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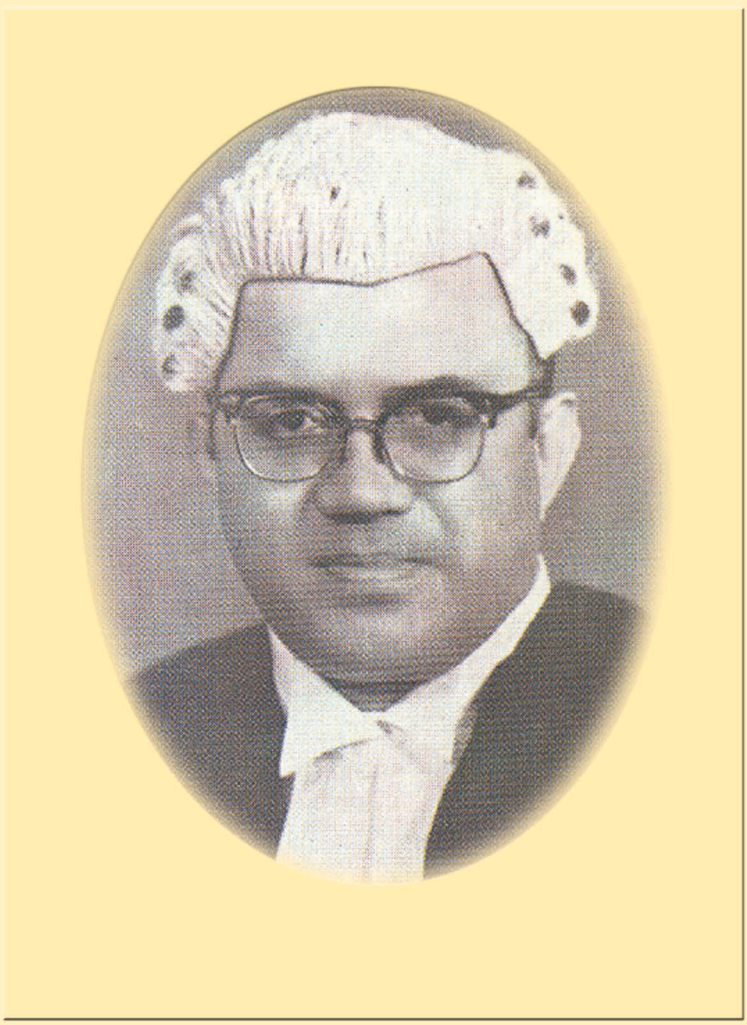

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COVER PHOTOGRAPH features Professor Ahmad Ibrahim.

The late Professor Ahmad Ibrahim was Malaysia's well known legal academic. He had the honour of being the first advocate & solicitor in Malaysia to be called to the Bar after the War, when he was called in Singapore on 16th September 1946 before Murray Aynsley CJ.

The Court made a special order shortening his period of pupilage because of the special circumstances of the War. He was later to become Attorney-General in Singapore before coming to Malaysia.

LOSS SUFFERED BY THE OWNER WHO IS NOT THE EMPLOYER IN A BUILDING CONTRACT – A LEGAL BLACK HOLE?

TENG KAM WAH*

Introduction

Suppose a matrimonial home belongs to the husband. As the husband is always busy at work, the wife engages a contractor to build a new kitchen. The kitchen turns out to be defectively constructed. The wife calls in and pays another contractor to do remedial work.

Under general contractual principles, the wife cannot recover from the original contractor substantial, as opposed to nominal, damages as she has suffered no loss since neither the land nor the building belongs to her. Nor can the husband recover damages because there is no privity of contract[1]. Any claim for damages would appear to simply disappear into a 'legal black hole'[2].

Such a scenario is not only confined to domestic contexts but it can also occur in commercial building contract situations where the owners are not the employers for various reasons, including reducing the incidence of tax. A rational system of law cannot tolerate such a wrong to go without any possibility of redress. That would be a manifest defect in the law. If this were not so, it would be like giving a *carte blanche* to a contracting party to abandon his obligations with impunity. This cries out for a solution; a solution which should not cause anarchy to established principles of law.

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[1] The Privy Council in *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 had emphatically held that the doctrine of privity of contract applies in Malaysia. In England, such a position has been profoundly changed by the Contracts (Rights of Third Parties) Act 1999.

[2] This colourful and yet colourless term was used by Lord Stewart in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157 at p 166.

The general rule

Take the situation where A enters into a contract with B for the erection of a building by B on land belonging to C. The building so constructed is defective. The general rule that a party can only recover compensation for his own loss will bar A from recovering substantial damages from B since neither the building nor the land belongs to A and therefore A has not suffered any loss.

Lord Diplock in *The Albazero*[3] referred to the general rule of English law that apart from nominal damages, a plaintiff can only recover in an action for breach of contract the actual loss he has himself sustained. The antecedents of this supposed rule are suspect. Reliance is often placed on the two cases of *Robinson v Harman*[4] and *Livingstone v Raywards Coal Co*[5]. In the former, Parke B said:[6]

> 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with regard to damages as if the contract had been performed.'

In the latter[7], Lord Blackburn referred to the general rule that compensatory damages should as nearly as possible:

> '… put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong.'

Neither of these two cases was concerned with the loss suffered by a third party and not by the plaintiff. Therefore, these two cases are no authority for the proposition that damages cannot be claimed by a party for a loss suffered by a third party. Despite there being no direct authority for such a rule, the authoritative statements by Lord Diplock in *The Albazero* and also by Lord

[3] [1977] AC 774.
[4] (1848) 1 Exch 850.
[5] (1880) 5 App Cas 25.
[6] (1848) 1 Exch 850 at p 855.
[7] (1880) 5 App Cas 25 at p 39.

Browne-Wilkinson in *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd*[8] of such a general rule give the rule much credibility. Such a rule has been so well accepted and so often applied that its questionable pedigree seems scarcely to be of any concern.

The rationale for such a rule is simple enough. The object of compensation for loss is to make good a loss. Only the person who has suffered the loss is entitled to have it made good by compensation. Few would question the logic of such a rule. However, there are situations where exceptions are necessary to the general rule to achieve a just resolution of disputes.

There are at least four well-established exceptions to this general principle. First, a trustee has the right to recover damages for breach of contract in respect of the loss suffered by the beneficiary. Secondly, an agent can recover for the loss sustained by an undisclosed principal[9]. Thirdly, a bailee has the right to recover for loss or damage to his bailor's goods. Fourthly, a person who has insured goods with the relevant terms has the right to recover under the policy the full value of the goods even though the loss or part of it has been sustained by a third party. The insured in such a case must have an insurable interest in the goods, which often arises where he is either a part-owner or bailee[10].

All these situations are more apparent than true exceptions to the general rule that a person can only recover a contractual loss sustained by himself and not by a third party. The law has been fashioned to give effect to commercial practicalities by imputing the loss to the contracting party although such loss is actually sustained by a third party.

There are two further formulations, which are advocated to have a modifying effect on the general rule; frequently referred to simply as the narrow ground and the broader ground. The narrow ground is also variously referred

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[8] [1994] 1 AC 85. This case was heard together with *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*.

[9] *L/M International Construction Inc (now Bovis International Inc) v The Circle Ltd Partnership* (1995) 49 Con LR 12.

[10] *Waters v Monarch Fire & Life Assurance Co* (1856) 5 El & Bl 870.

to as 'the rule in *Dunlop v Lambert*[11]', 'the *Dunlop v Lambert* exception' and '*The Albazero* exception'. Under the narrow ground, A sues B on behalf of or for the benefit of C.

The broader ground is significantly different: A sues B to recover damages for himself to compensate for what is perceived to be his own loss.

The narrow ground

This exception to the general rule was triggered by *Dunlop v Lambert*, a Scots case concerning carriage of goods by sea. This case has since been treated by authoritative English textbook authors as authority for the broad proposition that a consignor may recover substantial damages against the ship owner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment.

In his perceptive analysis of *Dunlop v Lambert* in *Alfred McAlpine Construction Ltd v Panatown Ltd*[12], Lord Clyde concluded that *Dunlop v Lambert* did not decide that a consignor can sue for damages for loss of a cargo even though he has suffered no loss, nor is it authority for the view that a consignor may recover on behalf of the consignee damages for a loss which has fallen upon the consignee. He said that the case merely decided that a consignor might be able to make a claim on the carrier if there is a special contract between the consignor and the carrier or between the consignor and the consignee, which varies the general rule that the risk passes to the consignee on delivery to the carrier.

Despite the doubtful value of *Dunlop v Lambert* as an authority in this respect, Lord Diplock in *The Albazero* sought to rationalise the rule in the

[11] (1839) 6 Cl & F 600.
[12] (2000) 8 BLR 331.

former so that it might fit into the pattern of English law. He treated the supposed rule as:[13]

> '… an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.'

Lord Diplock thus treated the rule in *Dunlop v Lambert* as a solution to a practical problem which may occur in the context of commercial contracts where the property in goods may pass from one party to another after the contract has been made and that loss of or damage to the goods may happen at a time when the property in the goods has passed from the consignor to another party. It would be expedient in such contexts that if the parties so intend that the consignor of the goods should be treated as having contracted for the benefit of all those who may acquire an interest in the goods before they are lost or damaged so as to be able to recover damages for their benefit.

Lord Diplock was of the opinion that the exception does not apply to contracts for the carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of the relevant goods because complications, anomalies and injustices might arise from the co-existence of different parties of different rights of suit to recover under separate contracts of carriage which impose different obligations upon the parties to them, a loss which a party to one of those contracts alone has sustained. It has also been said that the exception is also inapplicable if

[13] [1977] AC 774 at p 847.

such separate contracts are identical to the contract with the consignor[14].

The same consideration applies to a building contract where the provision of a direct entitlement in a third party to sue the contractor in the event of a failure in the contractor's performance will not bring the exception into operation. Lord Browne-Wilkinson said in *St Martins*:[15]

> 'If, pursuant to the terms of the original building contract, the contractors have undertaken liability to the ultimate purchasers to remedy defects appearing after they acquired the property, it is manifest the case will not fall within the rationale of Dunlop v Lambert. If the ultimate purchaser is given a direct cause of action against the contractor (as in the consignee or endorsee under a bill of lading) the case falls outside the rationale of the rule.'

The rationale behind the exception to the general rule that a person can only recover damages for a loss which he has himself suffered as observed by Lord Diplock in *The Albazero,* is that the exception would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.

In *St Martins*, the House of Lords extended the rule in *Dunlop v Lambert* from contracts for the carriage of goods to building contracts. In this case, A entered into a building contract with B for the construction of a building on land which A then owned. A subsequently transferred the land to C. A also purported to assign the benefit of the contract to C. The assignment was held to be invalid as it was in breach of a clause in the contract prohibiting assignment without B's written consent. Therefore, C could not sue B when the building turned out to be defective. The House of Lords, however, held that A was entitled to recover from B substantial damages for such breach on the basis of the *Dunlop v Lambert* exception.

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[14] *Alfred McAlpine Construction Ltd v Panatown Ltd* (2000) 8 BLR 331 at p 343, per Lord Clyde.
[15] [1994] 1 AC 85 at p 115.

The decision was reached on the point that it was envisaged by A and B that ownership of the property might be transferred to a third party, C, so that it could be foreseen that a breach of the contract might cause loss to C. It has been argued by Lord Clyde in *McAlpine* that such foresight and the intention of the parties to benefit a third party may not be necessary factors in the applicability of the exception. He elaborated:[16]

> 'Foreseeability may be relevant to the question of damages under the rule in Hadley v Baxendale[17], but in the context of liability it is a concept which is more at home in the law of tort than in the law of contract. If the exception is founded primarily upon a principle of law, and not upon the particular knowledge of the parties to the contract, then it is not easy to see why the necessity for the contemplation of the parties that there will be potential losses by third parties is essential.'

Both *The Albazero* and *St Martins* established the point that A is accountable to C for any damages recovered by A from B as compensation for C's loss.

The scope of the exception, was extended further in *Darlington Borough Council v Wiltshier Northern Ltd*[18] by the English Court of Appeal. Whereas in both *The Albazero* and *St Martins*, it was within the contemplation of both A and B that the ownership of the property might be transferred to a third party before the completion of the contract, *Darlington* was concerned with the case where A did not own the property either at the date of the contract or at the date of the breach.

In this case, A and B entered into building contracts in respect of land owned by C. A assigned its rights under the building contracts to C. C sued B for breach of the contracts. B resisted by taking the point that C, as assignee, had no greater rights under the contracts than A had and that A had not suffered any loss because it did not own the land. All the three judges on the panel held that the narrow ground was applicable.

[16] (2000) 8 BLR 331 at p 342.
[17] (1854) 9 Exch 341.
[18] [1995] 1 WLR 68.

The broader ground

In the *St Martins* case, although Lord Griffiths reached the same final decision as the other members of the Appellate Committee, he cut his own path by doing so on the broader ground which is that A has suffered loss because he did not receive the bargain for which he had contracted with B. A will be entitled to substantial damages from B which, in his view, are the cost to A of providing C with the benefit. He refused to accept the proposition that in the case of a contract for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract should depend on the plaintiff having a proprietary interest in the subject matter of the contract at the date of the breach. He noted that in everyday life, contracts for work and labour are constantly placed by persons who have no proprietary interest in the subject matter of the contract.

Lord Griffiths' proposition was favourably received by three other judges on the panel but they were not prepared to embrace it unequivocally at that stage. Lord Browne-Wilkinson was of the opinion that the proposition should be first examined by academic writers as it might have profound effects on commercial contracts. Since then, no fundamental flaw has been discerned in the broader ground although differences in opinion on the finer points of its application still abound.

In *Darlington*, another three-party building contract matter, the case was decided by all the three members of the court on the narrow ground. Steyn LJ decided the case also on the broader ground which he defined as where a builder fails to render the contractual service, the employer suffers a loss of bargain or expectation of interest which cost can be recovered on the basis of what it would cost to remedy the defect. He thought the broader ground is based on classic contractual theory which Lord Goff of Chieveley in *McAlpine* agreed.

The case of *Radford v De Froberville*[19] is also supportive of the broader ground. In this case, the plaintiff owned a house which was divided into six

[19] [1977] 1 WLR 1262.

flats which were tenanted. The plaintiff sold part of the adjoining garden to the defendant who undertook to erect a dividing wall on the plot sold so as to separate it from the plaintiff's land. The defendant failed to build the wall. The plaintiff claimed for the cost of building a similar wall on his own land.

The defendant argued that since the plaintiff did not occupy the property himself, he could not have suffered any damage due to the defendant's failure to build the wall because he was not there to enjoy it. Oliver J rejected this argument by holding that although the plaintiff's motive might be to confer what he conceived to be a benefit on persons who had no contractual rights to demand it, this could not alter the genuineness of his intentions. The learned judge said:[20]

> 'If [the plaintiff] contracts for the supply of that which he thinks serves his interests - be they commercial, aesthetic or merely eccentric - then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to receive an uncovenanted profit.'

Oliver J's reliance on the simple fact that the plaintiff had a contractual right to have the wall built constituted a plain assertion of the plaintiff's right to recover damages on the basis of damage to his performance interest.

In their dissenting judgments in *McAlpine*, Lord Millett and Lord Goff expressly approved the broader ground. Lord Millett regarded Lord Griffiths in *St Martins* as not proposing to depart from the general rule that a party can only recover compensatory damages for a loss, which he has himself sustained. He thought Lord Griffiths was insisting that, in certain kinds of contracts, the right to performance has a value, which is capable of being measured by the cost of obtaining it from a third party.

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[20] Ibid at p 1270.

Lord Millett disagreed with the view of Steyn LJ in *Darlington* that the broader ground can be included in the narrow ground because he reasoned that the narrow ground is an exception to the general rule that a plaintiff can only recover damages for his own loss whereas the broader ground considers the plaintiff as recovering for his own loss. On this basis, the narrow ground is an exception to the general rule whereas the broader ground is an application of the general rule.

Lord Goff commented in *McAlpine* that Lord Griffiths in *St Martins* was concerned that a contracting party who contracts for a benefit to be conferred on a third party should himself have an effective remedy. He thought that the broader ground not only addresses a special problem which arises in a particular context, such as carriage of goods by sea, but a general problem which arises where a party contracts for benefits to be conferred on others.

The proposition that a party to a contract is entitled to damages measured by the value of his own defeated interest in having the contract performed was alluded to in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[21] where Lord Scarman remarked:

> 'Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon C.'

At first blush, the broader ground is attractive as it provides a common thread to link all situations where a party suffers a loss of expectation or

[21] [1980] 1 WLR 277 at pp 300-301.

performance interest. This would include cases like *Jackson v Horizon Holidays Ltd*[22] where the plaintiff made a contract with the defendant for a holiday for himself, his wife and two children in the then Ceylon. The holiday was a disaster and the defendant accepted that it was in breach of contract. The English Court of Appeal held that the plaintiff could recover damages not only for the discomfort and disappointment he suffered himself but also for that experienced by his wife and children.

However, on closer scrutiny, the broader ground is also beset with problems due, in the main, to the clashing interests of the parties. A problem with the broader ground which has yet to be satisfactorily resolved is whether A is accountable to C for the damages recovered or is bound to expend the damages on providing for C the benefit which B was supposed to provide. Lord Griffiths in *St Martins* was of the view that A is so obliged. It has been suggested that the court should require an appropriate undertaking from A to pass on the damages to C as a condition for recovery[23].

However, Lord Goff and Lord Millett in *McAlpine* concurred with Steyn LJ in *Darlington,* that A is not accountable to C for any damages recovered by A from B. Steyn LJ took the view that 'in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages.[24]'

As Lord Millett noted in *McAlpine*:[25]

> 'The plaintiff is a contracting party who recovers for his own loss, not that of a third party. Whatever arrangements the third party may have entered into, these do not concern the plaintiff and cannot deprive him of his contractual rights. He is not accountable for the damages to anyone else, and he cannot be denied a remedy because "it is not needed." '

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[22] [1975] 1 WLR 1468.
[23] John Cartwright, *Damages, Third Parties and Common Sense* (1996) 10 JCL 244 at p 256.
[24] [1995] 1 WLR 68 at p 80.
[25] Op cit at p 383.

Lord Jauncey of Tullichettle did not favour such a view in *McAlpine* where he said:[26]

> 'On the reasoning of Steyn LJ it would appear that the employer in such a case could recover the cost of effecting the necessary repairs and then put the money in his own pocket. This would be a particularly unattractive result and certainly not one which Lord Griffiths would have advocated. Indeed it would seem to raise very sharply the question of whether the employer had suffered any financial loss at all.'

Closely allied to the issue of whether A is accountable to C for the damages recovered from B is the question of whether it is a condition for recovery under the broader ground that A must intend to carry out the work for the benefit of C. In *St Martins*, Lord Griffiths answered this question in the affirmative. He referred to the fact that A suffers loss because he has to spend money to obtain the benefit of the bargain, which B had promised but failed to deliver. He added that the court should be satisfied that the repairs had been or would be carried out. Oliver J was similarly disposed in *Radford*[27] where he asked himself whether the plaintiff had 'a genuine and serious intention of doing the work'.

Lord Jauncey in *McAlpine* was of the view that the employer's entitlement to substantial damages depends on whether he has made good or intends to make good the effects of the breach as this produces a sensible result and avoids the recovery of an uncovenanted profit by an employer who does not intend to take steps to remedy the breach. Lord Goff was of the opinion that the plaintiff's intention to make good the defects should be considered as it goes to the matter of reasonableness of his claim for damages[28].

In the same case, Lord Jauncey raised doubts whether the broader ground would permit the recovery of consequential loss resulting to C due to

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[26] Op cit at p 368.
[27] [1977] 1 WLR 1262 at p 1283.
[28] See also *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at p 372, per Lord Lloyd of Berwick..

delay and resultant loss of profits. Lord Browne-Wilkinson took the view that the broader ground is only available if C does not have a direct cause of action against B.

Lord Clyde in *McAlpine* expressed difficulty in adopting the broader ground as a sound way forward. He said:[29]

> '… there is no obligation on the successful plaintiff to account to anyone who may have sustained actual loss as a result of the faulty performance. Some further mechanism would then be required for the court to achieve the proper disposal of the monies awarded to avoid a double jeopardy. Alternatively, in order to achieve an effective solution, it would seem to be necessary to add an obligation to account on the part of the person recovering the damages. But once that step is taken the approach begins to approximate to The Albazero exception.'

Alfred McAlpine Construction Ltd v Panatown Ltd

In this case, the respondent, Panatown Ltd 'Panatown' entered into a building contract 'the building contract' with the appellant, Alfred McAlpine Construction Ltd 'McAlpine' under which McAlpine undertook to construct an office building in Cambridge. The building contract was in a modified JCT Standard Form of Building Contract with Contractor's Design (1981 edition).

The site was owned by Unex Investment Properties Ltd 'UIPL'. Panatown and UIPL were both part of the Unex group of companies. The rather unusual arrangement of having Panatown, instead of UIPL, enter into the building contract was to avoid the incurring of tax by the group.

On the same day that the building contract was made, McAlpine entered into a Duty of Care Deed 'the DCD' with UIPL in which McAlpine undertook that, in respect of all matters which lay within the scope of its responsibilities under the building contract, it would exercise reasonable skill and care. UIPL

[29] Op cit at p 345.

had thus acquired a direct remedy against McAlpine should McAlpine run foul of the building contract.

The building was faultily constructed and there was also delay. Panatown alleged that the defects were so serious that the existing building might have to be demolished and entirely rebuilt.

Panatown commenced arbitration proceedings against McAlpine for damages arising from alleged breach by McAlpine of the building contract. In the arbitration, McAlpine raised a preliminary issue that Panatown was not entitled to substantial damages, as opposed to nominal damages, since Panatown had no proprietary interest in the site and had therefore suffered no loss. The arbitrator decided the issue in Panatown's favour. On appeal, the High Court reversed the decision. On appeal by Panatown, the Court of Appeal held in favour of Panatown.

McAlpine then appealed to the House of Lords. The two main issues confronting the House were as follows:

(a) whether Panatown was entitled to recover substantial damages from McAlpine notwithstanding that Panatown was not at all material times the owner of the land, and

(b) if so, whether the DCD precluded Panatown from recovering substantial damages from McAlpine.

By a three-two majority, the House of Lords allowed McAlpine's appeal against the decision of the Court of Appeal, holding that Panatown was not entitled to claim substantial damages from McAlpine.

Four of the Law Lords formed the opinion that the existence of the DCD crippled Panatown's claim against McAlpine on the narrow ground. Lord Clyde remarked that the resolution of the problem in any particular case has to be reached in light of its own circumstances. After noting that there was a plain and deliberate course adopted whereby the company with the potential

risk of loss was given a distinct entitlement to sue the contractor, he held that the narrow ground was not available to Panatown.

Lord Jauncey acknowledged that the DCD was not co-terminous with the building contract between Panatown and McAlpine as the remedies available to UIPL under the DCD were different from and less effective than those available under the building contract. However, he did not consider this as sufficient to displace the general rule. He said that since UIPL was entitled to sue McAlpine under the DCD, the need for an exception to the general rule ceased to apply.

Lord Browne-Wilkinson held that the direct cause of action which UIPL had under the DCD was fatal to any claim to substantial damages made by Panatown against McAlpine based on the narrow ground. Lord Goff also held that the existence of the DCD precluded Panatown's claim under the narrow ground.

In conformity with the other Law Lords, Lord Millett also rejected the narrow ground from being applied to the facts of this case. However, he reached this conclusion without any reference to the DCD at all.

Although he rejected the application of the broader ground to Panatown's claim, it is unclear how Lord Clyde arrived at such a decision. Certainly he did not consider the effect of the DCD on the broader ground unlike Lord Jauncey and Lord Browne-Wilkinson who concurred with him in the final decision.

Lord Jauncey took the stance that the DCD was equally relevant to the broader ground as to the narrow ground as both the grounds sought to find a rational way of avoiding the legal black hole. He said that there was no justification for allowing A to recover from B as his own a loss, which was truly that of C when C had his own remedy against B. He opined that were it not so, McAlpine could be liable twice over in damages. He added that Panatown's claim for loss of expectation of interest could have only nominal value when UIPL had an enforceable claim and Panatown had no intention of taking steps to remedy the breach.

