practices applicable to courts have been designed for the fact finding and determination of evidence between the respective litigants in the context of the adversarial system.[15]

Are policies better determined by the Legislature which has at its disposal the necessary facilities and resources to undertake judicial reform? These would include surveys, investigations and reports conducted where the findings are on a macro scale.

Questions also arise in respect of moral and ethical issues in which there is no clear community consensus.

Do judges take into consideration only the predominant values or values of the majority in the community? In the case of *Airedale N. H.S. Trust v. Bland*[16] the ethical and moral issue was whether the sterilisation of an intellectually handicapped female requires court approval. Lord Browne Wilkinson was of the opinion that:

> Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all-embracing, principles of law in a way which reflects the individual judge's moral stance when society as a whole is substantially divided on the relevant moral issues.[17]

Judicial Activism And The Rule Of Law

While it is possible to refer to dictionary definitions of judicial activism, the exact scope and meaning remains imprecise. The preponderance of writings which address judicial activism has added to the uncertainty of the

15. Sir Anthony Mason, *The Nature of the Judicial Process and Judicial Decision-Making* in *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (2003).

16. [1993] AC 789.

17. [1993] AC 789 at 880.

term as there arises disparate and contradictory meanings. In essence, however, it appears that judicial activism incorporates the following elements:

(i) failure to adhere to precedent;

(ii) judicial "legislation"; and

(iii) departures from accepted interpretive methodology.[18]

Craven[19] defines "judicial activism" as a judicial function relating to the common law, statute law and the Constitution. In his view, in respect of the common law, judicial activism is the conscious development of the common law according to the judicial evaluation of the direction or development of the law by taking into account legal, social, economic or other policies, in preference to precedent.

In respect of statute law, judicial activism means where a court adopts an interpretation of statutory language beyond the meaning of the words, or even an interpretation that is not within the intent of the statute because the meaning is unclear or because a "progressive interpretation" is required to bring the statute up to date to changing needs and circumstances.

Where the Constitution is concerned, judicial activism means a continual updating of the Constitution consistent with current social expectations, rather than according to its tenor, or in conformity with the intentions of the authors of the Constitution.

Jurisprudential debate is still divided on whether judicial activism is a positive or negative aspect of judicial function. Reference has been made to "proper" as opposed to "improper" judicial activism. It would not be wrong to say that in part the amorphous nature of judicial activism demonstrates the complexity of the judicial decision making process.

Judicial activism also contemplates judges assuming legislative and executive functions which is contrary to the constitutional doctrine of the separation of powers. Since it is part of the judicial function to interpret statutes and the Constitution, as well as to check excessive and illegitimate use of executive powers, the fear is that it would lead to what has been termed "an imperial judiciary".

18. Kmiee K, *The Origin and Current Meanings of Judicial Activism* (2004) 92 California Law Review 1441.

19. Craven G, *Reflections on Judicial Activism: More in Sorrow than in Anger*, speech to Samuel Griffith Society (1997).

Dicey had declared wide discretionary power as being contradictory to the rule of law. More recently, Heydon[20] has expressed the view that judicial activism, taken to extremes can spell the death of the rule of law. This begs the question of the legitimate and proper limits of judicial power. Is the exercise of wide discretionary power the equivalent of judicial activism?

While it is generally accepted that there should be certainty in law and there should be consistency and predictability in order that human conduct can be guided by law, it would also be difficult to dismiss the need for law to adapt to the changing needs and circumstances prevailing in society in order to remain effective and relevant.

This critical tension is nothing new. In his dissenting judgment in the case of *Candler v. Crane, Christmas & Co.*[21], Lord Denning describes the great divide between the two kinds of judges, thus:

> This argument about the novelty of the action doesn't appeal to me. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If we read the cases … you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action, on the other side there were the bold spirits who were ready to allow it if justice so required.[22]

Lord Denning refers to the judges who are open to creative interpretation of the law, which may include judicial law making, as "bold spirits", while those who adhere to established precedent and certainty of law as the "timorous souls".

The common law, also referred to as "judge-made law", has evolved through the creativity of judges to adapt and meet the changing needs of society. At times, the law goes even further by anticipating the future needs of society.

In *Woolwich Equitable Building Society v. Commissioners of Inland Revenue*[23], Lord Goff admitted that he was never quite sure where to locate the boundary between legitimate judicial development of the law and improper judicial lawmaking. His Lordship stated that if the boundary were to be too

20. Heydon D, *Judicial Activism and the Death of the Rule of Law* (2003) 47 Quadrant 9 at 10.

21. [1951] 1 All ER 432.

22. *Ibid.*

23. [1993] AC 70, 173.

rigidly drawn, *Donoghue v. Stevenson,* modern judicial review and *Mareva* injunctions would not have added to the wealth of the common law as they did.[24]

The burning question remains: is judicial activism a legitimate exercise of judicial function or does it spell the death of the rule of law? There is no easy answer to the question.

The concept of a legal system with rules of general application which gives certainty and predictability, and enables citizens to order their affairs accordingly is a cornerstone of the rule of law. The importance of the rule of law is the discipline to which all authority is subjected. The idea of untrammelled or unfettered judicial discretion is inconsistent with the rule of law.

