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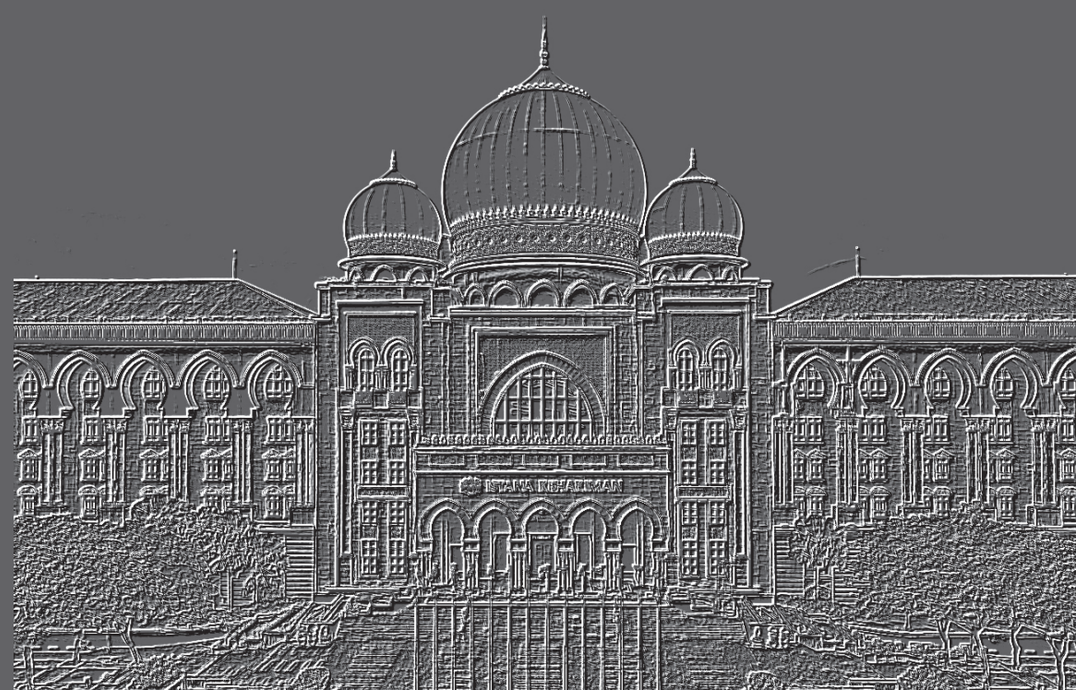

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FOREWORD

As this journal evolves, linear changes will take place.

Certain ideas and concepts emerge as do their shape and visage. The cover for instance represents this new construct.

This slim volume will be augmented in the coming months and a fuller account will hopefully be contained in the next publication.

Justice Zainun Ali
Managing Editor

CONTENTS

Judicial Review: The Malaysian Experience

by

*Tan Sri Dato' Seri Md Raus bin Sharif**

[1] In this paper, I will start by discussing the basic premise over which the philosophy of judicial review lies. Here, I will discuss the concept and the importance of judicial review in the broader legal context and provide some broad characterisation of the way in which issues arise in the decision-making process of public authorities in Malaysia. Secondly, I will discuss the scope of judicial review and its procedure under Malaysian laws. I will then share with you the approach by the Malaysian courts in this area of the law, i.e. the recent trends in the Judiciary in developing the boundary of issues falling within the scope of judicial review. Finally, I seek to draw some of these threads together to suggest how questions of the intensity of scrutiny may assist an understanding of the operation of judicial review in Malaysia. In this part, I endeavour to discuss the limitations placed on judicial review and the probable grounds on which judicial review cannot be invoked.

Background

[2] Before addressing the position of judicial review in Malaysia, it is important to first understand the meaning of the term judicial review.

[3] Judicial review as defined in *Halsbury Laws of Malaysia*, Volume 9 (paragraph 160.059) is:

> … the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.

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* The Right Honourable Chief Justice of Malaysia. This article is adapted from the author's speech at the ILKAP Speaker Series 1/2017 on May 19, 2017 at Auditorium ILKAP, Institut Latihan Kehakiman dan Perundangan (ILKAP), Bangi.

[4] The expression judicial review may be taken to refer to the process by which the courts exercise their supervisory jurisdiction to see that public authorities do not act outside the remit of their powers. In other words, judicial review is a process whereby a court of law examines the conduct of a body to establish whether or not that body has acted lawfully, in the sense of acting within the scope of its lawful powers.[1] In practice, this power of judicial supervision is administered by the High Court on other courts in the lower judicial hierarchy, as well as other public entities which are entrusted with the task of administering judicial or quasi-judicial functions.[2]

[5] For me, judicial review is the "backbone of administrative law and the most potent weapon available to an aggrieved individual to challenge the validity of the decision-making process of public authorities".[3]

[6] Judicial review should be seen as providing an essential foundation for good governance under the rule of law. As a concept, judicial review has developed to ensure that public bodies which exercise law-making powers or adjudicatory powers are kept within the confines of the power conferred.

[7] The growth of judicial review in our jurisdiction in recent years is consistent with what has happened in many common law jurisdictions. The courts continue to face many challenging issues in judicial review cases. Questions concerning individual rights such as freedom of speech, freedom of assembly and right to privacy, as well as those relating to property and economic interests often form the crux of judicial review applications.[4]

[8] The rationale behind the remedy of judicial review is to protect individuals against illegal acts of the administration by providing remedies/redressals for wrongs done to the individual. Courts are also duty bound to ensure that administrative bodies act lawfully and not

1 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995), p 552.
2 Arjunan, Krishnan, "Judicial Review and Appellate Powers: Recent Trends in Hong Kong and Malaysia", [2000] 2 MLJ lxx.
3 Ahmad Masum, "The Doctrine of Judicial Review: A Cornerstone of Good Governance in Malaysia", [2010] 6 MLJ cxiv.
4 Nik Ahmad Kamal Nik Mahmod and Anwarul Yaqin, "Reasons in Administrative Decision-Making: The Reach of Judicial Reviewability in Malaysia", [2003] 4 MLJ xcvi.

act unlawfully; and to ensure that the administrative bodies perform their public duties in accordance with law.[5] Judicial review has then a dual role; to provide relief to the person who has challenged some particular administrative action, and to influence future administrative action.[6]

[9] His Royal Highness Al-Marhum Sultan Azlan Shah in stating the importance of judicial review in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*[7] said, "Every legal power must have legal limits, otherwise there is dictatorship … The courts are the only defence of the liberty of the subject against departmental aggression".

[10] There are two main areas in a judicial review application. The first relates to supervision of administrative action in its many forms by the principles of legality, procedural impropriety and irrationality. These are grounds developed through case law. The second area concerns control over the exercise of discretionary powers, and here the subject matter can be very wide indeed, ranging from the exercise of powers of preventive detention, to powers of disciplinary bodies and discretion in relation to planning decisions.[8]

[11] It has always been the position in England that in judicial review proceedings, the sole function of the court is to scrutinise the decision-making process and not to question the decision itself. For the most part, they have steered clear of exercising appellate powers, or at least have professed to do so. In the leading case of *Chief Constable of the North Wales Police v Evans*,[9] the House of Lords took the Court of Appeal to task on the proper role of the court in judicial review cases:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will … under the guise of preventing the abuse of power, be itself guilty of usurping power.

5 Seow, Zhixiang, "Rationalising the Procedure for Judicial Review in Singapore", *Singapore Journal of Legal Studies*, pp 533-552, December 2011.

6 Barker, Anthony, "The Impact of Judicial Review: Perspectives from Whitehall and the Courts", Public Law, Winter 1996, pp 612-621.

7 [1979] 1 MLJ 135.

8 Mohamad Ariff bin Md Yusof, "Recent Trends in Judicial Review in Malaysia", unreported.

9 [1982] 3 All ER 141, HL.

[12] The attitude of the courts in Malaysia is somewhat consistent with their English counterparts. In exercise of their supervisory powers, grounded on inherent jurisdiction, courts have from time immemorial interfered with the decisions of administrators and inferior courts and tribunals on a variety of grounds, including illegality, irrationality, and unreasonableness and for infringement of rules of natural justice. The basic premise for this interference was that the Legislature, in setting up the authorities, must have intended that the authorities should have a defined field of operation and they have no right to venture outside the set limits. The traditional stance in judicial review proceedings in Malaysia was to review the decision to ensure that the decision-maker had not defaulted in the decision-making process. Hence, the courts were more involved in vetting the decision-making process rather than questioning the actual decision itself.[10]

[13] However, there was a forward march in this area of the law after *R Rama Chandran v Industrial Court of Malaysia & Anor*[11] (*"Rama Chandran"*). The Federal Court in *Rama Chandran* held that the decision of an inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permit the courts to scrutinise the decision not only for process but also for substance. It allows the courts to go into the merits of the matter. His Lordship Edgar Joseph Jr stated that "Lord Diplock's *other* grounds for impugning a decision … permits the courts to scrutinize such decisions not only for *process*, but also for *substance*".

[14] The Federal Court reiterated the same stance in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*[12] (*"Ranjit Kaur"*) but with a rider that not every case is amenable to the *Rama Chandran* approach**.** The Federal Court said so in the following manner:

> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 AMR 1008; [1997] 1 MLJ 789; [1997] 2 CLJ 11 after

10 Lobo, B, "Appellate Powers and Consequential Relief in Judicial Review—R Rama Chandran Revisited", [2000] 3 MLJ ccxxv.

11 [1997] 1 AMR 433; [1997] 1 MLJ 145, FC.

12 [2011] 3 AMR 38; [2010] 6 MLJ 1, FC.

affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[15] It is important to note that in *Rama Chandran* the Federal Court was dealing with a decision of the Industrial Court. That is why in *Ranjit Kaur* the Federal Court stated in no uncertain terms that there may be cases in which, for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views on substance. It must not be overlooked that the courts have a very delicate task to perform. The temptation for a judge to substitute his own view for those of the Minister, or statutory body, in whom is vested the relevant power, and to concern himself with the merits of the particular decision, has to be resisted. In judicial review proceedings, courts are concerned only with the lawfulness of the decision-making process and with the requirement that the exercise of any statutory power affecting a citizen's rights or interests should be performed in accordance with the rules of natural justice, that is, fairly.[13]

Procedure and scope of judicial review

[16] The statutory basis of judicial review actions in Malaysia is provided under section 25(2) read with paragraph 1 of the Courts of Judicature Act 1964 ("CJA"). Section 25(2) of the CJA states two things:

(i) the High Court is conferred with additional powers set out in the Schedule to the Act; and

(ii) such additional powers shall be exercised in accordance with any written law or rules of court relating to the same.

13 Arjunan, Krishnan, supra, n 2.

[17] Paragraph 1 of the Schedule to the CJA gives the High Court power to issue to any person or authority directions, orders or writs, including *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others for the enforcement of the rights conferred by Part II of the Constitution or for any purpose.

[18] The exercise of these prerogative powers is provided for by the Rules of Court 2012 ("ROC") that is Order 53. The prerogative powers are issued in judicial review proceedings under Order 53 rule 1(1) of the ROC. The applicant may also claim for a declaration, injunction and damages as well as seek discovery and interrogatories in the judicial review application. (See Order 53 rule 2(2), Order 53 rule 5(1) and Order 53 rule 6 of the ROC).

[19] Order 53 rule 3(1) provides that an application for judicial review cannot be made unless leave of court is obtained to make the application. The application must be made within three months from the date when the grounds for application first arose or the decision is first communicated to the applicant. The court however is given power to extend time on an inter partes application. But the applicant must provide good reasons as to why the application is made out of time.

[20] What is the threshold requirement at leave stage under Order 53 rule 3(1)? The Federal Court in *WRP Asia v TNB*[14] laid down the following test:

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e. unless the matter for judicial review is amenable to judicial review no success may be envisaged.

[21] In an application for judicial review the court first determines whether the applicant has locus standi to bring the case to the court.[15] For the purposes of procedural locus standi, the applicant needs only to show that he is "adversely affected by the decision of any public authority" (see Order 53 rule 2(4)).

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14 [2012] 4 CLJ 478, FC.

15 Singh, Ranjit s/o Harbinder Singh, "A Comparative Study of Approaches to Public Interest Litigation (*Government of Malaysia/UEM v Lim Kit Siang* Revisited)", [2003] 4 MLJ i.

[22] The procedural locus standi under Order 53 rule 2(4) is wider than the restrictive test in *Boyce v Paddington*[16] which was applied previously in Malaysia in *United Engineers (M) Berhad v Lim Kit Siang*.[17] The Malaysian position on locus standi was restated by the Federal Court in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor*[18] ("*Malaysian Trade Union Congress*"). The Federal Court in *Malaysian Trade Union Congress* stated that the "adversely affected test", is a single test for all the remedies provided for under Order 53 of the ROC. In order for an applicant to pass the "adversely affected test", the applicant had to show he had a real and genuine interest in the subject matter, which was different from the "sufficient interest" test applied to English cases under the English Supreme Court Rules 1977.

[23] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. By virtue of Order 53 of the ROC only a decision made by a public authority is amenable to judicial review. To qualify, there must be a sufficient public law element in the decision made. Whether an entity is subject to judicial review depends on whether its activities are subject to supervision according to the rules and principles of public law. This is the general rule. The Federal Court in *OSK & Partners Sdn Bhd v Tengku Noone Aziz & Anor*[19] held that the court will look at the structure, nature, powers, duties and functions of the body in issue to look for the existence of a "public law element".

[24] When the element of public law is satisfied, the mode of commencement of claims must be made by way of a judicial review. This was discussed at length in the Federal Court case of *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors*[20] ("*Ahmad Jefri*"). In *Ahmad Jefri* the Federal Court held the view that there must be the presence of a public law element to attract the remedies of judicial review. The Federal Court further held that the correct procedure in a case where an aggrieved person can direct and pursue his complaint against a public authority in a court of law for a decision made by them affecting him must be by way of Order 53 of the ROC. However,

16 [1903] 1 Ch 109.
17 [1988] 2 MLJ 12.
18 [2014] 2 AMR 101; [2014] 3 MLJ 145, FC.
19 [1983] 1 MLJ 179, FC.
20 [2010] 5 CLJ 865, FC.

there are exceptions "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons", or where the claim is against the public authority for negligence. This was based on the principles propounded in *O'Reilly v Mackman*.[21]

[25] In *Ahmad Jefri* it was clearly stated by the Federal Court that if the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of Order 53 of the ROC. However, if it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under Order 53 of the ROC must be adopted. But if the matter is under private law, though concerning a public authority, the mode to commence such action may not be necessarily under Order 53 of the ROC.

[26] This issue was clarified by the Federal Court in *Superintendent of Lands and Surveys, Samarahan Division & Anor v Abas Naun & Ors and Another Appeal*.[22] The issue before the Federal Court was on the mode of commencement of proceedings of a native customary rights ("NCR") related claim: whether in light of the decision of the Federal Court in *Ahmad Jefri*, the claim should have been made by way of judicial review proceedings or the claim should be made by way of writ action.

[27] The Federal Court held that the writ action filed by the respondents/natives in that case was an exception to the general principle as propounded in *Ahmad Jefri.* Simply put, by this ruling a suit filed by a person claiming NCR to challenge the decision of a public authority which supposedly infringes the claimant's alleged rights is an exception to the general rule in *Ahmad Jefri.*

[28] In *Indira Ghandi Mutho v Ketua Polis Negara*[23] ("*Indira Ghandi*") the Federal Court in an appeal arising from a judicial review proceeding ordered a *mandamus* compelling the IGP to command the execution of a warrant of a committal order, against the respondent father in a custody case. Even though this case started as a private dispute between

21 [1982] 3 All ER 1124, HL.
22 [2015] 1 AMR 455; [2015] 1 CLJ 18, FC.
23 [2016] 3 AMR 521; [2016] 5 CLJ 353, FC.

the husband and wife for custody of their children, it had developed somewhat into a challenge to the administration of justice when a warrant of committal was issued against the father for disobeying the civil court order.

[29] The decision to order a *mandamus* against the IGP in the judicial review application was consistent with the earlier decision of the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*[24] ("*Petrojasa*"). In *Petrojasa*, the respondent (Petrojasa Sdn Bhd) had obtained a monetary judgment at the High Court against the State Government of Sabah. Petrojasa then applied for and obtained judgment. As the State Government of Sabah did not make payment as required, Petrojasa filed an ex parte application for leave for judicial review for an order of *mandamus* against the Minister of Finance and Government of Sabah to pay the sum in accordance with the said judgment. Leave was granted. However, the substantive application for judicial review was dismissed by the High Court.

[30] The Court of Appeal allowed the appeal by Petrojasa. The Government of Sabah appealed to the Federal Court. The issue before the Federal Court was whether judicial review proceedings may be taken against the Government of Sabah to compel the payment of a judgment for a monetary sum obtained against the State Government of Sabah.

[31] Arifin Zakaria FCJ (as he then was) in answering the issue in the affirmative held that there was a duty on the part of the government to pay the judgment sum to Petrojasa. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*. The Federal Court in *Petrojasa* opined that the order of *mandamus* was issued against the Sabah State Government "to put right what was plainly wrong in law".

[32] Similarly, the Federal Court in *Indra Ghandi* was also trying to put right what was untenable in law, namely for the IGP not to command the execution of a committal order issued by the court.

24 [2008] 5 AMR 1; [2008] 5 CLJ 321, FC.

Judicial review in practice

[33] In *Ah Thian v Government of Malaysia*,[25] our apex court declared that the doctrine of parliamentary supremacy as practised in the United Kingdom does not apply in Malaysia because we have a written constitution. It follows that the power of Parliament and State Legislature in Malaysia is limited by the Federal Constitution ("the Constitution") as they cannot make any new law as they please.[26]

[34] If any statute, including one amending the Constitution, should offend the basic structure and features of the Constitution such as the sacrosanct concepts of separation of powers and judicial independence, the Judiciary has the inherent jurisdiction to strike it down as unconstitutional under Article 4(1). The Judiciary can declare an Act of Parliament as unconstitutional under Article 4(1) on the supremacy of the Constitution.

[35] The Judiciary is able to exercise control over subsidiary legislation. This is by virtue of sections 23(1) and 87(d) of the Interpretation Acts 1948 and 1967 which, in effect, lay down the principle that any subsidiary legislation which is inconsistent with an Act of Parliament or State Enactment shall be void to the extent of the inconsistency.

[36] The role of judicial review as a cornerstone of good governance in Malaysia could be viewed from two prongs: (i) where powers are conferred on the superior courts to determine the constitutional validity of federal and state laws and to invalidate them on the ground of unconstitutionality; and (ii) where constitutional supremacy is maintained by reviewing the executive act on constitutional as well as on administrative law grounds.[27]

[37] Under the first prong, the juristic basis on which courts exercise judicial review is through the "doctrine of ultra vires". "Ultra vires" is a Latin phrase which simply means "beyond powers" or "without powers". The common law doctrine of ultra vires is the foundation of judicial review and it is broadly applied to every executive action, or inaction, which affects the rights of citizens.

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25 [1976] 2 MLJ 112, SC.

26 Gopal Sri Ram, "Intensity of Judicial Review: The Way Forward" at the 13th Professor Emeritus Ahmad Ibrahim Memorial Lecture 2012, Moot Court, Ahmad Ibrahim Kulliyyah of Laws (AIKOL), International Islamic University Malaysia on December 5, 2012.

27 Jain, MP, "Malacca Law Seminar: Judicial Review of Administrative Action", March 9-10, 1985; eprints.um.edu.my.

[38] The doctrine of ultra vires as used in administrative law implies that discretionary powers must be exercised for the purpose for which they were granted. At the inception, the application of the doctrine was designed exclusively to ensure that administrative authorities do not exceed or abuse their legal powers.[28] If they did so, such acts are ultra vires and therefore, invalid. The English decision of *Padfield v Minister of Agriculture, Fisheries and Food*[29] rejected the concept of "unfettered discretion", holding that Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the particular Act and that the policy and objects of the particular Act must be determined by construing the Act as a whole and construction is always a matter of law for the courts.

[39] A whole range of administrative activities were therefore brought within the purview of judicial control as to their vires, on the footing that:[30]

(1) every executive action must have a legal basis to it; and

(2) every legal power must be exercised within its limits, in good faith and reasonably to achieve the objective of the power.

[40] Whether an agency has acted ultra vires is a complex question of law. Many statutes confer legislative powers on the administration. The system of legislation by the administration is known as subsidiary or delegated legislation. This can be recognised in practice by such terms as regulations, rules, by-laws, etc. The power of delegated legislation is also significant. The public authorities' administration can vitally affect the rights of the people through delegated legislation. Thus, courts are called upon to develop norms for controlling delegated legislation. Anyone adversely affected by any subsidiary legislation may challenge the same in court. The court applies the doctrine of ultra vires to adjudge the validity of the subsidiary legislation in question. The underlying purpose of the doctrine is to assess whether the said subsidiary legislation falls within the power delegated.

[41] Judicial review of statutes on constitutional grounds is affected by a cluster of doctrinal practices that are generally accepted by the

28 Talagala, Chamila S, "The Doctrine of Ultra Vires and Judicial Review of Administrative Action", *Bar Association Law Journal of Sri Lanka*, Vol XVII (2011).
29 [1968] AC 997, HL.
30 Iyer, Dr Venkat, "The Importance of Judicial Review", (2002) INSAF XXXI No. 4.

courts but not entirely consistent with each other. Courts usually judge statutes "as applied" rather than as written. Courts interpret statutes in ways that avoid constitutional difficulty. These practices presumably are intended to preserve the impugned legislation. However liberally or narrowly the court construes a statute in question, the end result must be one which can be reconciled with the Constitution.

[42] Take the case of *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and Another Appeal*.[31] In that case the impugned legislation the validity of which was in question was the Malaysian Palm Oil Board (CESS) (Oil Palm Fruit) Order 2007 ("2007 Order") which was issued by the Minister of Plantation, Industries and Commodities under section 35 of the Malaysian Palm Oil Board Act 1998 ("the Act"). Pursuant to this Order, oil palm producers who owned oil palm holdings, which were not less than 40.46 hectares, were required to pay the Malaysian Palm Oil Board ("the Board"), the first appellant, a cess for every metric tonne of crude oil. The cess collected was to be utilised to compensate the losses incurred by the producers and packers of cooking oil by reason of the increase in the price of crude oil and to stabilise the price of cooking oil. The respondents being oil palm planters challenged the validity of the 2007 Order. The Federal Court was invited to decide on whether the 2007 Order was ultra vires the Constitution and whether section 35 empowered the Minister to impose cess via subsidiary legislation.

[43] The trial judge decided in favour of the respondents. The trial judge after acknowledging that Parliament had authorised the imposition of cess on terms set out under section 35 of the Act was of the view that the cess collected could only be used for the purpose set out under section 33 of the Act. After examining section 33, he opined that the use of cess to subsidise the price of cooking oil was not one of the purposes for which cess collected could be utilised by the Board. For that reason alone the trial judge decided that the 2007 Order was ultra vires and consequently void and illegal.

[44] The Court of Appeal agreed with the High Court.

[45] The Federal Court decided differently. The Federal Court was of the view that the 2007 Order which was issued by way of subsidiary

31 [2015] AMEJ 1112; [2015] 7 CLJ 149, FC.

legislation pursuant to section 35 had not contravened Article 96 of the Constitution. The Federal Court held that in considering the proper statutory construction of a taxing statute, one which would promote the purpose of the Act in question should be adopted. The Minister's power in the present case, which was to impose cess for the purpose of subsidising the price of cooking oil, should be viewed against the background, scheme and circumstances under which the 2007 Order was promulgated. In this regard, it was clear that the Act had given the Minister enough guidance on the use of his discretion to decide whether cess could be collected to subsidise the price of cooking oil.

[46] Another example was the case of *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* ("*Victoria Martin*").[32] The issue in contention here was whether a non-Muslim could be admitted as a *Syarie* lawyer to represent parties in any proceedings before the Syariah Court in the Federal Territory of Kuala Lumpur.

[47] The applicant, Victoria Jayaseele Martin, an advocate and solicitor of the High Court in Malaya, applied to be admitted as a *Syarie* lawyer in the Federal Territory of Kuala Lumpur, Malaysia. Her application was however rejected on the ground that she is not a Muslim, a condition imposed by rule 10 of the Syariah Lawyers Rules 1993, commonly known as the *Peguam Syarie Rules* 1993 ("the Rules").

[48] In her application for judicial review to quash the decision of the Majilis Agama Islam Wilayah Persekutuan ("MAIWP") she contended that MAIWP had contravened the Constitution in rejecting her application. She had asked the court for a declaration that rule 10 of the Rules, which only allows Muslims to be accepted as *Syarie* lawyers in the Federal Territory, was unconstitutional as it violates specific provisions of the Constitution, namely, Article 5 on the right to life and liberty, Article 8 on the right to equality and Article 10 on the freedom of speech, assembly and association.

[49] In dismissing Ms Martin's application the High Court, in 2011, held that the Majlis was empowered under section 59(2) of the Administration of Islamic Law (Federal Territories) Act 1993 ("the 1993 Act") to make rules relating to the qualifications for admission of

32 [2016] 2 AMR 715; [2016] 4 CLJ 12, FC.

persons as *Peguam Syarie*, including the power to impose a condition that the applicant must be a Muslim. The judge further decided that (i) the Majlis had the discretion to admit any person with sufficient knowledge of Islamic law to be *Peguam Syarie* subject to subsection (2); (ii) the words "may admit" in section 59(1) show that it is not mandatory for the Majlis to admit a person solely on the basis of having sufficient knowledge of the Islamic law; (iii) the Majlis was empowered by virtue of section 59(2) to regulate the qualifications of a *Peguam Syarie* and was allowed to impose the conditions appearing in rule 10 of the Rules; and (iv) the impugned rule 10 does not contravene Article 8 of the Constitution.

[50] On appeal, however, the Court of Appeal set aside the decision of the High Court and declared that rule 10 mandating that only Muslims may be admitted as *Peguam Syarie* was ultra vires section 59(1) of the 1993 Act. The Court of Appeal held, inter alia, that the words "any person" in section 59(1) in their natural meaning mean any person regardless of his or her religion may be admitted as a *Peguam Syarie* since there is nothing in the 1993 Act which restricts the meaning of the said words to mean "any Muslim".

[51] At the Federal Court the primary questions posed for determination were whether that part of rule 10 mandating that only Muslims can be admitted as *Peguam Syarie* (a) is ultra vires the 1993 Act ("the first question"), and (b) contravenes Articles 5 and/or 8(1) and/or 8(2) and/or 10(1)(c) of the Constitution ("the second question").

[52] By majority, in allowing the appeals and in answering both the questions posed in the negative, the Federal Court held that the application of section 59(1) is conditional and dependent upon the provision in section 59(2). Section 59(2)(a) of the 1993 Act clothes the Majlis with the power to make rules pertaining to qualifications for the admission of a *Peguam Syarie*. The word "qualifications" used in section 59(2) is wide enough to enable the Majlis to impose the conditions appearing in rule 10 of the Rules. Thus, the additional qualifications required by the Majlis under rule 10, read together with the qualification of any person with sufficient knowledge of Islamic law appearing in section 59(1), would then complete the definition as to who may be appointed as a *Peguam Syarie* for the purposes of the 1993 Act. Accordingly, that part of rule 10 mandating that only Muslims can be admitted as *Peguam Syarie* is not ultra vires

and also not in contravention of Articles 5, 8(1) and 10(1)(c) of the Constitution.

[53] The minority took a diametrically opposed view. The minority was of the same view as the Court of Appeal.

[54] The above cases are examples of how some statutes give wide discretion to Ministers to issue orders. Some statutory powers are conferred in broad and subjective terms. The statutory formulae of interpretation in this sort of cases vary. Hence, in the above cases the High Court and Court of Appeal in some instances were similar in their views as compared to the Federal Court. Some were different in their approach. Even at the Federal Court as you can see from *Victoria Martin*'s case that we were split at 3:2.

[55] Now moving on to the second prong, where the courts may review the decision of a lower tribunal on administrative law grounds. In Malaysia, we have achieved quite a milestone in this area of the law. A number of ground-breaking decisions in judicial review are in the field of employment law.

[56] There has been much development in the reviewability of Industrial Court awards in the face of ouster clauses. By virtue of section 33B of the Industrial Relations Act 1967 ("the IRA 1967"), the awards of the Industrial Court are, generally, insulated from challenge in any court. Thus, the award of the Industrial Court is, per the IRA 1967, to be final and conclusive in relation to the dispute between the parties and it is not to be called into question at all.

[57] The traditional approach as set by the Privy Council in *South-East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employee's Union*[33] ("*Fire Bricks*") restricted the scope of judicial review in industrial law cases through the application of ouster clauses vide section 33B of the IRA 1967. To justify this, the Privy Council drew a distinction between a jurisdictional error of law and mere error of law. It was held that only an error of law that went to the jurisdiction of the decision-maker could warrant the curial intervention of the courts via judicial review.[34]

33 [1983] 1 ILR 77, PC.

34 Shanmugam, N, "Deliverance from the Dominance of Fire Bricks", [1995] 3 MLJ cxxxvii.

[58] Thus, when a statutory tribunal makes a decision which is in excess of its jurisdiction and authority, it commits an "error of law". Such decision is invalid in law, or a nullity, and as such would not enjoy the protection afforded by the ouster clause. In other words, the ouster clause is deemed to have been intended to only immunise decisions of the statutory tribunal which are made without jurisdictional errors or errors of law. Only then would the decision qualify as a determination made in accordance to law. Such was the limitation placed based on the ouster clause pursuant to section 33B of the IRA 1967.

[59] In more recent times, our civil courts have taken the view that any error of law by the Industrial Court would be sufficient for the High Court to intervene by way of judicial review notwithstanding section 33B. The case on point in this regard is the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union*[35] ("*Syarikat Kenderaan Melayu Kelantan*") where his Lordship held that since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immuned from judicial review by an ouster clause however widely drafted.[36]

[60] The *Syarikat Kenderaan Melayu Kelantan* decision represented a clear departure from the *Fire Bricks* approach towards the section 33B ouster clause. In the result, section 33B is only applicable to prohibit an appeal from the Industrial Court. The award, if infected by open-ended categories of errors of law, may be successfully impugned in a judicial review action.[37]

[61] As stated earlier, the scope of judicial review in Malaysia has been expanded beyond the common law. In the landmark case of *Rama Chandran* the Federal Court decided that when a decision of a public decision- maker or statutory tribunal (such as the Industrial Court) is challenged on the grounds of irrationality or illegality, the supervisory court is entitled to review the procedural aspects as well as the substance or merits of the decision.[38]

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35 [1995] 2 AMR 1601; [1995] 2 CLJ 748, CA.

36 Pillay, Sudha CKG, "The Ruling in *Rama Chandran*—A Quantum Leap in Administrative Law?", [1998] 3 MLJ lxii.

37 Anantaraman, Prof V, "The Industrial Relations Act 1967: A Review from the Workers' Perspective", [2002] 1 MLJ i.

38 Anantaraman, V, "The Enigmatic Law on Unfair Dismissals in Malaysian Industrial Relations", [1999] 2 MLJ ciii.

[62] In *Rama Chandran* the appellant was dismissed by his employer and he made a claim for reinstatement or in the alternative for compensation on the ground that the dismissal was without just cause or excuse. The Industrial Court, however, held that the dismissal was for just cause or excuse. The appellant's subsequent application for judicial review having been dismissed by the High Court, the appellant appealed to the Federal Court.