While conceding that the broader ground is sound in law, Lord Browne-Wilkinson held that the DCD barred recovery on the broader ground based on the following reasoning:[30]

> 'The essential feature of the broader ground is that the contracting party A, although not himself suffering the physical or pecuniary damage sustained by the third party C, has suffered his own damage, being the loss of his performance interest i.e. the failure to provide C with the benefit that B had contracted for C to receive. In my judgment it follows that the critical factor is to determine what interest A had in the provision of the service for the third party C. If, as in the present case, the whole contractual scheme was designed, inter alia, to give UIPL and its successors a legal remedy against McAlpine for failure to perform the building contract with due care, I cannot see that Panatown has suffered any damage to its performance interests: subject to any defence based on limitation of actions, the physical and pecuniary damage suffered by UIPL can be redressed by UIPL exercising its own cause of action against McAlpine.'

The two dissenting judges allowed Panatown's claims under the broader ground. They advocated a more unrestrained approach to the broader ground. In respect of McAlpine's submission that the DCD had the effect of divesting Panatown of any right to recover damages from McAlpine under the building contract, Lord Goff answered that by noting that it would be a strange conclusion indeed that the effect of providing a subsidiary remedy for the owner of the land, UIPL, on a restricted basis (breach of duty of care), was that the building employer, who had furnished the consideration for the building, was excluded from pursuing its remedy in damages under the main contract, which made elaborate provision, under a standard form specially adapted for the particular development. The learned judge was of the opinion that on the facts of the case, there was no possibility of double recovery from McAlpine and if there was such a possibility, it could be resolved by a "joinder" of the relevant party or parties to the proceedings.

[30] Op cit at p 372.

He was also of the view that where A was permitted by C to procure building work on C's property, A was under a duty to take reasonable steps to procure the satisfactory completion of that work and if A recovered damages from the contractor for defective work, he should procure the necessary remedial work. Lord Goff concluded that the existence of the DCD did not stand in the way of the enforcement by Panatown of its right to recover substantial damages from McAlpine under the building contract.

Like Lord Goff, Lord Millett also expressly approved the broader ground. He confined it to building contracts and other contracts for the supply of work and materials where the claim arises from defective or incomplete work or delay in completing it. He saw no possibility of the DCD, raising the spectre of double recovery by reasoning that :[31]

> 'Even though the plaintiff recovers for his own loss, this obviously reflects the loss sustained by the third party. The case is, therefore, an example, not unknown in other contexts, where breach of a single obligation creates a liability to two different parties. Since performance of the primary obligation to do the work would have discharged the liability to both parties, so must performance of the secondary obligation to pay damages. Payment of damages to either must pro tanto discharge the liability to both.'

In his view, the problem was not one of double recovery, but of ensuring that the damages were paid to the right party. His proposed solution was that such an action should normally be stayed in order to allow the building owner to bring his own proceedings. The court, he said, would need to be satisfied that the building owner was not proposing to make his own claim and was content to allow his claim to be discharged by payment to the building employer before allowing the building employer's action to proceed.

He also noted that the development of the site was a group project financed by group money. He thought it unlikely that the damages recovered by Panatown would simply be retained for its own benefit as such damages

[31] Op cit at p 383.

would almost certainly be held on trust to be applied at the direction of the group company which provided the building finance.

Conclusion

It is undeniable that there is a need for an exception to the general rule so as to provide a recourse for A against B to avoid the spectre of the legal black hole. However, to make such an exception fit into the tapestry of the established law is proving to be very difficult.

As testimony of the complexities involved, the decision in *McAlpine* was reversed at every turn and when the dispute finally reached the House of Lords, it was only by a simple majority that Panatown's claims against McAlpine were defeated. The five Law Lords on the panel were divided in their reasons for their decisions. It is difficult to discern many general principles from this case which can be applied to future cases. *McAlpine* seems to lead to the inference that the applications of the narrow and broader grounds are very much dependent on the facts and circumstances of the particular case. *McAlpine* has not resolved all the problems associated with this issue comprehensively and with precision. A holistic solution is clearly missing.

Without the guidance of general principles, every case will have to be resolved on its own facts as the court tries to balance the competing interests of the parties in a sensible way. However, this makes for an uncertain law. Parties will be unable to enter into contractual relations with a clear view of the implications involved. Disputes may also be easily stoked.

There ought to be clear parameters to the utility of the narrow and broader grounds. There should be a clear demarcation between the narrow ground and the broader ground otherwise the continued existence of both will lead to confusion.

As imperfect as they are, it is submitted that the following principles be considered as a starting point in addressing this issue. Take first the simpler

scenario where C has not entered into any contract with B, such that C acquires an independent cause of action against B if B breaches the contract with A. Upon breach by B, A is entitled to bring an action against B under the narrow ground or the broader ground.

Under the broader ground, A can recover substantial damages, measured by the amount it takes to make good what B has undertaken to perform. As the broader ground rests on the premise that it is to compensate for A's own loss due to his performance interest or expectation interest, A will be precluded from recovering any consequential losses suffered by C, including loss of profits. Such consequential losses have to be pursued by A on the basis of the narrow ground where he may sue on behalf of C for losses sustained by C.

Whether A is obliged to deliver to C the damages he recovers from B or to complete or perfect the performance to C after obtaining the damages will depend on whether he succeeds against B on the narrow ground or the broader ground. The answer would then be yes and no respectively due to the underlying rationale of these two grounds.

If it is an incidence of the broader ground that A has to account to C for the damages that he recovers from B, then there is hardly any difference between the narrow ground and the broader ground. The rationale for the existence of the broader ground completely evaporates.

Under the narrow ground, does A have to prove that he will actually utilise the damages recovered from B to make good the performance which B had promised? It is submitted that A should not be placed under such a burden. For one, it is difficult to say what kind of proof will suffice. A can say that he intends to complete the work or remedy the defects if that is all that is required of him but that does not seem to have much practical effect. To compel A to prove that he has taken all the necessary steps for performance is unfair as there is no certainty that he will obtain judgment against B, much less that he will be able to enforce such judgment, and also bearing in mind that A will incur expenses in making efforts and taking steps to perfect the performance.

It is possible that A's avowed intention of completing the work turns out to be falsely made or that he does not in fact apply the damages, which he recovers towards such an end. Who will be able to take action against A? It is difficult to see how C has thus acquired a cause of action against A on such a premise per se. For all intents and purposes, imposing upon A the burden of satisfying the court of his intention to complete the work may not have any tangible significance.

Whether C has a right to the damages recovered by A from B will hinge on the contractual or legal relationship between A and C. If A promises to erect a house on C's land without any consideration from C and if B has even failed to start work on the construction, then C cannot have any recourse to the damages recovered by A from B as there is no valid contract between A and C, and C has not suffered any loss at all.

Certainly the solution is not so simple in other situations. Take for instance where C has not furnished any consideration to A and the building erected on C's land is severely defective. The building cannot be used at all and it is taking up space on the land, which could be put to profitable use. Expenditure needs to be made to rectify the defects or to demolish the building and clear the debris to free the land for other use. In these circumstances, to deprive C from recovering from A damages which A had obtained from B would be most unjustified. To prevent C's claim from being sucked into a legal black hole, the court will have to strain to find some kind of contractual or legal relationship between A and C to confer upon C such a right of recovery. The way forward seems to be not to give C an automatic right against A but to determine the contractual or legal relationship between them to see whether such a right exists.

The problem takes on greater complexity where C has his own cause of action against B by way of a separate agreement between B and C. Considering first the position where C's cause of action gives C the same rights as those available to A against B, the first issues that spring into mind are that B should not be put to double jeopardy and that neither A nor C should obtain an uncovenanted profit. These are just as undesirable as the legal black hole. A

proper resolution of their competing interests can be easier to achieve if A and C join, in bringing an action against B.

If only A or C commences an action against B, B's liability to both A and C cannot be discharged merely upon the securing of judgment by, say, A against B. Take the situation where A obtains judgment against B. If A does not enforce or fails to successfully enforce the judgment against C within the limitation period of C's claim against B, then C may lose his right of recovery. To say that C's cause of action against B arises only when A fails to recover from B is very problematic as it would be unjust to stop C from proceeding against B or to postpone this right in favour of A's right. Furthermore, how to define the moment when A cannot enforce his judgment against B will be equally vexing.

Lord Goff's and Lord Millett's suggestion in *McAlpine* that such an action should be stayed to allow the other party to join in the action is a seductive solution. The court may even order that the other party be made a party to the proceedings. A comprehensive resolution of all the issues may then be feasible.

If the other party does not join in or is not made a party to the action for whatever reason, then a possible way out of this quagmire is to allow the action that either A or C takes against B to proceed accordingly. When B discharges his liability to either A or C, B's liability to the other party will also be extinguished. Assuming that A has obtained the judgment sum from B, it would be available to B to set this up as a complete defence should C decide to proceed with an action against B. C can only seek redress by suing A in which case the court will have to unravel all the contractual and other legal issues involved between them before making a decision. This seems to be a possible framework to adopt.

The level of complexity notches up even further where the rights of C against B are different from the rights of A against B as was the case in *McAlpine*. In such a case, there will be a cast of many factors and possible permutations, such that generalisations will be difficult to make. The sprawling issues have to be decided on their own facts. The approach taken will have to

be built upon the principles for the simpler scenarios.

Assuming that C's rights against B are inferior compared to those available to A against B, is it possible for C to recover from B and then take action against A to recover the deficit? It is submitted that this is not entirely impossible if there is no impediment against this in the three-party matrix.

It will be a bumpy road ahead to adequately resolve all the difficulties. It will take dexterity and innovation to put the law on this point on a sound basis. As observed by Lord Wilberforce in *Woodar Investment Development Ltd*[32], *'there are many situations of daily life which do not fit neatly into conceptual analysis, but which require some flexibility in the law of contract.'*

[32] [1980] 1 WLR 277 at p 283.

THE CONTINENTAL SHELF

SELVANATHAN SUBRAMANIAM*

Introduction

The feature separating the coastal land mass from the deep ocean floor, is the Continental Margin.

The Continental Shelf is part of the Continental Margin, which comprises, in addition the continental slope and the continental rise. Geologically, the continental shelf is the region from the low water mark to an average depth of 130 metres. The continental slope takes off from the continental shelf to a depth of about 1200 to 3500 metres and the continental rise follows the continental slope with a gentler gradient and average depths of 3500 to 5500 metres.[1]

Early Claims to the Continental Shelf

Early 20th Century state practice had led to the acceptance of the idea that if the coastal state had possession of the territorial sea, it had concomitant proprietary rights over the resources within that zone and this included the sea bed and sub-soil underlying the territorial sea.

As regards the sea-bed underlying what were then regarded as High Seas, this area was not regarded as appertaining to the coastal state. The coastal state could however gain the rights to the resources therein by 'effective occupation' and 'regular exploitation' of and assertion of rights of control over specific areas of the surface of the sea-bed. Though there were criticisms that these rights were '*res communis*' and thus not subject to unilateral appropriation, such rights were generally recognized, so long as the claims did not extend to ownership of the ocean floor itself[2], especially as these claims did not affect

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[1] Churchill, RR and AV Lowe. 'The Continental Shelf', In The Law of the Sea (ed Manchester University Press), 1988 at pg 120.

[2] Ibid at pg 121.

the general High Seas rights of freedom of fishing and navigation in the superjacent waters.

In 1942, the United Kingdom (on behalf of Trinidad) on the one part and Venezuela on the other part entered into an agreement to effectively divide the submarine areas of the Gulf of Paria between themselves. This Treaty between the two states defining the sectors where the respective states were not to claim sovereignty or and to recognize rights of sovereignty or control lawfully acquired by the other state over the sea-bed beyond territorial waters was probably the first instance of the delimitation of the continental shelf i.e. even before the 'birth' of the continental shelf concept. Note must be taken that even in this treaty, sovereignty had to arise from occupation.[3]

O'Connell comments that 'At that stage no legal regime was applied to that area and it was thought questionable whether the claim would be valid *erga omnes*'. But for practical purposes, the engagement of Venezuela was sufficient guarantee so that the validity of the action was only a theoretical question.[4]

Arguably however the concept of the continental shelf and the resources therein being subject to national jurisdiction stems from the Truman Proclamation of 28 September 1945, which declared:

> 'Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the U.S. regards the natural resources of the subsoil and seabed of the continental shelf beneath the High Seas but contiguous to the coasts of the US as appertaining to the US, subject to its jurisdiction and control…….The character as high seas of the waters above the continental shelf and the rights to the free and unimpeded navigation are in no way thus affected'.[5]

The US provided justification for their claim on the grounds of contiguity

[3] Ibid at pg 121
[4] O'Connell, DP, 'The Continental Shelf'. In the International Law of the Sea, Vol 1 (ed Clarendon Press).
[5] Truman Proclamation, 2667, Sept 28, 1945

and reasonableness. Following this Proclamation by the US, other states began to follow suit.

However, despite this, state practice was not uniform. In fact, it was stated that the doctrine could not claim to have assumed either to the 'hard lineaments' or the 'definitive status' of an established rule of international law- per Lord Asquith in *Petroleum Development Limited v Sheikh of Abu Dhabi 1951*.[6] His Lordship rejected the contentions that the Continental Shelf had become and was already in 1939, part of the corpus of international law.[7] As the exploitation of the continental shelf resources was further enhanced by new technology, this led to the need to give a clearer definition to the continental shelf.

This took place in the 1958 Continental Shelf Convention. Article 1 of the 1958 Continental Shelf Convention defines the Continental Shelf:

> 'For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas: (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands'.

Article 2 states that the rights for the purposes of exploring and exploiting the resources of the Continental Shelf shall be sovereign rights. Thus, there was general acceptance of the idea that coastal states have rights over their continental shelf.

Subsequently, in the *North Sea Continental Shelf Cases* (1969) 'the NSCS' the International Court of Justice stated:

'the rights of the coastal state in respect of the area of continental shelf

[6] Churchill and Lowe, pg 122

[7] Larson, DL (ed). *'The Continental Shelf', In Major Issues of the Law of the Sea*. (The University of New Hampshire)

> that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared but does not have to be constituted. Furthermore, the right does not depend on it being exercised'.[8]

What is clear from the Continental shelf Convention 1958 and the NSCS cases is that the concept of the Continental Shelf had begun to gain wide acceptance since 1958. Indeed the right to control, explore and exploit the continental shelf zone adheres to every state whether it had ratified the 1958 Convention or otherwise.

1982 Law of the Sea Convention

The 1982 Law of the Sea Convention 'the LOS' deals with the Continental Shelf in Part VI in Articles 76 to 85. It should be noted too that, LOS also introduced the concept of the Exclusive Economic Zone 'the EEZ'. Hence, there is some overlap between the rights in the Continental Shelf and the EEZ of a state which decides to claim an EEZ as under the LOS, the coastal state has pursuant to Article 56, '*sovereign rights for the exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil……..*'[9]

[8] North Sea Continental Shelf Cases (1969) ICJ from Churchill and Lowe, pg 122
[9] Article 56 LOS

Continental Shelf Definition in the LOS

Article 76(1) defines the Continental Shelf as comprising:

> 'the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend to that distance'.[10]

Article 76(2) refers to Articles 76(4) and 76(5) and states that the continental shelf of a coastal state shall not extend beyond the limits stated therein.[11]

Articles 76(3) defines the continental margin as comprising:

> 'the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceans ridges or the subsoil thereof'.[12]

Oxman[13] has provided a very useful flow-chart on the operation of Article 76 and it is advised that reference should be made therein.

The Outer Limit of the Continental Shelf

In general, the inner limit of the continental shelf has been taken to be the outer limit of the territorial sea. The outer limit has not been quite as simple. For instance, the US in a memorandum to the Truman Proclamation stated:

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[10] Article 76(1) LOS
[11] Article 76(2) LOS
[12] Article 76 (3) LOS
[13] Oxman, Bh., 'The United Nations Conference on the Law of the Sea.' The Ninth Session (1980), 75 Am J Int'L 1981

> 'The continental shelf is usually defined as that part of the undersea land mass adjacent to the coast, over which the sea is not more than 100 fathoms in depth'.

Some Latin American countries had declared continental shelf boundaries of 200 miles, though this delimitation extended further than the seaward limit of the Continental margin.

At the embryonic stage of development of the continental shelf doctrine, the outer limit of the continental shelf did not appear to have much practical significance but with technological advances to facilitate exploitation, this was no longer true.

Indeed, in the 1958 Convention, while there was criterion for the 200 metre isobath, the convention also provides in Article 1 that the limit may be extended to beyond that isobath, where the depths of the superjacent 'waters admits of the exploitation of the natural resources of the said areas', i.e: an exploitability criterion.

The 'exploitability' criterion was criticized as being imprecise as well as favouring the developed countries, which had advanced technology. Shaw [14]states that:

> 'Article 1 of the 1958 Convention defined the shelf in terms of its exploitability rather than relying upon the accepted geological definition, noting that the expression referred to the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea to a depth of 200 metres or 'beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.'

The provision caused problems, since developing technology rapidly reached a position to extract resources to a greater depth than 200 metres, and

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[14] Shaw, M N, '*The Law of the Sea*', In International Law, (Cambridge Edition, Univ Press), 1997.

this meant that the outer limit of the shelf, subject to the jurisdiction of the coastal state, was consequently very unclear. Article 1 was, however, regarded as reflecting customary law by the court in the North Sea Continental Shelf case. It is also important to note that the basis of title to the Continental Shelf is now accepted as the geographical criterion, and not reliance upon, for example, occupation or effective control. The court emphasized this and declared that:

> 'The submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion in the sense that although covered with water, they are a prolongation or continuation of that territory and extension of it under the sea.'

The LOS in Article 76(1) provides a legal definition of the continental shelf as opposed to a geographical one. While this legal definition may be criticized as being arbitrary, it does permit that substantially all of the continental margin is within national jurisdiction. Churchill and Lowe in making the point that 'the legal definition of the shelf is quite distinct and different from the geographical definition state as follows:

> 'areas of the seabed which lie beyond the continental margin are included, so long as they are within 200 miles of the coast. Where the continental margin (defined in article 76(3) as consisting of the shelf, slope and rise and excluding the deep oceanic floor with its oceanic ridges) extends beyond 200 miles, the outer limit of the legal continental shelf is either a line connecting points not more than sixty miles apart, which points the thickness of sedimentary rocks is at least one per cent of the shortest distance from such point to the foot of the continental slope, or a line connecting points not more than sixty miles apart, which points are not more than sixty miles from the foot of the slope. In each case the points referred to are subject to a maximum seaward extent' they must be either within the 350 miles of the baseline or within 100 miles of the 2500 metre isobath'[15]

Mindful of the fact that debate may arise over the outer limits of the

[15] Churchill and Lowe

shelf, States are required, to notify the outer limits to the Commission on the Limits of the Continental Shelf.[16] The coastal state is also required to deposit with the Secretary General of the United Nations, charts and relevant information, including geodetic data, permanently describing the outer limits of the continental shelf'.[17]

There is also provision for giving due publicity to these limits. (Article 76(9))

It is also provided for the Commission to recommend to the State the establishment of such delimitation wherein, if such recommendation if accepted is final and binding.[18]

Delimitation of the Continental Shelf between states with opposite or adjacent waters.

The 1958 Convention in dealing with the issue of delimitation of the continental shelf limits between adjacent/opposite states provides as follows:

> 'In the absence of agreement and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance'[19] i.e: by the drawing of a median or equidistance line.

Now, it will be noted that under customary international law, equitable delimitation is the test while under the 1958 Convention, 'special circumstances-equidistance principle' is the benchmark.

As a result of this equidistance principle, some states did not ratify the Convention. These states were hence not bound by the equidistance principle.

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[16] Article 76 (8) LOS
[17] Article 76 (9) LOS
[18] Article 76 (8) LOS
[19] Article 6 (2) Continental Shelf Convention 1958

In the North Sea Continental Shelf Cases 'the NSCS' (1969), the court held that the rule of equidistance had not became part of customary international law. (It must be noted that the bare application of the 'equidistance' principle without 'special circumstances' would yield injustice as for instance if an isolated island were to be used in the equidistance principle).

In the face of dealing with states, which were not parties to the Convention, the Court in the NSCS cases was of the view that there is no single method of delimitation, which is obligatory and satisfactory in all circumstances.

The Court went on to say that:

> 'delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.'

In drawing agreements delimiting the continental shelf, all relevant circumstances should be taken into account. These would include:

- the general configuration of the coasts of the Parties as well as the presence of any special or unusual features;
- So far as known or readily ascertainable, the physical and geological structure and natural resources of the continental shelf areas involved;
- The element of a reasonable degree of proportionality…between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the general direction of the coastline.

In practice however, the effect whether under customary international law or the 1958 Convention is said to be similar.[20]

In the *Anglo-French Continental Shelf Arbitration (1977)*, the court

[20] Churchill and Lowe

of Arbitration stated:

> 'The court found that Article 6 does not establish two rules – an equidistance rule and a special circumstances rule. Instead, the court found that Article 6 provides a combined equidistance – special circumstances rule. Further, the rule of special circumstances in Article 6 is to ensure an equitable delimitation and that` the combined equidistance special circumstances rule in effect provides for the general norm of customary law that the continental shelf boundary is to be determined in accordance with equitable principles.
>
> '… the equidistance-special circumstances rule and the rules of customary law have the same object – the delimitation of the boundary in this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article (6)'

The LOS provision on delimitation of the continental shelf is contained in Article 83(1) which reads:

> 'The delimitation of the coastal shelf between States with opposite or adjacent coats shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve equitable solution'.[21]

Article 83(2) provides that if the States are unable to reach agreement within a reasonable period of time, the dispute settlement procedure in Part XV shall be used.

Article 83(3) provides that pending agreement, the States shall in a spirit of understanding and co-operation endeavor to enter into provisional practical arrangements which practical arrangements shall be without prejudice to the final determination. States should not jeopardize or hamper the reaching of a final agreement.

[21] Article 83 (1) LOS

Article 83(1) is so vague that much has had to be determined by the Courts. While the issue of 'equitable principles' remains elusive, relevant factors to be taken into consideration in delimitation would appear to include:

1. The geography of the coastline, for example: concavity (NSCS), broad equality of coastline (UK France), change in direction of coastline (Tunisia/Libya), discrepancy in length of coastline (Libya/Malta)
2. The geological/geomorphological features of the area, for example: the physical characteristic of the continental shelf itself. This was considered in the NSCS cases but has virtually faded from use since then. In subsequent cases the court has held that the 200 mile minimum distance provision in Article (76), 1982 has effectively meant that geological features within this distance are irrelevant (Libya/Malta).
3. The conduct of the parties, for example: consent or acquiescence by one party (Tunisia/Libya)
4. Security or other navigational interest recognized but not decisive (Tunisia/Libya; UK/France)
5. Boundaries with or claims by third states, for example: in UK/France the tribunal did not want to trespass on any delimitation involving Ireland. In Tunisia/Libya the court indicated it would be careful about not damaging the interest in Malta. In Libya/Malta the court took Italian interests into consideration.
6. Proportionality – this was stressed in the NSCS Cases. The court has since used proportionality to test the equity of the result. However, it has stressed that it is not a basis of entitlement, only a rough guide as to the fairness of the result.

As well as relevant factors, the cases indicate that a number of factors will not be taken into account:

- Land mass: in Libya/Malta the court indicated that it was the length of coastline that mattered, not the total land area of the party.
- Location of natural resources: in the NSCS the court suggested that this would not apply. (However, it is unlikely that the court would not take into account, for example, existing oil installations, if for no other reason

than may be an indication of acquiescence by the other side).