At the same time, one cannot run away from the fact that law is not an exact science. The nature of law itself is larger than itself and certainly goes beyond a mere collection of rules. The words of Lord Radcliffe is particularly enlightening:

> You will not mistake my meaning or suppose that I deprecate one of the great humane studies if I say that we cannot learn law by learning law. If it is to be anything more than just a technique it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life.[25]

24. Referred to by Sir Anthony Mason, *The Judge as Lawmaker* (1996) Mayo Lecture, James Cook University.

25. Lord Radcliffe, *The Law and Its Compass* [1961] 92-93.

Rule Of Law And The Development Of Construction Law In Malaysia

by

Lim Chong Fong *

Introduction

The World Justice Project[1] has defined the rule of law based on internationally accepted standards to include, *inter alia*, the following principles:

(i) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and

(ii) justice is delivered timely by competent, ethical, and independent representatives and neutrals that are of sufficient number, have adequate resources, and reflect the make up of the communities they serve.

Malaysia subscribes to the rule of law as embodied in the Fourth National Principle of the Rukunegara. Besides constitutional governance, the rule of law has its role and matters in the economic development of the nation such as providing supporting legislation and dispute resolution infrastructure. This is generally applicable to all sectors of the national economy.

The construction industry is an important sector that propels the Malaysian economy. It enables the growth of other industries through its role as a fundamental building block of the nation's social economic development. Annually, the construction industry contributes to around 5.5% of the gross domestic product of Malaysia.[2]

Norms Of The Malaysian Construction Industry

The construction industry worldwide is dispute prone and the Malaysian construction industry is without exception. These disputes are defaults

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* Judicial Commissioner, High Court of Malaya, Penang. This article is adapted from the author's lecture presented at the Programme for QS Registration Scheme 2015.

1. An American-based independent and multi-disciplinary organisation working to advance the rule of law around the world.

2. CIDB: Construction Industry Transformation Programme 2016-2020.

arising from mismatch in expectations of the parties in the course of the implementation of the construction contract. They often revolve around construction quality, time for completion, extra work, abandonment of the project and inadequate or non-payment for work done.

It is common in the construction industry that construction contracts are awarded on tender or negotiated basis. Terms of the contract are dictated primarily by the party awarding the contract who is also the party making the payment. This is not prohibited by the Contracts Act 1950. The contractual terms may hence not necessarily be fair or balanced and that results in the other party absorbing considerable unwarranted risks whilst undertaking the work.

The undertaking of construction work is also inherently complex in nature. It involves multi-party participation often under open physical environment. Moreover it is capital intensive to finance the usage of materials and deployment of plant and labour. The challenge is undoubtedly to have the project completed on time to the required quality at the desired cost.

Construction disputes ensue from the eventuation of the unwarranted risks or unmet challenge or both. The affected parties in dispute naturally want justice for their loss or grievances by way of compensation. In a civilised community governed by the rule of law, justice can only be meted out *via* a dispute resolution forum recognised by the legal system of the country, commonly the courts of law. The expectation of the disputant parties in the dispute resolution process is plainly for expert, swift and economical justice.

The Early Years Of Construction Contracting And Dispute Resolution

In the early years of economic development of Malaysia in the late 1960s, the private sector mainly utilised the PAM/ISM Agreement and Conditions of Building Contract (1969 Edition) whilst the public sector utilised the PWD Agreement and Conditions of Contract. Both of these contracts were adopted from the English Royal Institute of British Architects (RIBA) Building Contracts and modified to suit local conditions. These forms were for use at the main contract layer with accompanying forms for nominated sub-contracts. From judicial decisions in the United Kingdom, there were anomalies and weaknesses seen in the forms. Consequently the private sector form was revised in 1998 to the PAM Agreement and Conditions of Building Contract (1998 Edition) and the public sector form was substantially revamped and revised in 1983 as the PWD 203 /203A Agreement and Conditions of Contract (Rev. 10/

83) to be followed later with six addendums. Notwithstanding that, there was widespread usage of bespoke construction contracts or major amendments made to the PAM form by the private sector to protect the employer's interest since the 1990s.

As for dispute resolution, court litigation was the principal mode of resolution of construction disputes in the early years. The notable cases include *Yong Mok Hin v. United Malay States Sugar Industries Ltd*[3] concerning repudiation of the contract by the main contractor due to non-payment of progressive payments by the employer, *Bandar Raya Developments Bhd v. Woon Hoe Kan & Sons Sdn Bhd*[4] on set offs against an interim certificate, *KP Kunchi Raman v. Goh Brothers Sdn Bhd*[5] concerning repudiation and defective work done, *Tan Hock Chan v. Kho Teck Seng*[6] on the dispute of failure to give site possession and the resultant *quantum meruit* claim, *Sim Chio Huat v. Wong Ted Fui*[7] on time being of the essence as well as time at large, *Syarikat Tan Kim Beng & Rakan-Rakan v. Pulai Jaya Sdn Bhd*[8] which dealt with extension of time under the PAM form of contract and *Kokomewah Sdn Bhd v. Desa Hatchery Sdn Bhd*[9] on defective construction, delay and termination of the construction contract.