[63] This court (comprising Eusoff Chin Chief Justice, Edgar Joseph Jr and Wan Yahya FCJJ) unanimously allowed the appeal. However, Wan Yahya FCJ dissented on the issue of whether the court could proceed to grant consequential relief instead of remitting the case to the Industrial Court.

[64] The case is significant in the Malaysian jurisprudence for the innovative contributions it has made on at least two fronts. Firstly, it has elaborated on the meaning to be assigned to what Lord Diplock had said in the case of *Council of Civil Service Unions & Others v Minister for the Civil Service*[39] with regard to the grounds on which judicial review may be granted. Secondly, the case has broken new ground in asserting the legal power to grant consequential relief in judicial review proceedings instead of following the norm of remitting the case to the original decision-maker.

[65] The decision in *Rama Chandran*'s case has given the supervisory court the power to reconsider the award of the Industrial Court on its merit where it can be shown that there was irrationality (*Wednesbury* unreasonableness) or illegality in the decision. Thus, the High Court would in reality be exercising certain appellate powers. In the result, despite the prohibition of appeals by section 33B of the IRA 1967, the High Court has now the power to examine the merits of the decision of the Industrial Court in a judicial review action that is grounded on the two heads of errors of law identified in the *Rama Chandran* case.

[66] The Federal Court in *Rama Chandran* also went on to hold that where a judicial review action results in the award being quashed on the merits, the supervisory court can substitute its own decision in place of the decision of the Industrial Court. This is again a departure from the norm in judicial review proceedings as it has always been the position that the review court has no such powers and the exercise of these powers would be usurpation of the statutory functions of

39 [1985] AC 374, HL.

the Industrial Court.[40] The Federal Court however relied on the section 25 of the CJA power and particularly the following words in paragraph 1 of the Schedule to that Act: "… for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose". These words, according to the court, would allow the supervisory court to protect a workman's fundamental right to livelihood as guaranteed by the Constitution by holding, in an appropriate case, that a dismissal was without just cause or excuse.[41]

[67] The Federal Court in the *Rama Chandran* case also drew on the section 25 power and held that the supervisory court could, in appropriate cases, proceed to mould the appropriate relief to meet the requirements of justice in the particular case. Thus, in practical terms, the review court could quash the award upon reviewing the award on merits, hold that the dismissal was unfair and proceed to order, for example, compensation from loss of employment in the form of back wages. This was a departure from the previous practice of remitting the matter back to the Industrial Court for adjudication for the appropriate relief.[42]

[68] The liberal and progressive approach established in *Rama Chandran* has been applied in a plethora of cases, particularly in the area of industrial relations law.

[69] As stated earlier, the *Rama Chandran* principle was restated without equivocation in the recent Federal Court case of *Ranjit Kaur* in the following terms:[43]

> Historically, judicial review was only concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a

40 Dr Anwarul Yaqin, "Procedural Fairness in Dismissals for Misconduct : Some Reflections on Judicial Trends in Malaysia", [1999] 2 MLJ cxl.

41 Venugopal, Vijayan, "*Certiorari* – An Employment Perspective", [2001] 4 MLJ cclxxiii.

42 Professor Dr Anwarul Yaqin and Associate Professor Dr Nik Ahmad Kamal Nik Mahmod, "Ministerial Discretion to Refer A Dispute to The Industrial Court: Some Issues of Reviewability", [2002] 4 MLJ clxviii.

43 Arjunan, Krishnan, supra, n 2; an extensive yet critical analysis by the learned commentator on the impact of *Rama Chandran*.

landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

[70] The above analysis indicates clearly what the traditional position was in respect of judicial review powers, and the departure therefrom, particularly in the Malaysian jurisdiction.

[71] Many years after, the Federal Court had the opportunity to decide on the principle of proportionality of punishment. The principle of proportionality of punishment was duly considered in *Norizan Bakar v Panzana Enterprise Sdn Bhd* ("*Norizan Bakar*").[44]

[72] In *Norizan Bakar* the Federal Court stated that the Industrial Court could substitute its own view, in place of the employer's view, as to what should be the appropriate penalty for an employee's misconduct. The Federal Court was of the view that the Industrial Court is empowered to replace the penalty of dismissal by the employer with a lesser penalty, not amounting to dismissal, even though the employer has specified dismissal as penalty for the particular misconduct in its disciplinary rules and regulations.

[73] In *Norizan Bakar*, the claimant, Norizan Bakar, was dismissed by Panzana Enterprise Sdn Bhd ("the company") from its employment after the company's domestic inquiry panel found him guilty of four charges of misconduct.

[74] The Industrial Court decided that the particular misconduct (which had been proven) was not serious enough to justify dismissal. Reinstatement was not a suitable remedy in the circumstances. The Industrial Court awarded Norizan back wages and compensation in lieu of reinstatement. The company applied to the High Court to quash the Industrial Court award. The High Court dismissed the application.

[75] The company appealed against the decision to the Court of Appeal. The Court of Appeal set aside the High Court's decision and quashed the Industrial Court award. The Court of Appeal held that both the

44 [2013] 6 AMR 338; [2013] 9 CLJ 409, FC.

Industrial Court and the High Court were wrong in substituting their views on the appropriate penalty to be imposed on Norizan. The Court of Appeal held that in considering the reasonableness of what a reasonable employer would have done, no court should substitute its own views, in place of the employer's views, on what should be the appropriate penalty for an employee's misconduct.[45]

[76] Norizan appealed to the Federal Court. The Federal Court held that the Industrial Court has the jurisdiction to decide that the dismissal of Norizan was without just cause or excuse and/or that the punishment of dismissal was too harsh in the circumstances by using the doctrine of proportionality of punishment, when handing down an award under section 20(3) of the IRA 1967. The Federal Court held that the doctrine of proportionality of punishment is inbuilt into the IRA 1967 through section 30(6) and item 5 of the Second Schedule to the IRA 1967. By virtue of the doctrine of proportionality of punishment, the Industrial Court in considering the appropriate relief to be granted in cases involving unlawful dismissal of a private sector employee is at liberty to take into account the contributory misconduct of the employee and accordingly can substitute its own views as to what is the appropriate penalty for the employee's misconduct for the view of the employer concerned.

[77] The Federal Court's decision in *Norizan Bakar* has an important bearing in the industrial relations and employment law jurisprudence in Malaysia. The Industrial Court can now substitute its own view as to the appropriate penalty for the employee's misconduct, for the view of the employer concerned. This is indeed another instance the Malaysian Judiciary has shown great activism in the field of industrial relations law.

Limitations on judicial review

[78] Just how courts should venture in exercise of their judicial review function has, quite clearly, occupied centre-stage in the frequent debates on judicial review.

[79] In some jurisdictions, courts under the guise of judicial activism have made many ground breaking decisions in judicial review

45 Cheah Choo Kheng, "Doctrine of Proportionality of Punishment on Industrial Practice", [2014] 1 LNS(A) vi.

cases. Unsurprisingly, judicial activism has not been entirely free of controversy. There are always eminent dangers of judges overreaching themselves and trespassing into the territory of elected government. In this sort of situations judicial activism has passed into "judicial excessivism". The problem is this: where does the province of the courts end and that of the elected representatives begin?

[80] The courts do not have jurisdiction to frustrate the powers of an elected government, but they have and must exercise a jurisdiction to prevent an elected government from exercising powers which it does not have or from exercising the powers which it does have by a procedure which is unfair.

[81] Except on those rare occasions when a legislature goes beyond its powers, the courts uniformly defer to the legislative will. It is politicians, not judges, who must take responsibility for the laws enacted by Parliament and for their operation. In matters of statute law, the courts are not the translators of democratic opinion; theirs is the more pedestrian role of interpreting the language of the law enacted by Parliament. If it were otherwise, the rule of law and the democratic process would be subverted.

[82] The courts will review executive action only to ensure that the exercise of executive power is within the boundaries of the law, and by a procedure that accords natural justice to the affected party or parties. But the courts do not and cannot review the desirability of legitimate policies or strike down decisions which are fairly made in accordance with legitimate policies. The courts are fitted to determine and enforce individual rights; they are ill-fitted to settle administrative policies that must take account of the diverse interests of the whole community.[46]

[83] There are certain matters which are beyond judicial purview. In these matters interference beyond the defined limits would constitute an abuse of the courts' supervisory jurisdiction. These considerations shape the scope of the doctrine of non-justiciability. For starters, courts should decline reviewing decisions involving matters of government policy as judges are ill-equipped by training to review the merits of executive policies. Further, courts should not hinder the Executive

46 Anwarul Yaqin and Nik Ahmad Kamal Nik Mahmod, "Review and Appellate Powers: An Elusive Quest for Maintaining the Dividing Line", [2004] 3 MLJ lxvi.

or any branch of government in the conduct of matters traditionally within their realm. We must not lose sight of the fact that there are areas of prerogative power that the democratically elected Executive and Legislature are entrusted to take charge of, and not the Judiciary. In these matters the Executive and Legislature are ultimately accountable.[47]

[84] Excessive interference by courts in matters of high policy can only lead to a serious questioning of judicial legitimacy. Hence, judicial review must always balance between the rule of law and democratic values, keeping in view the wider objective of securing the constitutional rights of the citizens and yet ensuring that the Judiciary remains within its boundary, that is, interpreting laws and the Constitution. This is where the limitation is set on the reviewability of administrative decision.[48]

[85] To list out a few instances:

(i) In *Repco Holdings v PP*[49] it was held that the exercise of discretion by the Attorney General under Article 145(3) is put beyond judicial review.

(ii) In *Juraimi bin Husin v Lembaga Pengampunan, Negeri Pahang & 2 Ors*[50] it was held that the prerogative of mercy is not amenable to judicial review.[51]

(iii) In *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia*[52] it was held by the Federal Court that:

> … the disbursement of the Special Constituency Allocation is a policy matter which is not within the purview of the courts … the courts are in no position to evaluate the qualifications in the application for the Special Constituency Allocation and

47 Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore", SAL Conference 2011 – Singapore Law Developments (2006-2010).

48 Nayel Musa Shaker Al-Omran, "Admissibility Conditions of a Constitutional Action and its Limitations in the United States of America", [2011] 3 MLJ i.

49 [1997] 3 MLJ 681.

50 [2001] 3 AMR 2995; [2001] 3 MLJ 458.

51 See the Federal Constitution, Article 42: the Yang di-Pertuan Agong, the Ruler of the State concerned and the Yang di-Pertua Negeri have power to grant pardons in respect of all offences. It is exercised on advice of the Pardons Board.

52 [2013] 3 AMR 315; [2013] 2 CLJ 1009.

> to determine or decide on the policy made by the executive … government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors ….

(iv) In *City Growth v The Government of Malaysia*[53] it was held that a decision made in an investigation into a crime is not reviewable. Here the order made by the DPP under section 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 to seize movable property in the possession of financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied was held to be part and parcel of an investigation. This was affirmed in the recent Federal Court case of *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementrian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor*.[54]

(v) Statute may exclude judicial review (*Pengurusan Danaharta v Tang Kwor Ham*).[55]

(vi) An ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended. If the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause. (*Kerajaan Malaysia v Nasharuddin;*[56] *Lee Kew Sang v Timbalan Menteri Dalam Negeri*).[57]

(vii) In *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor*,[58] the Court of Appeal held that judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant, it will only be exercised in exceptional circumstances. The applicant must show exceptional circumstances, such as a clear lack of jurisdiction or a blatant

53 [2005] 7 CLJ 422.
54 [2015] 1 AMR 540; [2015] 1 MLRA 341.
55 [2007] 4 AMR 533; [2007] 4 CLJ 513.
56 [2003] 6 AMR 497; [2004] 1 CLJ 81.
57 [2005] 4 AMR 724; [2005] 3 CLJ 914.
58 [2008] 5 AMR 458; [2008] 6 CLJ 235, CA.

failure to perform some statutory duty or a serious breach of natural justice.

[86] Case law shows that not all decisions are reviewable or amenable to judicial review. The nature of the decision and who makes it is important. For example in *Members of the Commission of Enquiry v Tun Ahmad Fairuz*[59] the Commission of Enquiry ("COE") in the VK Lingam video clip enquiry made certain findings adverse to the applicants in their report which was made public. The applicants applied for *certiorari*.

[87] At the leave stage the Attorney General objected to the application on the ground that what the applicants sought to quash was not a decision under Order 53 rule 2(4) and therefore they were not "adversely affected". The question before the Federal Court was whether the "findings" of the COE were reviewable under Order 53?

[88] It was held that the COE was a public authority but not a decision-making body. An order of *certiorari* was to quash the legal effect of a decision. The COE did not make a legal decision. The findings and recommendations of the COE did not bind the applicants. Such findings were not reviewable as the applicants' legal rights were not directly affected. The second reason given was that there was a strong policy consideration that it was against public interest to allow the findings of the Commission to be challenged in court.

[89] When discussing limitations, I must also discuss of the limitation set under Article 4(1) of the Constitution. If one wishes to challenge the validity of any federal or state law on the ground that the law provides for any matter on which its maker (Parliament or the State Legislature, respectively) has no power to make laws, three restrictions apply.[60] These restrictions were helpfully summarised by Suffian LP in *Ah Thian v Government of Malaysia*.[61]

[90] First, such a challenge can only be brought in proceedings for a declaration that the law is invalid on that ground, or (in the case of federal Acts) in proceedings between the Federation and one or more States, or (in the case of State law) in proceedings between the

59 [2011] 6 AMR 381; [2011] 6 MLJ 490.
60 Tay Tze Vern, Wilson, "The Use and Misuse of Article 4(3) and 4(4) of the Federal Constitution", [2015] 2 MLJ cliv.
61 Supra, n 25.

Federation and that State. Consequently, if an individual or private party seeks to invalidate any law on this ground, he must frame his action as a proceeding for a specific declaration to that effect.

[91] Secondly, Article 4(4) means that any individual or private party seeking to invalidate law on this ground must first obtain leave of a Federal Court judge to commence these proceedings, and the Federation as well as any State that would be affected shall be entitled to be a party to such proceedings.

[92] Thirdly, only the Federal Court has jurisdiction to decide whether any law made by Parliament or a State Legislature is invalid on the ground that it relates to a matter on which the relevant legislature has no power to make law.

[93] In practice, therefore, individuals and private parties seeking to challenge the constitutionality of federal or State law on the ground mentioned in Article 4(3) and 4(4) must first move the Federal Court for leave to bring proceedings for a specific declaration to that effect. This motion is heard and disposed of by a single judge. If leave is granted, the individual or private party may then proceed to petition the Federal Court for the declaration.

[94] In the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors*[62] ("*Titular Roman Catholic Archbishop of Kuala Lumpur*") the Federal Court heard the leave to appeal application against the decision of the Court of Appeal in overruling the High Court and ruling that the first respondent ("the Minister"), in prohibiting the applicant from using the word "Allah" in the Malay version of its weekly publication ("the *Herald*") on grounds of public order or national security ("the Minister's decision"), was acting intra vires the law and the Constitution, and further, had not transgressed the rules of natural justice and fairness nor violated the *Wednesbury* principle of reasonableness or the principles of illegality, proportionality and irrationality.

[95] In refusing the applicant's leave to appeal the Federal Court by majority reiterated the limitations set by Suffian LP in *Ah Thian*[63] to the effect that the party seeking to challenge the validity or the

62 [2014] AMEJ 0795; [2014] 6 CLJ 541, FC.
63 Supra, n 25.

constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court pursuant to Article 4 of the Constitution. Further, the respective State must be made party so as to give the State an opportunity to defend the validity or constitutionality of the impugned provision.

[96] Clearly the limitation set in this case was that the validity or constitutionality of the laws could not be questioned by way of collateral attack as was done in the present case. It follows that the High Court judge, for reasons of procedural non-compliance and want of jurisdiction, ought not to have entertained the challenge on the validity or constitutionality of the impugned provision. It follows further that the finding of the High Court judge that the impugned provision was arbitrary and unconstitutional was rightly set aside by the Court of Appeal.

[97] A similar stance was taken by the Federal Court in *State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors*.[64] In that case the issue before the Federal Court was whether the validity and constitutionality of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992, which is a State law could be questioned and challenged by way of collateral attack in judicial review proceedings in the High Court. Whether the judicial review action was rendered incompetent as the proper mode of challenge should have been in accordance with procedures laid out in clauses (3) and (4) of Article 4 of the Constitution.

[98] The respondents in this case had sought to challenge the validity and constitutionality of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ("section 66"), and to that end had applied to the High Court by way of judicial review for declarations to that effect. The application, however, was dismissed by the learned judge. The respondents appealed, whereupon the Court of Appeal, upon noting that the respondents were Muslim males suffering from Gender Identity Disorder, and that section 66 had indeed criminalised any Muslim male who sported a woman's attire or posed as a woman in a public place, ruled that section 66 had directly affected the

64 [2015] 6 AMR 248; [2015] 8 CLJ 975, FC.

respondents, and more, had offended their fundamental liberties as guaranteed by Articles 5(1), 8(2), 9(2), 10(1)(a) and 10(2) of the Constitution.

[99] The appellants applied for, and having obtained, leave to appeal, raised the following preliminary issue before the apex court, namely, that, since the respondents had in actuality challenged the validity or constitutionality of section 66 on grounds that the State Legislature (of Negeri Sembilan) had no power to enact that provision, the respondents were duty bound to comply with the specific procedure as laid down in clauses (3) and (4) of Article 4 of the Constitution, and commence the application in the Federal Court and with leave of a judge of that court—and further that—since the respondents had not done so, and had instead initiated the challenge by way of judicial review in the High Court, the application in the High Court was rendered incompetent in law with the result that both the High Court and the Court of Appeal had committed a jurisdictional error when they decided to entertain the application and the appeal thereon.

[100] In allowing the appeal and setting aside the judgments of the Court of Appeal and High Court, the Federal Court, following its earlier decision in *Titular Roman Catholic Archbishop of Kuala Lumpur* held that the validity or constitutionality of section 66 could not be questioned by way of collateral attack in a judicial review proceeding before the High Court. Such challenge could only be made by way of the specific procedure as provided in clauses (3) and (4) of Article 4 of the Constitution. The Federal Court held that since the respondents had failed to follow the specific procedures as laid down in clauses (3) and (4) of Article 4 of the Constitution, the learned judges of the Court of Appeal as well as the High Court were in grave error in entertaining the respondents' application to question the validity or constitutionality of section 66 by way of judicial review.

Conclusion

[101] When all is said and done, the fact remains that judicial review has proved to be a very useful and very effective instrument of democratic constitutionalism in many jurisdictions. It has often made up for legislative inaction or served as a bulwark against an overbearing Executive. Court decisions in many judicial review cases

have important repercussions for various political, economic and social problems which confront our society.[65]

[102] From what I have discussed in the preceding paragraphs the constitutional role of the courts is only to determine the limits of legality by reference to the relevant constitutional and statutory provisions and the applicable common law principles. Courts are only concerned with what is legally valid, and what is not, in accordance with legal norms and principles.

[103] Judicial review proceedings are a good sign that the legal system and the operation of the rule of law remain functional. There is no doubt that in any given legal system where the doctrine of judicial review is allowed to operate without any hindrance, the end result would be an adherence to the principles of good governance such as respect of the rule of law, protection of human rights, accountability and answerability of the executive arm.[66]

[104] Public law cases, of which there are many in judicial review proceedings, not only involve topics of immense public importance and interest, but may sometimes also involve testing the demarcation lines between the Legislature, the Executive and the Judiciary. For me, the constitutional line drawn for the Judiciary is clear: courts and judges only deal with the legal issues arising in the disputes that come before them and we determine only these legal issues.

65 Tan, Kevin YL, "The Role of Public Law in a Developing Asia", *Singapore Journal of Legal Studies*, p 265, 2004.

66 Pillay, Sudha CKG, "The Changing Faces of Administrative Law in Malaysia", [1999] 1 MLJ cxl.

Cross-Border Theft and Remedies: An Intellectual Property Perspective

by

*Tan Sri Ramly bin Haji Ali**

[1] Intellectual property is intangible property owned by its rightful owner in law. It refers to the creation of the mind based on knowledge or information such as musical, literary and artistic works, inventions, symbols and marks and designs used in commerce.

[2] Intellectual property can be differentiated from personal or physical property. Each of them has different characteristics. Physical property can be transferred without causing direct physical loss to the owner and can infinitely be replicated. Unlike physical property, intellectual property does lapse or revert to the public domain.

[3] Intellectual property rights are created by law which protects the creations. Rightful authors, inventors or creators are given exclusive rights over the use of their created works, including the rights to reproduce, sell, hire, make copy, import and export the works for a certain period of time. They are in this sense encouraged and rewarded for their creativity.

[4] Like physical property, intellectual property can also be subjected to theft by irresponsible and unauthorised persons for illegal gain. Theft of intellectual property (IP theft) can be in the form of infringement or counterfeiting of the rights and the related products. Counterfeiting is the most common form of IP theft. It involves the making or copying in exact imitation of something valuable with the intention to deceive or defraud. It covers the whole spectrum of intellectual property such as copyright, trade mark, patent, passing off, geographical indication, industrial design and trade secret.

[5] Intellectual property, in the form of inventions and innovations, is a major contributing factor to the economic growth and prosperity

* Judge of the Federal Court of Malaysia.

of a nation. Creation of knowledge intensive products often involves in-depth research and huge investment of money, time and effort, but sadly they are very easy and cheap to copy and replicate.

[6] Undoubtedly, effective laws and regulations relating to intellectual property either in the form of statutes or treaties/conventions must be made available to the commercial world in countries throughout the world. This will help combat domestic as well as cross-border theft relating to intellectual property.

[7] IP theft is an act of crime committed globally, thus polluting worldwide markets with fake or imitated products and deceiving the public at large. In Malaysia alone, the value of counterfeit goods seized throughout the country during the period of 2004–2008 was more than RM212 million (USD 60.57 million). In the United States of America (the USA), the Department of Commerce in its 2006 report estimated the annual loss of IP theft to be in the region of USD 250 billion.

[8] Infringement is committed when someone else exercises the owner's exclusive rights without the owner's or agent's licence. It can be committed domestically by someone in the country where the intellectual property was created, or cross-border, i.e. in a foreign country other than the country where the intellectual property was created.

[9] In Malaysia, some categories of intellectual property rights and the statutes regulating them are as follows:

(a) copyright	Copyright Act 1987 (Act 332);
(b) patent	Patents Act 1983 (Act 291);
(c) industrial design	Industrial Designs Act 1996 (Act 552);
(d) trade mark	Trade Marks Act 1976 (Act 175) and Trade Descriptions Act 2011 (Act 730);
(e) geographical indication	Geographical Indications Act 2000 (Act 602);

(f)	layout-design of an integrated circuit	Layout-Designs of Integrated Circuits Act 2000 (Act 601); and
(g)	new plant variety	Protection of New Plant Varieties Act 2004 (Act 634)

[10] Besides statutory provisions incorporated by the government, protection of intellectual property rights, particularly in cross-border trade, is also strengthened by way of bilateral or multilateral treaties or conventions among member countries. The main international conventions or agreements to which Malaysia is a member are as follows:

(a) Berne Convention for the Protection of Literary and Artistic Works 1886 (the Berne Convention);

(b) Marrakesh Agreement on General Agreement on Tariffs and Trade (GATT) which includes the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) under the World Trade Organisation (WTO);

(c) Paris Convention for the Protection of Industrial Property (the Paris Convention);

(d) World Intellectual Property Organisation (WIPO) Agreement (the WIPO Agreement); and

(e) Patent Cooperation Treaty (the PCT).

[11] For a better and more effective enforcement of the intellectual property laws, thus providing a better protection to the intellectual property rights, particularly foreign intellectual property rights, Malaysia has also incorporated provisions of the following conventions into the domestic statutes:

(a) WIPO Copyright Treaty (WCT) 1996;

(b) WIPO Performances and Phonograms Treaty (WPPT) 1996; and

(c) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 (the Rome Convention).

[12] We need effective intellectual property law as well as bilateral and multilateral agreements between member countries to fight the IP theft menace, particularly cross-border, throughout the world. There is great risk that persons other than the original or rightful owners of the intellectual property rights will "steal" the rights and make copy, sell, distribute and use the products thus depriving the rightful owners the fruits of their labour. Without the intellectual property law, the rightful owners of intellectual property rights may not be able to recover their investments and thus may not be able to continue their work. It must be stressed that intellectual property rights are a set of intangible assets in the form of goodwill of a business. Investors, particularly foreign investors, will only come to invest where they are able to effectively stop others from copying their ideas, products and designs.

[13] Article 61 of the TRIPS Agreement requires that member countries must provide criminal sanctions and penalties in cases involving wilful trade mark counterfeiting or copyright piracy on a commercial scale and remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent effect.

[14] In compliance with the said Article 61 of the TRIPS Agreement, Malaysia has incorporated such a penal provision in section 41(1) of the Copyright Act 1987 for copyright offences and in section 8(1) of the Trade Descriptions Act 2011 for trade mark counterfeiting offences.

[15] Intellectual property rights protection in a particular country depends on the domestic laws of that country and on how treaties and conventions have been enforced and implemented in domestic litigation. Most countries provide some level of protection for their own works and have entered into bilateral or multilateral treaties by which they afford some protection to foreign works. Most major trading countries entered into the multilateral treaty, the Berne Convention, beginning in the 19th century and they recognised each other's intellectual property rights pursuant to domestic laws passed to implement their membership in the Berne Union.

[16] Trade mark infringement can be committed by unauthorised persons without engaging in "counterfeiting." Infringement occurs when a party uses a colourable imitation of a registered trade mark, which is a mark "that so resembles a registered mark as to be likely to cause confusion mistake or to deceive". A counterfeit mark, on the

other hand, is a "spurious mark which is identical with or substantially indistinguishable from a registered mark". More often than not, counterfeiting involves low-quality and inexpensive copying of well-known products or articles onto which have been placed counterfeit marks.

[17] The digital revolution is considered as the main factor or linkage in contributing to the cross-border IP theft. It facilitates real time communication for effective and faster cross-border IP theft. In the context of the Internet, it has created what could be called a "global shopping mall" in which any person or consumer with access to a personal computer or mobile device and a credit card can, from their home or office, review, examine and purchase products or services from anywhere in the world. Individual international or cross-border trading activities are already possible and are now virtually transparent with purchases made from vendors in other countries as easily as one can purchase local products at a nearby store.

[18] This type of "global shopping mall", via the Internet, poses significant problems for intellectual property laws as it is presently structured. The problems that arose which are already apparent from these technological developments in cross-border trade include the issue of jurisdiction and choice of laws, a "multiple mark" phenomenon, involving companies in different countries using the same mark as in the Internet. Social media may well be the platform for a trade mark owner to market its goods to its targeted audience that could hail from various countries. The optimism of trade mark owners in social media is readily understandable. After all, social media could reach out and connect with potential customers from across the globe within seconds. Yet, at the same time, social media could, in the manner spoken above, act as a double-edged sword when used by counterfeiters. The scourge perpetrated by these counterfeiters on social media knows no boundaries and counterfeiters often hide behind the veil of a username which, on its own, is a meaningless piece of information that comprises nothing more than jumbled letters and numbers to the public. Usernames do not tell the public the location or exact location where these counterfeiters are based. Counterfeiters, threatened by potential infringement actions by the lawful trade mark owner, could easily remove the goods for sale from the platform only to upload these pictures again using another username within the same social media platform. The stealth with which counterfeiters

could operate makes counterfeiting activities hard to pin down. The essence of counterfeiting remains the same, yet the manner and the pace with which such illegal transactions could conclude has evolved. The new challenges posed by social media had evidently blurred the lines and barricades of the traditional boundaries.

[19] IP theft works on the basis of the economic principle of supply and demand. The supply of counterfeit or infringed products will always be there so long as there is demand for them. The most discernible type of counterfeiting, especially in cross-border activities, is the counterfeit of luxury products or products which bear well-known marks. Counterfeit products that put the consumers at risk, such as counterfeit food, drugs, vehicle parts and toys, are dangerous to consumers. These are "favourite products" among the infringers. Market for these products is found among consumers of under-developed or developing countries where the individual purchasing power of the population is limited. Some of these products are considered "essentials" among the consumers, since the need for food, pharmaceutical drugs, vehicle parts and toys for their children is continous. Pharmaceutical drugs could well be generics of patented drugs which could potentially infringe the Patents Act 1983.

[20] Counterfeit or infringed products always come with lower prices and their unscrupulous producers not only endanger the lives of unknowing consumers but also put genuine business owners at risks legally, as well as posing risks to their reputation and sales. It has a direct impact on foreign investments in some countries, as well as causing loss of employment and loss of tax revenue to the government. The rise of the counterfeit industry has turned away bona fide investors, particularly foreign investors. This include countries which are victims of cross-border counterfeiting.

[21] There is a strong suspicion that organised crime and IP thefts are inter-linked. There are indications that criminal activities are often facilitated via intellectual property crimes and the funds that these crimes generate.

[22] The International Trade Administration of the USA has labelled IP theft as one of the top problems faced by the USA's exporters. Thieves or counterfeiters sidestep copyrights, trade marks and patents with counterfeit products that falsely carry brand names or crib technologies they have no right to use. As admitted by some company executives in

the USA, fake products made by the USA's companies have popped up in China, Taiwan, Singapore, Russia, Belarus, Ukraine, the Czech Republic and a host of other countries.

[23] An executive officer of a firm in the USA which produces highly specialised niche machine tools and large machine repairs admitted that doing customised work did not stop his small firm from being a victim. The firm had competitors in Europe who swiped the firm's designs and copied them. The said competitors were customers of the firm who subsequently decided to reverse engineer the firm's products and later took them into the Eastern Bloc countries to sell. In the Asian perspective, the China government has been put under the spotlight regarding this issue of cross-border IP theft ever since the start of its *laissez faire* economy.

[24] Generally, remedies for counterfeiting or infringement (including cross-border counterfeiting or infringement) come in two forms, namely criminal prosecution and civil enforcement. In Malaysia, criminal prosecution is provided for against offences relating to copyright infringement as well as trade mark counterfeiting under their respective statutes. This is in compliance with Article 61 of the TRIPS Agreement. There is no requirement under the TRIPS Agreement for infringement of other intellectual property rights to be made criminal offences. However, civil remedies are available for infringement of other intellectual property rights.

[25] In Malaysia, the law relating to infringement or counterfeiting of trade marks can effectively be enforced under the Trade Descriptions Act 2011 (the TDA). Section 8(2) of the TDA prohibits false trade description in relation to trade marks. It is an offence, in the course of a trade or business, to apply a false trade description to any goods as if the goods were subject to any rights relating to registered trade mark, or to supply or offer to supply any goods to which a false trade description is applied as if the goods were subject to any rights relating to registered trade mark, or to expose for supply or have in possession, custody or control for supply any goods to which a false trade description is applied. Section 8(3) of the TDA further provides that any person who applies, supplies or offers to supply, exposes for supply or has in his possession, custody or control for supply any goods bearing an identical mark with the registered trade mark without the consent of the registered owner of the trade mark is deemed to

apply, supply or offer to supply goods bearing false trade description unless the contrary is proven. The definition of "trade description" as provided under section 6 of the TDA is wide enough to cover infringement or counterfeiting of goods under the Trade Marks Act 1976 (the TMA). Both the Acts must be read together.