- The political status of the territory concerned, for example: whether they are a long distance from the mainland of the state concerned, appears to be irrelevant. For example: in the French Canada (French islands off Newfoundland) or Denmark Norway (the island of Jan Mayen)[22]

Churchill and Lowe offer the following comment:

> 'It can further be said that at least four principles are clearly accepted. First, rights to the continental shelf are inherent, and this must be recognized in delimitations: there is, in theory, no element of distributive justice involved. Second, delimitation by agreement remains the primary rule of international law.
>
> 'Third, any delimitation, whether agreed or determined by a third party, must result in an equitable solution. Fourth, there is in principle no limit to the factors relevant to the determination of equitableness. In practice, geographical considerations are coming to predominate, and the existence of a significant disproportion between the relative maritime areas attaching to the States and the relative lengths of their coastlines is likely to be taken as a sign of inequity. Other factors, such as economic, ecological, security and geomorphological factors, are given less weight. Furthermore, features such as offshore islands which would produce an inequitable solution if given full effect in the application of the equidistance principle, will be given a reduced effect or even ignored in order to achieve equity.'[23]

In practice, many maritime boundaries have been dealt with by way of treaties between states (more than 100) largely based on equidistance special circumstance principle.

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[22] 'The Law of the Sea', In Public International Law. HLT Publications, 1990.
[23] Churchill and Lowe, pg 158

Right of Coastal State under the Continental Shelf Regime of LOS

Part of the continental shelf falls in an area, which was originally High Seas. Subsequently, with the emergence of the EEZ principle, the areas of the continental shelf and the EEZ co-exist up to 200 nautical miles. Beyond this 200 nautical miles zone, only the continental shelf regime exists. In the case of a state which elects not to claim and the EEZ, the continental shelf regime would apply.

Rights in the 200 Nautical Miles Area

Article 77(1) of the LOS provides that the coastal state shall exercise sovereign rights for the purpose of exploring and exploiting its natural resources. This includes the right to the shelf resources through tunneling (Article 85 of the LOS)

Article 77(2) enables the coastal state to enjoy the rights over the continental shelf without any need for occupation or proclamation.

Article 77(4) of the LOS provides:

> 'The natural resources referred to in this part consist of the mineral and other non living resources of the sea bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'

The Article permits of the exercise of rights over oil and gas resources as also living resources, which are sedentary. Thus shell fish such as oysters and abalone would fall under this. However, debate has raged over other organisms such as crabs and lobsters as to whether these may be classified as sedentary otherwise. Indeed the USA and Japan have had a dispute over King Crab fishing in the eastern Behring Sea and the lobster fishery off Brazil has

been the subject of dispute between France and Brazil.[24]

While this is the position with regard to the continental shelf regime, if we were to consider the EEZ regime, this problem does not arise since the coastal state's right to exploit the resources of the EEZ is not restricted merely to sedentary species. Indeed the coastal state has all the rights to exploit the resources of the EEZ (Article 50(1)of the LOS) subject merely to the other provisions therein.

Churchill and Lowe further submit that because Article 77(4) of the LOS provides that while the coastal state has rights over the natural resources in the continental shelf, the State would not have rights over non-natural resources, such as 'wrecks'.

Article 77(2) of the LOS provides that the consent of the coastal state would be necessary if another state was minded to exploit continental shelf resources of the coastal state. In the event that the coastal state is prepared to consider such outside exploration/exploitation, the coastal state may define the parameters of such exploitation.

Article 81of the LOS provides that the coastal state shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

Thus the LOS provides the coastal state with a host of rights over the continental shelf, however this is limited by Article 78 of the LOS. For instance article 78(1) states that:

> 'the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.'

Further Article 78(2) provides that:

[24] Churchill and Lowe, pg 128

> 'The exercise of the rights of the coastal state over the continental shelf must not infringe or result in unjustifiable interference with navigation and other rights and freedom of other States as provided for in this Convention'.

Again Article 60(7) of the LOS provides hat installations may not be established, where interference may be caused to the use of recognized sea-lanes essential to international navigation and Article 80 of the LOS stipulates that Article 60 of the LOS applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

It would appear that outside of these recognized sea-lanes, the state has rights and jurisdiction for the establishment of drilling platforms, installations for the exploitation of offshore resources. Arguably this would not be an unjustifiable interference with navigation. It should also be noted that Article 60 of the LOS permits the coastal state to establish a safety zone of 500 metres from the outer limits of the said installations where navigation and fishing is not permitted.

On the issue of abandoned installations, the LOS requires that these be removed (not completely as required under the Continental Shelf Convention) but to ensure safety of navigation with cognizance given to accepted international standards and other interests such as fishing and marine environment. Where the structures are only partly removed, due publicity must be given. (Article 60(3) of the LOS)

The coastal state is required to allow other states to lay submarine pipelines and cables in the continental shelf (Article 79 of the LOS). The coastal state may however impose conditions on such pipe and cable laying exercise. For example conditions to prevent pollution and the coastal state may also delineate the course taken by each pipelines.

Continental Shelf regime beyond 200 nautical miles

This area would be outside the EEZ of the coastal state. Hence, the coastal state would have the rights over the continental shelf described earlier.

However, one notable issue is that the question of sedentary and non-sedentary living resources becomes crucial in as much as the continental shelf regime gives the coastal state rights of exploitation over sedentary species but not over non-sedentary living organisms. Over the latter, the High Seas fishing regime would apply, as the superjacent waters over the continental shelf in this zone are High Seas open to free fishing.

With respect to the non-living resources in the continental shale of this zone, the coastal shelf shall have the exclusive right of exploitation. However, the coastal state would have to pay to the International Sea Bed Authority, after the fifth year of exploitation a sum based on the value/volume of production. This amount would range from one per cent in the sixth year to seven per cent in the twelfth year. (Article 82 of the LOS).

The Authority would then distribute such proceeds to other Convention states on equitable developing sharing criteria as provided for in Article 82(4) of the LOS. Particular attention, would be paid to the cases of the least developed and land locked developing states in this scheme of sharing and distribution.

Article 82(3) of the LOS provides exemption from the need to make such payment to the International Sea Bed Authority if a developing Coastal State is a net importer of the mineral under exploitation.

Islands

Under the Continental Shelf Convention, islands may claim a continental shelf regime. The LOS also permits of the same. However, a rider is imposed in Article 123(3) of the LOS, which prevents rocks that cannot sustain human habitation or economic life of their own from claiming a continental shelf zone.

This would prevent isolated offshore rocks from being used to claim the EEZ or the continental shelf zones, thereby inequity in the new ocean regime.

Conclusion

When the juridical position of the continental shelf was initially raised, there were attempts to categorize the shelf either as *res nullius* or *res communis*. It was felt that treating the continental shelf as high seas would, prevent any encroachment on the freedom of the high seas, as international law had been loath to encourage such encroachment.

Within five years of the Truman Proclamation, more than 30 nations states had made claims/proclamations declaring exclusive rights over the shelf. These proclamations in the main sought to declare what the states felt to be a pre-existing right.

Chile claimed sovereignty over the sea-bed at 'whatever depth and over all adjacent seas at whatever depth' though it hardly had any shallow submarine areas. Generally, the more reasonable claims such as that of the US were acquiesced in or not actively resisted, laying the foundation for customary international law in this area.

The 1958 Continental Shelf Convention in defining the continental shelf moved away from the strict physical definition of the continental shelf as scientists themselves indeed had different views on the geological definition of the continental shelf. As such, the 1958 Convention provided a legal definition by extending rights up to 200 metres and also beyond to where the depth admitted of exploitability of natural resources. While providing for sovereign rights to explore and exploit, it shrank from giving full territorial sovereignty over the continental shelf. The 1958 Convention however created problems with regard to the issue of 'exploitability'.

The continental shelf provisions/definitions in the LOS may be considered to contain both legal and geological elements. This is an advancement over the

legal definition in the 1958 Convention. However, the LOS too creates uncertainty, for instance in the vague definition of Article 83(1) and the question as to sedentary and non-sedentary living organisms.

Hence, the law on this subject still remains to be defined and developed by the Courts/Tribunals as and when disputes or issues are raised by States.

The Law of Partnership in Malaysia: Prospects For Islamisation

DR SAMSAR KAMAR LATIF*

INTRODUCTION

The title of this paper might lead some to speculate that the law of partnership in Malaysia is totally devoid of Islamic content. This misapprehension is understandable because from the historical perspective the present Malaysian Partnership Act 1961, originated from the Partnership Ordinance 1961 of Sabah[1] and this legislation was in close proximity with the English Partnership Act 1980.[2] However, the Islamic concept of partnership in the form of a profit-sharing venture has been practiced in the Malay Peninsula, particularly in the introduction of profit - sharing venture, based on the Malay Legal Digests such as the Undang-Undang Malacca and the Maritime Laws of Malacca.[3]

The objective of this paper is to discuss to what extent can the Malaysian

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[1] See IC Sexena, *Prerequisitse of Partnership in Malaysia: Pre-Views and Post-Views,* Journal of Malaysian and Comparative Law [1978] 5 (JMCL), Faculty of Law, University of Malaya, pp 225-249, at p 226. For textbooks on partnership law in Malaysia: see Samsar Kamar Latif, *Partnership Law in Malaysia,* International Law Book Services; Kuala Lumpur, 2003 (reprint); El Gaily Ahmad El Tayer, *Principles of Partnership in Malaysia,* International Law Book Services, Kuala Lumpur, 1997 and Hardy Ivamy and Vincent Powell-Smith, *Malaysian Law of Partnership, Cases and Materials,* Butterworth Asia, Malaysia 1995.

[2] For the detail historical development of tile Malaysian Partnership Act 1963 see IC Sexana, ibid, pp 225-228. Briefly, in 1899, the Federated Malay States of Perak, Selangor, Negeri Sembilan and Pahang passed the Contract Enactment (FMS Cap 52) bases wholly upon tile Indian Contract Act 1872. Chapter XI of the Enactment (sections 239-266) dealt with the law relating to partnership. In succession, the Contracts (Malay States) Ordinance 1950 (No 10 of 1950) of the Federation of Malaya repealed the Contract Enactment of 1899. The Ordinance was revised in 1974 and was called the Contracts Act 1950. In 1974 a separate Act called the Partnership (Amendment) Act 1974 repealed chapter X dealing with partnership of the Contracts (Malay States) Ordinance, 1950. Thus the law of partnership in Malaysia is mainly provided for by the Partnership Act 1961. The revised version of the Sabah Ordianace No 1 of 1961 became the law of Partnership in Malaysia and it was revised and published in 1974.

[3] See Syed Omar Syed Agil, *Profit-Sharing Partnership in Malaysian History prior to the European Influence: A Preliominary Study,* (1994) 2(2) IKIM Journal, pp 11-38. This article gives a good discussion of the existence of the Islamic partnership in business transactions in the Malay Peninsula before the European influence came to Malaysia.

Partnership Act 1961, be Islamized in order to provide the commercial legal framework which is in line with the Islamic law, especially in the Islamic banking transactions and the Islamic insurance – *Takaful*, where the Islamic financing techniques of *mudarabah* and *musharakah* are being used. *Mudarabah* is a financing technique in which the owner of capital provides funds to the capital-user for some productive activity on the condition that the profit generated will be shared between them.[4] The loss, if any, incurred in the normal process of the business and not due to neglect or misconduct on the part of the capital-user is borne by the capital owner. The user does not invest anything in the business except his human capital and does not claim any wage for conducting the business. The ratio in which profits are distributed is fixed and predetermined, and known in advance to both parties. In the event of loss, the capital- provider loses his capital to the extent of the loss, and the user of the finance loses all his labour .The willingness to bear the risk of loss justifies a share in the profit for the finance-provider.[5]

In *musharakah*[6] financing, a capital-owner finances investment in another party's business. Additional finance is provided to the party which already has some funds for investment. The finance-provider provides the additional funds on the condition that he shares in the profits from the business. The ratio in which the finance-provider shares the-profits from the business with the party receiving the additional funds is fixed and predetermined, and made known in advance to all concerned. The loss, however, will be shared in the exact proportion of the capital invested by each party. Both parties are allowed to charge a fee or wage for any management or other labour put into the project. All providers of capital are entitled to participate in management

[4] See Fuad Al-Omar & Mohammed Abel-Haq, *Islamic Banking - Theory, Practice & Challenges*, Oxford University Press, Karachi, 1996 p 12. Books on this subject: Imran Ahsan Khan Nyaree, *Islamic Law of Business Organization - Partnerships*, The Other Press, Kuala Lumpur, 2002; Sami Hassan Homoud, *Islamic Banking*, Arabian Information, London, 1985 and M Umer Chapra, *Towards a Just Monetry System*, The Islamic Foundation, 1995.

[5] The profit sharing ratio mutually agreed upon between finance-provider and finance-user is determined by market forces. The finance-user (the client) guarantees to return funds only on two conditions: if he is negligent in the use of the funds or if he breaches the conditions of *mudarabah*.

[6] See Fuad Al-Omar & Mohammed Abel-Haq, ibid, at p13-14. This definiation and explaination is taken from the book.

but are not necessarily required to do so. The *musharakah* is continuous if the partnership lasts as long as the business operates.

These techniques *(mudarabah* and *musharakah)* are very similar because the provider of finance shares the profits directly and is contracted to bear the losses, if any, to the extent of his investment. These two techniques are often categorized as profit-and-loss-sharing.

The Partnership Act 1961

The Partnership Act 1961 (the Act) contains a total of forty-seven sections. There are five Parts to the Act. Part I is the Preliminary; Part II is on the nature of partnership (s. 3 to 6) , Part III - the relations of partners to persons dealing with them, Part IV - relations of partners to one another and Part V is on dissolution of partnership and its consequences. Partnership law is essentially a contract law. Therefore the Contracts Act 1950 and the contract law apply to a partnership agreement because a partnership is a contractual relationship, which subsists between persons carrying on business in common with a view of profit.[7]

The discussion on the prospects of the Malaysian Partnership Act 1961 to be Islamized, will be divided :into two Parts. Part I will consider the provisions in the Act which are not contradictory to the Islamic law and Part II will consider provisions of the Act which are not in line with the Islamic law and proposals for changes.

There are two basic principles of business law in Islam.[8] The first is the

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[7] The issues of interest as in the case of a creditor entitled to share in the profits or other charges on which interest is due.

7 VC George J in the Malaysian High Court case of *Tan Eng Choong v Foo Kai Yuen* [1988] 1 MLJ 531 explained that the 'mutual rights and duties of the partners may be set out in a partnership agreement or deed and if not are as provided in Part IV of the Partnership Act 1961 ...The scheme of the Partnership Act in general and the terms of Part IV thereof in particular make it clear that the provisions of the Contracts Act 1950 have application to a partnership agreement..'

[8] See Imran Ahsan Khan Nyazee, ibid, p303-314, Chapter 20, at p303-304.

principle of prohibition of *riba* and the second is the principle of liability, which is stated in a tradition as *al-kharaju bi al-daman.* The other principles like *gharar* and other sub-principles, are but corollaries of these two principles. These two principles and the sub-principles are being applied, to examine the law of partnership as applied in Malaysia.

The provisions of the Partnership Act 1961 to be amended to comply with the Islamic law principles would relate generally to the following issues:[9]

1. The issues of *daman,* that is, liability for debts, especially in situations where profits are being earned without a corresponding liability for loss, like the minor admitted to the benefits of the partnership and the transferee to whom a partner has assigned his interest.

2. The issues of interest, as in the case of a creditor entitled to share in the profits or other charges on which interest is due.

3. The issues pertaining to *wilayat al-istidanah,* The concept of agency that governs this law is different from that applied by Muslim jurists and would provide the same rules that are provided by the contract of surety *(kqfalah)* under Islamic law, yet the issue or buying on credit and raising debts should be clarified within the law, should not be implied.

   In the discussion that follows, only the relevant provisions of the Malaysian Partnership Act 1961 will be stated and discussed in the light of Islamic law.

Part I - Provisions of the Act which are not contradictory to Islamic law[10]

[9] See Imran, ibid, p304.

[10] The writer owes a great debt to Imran Ahsan Khan Nyazee for his scholarly exposition oftl1e Islamic partnership law in his book *Islamic Law of Business Organization - Partnerships,* The Other Press, Kuala Lumpur, 2002. In making the proposals to Islamaize the Act, many of the ideas are taken from Imran because the Pakistani Partnership Act is similar to the Malaysian Partnership Act 1961.

(1) Definition of Partnership.

Section 3(1) of the Act provides that, a 'Partnership is the relationship which subsists between persons carrying on business in comnon with a view of profit'.

The definition of partnership in s3(1) of the Act is correct according to Islamic law[11]. The reason for this is that the emphasis in Islamic law is also on the relationship established between the partners. This relationship is judged through the contracts of '*inan* and *mufawadah*, which in turn regulate the relationship through the contracts of agency (*wakalah)* and the contract of surety *(kafalah)*' The contract of *kafalah* does not come into play in a modern partnership because the concept of agency is much wider and achieves the same result.

The concept of the firm is acceptable in Islamic law.[12] The acceptance is based on the contract of *kafalah* underlying an Islamic partnership. The above definition does not give separate treatment to partnership based upon wealth, labour or creditworthiness. Thus the formation of such specialized partnership is left to the agreement of the parties. They may agree to become partners in any arrangement they like.[13]

(2) Partnership not created by status

In Malaysia, partnership arises from contract and not from status.

The *Majallah* states[14] that where some partners are dependent upon other partners, like a son being dependent upon his father, the partnership is not acknowledged by Islamic law, even where there is a contract between the partners. According to Imran[15], perhaps the relationship between a father and

[11] Imran, ibid, at p305.
[12] Imran, ibid, p305.
[13] We can say that the contract of *mudarabah* may also be said to be included in this definition, although the position of the *mudarib* will be that of the employee. The *mudarib* will be treated as a worker and not as a partner, and will, therefore have no liabilities for the debts of the firm.
[14] See paragraph 1398. Imran, ibid, p306.
[15] Ibid, at p306.

a son can be justified on the basis of the tradition: 'You and your wealth are for your father'.

However, a husband and wife are treated as independent persons in Islamic law.[16] A partnership between them should be acceptable, when there is a contract.

(3) Mode of determining existence of partnership

Section 4 of the Act provides that, in determining whether a group of persons is or is not a partnership according to section 3(1) of the Act, regard shall be had to the real relationship between the parties, as shown by all relevant facts taken together.

Thus in the words of the Act[17], 'the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from winch or from the use of which the returns are derived'.

The term *sharikah* can be used[18] for such an arrangement, but it will be called *sharikat al-milk*, co-ownership that may be giving rise to profits. The term *sharikat al-'aqd* or contractual partnership cannot be used here. For a partnership to exist under Islamic law, it has to be the result of a contract.

(4) Partnership at will

Where no provision is made by contract between partners for the duration of their partnership, or for the determination of their partnership, the partnership

[16] Imran, ibid, at p306.
[17] Section 4(b).
[18] Imran, ibid, at p306.

is 'partnership at will'.[19] This is because any partner may terminate the relationship at any time by notice without having to show cause.[20]

This conforms with the provision of Islamic law that the contract of partnership is *ghayr lazim.*

(5) Particular partnership

A person may become a partner with another person in a particular adventure or undertaking.[21]

This type of partnership is called *sharikah khassah* in Islamic law, as agianst *sharikah ammah* or general partnership, which is formed to deal with all kinds of goods and trade.[22] This classification is also linked to general and special agency.

(6) General duties of partners

Partners owe each other a duty of good faith, that is, to act honestly and for the benefit of the partners as a whole.[23] The foundation of partnership is a mutual faith and trust in each other, *uberrimae fidei*. Partners are said to be in a fiduciary position towards each other. This means that they owe each other duties as if each were a trustee and the other partners were beneficiaries, under a trust.[24]

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[19] Samsar Kamar, ibid, at p125.
[20] However, as pointed out by Lord Watson in the English case of *Neilson v Mossend Iron Co* [1886] 11 App Cas 298, 'the right. [to dissolve partnership] must be exercised bona fide and not for the purpose of deriving an undue advantage from the state of the firm's engagements'.
[21] The legality of this partnership in Malaysia can clearly be seen in section 34(1)(b) when it states that 'Subject to any agreement between the partners, a partnership is dissolved...(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking'.
[22] See Imran, ibid, at p308.
[23] See Samsar Kamar, ibid, at p87.
[24] Samsar Kamar, ibid, at p87.

In Islamic law, the contract of *ammanah* underlying all Islamic partnerships, governs the fiduciary relationship between the partners.

(7) Duty to indemnify for loss caused by fraud

Every partner must indemnify the firm of any loss caused to it by his fraud in the conduct of the firm. The Act also provides that the firm must indemnify every partner in respect of any payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm or in or about. anything necessarily done for the preservation of the business or property of the firm.[25]

The provisions of *ta 'addi*, negligence and *ghasb* may govern the provision.

(8) Determination of rights and duties of partners by contract between partners

A partnership agreement may be varied by a course of conduct or by an express term to the existing partnership agreement. Section 21 of the Act makes all this quite clear by stating that, 'The mutual rights and duties of partners, whether ascertained by agreement or defined by the Act, may be varied by consent of the partners, and such consent may be either express or inferred from a course of dealing'. Whether any express or implied term of the agreement has been varied by a course of conduct is a question to be decided on the facts of each case.[26]

In Islamic law,[27] the partnership contract may be varied and duties and powers of partners may be changed, by granting general or special agency. The Shafi'I and Hanbali jurists provide for the termination of agency of one

[25] Section 26(b) of the Act.
[26] See *Cruikshank v Sutherland* [1923] 92 LJ Ch 136.
[27] Imran, ibid, at p309.

partner, so as to prevent him for acting on behalf of the partnership. This arrangement permits him to act to the extent of his own share.[28]

(9) Agreements in restraint of trade

If a partner, without the consent of the other partners, carries on any business of the same nature, competing with that of the firm, he must account for and pay over to the firm all profit made by him in that business.[29] Whether a business carried on by a partner on her own account is of the same nature as that carried on by the partnership, is a question of fact.[30]

This provision in Islamic law is supported by the principles underlying the Hanafi partnership concluded as *mufawadah.*[31]

(10) Partner to be an agent of the firm

Section 7 of the Act provides for the provision that every partner is an agent of the firm and to his other partners, for the purpose of the business of the partnership. The implied authority of any agent, depends upon the status of the agent, giving rise to the presumption that he has authority to carry out that transaction.

This is the same[32] as the Islamic forms of partnership. Islamic law also provides for the insertion of surety into the partnership, but this is mainly due to the narrower concept of agency in Hanafi law as well as the distintion made between the *hukm* of the contract and its *huquq.*

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[28] This provision of Islamic law is rejected by the Hanafis as it leads to t1le dissolution of the partnership: Imran, ibid, at p309.
[29] Section 32 of the Act.
[30] In *Aas v Benham* [1891] 2 Ch 244, the court held that a ship-broking was not of the same nature of ship building. However in *Glassington v Thwaites* [1822] 1 Sim & St 124, it was held that the publication of a morning newspaper and an evening newspaper were of the same nature.
[31] Imran, ibid, p309. For details explanation on this partnership see Imran, ibid, Chapter 12, pp 159-177.
[32] See Imran, ibid, at p312.

Part II - Provisions in the Act which are not in line with the Islamic law and proposals for changes.

(1) The conduct of the business

Section 26(e) of the Act states that every partner may take part in the management of the partnership business. From the above provision, it also implies that a partner may be designated as a 'sleeping partner'.

Islamic law does not permit the existence of a sleeping partner.[33] It must be stipulated that every partner will take part in the conduct of the business. A partner may, if he chooses, abstain from taking part in the business of the partnership, if the others agree, but the contract itself cannot stipulate this.

(2) Sharing of profit

In a situation where there is no express or implied agreement between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm. This principle of partnership law is clearly stated in section 26(a) of the Act. The provision implies the presumption that profits are divisible and losses apportioned in equal shares. It may be changed by express agreement. Contribution to losses, however, is linked to the ratio of profits[34]; if profits are being shared equally, losses will be borne equally. It is also possible under the law to excuse a partner from bearing any loss.

In this aspect, it is proposed that to give the Islamic principle of liability[35] (daman) in the context of the Act, it should be stated that each partner will be

[33] Imran, ibid, at p309. In Malaysia, the law recognizes the concept of sleeping partner as seen in *Osman bin Haji Mohomed Usop* v *Chan Kang Swi* [1924] 4 FMSLR 292 where the partnership was actively managed by three Chinese partners while the Malay partners took no part in the management.