Non recovery of payment for work done is often the dominant problem. The Supreme Court in 1995 dealt with the landmark construction case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Center Sdn Bhd*[10] on set off against the penultimate certificate pursuant to the PAM form of contract. In that case, Edgar Joseph Jr FCJ opined as follows:

> It is well known to lawyers engaged in the field of construction contract law that the question whether a building owner or main contractor is entitled to refuse to make payment of money to a contractor or sub-contractor, as the case may be, allegedly due and payable under an interim certificate issued by an architect or engineer, pursuant to provisions in a RIBA contract and other known forms of building contracts and sub-contracts, on the ground

3. [1966] 2 MLJ 286; [1964] 1 LNS 230.
4. [1972] 1 MLJ 75; [1971] 1 LNS 11.
5. [1978] 1 MLJ 89; [1977] 1 LNS 40.
6. [1980] 1 MLJ 308; [1979] 1 LNS 110.
7. [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ (Rep) 363.
8. [1991] 1 LNS 52; [1992] 1 MLJ 42.
9. [1995] 1 MLJ 214.
10. [1995] 2 MLJ 57; [1995] 2 CLJ 345, see also *Lim: Pembenaan Leow Tuck Chui Revisited*, MBJ (2003 1st quarter) 42.

> that he has cross-claims alleging defective work or overvaluation or damages for delay, is a question of ever recurring importance, which inevitably throws open for discussion the actual terms of the particular contract or sub-contract in the case and the all too familiar trilogy of cases of *Dawnays Ltd v. FG Minter Ltd & Anor* [1971] 2 All ER 1389; [1971] 1 WLR 1205, *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1974] AC 689; [1973] 3 All ER 195; [1973] 3 WLR 421, *Mottram Consultants Ltd v. Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 and their progeny…
>
> When, upon the proper construction of a particular contract which, of course, is a question of law, there is no obligation on the part of an employer in a main contract, or a main contractor in a sub-contract, to pay upon being served with a progress payment certificate, because of pending disputes, allegations of defects in works or materials or claims for damages for delay, without giving some reasonable amount of detail and quantification, are unlikely to result in the dismissal of an application for summary judgment under O 14 and leave to defend being given. (See *Kilby & Gayford Ltd v. Selincourt Ltd* (1973) 229 EG 1343, CA)…
>
> Having regard to the terms of the contract, if the employer had considered that the architect had failed in his duty to make the necessary deductions because of alleged defective work or materials as being not in accordance with the terms of the contract thus resulting in over-certification of the sums payable, the employer had three remedies open to him, namely:
>
> (i) to request the architect to make appropriate adjustments in another certificate; or
>
> (ii) if the architect declined to comply with that request, then to take the dispute to arbitration; or
>
> (iii) to sue the architect. (See *Sutcliffe v. Thackrah & Ors.*) …

and accordingly gave summary judgment to the main contractor on the unpaid penultimate interim certificate notwithstanding the allegations of overvaluation and defective work by the employer.

This decision gave inspiration and impetus to many unpaid sub-contractors and main contractors to seek for early recovery of payment by way of litigation using either the summary judgment or winding up procedure. There were however mixed results: several were successful [11]

11. *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* [2000] 7 CLJ 320, *Mascon Sdn Bhd v. Kasawa (M) Sdn Bhd* [2000] 1 LNS 203 and *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591.

whilst several others failed.[12] Ultimately it seems to be fact sensitive depending on the circumstances of each case rather than a certainty as a matter of general principle arising from that Federal Court case. The problem of collecting payment for work done whenever disputed therefore continues to persist.

Besides litigation, there was sporadic usage of arbitration for dispute resolution as seen from the notable cases of *Cheng Keng Hong v. Government of the Federation of Malaya* [13] on variations and *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [14] which dealt with abandonment of work. By the 1990s, there were more arbitration cases seen such as *AC Ho Sdn Bhd v. Ng Kee Seng (T/A Konsultant Senicipta)*,[15] *Usaha Damai Sdn Bhd v. Setiausaha Kerajaan Selangor*,[16] *Shencourt Sdn Bhd v. Arab- Malaysian Toda Construction Sdn Bhd & Anor*,[17] and *Daewoo Corporation v. Bauer (M) Sdn Bhd.*[18] The arbitrations were all conducted under the Arbitration Act 1952 which were unsatisfactory too because, amongst others, there was the right of the parties to state a consultative case to the High Court on questions of law midstream during the arbitration proceedings thereby frustrating the expeditious conclusion of the arbitration.[19] Besides, there were many challenges made against the arbitral awards in court for misconduct [20] and error of law on the face of the award [21] thereby further delaying the ultimate enforcement of the arbitration award.

12. *IJM Corporation Bhd lwn. Antara Bumi Sdn Bhd; Nesa Arkitek (Pihak Ketiga)* [2002] 1 LNS 27, *Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709 and *Kemayan Construction Sdn Bhd v. Prestara Sdn Bhd* [1997] 1 LNS 117.
13. [1966] 2 MLJ 33; [1965] 1 LNS 22.
14. [1971] 2 MLJ 210; [1969] 1 LNS 172.
15. [1998] 2 MLJ 393; [1998] 2 CLJ 645.
16. [1997] 5 MLJ 601; [1997] 1 LNS 415.
17. [1998] 7 MLJ 473; [1998] 1 LNS 350.
18. [1998] 7 MLJ 25; [1999] 7 CLJ 23.
19. Section 22 of the Arbitration Act 1952, see also n 14 *supra.*
20. Section 24 of the Arbitration Act 1952.
21. *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788, see also *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2001] 6 MLJ 727; [2003] 1 MLJ 49 (CA); [2003] 1 CLJ 103, [2004] 1 MLJ 401 (FC); [2004] 1 CLJ 743 and *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185.