[26] What a proprietor of a registered trade mark has to do is to lodge a complaint with the Enforcement Division of the Ministry of Domestic Trade Cooperatives and Consumerism (the MDTCC) which is vested with the power of search and seizure. If the infringing mark is identical with the proprietor's mark, the MDTCC will commence and conduct a raid upon receiving a complaint from the proprietor. If the unauthorised mark or get-up used by any other person is not identical with the registered trade mark but can be passed off as his registered trade mark, an application for a trade description order (the TDO) must be made at the High Court under section 9 of the TDA to declare that the infringing mark is a false trade description for the purpose of section 8 of the TDA. Such an application for a TDO is made ex parte. A person who is found guilty of an offence under the TDA is liable to a fine of up to RM10,000 for each goods bearing the false trade description or to three years' imprisonment or to both, and if such a person is a body corporate, to a fine up to RM15,000 for each goods bearing the false trade description. Higher fine and term of imprisonment are imposed against second or subsequent offences under section 8(1) of the TDA. The proprietor may still thereafter elect to commence civil action based on the evidence collected in the raids by the MDTCC.

[27] An offering of counterfeits to the public without the trade mark owner's consent would be tantamount to trade mark infringement pursuant to section 38(1) of the TMA, which reads as follows:

> 38.(1) A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or registered user of the trade mark using by way of permitted use, uses a mark which is identical with it or so nearly resembling it as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trade mark is registered in such a manner as to render the use of the mark likely to be taken … —
>
> (a) as being use as a trade mark;
>
> …

[28] Based on section 38 of the TMA, in order to establish an action for trade mark infringement, the plaintiff would need to establish:

(a) that the defendant uses a mark identical with the plaintiff's registered trade mark or so nearly resembling the plaintiff's registered trade mark as is likely to deceive or cause confusion (if the mark is identical with a registered trade mark then the question of deception or causing confusion is immaterial);

(b) that the defendant is not authorised nor licensed to use the offending mark;

(c) that the defendant uses the offending mark in the course of trade;

(d) that the defendant uses the offending mark in relation to goods in respect of which the trade mark is registered; and

(e) that the defendant uses the offending mark in such a manner as to render the use of the mark likely to be taken as being used as a trade mark.[1]

[29] "Likely to deceive or cause confusion" —

> One must take the two words or marks and judge them, both by their look and by their sound. One must consider the goods to which they are to be applied and consider all the surrounding circumstances; and must further consider what is likely to happen if each of the trade mark is used in the normal way as a trade mark for the goods of the respective owners of the mark and decide on the issue of deception or confusion.

[30] "Likelihood of confusion" is sufficient, actual confusion is not required. It is determined on the basis of seven elements, namely, similarity of marks, similarity of products goods or services, physical area and manner of concurrent use, degree of care likely to be exercised by consumers, strength of the marks, actual confusion and wrongful intent.

[31] No one has any right to represent his goods as the goods of another. No person may pass off his goods as those of another.

1 *Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188.

A person is not to sell his own goods under the pretence that they are the goods of another person. To prove passing off, the following ingredients must be satisfied:

(a) the plaintiff has sufficient reputation or goodwill in the mark, get-up or other indicia in question in this country;

(b) the defendant's action likely or actually caused misrepresentation; and

(c) the plaintiff suffered or is likely to suffer damage or injury to its business or goodwill as a result of the defendant's misrepresentation.

[32] The overriding principle is trade which is unfair resulting in damage to goodwill and reputation of the claimant. The test in passing off thus could be summarised as misrepresentation in the course of trade causing damage to the business or goodwill of the claimant.

[33] Passing off action is expressly preserved by section 82(2) of the TMA which provides:

> … nothing in this Act shall be deemed to affect the right of action against any person for passing off goods or services as those of another person or the remedies in respect thereof.

[34] With regard to damage on passing off, it is essential that the defendant's misrepresentation be such as to be likely to cause substantial damage to the plaintiff's right of property in his business or goodwill. There are various heads of damage or injury but the generally recognised ones can be labelled in two ways, namely, destruction and diversion. In the case of destruction, the goodwill is destroyed, damaged or depreciated. In the case of diversion, the goodwill as such may not initially be damaged to any measurable extent, but the plaintiff is just as certainly deprived of the benefit of the attractive force which the goodwill may draw in custom as powerfully as before as it is drawn to the defendant instead of to the plaintiff.

[35] Generally, the plaintiff needs to establish that he has suffered damage. However, if the goods in question are in direct competition with one another, the court will readily infer the likelihood of damage to the plaintiff's goodwill through loss of sales and loss of exclusive

use of his name.[2] In such cases, actual damage need not be proven but a probability of damage is sufficient.[3]

[36] Remedies for infringement of trade mark and passing off usually consist of declaratory relief, injunctive relief (including *Anton Pillar* Order and *Mareva* Injunction), an account for profits, damages, an order for delivery up or destruction of disputed products of the defendant and costs.

[37] Pursuant to section 36 of the Patents Act 1983 (the PA), the owner of a patent has the right to exploit the patented invention, assign or transmit the patent and conclude licence contracts. Subsection (2) provides that anyone who without permission, makes, imports, uses or offers for sale or sells the patented invention is a direct infringer of the patent. If a person actively encourages another to make, use, offer to sell or sell the invention without permission, the person who induces is liable for indirect infringement and in accordance with section 58 of the PA, these acts amount to infringement of a patent.

[38] The owner of a patent shall have the right to institute court proceedings against any person who has infringed or is infringing his patent as well as against any person who has performed acts which make it likely that an infringement will occur (imminent infringer). Pursuant to section 59 of the PA, proceedings cannot be instituted after five years from the act of infringement. If infringement is proven, the court shall award damages and grant an injunction to prevent further injury and any other legal remedy as provided under section 61 of the PA. An action for infringement may also be instituted by a licensee or a beneficiary pursuant to the same section.

[39] In relation to cross-border or extraterritorial injunctions, the courts do not grant such remedies as patent rights are territorial in nature. However, the courts may have jurisdiction over a person who does not reside or has no place of business or has no property within Malaysia if such person is one of several defendants who have been sued where the other defendants are residing or have a place of business or have property within Malaysia.

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2 Supreme Court in *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 AMR 1353; [1994] 2 MLJ 770.

3 *Bulmer (HP) Ltd v Bolinger SA* [1978] RPC 79.

[40] The relevant law relating to industrial design is the Industrial Designs Act 1996 (the IDA). The policy of the law is to preserve for the owner of the design the commercial value resulting from customers preferring the appearance of articles which have the design to that of those which do not have it.

[41] Section 32(1) of the IDA provides that the owner of a registered industrial design shall have the exclusive right to make or import for sale or hire or for use for the purposes of any trade or business, any article to which the registered industrial design has been applied. Section 32(2) of the same Act provides protection against any act of infringement of those statutory rights.

[42] Pursuant to section 30 of the IDA, an action for infringement under the Act can be instituted by a registered owner of a valid registered industrial design or by a person who becomes entitled by assignment or transmission or through other operation of law to a valid registered industrial design.

[43] In respect of an infringement, the court may refuse to award damages or make an order for an account of profits if it is satisfied that the defendant was not aware that the design in question was registered at the time of infringement and had taken all reasonable steps to ascertain whether the industrial design had been registered prior to that time.

[44] The remedy sought in the form of compelling the social media platform host to take down or disable the Malaysian public from accessing the relevant social media page is a consequential remedy that flows from the finding of a trade mark infringement.

[45] The above is spoken of liberally, bearing in mind that in the case of social media platforms such as Facebook, Twitter and YouTube, they do have their respective self-regulating mechanism, that attempt to eradicate the growing menace of counterfeits. Facebook, for instance, provides the procedures on "How to Report Claims of Intellectual Property Infringement" and imposes a stern warning that it would disable an account if there is persistent infringement of another party's intellectual property rights. Such measures could be seen as logical ones to a trade mark owner who otherwise, confronted with cross-border theft involving various countries, would have to resort to various territorial laws of the countries to stem the acts of counterfeiting. Whether such mechanism is an effective one remains to be seen.

[46] The Copyright Act 1987 (the CA) has its own penalty provisions to cater for criminal offences relating to infringement or counterfeiting of copyright. Section 41 of the CA provides that any person who during the subsistence of copyright in a work or performers' right, among others (as relates to cross-border theft), makes for sale or hire an infringing copy, distributes infringing copies, has in his possession, custody or control, or imports into Malaysia otherwise than for his private and domestic use, any infringing copy, is committing an offence. It is also provided that any person who distributes, imports for distribution or communicates to the public, without authority, works or copies of works in respect of which electronic rights management information has been removed or altered without authority, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM250,000 or to imprisonment for a term not exceeding five years or to both and for any subsequent offence, to a fine not exceeding RM500,000 or to imprisonment for a term not exceeding 10 years or to both.

[47] The convenience afforded by social media also means the relative ease with which artistic, graphical and literature contents, whether user-generated or otherwise, could be shared or reproduced online. The ability to share with such random ease such as through peer-to-peer file sharing of music, videos and movies, or at the flick of the "share" button, lies in its marginally low, if not zero, costs of copying. The Optical Discs Act 2000 which was enacted during the heyday of booming pirated discs, and which requires valid licences to produce discs, has slowly faded into disuse.

[48] The pervasive downloading of these shared files for personal entertainment and enjoyment is often seen as a form of entitlement, encouraged no doubt by the misconceived perception that usage of one's intellectual property rights without consent is a victimless crime. Illegal copying and distribution of copyright materials disrupts the creative industries. This matter is made worse when such downloading transcends conventional borders.

[49] While copyright owners could avail themselves of copyright laws, the anti-infringement mechanism provided by the various social media platforms over the disputed content that is shared on their respective platforms could be considered. The social media platform, seen in control of the contents, could potentially wield power that transcends conventional borders by cutting off access to the source

of the infringing materials to the public. Twitter's copyright policy, for instance, states that it will respond to notices of alleged copyright infringement. The owner lodging such a complaint is required to provide the physical or electronic signature of the copyright owner, amongst others, in support of its assertion of copyright ownership as well as the identification of copyright work that is allegedly infringed.

[50] A new amendment to the CA on offences relating to anti-camcording was inserted recently. Section 43A of the CA provides that any person who operates an audio-visual recording device in a screening room to record any film in whole or in part shall be guilty of an offence and shall on conviction be liable to a fine of not less than RM10,000 and not more than RM100,000 or to imprisonment for a term not exceeding five years or to both. This is another step taken by the government to facilitate combating of cross-border theft of copyright.

[51] Importation of goods into one country from a foreign country is the most common vehicle of IP theft, either in the form of counterfeiting or infringement of trade mark and copyright. In relation to that, Article 51 of the TRIPS Agreement stipulates that all member countries (including Malaysia) must adopt measures allowing trade mark owners to request that customs officers seize imported counterfeit trade marks. In Malaysia, the Trade Marks Act 1976 has incorporated this requirement.

[52] Section 70D of the TMA deals with the issue of restriction on importation of counterfeit trade mark goods. An application can be made by the proprietor of a registered trade mark or his agent to notify the authority, which is the Registrar of Trade Marks, that goods with counterfeit trade mark are expected to be imported for the purpose of trade and that he objects to such importation. Once the application is approved the importation of any counterfeit trade mark goods into Malaysia for the duration of the period specified shall be prohibited. With the approval, any proper officer of the customs or other authorised public officer shall take the necessary action to prohibit any person from importing the goods identified (not being goods in transit) and shall seize and detain the identified goods.

[53] The procedure as provided for under section 70D of the TMA does not seem to be popular among proprietors of intellectual property rights. The main reason is that intellectual property proprietors realise the risks involved should the seized goods turn out to be genuine where

they have to pay damages or compensation to the aggrieved person. The Customs Department would also face difficulties in carrying out their tasks when intellectual property rights proprietors do not provide them with the required support and detailed information on the goods in question and the routes and shipping pattern usually taken by the parties concerned.

[54] As a condition for an approval to be granted by the Registrar under section 70D of the TMA, the proprietor is required to deposit with the Registrar a security sufficient to reimburse the Registrar for any liability or expense it is likely to incur as a result of the seizure of the goods or to prevent abuse and protect the importer or to pay such compensation as may be ordered by the court in case the goods turn out to be genuine. The amount of the security may be huge. To a certain extent, this will have a deterrent effect on the proprietor whether to choose this alternative, especially for those who are under financial constraint.

[55] This matter is exacerbated by the rise in digital revolution that has resulted in cross-border thefts which has assumed a different persona altogether. Social media platforms, such as Facebook and Twitter, have gained popularity amongst the public and are now perceived and accepted by sellers, small, medium, or large, as a cost-effective means of offering goods to the public. The delivery of goods, which occurs only on demand and upon conclusion of a sales transaction online, make counterfeits harder to be traced by the customs at the conventional borders, thus rendering conventional cross-border measures hardly effective. The location where these counterfeits are stored may be thousands of miles away from where the purchasers live, thus rendering the traditional raid-and-seize remedies ineffective.

[56] Section 71 of the TMA provides for prohibition against infringement of trade mark products for export from Malaysia. Such an act of exporting is subject to prohibitions on the use of a registered trade mark for infringement as provided under section 38 of the TMA and subject to the same criminal sanction as if it is done within Malaysia.

[57] There are several civil remedies available in a civil action initiated by the proprietor of intellectual property rights where there is infringement or counterfeiting of their rights. Civil action can be an effective tool in enforcing their rights when the identity of the offending party is known and its financial worth and assets are

more than sufficient to pay out the damages and costs sought by the proprietor.

[58] The relevant civil remedies available in a civil action include an order for injunction (either interim or permanent in nature), damages (including statutory damages), an account of profits, summary judgment (for trade mark infringement) and an order for delivery up or destruction of the counterfeits (mainly for trade mark infringement).

[59] An interim or interlocutory injunction is an effective tool to be used to stop infringers or counterfeiters from continuing their unlawful activities pending trial. An *Anton Piller* injunction may also be useful for the trade mark proprietors to search and seize evidence from infringers or counterfeiters if it is suspected that they may destroy or dispose of the evidence of infringement or passing off. Another type of ex parte injunction which may be applicable is the *Mareva* injunction. With this injunction, trade mark owners can restrain infringers or counterfeiters from dissipating their assets out of the relevant jurisdiction. This will enable the owners to enjoy the fruits of their litigation in the event they subsequently win their cases in court.

[60] Section 37 of the CA provides for various remedies for infringement of copyright as well as offences relating to circumvention of technological protection measures (under section 36A) and rights management information (under section 36B). Besides granting general remedies of injunction, damages and an account of profits, the court can also grant statutory damages of not more than RM25,000 for each work but not more than RM500,000 in the aggregate as provided under subsection (1)(d).

[61] It must also be stressed here that it is an expensive and costly affair to take a civil action in intellectual property related cases. There is a huge risk for the owner to pay costs in the event of an unsuccessful civil action. It is also costly to defend any claim of intellectual property infringement in court. Matt Samuel, a principal and patent attorney at Fish and Richardson in Minneapolis has once stated that "it's costly to fight some thieves … to file a patent can cost $8,000 to $10,000 … to file a trade mark cost more like $200 … but to defend a patent with a law suit can easily cost a few million dollars …. It's very, very expensive."

[62] Small businesses are increasingly becoming the targets of IP theft, particularly those involving cross-border activities where companies

are not accustomed to global trade and related laws and rules in foreign jurisdictions. They lack money and resources to sue fraudsters if their products are being counterfeited or infringed.

[63] To facilitate more effective enforcement and better protection of their intellectual property rights throughout the world, owners of intellectual property rights must realise the importance of filing and registering their rights in each applicable country wherever possible. It is advisable for them to appoint an attorney in those countries. Relevant authorities must step up touring seminars and websites aimed at educating small and large businesses on how to fend off theft and protect their research and intellectual efforts. The government must enhance efforts to convince the public that IP theft poses social and economic concerns. This requires a constant educational programme. The media is a powerful tool to achieve this goal.

[64] IP theft, particularly cross-border counterfeiting, will continue to become a global menace polluting the worldwide market with tainted products which in turn create a false impression of economic security unless there is no demand for those products from the public at large or consumers throughout the world. Consumers must be made to realise and understand that purchasing or consuming counterfeit or fake products, even if cheaper, is unsafe and dangerous. It does not pay to do so.

[65] Combating IP theft, particularly cross-border theft, is not easy. In fact, it is really an uphill task. The expansion of social media and its continuous evolution has added to the age old problems of global counterfeits, previously only known to cross conventional frontiers and boundaries. These problems cannot be contained by trans-governmental effort alone. The rationalisation of the laws above is meaningless without constant surveillance of the market. No longer can a trade mark owner stay contented in today's market without such surveillance. It will be up to all relevant parties to combat this.

Judicial Recusal

by

*Tan Sri Idrus Harun**

Introduction

[1] Upon ascending the bench, every judge of superior courts in Malaysia, as with judges in other jurisdictions, takes an oath to discharge his judicial duties honestly and impartially to the best of his ability. It is a matter of utmost importance that judges make decisions according to law, not troubled or spoiled by personal bias or conflict of interest. The underlying reason is that judges must be impartial and impartiality is indeed a defining characteristic of, and one of the most fundamental principles which is naturally intrinsic to, the judges' role in the administration of justice. The doctrine of judicial recusal dictates that a judge may recuse himself from proceedings if he decides that it is not appropriate for him to hear a case. A judge may recuse himself when a party applies for him to do so and he must step down in circumstances where there appears to be actual or apparent bias.[1] When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.

[2] To reiterate the point, all judges are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. A judge should not concern himself with or allow himself to be affected or influenced by all considerations extraneous to the particular case. The maxim that no man is to be a judge in his own cause ought not to be confined solely to a cause in which he is a party, but also applies to a cause in which he has an interest. The principle applies in all cases of apparent bias, whether concerned with judges, or members of inferior tribunals, or with jurors, or with arbitrators. In the manner of speaking, some use the

* Judge of the Court of Appeal of Malaysia.

1 Masood Ahmed, "Judicial Recusal", *University of Leicester: The Law Society Gazette*, October 14, 2013.

words "disqualification" and "recusal" interchangeably, while others distinguish between the two, using "recusal" to mean withdrawal on the judge acting *sua sponte* or on his own motion and "disqualification" to mean withdrawal on the motion of or at the request of a litigant or party.[2]

[3] It is a fundamental principle that a judge should resist the temptation to yield to the pressure to recuse himself if there is no valid or sufficient ground for recusal. In law, any party seeking disqualification must establish the circumstances and situations to justify the disqualification of the judge.[3] Judges enjoy a presumption of impartiality in the performance of their judicial functions. However, such presumption is rebuttable, but only with cogent evidence and it is only in appropriate cases that he may recuse himself. This proposition has found favour with local cases which in summary show that the law will not suppose a possibility of bias in a judge who is sworn to administer impartial justice and whose authority greatly depends on that presumption and idea.[4]

Source of disqualification law

[4] The primary source of recusal or disqualification law in Malaysia is the English common law. Recusal standards in Malaysia have been a work in progress at one point of time but as it stands now, the legal position in Malaysia has to a greater extent gained in strength and complexity over time albeit judicial opinion seems to be at variance on the appropriate test applicable in cases of perceived or apparent bias. There is moreover no specific legislation which codifies the common law principles concerning disqualification of judges in Malaysia such as the 28 US Code 455 of the United States of America which calls for disqualification of judges who are concerned in interest and entitles a party to secure the disqualification of a judge in any proceeding in which his impartiality might reasonably be questioned.[5]

2 Geyh, Charles Gardner, *Judicial Disqualification: An Analysis of Federal Law*, 2nd edn (Federal Judicial Centre, 2010), p 2.

3 *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 3 AMR 365; [2008] 5 MLJ 206.

4 *Hock Hua Bank (Sabah) Berhad v Yong Liuk Thin & 7 Ors* [1995] 2 AMR 1332; [1995] 2 CLJ 900; *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and Other Applications* [2013] 3 AMR 741; [2013] 4 MLJ 351.

5 Geyh, Charles Gardner, supra, n 2.

[5] Nevertheless, it is significant to observe that the Judges' Code of Ethics 2009 ("the Code") sets out the basic standards to govern the conduct of all judges and provide guidance in setting and maintaining high standards of personal and judicial conduct. The Code in fact envisages various situations a judge may have to deal with at some point which in the event of a breach thereof, may potentially tantamount to apparent bias, that in order to prevent it, great reliance must necessarily be placed on the judge to exercise his judgment. Thus, section 5 of the Code requires judges, in the exercise of their judicial functions, to act independently on the basis of their assessment of the facts and in accordance with their understanding of the law, free from any extraneous influence, inducement, pressure, threats or interference, direct or indirect from any quarter or for any reason. Section 6 imposes a further requirement that a judge shall act at all times in a manner that promotes the integrity and impartiality of the judiciary. Under section 7(3) of the Code, a judge is required to perform his judicial duties without bias or prejudice and to refrain from giving any public comment about pending or impending proceedings which may suggest to a reasonable person the judge's probable decision in any particular case. The Code, in essence, elucidates the inherent characteristic of the judges' role in the administration of justice and encapsulates the principles that a judge should decide a case according to law and without bias, must be impartial and act independently uninfluenced by all considerations extraneous to the particular case.

[6] But it is section 7(2), remarkably plain in language and devoid of any embellishment, that prohibits a judge from participating in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case. Thus, where a judge has or is shown to have this kind of relationship involving a case in which he is presiding, proof of the requisite fact, that is the existence of bias, is effectively presumed, which presumption gives rise to automatic disqualification. In other words, the prohibition in section 7(2) belongs to the category of automatic disqualification where it is improper for the judge to participate as it would inevitably undermine public confidence in the integrity of the judicial institution and administration of justice. The judge instead has a legal duty to recuse himself or remove himself from a position of judicial authority upon proof of such association.

[7] Any breach of the provisions prescribed in the Code is bound to have legal ramifications for section 4(2) thereof stipulates that a judge who breaches any provision of the Code shall be rendered liable to disciplinary proceedings. Another legal consequence that follows is that, quite apart from automatic disqualification under section 7(2) of the Code, where there is a breach of any of the circumstances prescribed in the above provisions which may be tantamount to perceived or apparent bias, a judge is legally bound to recuse himself from the case and if he fails to do so, any judgment given by the judge is liable to be set aside. The relevancy of the Code lies in the fact that the reasonableness of the existence of the real danger of bias has to be assessed in the light of this Code.[6] Essentially, every judge, in considering any application for his disqualification, ought to be mindful of the provisions of the Code. It is indeed a very serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence or to raise against the judge that he has a personal interest, financial or otherwise, in any case he is hearing in his judicial capacity.[7] The Federal Court in this regard appears to be of the view that a breach of the Code may constitute a ground for the removal of the judge from office.[8]

Automatic disqualification

[8] It does indeed go without saying that any judge who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to a fair hearing which consequently violates one of the principles of central importance underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has two options opened to him. Firstly, the litigant has grounds for objecting to the trial of the case by the judge if the objection is made before the hearing and secondly he has grounds for applying to set aside any judgment given.[9]

[9] Under the English common law, the accepted basis for judicial disqualification began with financial or proprietary interest, that

6 *Bumicrystal Technology v Rowstead Systems Sdn Bhd* [2004] 6 CLJ 85.
7 *Hock Hua Bank (Sabah) Berhad v Yong Liuk Thin & 7 Ors*, supra, n 4.
8 *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another Application* [2001] 2 AMR 2097; [2001] 2 MLJ 305.
9 *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65, CA.

is, where a judge sitting in a judicial capacity has a pecuniary or proprietary interest in the outcome of the proceedings. This is one situation in which on proof of such interest, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. This is because the existence of such circumstances are such that they must inexorably shake or undermine public confidence in the integrity of the administration of justice and may bring the justice system into disrepute if the decision is allowed to stand. Such cases attract the full force of Lord Hewart CJ's requirement in *R v Sussex Justices, Ex p McCarthy*[10] that justice must not only be done but must manifestly and undoubtedly be seen to be done.[11] The principle is based on the maxim that nobody may be judge in his own cause (*nemo judex in sua causa*). In *Dimes v The Proprietors of the Grand Junction Canal*,[12] when orders and decrees made by and on behalf of the Lord Chancellor of England were set aside on the ground that he had a substantial shareholding in the respondent company, Lord Campbell[13] authoritatively stated the principle as follows:

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the Maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest … we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that ground a decree not according to law and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such influence.

10 [1924] 1 KB 256.
11 *R v Gough* [1993] AC 646; [1993] 2 WLR 883, HL.
12 (1852) 3 HL Cas 759.
13 Ibid, at 793.

[10] Several years after *Dimes'* case, in *R v Rand & Ors*[14] Blackburn J dealt with this issue in the following manner:

> There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; … .

[11] In *R v Camborne Justices & Anor, Ex p Pearce*[15] Slade J handing down the judgment of the court stated the law in succinct and accurate description when His Lordship said:

> It is of course, clear that any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification.

[12] Thus, in the context of automatic disqualification, if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause and such proceeding would undermine public confidence in the integrity of the administration of justice. In such a case, not only is it irrelevant that there is in fact no bias on the part of the judge, but there is no question of investigating whether there is any real likelihood of bias, or any reasonable suspicion or apprehension of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the judge concerned should recuse himself from hearing the case lest the decision should not stand.

[13] For Malaysia, the issue of automatic disqualification was considered by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*.[16] The facts of the case showed that due to the need to evict squatters on the land, including Rabeah, the respondent had to engage in some negotiations with a Council (the appellant) member namely Khan who was Rabeah's uncle. The respondent offered Rabeah a two-bedroom flat for free, but the offer was rejected by Khan who wanted a three-bedroom flat for Rabeah. Khan had however sat and

14 (1866) LR 1 QB 230.
15 [1955] 1 QB 41.
16 [1993] 3 AMR 3529; [1999] 3 CLJ 65.

participated at every meeting of the appellant at which the respondent's planning permission was discussed. The Federal Court held that on the facts admitted by Khan himself, personal interest in the outcome of the application for extension of planning permission made by the respondent by reason of his championing the cause of his niece when negotiating with the respondent about the flat to be given to her was sufficient to lead to his automatic disqualification.

Extension of automatic disqualification

[14] The question has arisen, in consequence of the earlier common law position that the only accepted basis for automatic disqualification was financial interest, whether such automatic disqualification rule is limited and confined to that ground only. In fact until 1998, the automatic disqualification rule had been widely thought to apply only to cases where the judge had a pecuniary or proprietary interest in the outcome of the litigation. However, in *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex p Pinochet Ugarte (No. 2)*,[17] the House of Lords made it plain that the rule extended to a limited class of non-financial interests. In this case, Lord Hoffmann was disqualified because of his links with Amnesty International which was a party to the appeal. Lord Hoffmann was a director of a charity closely allied to Amnesty International and sharing the latter's objects. Lord Browne-Wilkinson said:[18]

> … although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.

17 [1999] 2 WLR 272.
18 Ibid, at 283.

[15] Another rationale for disqualifying a judge on the ground which did not relate to pecuniary interest was explained by Lord Hutton in the same case where His Lordship said:[19]

> However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitments to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.

Applicable test of bias

[16] The House of Lords in *R v Gough*,[20] and the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*,[21] acknowledged that objections and applications for recusals based on actual bias were extremely rare; judges routinely took care to disqualify themselves, in advance of hearing and of course if actual bias was proved, that was the end of the case, the judge concerned must be disqualified. But apart from automatic disqualification in cases involving pecuniary or proprietary interest on the part of the presiding judge, the broader question of bias may arise in wide variety of circumstances. Disqualification in fact extends beyond actual bias to perceived and apparent bias. Such bias may well be thought to arise if there is personal friendship or animosity between the judge and any person involved in the case, or if the judge is closely acquainted with any person involved in the case. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness or found their evidence to be unreliable, would not of itself found a sustainable objection. Other interests include, but are by no means limited to, cases in which a judge has an interest of the outcome of the proceedings which fall short of a direct disqualifying pecuniary interest.[22]

[17] Such interest, as Lord Goff of Chieveley in *R v Gough*,[23] put it, "may vary widely in their nature, in their effect, and in their relevance to the subject matter of the proceedings; and there is no rule, as there

19 Ibid, at 293.
20 [1993] AC 646; [1993] 2 WLR 883, HL.
21 [2000] 1 All ER 65, CA.
22 *R v Gough*, supra, n 20.
23 Supra, n 20.

is in the case of pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts". In both cases of *R v Gough*[24] and *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*,[25] it was decided that in cases other than those cases which fall within the category of automatic disqualification, a judge might be disqualified and his decision set aside if on an examination of all the circumstances the court concluded that there was a real danger or possibility of bias so that justice required that the decision should not stand. What has emerged from these decisions is that the proof of actual bias is difficult as the law does not countenance the questioning of a judge about extraneous influences affecting his mind and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists. Lord Goff in *R v Gough*[26] was of the opinion that if in the circumstances of the case (as ascertained by the court) it appeared that there was a real likelihood, in the sense of a real possibility, of bias on the part of a judge, justice required that the decision should not be allowed to stand.

[18] Prior to the decisions of *R v Gough*[27] and *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*,[28] there had been some divergence or an acute conflict of judicial opinions in the English authorities on the test that should be applied in order to determine whether there was a real danger or likelihood of bias. In fact, the House of Lords in *R v Gough*[29] described this divergence as having left a legacy of some confusion adding that in some cases, the courts had expressed the test in terms of a reasonable suspicion or apprehension of bias. This is the reasonable observer test which is based on the old and well established principle that justice should not only be done but should manifestly and undoubtedly be seen to be done [see for examples *Law v Chartered Institute of Patent Agents*;[30] *R v Sussex Justices, Ex p*

24 Supra, n 20.
25 Supra, n 21.
26 Supra, n 20.
27 Supra, n 20.
28 Supra, n 21.
29 Supra, n 20.
30 [1919] 2 Ch 276 at 290.

McCarthy;[31] *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors*;[32] *R v Liverpool City Justices, Ex p Topping*;[33] and *R v Mulvihill*[34]]. Other cases had expressed the test in terms of a real danger or likelihood of bias [*R v Rand & Ors*;[35] *R v Sunderland Justices*;[36] *R v Camborne Justices & Anor, Ex p Pearce*;[37] *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association & Anor*;[38] and *R v Spencer & Ors*[39]].

[19] In *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association & Anor*,[40] Devlin LJ preferred the real likelihood of bias test. Pursuant to this test, it is incumbent upon the court to be satisfied that there was a real likelihood of bias, not that the court has to inquire what impression might be left on the minds of the litigants or on the minds of the public generally. In other words, real likelihood of bias depends on the impression which the court gets from the circumstances in which the justices were sitting.

[20] However, Lord Denning in *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors*,[41] propounded the law that took a different turn. While his Lordship stood by Lord Devlin's real likelihood of bias test, the great law Lord said that the court looked at the impression which would be given to other people so that if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit, and if he did, his decision could not stand. The court therefore did not look at the mind of the justice himself in considering whether there was a real likelihood of bias.