[34] See Imran, ibid, at p310.

[35] See Imran, ibid, at p310.

liable for contributing to losses and entitlement to profit will be based on such liability for loss, irrespective of the contribution made to the capital of the firm. The liability to bear loss should be the basic criterion for determining whether a person is a partner of the firm.

(3) The property of the firm

Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise by or for the firm or for the purposes and in the course of the business of the firm (section 22(1) of the Act). Furthermore, unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.[36]

This provision of the Act may clash with the provisions of Islamic law about *ikhtilat*.[37] Modem transactions have become quite complex and the rules of *ikhtilat* cannot be followed. The major purpose of *ikhtilat* is to create co-ownership and determine the extent of liability for losses or debts. This is achieved by express statement about liability for loss. With the exclusion of *ikhtilat*, this section may be said to be in accordance with the provisions of Islamic law.

According to Islamic law, the property of the firm is held in co-ownership among the partners and that is what determines the issues of *daman*.

(4) Liability of partner for acts of firm

Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner (section 11 of the Act). In the case where by any wrongful act or omission of any partner acting in the

[36] Section 23 of the Act.
[37] Imran, ibid, p311.

ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person or penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act (section 12 of the Act).

Islamic law provides for unlimited liability in forms, that is, joint and several.[38] The Malaysian law is similar to the British and American law on this point where liability is joint and several. The main idea in these systems is that collective assets of the firm must first be exhausted before partners are involved individually.

However, Islamic law creates joint liability through the contract of *kafalah* and not agency, unlike the existing law. Liability through *wakalah* is several and that too for the managing partner or the partner undertaking the transactions.[39]

(5) Authority to buy on credit

Section 9 of the Act states that where one partner pledges the credit of the firm for a purpose connected with the firm's ordinary course of business, the firm is bound.

This section should be clearly stated that each partner conducting business on behalf of the partnership has the right to buy on credit to the extent of the capital of the firm, and any credit purchase beyond that, needs special authority from all the partners *(wilayat al-istidanah*).[40] This problem will be removed if the contract of surety (*kafalah*) is specially introduced into the partnership. The authority of *istidanah* may either be deemed to be implied by the partnership contract and may be restricted specifically by the partners or it may not be included in the implied contract and be spelled out specifically. Islamic law prefers the latter.

[38] Imran, ibid, p312.
[39] Imran, ibid, p312.
[40] Imran, ibid, p309.

(6) Partnership by lending of money

Section 4(4)(iv) of the Act provides that the receipt by a person of a share of the profits of business is *prima facie* evidence, that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular- …(iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits … does not of itself make the lender a partner with the person or persons carrying on the business.

There is no doubt that such an arrangement cannot be called a *sharikah* in Islamic law. The problem in such an arrangement is that the relationship is unlawful according to Islamic law. It violates the principle of prohibition of *riba*, because it amounts to an exchange of currency for currency with an excess.[41] It is proposed that the arrangement of a lender of money, sharing the profits of a partnership be declared unlawful.

(7) Partner is entitled to interest

Section 26 (d) of the Act states that a partner is not entitled, before the ascertainment of profits to interest on the capital subscribed by him. Further, a partner making, for the purposes of partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the right of eight per cent per annum from the date of the payment or advance (s.26 (c) of the Act).

Theses provisions are unlawful according to Islamic law and should be repealed. It is null and void according to the principles of the prohibition of the *riba.* It is proposed that if a partner makes payment on behalf of the partnership, such a payment may be included in the capital of the partnership in return for sharing profits.

[41] Imran, ibid, p307.

Conclusion

The most important issue facing Muslims today is that of Islamic banking. Islamic banking is being established with increasing speed. The question is; how to invest the money that is entrusted to them by sincere Muslims in Islamically permitted securities and to provide a lawful return to their investors that is free of *riba?*.

From the above analysis of the Malaysian Partnership Act 1961 many of the provisions are in line with the Islamic law. However, as pointed above, there are provisions in the Act, which must be repealed in order to comply with the Islamic law of partnership. It is important to note that in Malaysia an agreement valid in Islamic law must not only comply with Islamic law but also the civil law of the country.

JUDICIAL INDEPENDENCE : IN SEARCH OF PUBLIC TRUST*

DATO' PARAM CUMARASWAMY**

In my second annual report in 1996 to the Commission on Human Rights among the countries of concerns I reported was the United Kingdom. In the opening paragraphs of a lecture on Judicial Independence delivered in the 1996, to the Judicial Studies Board by Lord Bingham, the then Lord Chief Justice of England and Wales, he described my mandate and referred to the text in my report as follows:

> 'The Commission went on to appoint a Special Rapporteur to monitor and investigate alleged violations of judicial and legal professional independence world-wide, and to study topical questions central to a full understanding of the independence of the judiciary.
>
> 'In the most recent report of 1 March 1996 the Special Rapporteur summarized the results of his worldwide investigation, and with reference to the United Kingdom wrote:
>
> > *'The Special Rapporteur notes with grave concern recent media reports in the United Kingdom of comments by minister and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the judges did not exercise self-restraint, 'it is inevitable that we shall statutorily have to restrict judicial review.' The controversy continued and reportedly prompted the former Master of the Rolls, Lord Donaldon, who was said to have accused the Government of launching a concerted*

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* Paper delivered at Transparency International, Malaysia Public Lecture on October 13, 2003 in Kuala Lumpur.

** Former UN Special Rapporteur on the Independence of Judges & Lawyers

> *attack on the independence of [the] judiciary to have said 'any government which seeks to make itself immune to an independent review of whether its actions are lawful or unlawful is potentially despotic'. 'The Special Rapporteur will be monitoring developments in the United Kingdom concerning this controversy. That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe.'*

After an extensive expose of the state of judicial independence in the UK, he concluded as follows:

> 'It seems on the whole unlikely that any challenge to judicial independence in this country will be by way of frontal assault. The principle is too widely accepted, too scrupulously observed, too long-established for that. The threat is more likely to be of insidious erosion, of gradual (almost imperceptible) encroachment. Such a process we must be vigilant to detect and vigorous, if need be, to resist. But my own, perhaps unduly complacent, view is that we can at present give reassurance to the United Nations' Special Rapporteur. In the country which cradled judicial independence the infant is alive, and well, and even – on occasion – kicking.'[1]

That is what I did in the last nine years under my UN mandate. To keep judicial independence alive and moreover kicking all over the world as prerequisite and fundamental for the rule of law which is the cornerstone of a democratic State.

The importance of an independent judiciary and legal profession was expressly provided in the Vienna Declaration and Programme for Action in 1993 adopted by the 171 member States with about 7000 participants including 800 NGOs present in Vienna. Para 27 reads:

'Every state should provide an effective framework of remedies to

[1] The Business of Judging, selected Essays and Speeches, Tom Bingham at Page 55

redress human rights grievances or violations. The administration of justice including law enforcement and prosecutorial agencies and, especially, **an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments,** are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.——' (writer's emphasis)

Judicial independence is valued because it serves important societal goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. The other societal goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.[2] As said by a former Chief Justice of Canada it is also the lifeblood of constitutionalism in democratic societies.

It will therefore be seen that judicial independence is founded on public confidence; in essence public trust. It is not the right or privilege of judges and lawyers. The right to an independent judiciary is the right of all consumers of justice.

Without that confidence and trust, the system cannot command the respect and acceptance that are essential to its effective operations. It is, therefore, important that a court or tribunal should be perceived as independent, as well as impartial and the test for independence should include that perception.[3]

The importance of public confidence as the foundation for judicial independence was underscored recently in a High Court judgment in South Africa. The Judge made these profound and steering remarks:

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[2] See Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and others (1997) Vol 150. DLR (4th) Serial pg 577 and *Beauregard vs Canada* (1986) 2 SCR 56.
[3] *Valente vs The Queen* (1985) 2 SCR 673

> 'The real test is and remains, whether the appointment of first respondent was such that it created a perception of lack of judicial independence or not. To my mind, what is really at the heart of the problem is the confidence which courts, operating in an open, democratic and constitutional state, must engender and inspire in the public. Public confidence in the judiciary is crucial for the credibility and legitimacy of the entire judiciary. In my view it is imperative that in every modern democratic society, particularly ours which is still relatively young and nascent, that the judiciary – as a whole must, not only claim or purport to be, but must manifestly be seen to be truly independent. I venture to say that the attributes of judicial independence and impartiality lie at the very heart of the due process of the law. They represent the true essence of a proper judicial process. It follows logically that all attempts must therefore be made to avoid any perception or indication of dependence by the judiciary on the Executive'.[4]

How then can the independence of the judiciary be secured? This was a growing problem and became the top priority of organizations of judges and lawyers committed to the rule of law since the sixties. All their efforts culminated with the endorsement by the UN General Assembly of the Principles on the Independence of the Judiciary in 1985 and the Principles on the Role of Lawyers in 1990. The Commission on Human Rights in 1990 also endorsed the Guidelines on the Role of Prosecutors.

At the regional level in Asia at the 6th Conference of the Chief Justices of Asia and the Pacific in Beijing in 1995 under the auspices of LAWASIA, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA was adopted.

These international and regional instruments provide minimum standards for member States to provide for the preservation of an independent judiciary and a legal profession.

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[4] Per Bosielo, J in *Van Rooyen vs De Kock No and others* (High Court of South Africa Transvaal Division delivered on 17/10/2002)

The core values of judicial independence are security of tenure, financial security, institutional security, independent appointment, promotion and removal mechanisms and procedures.

Security of tenure

Principles 11 and 12 of the U.N. Basic Principles provide:

'11) The terms of office of judges, their independence, security, adequate remunerative conditions of service provides and the age of retirement shall be adequately secured by law.

12) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office where such exists.'

It is essential that their tenure whether for life or until an age of retirement or a fixed term be provided under the Constitution. Mere provision in the ordinary legislation, which could be amended at the whims of the legislature in which the executive could command the majority, will not provide the requisite security. Similarly removal from office for proved misbehavior or for inability to perform his or her duties and the procedure for such removal should be provided for in the Constitution. Principles 17-20 of the Basic Principles should therefore be entrenched into the Constitution to secure independence. No doubt entrenchment itself is not an absolute guarantee. We know how in Malaysia the Constitution itself could easily be amended with the two thirds majority.

Financial Security

Financial security of judges means security of salary or other remuneration, and where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subjected to arbitrary interference by the executive in a manner that could affect judicial independence. In effect judicial salaries should not be subject to reduction at the whims of the executive. If there is to be an overall review of

salaries of all public servants at times, for example, during a general economic downturn in the country, then a special independent review committee should be set up to review judicial salaries and that committee's advice should be accepted by the government.[5]

Institutional Independence

The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence. This is distinct from adjudicative independence. The essential minimum requirement for this institutional or 'collective' independence is often listed as control over assignment of judges, sittings of the court and court lists as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying these functions.

The need for complete institutional autonomy of the judiciary to the extent of financial aspects of court administration, e.g. budgetary preparation and presentation and allocation of expenditure, has been the subject of debate in certain jurisdictions. It may be ideal for the perception of judicial independence that such control be left with the judiciary itself.

Judicial Appointments

Judges are standard setters in society. They interpret and develop the law upon which society is structured and human relationships are conducted. Their actions and conduct, both within and outside the Court, must at all times be above suspicion and be seen to be so if they are to command the respect and confidence of the public. Suspicious conduct of one or two judges is enough to tarnish the image of the entire judiciary. It follows that those appointed to this high position of esteem and respect must be only men and women with proven competence, integrity, probity and independence. There should be no

[5] Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island and others 1997, referred to earlier

compromise on these standards. Judges appointed for lesser qualifications or for other considerations, political or otherwise, would eventually bring disrepute to their own institution.

What should be an ideal mechanism for judicial appointments is a subject of some debate. Traditionally constitutions provide that such appointments are made by the head of state upon the advice of the chief executive of the government who in turn consults the Chief Justice. Many Commonwealth constitutions provide for such a procedure. In civil law jurisdictions the involvement of the executive has been considerable. To provide for more transparency and accountability, modern constitutions provide for an independent mechanism like a judicial service commission to advice the chief executive of the government.

Principle 10 of the Basic Principles provides, *inter alia*, '1) those selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law; 2) any method of judicial selection shall safeguard against judicial appointments for improper motives persons'.

In essence what is expected is that appointments are based on merit and there should be no appointments made for political or other improper considerations which appointments could tarnish the integrity and independence of the system. Appointments should not only be made independently but must be seen to be so. Where the executive has too much of power or influence in the appointments the same appointments will not be seen to be independent.

Recent cases decided by the Indian Supreme Court are in point. The Indian constitution provides for the appointments of judges by the President after '*consultation with the Chief Justice of India*' In a 1993 case[6] the court held that 'consultation' in the context must be genuine and not a sham. When there is a conflict between the opinion of the executive and that of the Chief Justice, the opinion of the Chief Justice should prevail. By this judicial interpretation, the Supreme Court in effect removed the power of judicial appointments from the executive and vested it in the Chief Justice.

[6] Supreme Court Advocates on *Record Association and anor v State of India* JJ 1993 4 SC441

Controversy thereafter arose whether the power can be vested in just one person like the Chief Justice or should it require consultation with a plurality of judges in the formation of the opinion of the Chief Justice. In 1998 the President of India referred this and other doubts caused by the 1993 judgment back to a full bench of the Supreme Court without the Chief Justice. In a detailed decision the Court held that 'the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion.'[7]

Thus the Indian Supreme Court in its interpretation of the expression 'consultation with the Chief Justice of India' in the constitution read into the constitution not only that the Chief Justice's opinion must be a collective opinion formed after taking the views of his senior colleagues but also that when that opinion conflicts with that of the Executive the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' should have primacy.

Soon after the 1993 decision of the Supreme Court of India a similar issue arose before the Pakistan Supreme Court. The constitution of Pakistan too had such a provision for consultation. Following the 1993 Indian Supreme Court decision the Pakistan Court wrested the power of judicial appointment from the executive. However there was a difference. The Pakistan court held that if the Executive refuses to accept the opinion of the Chief Justice then the executive should give its reasons in writing thus calling for transparency.[8]

On this issue of consultation process another case arose in Belize in 1998 when one morning, the then Chief Justice found that he lost his office by way of an order of court made by a High Court judge.

S.97(1) of the Belize Constitution provides as follow:

'The Chief Justice shall be appointed by the Governor General acting in accordance with the advice of the Prime Minster given

[7] Special Reference No 1 of 1998 JT 1998 5SC 304.
[8] *Al-Jehad Trust vs Federation of Pakistan PLD* (1996)SC324

after consultation with the leader of the Opposition.' (emphasis added)

S.129 (2) of the same Constitution provides the definition of consultation:

'*Where any person or authority is directed by this constitution, or any other law to consult any other person or authority before taking any decision, or action, that other person or authority must be given a genuine opportunity to present his or its views before the decision or action, as the case maybe, is taken*.' (emphasis added)

A controversy arose as to whether there was a genuine consultation with the leader of the opposition prior to the appointment of the then Chief Justice. A lay litigant who had proceedings before the court challenged the constitutional validity of the appointment. The Court after examining the facts found that there really was not a consultation as provided under Section 129 (2) of the Constitution. A letter written by the Prime Minister's office to the Leader of the Opposition on the particular appointment was responded by a request for a meeting to discuss the proposed appointment. The Prime Minister recommended to the Governor General the appointment without meeting the Leader of the Opposition. The Governor General duly made the appointment. As such the Court found that there was no consultation and ordered that the appointment was unconstitutional and therefore null and void.

Considerable executive involvement in the appointment procedure has resulted in the judiciary not being independent or perceived as independent. Provisions for consultation or advice too has resulted in doubts and suspicions whether such consultations and advices are genuine or mere shams. Vesting this power in just one person like the Chief Justice too is fraught with suspicions. However eminent he may be there is always the likelihood of abuse. Hence, the trend now in modern constitutions is to entrust the power of recommendations for judicial appointments with an independent council or commission. Such council or commission is composed of representatives of institutions closely connected with the administration of justice. The Council or Commission then recommends suitable men or women for appointment by the government. Such a commission is now being proposed for England & Wales. A debate is very

much alive there.

A good example is the Philippines. In that Republic, pursuant to the 1986 Constitution there was created a Judicial and Bar Council for judicial appointments. This council is composed of the Chief Justice, The Minister for Justice, a representative of the Bar association, a professor of law, a retired member of the Supreme Court and a representative of the private sector. This council advertises for judicial appointments, processes all applications, conducts interviews and selects suitable applicants based on proven competence, integrity, probity and independence which is the criteria provided in the constitution. Whenever there is one vacancy in the Supreme Court or High Court the council submits to the Executive President three names. The Executive President selects one among the three in the list.

Similarly the 1996 South African Constitution provides for a Judicial Services Commission to recommend to the Executive President suitable appointees for judicial appointments.

The 1998 European Charter on the Statute of judges, referred to earlier, provides, inter alia, '*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the Statute envisages the intervention of an authority independent of the Executive and Legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representative of the judiciary*.' (emphasis added).

Whatever form the selection and recommendatory mechanism maybe what is essential is that judicial appointments are perceived to be made independently and transparently based on merit and without improper considerations, political or otherwise.

Judicial Promotions

Like appointments judicial promotions too must be based on merit without any

improper considerations. Hence again the mechanism should be independent and seen to be so. Generally, the same mechanism for judicial appointments could extend to recommendations for promotions.

Promotions need not be based solely on seniority. While seniority could be a guiding principle yet it should not be the sole criteria. Leap frogging in some jurisdictions in the past did give rise to suspicions. There were resignations from those superseded. That was because the selection process was left with the chief executive of the government or as in some countries now with the Chief Justice who, as said earlier, too could abuse his power.

The latest controversy over the Malaysian Bar Council's call for an extraordinary general meeting to discuss the recent judicial promotions has once again brought to surface the rot which beset the Malaysian judiciary since 1988.

In the recent exercise three particular promotions had every reason for the public to perceive as rewards for having 'delivered' in the Anwar Ibrahim related trials and appeals. 'Blatant' is a mild word to describe these promotions.

The Bar Council had every right to express its concern and to call for an EGM as it had done previously in other similar instances when judicial independence was seen severely undermined and threatened.

In the proposed motions for the EGM to consider the Council called the Government and the Chief Justice to disclose the criteria applied in the evaluation of the promotions. It also called upon the setting up of an independent judicial commission, after consultation with the Bar Council, for judicial appointments, promotions and transfers. That was all it asked for. That was the legitimate right of a concerned Bar association in defence and protection of judicial independence.

These were misunderstood by certain quarters including the Prime Minister. He was reported to have said that judges will be indebted to the Bar Council if lawyers are involved in the appointment, transfer and promotion of judges via a proposed commission. He said:

> 'Lawyers will become more powerful in the appointment of judges and if the judges are afraid of lawyers because they can determine whether judges are promoted or who can be judges, their judgments will no longer be correct.'[9]

The Bar Council was certainly not seeking to be solely involved in the selection, appointment or promotion of judges. It just called for the setting up of an independent judicial commission and for that purpose to be consulted.

From what he was reported to have said the Prime Minister appears to have admitted to his perception of judicial appointments - that judges would be afraid of those who determine judicial appointments and promotions. I will shortly say who really determines judicial appointments in Malaysia.

Throughout his 22 years in office though the Prime Minister got some things right yet he never got the principles and the role of an independent judiciary right. That was his short coming and resulted in so much of damage to this vital constitutional institution.

One can well excuse the Prime Minister for his want of appreciation of these finer points on legal issues as he is not a lawyer but the recent statement on this issue by the de facto Law Minister is beyond belief. He was reported to have said that the Council was being disrespectful of the King in contesting the choice of the judges chosen for elevation to the appellate courts.[9] Dr Rais Yatim's statement goes against the grain of the constitutional position of the King under the Malaysian Constitution over judicial appointments and promotions. Even the Speaker of Dewan Rakyat, Dr Mohamad Zahir, fell into the same error.[10]

Under articles 40(1) and 40(1A) of the Malaysian Constitution where the King is to act in accordance with advice *'he shall accept and act in accordance with such advice'*. The King has no discretion on the matter. Under article 122B of the Constitution the judges are appointed to High Court and the Appellate Courts by the King acting on the advice of the Prime Minister

[9] The Star online Oct 3, 2003
[10] See Malaysiakini Oct 21, 2003

who consults the Chief Justice and the Conference of Rulers.

The Court of Appeal in one of the Anwar Ibrahim cases[11] interpreted Articles 40(1A) and 122(B) regarding judicial appointments as follows:

On Article 40(1A) he said:

> 'clearly therefore the Yang di-Pertuan Agong must act upon the advice of the Prime Minister. The advice envisaged by Article 40(1A) is the direct advice given by the recommender and not advice obtained after consultation'.

On Article 122(B) he said:

> 'The intention of this article is clear i.e. the Yang di-Pertuan Agung must act on the advice of the Prime Minister.'

On the process of consultation with the Conference of Rulers the Court of Appeal said in the same judgment:

> 'where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers does not agree or withholds its views or delays the giving of its advice with or without reasons, legally the Prime Minister can insist that the appointment be proceeded with'.

From these interpretations it is clear that the choice of judicial appointments, is not that of the King. The choice, ultimately is that of the Prime Minister. Therefore if the internationally and regionally recognized criteria are not seen adopted in the selection for judicial appointments and promotions, then it is open to anyone including a member of the public to publicly question such selections. In doing so one is not questioning the King but the advisor i.e. the Prime Minister whose advice the King is obliged to accept. Surely the Prime Minister is accountable to the people and has a duty to explain the basis of his advice to the King. Isn't that what democracy is all about?

[11] Re: Dato' Seri Anwar bin Ibrahim (2000) 2MLJ 483

Judicial Discipline

Principles 17-20 of the Basic Principles provide for the minimum standards for the discipline, suspension and removal of judges. Security of tenure would be meaningless if judges can be subjected to discipline at the whims of the executive or any other organs of the State. However, judges too are accountable. Hence Constitutions generally provide for a mechanism to deal with complaints against the conduct of judges. Procedures vary. In some countries removal before the age of retirement, is by impeachment by Parliament. In other jurisdictions it is done by the recommendation of a judicial commission after the judge is heard. Whatever maybe the procedure it is essential to entrench in the Constitution itself that judges are suspended or removed for reasons of incapacity or misbehavior that renders them unfit to discharge their duties.

Judicial Accountability

No discussion on judicial independence is complete without addressing judicial accountability. Accountability and transparency are the very essence of democracy. Not one single public institution, or for that matter even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable. However, judicial accountability is not the same as the accountability of the executive or the legislature or any other public institution. This is because of the independence and impartiality expected of the judicial organ.

Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons), fairly and delivering their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by the appellate courts. No doubt legal scholars and even the public including the media may comment on the judgment. If they misconduct themselves, they are subject to discipline by the mechanism provided under the law. Beyond these parameters, they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

However, it must be stressed that the constitutional role of judges is to decide on disputes before them fairly and to deliver their judgments in accordance with the law and the evidence presented before them. It is not their role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like freedom of expression. When judges resort to such conduct, they lose their judicial decorum and eventually their insulation from the guarantees for judicial independence. They open the door for public criticism of their conduct and bring disrepute to the institution. That could lead to loss of confidence in the system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers except in extreme cases. The judiciary must earn its respect by its own performance and conduct.

No doubt judges too have freedom of expression. The UN Basic Principles on the Independence of Judges and lawyers requires judges to exercise their freedom of expression 'in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary'. Similarly the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region states that judges are entitled to freedom of expression 'to the extent consistent with their duties as members of the judiciary.' If follows that judges do not have a carte blanche to say all and sundry both in the adjudicating process or even in their extra judicial capacities. Particularly in the adjudicating process they must be circumspect with their words to maintain their objectivity and impartiality.

While the executive arm is often apprehensive of judicial independence the judicial arm is often apprehensive of judicial accountability. I have in my reports observed that judicial accountability is not inimical to judicial independence. Though judicial accountability is not the same as accountability of the executive or legislative branches of the government yet judicial accountability without impinging on judicial independence will enhance respect for judicial integrity. The UN Basic Principles do not provide for judicial accountability, save for provision on procedure for judicial discipline.