By the close of the old millennium, it was perceived by the users that construction litigation and arbitration were not satisfactory as they were prolonged, increasingly expensive and subjected to unending court consultations and challenges. The inspiration that was derived from the Supreme Court case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd (supra)* has also been proven to have been misplaced.

Transformation Initiatives In The New Millennium

As for construction contracts, the Construction Industry Development Board (CIDB) launched the CIDB 2000 standard form of construction contract and nominated sub-contract which is balanced in terms of risks allocation shared between the parties and available remedies for default. This standard form did not however enjoy the popularity and usage it sought to achieve. It was not used at all by the public sector. There was only minimal usage in the private sector. The problem is that the standard form has been perceived to alter the *status quo* and is therefore adverse to the interest of the party making payment. The public sector instead in the latter half of the 2000s made a major revision to the PWD 203/203A Agreement and Conditions of Contract with the launch of the 2007 revision together with the accompanying standard forms of nominated sub-contract. There were further amendments in the 2010 revision and 2013 addendum particularly to cope with the advent of statutory adjudication. The revised PWD 203/203A Agreement and Conditions of Contract are skewed in favour of the Government.[22] In respect of the private sector contract, the PAM form and its accompanying nominated sub-contract form were revised in 2006 to re-balance the risks allocation between the parties as well as to set out detailed contract administration procedures including the imposition of strict conditions precedent relating to time and money claims. Many contractors and sub-contractors may not be prepared for or even realise the drastic consequences of non-compliance with these conditions precedent. That notwithstanding, it is also seen that many private sector employers have introduced their own bespoke addendums to complement and 'water down' the PAM 2006 contract in their favour.

Notwithstanding the revisions of the public and private standard forms of contract, there was prevalent usage of conditional payment provisions, *to wit*: 'pay when paid' and 'pay if paid' type of clauses in many construction contracts particularly those at the sub-contract level. These conditional

22. *Lim: The Malaysian PWD Form of Construction Contract,* 2nd Edition and 1st Supplement (Sweet & Maxwell Asia).

payment clauses were seen in either bespoke contracts or modified standard forms of contract. Cash flow is paramount in construction contracting. Conditional payment provisions stifle cash flow as payment to the sub-contractor in a 'pay if paid' payment clause is contingent upon the main contractor having actually received the corresponding payment from the employer. However in a 'pay when paid' payment clause, the payment to the sub-contractor is postponed. The sub-contractor has to be paid after reasonable time has elapsed irrespective of whether the main contractor has by then been paid by the employer.

There was much litigation that arose on the interpretation of such conditional payment provisions as to whether they are in law 'pay if paid' or 'pay when paid' clauses. In *Antah Schindler Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd*,[23] Suriyadi Halim Omar JCA (as he then was) opined as follows:

> [16] By the very language alluded to in the relevant provisions of the current main contract and sub-contract, read together with cl. 27(a)(vii), we had construed the latter as a mere provision imposing a time limit for payment. We found no express provision mounted into it which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant. Master Towle in *Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 had occasion to state:
>
> > While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a sub-contractor has the right to be paid, any such agreement would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe that the *contra proferentem* principle would apply to such clauses and that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clauses relied upon contain no ambiguity.
>
> [17] It was our view that, since it was not unambiguously expressed in cl. 27(a)(vii) that the plaintiff was to be denied its rights from pursuing the claim in the current format, this action was procedurally correct. We now discuss the merit of the appeal.
>
> [18] From the above arguments and despite the production of a substantial amount of documents we were of the view that the case was straightforward and simple. We were satisfied, not unlike the High

23. [2008] 3 CLJ 641.

> Court judge that the salient terms of the written contract had been agreed upon by both parties. The history of payments showed that parties had acceded to the mode of payment. On the other hand we disagreed that this 'pay when paid' clause disallowed the plaintiff from pursuing this claim, on account of there being no bar preventing it. We also found, as the High Court judge did that there was no dispute as to the quantum, and to-date the sum claimed still remained unpaid.
>
> …
>
> [24] Simply put, despite being faultless but pinned down by such inhibitive terms, the plaintiff's chances of recovering the balance by other alternative routes would face undue pressure and challenges. The fact that there was no cross-appeal on the judgment sum by the defendant speaks volumes of its assumed safe position, unwittingly accorded to it. Having said that, and in *obiter*, no court of law would condone any act, activity or inactivity or unholy collusions deliberately set up to defeat the plaintiff's claim (*Durabella Ltd v. J Jarvis & Sons Ltd* 83 Con LR 145).

Subsequently, in *Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd*,[24] Abdul Malik Ishak JCA opined as follows instead on a similar payment provision:

> [40] There is only one meaning to cl. 13.01. It is rather clear. That payment for the sub-contract works can only be made upon receipt of such payment by the defendant from the employer.
>
> [41] It must be borne in mind that the meaning of the contract, once interpreted by the court, does not change. Lord Diplock LJ explained it better in *Slim and Others v. Daily Telegraph Ltd. and Others* [1968] 2 QB 157, CA at pp. 171 to 172:
>
> > Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be 'right' conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right' meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed

24. [2010] 2 CLJ 28.