[21] Whatever the merits of these competing tests, the conflict of judicial opinions seems to have been resolved somewhat in England and Wales by the House of Lords' decision in *R v Gough*[42] when it

31 Supra, n 10.
32 [1969] 1 QB 577 at 599, 602 and 606.
33 [1983] 1 WLR 119 at 123.
34 [1990] 1 WLR 438 at 444.
35 Supra, n 14.
36 [1901] 2 KB 357.
37 Supra, n 15.
38 [1960] 2 QB 167 at 186.
39 [1987] 1 AC 128, HL.
40 Supra, n 38.
41 Supra, n 32.
42 Supra, n 20.

applied the "real danger of bias test" and held that there was no real danger of bias. Lord Goff said:[43]

> In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore, the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose.
>
> …
>
> In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise, I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …

43 [1993] AC 646 at 668, 670.

[22] However, the attempt by the House of Lords to resolve the conflict of judicial opinions in *R v Gough*[44] had not commanded universal approval in the light of subsequent decisions in Canada, New Zealand and Australia [see *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex p Pinochet Ugarte (No. 2)*[45]]. The reasonable likelihood and real danger tests which Lord Goff described in *R v Gough*[46] had been criticised by the High Court of Australia in *Webb v R*[47] on the ground that they emphasised the court's view of the facts and placed inadequate emphasis on the public perception of the irregular incident. However, the English court had been reluctant to depart from the test which Lord Goff so carefully formulated in *R v Gough*.[48] Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex p Pinochet Ugarte (No. 2)*[49] thought that it was unnecessary in that case to determine whether it needed to be reviewed as, although the tests were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. His Lordship moreover observed that the Court of Appeal of England, having examined the question whether the real danger of bias test might lead to a different result from that which the informed observer would reach on the same facts, concluded in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*[50] that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

[23] Nevertheless, the House of Lords in *Porter v Magill*,[51] eight years after its decision in *R v Gough*,[52] considered that the approach described as the reasonable apprehension of bias test was in line with that adopted in most common law jurisdictions and that it was also in line with that which the Strasbourg court had adopted which looked at the question whether there was a risk of bias objectively in the light of the circumstances the court had identified. Section 2 of the Human Rights Act 1998 or the European Convention on Human Rights enjoins UK domestic courts to take into account Strasbourg

44 Supra, n 20.
45 Supra, n 17.
46 Supra, n 20.
47 (1994) 181 CLR 41.
48 Supra, n 20.
49 Supra, n 17.
50 Supra, n 21.
51 [2001] UKHL 67.
52 Supra, n 20.

jurisprudence since October 2, 2000. The test laid down in *R v Gough*[53] was indeed in conflict with Strasbourg jurisprudence. The House of Lords in *Porter v Magill*[54] therefore reconsidered the whole question relating to the precise test to be applied and approved the Court of Appeal's modest adjustment of the real danger of bias test in *In re Medicaments and Related Classes of Goods (No. 2)*[55] which was summarised in the following terms:

> When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

[24] Lord Bingham of Cornhill, delivering the opinions of the House of Lords in *Porter v Magill*,[56] said that the modest adjustment of the test in *R v Gough*[57] expressed in clear and simple language, a test which was in harmony with the objective test which the Strasbourg court applied when it was considering whether the circumstances gave rise to a reasonable apprehension of bias. It removed any possible conflict with the test which was applied in most Commonwealth countries, and in Scotland, which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances. Lord Bingham however deleted from the new test the reference to "a real danger" as those words were not used in the jurisprudence of the Strasbourg court. Hence, the House of Lords laid down the following test:

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

53 Supra, n 20.
54 Supra, n 51.
55 [2001] 1 WLR 700.
56 Supra, n 51.
57 Supra, n 20.

[25] It is worthy of note that the House of Lords, while making the modest adjournment, formulated the new test in terms of possibility of bias preferring a lower standard than likelihood or probability of bias.

Legal position in Malaysia

[26] Closer to home, as early as 1937, the issue of bias was considered in the Singapore case of *Alkaff & Co v The Governor-in-Council & Ors*.[58] It was submitted that an officer appointed under section 144(1) of the Municipal Ordinance ought to have been an impartial officer and that as he was a member of the Improvement Trust, he was not an impartial officer. It was alleged that the officer namely Mr Ebden did not conduct the inquiries in an impartial or judicial manner. The Court of Appeal, in the judgment of Terrell, Ag CJ, applying the general principle in *R v Sussex Justices, Ex p McCarthy*,[59] held that Mr Ebden's dual position *viz*, as a member of the Improvement Trust which had approved the back lane schemes, and then, as the officer appointed under section 144(1), who had inquired into the merits of these same schemes, could only result in a suspicion that justice might not be done. Therefore, irrespective of his actual conduct of the inquiry, the rule that nothing was to be done which created even a suspicion that there had been an improper interference with the ordinary course of justice, which was the general principle affecting the possibility of bias, applied to the officer who acted in quasi-judicial capacity. He was therefore disqualified from acting in the latter capacity *viz*, as the officer appointed under section 144(1) of the Municipal Ordinance. It would seem that the court in *Alkaff & Co v The Governor-in-Council & Ors*[60] preferred the mere suspicion of bias test and contemplated a lower standard in terms of possibility rather than probability of bias. The court nevertheless, in adopting this approach, did not clearly discuss whether the question of bias had to be answered by the judge or by the hypothetical reasonable man after considering all the relevant facts.

[27] For ourselves, the legal conundrum which characterised the development of the law of disqualification in England has also plagued the Malaysian courts to certain extent. In 1999, the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna*

58 [1937] 1 MLJ 211.
59 Supra, n 10.
60 Supra, n 58.

Sungai Gelugor Dengan Tanggungan,[61] had occasion to consider the test to apply in determining the limits of apparent bias. The Court of Appeal had earlier, in considering the issue, stated that it was concerned not whether there was actual bias on the part of Khan but whether even if Khan was as impartial as could be, right minded persons would think there was a real likelihood of bias on his part and thus thought that Lord Denning's test in *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors*,[62] was still the best. The Court of Appeal relied on a lengthy passage in the judgment of Lord Denning which ended with the following words:

> … There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did favour one side fairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice if that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-mind people go away thinking: "The Judge was biased".

[28] The Federal Court, having agreed with Devlin J in *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association & Anor*,[63] that the different tests if applied to the same facts might lead to different results, decided to follow the House of Lords' decision in *R v Gough*[64] preferring the test of apparent bias (the real danger of bias test) as this would avoid setting aside of judgments upon "quite insubstantial grounds and the flimsiest pretexts of bias". It is to be remembered that Lord Goff speaking for the House of Lords in *R v Gough*[65] made it clear that this was the test to apply in all cases of apparent bias whether concerned with justices or other members of inferior tribunals, or jurors or with arbitrators. At page 129 of the judgment, Edgar Joseph Jr FCJ said:

> Explaining the "real danger" of bias test Lord Goff put it this way (at p 670 F):

61 Supra, n 16.
62 Supra, n 32.
63 Supra, n 38.
64 Supra, n 20.
65 Supra, n 20.

> "Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard '(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.'"

Lord Goff went on to substitute "the opinion of the Court" for Lord Denning's "reasonable people" in *Lannon*. Here is what he said on this point:

> "… Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."

The "*real danger*" test favoured in *Gough* could be seen as a compromise between "*the reasonable suspicion*" of bias test and the "*real likelihood*" of bias test so as to stress that the Court is contemplating a lower standard than "*likelihood*" or "*probability of bias*", that is to say, a "*real possibility of bias*." See, *Gough* at pp 668 C–D, 670 E–F, per Lord Goff; p 671 B–C, per Lord Woolf.

It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v Gough*, per Lord Goff, at p 670 D to E).

[29] Thus, having regard to the facts admitted by Khan in his affidavit, the Federal Court held that the conduct and behaviour of Khan were such that the respondent had clearly succeeded in establishing a real danger of bias under the rule in *R v Gough*,[66] in other words a case of non-automatic disqualification.

[30] Two years after the Federal Court's decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*,[67] before the same court in the case of *Allied Capital*

66 Supra, n 20.
67 Supra, n 16.

Sdn Bhd v Mohamed Latiff bin Shah Mohd and Another Application,[68] the appellant raised a primary point of bias on the part of the judge who presided in the Court of Appeal on the grounds of the judge's membership of the Raintree Club of Kuala Lumpur ("the Club") and the allegation that he had acted professionally for the appellant on the very matters in issue in the suit. The dispute concerned the Club. But the judge had made full disclosure of his interest in the case by informing counsel that he was a member of the Club and that he had not acted for any of the parties in the appeal and that he had checked with his former office and was informed that he had not acted for any of the parties in the appeal and the subject matter of that brief with which he was involved when he was a member of the Bar was unconnected with the subject matter of the appeal. Counsel did not raise any objection as to the propriety of the judge hearing the appeal. The appellant, during their leave application before the Federal Court, produced an affidavit alleging that the judge had in fact acted for the appellant in connection with the project for the setting up of the Club. The Federal Court acknowledged that the issues raised affected a very fundamental aspect of the administration of justice and public confidence in the system of justice. The principles of law on bias and disqualification of judges from hearing a case were so basic and entrenched in our judicial psyche that any aberration from the norms of ethical behaviour would be frowned upon. Nevertheless, applying the real danger test, the Federal Court was satisfied that the objection by the appellant was without merit. The judge had made full disclosure of facts to counsel and in the absence of any objections from counsel, the judge had genuinely believed that he could continue to sit as a member of the coram hearing the appeal. The appellant had ample time to cross check if they had any misgivings as to the position of the judge and they should raise objection at the earliest possible opportunity upon disclosure by the judge.

[31] In *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara*,[69] the correct test of bias to apply when apparent bias was alleged was an issue for determination before the Federal Court. The issue arose following an application by the appellant for the recusal of the trial judge grounded on the fact that he had heard the case involving

68 Supra, n 8.
69 [2001] 4 AMR 4605; [2001] 4 CLJ 701.

Dato' Seri Anwar Ibrahim. The learned judge in dismissing the application used a reasonable person test, that is, would a reasonable person conclude that the judge was anti-*reformasi*. Before the Federal Court, learned counsel for the appellant cited the Australian case of *Webb v R*[70] in support of his submission that the appropriate test should be a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge would not discharge his task impartially. The Federal Court referred to *R v Gough*,[71] *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*[72] and *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*[73] in applying the real danger of bias test. There was, according to the Federal Court, no real likelihood of danger in the sense of a real possibility of bias on the part of the judge when he heard the appellant's habeas corpus application. It would seem clear that the rigorous test of establishing bias on balance of probabilities is not necessary. However, the Federal Court went further to hold that even if the reasonable apprehension of bias test was applied to the circumstances of the case, the court would arrive at the same conclusion.

[32] However, despite the Federal Court's decisions in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*[74] and *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara*,[75] a question of law was referred to the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor and Another Appeal*[76] in the following terms:

> Whether the new test for recusal formulated by the Court of Appeal in these words: "would a right thinking member of the public armed with the facts before us come to the conclusion that the appellant would receive justice at the end of the trial before the same judge".

[33] The Court of Appeal had obviously put forward a new formulation on the precise test to be applied in determining perceived or apparent

70 Supra, n 47.
71 Supra, n 20.
72 Supra, n 21.
73 Supra, n 16.
74 Supra, n 16.
75 Supra, n 69.
76 [2006] 2 AMR 549; [2006] 1 CLJ 577.

bias which seems to be somewhat seriously out of sync or not in accord with the applicable test adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*.[77] The court nevertheless acknowledged that it did not matter which test was applied, the result would be the same which was in line with the English Court of Appeal's observation in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*[78] that the two tests would lead to the same outcome. The learned High Court judge however applied the real danger of bias test as approved by the Federal Court in *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara*.[79]

[34] The Court of Appeal, in an oral judgment, was of the view that the learned judge had asked the wrong question when she applied the real danger of bias test. The correct test formulated by the Court of Appeal, is in the terms reproduced in the preceding paragraph. The Federal Court, after reviewing its earlier decisions in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*,[80] *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and Another Application*[81] and *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara*,[82] held that these decisions, being the decisions of the Federal Court, were binding on the Court of Appeal at the same time laying stress that whether the Court of Appeal agreed with them or not, it was incumbent upon it to apply the test. The doctrine of *stare decisis* required the Court of Appeal to follow the real danger of bias test adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*.[83] On the question of the precise test to be applied, the Federal Court did not see any reason why the test should be changed or modified.

[35] The Federal Court had also observed that in England the *R v Gough* test had been modified by the House of Lords in *Porter v Magill*.[84] With the modification, the question is whether a fair-minded and informed

77 Supra, n 16.
78 Supra, n 21.
79 Supra, n 69.
80 Supra, n 16.
81 Supra, n 8.
82 Supra, n 69.
83 Supra, n 16.
84 Supra, n 51.

observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This modification was made to bring it more closely with Strasbourg jurisprudence which, since October 2, 2000 the English courts were required to take into account. Thus, the House of Lords had a reason for modifying the test. But that reason, according to the Federal Court, was not relevant in Malaysia adding that the old test would not lead to an injustice nor would the new test lead to more justice. It seems quite clear, at least for now, and barring any further development in future, that the law in Malaysia on the appropriate test of apparent bias is finally settled by the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor and Another Appeal*.[85] The fact that the test premised on the real danger of bias is the legal position in Malaysia has been reaffirmed by the Federal Court in *Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin*[86] when it accepted that the law on the subject of judicial bias was settled. However, the point of importance that has emerged is that by adopting the real danger of bias test, the legal position in Malaysia is clearly at variance with the position in other common law jurisdictions.

Circumstances amounting to apparent bias

[36] Having considered the matter, it is now necessary to emphasise that situations that may arise which may be tantamount to perceived or apparent bias are so varied that great reliance must be placed on the judgment of the judge. At the end of the day, the decision whether to recuse from the case will depend greatly on the facts and circumstances of each individual case and the court should be vigilant not to allow parties to do judge-shopping by recusal of judges.[87] Although it is important that justice must be seen to be done, it is equally important that judges discharge their duties to sit, and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[88] The judgment of the Court of Appeal in *Locabail*

85 Supra, n 76.
86 [2009] 4 AMR 298; [2009] 4 MLJ 484.
87 *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65, CA; *Dato' Tan Heng Chew v Tan Kim Hor & Another Appeal*, supra, n 76.
88 *Re JRL, Ex p CJL* (1986) 161 CLR 342 at 352.

(UK) Ltd v Bayfield Properties Ltd & Anor[89] in this regard provides authoritative and useful guidance when it said:

> (25) It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, June 28, 1991, International Arbitration Report Vol 6 # 8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* [1989] 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness,

89 Supra, n 21.

> or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[37] In any case giving rise to automatic disqualification, the judge should recuse himself from the case before any objection is raised. The Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*[90] had also stressed that the same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. As a matter of procedure, where in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which can give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it.[91]

[38] Thus, in *Glomac Resources Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan & Anor*,[92] where the first defendant sought the recusal of the presiding judge on the ground that he and the plaintiff's counsel were once partners in a law firm, it was held that a judge or counsel for a party should inform parties of any relationship which might give rise to bias at the earliest possible date. However, the court in *Glomac Resources Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan & Anor*[93] held that the fact that the judge worked at the firm was a matter of public record and past relationship between the judge and counsel per se, was not generally a disqualification or a ground of recusal of the judge.

[39] The Federal Court in *Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin*[94] provides two other instances which are not

90 Supra, n 21.
91 *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*, supra, n 87.
92 [2016] 3 AMR 542; [2016] 5 CLJ 590.
93 Supra, n 92.
94 Supra, n 86.

considered cogent evidence for recusal. These are the respondent's criticism of the judge on his website and that consequently there might be a real danger of bias if he sits on the panel to hear the appeal and that the same judge had dismissed the previous application for habeas corpus by the respondent. The Federal Court observed that the judge did not respond to the criticism, neither was the respondent cited for contempt. As regards the previous decision, the judge was not precluded from hearing a case against a person when he had in the past heard another case against the person if the facts were different. The Federal Court further observed that the judge did not go into the facts of the case in the earlier application as it was agreed by the parties in that case that the decision in one case that was being heard should be binding on the respondent. The Federal Court accordingly found that there was no real danger of bias.

[40] In *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd*,[95] the defendant filed an application to recuse the judge from hearing the Order 14A application (seeking orders in relation to whether the defendant was precluded from maintaining the counterclaim) on the ground that the judge had allowed the plaintiff's application for summary judgment. It was also contended that the judge had in his grounds of judgment advised the defendant to reconsider its position as to whether to proceed with the counterclaim. The High Court in its decision stated that if the application for recusal was allowed freely, it would encourage tactical applications by litigants seeking another judge to hear their case. A judge's decision which did not favour a litigant could not be used as an instrument to recuse the judge or to remove the case to another court. Each case must be evaluated in its particular circumstances and in light of the whole proceedings. The party alleging bias has the onus of proving it. A party who was not satisfied with the decision should not apply to recuse the judge in hearing other pending or related matters. Preconceived opinion by a judge did not constitute such a real bias as to justify the recusal of the judge as the decision of the court in a pending matter would still be based and decided on the evidence and material produced or presented before the court. There must be a strong foundation or ground for supposing that the judge had so acted in such unjudicial fashion that he could not be expected fairly to discharge his judicial function and duty. It was held that the grounds raised by the defendant

95 [2014] 10 MLJ 413.

were not sufficient to recuse the bench. Likewise in *Comsa Farms Bhd v Malaysian Assurance Alliance Bhd*,[96] the High Court held that judge's finding made according to law in a particular suit could not be a ground for recusal application in other suits.

[41] The High Court in *Kua Kia Soong v Chow Siew Hon*[97] accepted the principles for the recusal of a judge stated in *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd*[98] when it held that there was no real danger of bias on the part of the learned judge even if she were to continue with the trial of the case by hearing the defendant's case. In this case, after the plaintiff closed his case, the court adjourned the hearing to another date. On the adjourned trial date, the learned judge ruled that the defendant's interpreter was incompetent, causing the defendant to ask for the trial to be postponed to enable him to appoint another interpreter acceptable to the court. The request was denied and the court entered judgment in default against the defendant in respect of liability. The parties were directed to submit on the issue of quantum of damages and a date was fixed for decision. On the decision date, the court vacated its earlier default judgment and directed the parties to file written submissions on liability and quantum. The court subsequently allowed the plaintiff's claim. The Court of Appeal, however, set aside the decision on appeal, and remitted the case back to the High Court for the trial to be continued "not necessarily before a different High Court judge" to hear the testimonies of the defendant and his witness. When the defendant was informed that the continued trial would take place before the same judge, he wrote to the Chief Judge of Malaya requesting for a different judge on the ground that the instant judge who heard the matter had already made findings of facts and law and ruled against him. The request was denied on the ground that the case was part-heard and it was not suitable for the trial to be continued before a different judge and, furthermore the Court of Appeal had also not made such a direction. The defendant then applied for the instant judge to be recused from hearing the matter further.

[42] The High Court dismissed the application. In her decision, the learned judge found that the defendant failed to show any fact which

96 [2012] 4 AMR 115; [2012] 3 CLJ 724.
97 [2016] 1 AMR 278; [2016] 9 MLJ 326.
98 Supra, n 95.

could lead a right-minded person to think there was a real danger of bias. Since the defendant would have a fair chance to present his case and to submit at the conclusion of the trial, there was no real likelihood of bias. The court's judgment would be based on the evidence that had been adduced earlier by the plaintiff and the evidence that would be adduced by the defendant. The previous judgment was made after only the plaintiff's case was heard and without hearing the defendant's case because the defendant was not ready to proceed with his case by calling his witnesses including himself. Even though conclusions of fact and law were arrived at, they were not prejudicial to the defendant because they were only based on the plaintiff's witnesses' evidence. The fact that the judgment was given in favour of the plaintiff earlier did not by itself constitute a real danger of bias to justify recusal. The defendant had not adduced any evidence to show there would be a conflict of duty and interest on the part of the learned judge if she continued to hear the case until its conclusion.

[43] Can an objection be soundly based on an allegation that the judgement of the trial judge was copied from the submission of counsel in order to show evidence of bias on the part of the court? This was the issue for determination before the Federal Court in the case of *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications*.[99] The applicants in this case moved the Federal Court to review and set aside its decision in allowing the respondents' appeal. They contended that there was alleged copying or plagiarism in the Federal Court's judgment. It was alleged that the judgment was copied verbatim from the submissions of counsel for the respondents without attribution. The applicant contended that there was apparent bias arising out of the contents of the judgment. If the court's decision was tainted by bias there could be no justice and as such the decision ought to be vitiated. The Federal Court held that the adoption of counsel's submissions as the court's grounds of judgment in itself was not a sufficient ground for the court to set aside the judgment under rule 137 of the Rules of the Federal Court 1995. However such practice was not encouraged as it had a tendency to invite a negative perception which went against the presumption of judicial impartiality and accountability. It was settled law that a judgment might only be challenged on the ground of actual bias or real danger of bias and not

99 [2013] 3 AMR 741; [2013] 4 MLJ 351.

on the ground of apparent bias. The Federal Court found that there was no evidence whatsoever, either in the grounds of judgment or in the conduct of the judges, to substantiate the applicants' contention that there existed a real danger or real likelihood of bias on the part of the members of the court. One thing which seems clear from the decision of the Federal Court in this case, is that, while the practice is not encouraged, there is nothing inherently wrong with adopting the submissions of a party in whole or in part as reasons for judgment so long as those submissions truly and accurately reflect the judge's own independent analysis and conclusion.

[44] It would be useful to remember that judges should refrain from making injudicious and unfair remarks in extreme, outspoken and unbalanced terms which are not supported by evidence. Such remarks would have the tendency of exciting an apprehension that the court may not bring an unprejudiced mind to the resolution of the matter before it. Thus, in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad and Che Abdul Daim Hj Zainuddin (Interveners)*,[100] the Court of Appeal had made "injudicious and unfair remarks" against two persons. The Federal Court in finding that there was a real danger of bias said:

> [98] We are therefore inclined to agree with the submission of learned counsel for the appellant that the remarks and findings found particularly in the main judgment of the Court of Appeal are not supported by evidence, "yet they make use of injudicious, unfair and extravagant language" in such extreme, outspoken and unbalance terms in that they were "out of all proportion to or not commensurate with the circumstances before the court" and they excite an apprehension that the Court of Appeal might not bring an unprejudiced mind to the resolution of the matter before it. There is indeed a real danger that the appellant's case had been unfairly regarded with disfavour, and its argument were not addressed by the Court of Appeal although they were either submitted or apparent from the record of appeal. In short the element of real danger of bias is present especially in the main judgment of the Court of Appeal.

100 [2007] 4 AMR 736; [2007] 5 MLJ 501.

Inappropriate recusals

[45] A judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.[101] The right of fair hearing requires that a judge compromised by interest or favour must withdraw from the case. However, there are circumstances in which it would be wrong or inappropriate for a judge to recuse himself. One such instance is where a judge considers that the requirements for recusal have not been satisfied but decided to recuse himself any way as he did not wish "to be saddled with those allegations while hearing the case at the trial". In *Hock Hua Bank (Sabah) Berhad v Yong Liuk Thin & 7 Ors*,[102] the trial judge, in the course of hearing an application for extension of an injunction, made a remark on the respondents' evidence to the effect that the evidence disclosed a defence which "to say the least, is inherently incredible". The respondents took the judge's comment as expressing a concluded view upon their defence, and hence, applied to disqualify the judge from hearing the trial of the action on grounds of possible bias. The judge acceded to the request but not for the reasons advanced by the respondents, which he considered groundless. He instead decided upon disqualification simply because he did not wish "to be saddled with those allegations while hearing the case at the trial". The Court of Appeal held that a judge must confine himself to the points raised by counsel and not decide a case upon a matter not raised by counsel unless he put the point fairly to both sides. The judge failed to act in accordance with principles. He decided upon disqualification not on grounds argued before him. His fear that an allegation might later be made against him is *non sequitur*. He was at pains to point out his lack of prejudice, yet he was not prepared to hear the case. To allege bias, there must be circumstances upon which suspicion could be grounded that the judge would appear to be biased. The proper test was whether a reasonable and fair-minded person sitting in court and knowing all relevant facts would have ground to suspect that a fair trial would not be possible. There was no such ground.

[46] In the recent case of *Wong Kie Chie v Kathryn Ma Wai Fong and WTK Realty Sdn Bhd (and 19 Other Appeals)*,[103] the learned judge decided to

101 *Laird* 409 US 824 (1972) at 837 as cited in Olowofoyeku, Abimbola A, "Inappropriate Recusals" in *The Law Quarterly Review*.

102 [1995] 2 AMR 1332; [1995] 2 CLJ 900.

103 Civil Appeal No Q-02(IM)-289-02/2016, unreported.

recuse himself from hearing all cases and related cases involving the WTK Group of Companies, Kathryn Ma Wai Fong, Neil Wong Hou Liang and Mimi Wong Hou Wai. The notes of proceedings recorded read as follows:

> In light of the baseless rumours which I have heard, I feel that I am not able to make a fair and just decision in respect of the above cases which are heard jointly and also other related cases. To be fair to all parties, I am recusing myself from hearing all the cases and related cases involving WTK Group of Companies and Kathryn Ma, Neil and Mimi Wong.

[47] This is an instance where there was no application for recusal made by any parties. The recusal was made by the learned judge on his own motion. The Court of Appeal held that the learned judge appeared to have made his decision in the light of baseless rumours "which I have heard, I feel that I am not able to make a fair and just decision …". The impartiality of the learned judge could not be said to be displaced merely because the learned judge heard baseless rumours; which rumours the learned judge himself stated to be baseless. The learned judge erred in accepting "baseless rumours" as sufficient ground upon which to warrant his unilateral recusal from hearing the cases in question. The learned judge's concern of being unable to make a fair and just decision is misplaced in light of the principle enunciated in *Hock Hua Bank (Sabah) Berhad v Yong Liuk Thin & 7 Ors*[104] that the law would not suppose a possibility of bias in a judge who is sworn to administer impartial injustice, and whose authority greatly depended upon that presumption and idea.

[48] The case of *Hock Hua Bank (Sabah) Berhad v Yong Liuk Thin & 7 Ors*[105] demonstrates that appeasement is not an appropriate ground for recusal. A recusal based on appeasement was rightly overturned in *WestLB AG London Branch v Pan*[106] as cited in article "Inappropriate Recusals".[107] The judge considered that the requirements for recusal had not been satisfied, but decided to recuse herself, in order to save costs on both sides, enable the parties to concentrate on the substantive issues in the run up to the hearing, and to ensure "that any upset that

104 Supra, n 102.
105 Supra, n 102.
106 2011 WL 2747817, UKEAT/0308/11/DM (unreported, July 19, 2011, EAT).
107 Supra, n 101.

this issue is causing to the Claimant, who is unwell, does not continue". On appeal to the EAT, HH Judge Richardson said that it was "plain that the Employment Judge did not decide the application to recuse herself upon correct principles".

[49] An important point for judges to bear in mind is that where there is an application for recusal on various grounds, it is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so.[108]

Conclusion

[50] A study of the case authorities as shown above undoubtedly presents an inexorable legal conundrum with various jurisdictions adopting different tests in determining the issue of perceived or apparent bias. Viewed objectively, it seems that the continuing saga of the precise tests to be adopted will provide a broader legal dimension to the law of disqualification. Whatever test to be adopted, the ultimate goal is to ensure that justice is not only done but seen to be done and to this end, it is imperative that judges make decisions according to law free from personal bias and conflicts of interest. Most importantly, which test is adopted does not seem to really matter because as the cases have shown, it would lead to the same outcome, that is, a judge either has to recuse himself from, or otherwise hear the case. The point of importance that has apparently emerged from the various legal principles propounded thus far on the law of disqualification, is that a legal framework within these principles exists to provide guidelines and parameters as to how judges should balance properly their competing duties as justices when recusal applications fall to be decided by them. These principles dictate that judges have a duty to sit and adjudicate on cases allocated to them, displaced only when there are objectively justifiable grounds for recusal, that litigants cannot

108 *Triodos Bank NV v Dobbs* [2005] All ER (D) 364 (May); [2005] EWCA Civ 630.

judge-shop and judges cannot case-shop and that the administration of justice is served as much by a fearless and confident judiciary as by a fair judiciary.[109] It is also important to bear in mind that where in any case there are real grounds for doubt, such doubt should be resolved in favour of disqualification and that every application must be decided on the facts and circumstances of the individual case.[110]

109 Article "Inappropriate Recusals", supra, n 101.
110 *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* supra, n 87.

Legal Professional Privilege

by

*Datuk Nallini Pathmanathan**

Introduction

[1] Lawyers are, together with prosecutors and judges, one of the pillars upon which human rights and the rule of law rest.[1] This is because lawyers play an essential role in protecting human rights and in guaranteeing that the right to a fair trial is respected by providing accused persons with a proper defence in court, and civil litigants an opportunity to be heard fully.

[2] In order for legal assistance to be effective, it must be carried out independently. This is recognised in the preface to the UN Basic Principles on the Role of Lawyers ("the UN Basic Principles") which states that "… adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession". Accordingly, international law provides certain safeguards crafted to ensuring the independence of individual lawyers as well as the legal profession as a whole.[2]

[3] In order that lawyers can function independently, it is incumbent upon states to protect them from any unlawful interference with their work. The UN Basic Principles include a set of provisions that establish safeguards for lawyers in this respect:

> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution

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* Judge of the Court of Appeal of Malaysia.

1 See *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1* (International Commission of Jurists, 2007), p 63.

2 Ibid, p 64, n 1.

or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics".[3]

[4] One of the important provisions in relation to these safeguards is the secrecy of communications between the lawyers and their clients. In order for lawyers to effectively represent their clients, the authorities must respect this secrecy, which has been described as the cornerstone of the lawyer-client relationship. In this context, Principle 22 of the UN Basic Principles provides as follows:

> 22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

The Evidence Act 1950

[5] In Malaysia this safeguard is statutorily provided for in relation to judicial proceedings,[4] in sections 126 to 129 of the Evidence Act 1950 ("the EA 1950"). These provisions deal with the law relating to legal professional privilege – namely communications between clients and their legal advisers or their clerks.

[6] A lawyer is under an obligation not to disclose communications which have been made to him in professional confidence, i.e. in the course and for the purpose of his employment, by or on behalf of his clients, or to state the contents of documents with which he has become acquainted in the course of his professional employment, without the express consent of his client.

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3 Ibid, p 64, n 1.

4 The EA 1950 relates to essentially judicial proceedings. This therefore excludes the extent to which legal advisers should be entitled to claim legal advice privilege on behalf of their clients when required by investigatory authorities to disclose documents and other communications made in the course of and for the purposes of giving legal advice to their clients. For example, the Malaysian Anti-Corruption Commission ("MACC"). This important question turns on the nature of the right accorded to citizens under this privilege. Is it a mere rule of evidence or is it more substantive? Reading from the UN Basic Principle**s**, it is clear that internationally it is intended to create what amounts to a substantive right, a fundamental common law right. The High Court in Singapore in the case of *Yap Sing Lee v MCST Plan No. 1207* [2011] SGHC 24 held that "… at common law, legal advice privilege is not regarded as merely a rule of evidence, restricted to judicial or quasi-judicial proceedings, but is now considered a substantive legal right that may be claimed outside these areas".