Over the last three years in association with the Judicial Group on

Strengthening Judicial Integrity and collaboration with the Consultative Council of European Judges of the Council of Europe and the American Bar Association and Central and European Law Initiative (ABA/CEELI) we deliberated in the drafting of the Bangalore Principles of Judicial Conduct. The drafting was finalized and adopted in November last year at the Hague.

At the last session of the Commission in April this year I presented these Principles for its consideration. There was unanimous support for these Principles from member States. In a resolution the Commission noted these Principles and called upon member States, the relevant UN organs, intergovernmental organizations and non-governmental organisations to take them into consideration.

In my report I observed that these principles would go some way when adopted and applied in member States to supporting the integrity of judicial systems and could be used to complement the United Nations Basic Principles on the Independence of the Judiciary to secure greater accountability. The Bangalore Principles are now available in the six United Nations official languages.

Conclusion

In addressing the importance of judicial independence and impartiality as enshrined in international and regional instruments we need to address the wider concept of constitutionalism in government and call for an environment where an independent judiciary and legal profession will be allowed to discharge their rightful roles. Unless there is Executive respect for the institutional independence of the judiciary individual independence of judges could lead to harassment and intimidation of those courageous judges.

The media has an important role to mobilize public opinion for protection of judicial independence. As Shimon Shestreet said in his classic work on Judges on Trial[12]:

[12] Judges on Trial by Shimon Shestreet pg 392

> 'Written law if not supported by the community and constitutional practice, can be changed to meet political needs, or can be flagrantly disregarded. On the other hand, no executive or legislature can interfere with judicial independence contrary to popular opinion can survive,'

The public must be informed that it is the presence of an independent judiciary in a democracy which distinguishes that form of government from that of a dictatorship. They should be advised that the right to an independent judiciary is the protective right of all other human rights and therefore it is in their interest to jealously guard this right.

In the context of Malaysia after the 1988 assault on what I then in 1987 publicly described as an internationally respected independent judiciary, and the subsequent events during the Tun Eusof Chin CJ's era and followed by the manner in which the judicial processes were used and continued to be used to incarcerate Datuk Seri Anwar Ibrahim and the recent controversial judicial promotions, public trust in the judiciary remains seriously undermined.

No doubt there are some good independent and courageous judges in the system. However, their presence will not enhance public perception of the institutional independence of the judiciary. As I have said before good judges do not fear public scrutiny of their performance and conduct. What they fear is the presence of bad judges within the system. The presence of these bad judges could tarnish the image of the entire institution. It is aggravated when the good ones are bypassed for promotions.

To restore the public trust and confidence in the judiciary political will is needed from our political masters to reform the procedures in compliance with international and regional standards for the preservation of judicial independence. Respect for constitutionalism should be the starting point.

THE ROLE OF THE BARRISTER IN UPHOLDING THE RULE OF LAW : AN INTERNATIONAL PERSPECTIVE**

KARPAL SINGH*

A barrister or an advocate plays a crucial role in the upholding of the Rule of Law in any democracy despite the legal profession being classified by the ignorant as second to the oldest profession in the world. We have also often been classified as a gathering, which should not in the least be capable of being called honourable. Even doctors, engineers and accountants often take potshots at lawyers albeit in their absence and often when inebriated at the other Bar which is more spirited, at least tangibly, than the Bar at which we practice.

It is difficult to forgive Benjamin Franklin for his utterance, 'God works wonders now and then; Behold! A lawyer, an honest man!'

Despite these thoughtless and derogatory remarks, there can be no doubt it is the barrister and the advocate who are best equipped to ensure the Rule of Law is nurtured and enhanced in society which in many Commonwealth countries has to deal with the scepter of an Executive which is seen as only paying lip-service to the Rule of Law as universally understood.

What is the Rule of Law?

When delivering an address at the Annual Meeting of the Canadian Bar Association in Vancouver as far back as 4 September, 1959 the Honourable Mr. Justice Thorson, the President of the Exchequer Court of Canada, had occasion to say:

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** An address to a gathering of members of the West Australian Bar Association, Lawasia, the International Commission of Jurists and the Law Society of Western Australia in Perth on Thursday, 10 April 2003.

> 'The concept of the Rule of Law is difficult to define for its meaning is not constant. Indeed, it changes as the conditions of the society in which it operates, change. Thus, the term does not mean the same today as it did when it was first formulated. Nor has it the same meaning in a dictatorial society as in a free one… We are here concerned with the Rule of Law that should operate in a free society and must, consequently, consider the quality of the law that should rule and the principles on which it should be based.'

In 1955, an International Congress of Jurists in Athens formulated the safeguards necessary to ensure the use of the Rule of Law and the protection of individuals against arbitrary action of the State. At Athens, the Congress adopted the Act of Athens, which decreed:

> 'We free jurists from forty-eight countries, assembled in Athens at the invitation of the International Commission of Jurists, being devoted to the Rule of Law which springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.
>
> 'Being concerned by the disregard of the Rule of Law in various parts of the world, and being convinced that the maintenance of the fundamental principles of justice is essential to a lasting peace throughout the world;
>
> 'Do solemnly Declare that:
>
> 1. The State is subject to the law;
>
> 2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement;
>
> 3. Judges should be guided by the Rule of Law, protect and enforce it

without fear or favour and resist any encroachments by governments or political parties on their independence as judges; and

4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.

'And we call upon all judges and lawyers to observe these principles and,

'Request the International Commission of Jurists to dedicate itself to the universal acceptance of these principles and expose and denounce all violations of the Rule of Law.'

It was, however, the Declaration of Delhi, which gave spirit and expression to the need for a Rule of Law based on the fundamental principles of the sacredness of human personality and the brotherhood of man.

The Declaration in Delhi on 10 January, 1959 reads:

'This International Congress of Jurists, consisting of 185 judges, practicing lawyers and teachers of law from 53 countries, assembled in New Delhi in January, 1959 under the aegis of the International Commission of Jurists, having discussed freely and frankly the Rule of Law and the administration of justice throughout the world, and having reached conclusions regarding the legislative, the executive, the criminal process, the judiciary and the legal profession, which conclusions are annexed to this Declaration,

'NOW SOLEMNLY Reaffirms the principles expressed in the Act of Athens adopted by the International Congress of Jurists in June, 1955, particularly that an independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice;

'Recognises that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised;

'Calls on the jurists in all countries to give effect in their own communities to the principles expressed in the conclusions of the Congress; and finally,

'Requests the International Commission of Jurists -

1. To employ its full resources to give practical effect throughout the world to the principles expressed in the conclusions of the Congress;

2. To give special attention and assistance to countries now in the process of establishing, reorganising or consolidating their political and legal institutions;

3. To encourage law students and the junior members of the legal profession to support the Rule of Law; and

4. To communicate this Declaration and the annexed conclusions to governments, to interested international organizations, and to associations of lawyers throughout the world.'

It is significant to highlight that the Declaration adverts, and correctly, *"to an independent judiciary and legal profession being essential to the maintenance of the Rule of Law and to the proper administration of justice"*. For there to be a strong Bench, of necessity, there must be a strong Bar. One complements the other to ensure the Rule of Law is given expression and spirit and the Executive be cribbed, cabined and confined to operation within the parameters of the Rule of Law. Malaysia operates on the doctrine of Separation of Powers. The Legislature, the Executive and the Judiciary must keep within their domains and not encroach upon the clear lines of demarcation, the doctrine

of Separation of Powers ordains. It is indeed surprising that the former head of the judiciary in Malaysia, Salleh Abas, who was removed from office by Prime Minister Dr Mahathir Mohamad, openly conceded that the judiciary was the weakest of the three digits, the Legislature, the Executive and the Judiciary. On 27 May, 1988 Salleh Abas was summoned by Dr Mahathir Mohamad to his office. In my view, Salleh Abas should have declined condescending to see the Prime Minister in his office. It was not an ordinary invitation. This should have been obvious to Salleh Abas given the public criticism of the judiciary then by the Prime Minister. The doctrine of Separation of Powers militated against Salleh Abas subjecting himself to the summons. There was antecedent bad blood. So, Salleh Abas' defence that he answered the invitation [as he ineptly called it] out of ordinary politeness sounds like a broken cymbal despite Salleh Abas' assertion in *May Day For Justice* [1] in these terms:

> 'Politeness, according to Dr Mahathir in his old book, *The Malay Dilemma,* is a Malay weakness. I disagree. In fact, it is a strength**.** 'It makes us what we are. Without that particular fine quality, we would hardly be Malays.
>
> 'Indeed, is it not politeness that distinguishes civilised men from the rest? Has it not been truly said that rudeness is only a weak man's imitation of strength?
>
> 'It is true that when the Prime Minister sent for me, I did not have to go. No one in our system may summon a judge, whereas a judge may summon anyone. But ordinary courtesy demanded that I respond to the invitation by the Prime Minister who happens to head the most dominant of the three branches of Government. I headed the weakest.
>
> 'I must make it clear at once, however, that I did not answer because of any weakness. Of course, I did not know what the Prime Minister wanted to see me about on that day. If I had known, I suppose, I might not have gone to see him in the way I did, armed with nothing more than my politeness.'

[1] Magnus Books, Kuala Lumpur, 1989 at pages xxiii, xxiv

Surely, a summons is not an invitation. Wasn't it necessary, given the position, for Salleh Abas to have enquired as to the reason why the Prime Minister wanted to see him at the seat of power of the Executive, and not at some neutral avenue. Surely, Salleh Abas ought to have known he was dealing, not with a statesman, but a politician known to be a Tricky Dicky who had managed through guile and intrigue to bring about the downfall of the Father of Malaysian independence, Tunku Abdul Rahman.

Had Salleh Abas forgotten Dr Mahathir's infamous interview in which he expressed himself very strongly as follows:

> 'The judiciary says [to us], 'Although you passed a law with a certain thing in mind, we think your mind is wrong, and we want to give our interpretation.' If we disagree, the courts will say, 'We will interpret your disagreement.' If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be *interpreted according to our wish.'* (Present author's emphasis)'[2]

The political landscape was no more what it was during the times of our first three Prime Ministers; Tunku Abdul Rahman, Tun Abdul Razak and Tun Hussein Onn, who were all lawyers. Dr Mahathir is, after all, a medical doctor who, by training, is used to the cold surgical approach, which has rendered the judiciary in Malaysia on the verge of impotency.

Salleh Abas should not have conceded publicly that the judiciary was the weakest of the three branches of Government. This self-proclaimed weakness has only emboldened Dr Mahathir to perpetuate a firm grip on the judiciary. After the shadow of Dr Mahathir was cast on the political scene with him as Prime Minister, the judiciary was at the tender mercies of this self-proclaimed leader of the Third World.

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[2] TIME MAGAZINE 24 November, 1986 at page 18

The following passages from *May Day For Justice*[3] bear repetition here:

> 'Historically the Malayan, and later, the Malaysian, Judiciary grew out of the British system which thrived here in colonial times. British judges in this country in the pre-war days in the post-war years, functioned like judges in Britain, without fear of being interfered with or being abused in any way, even though their tenure of office was less secure, being subject to the pleasure of the Crown.
>
> 'There was the case of Mr. Justice Edward Terrel, who was Acting Chief Justice of the former Federated Malay States. It was not really a case of 'removal'. Mr. Justice Terrel lost office when Malaya was overrun and occupied by the Japanese in the last World War. At the time he was on leave in Australia. His suit against the British Government for damages failed because the tenure of office of colonial judges was not dependent upon good behaviour, but the pleasure of the Crown.
>
> 'That was a unique case. It was the Colonial Office in action, not the British Government in its Imperial Majesty. It was not an aberration but an extraordinary exception because of the War. It was not the rule.
>
> 'The judges as a community in British Malaya, then, remained independent and secure.
>
> 'This happy condition obtained after Independence as well when many Malayans were elevated to high places on the Bench. When the government lost a case in court, there was never any attempt to browbeat the Judiciary.
>
> 'For instance, in the celebrated case involving the then Education Minister, in *Abdul Rahman Talib v Seenivasagam & Another* in 1965, when the Minister lost a libel suit he filed against an Opposition Member of Parliament, he felt obliged to resign. The then Prime Minister, Tunku

[3] at pages 9-11

Abdul Rahman, did not agree with the judgment of the court and he wrote to Encik Abdul Rahman Talib, saying, 'I am convinced of your innocence.' What Tunku Abdul Rahman actually thought of the case or said about it in a private letter is not relevant, but there was no question of his interfering in any way with the courts or the judgment delivered by the courts. The judgment itself stood inviolate.

'For almost thirty years after Merdeka Day [Independence], which fell on 31 August, 1957 the Judiciary was treated with all the respect due to it even if the Government had occasion to be disappointed with the outcome of some cases.

'An outstanding example was the case of *Teh Cheng Poh v Public Prosecutor* in 1979 when Datuk (now Tun) Hussein Onn was Prime Minister. A man was sentenced to death for unlawful possession of firearms after a trial conducted in accordance with the Essential (Security Cases) Regulations, 1975.

'When the Privy Council overturned the then Federal Court decision on the matter, the Executive took what many legal luminaries regarded as drastic and regressive action. It was no joy to many that the law was changed or that (coincidentally) Privy Council appeals were abolished not long after, but the Executive action was well within its legal rights. 'There were debates about the ethics and morality of changing the law in the way it was changed, and the Government was criticised severely both inside as well as outside Parliament for it, but the courts and the judges again remained unscathed. They were certainly not blamed. They remained independent'.

The Rule of Law in Malaysia is under threat. That this is so, believe you me, is crystal clear. I have had first hand experience, and a bitter one, having had to endure the wrath of Dr Mahathir many a time.

As barristers or advocates, it is incumbent on us, to play an effective role in the administration of justice and defence of the Rule of Law. Thus, we

should be concerned with the quality of law that should rule and the principles on which it should be based.

In 1975, the Malaysian Government through the King promulgated the Essential Security Cases Regulations known as 'ESCAR'. These regulations were draconian and an affront to the Rule of Law. Hearsay evidence, inter alia, was admissible under the regulations which also provided for an accused person to be charged irrespective of his age and for the purposes of the regulations, the provisions of the Juvenile Courts Act, 1947 were excluded. Evidence could be led in the absence of the accused or his counsel and witnesses could give evidence while hooded. A person, irrespective of age, could be charged for a security offence and subjected to the mandatory death penalty.

In fact, having regard to the provisions of ESCAR, it was practically a case of 'You will be tried and hanged here!'

If it was thought these regulations would only serve as law to frighten would-be offenders and would never be invoked, the stark reality of it surfaced when a 14-year-old boy, Lim Hang Seoh, was charged for an offence under the Internal Security Act, 1960 for possession of a pistol and ammunition which carried the mandatory penalty of death. The Public Prosecutor designated the case to be one triable under the regulations. I represented the boy who was found guilty by the High Court, Penang and sentenced to death by Justice Fred Arulanandom who relished being addressed as the 'Hanging judge.'

On appeal, the Federal Court on 4 October, 1978 confirmed the conviction and sentence of death although Tun Mohamed Suffian, the then head of the judiciary, a highly respected judge, grudgingly concluded in the judgment he delivered on behalf of the Federal Court:

> 'We are of the opinion that in view of the words, the Juvenile Courts Act, 1947, shall not apply to such person in regulation 3(3) of the Essential Security Cases Regulations, 1975. There is only one sentence authorised by law … and that is the sentence of death despite the fact that the boy was only a boy of 14. We, therefore, affirm the sentence [of death]

passed on him.'[4]

As I sincerely felt the Rule of Law had been brought into obvious disrepute as a result of the promulgation of the regulations by the King, who, to be fair to His Majesty, was obliged to act on the advice of the Executive, as no King (who is the Fountain of Justice) would have promulgated such regulations if he had the personal choice in the matter.

In the public interest, I moved a resolution at an extraordinary general meeting of the Malaysian Bar, called for the purpose that there be a boycott of all cases triable under the regulations by all members of the Bar, on pain of disciplinary action.

Unfortunately, the resolution was amended by the general body to make it only advisory, despite my protests. The Executive acted swiftly to amend the Societies Act, 1966 to, inter alia, prohibit holding of office in the Bar Council by elected representatives of the people. As I was a Democratic Action Party [DAP] State Assemblyman for Alor Star then, I was legislated out of the Bar Council of which I was an elected member! I had to pay the price for giving spirit and expression to effectively pursue my role as an advocate in the defence of the Rule of Law. As a result of the public outcry over the death sentence on the 14 year-old boy and a signature campaign launched by the DAP, the King commuted the sentence of death on him to one of detention in a boys home until he reached the age of 21, when he was unconditionally released.

Of greater moment and significance was the prosecution of carpenter, Teh Cheng Poh, who was charged under the Internal Security Act for possession of a home-made .38 revolver and 5 rounds of .38 Special Revolver bullets. His trial, too, was directed by the Public Prosecutor to be conducted under the regulations.

He was found guilty, convicted and sentenced to death by the 'Hanging judge' Fred Arulanandom. I was defence counsel once again. The conviction and sentence of death was confirmed by the Federal Court on appeal to it.

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[4] *Lim Hang Seoh v Public Prosecutor* [1978] 1 MLJ 68

Dissatisfied with the decisions of the trial and the appellate courts to sustain my submission that the regulations were unconstitutional and, therefore, void, I made a last-ditch attempt to avert disaster for 25 others condemned and sentenced to death under the regulations by appealing to the Privy Council in London. Victory in London would also mean cancellation of the their appointments with the hangman.

On 11 December, 1978 the Privy Council, when tendering its advice to the King of Malaysia, agreed with my submission that the regulations were unconstitutional, with Lord Diplock concluding in his speech:

> '…. it follows that the charge against the appellant was good in law but that his trial upon the charge [under the Essential Security Cases Regulations] was a nullity. Their Lordships will report to His Majesty the Yang di-Pertuan Agong [the King] that the conviction and sentence [of death] of the appellant on November, 17, 1976 should be remitted to the Federal Court for further consideration as to whether or not to order a new trial.' - *Teh Cheng Poh @ Char Meh v Public Prosecutor, Malaysia.*[5]

This was the first appeal from Malaysia where the Privy Council directly told off the King that he was wrong to have promulgated the regulations although, of course, the Privy Council meant the rebuke for the Executive.

The upshot of the perseverance to have the draconian regulations declared unconstitutional was the passing of the Emergency [Essential Powers] Act, 1979 by Parliament in January, 1979 even before the Federal Court could decide whether or not to order a new trial for Teh Cheng Poh.

The Executive resurrected the regulations with the passing of this Act and, to top it all, made them retrospective in operation.

Lord Diplock delivered a lecture in Kuala Lumpur on 4 June, 1979 [when appeals in criminal matters to the Privy Council from Malaysia had been

[5][1980] AC 458 at page 476

abolished] entitled, 'Judicial Control of Government' but omitted to make any reference to *Teh Cheng Poh*, being contented only to say in his lecture:

> 'All that I have said about administrative law in England applies also to judicial control of the executive branch of the Government of Malaysia whose constitution so far as concerns the relationship of legislature and executive follows the Westminster model; but in Malaysia, judicial control of government receives a new dimension - it extends to the legislative branch of government, not only to the state assemblies but to the federal parliament itself. Its power to make laws is not absolute; it is subject to restrictions which, if exceeded, render a law that it was purported to pass, ultra vires and consequently void; and it is the function of the judicial branch of government to declare it so and to decline to enforce it. This imposes upon the judiciary of Malaysia an even greater responsibility than that borne by the judiciary of England in the field of public law.
>
> 'I can speak the more freely of this because although as a member of the Judicial Committee of the Privy Council, I am proud to regard myself as a member of the Malaysian Judiciary, the Federal Parliament in the lawful exercise of its legislative powers has recently withdrawn from me any jurisdiction to interpret that part of the written law of Malaysia that is contained in the Constitution itself. Looked at from a personal point of view I regret this, because, since my earliest days at the Bar of England, constitutional law was one of my particular, not unprofitable, interests and I have found perhaps my greatest intellectual pleasure, while sitting in the Privy Council, in deciding constitutional cases that have been brought there from a number of different countries of the Commonwealth. But the very title of this lecture, 'Judicial Control of Government' is sufficient justification for the belief that such control is best exercised by Malaysian judges, sitting in Malaysia and familiar with conditions here in a way that we who sit in Downing Street in London cannot hope to be.'[6]

[6]Judicial Control of Government by the Right Honourable Lord Diplock – [1979] 2 MLJ cxl at cxlvi

Lord Diplock missed the golden opportunity to at least express his displeasure at the Malaysian Parliament having put asunder the Privy Council advice he tendered to the King on his own behalf and on behalf of his other brethren; Lord Simon of Glaisdale, Lord Salmon, Lord Edmund Davies and Lord Keith of Kinkel on that wintery 11 December, 1978 in London.

In Parliament, on my part, in defence of the Rule of Law and my role as an advocate, with all the force at my command, from the Opposition benches, with able assistance from my DAP colleagues, I lashed out at the Government for giving life, spirit and expression to the regulations which had been struck down as unconstitutional by the Privy Council, and to aggravate the position further, enacting the regulations with retrospective effect. However, with the Government's brute majority, the Emergency (Essential Powers) Act, 1979 was passed even before the ink on the Privy Council's report to the King had dried.

In fact, the moment the Emergency (Essential Powers) Bill, 1979 was published, I had filed proceedings in the High Court in Kuala Lumpur to restrain Parliament from tabling the Bill on the ground it was premature for Parliament to debate, let alone pass the Bill, as the Federal Court had yet to consider whether or not to order a new trial for Teh Cheng Poh. But Parliament would have none of it and proceeded to enact the law, which flew in the face of the ruling of the Privy Council.

On 27 April, 1979 the Federal Court in *Teh Cheng Poh v Public Prosecutor*[7] held by virtue of the Emergency (Essential Powers) Act, 1979 the Essential Security Cases Regulations, 1975 had been validated, and with effect from the date they purported to come into force. The Federal Court went on to hold the conviction and sentence of Teh Cheng Poh had been set aside by the King acting on the advice of the Privy Council and no longer existed; in those circumstances, it was a proper case in which a retrial should be ordered.

Teh Cheng Poh was convicted and sentenced to death at the retrial by

[7] [1979] 2 MLJ 238

the High Court, Penang on 16 August, 1979[8]. His conviction and sentence was affirmed by the Federal Court and he was hanged together with the 25 others who had rejoiced in death-rows throughout the country when his trial was declared a nullity by the Privy Council in December, 1978.

In the clemency petition to the Governor of Penang, I had appealed to the Pardons Board to spare Teh Cheng Poh as he had to undergo the sceptre of death in death-row twice. The Rule of Law demanded that the sentence of death be commuted to one of life imprisonment at least on compassionate grounds. The Public Prosecutor, on whose report the Pardons Board very heavily relied, could easily have recommenced mercy. He did not. I cannot fathom why. Perhaps, it was too much for the Government to accept a mere carpenter having brought the King and the Government to their knees at the Privy Council in London and, most of all, shown the Government had negligently advised the King to promulgate the Essential Security Cases Regulations, 1975 and which negligence could not be discerned by Justice Fred Arulanandom and the Federal Court! The Privy Council in London served its purpose. One can appreciate a problem from afar; the perspective is more pronounced, and the vision not myopic.

The Rule of Law suffered near fatal blows in the trials of former Deputy Prime Minister of Malaysia Anwar Ibrahim. The challenges to the role of an advocate in upholding the Rule of Law underwent the acid test in these cases, Anwar Ibrahim is now serving a total of 15 years on charges of corruption and sodomy in Malaysia. His trials, or rather mistrials, departed from what is expected of an adversarial system, with the judge evenly holding the scales of justice. On 16 April, 1999 the Bar Council criticised the judgment of judge Augustine Paul in the corruption trial in the following terms:

> 'The unusual manner in which the trial itself was conducted, for example: the refusal of bail; the expunging of evidence given on oath; preventing the accused from raising every possible and conceivable defence; to state beforehand what evidence the defence sought to adduce through various witnesses; disallowing witnesses from testifying and making

[8] *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 291

rulings as to the relevancy of their evidence without first hearing their testimony; citing and threatening defence lawyers with contempt proceedings, including sentencing a defence lawyer to three months imprisonment for contempt while in the exercise of their duties, raise questions impinging on the administration of justice.'