> major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it.
>
> …
>
> [46] Properly construed cl. 13.00 may be said to be a 'pay-when-paid' clause or 'back-to-back' clause. A classic example of a 'pay-when-paid' clause can be seen in the case of A *Davies & Co (Shopfitters) Ltd v. William Old Ltd*. [1969] 67 LGR 395, a Queen's Bench Division case. In that case the defendant was the main contractor for the erection of a new store on JCT 63 terms, which provided for certain work to be sub-contracted to a sub-contractor nominated by the architect. The architect obtained a tender for this work from the plaintiff and instructed the defendant to accept it. The defendant sent an order to the plaintiff on their standard printed form, which contained on its reverse, printed conditions which included a 'pay-when-paid' clause. The plaintiff wrote thanking the defendant for the order and carried out the work. The employer became insolvent before having paid for all the work. It was held that the contract between the plaintiff and the defendant was on the basis of the defendant's printed conditions, which the plaintiff had accepted. The defendant was only liable to pay for the work in so far as he had himself been paid by the employer.

The differing interpretation on these conditional payment clauses put forth by the Court of Appeal caused much exasperation, if not also despair to many sub-contractors who much needed cash flow.

Subsequently, in the Federal Court case of *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd*,[25] Jeffery Tan FCJ opined as follows:

> [1] In this appeal, the questions of law for determination are prolix. In *verbatim*, the 'leave questions' read as follows:
>
> [1] Whether the 'pay-when-paid' provision as found in cl. 11(b) of the sub-contract between the main contractor (the respondent) and the sub-contractor (the applicant) and in para. 14 of the pre-sub-contract letter of award, the material part of which reads:
>
> Clause 11(b) of the Sub-Contract:
>
> Within seven days of the receipt by the Contractor from the Employer of the amounts included under on (sic.) Architect's Certificate for which the Contractor has made an application under cl. 11(a), the Contractor shall notify and pay to the Sub-Contractor the total value

25. [2014] 7 CLJ 1.

certified therein... less: i) Retention money, that is to say the proportion attributable to the Sub-Contract Works of the amount retained by the Employer in accordance with the Main Contract...; and ii) The amounts previously paid.

Paragraph 14 Letter of Award:

Payments - Back to back basis. Within seven days upon [the Contractor] receiving from the Client [Employer], Sum Projects (Brothers) Sdn. Bhd.

is a provision that merely fixes the time of payment of the amount included under the Architect's Certificate as attributable the Sub-Contract Works namely seven days from the date of receipt of such payment by the Main Contractor from the Employer without absolving the Main Contractor from its liability to pay the Sub-Contractor, or, is otherwise a provision which prescribes the Main Contractor's liability to pay the Sub-Contractor as subject to or conditional upon the actual receipt of such payment from the Employer, regard being had to the conflicting decisions of the Court of Appeal in *Antah Schindler Sdn Bhd v. Ssyangyong Engineering & Construction Co Ltd* [2008] 3 CLJ 641 and *Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd* [2010] 2 CLJ 28.

…

[32] Time to honour payment to the appellant was contingent upon the time that the respondent would receive payment from the employer. That which was contingent was time for payment. But the fact that time for payment was so contingent could not reasonably extend to mean that even liability of the respondent was contingent, in the sense that the respondent would walk free 'if' the employer defaulted on the contract. For such a construction, there must be clear and unambiguous provisions to the effect that the liability of the respondent to pay the appellant, as opposed to time for payment, was contingent upon receipt of payment by the respondent from the employer. It must be universal truth that it need not even be said between contracting parties, that goods and services will naturally be paid by the receiving party. That is self-evident. 'So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract' (*Modern Engineering v. Gilbert-Ash* [1974] AC 689 at 718 per

Lord Diplock). The burden is on the party who proposes otherwise, to show that payment was on an 'if' basis. Hence, the burden was on the respondent to show that liability for payment was contingent. Since there were no such provisions to that effect or from which that could be so construed, it could not be so read into the sub-contract where it was silent, that the liability of the respondent was contingent. Time for payment of the certificates was contingent. But under para. 14 and cl. 11(b), the liability of the respondent was not contingent. The respondent was liable even 'if' the employer defaulted on the contract (for an analogy, see *Scobie v. McIntosh Ltd v. Clayton Bowmore Ltd* (1990) 23 Con LR 78, where it was held that with repudiation of the sub-contract by the main contractor and which was accepted by the sub-contractor, the primary obligations of the party in default which remained unperformed was substituted by a secondary obligation to compensate the sub-contractor for loss sustained in consequence of the non-performance of the primary obligations).

[33] That liability was contingent was also impliedly refuted by cl. 19 in the sub-contract. It should not be lost that 'the purpose of an interim certificate is to provide by payments on account a cash flow to enable the contractor to finance the work' *Crown House Engineering Ltd v. Amec Projects Ltd* (1990) 6 Const LJ 141, per Slade LJ), to enable 'interim payments to be made to the contractor as the Works progress' (*Tameside Metropolitan Borough Council v. Barlow Securities Group Services Ltd* (2001) 75 Con LR 112, [2001] EWCA Civ 1). 'The primary purpose of the interim certificates in this kind of contract is to ensure that the contractor will receive regular stage payments as his work progresses' (*London Borough of Camden v. Thomas McInerney & Sons Ltd* (1986) 9 Con LR 99; see also *Rohcon Ltd v. SIAC Architectural Ltd* [2003] IEHC 1133S 01) so 'that the sub-contractor can have the money in hand to get on with his work and the further work he has to do' (*Dawnays Ltd v. FG Minter Ltd and Another* [1971] 2 All ER 1389 per Lord Denning MR, which *dictum* was adopted by the Federal Court I in *Bandar Raya Developments Bhd v. Woon Hoe Kan & Sons Sdn Bhd* [1971] 1 LNS 11; [1972] 1 MLJ 75). ' ... the purpose of interim certificates is to see that the contractor is in sufficient funds to carry on the construction as it progresses' (*Unpaid Interim Payment Certificates* by Vinayak Pradhan [1997] 2 MLJ xv). But with termination of the sub-contract, the work thereunder would not progress any further. Given that work under the sub-contract would not progress any further, there was no further purpose for stage payments to finance work that had ceased and would not progress further, such that the purpose of para. 14 and cl. 11(b), indeed all provisions to do with interim certificates, had no further application, as the facts on the ground had moved beyond the purview of those provisions, which were spent and passed', to the stage of cl. 19. If the liability of the respondent were