[7] The communication if made in writing and made known to others, loses its "confidentiality" for either the client or the advocate claiming privilege under section 126 of the EA 1950.[5] As stated in *Sarkar on Evidence* in relation to section 126:

> … Not only should the communication be made to the legal adviser in the course of and for the purpose of his employment, it must also be of a private and confidential nature. …
>
> … The communication must be made with the intention of confidentiality but no special request for secrecy is necessary. … Whether the communication was intended to be confidential must depend on the facts of each case.

What is the rationale for this rule?

[8] The rule exists primarily to facilitate the administration of justice and the interests of justice, which cannot be upheld without the aid of persons skilled in the law who may provide salient legal advice. Deprived of this privilege, no client would consult any skilful person or would only tell half his case for fear that some "confidential" parts may be open to disclosure, thereby prejudicing his own case.

[9] Privilege is necessary to promote the free and frank consultation of legal advisers.

The origins of legal professional privilege

[10] Our provisions on legal professional privilege, namely sections 126 to 129 of the EA 1950, are a codified form of the privilege that originated from the United Kingdom under common law. Our provisions are *in pari materia* with the Indian Evidence Act of 1872 where it is acknowledged as stated in *Sarkar on Evidence* at page 2198:

> … The law relating to professional communications is the same in India as in England. Section 126 is taken from *Taylors 832* and in interpreting it the court may refer to English cases (*Framji Bhkiaji v Mohan Singh* 18 B 263).

5 See *Sarkar on Evidence*, 16th edn, Vol 2 (Nagpur: Wadhwa & Co, 2007), p 2203 under "Communications Must be Confidential and Necessary or Relevant to the Purpose". (All subsequent references in this article to *Sarkar on Evidence* is to this publication.)

[11] It should therefore follow, similarly, that English cases are applicable in Malaysia, as is evident from a consideration of Malaysian case law on the subject.

[12] Under English law, the concept of legal professional privilege has existed since at least 1577, during the reign of Queen Elizabeth I. The rationale for the rule at that time was not entirely clear as the earliest cases provided very little by way of reasoning.[6] Dean Wigmore and other commentators suggested that it was meant to uphold the honour of lawyers who had taken oaths of secrecy with their clients and were loath to breach these oaths. There has been some criticism of his rationale by writers who postulate that a perusal of the case law in the 1570s and 1580s discloses that solicitors and attorneys were in fact called to testify and were not exempt from being examined in their personal capacity in relation to matters not arising from their professional work. They could refuse to answer questions relating to client communications in relation to professional communications. Therefore it is argued that it is less than likely that the privilege was originally founded on the basis of an honour theory or the special status of advocates as expounded by Wigmore.[7]

[13] In any event, a more coherent approach was adopted in the 19th century as borne out by the case of *Greenough v Gaskell*:[8]

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

6 See for example *Berd v Lovelace* (1577) 21 ER 33 (Ch).

7 See for example Auburn, Jonathan, *Legal Professional Privilege: Law and Theory* (Oxford: Hart Publishing, 2000).

8 (1833) 1 My & K 98, 39 ER 618 (Ch).

[14] And in *Anderson v Bank of British Columbia*[9] ("*Anderson*") per Jessel MR:

> It is absolutely necessary that a man in order to prosecute his rights or to defend himself from an improper claim should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary to use a vulgar phrase that he should be able to make a clean breast of it to the gentleman and whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.

The sub-heads of legal professional privilege

[15] Under English common law and as is widely practised, even in Malaysia today, legal professional privilege "bifurcates" into two categories, namely lawyer and client privilege or client advice privilege and litigation privilege.[10]

[16] The difference between the two categories has been explained by Bray in his work on discovery[11] thus:

> Professional privilege [i.e. privilege affecting communications between lawyer and client] rests in the impossibility of conducting litigation without professional advice, whereas the ground on which a party is protected from disclosing his evidence [litigation privilege] is that the adversary may not be thus enabled so to shape his case as to defeat the ends of justice.[12]

[17] The distinction between the two categories was expounded lucidly by Bingham LJ in the case of *Ventouris v Mountain*:[13]

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9 (1876) 2 Ch D 644 at 644-649.

10 See Pinsler, Jeffrey, "New Twists in Legal Professional Privilege: Communication for the Purpose of Litigation and between the Lawyer and Client", [2002] 14(2) SAcLJ 195-230.

11 See Auburn, supra, n 7. Bray's work is called *Discovery* (1884), p 407.

12 See Auburn, supra, n 7, p 197.

13 [1991] 3 All ER 472; [1991] 1 WLR 607 at 618.

> Privilege in aid of litigation can be divided into two distinct classes: The first is legal professional privilege properly so called. It extends to all communications between the client and his legal adviser for the purpose of obtaining advice. It exists whether litigation is anticipated or not. The second only attaches to communications which at their inception come into existence with the dominant purpose of being used in aid of pending or contemplated litigation. That was settled by the House of Lords in *Waugh v British Railways Board* [1980] AC 521. It is not necessary that they should have come into existence at the instance of the lawyer. It is sufficient if they come into existence at the instance of the party himself – with the dominant purpose of being used in the anticipated litigation. The House approved of the short statement by James LJ in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 656: "… as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief".

[18] In so saying, Bingham LJ accepted the statement of the law by Denning MR in *Buttes Gas and Oil Co v Hammer (No. 3)*.[14]

[19] In summary therefore, different rationales underscore legal advice privilege and litigation privilege respectively. The rationale for legal advice privilege is that it serves and enhances the administration of justice and the rule of law while litigation privilege serves to advance access to adversarial justice.[15]

[20] In the Canadian case of *Blank v Canada*[16] which the Singapore Court of Appeal approved and endorsed in the case of *Skandinaviska Enskilda Banken A (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* (*"Skandinaviska"*),[17] the rationale for the two different categories of privilege was also explained:

> The solicitor-client privilege … recognises that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are

14 [1981] QB 223 at 243-244.

15 See *Report of the Law Reform Committee on Reforming Legal Professional Privilege* by the Law Reform Committee (Singapore Academy of Law, October 2011), para 35.

16 [2006] 2 SCR 319.

17 [2007] SGCA 9.

> trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
>
> Litigation privilege on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[21] The case of *Skandinaviska* was relied upon by our Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor*[18] but not in relation to the two distinct categories of legal professional privilege. The Federal Court relied on the Singapore Court of Appeal case to conclude that reference could be made to English cases in order to determine the scope of the privilege:

> In Singapore, legal professional privilege was a statutory right enacted in sections 128 and 131 of the Act. As the Act was modelled on the Indian Evidence Act 1872 (Act 1 of 1872), which itself had roots in English law, the court would need to refer to English decisions in order to determine the scope of the said provisions as well as the current state of the law, while bearing in mind that not all English law principles could be used for this purpose as a result of section 2(2) of the Act.

[22] Section 2(2) of the Singapore Evidence Act provides as follows:

> (2) All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

[23] Essentially, it would appear that the Federal Court thereby recognised that English case law was applicable in the construction and applicability of our section 126 of the EA 1950, which is *in pari materia*

18 [2009] 1 MLRA 248, FC.

with both the Indian Evidence Act of 1872 and the Singapore Evidence Act, save in respect of several amendments recently introduced in Singapore in 2012 further to recommendations made by the Law Reform Committee on the Singapore Evidence Act.

[24] However, this bifurcation of legal professional privilege into two categories has not been examined in any detail by the decisions of the superior courts in this country.

Is litigation privilege codified or covered in section 126 or section 129 of our Evidence Act 1950?

[25] This issue has similarly not been examined in any depth in our case law. However, it would appear that the courts routinely apply the English common law principles to some extent and rely on English authorities when dealing with both categories of cases. This is especially true in the course of discovery applications. Therefore, although in practice litigation privilege is routinely relied upon, there has been some debate as to whether sections 126 to 129 of the EA 1950 or their equivalent provision elsewhere encompass litigation privilege specifically.

[26] For example, this issue has been examined in Singapore. Jeffrey Pinsler in commenting about section 128 of the Singapore Evidence Act, which is *in pari materia* with our section 126, and adopted *in toto* from section 126 of the Indian Evidence Act, takes the position that the Act does not address litigation privilege. He takes the view that section 128 in Singapore, and by analogy our section 126, deals with legal advice privilege, namely lawyer and client communications.

[27] It is apparent from a perusal of section 126 alone that the section does not refer to the distinction between legal advice and litigation privilege. However, section 129 arguably envisages the concept of litigation privilege.

[28] The Singapore Court of Appeal in *Skandinaviska* held that the source of litigation privilege was the common law. Andrew Phang Boon Leong JA delivering the judgment of the court stated as follows:

> … litigation privilege exists by virtue of the common law. Since section 131 of the Act … clearly envisages the concept of litigation privilege, there is no inconsistency between the common law and the statutory provisions. Accordingly section 2(2) of the Act would apply

> to confirm the applicability of litigation privilege at common law in the local context … as there is no inconsistency between litigation privilege at common law and sections 128 and 131 read together.

[29] Similarly in Malaysia, it may be said that there is no inconsistency between litigation privilege at common law and section 126 and section 129 read together. In any event, it would appear that most practitioners apply what is in effect the common law litigation privilege, quoting extensively and applying English case law in this respect. The reasoning adopted in the foregoing case would lend credence to this approach, given the lack of inconsistency between our section 126 and section 129 and litigation privilege at common law.

[30] In India, in the case of *Vishnu v New York Insurance Co*,[19] it has been held that no provision in the Indian Evidence Act provides for litigation privilege but the court has the power under the Civil Procedure Code to protect from disclosure certain third-party documents obtained for the purpose of getting legal advice on litigation. Section 130 of the Indian Procedure Code provides: "the Court may … order the production by any party … of such of the documents in his possession or power relating to any matter in question in such suit or proceeding as the Court thinks right. … ".

[31] The equivalent provisions in our Rules of Court 2012 would be Order 24 rule 3, the general provision on discovery. The limits on discovery are circumscribed by Order 24 rule 13(2) which provides as follows:

> (2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

[32] And perhaps more pertinently, Order 24 rule 15 which states that:

> The foregoing provisions of this Order are subject to any written law or any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.

19 (1905) 7 Bombay Law Reporter 709.

[33] However it could equally be argued that these rules in themselves do not afford or provide a source of law, which specifically prescribes the application of litigation privilege.

[34] It would appear that the reasoning adopted in the *Skandinaviska* case is suitable for adoption in Malaysia, namely that litigation privilege exists by virtue of the common law position and its incorporation is not inconsistent with section 126 and section 129 read together.

[35] However, there is a minority view that takes the stance that lawyer-client privilege as provided for in section 126 encompasses both categories of privilege, namely client advice privilege as well as litigation privilege.

[36] In other words, litigation privilege may be viewed as a sub-category of client-advice or lawyer-client privilege.

[37] For example, in the English House of Lords case of *Three Rivers District Council v Governor and Company of the Bank of England (No. 5)* ("*Three Rivers*"),[20] the House of Lords re-stated the policy on legal advice privilege as being an absolute privilege that can only be overridden by statute or waived by the client. It went on to hold that legal advice privilege has a close relationship with litigation privilege. Legal advice privilege comes to the fore in relation to legal advice, which is sought over current or contemplated litigation or even where there is no litigation contemplated at that instance. If however, advice was sought in connection with contemplated litigation, then the advice would fall within both categories of privilege. The House of Lords felt that legal advice privilege was the more important category and should be given a broad scope.[21]

[38] Applying the reasoning in that case, it could be argued that section 126 encompasses both categories of litigation as they are closely related.

[39] In Sarkar's excellent treatise on Evidence, it would appear that the statutory provisions encompass litigation privilege.

[40] In relation to communications from third persons to the client or legal adviser for the purpose of litigation, Sarkar states firstly that

20 [2004] UKHL 48.

21 See Yim, Jimmy, SC, "Developments in Legal Privilege – A Review of the Decisions in the *Three Rivers* Case", www.lawgazette.com.sg/2005-5/May05-feature1.htm.

sections 126 to 129 apply solely to client-solicitor communications and no others. He points out that there is no special provision in the Act for the protection of similar communications for the purpose of litigation between the client and persons other than the legal advisers or between third persons and legal advisers. However, he goes on to point out that such communications are also protected from disclosure and the discretion rests with the court. This brings into play the dominant purpose test for the purposes of ascertaining whether litigation privilege exists.

[41] He also states that evidence obtained by the solicitor or at his behest is protected if obtained after litigation has commenced or is threatened with a view to the defence or prosecution of such litigation. And in support of this the famous passage cited by James LJ in *Anderson* is quoted – "You have no right to see your adversary's brief and no right to see the materials by the brief" – this is litigation privilege.

[42] However having considered the competing views, it would appear that the clearer and more comprehensible view is that litigation privilege is indeed not provided for in section 126. It is arguably provided for in section 129. In any event, the reasoning adopted in the *Skandinaviska* case in Singapore rationalises the approach we have already taken in Malaysia, namely that litigation privilege exists by virtue of section 129 and the common law. Given the lack of inconsistency between the statutory provisions in sections 126 to 130 and the common law, there is no reason why this rationale cannot continue to be applied locally.

[43] This gives us the added advantage of being able to modulate our approach with the changes in the common law and allow the courts to develop the law further.

[44] If an amendment was sought to be introduced to clarify the two types of privilege and the rationale for each, it would be difficult to draft and might, arguably result in considerable rigidity in application and eventually become somewhat ossified. The flexible approach at common law would be lost. Ultimately the objective here ought to be to keep abreast of changes in approaches as they develop in other countries world-wide and statutory rigidity might well preclude or inhibit the development of the law.

[45] The Singapore Law Reform Committee did in fact suggest a statutory codification of the two categories of privilege in their report in 2011, but interestingly this was not adopted in the latest amendments to the Singapore Evidence Act, which took effect from June 10, 2016. In fact, the only amendment they introduced was the inclusion of in-house counsel in relation to the applicability of legal professional privilege.

Section 2 of our Evidence Act 1950 – Does legal professional privilege apply?

[46] Section 2 of our EA 1950 provides as follows:

> 2. This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

[47] The seeming "anomaly" as it were, arises by reason of the fact that by virtue of this section, it would appear that legal professional privilege is confined to judicial proceedings but not to affidavits filed in court prior to trial.

[48] However as pointed out earlier, at the discovery stage, parties often rely on privilege to preclude documents covered by this privilege from being disclosed. The basis for this is the common law, coupled with the Rules of Court 2012 as pointed out earlier. Certainly the courts have not forced disclosure in discovery applications where legal professional privilege has been correctly claimed.

Privileged documents or communications[22]

[49] Some examples of privileged documents and communications which are attributable entirely to *Sarkar on Evidence* are as set out below:

(i) Cases given to counsel on behalf of a client amount to professional communications which are therefore privileged.

(ii) Notes of professional interviews and communications, whether made by the solicitor or client are privileged.

22 *Sarkar on Evidence*, pp 2213-2215.

(iii) Solicitor's confidential letters to a client for obtaining information about legal proceedings are privileged.

(iv) Names of a party's witness prior to trial.

(v) Statements of fact drawn up by a client for submission to the solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information to conduct his case are privileged.

(vi) Documents containing the contents of an interview and the subsequent opinion of solicitor and counsel on the strength of the party's position with regard to the claim and steps to be taken in regard thereof are privileged.

(vii) Letter written by an agent of the client, a company, giving details of the claim for the purpose of obtaining legal advice from the company's solicitor is privileged and inspection will not be granted.

(viii) The fact that part of a letter or letters has been read to defendant's counsel will not be sufficient to amount to waiver with regards to the parts that are not ready.

(ix) Although documents have not passed directly from the client to the legal adviser, the fact that they were created or made for the purpose of obtaining legal advice is sufficient for the privilege to attach.

Malaysian case law on section 126 of the Evidence Act 1950

1. Dato' Anthony See Teow Guan v See Teow Chuan[23]

[50] The Federal Court case of *Dato' Anthony See Teow Guan v See Teow Chuan* is the primary Federal Court decision on this area of the law. It reiterates and endorses an absolutist approach to legal professional privilege by reason of the express words of section 126 itself.

[51] The facts briefly are that the appellant, Dato' Anthony See Teow Guan and the financial controller of Kian Joo Can Factory Berhad ("KJFC") had met up with an advocate, gave her instructions and

23 Supra, n 18.

information and sought a legal opinion from her. Based on the instructions and information provided, the legal opinion was duly rendered. It contained various allegations that were defamatory of the respondents, i.e. See Teow Chuan and others. The legal opinion was addressed to KJCF and marked for the attention of the appellant only. The appellant however published the opinion to various persons. The respondents got hold of a copy through the external auditors. They then commenced a suit for defamation contending that the allegations in the legal opinion were defamatory of them, in that it was alleged that they had dishonestly and in breach of their duties as directors used an entity known as KL Metal Printing (M) Sdn Bhd ("KLMP") to siphon off monies from KJCF utilising fictitious invoices.

[52] At the trial, the respondents called the advocate as the first witness but the advocate maintained that she could not be compelled to disclose the communication she had received from the appellant and produce the legal opinion on the ground that section 126 protected the same from such disclosure. This stance was upheld by the trial judge, James Foong J, as he then was.

[53] However, the Court of Appeal reversed the decision maintaining that on the facts the appellant had waived the confidentiality and the privilege attached to the legal opinion and that the communication between the appellant and the advocate was not protected under section 126.

[54] The appellant appealed to the Federal Court where several questions pertaining to the construction of section 126 were posed, including the following:

(a) whether the principle at common law relating to legal professional privilege, namely "once privileged, always privileged" is recognised under the Act, and if so to what extent;

(b) whether the principle of confidentiality is co-extensive with that of legal professional privilege under section 126 of the Act so that the privilege continues until there is a waiver;

(c) the meaning to be accorded to "express consent" — an intentional and deliberate act to waive legal privilege;

(d) whether the Act recognises the common law rule of loss of legal professional privilege by implied waiver or that waiver could be imputed by the conduct of the holder;

(e) where the client is a corporation whether its directors and principal officers are classifiable as third parties or outsiders for the purposes of legal professional privilege;

(f) and others.

[55] The Federal Court found in relation to questions (a) and (b), in line with the decision of the High Court, that a document such as the legal opinion once privileged remains always privileged. This, it was held, was embodied in section 126 and section 129. The Federal Court also referred to *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors*,[24] where Eusoff Chin J held:

> Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is "always privileged" (per Cockburn CJ in *Bullock v Corry & Co*).

[56] The Court of Appeal's finding that "confidentiality is a characteristic that can be lost" with a corresponding loss of privilege does not accord with the express terms of section 126, which makes no reference to any such contention.

[57] It further held that a legal opinion is implicitly confidential but the exception under section 126 makes no reference to loss of confidentiality. The privilege has to be waived expressly. Therefore it was held that the Court of Appeal had taken an erroneous approach in treating "privilege" as being co-extensive with "confidentiality".

[58] The requirement of confidentiality is an essential element to be considered at the outset when determining whether or not privilege attaches to a document or communication. If the document or communication is confidential in its nature, as a legal opinion usually is, then the privilege attaches, and thereafter cannot be lost or abrogated without the express consent of the privilege holder, namely the client. In this case the client was KJCF and not Dato' Anthony See or the financial controller. If, on the other hand, the communication or document was not, and was never intended to be confidential, then one of the fundamental requirements for privilege to attach would not be met and the communication or document would therefore not be privileged. As it is not privileged at the outset, no question of

24 [1988] 2 MLRH 803.

duration would arise. Here the position was different because a legal opinion to a client is implicitly confidential so the privilege attached, and having done so, could then not be lost without the express consent of the client, KJCF. To that extent the so-called publishing to third parties was ineffective to abrogate the privilege which once attached, remained forever, so to speak.

[59] As for the meaning to be given to "express consent" in section 126, the Federal Court held that it had no choice but to give effect to the plain meaning of the words used in section 126 of the Act rather than seek to expand or modify the statutory provisions by way of reference to common law principles. They quoted the judgment of the Court of Appeal in a New South Wales case in *Sugden v Sugden*[25] at paragraph 34:

> … the availability of client legal privilege was to be decided in accordance with the relevant provisions of the Evidence Act.

[60] In short, the statutory provisions in our EA 1950 prevail over the common law principles which have been modified and adapted to include implied waiver. Therefore the courts in Malaysia continue to adopt an absolutist approach to privilege, notwithstanding the development of the law elsewhere which allows for implied waiver based on the rationale of the importance of disclosure in litigation in order to ascertain the truth of a matter.

[61] Given the express wording of the statute it is submitted that implied waiver is not contemplated under the framework of the EA 1950 except as expressly provided in section 129 and section 128. The common law rule of waiver by implication or imputation is not recognised under the Act. Therefore there has to be a clear, deliberate and intentional waiver of the privilege by the privilege holder. This would appear to be the same position in Singapore and India, which utilise similar provisions.

[62] So for example, the failure to raise an objection to a privileged communication or document "would not remove the lid of confidentiality attached to such communication or document between the advocate and his client".

25 [2007] NSWCA 312.

[63] With respect to the issue of disclosure to third parties, the Federal Court found that there had in fact been no such disclosure, as all disclosure had only been to the directors and principal officers of the client corporation. The client was KJCF. As a corporation it has to function and communicate through its directors and principal officers.

2. Yeoh Tai Chuan & Anor v Tan Chong Kean[26]

[64] The recent case of *Yeoh Tai Chuan & Anor v Tan Chong Kean* is authority for the proposition that section 126 does not afford clients a cause of action against their solicitors.

3. Dr Pritam Singh v Yap Hong Choon[27]

[65] In *Dr Pritam Singh v Yap Hong Choon* ("*Dr Pritam Singh*") the scope and applicability of section 126 was discussed *in extenso* by Gopal Sri Ram JCA (as he then was). This was a medical negligence case. The issue in dispute was whether the defendant doctor, who was the appellant in the Court of Appeal, was entitled to disclosure of expert reports of the plaintiff-patient. The defendant had asked for an order that the parties exchange reports of their respective experts whom they proposed to call at the trial. The judgment states that the object of the application was to "shut out" the plaintiff from calling an expert whose report had not been furnished to the defendant beforehand.

[66] The plaintiff resisted the defendant's application and the High Court did not order disclosure or exchange. On appeal the defendant-doctor's appeal was dismissed.

[67] One of the primary issues raised by the plaintiff was that the medical reports, of which the defendant sought disclosure, were in fact privileged and therefore not subject to disclosure save at the plaintiff's choice.

[68] The Court of Appeal agreed with the plaintiff's stance. Amongst the reasons was the issue of legal professional privilege under section 126(1) of the EA 1950. The court held that such privilege attached to the expert reports sought and these documents were therefore protected from pre-trial discovery.

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26 [2016] 2 AMR 540.
27 [2006] 6 AMR 633.

[69] Having set out the rationale for the privilege, namely its importance in the administration of justice which made it necessary for a client to be able to disclose fully all relevant matters to his solicitor in confidence in order to be defended competently, the court went on to hold that section 126 is more than an ordinary rule of evidence but is a "fundamental condition on which the administration of justice as a whole rests".

[70] The court then went on to consider the speech of Lord Jauncey of Tullichettle in *In re L (a minor)*[28] where the distinction between legal advice privilege and litigation privilege was considered. As stated there, a clear distinction is apparent between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client for the purposes of litigation. In the former case, the privilege attaches to all communications whether related to litigation or not, while in the latter case it attaches only to documents or other written communications prepared with a view to litigation: *Waugh v British Railways Board*.[29]

[71] In the former case the solicitor cannot, without his client's consent, be compelled to express an opinion on the factual or legal merits of the case. However, a third party who has provided a report to a client can be subpoenaed to give evidence by the other side and cannot decline to answer questions as to his factual findings and opinion thereon. There is no property in the opinion of an expert witness (see *Harmony Shipping Co SA v Davis; Harmony Shipping Co SA v Saudi Europe Line Ltd*).[30]

[72] The court held that litigation privilege is an essential component of adversarial procedure. The further cases of *Worral v Reich*[31] and in *Re Saxton deceased*[32] were also quoted. In the former case, it was held that one party to a litigation could not be compelled to produce to the other party a medical report obtained for the purposes of the action. In the latter, Denning MR said: "In short it is one of our notions of

28 [1997] AC 16, HL.
29 [1980] AC 521, HL at 533B, 544B.
30 [1979] 3 All ER 177; [1979] 1 WLR 1380, CA, per Lord Denning MR (and approved and endorsed by Bingham LJ in *Ventouris v Mountain* [1991] 3 All ER 472; [1991] 1 WLR 607, supra, n 13).
31 [1955] 1 QB 296.
32 [1962] 1 WLR 968.

a fair trial that, except by agreement, you are not entitled to see the proofs of the other side's witnesses." (which is to be gleaned from the 19th century case of *Anderson*).

[73] The more recent cases of *Causton v Mann Egerton (Johnsons) Ltd*[33] and *Waugh v British Railways Board*[34] were also relied upon. In the latter, Lord Simon of Glaisdale said:

> This system of adversary forensic procedure with legal professional advice and representation demands that communications between lawyer and the client should be confidential, since the lawyer is for the purpose of litigation merely the client's alter ego. So too material which is to go into the lawyer's (i.e. the client's) brief or file for litigation. This is the basis for the privilege against disclosure of material collected by or on behalf of a client for the use of his lawyer in pending or anticipated litigation.

[74] The importance of litigation privilege was thus underscored in ensuring a fair trial and not one in which the adversary with the use of such materials tailors his defence or prosecution to meet the adversary's case.

[75] This Malaysian case is the only one to draw a distinction between legal advice privilege and litigation privilege. However the source of litigation privilege is not discussed. The basis on which the English common law was relied upon was the contention that section 126 substantially reproduced the common law of England and English authorities therefore become relevant, quoting *Framji Bhicaji v Mohansing*.[35]

4. Toralf Mueller v Alcim Holding Sdn Bhd & Ors[36]

[76] The recent High Court case of *Toralf Mueller v Alcim Holding Sdn Bhd & Ors* discusses extensively the scope and applicability of section 126. The learned JC, Wong Kian Kheong also considers suitable amendments to be made to the EA 1950 in relation to legal professional privilege.

33 [1974] 1 WLR 162.
34 [1980] AC 521, HL at 536.
35 1893 ILR 18 Bom 263 (per *Sarkar*).
36 [2015] AMEJ 1432, HC.

[77] The absolutist approach as adopted by the Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* was followed.

[78] In this (then) petition for oppression, the respondents sought to adduce five e-mails between the petitioner and a legal adviser of the company, Mr Muralee. They founded their claim for disclosure on the first proviso to section 126, namely that the e-mails were in furtherance of an illegal purpose.

[79] The court read and examined the five e-mails (as it is entitled to do in order to ascertain whether there is in fact a prima facie case of furtherance of an illegal purpose) and concluded that they amounted to legal communications regarding the dispute in the oppression petition. Accordingly it found that legal professional privilege was indeed attached to these e-mails and they could not therefore be adduced in evidence.

[80] The contention put forward in urging the court to "lift the lid" on the confidentiality of these five e-mails included:

(i) that there was no evidence of the furtherance of an illegal purpose;

(ii) there was a commission of fraud or act detrimental to the company;

(iii) joint representation.

[81] It was held that there was no "express consent" to the disclosure of these e-mails; neither was there evidence of the furtherance of an illegal purpose. The respondents contended that the petitioner had given false evidence under the Penal Code. However having examined those e-mails, the learned JC found that the communications between the solicitor and the petitioner did not show any basis for inferring that it was intended to commit any offence, let alone any offence of giving false evidence under the Penal Code.

[82] The further contention that the contents of the five e-mails proved that the petitioner and the solicitor showed that they had committed a fraud on the company by sabotaging an earlier suit (the 2009 suit) or by causing the loss of a Petronas licence was also rejected. Accordingly, it was held that none of the exceptions or provisos to section 126 came into play to allow these five e-mails to be adduced in evidence.

[83] The further issue that arose in relation to section 126 was the admissibility of communications between the petitioner and one Dato'

Stanley, a solicitor and advocate who represented the petitioner in the earlier 2009 suit. The High Court concluded that this single e-mail sought to be adduced, was not covered by section 126 because Dato' Stanley had represented not only the petitioner but also the first and third respondents. Therefore, the first and third respondents, as clients of Dato' Stanley had a right to view and utilise the e-mail in question. Justice Wong Kian Kheong relied upon, inter alia, *Overseas Chinese Banking Corp v Lee Tan Hwa & Anor*,[37] where Eusoff Chin J determined as follows:

> The rule is that where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other, and further where the evidence showed that a party had placed himself entirely in the hands of his solicitor and constituted him his general agent in the transaction, the knowledge of the solicitor must be imputed to him: *Dixon v Winch* [1900] 1 Ch D 736.

[84] Reliance was also placed on the Singapore High Court case of *Foo Ko Hing v Foo Chee Heng*.[38] In that case it was held that where both the plaintiff and the defendant employed a single solicitor in respect of the same matter, it followed that he was jointly appointed. As such, the solicitor's obligations to the parties continued even after he ceased to be their solicitor. The privilege conferred by the EA 1950 in these circumstances amounts to a joint privilege. The solicitor would be prohibited from disclosing any communication made by one or both of them in the course of his employment as a joint solicitor unless they both expressly consented.

[85] The same judge also discussed section 126 and legal professional privilege in much the same vein in *Ranjeet Singh Sidhu & Anor v Zavarco Plc & Ors*.[39]

5. Yeoh Eng Kong v Goh Bak Ming & Ors[40]

[86] In the case of *Yeoh Eng Kong v Goh Bak Ming & Ors*, Lim Chong Fong JC refused to allow disclosure of an investigation report prepared by solicitors for a client at the behest of the client, in the course of

37 [1988] 2 MLRH 38; [1989] 1 MLJ 261; [1989] 2 CLJ (Rep) 198 at 262.
38 [2002] 2 SLR 361.
39 [2015] AMEJ 1720, HC.
40 [2015] AMEJ 1169, HC.

pre-trial discovery, citing section 126 or legal professional privilege, and relying on the construction given to it in the Federal Court case of *Dato' Anthony See Teow Guan v See Teow Chuan*.

[87] The competing contention was that privilege had been waived. The judge held that where the disclosure was sought against the client, section 128 and section 129 made it clear that it was only in very limited circumstances that the privilege could be deemed waived, namely if the client himself volunteered the privileged communication at trial or questioned his solicitor on such privileged material at trial. Otherwise the express consent of the client is required. Therefore it followed that unless there was express consent from the client, legal professional privilege would preclude pre-trial discovery of the investigative report.

6. Bukit Lenang Development Sdn Bhd v Telekom Malaysia Berhad & Ors[41]

[88] An interesting case where the privilege was held not to apply is the case of *Bukit Lenang Development Sdn Bhd v Telekom Malaysia Berhad & Ors*. That case involved contempt. The contemnor had failed to disclose salient and material information in relation to the case. The court found, as a matter of fact, that the withholding of such evidence was with a view to misleading the court. The contemnor contended that legal professional privilege attached to the report, precluding him from disclosing the same. The material evidence did not therefore have to be disclosed to the court.

[89] The court found that his evidence was not merely false testimony but had crossed the line to the point of deliberate concealment of material facts amounting to obstruction or frustration of the course of justice.