The Bar Council's response to the dismissal of Anwar Ibrahim's appeal by the Federal Court on 16 July last year was as follows:

'The Bar Council acknowledges that the Anwar trial has gone through the necessary steps in the legal process and that the Federal Court decision has to be respected. Nevertheless, the Bar Council is of the view that the several irregularities in the trial, that had been previously highlighted, do not justify a dismissal of Anwar's appeal. Examples of such irregularities include expunging evidence given on oath, preventing the accused from raising every possible defence and limiting him to particular defences, compelling the defence to state in advance what evidence they intended to adduce through various witnesses, disallowing witnesses from testifying and making rulings as to the relevancy of their evidence without first hearing their testimony.

'The dismissal of Anwar's appeal is all the more surprising given the findings and strong comments made by the Federal Court in Zainur Zakaria's case as to the conduct of the Anwar trial by the Prosecution and the Judge in the High Court.

'Further, the Bar Council finds that several aspects of the sentence imposed are highly unusual and regrets that the Federal Court did not see it fit to set them right.

'The Bar Council stresses that its views are founded solely upon established principles of criminal law and the safeguards guaranteed to an accused under our law, no matter who he may be.'

In the sodomy trial, judge Arifin Jaka ruled the notice of alibi given in relation to the charge as framed for an alleged offence of sodomy at 7.45 p.m.

on a day in the month of May, 1992 stood for the amended charge before commencement of the trial, which was the commission of the alleged offence of sodomy on an unspecified day at about 7.45 pm between January and March, 1993. It was an illegal ruling, but the judge refused to budge when the defence applied for an adjournment for 12 days to give a fresh notice of alibi required to be statutorily given to the Public Prosecutor within 10 days from the commencement of the trial. It was ridiculous for judge Arifin Jaka to rule a defence of alibi for a May 1992 offence could be invoked for an offence in January to March, 1993! It is rulings of this nature that cause loss of public confidence in the judiciary which in turn lead citizens in some countries to take the law into their own hands by assassinating judges who abuse their office from their exalted seats of judicial power which repose in them the jurisdiction, in the name of democracy, to take even a person's life. Are such judicial personalities then but Gods with clay feet! Is then such homicide, not justifiable! I leave it to you today make your own judgment.

To compound the position, the notice of alibi for the original May, 1992 charge was conceded by the prosecution to have been investigated with the result that the apartment in which the alleged offence was said to have taken place was found yet to have been completed requiring amendment of the charge to one of commission of the alleged offence between January and March, 1993!

Judge Arifin Jaka brushed aside the defence submission that the complainant, one Azizan Abu Bakar, Anwar Ibrahim's ex-chauffeur, was not sent for a medical examination to show he had been sodomised despite the prosecution conceding it had the opportunity to do so. The complainant's evidence was shown to be inconsistent, contradictory and inherently improbable by any standard. Azizan was proved to have committed an offence of khalwat [close proximity with a woman not related to him] in a Syariah Court during the pendency of the trial, but judge Arifin Jaka ruled it was irrelevant to the credibility of the complainant. The charge was amended from May, 1994 to May, 1992 and then to, between January to March, 1993 in point of the time of the alleged offence of sodomy. But the judge, despite these infirmities in the evidence of the complainant, found the complainant to be a reliable and truthful witness. Judge Arifin Jaka even went to the extent of describing the evidence of the

complainant to be as solid as the Rock of Gibraltar and, therefore, needed no corroboration! This prompted Anwar Ibrahim to say, 'It is at best the shifty Great Jelly of Gibraltar, given the countless predictable contradictions and utter lack of corroboration.'[9]

On 10 September, 1999 judge Arifin Jaka steadfastly refused to hear submissions to reconsider a ruling he had made earlier saying, 'My ruling stands'. I retorted it was important for him to take into account the views of the defence. On pain of the consequences I said:

> 'This court is not living up to expectations. The Bar will not take anything thrust upon us. A judge has a duty to make a ruling on what is submitted. Judges are not Maharajas.
>
> 'Why are you afraid? Is there an unseen hand influencing judges in this country. Let's not make a mockery of justice in this country.'

Holding a newspaper report, which had a picture of angry farmers throwing rotten vegetables at the Supreme Court in Manila, I said, 'Let there be no such incident in this country.'[10]

Judge Arifin Jaka was seething at his seams but did not have the moral or judicial courage to cite me for contempt in the face of the court.

On another occasion, after the defence had subpoenaed the Prime Minister, Dr Mahathir, as a defence witness, as the complainant Azizan had made a written complaint to the Prime Minister and Dr Mahahtir had publicly cleared Anwar Ibrahim saying there was a plot to get rid of his deputy, before Anwar Ibrahim was charged for alleged corruption and sodomy, judge Arifin Jaka asked me to satisfy him as to the relevancy of the evidence of the Prime Minister in the defence of Anwar Ibrahim. I replied that was a matter between the defence and the Prime Minister and Dr. Mahathir was at liberty to apply by motion to set aside the subpoena served by the defence on him as had been

[9] Far Eastern Economic Review 5 July, 2001 at page 70
[10] Harakah, Malaysia 10 September, 1999 at page 19

done by the defence in relation to Daim Zainuddin the Finance Minister and deputy Education Minister Aziz Shamsuddin on both of whom a subpoena had also been served and both had made applications to set aside the same, which was the right procedure, and it was wrong for judge Arifin Jaka to give special treatment to Dr Mahathir by asking the defence to orally satisfy him as to the relevancy of the evidence of the Prime Minister.

When I said the Prime Minister had interviewed Azizan and was, therefore, a material witness and even a first year law student knew that Dr Mahathir was a material witness[11] and should in fact have been called by the prosecution in the interests of justice to show consistency in the evidence of Azizan, judge Arifin Jaka set aside the subpoena on the Prime Minister on the ground his evidence was not relevant. As I felt, and sincerely, that judge Arifin Jaka was subverting the Rule of Law, I retorted, 'Are you afraid of the Prime Minister?' Judge Arifin Jaka demanded I repeat what I had said and that he would record it as it amounted to contempt of court. Of course, I repeated every word I had uttered, which he recorded. Judge Arifin Jaka then asked me to withdraw what I had said and he would let matters rest; otherwise, he would hold me for contempt of court. I retorted I stood by what I had said. Judge Arifin Jaka held his breath and said, 'I give you a final chance to retract', to which I retorted, 'I do not utter words for the sake of withdrawing them later.'

Once again, judge Arifin Jaka backed off.

I would have subpoenaed Prime Minister Dr Mahathir in the trial of my client, a former Opposition Member of Parliament, Buniyamin Yaacob, who was charged for having criminally defamed Dr Mahathir at a public function on 15 March, 2002 over his allegation that Dr Mahathir had watched a pornographic video with his grandchildren. Whether or not the court would have allowed Dr Mahathir to be called as a defence witness is difficult to predict as Buniyamin passed away in the midst of the trial. The Public Prosecutor was obliged to withdraw the charge and Buniyamin was acquitted and discharged posthumously on 8 April, 2003[12] with Dr Mahathir yet to clear

[11] Far Eastern Economic Review 27 April, 2000 at page 31
[12] New Straits Times, Malaysia 9 April, 2003 at page 14

himself of the allegation against him.

In *DP Vijandran v Public Prosecutor*,[13] I was the complainant against Vijandran, who is a lawyer and a former Deputy Speaker of Parliament. I had produced in Parliament a pornographic videotape in which Vijandran was depicted as the male performer. Although Vijandran was acquitted by the Court of Appeal after being convicted and sentenced to imprisonment for two 2 weeks and fined RM2,000 in default, 6 months imprisonment by the Sessions Court, the decision of which was confirmed by the High Court. In delivering the judgment of the Court of Appeal, Judge Gopal Sri Ram said:

> 'It is true that the appellant [Vijandran] had stated on oath that he had been made out to be a person who had acted in pornographic tapes**.** It is equally true that the prosecution had established beyond a reasonable doubt that the male actor appearing in exhibit P12 [the pornographic videotape] is indeed the appellant.'

In the defence of the Rule of Law in 1986, I filed a civil suit against the Sultan of Johor, Tunku Mahmood Iskandar, who was then the King of Malaysia. [The Malaysian throne is occupied by rotation every five years among the nine hereditary Rulers]. The civil suit was filed on behalf of one Daeng Baha Ismail for damages for assault, including punitive and exemplary damages. Daeng Baha Ismail had been taken to the Johor Palace in handcuffs at about 10.15 pm on 4 June, 1983 by police personnel and was punched and repeatedly hit by the Sultan on his hands, palms, legs, chest, back and buttocks in the presence of the Royal household. Until 1993, Royalty in Malaysia had absolute immunity from judicial process. Article 32(1) of the Federal Constitution then stated, 'The King …. shall not be liable for any proceedings whatsoever in any court.' In the High Court, I contended the Sultan of Johor was not the lawful Sultan and, therefore, could not have been lawfully elected King by his brother Rulers.

I contended he had been removed by his father as Crown Prince after he was convicted and sentenced to six months imprisonment and a fine of $6,000 in default six months imprisonment for culpable homicide not amounting

[13] [1999] 1 MLJ 385

to murder.[14] [He was, in any event, pardoned by his father, the Sultan, for this offence. On his father's death bed, he had himself reverted to Crown Prince and became Sultan after his father's death]. The High Court dismissed the suit, holding the court had no jurisdiction to hear and determine any question as to the legality or otherwise of the election of a Ruler to the office of King. On appeal, the Supreme Court upheld that decision.[15]

Raja Azlan Shah, the Sultan of Perak, and former head of the judiciary in Malaysia, as a judge, had convicted Tunku Mahmood Iskandar earlier as Crown Prince on 3 January, 1973 fining him a total of $2,500 in default 11 months imprisonment for causing hurt on three charges, but not before saying in his judgment:

> 'The record, to my mind, reads more like pages torn from some medieval time than a record made within the confines of a modern civilization. The keynote of this whole case can be epitomised by two words – sadistic brutality – every corner of the case from beginning to the end, devoid of relief or palliation. I have searched diligently amongst the evidence, in an attempt to discover some mitigating factor in the conduct of the respondent, which would elevate the case from the level of pure horror and bestiality and ennoble it at least upon the plane of tragedy. I must confess, I have failed.'[16]

Incidentally, when I sued the King, Tunku Mahmood Iskandar, the deputy King was the Sultan of Perak, Raja Azlan Shah, whose displeasure I incurred when he became King. In 1993, when debating and supporting the Constitution (Amendment) Bill, 1993 in Parliament to clip the wings of the Rulers, including the King, by doing away with immunity for Royalty in Malaysia, I stated my party, the Democratic Action Party [DAP], had complained to Sultan Azlan Shah as King about the assault by the Sultan of Johor on 20 January, 1991 on two DAP Johor State Assemblymen but had received no response from the King adding, 'The King did not carry out his responsibility when he chose not

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[14] *Public Prosecutor v Tunku Mahmood Iskandar* [1977] 2 MLJ 123
[15] Yang di-Pertuan Agong [The King] – Absolute Immunity- Election to Office [1987] 1 MLJ vi
[16] *Public Prosecutor v Tunku Mahmood Iskandar* [1977] 1 MLJ 128

to reply to my letter. Is the King afraid of the Sultan of Johore?.'

The King wrote to the Speaker over his dissatisfaction in respect of my remarks. In the letter, the King said the remarks gave the impression that he had not taken the necessary action after receiving the DAP letter which he actually did not receive. [Of course, the letter had been hand-delivered to the Palace in Kuala Lumpur].

The King's dissatisfaction was relayed to me by the Speaker who asked for my explanation. Of course, I replied I was duty-bound to bring up serious matters in Parliament in the public interest adding, 'Needless to say, I have to act without fear or favour.'[17]

In the early eighties, the then Sultan of Perak, Idris Shah Almarhum Sultan Alang Iskandar Shah, called upon Members of Parliament in the Federal Parliament from his State, Perak, to demand part of the territory of my home State, Penang, adjoining Perak. I protested vehemently in Parliament prompting the Sultan to say, 'I will teach that bullock-carter a lesson!'

In an article[18], by Michael Vatikiotis the following somewhat unflattering passage appears:

> 'Not many lawyers can claim to have sued the King in the name of the King. When Malaysian lawyer Karpal Singh brought a case against the Sultan of Johor in 1986, then also King of Malaysia, the summons was issued in the King's name. Karpal lost the case, and the Sultan allegedly named one of his dogs after him.'

Well, in the rough and tumble of it all, we barristers and advocates must take things as they come, and valiantly, in the stride. After all, a dog is man's best friend!

Although, of course, there was once cause for alarm when I received

[17] New Straits Times, Malaysia 25 February, 1993 at page 2
[18] A Malaysian Who Dared Sue a King Far Eastern Economic Review, 20 May, 1993 at page 78

an envelope in which was a letter threatening me with death, and a live bullet for good measure!

When I was told by journalists that my criticism of judge Arifin Jaka could get me into trouble for contempt of court, I replied, 'If we [lawyers] are afraid, then let's just take off our gowns and sit in the Himalayas.'[19]

Mr. Stuart Littlemore QC had occasion to have incurred the wrath of judge Lai Kew Chai of Singapore. On 31 January, 2002 when dismissing the application of the Queen's Counsel[20] for an ad hoc admission to practise in Singapore, the judge said:

> 'As I had said in open court, I concluded that Mr Littlemore had shown us contempt and had been utterly disrespectful. He came across to me as a person who lacked 'decency, measure and maturity'. I could not trust him to assist our courts in our deliberations in relation to the suits against Dr Chee. I also said that our judiciary could not possibly be expected to honour those who dishonoured us, disparaged us, and who said such hurtful things about us.'

Of course, judge Lai Kew Chai was protected by judicial immunity when launching this injudicious attack on Mr Littlemore, unlike Mr Littlemore who demonstrated courage of conviction, when uttering the following in an interview with the Australian Broadcasting Corporation on 14 October, 1997:

> 'The ICJ [International Commission of Jurists] is dedicated to the rule of law. That is, a government of laws, not of men, the rule of laws, not men. Now, that's very uncomfortable for a regime that does impeccably in its judiciary in commercial matters - you couldn't fault the courts but when it comes to human rights, they really don't matter … I think it's paying judges eight hundred thousand a year or the chief judge, 1.2 million. I mean people in Singapore … lawyers will say to you… that guarantees the independence of the judiciary. I think anybody would

[19] Far Eastern Economic Review, 23 September, 1999 at page 28
[20] Re Stuart Littlemore QC [2002] 5 LRC 45

says no, it puts the judiciary in the pocket of the government… And you know, when judges are appointed in Singapore, they serve two and a half years probation. Now, the idea of that is anathema to people who believe in an independent judiciary.'

and stating in his article which was published in the Sydney Morning Herald on 15 October, 1997 as follows:

'The Singapore High Court has a regrettable reputation as compliant with the interests of the Government. Its judges are paid S$ 800,000 (US$ 703,730) a year, and the Chief Justice S$ 1,200,000 (A$1,055,600) a situation which, far from demonstrating the independence of the judiciary, provides a very persuasive basis for concluding that the judiciary would be highly motivated to comply with the government priorities. While the rest of the common law world has formulated a 'public figure' test for defamation or treated political life as requiring a higher degree of robust tolerance, and while such jurisdictions have also placed reasonable limits on damages awards, the Singapore judiciary is exposed as unable to accommodate the fundamental right of free speech alongside the right to protection of reputation.'

Then again, in 1995, I had occasion to defend a lawyer colleague of mine, Sahadevan Nadchatiram, against the then King of Malaysia, Tuanku Ja'afar Rahman, the Ruler of the State of Negeri Sembilan. On 16 November, 1979 the King had signed a trust deed with Sahadevan, a close friend of the King. The deed related to 10 plots of land in the district of Rantau near the popular resort town of Port Dickson in the King's State. Signed by both men in the presence of a solicitor, it assigned 70% of the land to the King and 30% to Sahadevan. The King agreed to get the consent of Sahadevan before selling any part of the land. However, in April, 1995 Sahadevan wrote to the King saying he had heard the King was selling 560 acres of the land for RM2,145 per acre. Sahadevan thought the price was too low. He wrote to the King saying, 'I am sorry I am not able to accept this price.' The final selling price was far higher and Sahadevan was not given his share. When he met the King at the Palace, he no longer recognised the validity of the trust deed and Sahadevan told him he would sue him. The King retorted he had no objection

to Sahadevan taking him to the Special Court which had been set up in 1993 by a Constitutional amendment to remove the immunity of the Rulers, including the King. Sahadevan wrote to the King to say he was going to do just that and engaged me as counsel. I felt the Rule of Law had to be defended above all, and agreed to sue the King. The King had said to Sahadevan, 'If you go ahead, I'll argue that the Special Court is not valid because the Rulers never consented to its set up. I am above the law. I am King. I am not bound by the constitutional amendment.' The Royalty in Malaysia never thought they would ever be subjected to judicial process.

I took this statement by the King as an affront to the Rule of Law. I immediately wrote to the King asking for details of Sahadevan's share of the land, and noted, 'There could be an element of criminality in what has transpired.' The King's lawyers phoned me to say that probably they would contest the case. The Royal cudgel had been thrown. I willingly accepted the challenge. I wrote to the Attorney-General for his written consent, which was a prerequisite to sue the King, saying in Parliament, 'If the King does not settle, I will bring charges of criminal breach of trust against him. At the same time, there is civil liability.'[21] A police report was lodged at the behest of the King as sedition in Parliament is not protected. There is no absolute parliamentary immunity in Malaysia.

In the event, the King backed off and entered into a handsome settlement out of court with Sahadevan. However, I was questioned by the police following the police report and so was a somewhat shaken-up, Mr. Roger Mitton who had written the article in ASIAWEEK, but by the grace of God nothing has, at least thus far, required my being handcuffed again for production in court.

I have sat in the dock in Malaysia on many an occasion. I understand more than any other of my colleagues what goes on in the mind of my clients sitting in that very dock. The law says one is innocent until proven guilty. Why must innocence then constitute being handcuffed and led to the dock by the police even before one is convicted? Surely, that does not fit in with the concept of innocence until proven guilty. But then, Prime Minister Dr Mahathir will say

[21] Will the King go to Court? ASIAWEEK 24 November, 1995 at page 32

that it is a legacy left by our colonial masters, the British, and the Opposition's insistence in emulating the Westminster model in Malaysia!

The jurisdiction of the Special Court was invoked in reality when I represented Faridah Begum bte Abdullah against the Sultan of Pahang.[22] Faridah sued the Sultan in his personal capacity for alleged libel and for damages in the Special Court. The Attorney-General had given his consent to Faridah to sue the Sultan. However, by a majority of 4:1 the Sultan's preliminary objection that a non-citizen could not sue a Ruler in Malaysia was upheld. What was made clear, however, was that the legislation to remove the immunity of Rulers, including the King, in Malaysia was not for the statute books alone. It is significant the Attorney-General's consent, which was a prerequisite to sue a Ruler, must have been issued on the premise the proposed suit had merits.

We as barristers and advocates should be familiar with the following passages[23] when, in the agony of the moment, and for legitimate reasons, we have to deal with that rare breed of judges who have scant regard for the Rule of Law.

'Acute problems may be posed in cases in which it is sought to hold an advocate in contempt in respect of his conduct in court. Here is one of the most celebrated of all cases centred on the conduct of Erskine when acting for the defence in the case of the *Dean of St Asaph* in 1784. The case arose out of a prosecution for publishing an allegedly seditious libel entitled 'A Dialogue between a Gentleman and a Farmer', the object of which was to promote parliamentary reform. After an eloquent speech by Erskine to the jury on the importance of the liberty of the Press, and his conception of their role in such cases, Mr. Justice Buller directed them that their sole function was to determine whether or not the defendant had published the tract. The question of 'libel or no libel' was for him to decide. The jury returned a verdict of 'Guilty of Publishing only', which the learned judge was not prepared to accept, but which Erskine insisted should be recorded in that form. After the jury had made it clear in response to questions that it intended the verdict to mean that the

[22] *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah* [1996] 1 MLJ 617
[23] Contempt of Court, C J Miller, 2nd Edition at pages 110-112

defendant had published the tract, but no more, the following exchange took place:

'ERSKINE: The jury do understand their verdict.
BULLER, J: Sir, I will not be interrupted.
ERSKINE: I stand here as an advocate for a brother citizen, and I desire that the word only may be recorded.
BULLER: Sit down, Sir; Remember Your duty, or I shall be obliged to proceed in another manner.
ERSKINE: Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct.'

'Mr. Justice Buller did not repeat his threat of committal, and Erskine's conduct has frequently been cited as illustrating the need for an independent and courageous Bar.

'Although it is difficult to overstate the importance of this principle, it is clear that an advocate may go beyond commendable firmness and breach of professional etiquette and commit a contempt. Thus in Exp. Pater, the Court of Queen's Bench refused to interfere when a court of quarter sessions had imposed a £20 fine on counsel for imputing bias to the foreman of the jury. The presiding judge had taken the view that the conduct was deliberately insulting and went beyond a legitimate attempt to protect his client's interests. Similarly, and in more recent years, the Supreme Court of New South Wales has refused to interfere where the chairman of the Sydney quarter sessions had fined a counsel whom he believed was misconducting himself in an attempt to get himself expelled from court, thus having the jury dismissed and securing a retrial. The Court summarized and position in the following terms:

'If the words were harsh and disrespectful to the judge, although in breach of good manners, they may have been within the legal rights and privilege of counsel. Counsel may, for instance, in appropriate circumstances and in a proper manner request the judge to refrain from interfering with his

cross-examination at what he honestly believes to be a criticial point. But if his words took the form of insults to the judge or of setting at defiance his ruling as to the discharge of the jury, or if the manner of their utterance was insulting and offensive, then they could amount to an abuse of a barrister's privilege and the judge might treat the utterances as contempt and deal with them accordingly.

'Of course, in any such case it may be difficult to determine where the line is to be drawn especially where counsel has complained that the judge has adopted a position which is adverse to the person for whom he is appearing. In one such case, the High Court of Australia held that counsel's conduct was 'extremely discourteous, perhaps offensive, and deserving of rebuke' yet it did not constitute contempt. Counsel had used the following analogy when addressing the jury: 'You normally think of a judge as being a sort of umpire, ladies and gentlemen, and you expect an umpire to be unbiased. You would be pretty annoyed if, in the middle of a grand final, one of the umpires suddenly started coming out in a Collingwood jumper and started giving decisions one way. That would not be what we think a fair thing in Australian sport. It may surprise you to find out that his Honour's role in this trial is quite different.' The High Court noted also that punishment for contempt should be invoked sparingly and only when the alleged insult had been identified. There have been other modern Commonwealth and Privy Council cases. However, it seems that professional etiquette, coupled with a recognition by the judiciary of the importance of an independent Bar, have generally worked together to minimize the possibility of confrontation although it is known that there have been some problems with part of the 'radical Bar'.'

The necessity of a 'radical Bar' may in extreme circumstances be necessary. Sikhism's tenth religious teacher, Guru Gobind Singh, rightly said,

'If all else fails, the raising of the sword is justified!' Of course, we should not take that pronouncement literally in our age and time! I assure you I do not believe in violence!

On 9 September, 1999 when defending former Malaysian Deputy Prime Minister Anwar Ibrahim, after the court had adjourned for the day, I was informed by my client that a report by the Gribbles laboratory in Melbourne revealed the level of arsenic in his body was 77 times more than normal. I am no doctor. To me, even had it been double, it was cause for alarm! I was instructed by my client to make an application the next morning for him to be admitted forthwith in hospital. Of course, I thought it was a reasonable request and, accordingly, the next morning, I made the requisite application and asked for an inquiry to be held. In my submissions, inter alia, I said:

> 'It could well be that some one out there wants to get rid of him, even to the extent of murder. I suspect people in high places are responsible for this situation.'