> contingent, cl. 19 would reflect that. Contingent liability was not reflected. Clause 19 merely provided that upon termination of the appellant's employment, the appellant would be paid the value of the sub-contracted works completed at the date of termination. Effect must be given thereto.
>
> [34] Accordingly, our answers to the leave questions are as follows:
>
> Answer to question [1]: upon its proper construction, the instant so called pay when paid clause was a provision that merely fixed time for payment but did not absolve the respondent of liability to pay the amount certified and attributable to the work executed by the appellant.
>
> Answer to question [2]: upon termination of the sub-contract, all rights and liabilities were governed by cl. 19.
>
> Answer to question [3]: upon termination of the sub-contract, the entitlement of the appellant to be paid in accordance with cl. 19 was not contingent upon actual receipt by the respondent of such payment from the employer.

Although the Federal Court found the payment provision therein to be a 'pay when paid' clause but which had no application to a terminated contract, there was however no general pronouncement as to how conditional payment provisions ought to be uniformly or consistently treated. It is therefore apparent that this would continue to depend on the facts, particularly as to how the conditional payment clause is couched in each case.

Moving over to dispute resolution, the CIDB spearheaded construction mediation that included making mediation mandatory as the prelude to arbitration in the CIDB 2000 standard form of construction contract. The CIDB trained and created a pool in excess of 200 mediators. Unfortunately, construction mediation did not take off in resolving construction disputes that arose from the problems plaguing the construction industry.[26] It was hardly used principally because it is a non-binding procedure and is therefore incapable of enforcement to compel payment.

Akin to court litigation, arbitration is however a binding procedure. By the early 2000s, the Government of Malaysia was cognisant that there is the need to reform arbitral law in particular to repeal and reform the

26. *Lim: Malaysian Construction Industry Payment - Strategies for Reform* (LL.M. (Malaya) dissertation, 2009).

Arbitration Act 1952 (Act 93) in order to reposition Malaysia and compete to be a preferred venue for international arbitrations. As the result, the Arbitration Act 2005 (Act 646) was enacted based on the UNCITRAL model law. The new arbitration statute, amongst others, repeals the consultative case procedure. It is replaced with a regime of reference [27] to court on questions of law. This new regime of reference to court may either be contracted out or in [28] by the parties depending on whether the arbitration is a domestic or an international one respectively. There is greater [29] finality in the arbitration if the right of reference to court is absent. Besides the introduction of the new arbitration statute, the Government has rejuvenated the Kuala Lumpur Regional Centre of Arbitration (KLRCA) which, besides the Pertubuhan Akitek Malaysia, administers many domestic construction arbitrations. The pool of trained arbitrators in the KLRCA has been expanded and the KLRCA Rules of Arbitration have been revised now and again to better equip the arbitrators to conduct the arbitration with more effectiveness. At the launch of the new KLRCA premises at Bangunan Sulaiman, it has been documented [30] as follows:

> It has been more than three decades since the KLRCA was founded…Through our three plus decades of existence, however, we have continued to grow from strength to strength because of the loyalty and the dedication of the centre's past and present employees, and because of our panel of highly competent and respected arbitrators. This has enabled the KLRCA to evolve into one of the region's most enterprising and established alternative dispute resolution institutions.

Consequently, construction arbitrations continue to be popular and widespread in the resolution of construction disputes even though the conclusion is not necessarily swift.

By reason of the success seen in several Commonwealth countries [31] that have enacted statutory adjudication to resolve construction disputes, the

27. Sections 41 and 42 of the Arbitration Act 2005.

28. Sections 3(2) and 3(3) of the Arbitration Act 2005.

29. There is still the right of court challenge available under s. 37 of the Arbitration Act 2005 for serious irregularities only.

30. Preface to *KLRCA-Acknowledging the Past, Building the Future.*

31. United Kingdom in 1996, States of Australia commencing with New South Wales in 1999, New Zealand in 2002 and Singapore in 2004.