[90] The learned JC, while acknowledging the importance of litigation privilege, went on to note that the allegation central to the contempt charges was the deliberate concealment and suppression of information that a detailed survey was done on the subject land. This would have involved visits to and inspection of the site which was completely withheld from the court. In short, the contemnors had misled the court into believing that only a preliminary survey had been conducted when in fact they had done a detailed survey necessitating many visits

41 [2014] AMEJ 0777; [2014] 5 MLRH 353, HC.

and inspections of the subject site. The contemnor however had said without reservation or qualification that no visit to or inspection of the subject land whatsoever had been made throughout the survey. He had completely omitted mention of the detailed survey.

[91] In these circumstances, it was held that litigation privilege did not afford a defence.

[92] The reliance on privilege at the juncture of contempt proceedings detracts from the bona fides of the defence. If indeed it was privileged, the proper course for the witness to adopt would have been to state to the court that any further information about site visits and inspections was privileged under legal professional privilege. Further and in any event, there was nothing to show that this was a third party report instructed by the solicitor with a view to defending pending or threatened litigation. Neither was it legal advice privilege whereby the client or the solicitor had asked for this survey for a third party report in the course of a solicitor-client relationship. It is doubtful whether privilege attaches at all.

7. Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors[42]

[93] Another case of interest is *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors* where Su Geok Yam J refused to order disclosure of an Employment Audit Report for the purposes of a full trial on the grounds that legal professional privilege applied.

[94] The plaintiffs had by application sought to obtain discovery of this report or thereby preclude it from use at full trial. The court found that the plaintiff's application was devoid of merit as the law on legal professional privilege in Malaysia differed from that of England (at least in relation to the concept of waiver). Under the Act only the owner of the privilege could waive it (see section 126) or by calling the solicitor as a witness and questioning him specifically on privileged matters (see section 128). The common law rule of waiver by implication was not recognised here as held by the Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan*.

[95] Secondly, the plaintiff had failed to adduce any evidence to demonstrate to the court that the owner of the legal professional

42 [2013] AMEJ 0297; [2014] 2 MLRH 271.

privilege in the Employment Audit Report, namely one Tiffany & Co, New York had expressly waived the privilege by giving express consent. In fact, Tiffany was not a party to the plaintiff's claim. Neither were any witnesses called from this entity, namely its directors or principal officers, to state that they were expressly waiving the privilege. There was no express consent in writing either. Therefore, it was not possible to accede to the plaintiff's contention that there had been waiver by the defendants, who were not the owners of the privilege.

[96] This case points out the importance of identifying the "client" correctly at the outset so that no mistakes are made in claiming legal professional privilege accurately. If the wrong client is identified (as appears to be the case in the Federal Court decision of *Dato' Anthony See Teow Guan v See Teow Chuan*), this will result in an erroneous analysis of the section.

8. Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor[43] and *PKNS Holdings Sdn Bhd v Nusa Gapurna Development Sdn Bhd & Anor*[44]

[97] The same principles in relation to section 126 have been reiterated in numerous other High Court cases such as *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor* per Kamaludin Md Said JC (as he then was) and in *PKNS Holdings Sdn Bhd v Nusa Gapurna Development Sdn Bhd & Anor* per Hasnah Mohamed J (as she then was). These cases reiterate the principle that express consent is necessary to waive legal professional privilege and that the common law position of implied waiver is inapplicable in this jurisdiction by virtue of the express statutory words in section 126.

9. Ernest Cheong Yong Yin v Kamariyah Hadan & Ors[45]

[98] In *Ernest Cheong Yong Yin v Kamariyah Hadan & Ors*, VT Singham J held that an invoice to pay professional fees which does not contain any specific communication, advice or details between client and solicitor is not privileged. The court, in determining whether a document is in fact a privileged document, has to look at the substance and reality of the document itself and not just the label and circumstances in which

43 [2013] AMEJ 0225; [2014] 1 MLRH 115.
44 [2014] 4 MLRH 364.
45 [2010] 6 AMR 526.

it came into existence. The learned judge was careful to differentiate that the situation might have been different if the invoice had contained details or narration of a type or nature of the advice given and the communication between them. In such circumstances, an invoice might be subject to legal professional privilege. In this case the court found that the invoice was simply a bare bill, thereby not attracting legal professional privilege.

10. Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors[46]

[99] The oft quoted case of *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* decided by Eusoff Chin J (as he then was) considers the scope and applicability of section 126. It is most often cited for the proposition that a communication once privileged is "always privileged" per Cockburn CJ in *Bullock v Corry*.[47] It is also authority for the proposition that express consent of the client is needed for waiver and that implied consent does not suffice. Here, the defendant's solicitors had given the document in question to the first plaintiff in the presence of all the defendants and none of the defendants had objected to it. The fact that they had remained silent, it was held, was insufficient to, and did not, constitute a waiver, since the law requires that the defendant must have given express consent to their solicitors before a document could be released to anyone. Such consent may be endorsed on the document itself or given separately in writing. It was held that the document in question was privileged.

11. Faridah Ariffin v Dr Lee Hock Bee & Anor[48]

[100] The lengthy decision of *Faridah Ariffin v Dr Lee Hock Bee & Anor* points out the clear distinction between the law in Malaysia and the United Kingdom, which has enacted the Civil Evidence Act 1968, the Civil Evidence Act 1972 and the Courts and Legal Services Act 1990, enabling Parliamentary legislation allowing for rules of court to be made for pre-trial disclosure of experts' reports, provided they were intended to be called at trial. The position is different in Malaysia where expert reports are privileged when made in anticipation of a claim. This is borne out by section 126 of the EA 1950. The judgment

46 [1988] 2 MLRH 803.
47 (1878) 3 QBD 356.
48 [2006] 1 AMR 377.

goes on to examine in minute detail the basis for privilege attaching to expert medical reports at the discovery stage. They are privileged and an exchange cannot be ordered unless both parties consent.

The exceptions to legal professional privilege as codified in section 126

[101] Although the Malaysian courts tend to adopt the absolutist approach in relation to legal professional privilege, given the content of section 126 which stipulates that such privilege is absolute unless expressly (and not impliedly) waived by the client, there are statutory exceptions to the rule which have been spelt out in the provisos to the section. They include communication for an illegal purpose, which is not protected. Any fact coming to the knowledge of the legal adviser since the commencement of his employment showing that any crime of fraud has been committed is also not protected.

[102] The rationale for this is that the existence of an illegal purpose prevents the privilege from attaching. It is not the duty of a solicitor to advise his client how to breach the law or commit a fraud.[49] This would include attempts to evade the law. For example, fraud upon creditors would fall within this rule.

[103] The further reasoning for this proviso is evident from the case of *Gartside v Outram*[50] where Wood VC explained that no private obligation not to disclose such as forms the basis for solicitor client privilege can "dispense with the universal obligation which lies on every member of society to discover every design which may be formed contrary to the laws of society, to destroy public welfare". He concluded that where there is an intention to commit an offence and it comes to the knowledge of the legal adviser, the obligation to the public must dispense with the private obligation to the client.

[104] How is the court to determine whether there has indeed been an act or communication in furtherance of an illegal purpose? In the 19th century case of *R v Cox and Railton*,[51] Stephen J said:

49 See *Sarkar on Evidence*, p 2209 under "Provisos: Communication for Illegal Purposes not Protected".
50 (1856) 26 LJ Ch 113.
51 (1884) 14 QBD 153.

> In each particular case the court must determine upon the acts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended but before the commission of the crime for the purpose of being guided or helped in committing it.

[105] This is clear from the examples set out in the Act itself in relation to the proviso.[52]

[106] There was one instance in which I had to consider the application of this provision. In *Berjaya Land Bhd v Wong Chee Hie & Ors*,[53] solicitors were advising the defendant on the strategy to be adopted in relation to a management tussle involving a hotel. One of the steps sought to be undertaken was to obtain vacant possession of the hotel and thereafter seek to obtain management control of the hotel as well. The opposing party, namely the plaintiff who was in physical control of the hotel at the time managed to procure some e-mails emanating from the defendant's solicitors in relation to advice on obtaining vacant possession. (The fact that the evidence might have been obtained illegally does not in itself render the evidence inadmissible.)

[107] In the e-mails the solicitor had advised that it was essential to obtain vacant possession, and if necessary, to obtain extraneous assistance, otherwise than lawfully, i.e. not *vide* the police or the use of a court order, but using third parties in order to achieve such possession. There was some detail on when and how this could be done. The entire strategy for obtaining management control including this seemingly unlawful means of obtaining vacant possession was set out in a few e-mails.

[108] The plaintiff therefore sought to subpoena the solicitor who wrote the e-mail, claiming inter alia that the privilege did not apply by reason of the first proviso to section 126. The defendant in turn sought to set aside the subpoena maintaining that the advice was privileged.

[109] I concluded in a written judgment that the subpoena was not to be set aside. I did not exclude the possibility that the proviso might be applicable but maintained that this issue could only properly be

52 See *Sarkar on Evidence*, p 2210.
53 [2011] 6 AMR 126.

determined if the solicitor attended court and some evidence was led, after which arguments would ensue and I could then issue a ruling accordingly.

[110] I was unable to simply set aside the subpoena as being irrelevant or inadmissible evidence that was privileged as legal advice privilege because there appeared, prima facie, to be some basis for the plaintiff's contention that there was advice of a possibly unlawful nature in that the solicitor had advised that vacant possession should be obtained at any cost including the use of force, which appeared to be prima facie unlawful, in order to achieve such possession. This was sufficient to warrant the attendance of the solicitor to defend the issue at trial. The matter was however subsequently settled immediately prior to trial so the outcome of the matter remains moot.

[111] In this context, it has been held that in order to ascertain whether the communication between the solicitor and his client is not privileged because its purpose was the furtherance of crime, the court is entitled to look at the document in question without requiring the party objecting to the claim for privilege to prove by evidence that the document was prepared in furtherance of a crime or fraudulent purpose (see *R v Governor of Pentonville, Ex p Osman*).[54]

[112] What does the word "*fraudulent*" cover? It covers a case where it was shown that the communications passed between the defendant and his solicitor for the creation of trusts and transfer of assets. The purpose, the court held, was taken to conceal or render irrecoverable, profits in which the plaintiff had a proprietary interest. (See *Derby & Co Ltd v Weldon*).[55]

What about third party experts?

[113] This was explained in the case of *Harmony Shipping Co SA v Davis; Harmony Shipping Co SA v Saudi Europe Line Ltd*[56] per Lord Denning MR. He explained that many of the communications between the third party expert and the solicitors will be privileged. They cannot be disclosed without the express consent of the client. Therefore if questions were asked which infringed legal professional privilege (assuming they

54 [1989] 3 All ER 701, QBD. See *Sarkar on Evidence*, p 2210.
55 [1990] 3 All ER 315, QBD.
56 [1979] 3 All ER 177 at 181; [1979] 1 WLR 1380, CA.

are confidential in nature), then the judge is duty bound to protect the witness by upholding the privilege. Apart from that however, an expert witness is essentially a witness of fact. The court is entitled to hear evidence on facts which he has actually witnessed or observed and to have his independent opinion based on those facts.[57]

[114] Put simply therefore, legal professional privilege attaches to communications between the legal adviser and the expert, but not to the expert's opinion or the documents on which he has based his opinion (unless of course those documents are in themselves protected by legal advice privilege).

Section 127 of the Evidence Act 1950

[115] This section extends the provisions of section 126 to apply to interpreters, clerks or servants of advocates. The rationale for this is that advocates are unable to transact all aspects of their work personally and often rely on clerks or employees to collate and assist them. The privilege is thereby extended to these persons. As for interpreters, again given the multi-national diversity of the country, an interpreter is often necessary to translate between the solicitor and his client. Such communications which are confidential and sought to obtain legal advice, are similarly privileged under this section as in section 126. Otherwise section 126 and legal advice privilege would be rendered redundant because instead of obtaining details of the communications from the solicitor, the opposing party could simply subpoena the clerk or interpreter and obtain disclosure of privileged information thereby. Therefore it is in the interests of justice and the administration of justice that the section subsists. It speaks for itself and needs little clarification.

Section 128 of the Evidence Act 1950

[116] This section provides that if a party to a suit gives evidence at his own instance or otherwise, he is not deemed to have consented by reason of so testifying to disclosure of privileged communications between himself and his legal adviser.

[117] It goes on to provide that the calling of the solicitor or advocate as a witness by any party will only be deemed to amount to a waiver

57 See *Sarkar on Evidence*, p 2212.

if the party seeking the privilege himself questions the advocate as to privileged matters.

[118] In short, this section deals with waiver. While testifying in itself is insufficient to amount to a waiver (which position is consonant with section 126 which requires express waiver), waiver might be inferred if the client himself questions the solicitor or advocate in respect of matters which are specifically covered by legal professional privilege.

[119] It follows that calling the solicitor or advocate to testify but not touching on any privileged matters will not amount to waiver. That can only arise where the examination-in-chief touches specifically on privileged matters. But even in such an instance, a court in Ireland[58] maintained that cross-examination be limited to the specific matters raised in examination-in-chief.

[120] Wigmore postulates that it is not open to a privileged person to disclose as much as he pleases and withhold the rest.[59] This is essentially a rule of fairness.

[121] So for example, while a client's offer of testimony in itself cannot amount to implied waiver, where he offers his own testimony as to specific facts which he has communicated with his solicitor or his solicitor's testimony in relation to the same communications, it amounts to a waiver of all other communications to the solicitor on the same matter. Similarly, he is of the view that the client's offer of his own or the solicitor's testimony as to a part of any communication to the solicitor is a waiver as to the whole of that communication on the principle of completeness.

[122] This does not accord with the Irish case and position adopted there.

Section 129 of the Evidence Act 1950

[123] This section reiterates sections 126, 127 and 128 before going on to provide that the exclusion to such privilege may arise where the client offers himself as a witness, in which event the court may compel him to provide disclosure of such privileged communications as may

58 See *M'Donnell v Conroy* 1843 Ir Cir Rep 807.
59 See *Sarkar on Evidence*, p 2217.

appear necessary to be disclosed in order to explain any evidence which he has given but not any other such privileged communications.

[124] This section therefore provides yet another exception to the absolutist approach codified in section 126.

[125] Communications from third parties for the purpose of litigation fall under two heads:

(1) communications called into existence by the client for the purpose of submission to the legal adviser for his advice or for the conduct of litigation;

(2) communications called into existence by the legal adviser.[60]

[126] *Sarkar on Evidence*, has provided a comprehensive list of examples and exclusions which are set out below.

[127] Examples would include advice for the conduct of litigation; shorthand notes of interviews held between employees in relation to a threatened or pending litigation which is to be submitted to the client's solicitors; reports obtained by a party from his subordinates for the purposes of pending or anticipated litigation. (It is interesting to note that all the case law in support is largely from the common law, which clearly recognises litigation privilege expressly.)

[128] Excluded from this category of privilege would be documentary information obtained from the client for purposes otherwise than submission to a legal adviser in relation to litigation. For example, reports made by an agent to his principal in the ordinary course of business even though litigation is anticipated; reports made to a principal to be submitted "in the event of litigation" to the solicitor.

[129] Oral or documentary information from third persons, which has been called into existence by the solicitor or at his direction for the purposes (or dominant purpose) of litigation, for example, information collated and noted for the purposes of examination-in-chief, reports made by medical men at the request of solicitors of an entity as to the condition of a person threatening to sue for injury; reports by the servant of the client made for use of the client's solicitor in reasonable apprehension of a claim against the client are privileged.

60 See *Sarkar on Evidence*, p 2220.

[130] Where such reports come into existence or are created not for the dominant purpose of litigation, for example, copies of letters written before action by a third party to the client or called into existence by the solicitor not for the purposes of litigation or where litigation is not at the time contemplated although it might afterwards arise, is not privileged. Therefore it is the time of creation that is relevant to ascertain whether the privilege attaches.

How far does the law protect legal professional privilege in relation to a client's right to speak freely and frankly to his legal adviser in order to obtain skilled legal advice?

[131] As stated at the outset, in the context of litigation, legal professional privilege has been consistently recognised as "much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests". The privilege against *disclosure* is in *the interests of preserving confidentiality*. Privilege cannot be overridden even if the documents are directly relevant to the guilt or innocence of a third party on a serious criminal charge (see *R v Derby Magistrates, Ex p B*[61] per Taylor LJ and Gopal Sri Ram in *Dr Pritam Singh*.

[132] However, a perusal of section 126 discloses that legal professional privilege as statutorily provided relates primarily to judicial proceedings. So it could be argued that it is inapplicable in the context of statutory bodies, administrative tribunals or disciplinary tribunals, etc.

[133] In Malaysia, a case in point is *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor*.[62] I refer to the decision in the Court of Appeal where I was a member of the coram. The two respondents were advocates and solicitors acting for Datuk Shamsubahrin, the client who was summoned by the MACC to give a statement to assist in the investigation of an offence under the Malaysian Anti-Corruption Commission Act 2009 ("the MACC Act"). The respondents had accompanied their client to the MACC's office. After the client's statement was taken, the MACC informed the respondents that they wanted to record their statements. The respondents refused to comply.

61 [1996] AC 487, HL.
62 [2015] 5 AMR 225.

[134] The MACC then served a notice under section 30(1)(a) of the MACC Act requiring the respondents to be present at the MACC office to be examined orally and for their statements to be recorded. The respondents then filed a judicial review application in the High Court seeking inter alia an order of *certiorari* to quash the notices, a declaration that the notices were ultra vires and unenforceable as well as a declaration that the MACC did not have the power to take statements or testimony of lawyers who appear with their client who had been ordered to attend the MACC's office for the purpose of giving statements.

[135] In the High Court, the application for judicial review was allowed. The MACC appealed to the Court of Appeal. For the MACC it was submitted that section 30(1)(a) of the MACC Act empowers an officer of the MACC investigating into an offence to order "*any person*" to attend before him for the purpose of examination if the officer is of the opinion that it might assist the investigation. The MACC submitted that the words "in his opinion" in the section, empowered the MACC to so require attendance, and that the court should not usurp the power given to the investigation officer by forming its own opinion in this matter. Finally it was contended that there was no evidence that the notice was issued otherwise than in good faith.

[136] Section 30(1)(a) provides as follows:

> 30. *Power to examine persons*
>
> (1) An officer of the commission investigating an offence under this Act may—
>
> (a) order any person to attend before him for the purpose of being examined orally in relation to any matter, which may, in his opinion, assist in the investigation into the offence;
>
> (b) order any person to produce before him, within the time specified by such officer, any book document, records, accounts or computerised data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence;
>
> (c) by written notice order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the

notice being information which, in such officer's opinion, would be of assistance in the investigation into the offence within the time specified by such officer; and

(d) order any person to attend before him for the purpose of having his handwriting or voice sample taken.

(2) …

(3) A person to whom an order has been given under paragraph (1)(a) shall:

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and

(b) during such examination, disclose all information which is within his knowledge or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall not refuse to answer any question on the ground that it tends to incriminate him or his spouse … .

[137] The whole of section 30 should be perused in full. In a judgment written by his Lordship Vernon Ong JCA, we held, inter alia, as follows:

(a) In construing section 30(1) pursuant to section 17A of the Interpretation Acts 1948 and 1967, what must prevail is a construction that promotes the object and purpose of the MACC Act. The word "person", it was held, applied to witnesses and suspects;

(b) It was clear from MACC's affidavits that the only reason the MACC wanted to examine the respondents was because the respondents had insisted on being present at their client's statement recording;

(c) The discretionary power accorded to an officer of the MACC in deciding to call "a person" for examination and disclosure of documents was not an uncontrolled discretion to call any person he likes. Quoting from *Sri Lempah Enterprise* (per Al Marhum Sultan Azlan Shah),[63] it was reiterated that every legal power

63 *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

must have legal limits. A discretion should be exercised for a proper purpose and should not be exercised unreasonably. In exercising his discretion, the officer must have regard to all relevant considerations and disregard all improper considerations. Where the discretion is wrongly exercised, it is the duty of the courts to intervene;

(d) Significantly it was pointed out that the officer had failed to have regard to section 46 of the MACC Act, which expressly protects privileged information or communication between the respondents *qua* solicitors and their client. Section 46 of the MACC Act reads as follows:

(1) Notwithstanding any other written law, a Judge of the High Court, may on application being made to him in relation to an investigation into any offence under this Act, order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to seizure under this Act;

(2) Nothing in subsection (1) shall require an advocate and solicitor to comply with any order under that subsection to the extent that such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any pending proceedings.

[138] It was held that it is clear that section 46 of the MACC Act requires an application to be made to the judge of the High Court before an advocate and solicitor can be ordered to disclose information available to him. Significantly subsection 46(2) categorically excludes privileged information or solicitor-client communication.

[139] It is clear from the foregoing that there is an express provision that protects privilege under section 126. Therefore legal professional privilege prevails under the provisions of the MACC Act.

[140] A similar provision protects privileged information under the Criminal Procedure Code (Act 593) (Revised 1999) ("the CPC"). Section 51(1) of the CPC provides for a summons to produce documents or other things. It allows a police officer making a police investigation who requires the production of a document for the purposes of any investigation to issue a summons requiring "the person" in whose possession such document is believed to be, to attend and produce it as specified in the summons.

[141] However section 51(3) specifically provides that: "Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force …". Therefore, legal professional privilege is once again safeguarded under the CPC by express reference to the EA 1950.

[142] Section 116B(1) nevertheless provides that a police officer not below the rank of Inspector conducting a search shall be given access to computerised data whether stored in a computer or otherwise.

[143] Subsection (2) of section 116B further states that any information obtained under subsection (1) shall be admissible in evidence notwithstanding any other provisions in any written law to the contrary.

[144] There is no express saving in respect of privileged information. However neither is there an express ouster clause in relation to privilege. It is submitted that in order to oust privilege and force production of solicitor-client communications or documents, express words overriding such privilege should be present in the Act.

[145] Perhaps a clearer example of such an "overriding" effect may be found in section 20 of the Anti-Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613):

> The provisions of this Part shall have effect notwithstanding any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise.

[146] Section 26 provides:

> (1) An examiner authorised under section 25 may examine—
>
> (a) …
>
> (b) …
>
> (c) a person whom he believes to be acquainted with the facts and circumstances of the case, including an auditor or an advocate and solicitor of a reporting institution, and that person shall give such document or information as the examiner may require within such time as the examiner may specify.
>
> (2) …

(3) Notwithstanding any other written law, an agent, including an auditor or an advocate and solicitor of a reporting institution, shall not be liable for breach of a contract relating to, or a duty of, confidentiality for giving any document or information to the examiner.

[147] However, section 47 provides privilege for advocates and solicitors. It states:

(1) Notwithstanding any other law, a Judge of the High Court may, on application being made to him in relation to an investigation into any offence under subsection 4(1) or a terrorism financing offence order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to seizure under this Act.

(2) Nothing in subsection (1) shall require an advocate and solicitor to comply with any order under that subsection to the extent that such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any pending proceedings.

[148] So similarly to the MACC Act there is a saving provision for privileged information albeit information caught under "litigation privilege". Again this is another instance where, in light of the express savings provision it would appear that privileged information remains sacrosanct and is not available for disclosure.

[149] It would therefore appear that notwithstanding that section 126 applies to judicial proceedings expressly, the majority of our legislation similarly expressly preserves legal professional privilege in keeping with the UN Basic Principles. It remains to be seen how a section would be construed where there is an express clause ousting or overriding privilege.

The earlier position in England

[150] Initially in England, it was held that privilege was relevant only to judicial proceedings and could not be protected in, for example, disciplinary proceedings involving a solicitor (per Lord Diplock).

[151] This was stated in the case of *Parry-Jones v Law Society* ("*Parry-Jones*")[64] where Diplock LJ (as he then was) held that:

64 [1969] 1 Ch 1, CA.

> … privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or tribunal exercising judicial functions, material which would otherwise be admissible in evidence.

[152] In that case, the Court of Appeal refused to uphold privilege in trust documents and clients' accounts when a solicitor was required to produce them in disciplinary proceedings. The question of whether the solicitor was required to disclose these documents was determined by reference to the contractual (or equitable) duty of confidentiality. It was held that it was an implied term of his retainer that he could disclose those documents in relation to disciplinary proceedings taken against him.[65]

[153] However, the reasoning in *Parry-Jones* was rejected by the House of Lords in *R v Special Commissioners of Income Tax, Ex p Morgan Grenfell & Co Ltd* ("*Morgan Grenfell*").[66]

[154] In *Morgan Grenfell*, the principal issue was whether a notice under section 20(1) of the Taxes Management Act ("TMA") 1970 (as amended) required *the client* to disclose privileged documents because the section contained an express saving for documents in the hands of *his lawyer*. The relevant parts of the legislation are:

> 20. (1) Subject to this section, an inspector may by notice in writing require a person to deliver to him such documents as are in the person's possession, custody or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the person is or may be subject, or to the amount of any such liability.
>
> …
>
> (3) Subject to this section, an inspector may, for the purpose of enquiring into the tax liability of any person ("the taxpayer"), by notice in writing require any of the persons who in relation to the taxpayer are subject to this subsection, to deliver to the inspector or, if the person to whom the notice is given so

65 See article by Maitland Chambers, "The Scope of Legal Professional Privilege", found at old.maitlandchambers.co.

66 [2002] UKHL 21.

elects, to make available for inspection by a named officer of the Board, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability.

20B. (2) A notice under section 20(1) does not oblige a person to deliver documents relating to the conduct of any appeal by him; a notice under section 20(3) does not oblige a person to deliver or make available documents relating to the conduct of a pending appeal by the taxpayer;

…

(7) A notice under section 20(3) … does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained.

[155] It was held that this was insufficient to exclude legal professional privilege by implication. According to Lord Hoffmann, the justification for including a saving provision of this kind was to exclude any argument (based on the view of the law prevalent in *Parry-Jones*) that the solicitor's duty of confidentiality could be overridden by any statutory duty of disclosure. In reaching this conclusion the House of Lords also overruled the decision of Millett J in *Price Waterhouse v BCCI Holdings (Luxembourg) SA*[67] in relation to section 39 of the English Banking Act 1987 which conferred a power on the Bank of England to require a party to disclose all documents in its possession in furtherance of its investigatory powers. The section did not contain any express words in relation to documents covered by legal professional privilege and again it contained a saving provision in relation to documents in the hands of a barrister or solicitor.

[156] It was held that legal professional privilege is not to be regarded simply as a rule of evidence protecting a litigant in judicial proceedings. This is what the House of Lords said:

> It is not the case that LPP does no more than entitle the client to require his lawyer to withhold privileged documents in judicial or

67 [1992] BCLC 583.

> quasi-judicial proceedings, leaving the question of whether he may disclose them on other occasions to the implied duty of confidence. The policy of LPP requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all. The reasoning in *Parry-Jones* case suggests that any statutory obligation to disclose documents will be construed as overriding the duty of confidence which constitutes the client's only protection. In the present proceedings however it is accepted that the client is protected by legal professional privilege and this can only be overridden by primary legislation containing express words or necessary implication.

[157] This reasoning can only flow from a consideration of legal professional privilege as constituting more than a rule of evidence but a substantive right implicit and fundamental to the administration of the law. Such an approach has been endorsed in the case of *Dr Pritam Singh*. However, if a literal or hyper literal construction is adopted in relation to section 126 and it is viewed as merely another rule of evidence, this might give rise to a more restrictive view of legal professional privilege.

[158] It is rare to find express clauses in other statutes expressly taking away legal professional privilege. On the contrary, the doctrine is generally preserved in express terms. Statutes like the MACC Act and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, do not, by express terms or by implication remove or abrogate the principle of legal professional privilege which is a cornerstone of the administration of justice. On the contrary, these Acts contain specific provisions saving or preserving legal professional privilege.

The position in Australia

[159] A similar approach has also been adopted in Australia, as is evident from the case of *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* ("*Daniels*").[68]

[160] In *Daniels*, the issue was whether the Australian Competition and Consumer Commission could compel a *solicitor* to disclose information protected by legal professional privilege in the course

68 [2002] HCA 49.

of an investigation against the *client* under section 155 of the Trade Practices Act 1974. Again, the relevant legislation provided as follows:

> (1) If the Commission has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act … a member of the Commission may, by notice in writing served on that person, require that person:
>
> (a) to furnish the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;
>
> (b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any such documents; or
>
> (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.
>
> …
>
> (7) A person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person, but the answer by a person to any question asked in a notice under this section or the furnishing by a person of any information in pursuance of such a notice, or any document produced in pursuance of such a notice or made available to an authorised officer for inspection, is not admissible in evidence against that person.

(Subsection (7A) also preserved privilege for information, documents and evidence relating to any meeting of the Cabinet of a State or Territory.)

[161] The High Court of Australia held that the powers contained in section 155 did not expressly or by necessary implication exclude the legal professional privilege of the client or to override the solicitor's duty to maintain that privilege on behalf of their clients:

> In my opinion, the general words of s 155(1) cannot be read as authorising the production of documents protected by legal

> professional privilege. It is an elementary rule of statutory construction that courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law classifies as fundamental unless the context or subject matter of the statute points irresistibly to that conclusion. Nothing in the context of subject matter of s 155 points to Parliament intending the Commission to have power to require the production of documents that are the subject of legal professional privilege. In that respect, the right of legal professional privilege is in a different category from the immunity against self- incrimination, an immunity which s 155 expressly abolishes. It is also in a different category from the immunity against being exposed to a civil penalty, an immunity that this Court has held was abrogated by s 155(1).

[162] What then is the position that will be adopted in Malaysia where there is no specific saving provision? As I said before, it will ultimately turn on the weight accorded to legal professional privilege, i.e. whether it is simply a rule of evidence contained in section 126, or whether it constitutes a fundamental right that needs to be protected in order to preserve and facilitate the administration of justice.

[163] The rationale put forward by Dean J in the English case of *Carter v Northmore Hale Davy & Leake*[69] supports the view that it is a fundamental right requiring protection:

> [T]he focus of the modern theory of legal professional privilege is upon the removal of the "apprehension" of compelled disclosure: "the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser". The achievement of that "necessity" is not frustrated by the established exclusions in the form of particular identified circumstances in which legal professional privilege will not attach. Those circumstances can be identified in advance and the client can be advised that, provided they do not exist at the time when the relevant communication or document is made or comes into existence, legal professional privilege will attach to it and will, in the absence of waiver or loss of confidentiality, provide conclusive protection in the future. … In contrast, if the privilege could be overridden by the courts by reason of the outcome of some subsequent balancing process or wherever particular circumstances arise in subsequent litigation, an assurance of confidentiality could

69 (1995) 183 CLR 121.

never be given and the "necessity" for "the client's freedom of apprehension" could never be fully achieved.

[164] As explained earlier in this article, we have adopted the English common law cases in relation to litigation privilege with ease, as has India and Singapore. So we should not be faulted for preserving legal professional privilege in the interests of the administration of justice by adopting or following the case law in other jurisdictions, such as *Morgan Grenfell* in England and *Daniels* in Australia, where it is suitable to our needs to do so. That is not contrary to the EA 1950, which is arguably silent in this respect. Again, if there is no express statutory provision precluding the protection of legal professional privilege, then it cannot be said that the statute prevails over the common law position. It would also, importantly be in keeping globally with the current trends world-wide to seek to protect legal professional privilege.

Are communications provided by third party experts on technical matters protected by disclosure when litigation is not in progress or anticipated?