I had chosen my words guardedly. 'It could well be **....**' and, 'I suspect**....**'

At the Royal Commission of Inquiry, at which I held a watching brief for Anwar Ibrahim earlier, I had asked for an attempted murder charge against the former Inspector-General of Police, Rahim Noor, for the vicious attack on Anwar Ibrahim giving him and the country that notorious black eye for which he pleaded guilty on a charge for voluntarily causing hurt to the former Deputy Prime Minister for which offence he was subsequently sentenced to two months imprisonment and a fine of RM2,000. On appeal, this is what the Court of Appeal[24] had to say on 22 May, 2001:

> 'The appellant at the time of the offence held the highest office in the police force and, therefore, should have been a role model to the force. Instead, he stooped to the lowest level when he acted as he did. His actions towards the arrested person (Anwar Ibrahim) were despicable

[24] *Tan Sri Rahim bin Mohd Noor v Public Prosecutor* [2001] 3 MLJ 1

and inhuman to say the least, more so when the arrested person was, on his orders, blindfolded with his hands handcuffed behind his back. We cannot fathom the need to blindfold and handcuff a prisoner who was already in the police lock-up. This to us, is an indication of the deliberate nature of the assault on a defenceless victim. This is the worst act of indiscipline in a disciplined force.'

Surely, on reflection, no one could have faulted me for use of the words I did in applying for Anwar Ibrahim to be sent for a medical examination and that an inquiry be held into the matter.

Nevertheless, I was arrested on 12 January, 2000 and charged with sedition with a healthy prospect of being imprisoned for 3 years or fined RM5,000 or both. Michael Birnbaum QC and Mr James Laddie in an opinion commissioned by the Bar Human Rights Committee (England and Wales)[25], after I was charged, had this, inter alia, to say:

'One of the most worrying developments has been the increasing use of prosecutions for sedition as a weapon against opponents and critics of government [in Malaysia]. Throughout the Commonwealth this ancient offence has been reduced almost to a dead letter by liberal minded judges. They have limited its scope by insisting that the prosecution must prove an intention to incite disorder. But Malaysian judges have tended to move in the opposition direction. They have interpreted the offence so broadly that now almost any strong expression of dissent from or criticism of the government can be held to be seditious and punished by imprisonment.

'The prosecution of Karpal Singh may be a watershed. He is one of the leading counsel appearing for the defence of Anwar Ibrahim, who is, of course, the former Deputy Prime Minister.

'As far as we know, this is the first case anywhere in the world in which a lawyer has been accused of sedition for words spoken in defence of his client. We believe that such a prosecution strikes at the heart not

[25] The Commonwealth Lawyer September 2000, Volume 9, No.2 at page 35

only of the immunities of lawyers in respect of the conduct of their professional duties but even more importantly of the right of any individual to a fair trial. Our concern is so great that we have taken the unusual course of publishing an opinion setting out our views.

'It is very long and in some respects technical. But the main points are simple:

- If there is to be a fair trial of any case, witnesses and advocates for all parties must be able to express themselves in court freely and without fear that they will suffer repercussions for doing so;

- Therefore, both the common law and international law recognize they must be immune from prosecution and civil action for statements made during court proceedings;

- The immunity is forfeited only by conduct in bad faith threatening the very integrity of the legal process which the immunity itself is designed to protect;

- Where there is bad faith, criminal proceedings can properly be launched for offences against justice, such as contempt of court;

- Sedition is not an offence against justice but a political offence used to punish dissent;

- Therefore, to prosecute anyone for sedition in relation to statements made in the course of legal proceedings strikes at the heart of the right to a fair trial;

- Throughout the civilised world the independence of lawyers – and in particular, defence advocates – is recognized as essential to the maintenance of human rights and the rule of law;

- Since lawyers have duties not only to their clients but to the court before which they appear and to justice, it is of particular importance that lawyers' immunity is maintained;

- To prosecute a lawyer for sedition for statements in the course of legal proceedings strikes at the heart of the independence of the lawyer;

- Our argument is not that lawyers deserve special privileges and immunity because they are lawyers. It is rather that they must have those immunities – and only those immunities which are necessary to the proper discharge of their onerous duties to their clients and to justice;

- We take no position on whether it was true that Mr Anwar had been poisoned or by whom, if anybody was responsible; and

- On any fair analysis of the facts, Mr Karpal Singh has behaved perfectly properly. On the face of it, he was courageously and vigorously defending his client.'

As a result of international pressure from Amnesty International; International Commission of Jurists, (ICJ); Center For the Independence of Judges and Lawyers, Geneva; Inter-Parliamentary Union, Geneva; International Bar Association; Lawyers Rights Watch, Canada; Commonwealth Lawyers Association; Bar Human Rights Committee of England & Wales; Law Council of Australia; Australian Bar Association; Criminal Lawyers Association of Western Australia; Japan Federation of Bar Associations; New Zealand Law Society; Dato Param Cumaraswamy, UN Special Rapporteur for the Independence of Judges and Lawyers; Bar Council, Malaysia; and various other individuals and organisations to all of whom I am most grateful, the Attorney-General, Datuk Panglima Abdul Gani Patail, withdrew the charge against me on 14 January, 2002 but not after moves for an apology from me in Open Court for an acquittal which were rejected outright by me.

However, the trial judge, Augustine Paul, after acquitting and discharging me upon the Attorney-General, in the course of the proceedings, withdrawing the charge, referred me to the Disciplinary Board for my remarks against him in my application to allow observer status on behalf of:

(1) Mr Richard Gates QC, President of the Law Society of British Columbia;
(2) Mr Mark Trowell QC, representing the Law Council of Australia, the Australian Bar Association and the Criminal Lawyers' Association of Australia;
(3) Dato Param Cumaraswamy, the UN Special Rapporteur for the Independence of Judges and Lawyers;
(4) Mr Leslie AK James, for the High Commissioner of Canada;
(5) Mr Denise Miller, for the High Commissioner of Australia; and
(6) Mr John Marshall, for the High Commissioner of Britain;

Justice Augustine Paul, who had also tried and convicted Anwar Ibrahim, commented that they could be present in court as the court was open to the public. To this I responded:

> 'Observer status ought to be given as they have come here specially to observe this trial and for the reason that this is the first time a defence counsel is being charged for carrying out his duties. This has been done in the past. In all cases involving the public interest and matters, in particular, that effect the legal profession, this has been allowed. There has been no objection by any judge. The judiciary should not object to the subject of observation. There ought to be transparency.'

The judge then asked me whether the presence of observers could affect the independence of the judiciary, to which I responded:

> 'The answer to that is simple. No doubt, judges are obliged to uphold the Rule of Law and uphold the Constitution, in particular Article 5(1). [No person shall be deprived of his life or liberty save in accordance with law]. The judge must keep within the parameters of the law. In particular in the case of Dato Seri Anwar Ibrahim, Your Lordship cited one of his

> defence counsel for contempt of court and sentenced him to imprisonment. On appeal, the Federal Court found that Your Lordship acted more as a prosecutor than as a judge. In view of this finding made by the Federal Court, it is necessary that Your Lordship should be observed. Rightly, Your Lordship should have been tribunalised. It is as clear as a pikestaff that having regard to the finding by the Federal Court, there ought to be observers. That will ensure that nothing goes amiss. Above and beyond this, our criminal justice system itself will be on trial. I have filed an application to have Your Lordship disqualified.'

The judge in his complaint, through the Registrar of his court, has accused me of professional misconduct to which I have replied. When asked to comment on my reply to his allegations by the Board, the judge curiously said he was not obliged to do so but sent the Board a written judgment which he has said, was only for use of the Board and no one else including reporting in the law journals. In his judgment,[26] [made available to me by the Board, and not the judge, in line with the rules of natural justice], the judge justifies his actions in referring me to the Board.

I have, of course, made available the judgment to the law journals which have published the same as I do not believe in secret judgments!

I am waiting for the judge to fire his next salvo, which I assure you, will be resisted with all the might at my command. In his judgment, the judge alludes to the following remarks made against him by the Federal Court, which allowed the appeal of Zainur Zakaria, one of Anwar Ibrahim's counsel, who had been sentenced by the judge to three months imprisonment for contempt of court:

> 'The manner he conducted the proceedings, in particular the interrogation of the appellant and the speedy finding of guilt without even allowing the appellant to call any witness, gave the picture that he was behaving as though he was acting as counsel for the two prosecutors in the motion'.

He goes on to say:

[26] *Public Prosecutor v Karpal Singh* [2002] 2 MLJ 657 at pages 660, 662, 663

'The remarks have how been hurled back at me by the accused [Karpal Singh] though in a different form as I will explain later, with the explosive and detonative intention of rocking the very chair on which I sit.'

In this judgment, which the judge does not wish to make public, he says:

'They [my remarks] amount to an open and blatant attack on the independence of the judiciary. They are an affront to my impartiality and constitute the biggest threat and insult, not only to me, but also to the entire judiciary… They strike at the very core and foundation of the institution of justice and the democratic process as enshrined in the Federal Constitution. They are contemptuous.'

Very strong words shrouded in judicial immunity for use as a sword against me before the Disciplinary Board!

If what I had stated was, in the view of the judge, an open and blatant attack on the independence of the judiciary, why did he not have the courage to cite me for contempt in the face of the court. Surely, this is basic. Has he not let the whole Malaysian judiciary down by allowing criminal contempt of gigantic propositions against the independence of the judiciary? Did he not realize, I was an accused person in the dock fighting for my professional and political survival and that of my children and children's children? I was not acting in my professional capacity and, therefore, was an ordinary prisoner who had dared to attack and insult the entire judiciary!

In the Anwar Ibrahim trial on 1 April, 1999 Justice Augustine Paul, in the absence of Mr. Christopher Fernando, one of the counsel for the former Deputy Prime Minister, berated him by directing the following remarks against him:

'If the way and manner of speaking is like an animal, we can't tolerate it. We should shoot him. He has to change.'

I am acting for Mr. Christopher Fernando in contempt of court

proceedings against Justice Augustine Paul. There is authority for the proposition that a judge can be in contempt of his own court. Judge Ralph Kohn of Advin (Michigan USA) reached his court 10 minutes late. He was to hear arguments in a case that day at a fixed time. On reaching late, he just stood up and saluted the Chair and the present advocates and litigants by bowing his head and then delivered this verdict:

> 'I have committed contempt of my own court by coming late and, therefore, I impose a fine of $50 on myself which amount shall go to the State Exchequer and I beg pardon from all of you present.'[27]

The contempt proceedings against Justice Augustine Paul have been stayed to enable me to appeal to the Court of Appeal against the decision of the presiding judge allowing the Attorney-General to represent Justice Augustine Paul in the proceedings.[28]

Justice Augustine Paul has not denied the derogatory remarks he uttered in Open Court against Mr Christopher Fernando, which were reported in the newspapers the next day. I would have thought the Chief Justice would have called up the judge having regard to the Judges' Code of Conduct, 1994, which prohibits a judge from bringing the judiciary into disrepute or to bring discredit thereto. Alas, in Malaysia such eventualities do not germinate unless, of course, the Executive resolves to remove a perceived recalcitrant head of the judiciary!

I have for the common good in the course of my practice, particularly when I was a Member of Parliament, taken up issues involving the public. On 26 July, 1987 the Sultan of Selangor publicly stated that he would not pardon anyone who had been sentenced to the mandatory death penalty for drug trafficking in his State. To me, this statement was in violation of Article 42 of the Federal Constitution, which gave a person the right to apply for clemency after exhausting the judicial process. It was, and still is, my view that the Sultan could only reject a petition for clemency after considering the advice of the Selangor Pardons Board presided by him and then applying his mind to the

[27] The HINDU, 9 March, 1974 at page 7
[28] *Public Prosecutor v Dato' Seri Anwar Ibrahim* [2002] 2 MLJ 231

petition before him. I had, in my capacity as a Member of Parliament, issued a public statement contending the Sultan's statements were unconstitutional. I had expected the Attorney-General to respond. When he did not, I decided to commence legal proceedings against the Sultan in the High Court knowing fully well the consequences, as the Rulers in Malaysia are revered, particularly by the Malays. I was attacked by a bomoh [a Malay medicine-man] outside the High Court in Kuala Lumpur after the court adjourned for lunch. He accused me of having dared to take a Malay Ruler to court, which to him was unthinkable. This was about two weeks before the originating motion I had filed was heard by Chief Justice (Malaya) Abdul Hamid who later replaced the head of the judiciary, Salleh Abas, after unabashedly, despite a national and international outcry, heading the tribunal to remove his own boss.

On 16 September, 1987 the matter came up in Open Court before Abdul Hamid who invariably sat in the Federal Court together with other appellate judges to hear appeals from the High Court. It was somewhat curious that he should sit at first instance in the High Court. But he did. On this occasion, I went to court fully armed with a .38 Smith and Wesson revolver ready for use if the occasion arose after having been attacked by the bomoh previously in the precincts of the court. I did not want to take chances this time. However, I informed the somewhat startled and frightened Registrar of the court that I was armed and that I intended to make my submissions armed not only with authorities but also with a fully cocked revolver! The Registrar, of course, promptly informed the Chief Justice who struck a compromise; namely, that a police officer would sit next to me at the Bar table with my revolver in his custody and which would be returned to me after the hearing.

My application against the Sultan was dismissed with costs, inter alia, on the issue of locus standi with the judge holding:

> 'In my opinion, having regard to the facts and circumstances of this case …. the plaintiff in the present case has no locus standi.'[29]

Interestingly, it was the issue of locus standi in reverse which saved me

[29] *Karpal Singh v Sultan of Selangor* [1998] 1 MLJ 64

in another case, in which I was sued by a member of the Royalty of the State of Kelantan for the following statement I made on 13 December, 1992 and which was widely publicised in the press:

> 'The Internal Security Act can be used to detain anybody, including the Rulers, as they were not exempted from the ambit of the Act. Section 8(1) of the Act empowered the Minister of Home Affairs to detain anyone for a period of 2 years to prevent a person from engaging in activities against national security. However, the Democratic Action Party [DAP] is against detention under the Act as it was detention without trial.'

It was not the Sultan of Kelantan who sued me but a member of the Kelantan Royalty. It was contended the words uttered by me were tantamount to seditious libel and that it was sedition to degrade any Ruler or Sultan in the way I did. The High Court dismissed the suit holding:

> 'To possess locus standi, the plaintiff should be seeking to protect or vindicate an interest of his own. The plaintiff, purely on the ground of being of the Malay race and a subject of the Sultan of Kelantan, was not clothed with the necessary locus standi since there was no form of interference of his private right beyond that of any other Malay and subject of the Sultan of Kelantan. Therefore, the plaintiff had no locus standi to bring the suit.
>
> 'Issues which relate to alleged criminality do not come within the purview of a civil court as otherwise the civil court might be accused of intruding into the domain of the criminal court. Here, the plaintiff had made a complaint to the wrong forum and it should be left to the Attorney-General to take the necessary action.'[30]

I was, therefore, left by this judicial pronouncement at the tender mercies of the Attorney-General, who has not activated a sedition charge against me since. But then, alas, there is no limitation period for crime in Malaysia as

[30] *Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156

elsewhere in the Commonwealth!

I suppose I have to contend with the Sword of Democles hanging over me. After all, we barristers and advocates are duty-bound to uphold the Rule of Law and the cause of justice without regard to our own interests, uninfluenced by fear or favour.

CONTRACTS FOR BUSINESSMEN: SURVIVAL OF THE CLASSICAL MODEL[**]

CHRISTINA SS OOI[*]

INTRODUCTION

The law merchant or commercial law as it is now called was founded on an efficient economic system, which serves as a machinery for settling commercial differences in accordance with the ideas, trade custom and practices of businessmen. It is this very essence of the spirit of commercial efficiency to give speedy and simple justice according to the custom of businessmen.

The businessman is no ordinary citizen, and does not take the law much as he finds it. Instead, the businessman adopts a more independent stand as the parties in the business relationship are generally prepared to cooperate in the interests of their relationship.

Therefore, it is interesting to see the interplay of commercial law/contract law and the businessmen. Do businessmen use contract law to regulate their business relationships? Do they plan their contracts at all? If so, do businessmen rely on contractual remedies to resolve their business disputes and differences with their customers and suppliers?

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[**] It is the intent of this paper to explore the extent of use of commercial law/contract law and its contractual remedies by businessmen. It is also within the ambit of this discussion to reveal the empirical studies conducted by legal scholars around the world on understanding reasons why there is such a phenomenon - the indifference towards contract planning and towards the use of contractual remedies by businessmen in various jurisdictions and legal systems. Lastly, to complete the discussion, it is interesting to see the extent of such a phenomenon in the Malaysian business environment although no empirical study has been recorded in this area.

ATTITUDE OF BUSINESSMEN

Parties to a contract have the power to create their own remedies through the terms of the contract. Businessmen who are parties to a contract are no different. Today, legal scholars rarely ask whether businessmen do take the opportunity that the law presents them of using commercial law/contract law and its contractual remedies to plan their business relationships, and to create their own remedies.

According to Lord Devlin[1] it was the custom of the society that kept commercial law in tune with the ideas of businessmen. However, it is no longer the case today as the written contract has virtually killed custom. The written contract has now placed in the hands of the businessmen a substitute for it. The reality is that few businessmen can be bothered to write elaborate contracts for themselves.

Lord Devlin reasoned that the businessman is prone to treat the formal written contract, a document which he does not always bother to read, as being merely the seal that is set to chart the course of negotiations between himself and the other party with whom he has achieved a common understanding.

As a general observation, businessmen like the idea of a written contract; it gives them the feeling that they have tied the deal up. They like the solemnity of the contract but do not really care about the details. However, to the lawyer, the written contract has the ultimate merit of certainty and permanence; and he therefore presumes that it is the final embodiment of the parties' intentions and wishes.

Lord Devlin's observations on the attitude of the businessmen have been explored in numerous empirical studies of this issue. A common pattern has emerged in many common law and other jurisdictions despite their diversity. This pattern is consistent even where the parties to the business contracts are

[1] Devlin, P., 'The Relation between Commercial Law and Commercial Practice,' (July 1951) *14 The Modern Law Review 3,* p. 249.

of similar bargaining power. In essence, contract planning and use of contractual remedies is a rare occasion.

These studies have shown that businessmen are only concerned to ensure that their contracts are clear as to price, description of goods and services, and delivery conditions. Areas outside of these are left unattended to.

Tilbury, Noone and Kercher[2] observed that businessmen often feel that contract planning is too expensive, time consuming, and that it implies that parties do not trust each other. These businessmen avoid litigation because it is relatively too expensive. It also ruins the relationship of the parties. In many industries, it is not good reputation for any business firm to resort to using the law to resolve disputes.

Owing to that belief, commercial disputes are often settled using negotiations. It is also the belief that the law of damages is concerned with a single discrete breach of contract, which ignores the importance of a sustained and continued healthy business relationship.

CLASSICAL MODEL OF CONTRACT LAW

The classical model is based on the assumption that businessmen and entrepreneurs need to plan and deal with business risk. They do so by carefully drafting contracts, with terms and conditions understood and agreed to.[3] The common phenomenon, which has emerged from these empirical studies is very different from the classical model of a contract system.

In the classical model, for the contract to be performed and expectations met, the legal system defines when a contract is made, when ready to interpret the language used by the parties by applying norms which reflect the customs of the commercial community, and most importantly, offers remedies which

[2] Tilbury, M., Noone, M., and Kercher, B., *Remedies – Commentary and Materials,* The Law Book Co., 2nd ed., 1993.
[3] Macaulay, S., 'Elegant Models, Empirical Pictures, and the Complexities of Contract,' (1977) *11 Law and Society Winter*, p. 507.

either induce performance or compensate for non-performance. This model may fit one-time transactions, but the reality of modern business, particularly in the manufacturing industry[4], generally involves long-term relationships. Hence, the classical model assumes that the rules of contract law and the process of contract litigation are central, significant, and necessary for economic transactions in a modern capitalist economy.

According to David Trubek[5], in the classical model, litigation will only be used to resolve disputes under two conditions, namely, when there is low value in the current business relationship, and when there are high anticipated returns from the litigation process. Hence, this model only operates in special and limited cases when these conditions have been met.

EMPIRICAL STUDIES

Empirical studies on the extent of contract planning and the use of contractual remedies in commercial contracts by businessmen span across Wisconsin, United States of America (1963), Bristol, Great Britain (1975), Japan (1963 and 1974), Korea (1967, 1969), Indonesia (1974), Ethiopia, Africa (1974) and Poland (1971).

Kercher and Noone[6] seemed to allude to the fact that following the common phenomenon from these studies, Australian businessmen may follow the same pattern as seen in these studies, although no known study has been recorded to-date.

For the purpose of this paper, I will focus on four extensive ones; Wisconsin, Bristol, Japan and Poland.

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[4] Macneil, I. R..,'The Many Futures of Contracts,' (1974) *47 Southern California Law Review 691.*

[5] Trubek, D. M., 'Notes on the Comparative Study of Processes of Handling Disputes between Economic Enterprises.' Paper presented at the United States-Hungarian Conference on Contract Law and the Problems of Large Scale Economic Enterprise, New York, August 1975.

[6] Kercher, B. and Noone, M., *Remedies*, The Law Book Co, 1983 at p. 171.

The Wisconsin Study

Professor Stewart Macaulay[7] interviewed representatives of 48 companies and six law firms in Wisconsin, United States of America in 1963. He was concerned primarily with commercial contracts between manufacturers where his study was not limited to purchases and sales aspects.

In Macaulay's study, he saw contracts as involving two elements. Firstly, there is rational planning of transactions by having provisions carefully drafted to cater for future eventualities or contingencies, which are as foreseeable as possible. Secondly, where there is performance, it is induced by or where there is non-performance, it compensated by the existence of legal sanctions, or the use of actual or potential legal sanctions.

He divided the types of issues into four, namely, description of the primary obligations, contingencies, defective performance, and legal sanctions. His study revealed that in each of these types of issues, business transactions and exchanges involved a high degree of contract planning. However, he also found that there were equally many of these transactions, which 'reflect no planning or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances.'

The contracts reviewed in his study often covered only basic obligations such as price and description of goods sold. Many sellers and buyers swapped standard forms with contradictory terms, and they did not reach an agreement as to which sets of terms was to govern the transaction.

He also found out that there was little use of 'contractual practices' in long-term business relationships, and very little use of formal dispute resolution via the courts. However, in cases where the business relationship was strained or had soured such as in terminated franchises and dealerships where the relationships were already dead, business firms would be more prepared to be engaged in litigation.

[7] Macaulay, S., 'Non-contractual Relations in Business' (1963) 28 *American Sociological Review* 45, abridged in *Sociology of Law*, (ed. Aubert, 1969, Penguin, London) at pgs 195-209.

The Bristol Study

A similar study was conducted by two researches, Hugh Beale and Tony Dugdale[8] in Bristol, Great Britain in 1975 in the engineering manufacturing industry. Based on their research on other studies, they observed that the formal use of contractual remedies to settle disputes was 'unusual.'[9]

It was uncommon to go for arbitration or court proceedings, except if the dispute involved enforcement of uncontested debts. Contractual terms were not exercised, and settlement would be negotiated on some other basis. Smaller claims sometimes would be simply forgotten. The duo also found out that there was no complete contract planning even though the planning was focused more than just on primary obligations of the parties. In large contracts,which were specifically negotiated, it was common for important points to be deliberately left vague and ambiguous.

Where small items were traded, the transaction would be based on the pre-printed standard terms on the back of the buyer's order or the seller's acknowledgement slip. It was here that the attempt at contract planning broke down completely. There would be conflicting terms between the buyer and the seller, and neither party would make any attempt to resolve their differences. Hence, parties merely exchanged the documents, which were not legally enforceable contracts.

In the Bristol study, the researchers interviewed 33 representatives from 19 firms of engineering manufacturers about the firms' contracts of purchase and sale. Five of the interviewees were legal staff, at least one senior member of the firm, sales personnel and purchasing officers. Their research was concentrated on formation of contracts as a necessary preliminary, and the four issues of payment and security, cancellation of contract other than breach, delay and defects. They concluded that in each of these issues, there was little use of contract planning or of contractual remedies.