CIDB launched a similar initiative in the mid-2000s. The aim [32] is primarily to create a swift dispute resolution procedure to relieve choked cash flow by disputed non or under payment for work done or services rendered. This initiative was overwhelmingly supported by developers, contractors, sub-contractors, suppliers and professional consultants to be however met with opposition from arbitrators and lawyers. After much debate and compromise [33] that took place over several years, the Construction Industry Payment and Adjudication Act 2012 (Act 746) (CIPAA) was finally enacted in June 2012. In hindsight, the enactment of the CIPAA was only made possible due to persistent and unrelenting efforts of the Master Builders Association Malaysia (MBAM) as the prime mover of that initiative in tandem with the CIDB. The CIPAA is an interesting legislation which may not be easily navigated.[34] The KLRCA as the Adjudication Authority has trained in excess of 300 adjudicators to cope with the anticipated massive influx of statutory adjudication cases. There have been more than 200 adjudication cases registered with the KLRCA since the coming to force of the CIPAA in April last year. The High Court has also dealt with several of these cases that were eventually challenged.[35] In the maiden court case of *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and Another Case* (*supra*) on CIPAA, Mary Lim J (as she then was) opined as follows on its background and purpose:

32. *Lim: The Malaysian Construction Industry-The Present Dilemmas of Unpaid Contractors*, MBJ (2005 4th quarter) 80 and see also *Lim: Inadequacy of Present Laws and the Need for the Proposed CIPAA*, MBJ (2007 1st quarter) 72.

33. *Lim: Jurisprudence Behind the CIPAA* [2012] LR 550.

34. *Lim: The Legal Implication of CIPAA* (KLRCA Newsletter, Jul-Dec 2012 Issue) 9.

35. *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 11 MLJ 499; [2015] 5 CLJ 527, *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 4 AMR 560; [2015] 8 CLJ 728, *Mudajaya Corporation Bhd v. Leighton Contractors (M) Sdn Bhd* [2015] 3 AMR 688, *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise (M) Sdn Bhd* [2015] 4 AMR 565; [2015] 5 CLJ 848; *Foster Wheeler E&C (M) Sdn Bhd v. Arkema Thiochemicals Sdn Bhd (and Another Originating Summons)* [2016] 1 AMR 118; [2015] 1 LNS 632, *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd (and Another Appeal)* [2015] AMEJ 1095; [2015] 1 LNS 756, *Madujaya Enterprise Sdn Bhd v. Koshina Konsult (K) Sdn Bhd* [2015] AMEJ 1382; [2015] 1 LNS 786 , *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd (and 2 Other Appeals)* [2015] AMEJ 1568 and *WRP Asia Pacific Sdn Bhd v. NS Bluescope Lysaght Malaysia Sdn Bhd (formerly known as Bluescope Lysaght (Malaysia) Sdn. Bhd. (and Another Originating Summons)* [2016] 1 AMR 379; [2015] 1 LNS 1236.

[1] The Construction Industry Payment and Adjudication Act 2012 (Act 746) ('CIPAA') is a much awaited piece of legislation. For years, the idea of establishing such a regime was bandied around both in the construction industry and the legal profession that serves that industry. It would be fair to say that until the Arbitration Act of 2005 (Act 646) was ensconced in the legal landscape, and that piece of legislation was itself long in making its appearance, the idea of introducing and adopting the English practice of adjudication was seen with much skepticism. So, when CIPAA was finally enacted by Parliament in 2012, it was welcomed with much fanfare. Numerous courses, seminars, lectures, conferences were organised to introduce and familiarise all who were either affected by or simply interested or curious to know about CIPAA. Many assumed training as adjudicators, anticipating to play some role when the Act was enforced.

…

[91] Having examined the broad framework of CIPAA and seeing how it works, the burning question surely is, why has Parliament seen it fit to enact such an elaborate piece of legislation for just this aspect of the construction industry?

…

[92] As stated in the long title of the Act, CIPAA is an 'Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'. Each of these objectives relate to or is connected with payment; be it to facilitate regular and timely payment; provide speedy dispute resolution through adjudication which we have seen is also about payment; or to provide remedies for the recovery of payment in the construction industry. This long title of the Act confirms and reaffirms the observation that the court had earlier made, that the Act is, in essence and in reality legislation dealing with a very niche aspect of the construction industry. It only deals with payment which generally arise in the course of executing the relevant works or as the works progress; and how to secure that payment. …

…

[98] According to the Deputy Minister, the construction industry however, experiences problems over payments; either there is non-payment, late payment or insufficient payment. All this cause cash flow problems which in turn lead to delays in the completion of projects, compromise in the quality of works, and in cases of critical contracts result in a termination of those contracts. Ultimately, the construction industry gets a negative image.

[99] After taking stock of all these concerns, discussions and dialogues were conducted with the various stakeholders. CIPAA was conceived from those efforts. Through CIPAA, adjudication was to be offered as a simple, fast and cheap mechanism for resolving these payment problems or payment disputes faced by the construction industry as opposed to the existing resolution through arbitration or the courts; these two options being either time consuming or costly. Adjudication is an additional option; additional as the existing options may be concurrently invoked.

…

[130] From this examination, it can thus be seen that the legislative bodies of the respective jurisdictions discussed all had substantially the same common intention, object and purpose in enacting their own versions of CIPAA as our Parliament in relation to CIPAA. Adjudication was considered the most viable option in addressing the same ills or inequitable practices faced by the construction industries the world over - payment disputes over progress or stage payments. The disputes invariably were on delayed, insufficient or simply non-payment of interim claims made by main, subcontractors or sub-subcontractors.

[131] I am fortified in these observations when the Explanatory Statement of the Bill on CIPAA is examined:

> The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to facilitate regular and timely payment in respect of construction contracts and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry. The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits conditional payment terms that inhibit cash flow. The Act also seeks to provide remedies for the recovery of payment upon the conclusion of adjudication.