[165] Let us first consider the position when litigation is anticipated. The Malaysian case of *Dr Pritam Singh* as discussed earlier relating to medical negligence answers this question well. Certainly where litigation is contemplated and an expert opinion from a third party is procured by the client or solicitor, the dominant purpose being for use in litigation, litigation privilege will apply to protect the document from disclosure at the pre-trial point, i.e., for purposes of discovery.

[166] This was explained in the case of *Harmony Shipping Co SA v Davis; Harmony Shipping Co SA v Saudi Europe Line Ltd* per Lord Denning MR.[70] He explained that many of the communications between the third party expert and the solicitors will be privileged. They cannot be disclosed without the express consent of the client. Therefore if questions were asked which infringed legal professional privilege (assuming they are confidential in nature) then the judge is duty bound to protect the witness by upholding the privilege. Apart from that however, an expert witness is essentially a witness of fact. The court is entitled to hear evidence on facts which he has actually witnessed or observed and to have his independent opinion based on those facts.[71]

70 [1979] 3 All ER 177 at 181; [1979] 1 WLR 1380, CA.
71 See *Sarkar on Evidence*, p 2212.

[167] Put simply therefore, legal professional privilege attaches to communications between the legal adviser and the expert, but not to the expert's opinion or the documents on which he has based his opinion (unless of course those documents are in themselves protected by legal advice privilege).

[168] It would therefore appear that where third party experts or reports are procured at the behest of the solicitor or the client for the dominant purpose of litigation, privilege will attach. The rationale is essentially litigation privilege, which, in keeping with our adversarial system, precludes one party from customising its case to meet its adversary's case accordingly (see the case of *Anderson*).

[169] As stated in *Sarkar* however, there is no special provision in the Act for the protection of communications for the purpose of litigation between the client and persons other than legal advisers or between third parties and legal advisers. However, such communications are also protected from disclosure and the discretion rests with the court again at the pre-trial or discovery stage. And although a document may not be passed directly between the legal adviser and the client, yet if it was created for a clearly confidential purpose such for use in litigation, then the court will not compel the production of such a document at the discovery stage. At trial the expert would have to be subpoenaed by the opposing party at his own risk, and the expert would have to testify. There is no property in the opinion of the expert.

[170] Similarly evidence obtained by the legal adviser or the client is protected if obtained after litigation has commenced or is threatened. The rationale is that of *Anderson* per James LJ: "You have no right to see your adversary's brief and no right to see the materials for the brief". In short, it would appear that litigation privilege applies to third party communications.

[171] However, if litigation is *not* contemplated the situation is different. Legal advice privilege does not appear to extend to third party communications or documents. Oral or documentary information obtained by the client otherwise than for submission to the solicitor— example: reports made by agent to principal in the ordinary course of business even though litigation be anticipated, is not privileged.

[172] For example, an answer to a letter from a principal stating that certain claims had been made and asking the agent as to the facts or

reports made to the principal to be submitted "in the event of litigation" to the solicitor is not privileged.

[173] This is to be contrasted with oral or documentary information from third persons which has been called into existence by the solicitor or by his direction for the purposes of litigation, for example information to be used in witness statements, reports made by medical men at the request of the solicitors of a railway company in relation to the condition of a man threatening to sue the company for injury from a collision, or reports made by the servant of a company for use by the company's solicitor in reasonable apprehension of a claim against the company are privileged.[72]

[174] In short, where no litigation is pending or threatened, or to put it another way, where the dominant purpose for which the document or communication came into existence is not litigation, there is no privilege attaching to such communication or document. So in determining whether privilege attaches, it is necessary for the court to be satisfied that at the time of creation, the document or communication came into existence for the dominant purpose of litigation. If litigation is not the dominant purpose, for example it may have been created for a number of purposes, then arguably the privilege will not apply.

[175] However, if the report is obtained by the legal adviser from the technical expert and communicated to the client with some input from the legal adviser, couldn't it be argued that it is "caught" by legal advice privilege?

[176] It has been argued by critics that the extension of legal professional privilege to third party communications may encourage corporate misconduct and increase the zone of secrecy in opposition to open discovery rules. There could be abuse of privilege; the lawyer may be roped in on third party consultation only as a "façade to achieve secrecy"[73] or "to cover up damaging information that might otherwise be discoverable". More specifically, it was pointed out that a particularly insidious form of corporate abuse of privilege would be "information funnelling, this involves deliberately concealing

72 See *Sarkar on Evidence.*

73 See DeStefano, Michele Beardslee, "The Corporate Attorney-Client Privilege: Third Rate Doctrine for Third Party Consultants" (2009) 62 *SMUL Review* 727 at 771.

sensitive business information that would otherwise be compellable by transmitting the information through lawyers".

[177] As against this it has been argued by entities such as the Law Reform Committee of Singapore that legal advice privilege ought to be extended to third party communications. In their report they stated that although public interest disclosure is important, it is not paramount and ought to give way to the legitimate needs of a client unable to prepare its materials for the purposes of obtaining legal advice or who finds it more economical or expedient to employ a third party for this purpose. It will also encourage corporate clients to secure the best information that third parties can provide at affordable prices in keeping with their priorities in seeking legal advice.

[178] The Committee went on to recommend that the Act ought to be amended to provide that third party communications for the dominant purpose of seeking legal advice should be privileged. However it does not appear that this amendment was finally effected.

Should communications by an organisation's employees with their in-house counsel be protected from disclosure?

[179] Presently, communications by an organisation's employees with their in-house counsel are not protected from disclosure. However, communications with in-house counsel may attract privilege if they arise for the dominant purpose of seeking and obtaining legal advice from external counsel. If there is no external counsel, the privilege will not come into play.

[180] The issue considered here is whether such privilege should be accorded to in-house counsel. It is instructive to consider the position in other jurisdictions. Certainly section 126 which is primarily concerned with legal advice privilege does not cover in-house communications between in-house counsel and the client, unless it is for the dominant purposes of litigation and external counsel is one of the corresponding parties.

The position in England

[181] In England under the common law, the extension of legal advice privilege to in-house counsel came about in the case of *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No. 2)* ("*Alfred*

Compton").[74] There Denning MR held that it was essential for in-house counsel to have acted in an independent capacity:

> It does sometimes happen that such a legal adviser does work for his employer in another capacity perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be independent in the doing of right as any other legal adviser.[75]

[182] He went on to add:

> They [in-house counsel] are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court.

[183] The position of privilege attaching to in-house communications is well-accepted in the UK. This is because there is very little issue about the independence of such legal advisers. They are subject to the same duties to their client as well as the court as external counsel.

The position in Australia

[184] The position is the same in Australia provided certain conditions are met. First of all in *The Attorney General for the Northern Territory of Australia v Kearney*[76] the High Court of Australia approved the case of *Alfred Compton*.

[185] The High Court of Australia confirmed a commitment to the element of independence of in-house counsel, holding that it was a question of fact in each particular case whether the relationship is such as to give rise to privilege. It was held that: "It must be a professional relationship which secures to the advice an independent character notwithstanding the employment."[77]

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74 [1972] 2 QB 102, CA.

75 See *Report of the Law Reform Committee on Reforming Legal Professional Privilege* by the Law Reform Committee (Singapore Academy of Law, October 2011), para 37.

76 (1985) 158 CLR 500.

77 See *Waterford v Commonwealth* (1987) 163 CLR 54, per Mason and Wilson JJ.

[186] Factors which would be relevant to ascertain independence of the advice given would include a consideration of the employment structure, the chain of command and reporting, the existence and terms of any directions from superior officers and attitudes and occurrences within the employment environment. Finally, the court is likely to look at the general nature of the legal advice which was sought in considering whether in-house counsel was able to give independent advice.[78]

The position in Canada

[187] Similarly in Canada in the case of *IBM Canada Ltd v Xerox Canada Ltd*[79] the Federal Court of Appeal held that privilege attached to communications with in-house counsel, following *Alfred Compton*. A similar position was adopted by the Ontario Supreme Court in *Children's Aid Society of Hamilton-Wentworth v AL*,[80] where it was held that notes of conversations concerning a legal case taken by a social worker when discussing with his in-house counsel, were covered by solicitor-client privilege.

[188] In *R v Campbell*[81] the Supreme Court of Canada extended the principle of privilege to police communications with the Department of Justice lawyer, stating:

> The [police] must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition and the fact that the lawyer worked for an "in-house" government legal service did not affect the creation or character of the privilege.

[189] A similar position was taken in relation to advice given to an administrative board by in-house counsel as it does to advice given in private law. The test to determine when such communications are privileged, i.e. whether or not solicitor-client privilege attaches in such a situation, was stated to depend on the following factors:

78 See article by Maitland Chambers, supra, n 65.
79 (1977) 33 CPR (2d) 24 (FCTD).
80 [2000] Can LII 22573.
81 [1999] 1 SCR 565.

(a) the nature of the relationship;

(b) the subject matter of the advice; and

(c) the circumstances in which it is sought and rendered.

[190] On the issue of reform, to provide for privilege for in-house counsel, there are several options available to us. One would be to consider and adapt the new amendments introduced in Singapore which achieved that purpose comprehensively. The amendments to the Singapore Evidence Act are set out below for convenience:

128A. (1) A legal counsel in an entity shall not at any time be permitted, except with the entity's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal counsel, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his employment as such legal counsel, or to disclose any legal advice given by him to the entity, or to any officer or employee of the entity, in the course and for the purpose of such employment.

Nothing in subsection (1) shall protect from disclosure –

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any legal counsel in an entity in the course of his employment as such legal counsel showing that any crime or fraud has been committed since the commencement of his employment as such legal counsel;

(c) any such communication made to the legal counsel which was not made for the purpose of seeking his legal advice; or

(d) any document which the legal counsel was made acquainted with otherwise than in the course of and for the purpose of seeking his legal advice.

…

(3) For the purposes of subsection (2)(b), it is immaterial whether the attention of the legal counsel was or was not directed to that fact by or on behalf of the entity.

(4) Where a legal counsel is employed by one of a number of corporations that are related to each other under section 6 of the Companies Act (Cap. 50), subsection (1) shall apply in relation to the legal counsel and every corporation so related as if the legal counsel were also employed by each of the related corporations.

(5) Where a legal counsel is employed by a public agency and is required as part of his duties of employment or appointment to provide legal advice or assistance in connection with the application of the law or any form of resolution of legal dispute to another public agency or agencies, subsection (1) shall apply in relation to the legal counsel and the second-mentioned public agency or agencies as if the legal counsel were also employed by the second-mentioned public agency or agencies.

(6) For the purposes of subsection (5), "public agency" includes –

(a) the Government, including any ministry, department, agency, or Organ of State or instrumentality of the Government;

(b) any board, commission, committee or similar body, whether corporate or unincorporated, established under a public Act;

(c) for a public function (referred to in this subsection as a statutory body); any other board, commission, committee or similar body appointed by the Government, or by a statutory body, for a public purpose.

[191] An attendant amendment was made in the definition section, namely section 3(7), as follows:

(7) For the purposes of sections 23, 128A, 130 and 131, a "legal counsel" means –

(a) a person (by whatever name called) who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes;

(aa) any Deputy Attorney-General; or

(b) a public officer in the Singapore Legal Service –

(i) working in a ministry or department of the Government or an Organ of State as legal adviser to that ministry or department or Organ of State; or

(ii) seconded as legal adviser to any statutory body established or constituted by or under a public Act for a public function.

[192] It is evident from the amendment made to the Singapore Evidence Act that the privilege afforded to in-house counsel is effectively "absolute" in so far as independent legal advice is concerned. The exceptions are drafted with certainty in the proviso to section 128A(1). This mirrors the privilege accorded to external counsel, with a few additional safeguards. It is not clear whether the precautions adopted in the UK relating to ascertaining independence will weigh heavily in determining whether privilege attaches. It would appear that so long as the proviso to subsection (1) is not breached, i.e. the legal advice in question does not fall within any of the paragraphs in subsection (1), the privilege will attach. This is consonant with their section 128, which is *in pari materia* with our section 126.

[193] It falls to be considered whether we would opt to adapt such an amendment or whether we would prefer to adopt a more restrictive approach.

[194] Alternatively, we could set up a law reform committee to recommend the precise scope of such privilege to be afforded to in-house counsel. This would enable us to introduce a more restrictive or a wide scope as is seen fit.

Postcript

[195] After this article was written in July 2016, the Court of Appeal delivered a decision in *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd*[82] ("*Bukit Lenang*") where the court had occasion to deal with the question of whether litigation privilege could be applied and relied upon to protect from disclosure or admission in evidence, a detailed survey plan.

[196] This issue arose in the course of an application to adduce further evidence in the appeal, which found the appellant in the case, Tenaga

82 [2016] 4 AMR 345, CA.

Nasional Berhad, liable for trespass. In the course of objecting to the application of the respondent to adduce fresh evidence in the appeal, including the detailed survey plan, the appellant objected to production of the latter, maintaining that it was protected by litigation privilege, as it was created for the purposes of litigation.

[197] In their arguments, counsel for the appellant maintained that litigation privilege is a form of legal professional privilege. Further, legal professional privilege is accorded statutory recognition by virtue of sections 126 and 129 of the EA 1950.

[198] The respondent argued, inter alia, that the appellant's reliance on litigation privilege at common law was misconceived by reason of section 3 of the Civil Law Act 1956 ("the CLA 1956") which had the effect of displacing the common law position by or with section 126 of the EA 1950. The privilege codified by section 126 of the EA 1950 is not litigation privilege.

[199] The Court of Appeal concurred with the respondent's argument that the codified provisions of the EA 1950 displaced the common law position relating to litigation privilege. Accordingly section 126, which deals with litigation privilege could not be relied upon to protect disclosure of the detailed survey plan. It was also held that the EA 1950 is not to be construed against the background of the common law.

[200] It was further held that the courts must give effect to the relevant provisions of the EA 1950 whether or not they differ from the common law rules of evidence as applied by the English courts.[83] As such where the EA 1950 contains a rule of evidence, which is subsequently changed in an English decision, the rule in the Act cannot be construed in the light of the common law decision.

[201] The Court of Appeal went on to hold that even if common law privilege is applicable, no such privilege would accrue over material facts, such as the detailed survey plan which related to the appellant's own infrastructure on and over the respondent's lands. Matters of fact conveyed in communications subject to litigation privilege are not privileged. Neither was the survey plan procured by the appellant for the purposes of obtaining legal advice.

83 See *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, PC.

[202] In relation to the primary reasoning in this case, there is an effective excision of litigation privilege on the grounds that it is premised on the English common law, which is inapplicable in our jurisdiction in light of section 126 of the EA 1950 and section 3 of the CLA 1956. Section 126, it was held, applies only to legal professional privilege.

[203] With respect, it is not incorrect to state that section 126 does not expressly provide for litigation privilege (as discussed at the outset). However section 126 does not simply deal with legal professional privilege as a whole, but essentially with legal advice privilege. The full scope of legal professional privilege is dealt with in sections 126 to 129.

[204] Again, with the greatest of respect, the primary bifurcation of legal professional privilege into the two categories of client advice privilege and litigation privilege does not appear to have been argued nor presented to the court. As stated earlier, such categorisation was recognised as early on as 1884, when Bray's work on *Discovery* was published. The rationale underlying litigation privilege has also been discussed extensively earlier in this article under "**The sub-heads of legal professional privilege**". Given such categorisation, legal professional privilege covers both heads of legal advice privilege as well as litigation privilege.

[205] Litigation privilege is a cornerstone of litigation, because it ensures that an adversary is not accorded so much disclosure of his opponent's evidence, that he is thereby enabled to tailor his case to meet the case brought by his opponent.

[206] Moving on to the EA 1950, while section 126 deals primarily with legal advice privilege, section 129 is broader. To adopt the words of Andrew Phang Boon Leong JA in *Skandinaviska*'s case[84] at paragraph 34:

> It should also be noted that since section 131 [our section 129] is expressed to operate in the broader context of court proceedings where the client might offer himself as a witness, in which case he may be compelled to disclose any communication the court deems necessary. *It also extends the area of legal advice privilege to the domain of litigation privilege …*[85]

84 Supra, n 17.

85 See also Tiang Joo Su and Yin Faye Lim, "Malaysia" (Ch 34) in Jonathan Cotton (ed), *The Dispute Resolution Review*, 6th edn (Law Business Research, 2014).

[207] *Sarkar*,[86] although taking a different position in maintaining that neither section 126 to 129 provide for litigation privilege, still recognises that communications from third parties to a client or his advocate/legal adviser for the purpose of litigation are afforded protection from disclosure. This is how the relevant part of the text reads:

> **Communications From Third Persons to the Client or Legal Adviser for the Purpose of Litigation.**
>
> … There is no special provision in the Act for the protection of similar communications for the purpose of litigation between the client and persons other than legal advisers or between third persons and legal advisers. *Such communications are also protected from disclosure and the discretion rests with the court*. It has been held that s 130 does vest the discretion and it is to be exercised according to the practice of the court. *And although a document may not be such as passed directly between the legal adviser and the client, yet if it be of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the court will not compel the production of such document [Vishnu v New York LI Co 7 Bom LR 709]. … Again evidence obtained by the solicitor or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation [Wheeler v Le Marchant 17 Ch D 682 – per Jessel MR. In Anderson v Bank of Br Columbia LR 2 Ch D 644, James LJ said: "You have no right to see your adversary's brief and no right to see the materials for the brief*. (Emphasis added.)

[208] The learned author then goes on to categorise communications from third persons for the purpose of litigation into two distinct heads, namely:

(1) communications called into existence by the client for the purpose of submission to the legal adviser, either for his advice or for the conduct of litigation; and

(2) communications called into existence by the legal adviser.

[209] Pursuant to such categorisation, he concludes that communications from third parties such as experts that are called into

86 See *Sarkar on Evidence*, page 2219.

existence by the client or his advocate for the purposes of litigation are privileged. Numerous examples are provided. This then is litigation privilege. So it cannot be said that section 129 does not envisage litigation privilege. It is only that there is no use of the express words "litigation privilege".

[210] Communications and documents from such experts or third parties, *not called into existence by the legal adviser obtained for purposes of litigation*, are not so protected. Examples include copies of letters written for purposes of litigation, though not called into existence by the solicitor[87] and a survey report made at the solicitor's request though not for the purpose of litigation was not privileged.[88] These latter two cases were relied on by the court in the *Bukit Lenang* case, in holding that litigation privilege did not subsist in Malaysia.

[211] However these cases in fact comprise examples of instances where litigation privilege did not apply because the documents from third parties were either not called into existence by the legal adviser, or were not procured for the purposes of litigation. These cases are not authority for the proposition that privilege does not ever apply to third party communications to a client or his legal adviser. These were instances when litigation privilege did not come into play.

[212] It is evident therefore that privilege may be and is accorded to communications and documents by third parties to a client or his legal adviser where litigation is threatened or has commenced, provided those communications were at the behest of the litigant or his adviser for the dominant purpose of litigation. Even then matters of fact are still required to be disclosed to the court at trial by an expert.[89]

[213] While it can therefore be said that section 126 does not deal with litigation privilege, it is evident that section 129 expands into the area of litigation privilege. Certainly there is nothing in the EA 1950 that is contrary to the concept or application of litigation privilege.

[214] In any event, as I concluded earlier, while sections 126 to 129 collectively may not make express reference to litigation privilege, such privilege exists by reason of the common law.[90] And in adversarial

87 See *Chadwick v Bowman* (1886) 16 QBD 561.
88 See *Wheeler v Le Marchant* (1881) 17 Ch D 675.
89 See Denning MR in *Harmony Shipping Co SA v Davis and others*, supra, n 30.
90 See *Skandinaviska* per Andrew Phang Boon Leong JA, supra, n 17, para 34.

litigation, which is the basis of litigation practiced in Malaysia, litigation privilege has for some considerable time been relied upon, to ensure that the proper purpose of litigation, which forms the core of our justice system, is properly met, namely that at trial, the truth (as far as is possible) is attained.

[215] Litigation privilege is arguably even more essential in relation to discovery, prior to trial.

[216] As stated in *Three Rivers v Bank of England*[91] by Lord Rodger of Earlsferry at paragraph 52, quoting in turn from Jackson J in the United States decision of *Hickman v Taylor*[92] at page 16:

> Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

[217] Legal professional privilege, albeit legal advice privilege or litigation privilege are essential components of an efficacious system of administration of justice, particularly in an adversarial system. It is utilised in the countries that have inherited the common law system. The common law in relation to litigation privilege is readily adopted in other jurisdictions such as India and Singapore. Indeed in Malaysia, in *Dato' Anthony See Teow Guan v See Teow Chuan*[93] the Federal Court expressly referred to cases post 1956 in the course of its decision, citing them as enunciating correct principles of law. (At paragraph 12 the Federal Court approved the statement in the *Skandinaviska* case stipulating that as the statutory provisions of the Evidence Act (in Singapore) were modeled on the Indian Evidence Act (as is ours), the court would need to refer to English decisions in order the determine the scope of the said provisions.)

[218] The reasoning adopted in the *Skandinaviska* case, as stated earlier, proffers a cogent basis for the application of the common law in Malaysia. In *Bukit Lenang*, the Court of Appeal held that by virtue of section 3 of the CLA 1956, litigation privilege which is premised on the common law is effectively displaced by section 126 of the EA 1950.

91 [2005] 4 All ER 948.
92 (1947) 329 US 495.
93 Supra, n 18.

[219] The effect of section 3 of the CLA 1956 has been considered in numerous cases. In *Subashini Rajasingam v Saravanan Thangathoray (No. 2),*[94] Sri Ram JCA (as he then was) in the Court of Appeal quoted the judgment of Lord Scarman in *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 and went on to hold:

> [4] The effect of s 3, often misunderstood by many, was stated by Hashim Yeop A Sani (CJ (M)) in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 to be that:
>
> > "The development of the common law after April 7, 1956 (for the States of Malaya) is entirely in the hands of the courts of this country."
>
> It is important to note that this view was endorsed by the Federal Court in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 AMR 3161; [1999] 3 MLJ 81.
>
> [5] Another way is to treat s 3 as not forbidding a Malaysian court from applying modern developments in English common law. In *Jamil b Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 it was argued that s 3 prevents the application by Malaysian courts of English cases decided after April 7, 1956 and as such the practice of Malaysian courts of itemising damages for the purpose of calculating interest on damages by following English cases decided after April 7, 1956 was unlawful. That argument was rejected by the Privy Council whose judgment was delivered by Lord Scarman in the following terms:
>
> > "Clearly the English statute requires, or at the very least strongly encourages, itemisation of damages in personal injury cases, so that interest appropriate to each head of damage may be ordered: s 3(1A) and (1B) of the 1934 Act. Though no such requirement exists in Malaysia, the *written law certainly does not forbid* or prevent differentiation in the period or rate of interest as appropriate between the different heads of loss or damage suffered by a plaintiff. *Nor does the written law forbid* the courts to adopt the itemisation process in assessing damages. *The courts of Malaysia are free to take their own course*. The Federal Court was not, therefore, prevented by the written law of Malaysia from using the itemisation process in the assessment of damages for personal injury. Their Lordships reject the submission that in

94 [2007] 3 AMR 370.

> so doing the Federal Court was guilty of any error of law." (Emphasis added.)
>
> Put shortly, absent a statutory provision prohibiting the application of developments in English law after April 7, 1956, a Malaysian court is entitled to apply cases decided in England after that date. Indeed, this is what the Federal Court did in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd*.

[220] The last mentioned case recognised the effect of section 3 as effectively providing that the development of the common law after April 7, 1956 (for the States of Malaya) is "*entirely in the hands of the courts of this countr*y" [per Edgar Joseph FCJ]. That does not prohibit the courts of Malaysia from applying English cases post- April 7, 1956. Indeed the courts have on innumerable occasions applied or adopted positions consonant with the English common law.

[221] It is pertinent that the Federal Court in *Lori (M) Berhad*[95] further recognised that the trend shown by the courts in common law countries was relevant for the purposes of deciding a case in the Malaysian courts. Indeed as I have sought to point out in this article a consideration of the common law position enables the courts in this country to modulate and formulate the best approach for Malaysia.

[222] Most pertinently, the application of litigation privilege in no manner derogates from, or conflicts with the provisions for privilege in sections 126 to 129 of the EA 1950.

[223] In any event section 3 allows for the application of the common law up to April 7, 1956. Litigation privilege has been in existence and applied long before that date. So it would continue to be applicable post 1956 in Malaysia, so long as it was not inconsistent with the EA 1950 provisions on privilege. As it is not inconsistent it would, on the reasoning adopted in *Bukit Lenang*, continue to apply even after the passing of the EA 1950.)

[224] In summary therefore, with the greatest of respect, I prefer the second line of reasoning adopted by the Court of Appeal in *Bukit Lenang*, namely that even if litigation privilege (based on the common law) was applied, the appellant there would not have succeeded in

95 [1999] 3 AMR 3161.

its contention that the survey report warranted protection under section 126 of the EA 1950 because the circumstances and evidence required to establish a basis for invoking litigation privilege were absent.

Judicial Interpretation of the Federal Constitution: An Originalism Perspective*

by

*Dr Choo Kah Sing***

Abstract

[1] This article introduces the relevance of the theories of originalism as an alternative source for judicial interpretation of the Federal Constitution. The Federal Constitution, drafted more than half a century ago, was intended to lay down the foundation of rules to govern the nation and its people. Every article has its intended meaning, and that intended meaning was and still is the original intent of our forefathers. Any change to that original meaning of its articles has to be effected legitimately, which is through a legitimate amendment process. Any interpretation of its articles that departs from its original meanings, without going through a proper amendment process, will result in dissonance within the instrument itself.

Introduction

The theories of originalism in general

[2] Dennis J Goldford provided the following description of the originalism theory:

> Originalism is an interpretative theory advocated precisely as a way—indeed, the only way—to ensure that the Constitution will not be made a blank paper by construction. Its focus on the concept of original meaning is the crux of the theory: Whatever complexities it might involve and whatever forms it might take, originalism at its simplest holds that a constitutional provision means precisely what it meant to the generation that wrote and ratified it, and not, as non-originalism would contend, what it might mean differently to any subsequent generation.[1]

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* This article is an extract from my PhD Thesis (Monash 2012) with minor modifications.

** Judicial Commissioner of the High Court.

1 Goldford, Dennis J, *The American Constitution and the Debate Over Originalism* (Cambridge: Cambridge University Press, 2005), p 9.

[3] Justice Antonin Scalia, a Justice of the Supreme Court of the United States, in a speech in Sydney, Australia said "originalists believe that the Constitution has a fixed meaning, which does not change: it means today what it meant when it was adopted, nothing more and nothing less".[2] He added that the non-originalists would say "that the Constitution changes; that the very act which it once prohibited it now permits, and which it once permitted it now forbids".[3]

[4] Originalism focuses on the intended meaning of the framers of a constitutional provision, and that intended meaning is not only relevant but authoritative, and the courts are obligated to give effect to the intent of the framers.[4]

[5] The theories of originalism promote the idea of separation of powers. Originalists are against judges "making law" while interpreting the constitutional provisions. If judges were to give a contemporary meaning to a constitutional provision, effectively, they would be "making laws", and ignoring the original intended meaning. This amounts to usurping the function of the legislature, which is against the doctrine of separation of powers. In addition, judges would be ignoring the constitutional provisions embodying the constitutional amendment process.

[6] In Malaysia, the Constitution has provided the Parliament with a set of constitutional amendment procedures, and they have been clearly explained in the judgment of Raja Azlan Shah FJ (as HRH then was) in *Loh Kooi Choon v Government of Malaysia*.[5] Those constitutional

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2 Scalia, Justice Antonin, "The Role of a Constitutional Court in a Democratic Society" (1995) 2 *Judicial Review* 141 at 142.

3 Ibid.

4 Farber, Daniel A, "The Originalism Debate: A Guide for the Perplexed" (1988–9) 49 *Ohio State Law Journal* 1085-1106 at 1086.

5 [1977] 2 MLJ 187 at 189, which reads:
Our Constitution prescribes four different methods for amendment of the different provisions of the Constitution:
(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in clause (4) of Article 159, and are specifically excluded from the purview of Article 159;
(2) The amending clause (5) of Article 159 which requires a two-thirds majority in both Houses of Parliament and the consent of the Conference of Rulers;
(3) The amending clause (2) of Article 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of Parliament and the consent of the Governor of the East Malaysian State in question;

amendment procedures are significant, not only because they reflect the respect the founders of the nation had for the Constitution, but also because they reflect the agreement made between the founders of the nation who represented the major ethnic groups. For example, Article 159(5) requires a two-thirds majority in both Houses of Parliament to change the constitutional provisions in respect of the national language and the special rights of the Malays. The existence of these constitutional amendment procedures in the Constitution reinforces the argument that any change to the constitutional position of the Federation has to be made by way of the prescribed procedure for constitutional amendment, and not by judges.

[7] The theories of originalism embrace the very purpose for the existence of a constitution in a state. A constitution entrenches the fundamental character and backbone of the entire state. To change the original meanings of certain constitutional provisions means to change the originally intended basic structure of the state. If judges are allowed to change an originally intended meaning by interpretation, this is fundamentally wrong in a democratic society. Judges are not elected representatives; they should not speak on behalf of the majority. They also cannot change the original intended structure of the state, especially where minority interests are entrenched and protected under the fundamental structure of the constitution. Accordingly, the duty of judges should be limited to only eliciting the original intent of the framers of the constitution so as to maintain the fundamental character of the state.

[8] On the opposing side of the theories of originalism, the non-originalists believe that the meaning of a constitutional provision has to be flexible as opposed to being confined by the original intended meaning. An "open text" constitutional interpretation approach allows judges to give effect to the contemporary values of the present society

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(4) The amending clause (3) of Article 159 which requires a majority of two-thirds in both Houses of Parliament.

In this case, the appellant had been arrested and detained under the Restricted Residence Enactment (FMS Cap 39). The appellant was not produced before a magistrate within 24 hours of his arrest. He claimed damages but failed in the High Court. The appellant appealed. Before the appeal was heard, the Federal Constitution was amended by Act A354/76 which provided in effect that Article 5(4) of the Constitution shall not apply to the arrest or detention of any person under the existing law relating to restricted residence and that this amendment shall have effect from *Merdeka* Day. The appellant argued that the amendment was unconstitutional.

in the interpretation. This would do justice to the present society, so that they are not bound by their ancestors' words. At the same time, it keeps the constitution up to date with changing times. It also presumes that the values and needs of society are defeasible over time in the light of changing experience and perception. The non-originalists also believe that judges' decisions ought to reflect the majority view of a society because the nature of a democratic system is such that majority view always prevails.

[9] The non-originalists are doubtful about the methodologies adopted by the originalists in deciphering the original meanings as intended by the framers of the constitution, especially when interpreting a collective view of a diverse group of individuals. Non-originalists also question the reliability of evidence used as the source for interpreting the intention of the framers. Further, they question to what extent evidence is to be used in determining the intentions of those who framed the constitution besides investigating the words used. These are some of the criticisms levelled at originalism. Justice Antonin Scalia described non-originalism as "not in itself a theory of constitutional construction; it is simply an anti-theory, that is, opposition to an original, fixed meaning".[6]

The substantive idea

(a) A refined theory

[10] An originalist approach concerns not just the textual meaning but the original textual meaning. The approach as to how to elicit the original textual meaning has evolved over time. At the beginning, a strict approach was taken to interpret (i) the textual meaning of the written words, and (ii) the intentions of the framers of a constitution. Paul Brest describes them as the most extreme forms of originalism — the "strict textualism" and "strict intentionalism".[7] A strict textualist purports to construe words and phrases very narrowly and precisely. For a strict intentionalist, the whole aim of construction, as applied to a provision of the constitution, is to ascertain and give effect to the intent of its framers and the people who adopted it.[8]

6 Scalia, Justice Antonin, supra, n 2, at 148.
7 Brest, Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 *Boston University Law Review* 204-238 at 204.
8 Ibid.

[11] The flaws of strict textualism are summarised in a recent article by Jeffrey Goldsworthy in "Constitutional Interpretation: Originalism".[9] He describes the strict textualism as the "original literal meaning" approach. This approach, according to Goldsworthy:

> … limits the meaning of the provision to literal meanings of its words, maximises indeterminacy, absurdity, and frustration of their intentions and purposes. It maximises indeterminacy because it ignores evidence of authorial intention or purpose that can often resolve problems caused by ambiguity, vagueness, incompleteness, or inconsistency. It maximises absurdity because the proper understanding of any utterance depends on understanding unexpressed assumptions, and if they are ignored, the result will often be nonsensical.[10]

[12] Further, this approach "cannot recognise implications (other than those of logical entailment), because they do not depend on evidence of authorial intention in addition to the literal meanings of the words".[11]

[13] Moving away from the "strict textualism" is the "strict intentionalism" or "original intention" approach. This approach also has its own weaknesses. In order to ascertain the intention of the framers, additional factors should be included; these include evidence of the framers' intention. But what kind of intention should be permitted to be taken into account in order to determine the framers' intention? The originalists have identified two kinds of framers' intentions, first the framers' "semantic" intention; second, the framers' "expectation" or "application" intention. "Semantic intention concerns the meaning of what the constitution provides, whereas, expectation or application intention concerns the effects of what it provides – such as how it should be applied in particular cases."[12] The expectation or application intention has been discarded for the reason that "the object is to reveal and clarify the meaning of the norms that the founders enacted, and not to discover their beliefs about how those norms ought to be applied. Those beliefs are not part of the constitution and have no legal status".[13] The evolution of originalism did not stop. Objection was raised against "semantic intention" theories. What if the framers

9 Goldsworthy, Jeffrey, "Constitutional Interpretation: Originalism" (2009) 4/4 *Philosophy Compass* 682-702.
10 Ibid, at 684-685.
11 Ibid.
12 Ibid, at 685.
13 Ibid.

had made a wrong choice of words to express what they intended to mean? Should it then be that this is the law that the framers have enacted? It was said that "evidence of their semantic intentions cannot usually displace the meaning of their enactment".[14]

There was a landscape change in the originalism theories when the focus changed from "semantic intention" to "original public meaning" in the 1990s. The focus in "original public meaning" concerns the meaning that was understood by the relevant audience at that time of its adoption. Goldsworthy observes that the theoretical shift from original intentions to original public meaning "therefore cannot be complete, because public meaning depends partly on public knowledge of what the lawmakers intended, in addition to knowledge of conventional semantic content. Any evidence of a speaker's intentions that is readily available to the speaker's intended audience is 'public' in the relevant sense".[15] "Other contemporaneous public knowledge such as knowledge of belief, values and purposes that was widely shared among the founding generation is also relevant".[16] The speaker or the lawmaker's intended audience is often presumably the lawyers, and the court expected that to be the case. As for the layperson, they would depend on professional advice of the lawyers.

The theories of originalism are evolving and the jurisprudence of the theories is becoming more refined. As these theories continue to develop, the one thing that is certain is that an originalist takes the construction of the original meaning of a constitutional provision seriously.

(b) Promoting constitutionalism

[14] Steven G Calabresi said that "the originalism debate is of central importance to the Society's mission of promoting the rule of law, constitutionally limited government, and the separation of powers. We believe that ours should be a government of laws and not one of men or of judges."[17] It is submitted that only the originalist theory can ensure that constitutional interpretation remains faithful to the rule of law, because the theory ascribes to the belief that only the original

14 Ibid, at 686.
15 Ibid, at 686-687.
16 Ibid.
17 Calabresi, Steven G, "A Critical Introduction to the Originalism Debate" (2008) 31 *Harvard Journal of Law & Public Policy* 875-897 at 875.

intention of the framers has authoritative value. The meaning of a law comes from the intention of the framers, not judges. Governments are to act according to the original intention of the framers. Judges, other than discovering the true and original intention of the constitutional provisions, are also to ensure that the government works within the original intention of the framers. Therefore, Calabresi's statement encapsulates the essence of the relationship between originalism and a constitution.

[15] Malaysia, like America, is a country that purports to have a government of laws and not of men. The Federal Constitution of Malaysia, in Article 4(1), declares that the Constitution is the supreme law of the Federation. The Parliament in Malaysia is not supreme. Neither the executive nor the judiciary is supreme. It is the Constitution that is supreme and rules over the organs of state.[18] The Malaysian courts must therefore uphold the supremacy and binding authority of the written Constitution when interpreting constitutional provisions. Judges are not free to inject personal prejudice into their duty; if they do so, there will be grave disquiet.[19] Judges ought to uphold the spirit of constitutionalism and discover the fullest potential of the written Constitution. In interpreting the constitutional provisions, they must strive to discover the original intentions of the framers so as to give the Constitutional provisions their precise meanings.

(c) Embracing the original agreement

[16] The originalists from the United States of America and Australia are faced with the objection that the "dead hand of the past" should not have any authority over the people today. Several generations of the American and Australian societies have passed on after their respective constitutions were formed. The American Constitution has a history of around 230 years, and the Australia Constitution has a history of around 115 years; whereas, the history of the Malaysian Constitution just passed the half century mark.

18 See Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia*, 3rd edn (Selangor: Pacifica Publications, 2007). At p 19, it states: "In Malaysia no single institution is supreme, corresponding to the British Parliament. What is supreme in Malaysia is the Constitution itself".

19 Ibid, p 18.

[17] The originalists from America and Australia have high regard for their constitutions. They argue that if there should be any change in the original meaning of the framers, it ought to be effected by constitutional amendments using the mechanisms that are embedded within the constitution itself. The people of today should speak through their political representatives in Parliament to convince the houses to amend the concerned constitutional provision, so as to reflect its present values and needs.

[18] In Malaysia, although the Federal Constitution does not begin with "The people of …" as in the case of the American Constitution, the Federal Constitution is a compact arrived at by the three major ethnic groups in Malaysia, i.e. the Malay, Chinese and Indian, and eventually by a wider multi-ethnic and multi-religious society with the inclusion of the East Malaysian States. This fact should be acknowledged by the courts, and the judges should seek the original meaning of the framers when interpreting the constitutional provisions. Any changes to the intended meanings of the constitutional provisions will affect the original compact containing the original terms to which all the ethnic groups had subscribed. Accordingly, the present society, especially the minorities, has to unconditionally agree to a change if it is contemplated by Parliament, unless the change is made expressly under Article 149 or Article 150 when a state of emergency is proclaimed.

Conclusion

[19] Judges in Malaysia should make it a point to understand the original intent of the framers of the Federal Constitution. Our constitutional history has hardly traversed one generation of the Malaysian society. The multi-ethnic society and the political landscape of this country still closely reflect the spirit of the independence Constitution. Therefore, the objection of non-originalists that the present society should not be bound by the "dead hand of the past" loses its relevance in the Malaysian context.

[20] Two important characteristics of the Constitution of Malaysia can be perceived from the judgment of Raja Azlan Shah (as HRH then was) in *Loh Kooi Choon*.[20] First, the framers were aware that changes to the

20 Supra, n. 5, at 189, which reads:

> It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution,

Constitution were inevitable in the future; therefore, they had prepared for them by embodying a process of constitutional amendment. This reflects a characteristic of flexibility in the Constitution. Secondly, though flexible, the process of changing any of the constitutional provisions is particularised carefully, so that certain constitutional provisions cannot be easily changed.[21] These characteristics allow the Constitution to adapt to the changing values of the society, while preventing overzealous amendments that may easily undermine the original intention of the framers of the independence Constitution.

[21] For the above reasons, there may not be any justification for judges to interpret a constitutional provision in order to reflect the present values of the society. The judges are required only to discover and grasp the intended meaning of the framers for any given constitutional provision. Such an approach will uphold the social agreement of the forefathers of the nation and keep the society within the path that was intended by the forefathers of this nation.

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and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later.

21 See the Federal Constitution, Articles 159(3), (4) and (5), and 161E(2).

Decommissioning of Oil and Gas Facilities in Malaysia: Law and Regulations

by

*Datin Faizah Jamaludin**

Introduction

[1] Oil and gas is an important contributor to Malaysia's economy. Despite the current low global oil prices, oil and gas presently contributes about 20 percent of the country's gross domestic product (GDP). Currently, Malaysia is the second largest producer of oil in South East Asia and the world's third largest exporter of liquefied natural gas (LNG). Its current aggregate production rate is 730,000 barrels of crude oil per day and 56.63 million standard cubic metres per day of natural gas. It has approximately 28.35 billion barrels of oil reserves and about 1.2 per cent of the world's natural gas reserves (approximately 2.35 trillion cubic metres).[1]

[2] Malaysia has a long history of commercial oil and gas production. There are currently over 500 oil and gas installations, almost all of which are located offshore Peninsular Malaysia, Sarawak and Sabah. Some of these installations are approximately 30 to 40 years old. The earliest structures installed in the 1970s are now coming to the end of their lifespan. These structures, located in fields that are no longer producing, require to be decommissioned and removed properly to ensure there are no negative impact to navigation, the environment, fisheries and the local communities. Given the potential cross-border environmental impact of inadequate or improper removal of these installations, several international conventions were created to codify the rules relating to the international law of the sea and the decommissioning of these offshore structures.

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* Judicial Commissioner of the High Court. Formerly Partner and Head of the Oil & Gas Practice Group, Skrine; and Author of the Malaysian Chapter of *Chamber's Global Practice Guide for Energy: Oil & Gas 2016*.

1 Source: Malaysia Investment Development Authority (MIDA): Meet Malaysia: Investment Opportunities in Asia's Oil and Gas Hub (2013).

[3] This article discusses the legal and regulatory framework in Malaysia governing the decommissioning and removal of these offshore installations. It begins with an introduction of the ownership and licensing structure of petroleum resources in Malaysia and the international conventions that form the basis of local legislation in this area. Against this backdrop, it goes on to discuss the issues arising from the differing abandonment requirements imposed in the Convention on Continental Shelf 1958 ("Geneva Convention") and the United Nations Convention on the Law of the Sea 1982 ("UNCLOS") and various stakeholder requirements of the federal government, the state governments, Petroliam Nasional Berhad ("PETRONAS") and the local coastal communities.

Background

History of Malaysia's oil and gas industry

[4] Commercial oil production in Malaysia began over a century ago: the first oil well was drilled by Shell on top of Canada Hill in Miri, Sarawak in 1910. The well, Oil Well No. 1, was in production from December 1910 until 1972, with a hiatus during World War II. The field's concessionaire, Sarawak Shell Berhad gave the drilling rig used to produce oil from the field, the Grand Old Lady, to the Sarawak State Government on October 1, 1973 to be kept in perpetuity as a historical monument. The Petroleum Museum which showcases various exhibits relating to the history of the oil and gas industry in Malaysia was built next to her and opened to the public in May 2005.

[5] Oil was discovered offshore Sarawak in 1962 and offshore Peninsular Malaysia in 1971. The earlier oilfields were in shallow waters.[2] The 1990s saw the advent of exploration and production of oil and gas in deepwater and ultra-deepwater fields.[3]

Ownership and licensing of exploration and production rights

[6] To understand Malaysia's present oil and gas exploration and production regime, it is important to know the distribution of legislative powers and responsibilities between the federal and state

2 Shallow water is defined as water depth of below 100 metres.

3 Deepwater is defined as water depths of between 500 and 1,499 metres. Ultra-deepwater is defined as water depths of 1,500 metres and more.

governments as defined in the Federal Constitution. Under the Federal Constitution, all mineral resources, including oil, within or upon any land in a state is owned by the state and the state government can collect revenue from such mineral resources. Until 1966, exploration and production of oil were made pursuant to oil prospecting licences and oil mining leases granted under the Mining Enactments of the states in Peninsular Malaysia, the Mining Ordinance of Sabah, and the Oil Mining Ordinance of Sarawak. Through these oil prospecting licences and oil mining leases, oil companies were granted the exclusive right over all crude oil won and saved in mining areas in return for payment of rent and royalty to the state governments.

[7] The regime for the exploration and production of oil changed when the federal government enacted the Petroleum Mining Act 1966 ("PMA66"). The PMA66 applies throughout Malaysia but is only applicable to offshore land in Sabah and Sarawak.[4] The Act requires companies wishing to explore or extract oil onshore in any state to apply for an exploration licence or enter a petroleum agreement with the Ruler or the Yang Di Pertua Negeri of the state for the area in which the onshore land is situated.[5] Onshore includes the foreshores and submarine areas beneath the territorial waters of a state.[6] For offshore land,[7] the exploration licence is issued in the name of the DYMM Seri Paduka Baginda Yang Dipertuan Agong ("Yang Dipertuan Agong")[8] and the petroleum agreement is also entered with the Yang Dipertuan Agong.[9]

4 Section 1(2) of the PMA66.
5 Sections 3(1) and 4(3) of the PMA66.
6 Section 2 of the PMA66.
7 "Offshore land" is defined in s 2 of the PMA66 as "the continental shelf" which has the meaning assigned to it in the Continental Shelf Act 1966 (Act 83). "Continental Shelf" is defined in the Continental Shelf Act 1966 as the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea – (a) throughout the natural prolongation of the land territory of Malaysia to the outer edge of the continental margin as determined in accordance with section 2(b); or (b) to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured in accordance with the Baselines of Maritime Zones Act 2006 (Act 660) where the outer edge of the continental margin does not extend up to that distance, but shall not affect the territory of the States or the limits of the territorial waters of the States and the rights and powers of the State Authorities therein.
8 Section 7 of the PMA66.
9 Section 8 of the PMA66.

[8] The ownership and licensing regime was revised after the 1973 global oil crisis. Like many developing countries, Malaysia wanted to have ownership and control over the exploration and production of its own hydrocarbon resources. The federal government decided to take over the ownership and rights of the state in crude oil and other hydrocarbon resources located in all 13 states of the Federation of Malaysia.

[9] On August 17, 1974, PETRONAS was incorporated under the Companies Act 1965 to function as Malaysia's national oil company. The Petroleum Development Act 1974 ("PDA74") took effect on October 1, 1974. Pursuant to the PDA74, the entire ownership in and the exclusive rights, powers, liberties, privileges of exploring, winning and obtaining petroleum onshore and offshore Malaysia were vested in PETRONAS.[10]

[10] The PDA74 stipulates that the vesting of the ownership, rights, powers, liberties and privileges from the states to PETRONAS is in perpetuity and irrevocable. The Rulers and the Yang Di Pertua Negeri of the individual states vested, through the execution of vesting instruments, all their ownership and rights to all the oil and hydrocarbon resources in their states to PETRONAS. In return for the ownership and rights in the petroleum resources, PETRONAS is required under the PDA74 to make cash payments to the federal government and state governments.[11] These payments are made by PETRONAS in the form of royalty payments to the federal government, and these in turn are to be distributed to the relevant state governments.

[11] The PDA74 expressly provides that save for section 14 of the PMA66,[12] the PMA66 does not apply to PETRONAS and that all exploration licenses and petroleum agreements issued under the PMA66 (and any licences, leases, and agreements issued or made under any written law in force relating to prospecting, exploration

10 Section 2(1) of the PDA74.

11 Section 4 of the PDA74.

12 Section 14 of the PMA66 governs to the entry of alienated land by the licensee. In the application of s 14 of the PMA66 to PETRONAS, s 8(2) of the PDA74 states that any reference to the licensee in the PMA shall be construed as a reference to PETRONAS, and any reference to the exercising of any rights contained in the licence shall be construed as a reference to the exercising of the rights, powers, liberties and privileges vested in PETRONAS by virtue of s 2(1) of the PDA74.

or mining for petroleum) shall continue to be in force for a period of six months from the coming into force of the PDA74 or for such extended period as the Prime Minister may allow. The licenses and petroleum agreements terminated thereafter.

PETRONAS

[12] The rights to explore and produce oil and gas in Malaysia evolved from concession agreements between state governments and the oil companies; to exploration licences and petroleum agreements between the oil companies and the federal government for offshore land and with state governments for onshore land; and finally, to production sharing contracts ("PSCs") between PETRONAS and the oil companies. The first PSC was signed between PETRONAS and Exxon Corporation in 1976.

[13] In 2011, PETRONAS developed three key strategies to counter the decline in domestic oil production. These strategies included intensifying its focus on maximising oil and gas recoveries through diligent reservoir management and pursuing enhanced oil recoveries ("EOR") for mature fields; monetising marginal fields and stranded gas; and maximising the remaining potential in Malaysia's mature basins through aggressive exploration activities. In pursuit of these strategies, PETRONAS introduced risk service contracts ("RSCs") in 2011 for the development and production of marginal fields. In 2014, PETRONAS saw a 5% increase in total global production compared to 2013, from 2,127 thousand barrels of oil equivalent ("BOE") per day to 2,226 thousand barrels per day:[13] PETRONAS attributed this rise largely to the production enhancement efforts in existing fields over the last few years, such as aggressive EOR activities in maturing fields throughout Malaysia as well as to the emergence of new oil fields both in Malaysia and overseas.

[14] PETRONAS is wholly owned by the Malaysian government and comes under the direct control and direction of the Prime Minister, who may issue such direction as he deems fit on the corporation, which direction is deemed binding by virtue of the Act.[14] It advises the government on the country's oil and gas policies through its role in the National Petroleum Advisory Council. Today PETRONAS is a fully

13 Source: PETRONAS' 2014 Annual Report.
14 Sections 3(2) and 3(3) of the PDA74.

integrated oil and gas company and is the only Malaysian company ranked by Fortune Global 500 as one of the largest corporations in the world. It has oil and gas operations worldwide. In Malaysia, PETRONAS is the owner, regulator and licensing authority of the country's upstream oil and gas industry.

Oil and gas installations

[15] Most of the oil installations in the producing fields offshore Terengganu, Sabah and Sarawak are platforms that have a lifespan of approximately 25 to 30 years. In the early years most of the exploration and production activities in Malaysia took place in shallow waters. Many fixed offshore structures were installed in these fields. The older platforms did not include decommissioning as part of their plans. Exploration and production activities progressed to deepwater and ultra-deepwater fields in the 1990s. It was only in 1998 that PETRONAS started requiring PSC contractors to design platforms with a complete decommissioning plan as part of the platform life management. As of 2009, there are approximately 500 offshore structures operated by various operators offshore Malaysia.

[16] The types of platforms in Malaysia include fixed platforms[15] and floating structures.[16] The platforms are made up of two structural parts: topsides and substructures. The topside consists of a riser platform, living quarters, production separators, acid gas removal, gas dehydration and export metering. The design of the topside is primarily dependent on field development concepts and reservoir characteristics. For shallow-water fields, the substructures of platforms are jackets and hulls/pontoons made of steel or concrete. The types of substructures widely used in Malaysia are jackets (tripod, four-legged, six-legged or eight-legged, depending on the size and capacity of the topside), with a depth range of 50 to 70 metres.

[17] PETRONAS regulates abandonment and decommissioning of oil and gas structures through express terms and conditions in the PSCs and RSCs and the Guidelines for Decommissioning of Upstream Installations ("Decommissioning Guidelines"),[17] which

15 Fixed platforms are platforms where their substructures are attached or piled to the seabed.

16 Floating structures are moored to the seabed.

17 The Decommissioning Guidelines were issued in August 2008 as part of the PETRONAS Procedures and Guidelines for Upstream Activities (PPGUA).

are incorporated into the PSCs and RSCs as contractual terms. It is not within the scope of this article to discuss these contractual terms.

International Conventions

[18] Malaysia is a signatory to two international conventions that apply to the decommissioning of offshore installations on its continental shelf and exclusive economic zone.

Geneva Convention

[19] The Geneva Convention codified the rules of international law relating to continental shelf.[18] Article 5 of the Geneva Convention provides:

> 1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.
>
> …
>
> 5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. *Any installations which are abandoned or disused must be entirely removed.*
>
> (Emphasis added.)

[20] In relation to decommissioning, subsequent international law retracted from the obligation for the entire removal of abandoned or disused installations on the continental shelf imposed by the Geneva Convention.

UNCLOS

[21] Part V of UNCLOS introduced the concept of an exclusive economic zone ("EEZ"): an area that forms part of the continental shelf and extends up to 200 nautical miles from the baselines from

18 The Geneva Convention was done by the United Nations at Geneva on April 29, 1958 and entered into force on June 10, 1964.

which the breadth of a country's territorial sea is measured.[19] Malaysia signed UNCLOS on December 10, 1982.

[22] UNCLOS grants Malaysia sovereign rights over the natural resources in its EEZ,[20] the exclusive right to authorise and regulate drilling on its continental shelf[21] and the exclusive right and jurisdiction over the construction, operation and use of artificial islands, installations and structures in its EEZ.[22] This right of exploitation of natural resources is coupled with the obligation to do so in accordance with Malaysia's environmental policies and its duty to protect and preserve its marine environment.[23] Malaysia is obliged to take all measures that are necessary, "to prevent, reduce and control pollution of the marine environment from any source, using … the best practicable means at its disposal and in accordance with its capabilities"[24] and "to ensure that activities under its jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment".[25]

[23] In relation to offshore installations, these measures include, inter alia, those designed to minimise "to the fullest possible extent" pollution for such installations and devices used in the exploration or production of the petroleum resources in the marine environment.[26]

[24] UNCLOS requires that artificial islands, installations and structures in the EEZ and on the continental shelf, which are abandoned or disused to be removed and that such removal to take into account any "generally accepted international standards established in this regard by the competent international organisation" and to have "due regard to fishing, the protection of the marine environment and the rights and duties of other States."[27]

IMO Guidelines

[25] The "generally accepted international standards" for the removal of offshore structures referred to in Article 60(3) of UNCLOS are the

19 Part V and Article 57 of UNCLOS.
20 Article 56 of UNCLOS.
21 Article 81 of UNCLOS.
22 Article 60(1) and (2) of UNCLOS.
23 Article 193 of UNCLOS.
24 Article 194(1) of UNCLOS.
25 Article 194(2) of UNCLOS
26 Article 194(3) of UNCLOS.
27 Articles 60(3) and 80 of UNCLOS.

Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Zone issued by the International Maritime Organisation in 1989 ("IMO Guidelines"). Marc Hammerson and Anthony Martinez in *Oil and Gas Decommissioning* commented that:

> Article 60(3) of UNCLOS dealt with decommissioning in a more qualified way than the entire removal obligation in the Geneva Convention. However, rather than prescribe detail in UNCLOS, it referred to "generally accepted international standards established in this regard by the competent international organisation". These were provided by guidelines produced by the IMO.[28]

[26] The IMO Guidelines provide inter alia that:

- all disused installations "are required to be removed";
- installations in water depths of less than 75 metres, or 100 metres after January 1, 1998, and weighing less than 4,000 tonnes should be removed unless it is not technically feasible to do so or involve extreme costs or do not constitute unacceptable risk to personnel or the marine environment;
- an unobstructed water column of 55 metres must be left in the event of a partial removal; and
- all installations after January 1, 1998 are to be designed and built so that their entire removal is feasible.

London Convention

[27] Malaysia is not a party to the other international convention regulating the decommissioning of offshore structures – the 1972 Convention on Prevention of Marine Pollution by Dumping and Other Matter ("London Convention"), or its 1996 Protocol.

Other Conventions

[28] Malaysia is party to international conventions which primarily regulate marine pollution which also impact decommissioning activities offshore Malaysia. These conventions are:

28 Marc Hammerson, Consulting Ed., *Oil and Gas Decommissioning: Law, Policy and Comparative Practice*, (2013).

- the International Convention for the Prevention of Pollution from Ships, 1973 and its 1978 Protocol ("MARPOL 73/78");
- the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 ("OPPRC");
- the International Convention on Civil Liability for Oil Pollution Damage, 1992 ("1992 CLC"); and
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ("1992 Fund Convention").

Malaysian legal framework on decommissioning

[29] The legal framework governing the decommissioning of oil and gas structures in Malaysia is provided by several statutes. There is no one primary legislation governing decommissioning of abandoned or disused oil and gas installations.

[30] The statutes which, either directly or indirectly, regulate decommissioning of oil and gas structures are the PDA74, the Exclusive Economic Zone Act 1984, the Continental Shelf Act 1966, the Petroleum Safety Measures Act 1984, the Environmental Quality Act 1974, the Occupational Safety and Health Act 1994, the Fisheries Act 1985, the Merchant Shipping Ordinance 1952 and the Merchant Shipping (Oil Pollution) Act 1994. In the State of Sarawak, where many of these offshore structures are located, the decommissioning of offshore structures is also regulated by the Natural Resources and Environmental Ordinance and the Conservation of Environment Enactment.

[31] Malaysia ratified the provisions in UNCLOS relating to the EEZ and continental shelf as law in Malaysia pursuant to the Exclusive Economic Zone Act 1984 ("EEZA"). The EEZA applies to Malaysia's EEZ and its continental shelf, in addition to (and not in derogation of) the provisions of the Continental Shelf Act 1966 ("CSA").[29]

29 Section 1 of the EEZA. Section 1(2) of the EEZA expressly states that: "The provisions of this Act pertaining to the continental shelf shall be in addition to, and not in derogation of, the provisions of the Continental Shelf Act 1966 (Act 83)".

Malaysia's jurisdiction and sovereign rights in the EEZ and continental shelf

[32] The CSA ratifies Articles 77 and 81 of UNCLOS and establishes Malaysia's sovereign rights over the exploration and exploitation of natural resources on its continental shelf as well as its exclusive right to authorise and regulate drilling on the continental shelf.[30]

[33] The EEZA confirms that Malaysia's EEZ extends to 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.[31] Where there is an agreement in force between Malaysia and a country with an opposite or adjacent coast, questions relating to the delimitation of Malaysia's EEZ will be determined in accordance with the provisions of that agreement.[32] Malaysia is accorded sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources in its EEZ. And the federal government is given exclusive jurisdiction, inter alia, over the establishment and use of artificial islands, installations and structures and "such other rights and duties as are provided for by international law" in the EEZ and the continental shelf.[33] The EEZA prohibits any person, unless authorised under the Act or any applicable law, from exploring or exploiting natural resources, carrying out drilling operations, constructing and operating any artificial island or any installation or structure in the EEZ, or on the continental shelf.[34] The consent of the Malaysian government is also required for the laying of submarine cables or pipelines in the EEZ or on the continental shelf.[35]

Decommissioning of offshore structures

[34] In respect of decommissioning, the Malaysian government is empowered by the CSA to make regulations, inter alia, for:

> regulating the construction, erection, or use of installations or devices in, on, or above the continental shelf … in connection with

30 Sections 3 and 4 of the CSA.
31 Section 3(1) of the EEZA.
32 Section 3(2) of the EEZA. This complies with Article 83 of UNCLOS, which provides that the delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement based on international law.
33 Sections 4 and 21(2) of the EEZA.
34 Sections 5 and 21(1) of the EEZA.
35 Section 22 of the EEZA.

> the exploration of the continental shelf … or the exploitation of its natural resources;[36]

and

> providing for the removal of installations or devices constructed, erected or placed in, on or above the continental shelf which have been abandoned or become disused.[37]

[35] The EEZA adopted the UNCLOS definition of "dumping", which includes "any deliberate disposal of vessels, aircraft or other man-made structures at sea" but excludes "placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of [the] Act, any applicable written law or international law". The disposal of any offshore structure at sea would fall within the definition of "dumping" and requires a licence from the Director General of Environmental Quality ("DGE") and would be subject to any conditions imposed in such licence.

Conclusion

[36] The legislation discussed in this article together with contractual terms in the PSCs and RSCs form the legal framework for decommissioning of oil and gas installations and structures in Malaysia. Decommissioning activities are complicated by the fact that there is no single primary legislation governing the activity such as the Petroleum Act 1998 in the United Kingdom. The oil company conducting the decommissioning activity must consider the provisions of the various federal legislation detailed above as well as state legislative requirements. There are also numerous stakeholders including the federal and state governments, PETRONAS as the resource owner, local communities and many others.

[37] In contrast to more mature countries, such as the United States where over 45% of the facilities in the Gulf of Mexico have been decommissioned, there have only been two decommissioning activities in the last 100 years in Malaysia. Both were undertaken by Shell, where one structure was completely removed and the other, Baram-8, was toppled and converted into an artificial reef offshore Sarawak. Shell took three years to complete the decommissioning of the Baram-8

36 Section 6(1)(a) of the CSA.
37 Section 6(1)(i) of the CSA.

platform. It had to obtain the approval of PETRONAS and the DGE of the decommissioning plan prior to commencement of operations. It also had to engage in extensive consultation with external stakeholders, namely federal and state government departments and ministries, local fishermen's associations, village headmen, parliamentary representatives and local councils.[38]

[38] As discussed at the outset, Malaysia is a signatory to both the Geneva Convention and UNCLOS. The Geneva Convention requires the removal of the entire decommissioned structure. However, neither UNCLOS nor the IMO Guidelines require the complete removal of such structures. As the provisions in UNCLOS and the Geneva Convention relating to the removal and abandonment of offshore installations have not been ratified and enacted as law by Parliament, they do not have the force of law in Malaysia. The government is, accordingly, not required to reconcile the conflicting requirements in UNCLOS and the Geneva Convention relating to the removal of abandoned offshore structures. Furthermore, as discussed in paragraph [27] of this article, Malaysia is not a party to the London Convention, which by its 1996 Protocol, prohibits "any abandonment or toppling at site of platforms or other man-made structures at sea, for the purpose of deliberate disposal".

[39] The other issue for consideration is whether offshore structures include pipelines. Although the Geneva Convention and UNCLOS do not expressly require the removal of pipelines, the EEZA requires the owner of any submarine cable or pipeline "which has fallen into disuse or is beyond repair" to remove such cable or pipeline if directed by the government within the period of time so directed.[39]

[40] The Shell experience shows that both the complete removal and partial removal of the offshore facilities have been accepted in Malaysia. And as the decommissioning of the Baram-8 platform shows, the government has also allowed the toppling at site of disused offshore structures. However, as to which method of decommissioning will be the norm in the future remains to be seen. Under the common law of tort and Malaysia's environmental legislation, PETRONAS as the owner

38 Lily Khairi and Adrienne Chin of Shell Malaysia, "Life After Decommissioning: the Malaysian Rig to Reef Experience", presented at the Second Offshore Decommissioning Summit, October 13-14, 2010, Singapore.

39 Section 23 of the EEZA.

of the facilities would be responsible in perpetuity for any residual liability caused by any disused installation left on site. For this reason, it is likely that PETRONAS may in future decommissioning activities require the complete removal of disused oil and gas installations (including pipelines) or for the installations to be removed as much as is safely possible.

[41] With the number of ageing oil and gas installations on the rise, it may be time for Malaysia to consider the enactment of a primary legislation governing these decommissioning activities to ensure the efficient implementation of such activities with least impact to the environment, navigation, fisheries and the local coastal communities.