[132] It can reasonably be deduced that the hallmarks of adjudication or the key elements of adjudication would be the provision of a speedy, interim resolution mechanism for payment disputes. When an adjudication decision results in payments, there are remedies for recovery of such payments. Given that it is only an interim remedy to uncork the blockage in the cash flow which is the life blood of the construction industry, it may be, in a sense, be liken to a stent that is frequently put in place in arterial blockages through angioplasty etc. The experiences of other jurisdictions have been positive and encouraging; such that the Malaysian Parliament has seen fit to duplicate, but with modifications, many of the provisions found in the relevant legislations of those jurisdictions.

…

> [136] Seen in its proper perspective, it cannot be denied that adjudication is nothing more than a dispute resolution mechanism. It is a regime, process or procedure before which the parties' disputes or differences over payments claimed by one party against the other party will be determined by an adjudicator. That adjudicator's decision (as opposed to an award or an order), though enforceable, is only provisional for the intervening period, commonly referred to as 'temporary finality'. Through CIPAA, adjudication is offered on a statutory framework and it is offered as an additional alternative to existing payment dispute resolution forums such as the court and arbitration specially and specifically for the construction industry. …

In addition, the CIPAA has also outlawed conditional payment provisions.[36] In other words, the nightmares arising from 'pay if paid' or even 'pay when paid' clauses are over.

Notwithstanding that construction arbitrations have been widely used, there are still many court litigations involving construction disputes where there was no arbitration agreement or those *multi-partite* ones involving claims in tort. The Bar Council in the late 2000s hence embarked on the initiative [37] to convince the Malaysian Judiciary and the Works Minister to establish a specialist construction court that would complement construction arbitration and statutory adjudication. The initiative gained momentum when the CIDB jointly participated in that initiative after the enactment of the CIPAA. The Chief Justice on the Opening of the Legal Year 2013 announced [38] that specialist construction courts would be set up in Kuala Lumpur and Shah Alam with specialised judges to hear disputes as demand for construction projects rise. Both courts became operational on 1 April 2013.

The construction court focuses on resolving complex, technical *cum* legal construction disputes and is expected to dispense expedient resolution of all construction disputes that do not get referred to arbitration or adjudication.

36. Section 35 of the CIPAA.

37. *Lim: The Quest for Construction Justice Reform*, MBJ (2009 2nd volume) 46.

38. Sunday Star, 13 January 2013, at 16.

The construction court will also hear challenges to construction arbitration awards and adjudication decisions and enforcement of adjudication decisions.

There have been in excess of 285 cases filed in the construction courts as at 31 December 2014.[39]

The Future And Way Ahead

The then Chief Executive of the CIDB, Dato' Sri Dr Judin Abd Karim has stated [40] that the trinity comprising the KLRCA, CIPAA and specialist construction courts will give the construction industry a significant boost in reducing delays in construction projects. Arbitration, statutory adjudication and litigation in the construction court are complementary to one another. They have been designed to arrest the shortcomings experienced in the previous millennium. New dispute resolution procedures nevertheless bring new challenges,[41] particularly their effectiveness. Consequently, the success or otherwise of the Malaysian transformed construction justice landscape will be seen in the not too distant future both from the law reports and views of the construction industry stakeholders.

Be that as it may, it is plain that the successful implementation of the transformation forthwith requires adequate supporting infrastructure. There must be the publication of specialist law reports of judgments from the construction courts.[42] A construction law and dispute resolution academy should be established that offers programmes to train construction advocates, adjudicators, arbitrators, mediators, expert witnesses and even judges.

Finally, there is the medium term future need to perhaps regulate construction contracting to deal with the prevailing and continuing problem of unbalanced and unfair allocation of risks in construction contracts. This is evident from the public sector standard form of contract

39. *CIDB Malaysia: Learning from Decided Construction Cases and Commentaries* at 27.

40. The Edge Financial Daily, 5 October 2012, at 6.

41. *Lim: Resolution of Construction Industry Disputes: Arbitration, Statutory Adjudication or Litigation in the Construction Court?*, MBJ (2013 1st & 2nd volume) 86.

42. *Construction Law Digest* published by the Society of Construction Law Malaysia.

that significantly favours the Government and the bespoke or modified private sector standard form of contract that favours the employer or paying party. There has also been perceived increasing abuse in the usage of nominated sub-contracting in the private sector. The problem undoubtedly stems from lopsided bargaining power of parties including negotiations that often lacked good faith.[43] The solution to the problems is necessarily a statutory one as seen from the conditional payment problem that was ultimately addressed by the CIPAA. Ideas may be derived and developed from foreign concepts such as the Unfair Contract Terms Act of the United Kingdom (which has already been substantially adopted in the Malaysian Consumer Protection Act 1999)[44] and the Fair Trading Act of Australia.

Conclusion

To conclude, it can be surmised that construction law in Malaysia has thus far developed progressively within the national framework of the rule of law. The future growth will undoubtedly continue to be so: both *via* case law as supplemented by legislative intervention as well as contractual arrangements that reflect the changing needs of construction contracting parties.

43. MBAM Seminar on *'Looking at Practical Implications of the Nominated Sub-Contractors'* held on 29 March 2016.

44. *Fairview International School Subang Sdn Bhd v. Tribunal Tuntutan Pengguna Malaysia & Anor* [2015] 9 MLJ 581.