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[8] Beale, H. & Dugdale, T., 'Contracts Between Businessmen: Planning and The Use of Contractual Remedies,' (1975) 2 *British Journal of Law and Society.*
[9] Beale, H., *Remedies for Breach of Contract*, Sweet & Maxwell, London, 1980.

It is interesting to note that even though the sample size in the Bristol study was smaller compared to the Wisconsin Study, this seemed to confirm Macaulay's findings on the little use of contract planning or of contractual remedies. In their study Beale and Dugdale attempted to find out factors, which may influence engineering manufacturers in their decision on whether to plan a contract in detail, whether to adhere to their contractual rights and duties, and whether to employ contractual remedies when the need arises.

According to these researchers, one of the reasons why the firms agreed expressly only on their primary obligations, and not on the effect of the breach, is because they traded frequently and regularly, and therefore, were familiar with the attitude of each other. In practice an individual contract may only form a small part of a much larger commercial relationship between manufacturers who have regular business transactions with each other.

Hence, they share a common understanding of how business ought to be conducted between them, and need not have to state the 'unwritten laws' in each contract. These unwritten laws and trade customs were widely accepted by the firms, and formed the basis for settling any dispute. These manufacturing firms seemed to be less concerned with legal enforceability than with preventing any misunderstanding or dispute. They saw the contract as a mere vehicle for communication; nothing more than that.

The second reason why there was little contract planning is that planning was expensive, while the risk of a serious dispute or loss might be low. There seemed to be a feeling that a carefully negotiated contract might be insufficiently flexible to meet foreseeable events.

Litigation was opined to be expensive; so was prolonged negotiation of a dispute because highly paid personnel were distracted from their daily tasks and roles to be engaged in such negotiations which could be time consuming. This is especially pertinent when the unit value was low or the low likelihood of the dispute becoming serious, and the cost involved was not justifiable by the identified risks.

In addition, in cases of 'transaction-specific' situations, the firms would

be locked into a long-term relationship even if there was no detailed contract. As such, the firms would be reluctant to do business with others who may be newcomers or may not possess the right skills or the necessary equipment, with whom they would need to start to build and develop a relationship.

According to Beale and Dugdale, the firms would be in a situation of 'bilateral monopoly.' As such the parties would be motivated to quickly 'settle their differences and get on with the job' so that they could exploit the investment they had made together. In short, to allow any dispute to be escalated or evolved into hostile negotiations or even to resort to litigation or arbitration would be highly disruptive.

Further, such a highly negotiated contract might sour a healthy business relationship. The managers interviewed, seemed to think that a detailed contract would be too rigid, and any attempt made to define the relationship too much might sour it. They seemed to feel the likely impact of too much detailed planning or intervention by third parties on their long-term business relationships.

It was evident in their study that there was a considerable degree of trust amongst the firms. This was particularly so in smaller firms which obtained most of their orders locally, and who frequently placed great trust in the fairness of one or two large firms. There was a considerable degree of personal contact between officers, both in the business as well as in the social context.

The buyers interviewed, emphasized the need to maintain a reputation for the firm as fair and efficient. Both the salesmen and the buyers agreed that any attempt to shelter behind contractual provisions or even frequent reference to or citation of contractual terms would destroy the firm's reputation very quickly.

The main point about the general reputation of the firm was the desire to do business again with the other party, or with other firms in the same group of companies. Each party had to be prepared to make concessions and to do so in the spirit of cooperation. It was important to keep the relationship ongoing for as long as possible. Essentially, the parties have interests beyond the immediate transaction; they wish to do business again with each other for a long time.

The need to maintain the firm's reputation is a key incentive for the firm to deliver its performance. Hence, the risk of losing business becomes a more important sanction against default, than any legal remedy. This is one of the reasons why there is limited significance of contractual remedies in some cases.

Beale[10] explained that 'the need to do business in the future' is especially relevant to government contracts. He observed that government departments and local authorities nowadays seldom invite open tenders for work to be done. Instead, an approved list of contractors previously qualified from the technical as well as from the financial aspects would be selected and invited to participate in a closed bid.

This practice would ensure that the tendered scope of work is given to those who are responsible without the need to reassess these contractors each time there is a need for such work to be performed. If a selected firm fails to perform satisfactorily, it may be removed from the approved list or be given smaller scopes of work. Such a 'threat' is regarded as a serious sanction.

Such a practice is outside the normal boundaries of contract law. In fact, it is questionable if the firm, which has been removed from the approved list has any remedy under administrative law. But for the parties where there have been investments which are 'transaction-specific', such investments may not be able to be recouped on a single contract and cannot be used in transactions with other parties.

Special equipment may have been purchased or specialised skills may have been developed for the performance of such a contract. Hence, both parties would have been locked into the relationship; the party who has made the investment could only recoup it if further contracts are awarded, whilst the other party will face higher costs of he has to turn to other firms who may not have the right equipment or skills to deliver performance of the contract.

As such, this situation seems to create even greater incentives for better cooperation and more amicable solutions to resolve disputes. Hence, the

[10] ibid

existence of a long-term relationship seems to reduce the usefulness of contractual remedies.

One other reason for the manufacturers' indifference to contract law and remedies is the existence of a number of extra-contractual devices which could lessen the need to plan a contract to the level of detail required, or to resort to the agreed contractual remedies by the firms.

As an illustration, issues relating to non-payment could be reduced by taking credit ratings or bad debt insurance, whilst products liability insurance could safeguard a firm against risks arising from defective products, or even in cases to avoid late delivery, the buyer would place his orders much earlier and pay for them relatively earlier.

Self-help contractual remedies, without recourse to lawyers or litigation, such as withholding performance, incentive provisions or to a lesser extent, liquidated damages, have been expressly planned as a short-term protection without causing serious repercussions to the long-term business relationship.

However, Beale and Dugdale warned that it would be a mistake to assume that contract law has very little relevance. This is because it is always in the background and parties probably know in general their legal position but do not mention it. As one sales manager put it - 'it is an umbrella under which we operate.'

They observed that manufacturers did rely on contract law in situations where there was a serious risk of a dispute arising, for example, as in cases which involved foreign customers who might practise different procedures, or if there was a chance of a defective performance which might cause a serious loss to the firm. It was in such cases that detailed contract planning was evident. Litigation and arbitration would be more commonly used where foreigners were involved.

The Japanese Perspective

In Stephen W Guittard's article[11] on negotiating sales contract with the Japanese, he raised an interesting question of whether there is any connection between a social hierarchy and the Japanese approach to contracts. He observed that there is indeed a connection.

Generally, persons at the top of the Japanese corporate hierarchy possess a great deal of experience, and therefore, are very valuable to the company. These experienced people are expected to deal extensively in a contract with remedies and with the problems as they arise.

It is also important to note the mental processes of the Japanese businessmen. These include the pragmatic approach, the flexibility, the ad hoc approach to problems, and the emphasis on experience. The Japanese approach seems to say that problems of the future will be solved on the basis of the circumstances and capacities of the parties at that time. Hence, the flexible and pragmatic approach achieves the greatest results within the structure of the relationship of the parties.

From the Japanese perspective, to have a relationship means that one can be flexible; there is 'give and take'; and the words on a document like a contract merely serve as a guide or set of principles. Therefore, there is little contract planning involved.

According to Guittard, Japanese businessmen seem to base their actions on their pre-existing relationships to the extent that any agreed-upon directions or rules reflect what the parties expect to occur as a result of their relationships. Much broadly, Japanese businessmen see a contract as an expression of a relationship, rather than the basis for the formation of one.

Further, the relationship is itself a dispute resolution mechanism. To the Japanese businessmen, litigation is still generally viewed as a socially demeaning

[11] Guittard, S.W., 'Negotiating and Administering an International Sales Contract with the Japanese,' (1974) *8 International Lawyer 4*, p. 822.

situation. Arbitration and other forms of conciliation using third parties is an admission of failure to achieve a harmonious result between the parties.

Despite the fact that the Code of Civil Procedure contains provisions for an arbitration procedure, it is seldom used. Hence, clauses specifying that a dispute arising out of a contract shall be settled through arbitration are normally not exercised except in contracts with foreign business firms.

The presence of a third party such as an arbitrator, or a judge, or a mediator, simply means that the subjective approach to solving the dispute is no longer possible. This is because the existence of a third party merely means that the dispute will be viewed objectively. Further, the existence of a third party means that the relationship between the parties is deteriorating.

According to Kawashima[12], the Japanese prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision on who is right or wrong, much against the wills of the parties. It is his observation that judicial decisions emphasize the conflict between the parties, and deprive them of participation in the settlement. It is the expectation of the Japanese that even when a dispute occurs it is to be solved by mutual understanding based on a harmonious relationship. The Japanese business and social custom forbids one party to terminate a harmonious social tie by insisting on one's own interests selfishly.

However, in recent times, there have been indications of gradual change. Since the Meiji Revolution, Japan has been in the process of rapid transition. No study in this area has been found to illustrate the changing attitudes of Japanese businessmen in dealing with disputes and differences.

[12] Kawashima, T., 'Dispute Resolution in Contemporary Japan,' in von Mehren, A.T., (ed.) *Law in Japan – The Legal Order in a Changing Society,* Harvard University Press, Cambridge, Massachusetts, 1963.

The Polish Study

Kurczewski and Frieske[13] studied the practices of managers of Polish industrial enterprises in 1971 – 1972. Their study which is related to socialist contracts in Poland is an interesting addition to the numerous studies in other jurisdictions.

They conducted 60 interviews in depth with managers of state companies operating in various sectors of the economy throughout Poland, and 200 interviews with a random sample from one of the main industrial sectors of the nation. There they interviewed 86 directors, 62 deputy economic directors, 33 other deputy directors, and 19 legal advisers from 100 industrial companies.

The interview schedule contained questions about the way managers understand their professional role, their attitudes towards the national economic system, and the actual system of securing horizontal linkages among the units of a socialized economy.

Macaulay[14] in his comments about the Polish study noted that the socialist contract is a technique for placing both control and responsibility in the hands of those who manage enterprise. It is a means of dealing with the inability of the central administration to plan all details in a modern technological economy.

The classical model of contract in a socialist society also assumes the existence of contract norms and sanctions to induce performance. Managers are expected to adhere to this system to achieve two objectives.

Firstly, managers need to achieve the goals which have been set for them under the plan. Secondly, their problems and issues will be made known, and will come to the attention of their supervisors. Therefore, it is a safe assumption that the managers' discretion to make and perform contracts is very tightly controlled to ensure that the national plan is strictly adhered to, and will be carried out according to the plan.

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[13] Kurczewski, J. and Frieske, K., 'Some Problems in the Legal Regulation of the Activities of Economic Institutions,' (1977) *11 Law and Society Winter*, p. 489.
[14] Ibid, n.1.

In their study, Kurczewski and Frieske showed that a similar gap exists between the classical model and the empirical study in socialist Poland, just as in other jurisdictions. Their study also showed that the explanations for the gap are similar in both capitalist and socialist systems.

They indicated that it is the economically powerful who are likely to demand contract penalties. Only enterprises, which monopolize dealing in a given type of product, or enterprises which are in sporadic contact with a partner, can enjoy the luxury of invoking them. The system of contract penalties has a peculiar characteristic. The system works so long as the penalties are not actually applied. They work as a threat, but their application will be detrimental to the relationship.

To Kurczewski and Frieske, the classical model is a picture of how people ought to behave; their empirical study told a story of avoiding disputes if possible and, if not, of settling them by using techniques which are outside of the official model of central planning and socialist contract.

PERSISTENCE OF CLASSICAL MODEL

The classical model of contract law today still stands as central to the law and its study. There are many possible reasons for such a stand.

The most obvious explanation for the persistence of the classical model would be that legal academicians and scholars are unaware that the contract process described in the law books seldom affects behaviour directly. In some cases, these academicians and scholars are ignorant and unwilling to listen to the world outside the textbooks.

The other explanation is that the classical model of the contract process is partially accurate. In fact the classical perspective may just be an overgeneralization made based on a biased sample in some studies. In reality, there are large proportions of contract activities found in the courts which arise from situations involving debt collection, evasion of responsibilities, salvage

operations, and the like. But these topics do not excite these academicians and scholars.

Further, large important business organizations are seldom involved in these types of cases. That is probably why such large business corporations are not well represented in the classical model of the contract process. As such, these economically important contract cases are too rare to serve as a solid foundation for the classical model.

On this point, it is fair to say that businessmen only litigate and pursue appeals when the potential benefits are thought to outweigh the costs and risks. Hence, a large corporation which plans to continue in business would be hesitant to assert technical defences unless absolute necessary. It would be more likely to do so only when its economic power outweighs that of its adversary that it can afford to ignore the reaction of the latter.

Further, businessmen would only resort to the courts if their business relationships have already shattered, soured or strained. Hence, the contract is used for scavenger purposes, and that is to 'salvage something from the wreckage'. This is especially commonplace where a large business corporation is involved in bankruptcy proceedings or in the termination of franchises.

Yet another factor that contributes to the persistence of the classical model is that lawyers still have the illusion that contract planning and contract litigation ensures strict performance of obligations by the parties to a certain extent. However, findings from the empirical studies do not share the same opinion. Lawyers, legal academicians and scholars must realise that the application of contract norms through litigation, is costly and seldom pays.

CONTRACT AS A STRATEGIC WEAPON

It is interesting to note that businessmen do rely on contract norms and the possibility of contract litigation in their efforts to resolve disputes. The two cases below illustrate that partial litigation could be invoked without carrying the case to a conclusion in the courts. To the businessmen, this could be viewed

as a mere 'threat' to force parties to reach a quick settlement. This only goes to show that contracts do form the foundation for strategic business manoeuvres in an effort to reach a negotiated settlement by businessmen.

In such a strategy, the involvement of the courts may be marginal; only to the extent of filing a complaint, sending a letter using the law firm's letterhead in order to provoke serious negotiations and ultimately, force the parties to go for settlement.

The two recent cases in the United States between major business corporations are examples on the indirect use of contract norms for parties to reach a settlement.

The Westinghouse Electric Corporation Case[15]

In this case, Westinghouse Electric Corporation sold nuclear reactors to 27 power companies, and agreed to supply uranium oxide, the needed fuel, at an average price of $9.50 per pound. Even though Westinghouse had agreed to supply about 80 million pounds under these contracts, it had only purchased 15 million pounds of stock. Subsequently, the purchase price of uranium oxide rose from $6 a pound in 1972 to about $40 per pound in 1976.

Westinghouse then announced that it was terminating these contracts under Section 2-615(a) of the Uniform Commercial Code citing drastic market shifts. The power companies asserted in their numerous civil suits that Westinghouse had gambled and had lost, so that Section 2-615(a) was inapplicable.

After a trial which lasted for more than three months, the presiding judge sought to avoid making a decision based on contract norms. He pressed the parties to settle, and held negotiation sessions in his chambers with the Chairman of Westinghouse and the Presidents of the three utilities companies, the plaintiffs.

[15] *Wall Street Journal*, September 15, 1975, pp 4, 8.

The judge said, 'Any decision I hand down will hurt somebody and because of that potential damage, I want to make it clear that it will happen only because certain captains of industry could not together work out their problems so that the hurt might have been held to a minimum...[16] Solomon-like as I want to be, I can't cut this baby in half.'[17]

Finally, the judge's efforts succeeded when Westinghouse agreed to give the plaintiffs cash, services, and equipment over a number of years, which was estimated to have cost about a third of what the plaintiffs had claimed. The settlement also guaranteed the plaintiffs 'parity' with the 'most favourable of any settlements' Westinghouse might reach with the other 24 utilities suing it for breach of contract.

Eastern Airlines, Inc v McDonnell Douglas Corporation[18]

In this case, the defendant was late in delivering 90 DC-8-60 and DC-9 passenger jet planes to the plaintiff from 1966 to 1968. The delays were caused by the Vietnamese war, and its previous poor management under Douglas Aircraft Corporation. Owing to the delays, the plaintiff decided to purchase Lockheed L-1011 wide-body jets rather than the DC-10.

The plaintiffs who sued for breach of contract were awarded a $31.8 million judgement by the district court. The decision was later reversed by the Fifth Circuit on grounds of lack of proof of damage suffered, among other things, almost six years later. Instead of a re-trial, the parties reached a complicated settlement where the plaintiff returned nine older model DC-9 jets and leased nine newer model DC-9s at a price lower than usual.[19]

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[16] *New York Times*, February 11, 1977, D-1, D-10.
[17] *New York Times*, February 17, 1977, p. 57.
[18] 532 F. 2d 957, 5th Circuit, 1976.
[19] Gregory, W. H., 'Suit Settled as Eastern Leases 9 DC-9 Transports,' (1976) *104 Aviation Week and Space Technology 28; Standard and Poor's New York Stock Exchange Reports 792*, September 21, 1976.

Benefits of Partial Contract Litigation

To some large business corporations, litigation means that problems are turned over to lawyers to be handled, and this relieves management of the immediate heavy responsibility. It is here that lawyers could help the parties reach a quick settlement.

Litigation may also help to legitimate concessions in the eyes of external parties who may be keeping a watchful focus on the decisions made by the business corporation. Like in the *Westinghouse case*, the customers of Westinghouse are utility companies whose rates are regulated. Without some strong justification, these utility companies could not negotiate a settlement with Westinghouse, and then ask for a rate increase to cover their losses. That was why they sued Westinghouse for breach of contract.

Litigation may also affect the willingness of each party to make concessions. Litigation makes a statement that the dispute in question is serious, and is not subject to the usual process. Instead, litigation provides time limits in each step of the process, and parties are expected to adhere to these steps. By doing so, parties would be able to see the types of information exchanged in relation to claims and defences, damages and other contractual remedies made available.

As remote as it sounds, the contract litigation process may exert an indirect influence on the behaviour of managers of industrial enterprises[20] even if they do not realise it. When they negotiate, these managers may tacitly rely on the law to fill the gaps and to provide legal sanctions, without realising it.

THE MALAYSIAN PERSPECTIVE

There have been no similar empirical studies conducted on the attitude of Malaysian businessmen, their business ideas, custom and trade practices in relation to contract planning and the extent of their use of contractual remedies.

[20] Ibid, n.1.

Based on the empirical studies in Wisconsin, Bristol, Poland as well as views expressed from the Asia Pacific region from the Japanese and Australian perspectives, it would be a safe assumption to surmise that the attitude of the Malaysian businessmen would be no different from their counterparts overseas.

Like their foreign counterparts, Malaysian businessmen would be reluctant to practise the classical model of contract litigation in dealing with business disputes. Very little time would be spent on contract planning in terms of ensuring that all terms and conditions in the business contract would be fully dealt with and understood.

The Malaysian businessman would only focus on key elements such as pricing, delivery specifics, description of goods or services, and payment terms to be contracted. Very little emphasis would be made on areas concerning contractual remedies such as liquidated damages, compensation for loss, damage, late delivery, defects, etc unless the total contract value of the business transaction involves millions of Ringgit Malaysia.

Similarly, these remedies are not viewed as firm promises to be delivered by the defaulting party; rather they are viewed as a 'good to have' term 'just in case' things do not work out as planned. Hence, not much thought would be placed on them.

In cases where the situation commands for the remedy provision in the contract to be invoked, the Malaysian businessmen would first attempt to resolve the dispute or issue using extra-legal means such as having meetings or discussions between the parties, building on their long-term relationships or the 'face-saving' method of not resorting to seek legal advice. In this respect, self-help remedies would also be arranged.

There are many reasons why there is such strong reluctance on the part of the most Malaysian businessmen to seek legal remedies to resolve disputes.

There is the Asian methodology where heavy emphasis is put on business relationships and the 'gentleman's agreement', as practised by the Japanese businessmen. In fact, relationship is one remedy, which is recognised by Asian

business communities. Having long-term healthy relationships usually guarantee prolonged business transactions between these businessmen. This results in a continuous harmonious environment, which breeds future businesses involving foreign business partners.

Yet another reason is the traditional practice where family businesses may have begun for centuries. Such a phenomenon is especially prevalent in the Chinese businesses in Malaysia where it is commonplace to have family businesses being run for centuries through generations.

The current Chinese businessmen could be the second or third generations of their ancestors who had immigrated to Malaya from mainland China to seek greener pastures. These businesses would have prospered through the generations through business ties and relationships with their close friends and families. In fact, marriages are often arranged between business families just so that the family wealth is well kept within the limits of the two families, which have been joined in marriage.

The Malaysian court system is yet another reason why there is reluctance for Malaysian businessmen to resort to contract litigation. As with most other court systems, the court and litigation process is both time consuming and expensive. Depending on the dispute at hand, adjudication may not be the most efficient dispute resolution mechanism.

Of growing popularity in Malaysia are two other self-help remedies amongst Malaysian businessmen. These alternative dispute resolution 'ADR' mechanisms are arbitration and mediation.

In Malaysia, arbitral proceedings are governed by the Malaysian Arbitration Act 1952. Commercial arbitration is the most popular area of arbitration for cases involving disputes in shipping, insurance, construction and banking cases.

In terms of mediation, the Bar Council of Malaysia has taken positive steps to encourage mediation as an ADR mechanism between parties by setting up an ADR Sub-Committee entrusted with the task of training members of the

legal profession to be mediators. Such training includes courses in mediation conducted by experienced foreign and local mediators.

Additionally, the Bar Council has also set up the Malaysia Mediation Centre 'MMC' in Kuala Lumpur and in Penang. The MMC is a body established with the objective of promoting mediation as a means of alternative dispute resolution, and to provide a proper avenue for successful dispute resolutions. These Centres operate under a set of Mediation Rules and Code of Conduct formulated for a variety of matters relating to mediation, including the cost of such mediation process.

The MMC also has the responsibility to provide mediation workshops and training programs for lawyers in the practice of mediation. In the construction industry, for instance, at least two training courses for mediators have been conducted in association with The Accord Group anD Lawyers Engaged in Alternative Dispute Resolution 'LEADR', which are mediation groups from Australia.

Besides the MMC, there are other professional bodies which have also started to take a lead in this regard. Amongst those include The Institute for the Study and Development of Legal Systems 'ISDLS' where the MMC and ISDLS delegates plan to discuss the feasibility of incorporating court-guided mediation into the pre-trial process. A mediation seminar has been planned for 2004.[21]

At least four other industries have formed their respective mediation committees and bureaus to assist consumer disputes or complaints against its member companies. They are currently the General Insurance Association of Malaysia (Persatuan Insuran Am Malaysia or PIAM) Complaints Action Bureau & Insurance Mediation Bureau[22], the Malaysian Institute of Architects (Pertubuhan Akitek Malaysia or PAM) Arbitration & Mediation Bureau[23], the Malaysia Banking Mediation Bureau under the ASEAN Bankers Association[24]

[21] See website http://www.isdls.org/projects_malaysia.html
[22] See website http://www.piam.org.my/complain.htm.
[23] See website http://www.pam.org.my/arbitration_mediation200203.asp.
[24] See website http://www.aseanbankers.org/aba.

and most recently, the Construction Industry Development Board 'CIDB'.

CONCLUSION

It is true that based on the empirical studies, we have seen that businessmen do not usually regard contract planning and contract litigation as imperative 'tools' to help them run their businesses in a more efficient and profitable way. Contract planning and contract litigation are viewed as 'contingency ammunition' which businessmen would run for help only if the need arises.

They know that the law exists somewhere in the legal system, and they view contractual remedies as something which they hope they do not need to use for as long as they are able to manage their businesses in a profitable and efficient way.

However, this does not mean that the studies are representative of all businessmen in all industries in the countries where the studies were conducted. After all, these studies were conducted in the 1960s and 1970s, and had focussed only on the manufacturing industries. But they do certainly provide a visible pattern or trend, which is significantly consistent, and is worth noting.

It is my humble opinion that businessmen would continue to form this attitude for as long as their businesses are brisk and profitable, the demand and supply mechanisms are still working well, and there is efficient integrated supply chain for their trade.

In the New Millennium of today's business environment, global and domestic markets may not look too lucrative. Some economies are resilient to the forces of the marketplace, yet others continue to suffer from recession with no hope of a close rebound. Some others, experience slow business growth with unemployment on a steady rise.

Against an almost dismal backdrop such as this, it would be a wonder if businessmen would still continue to adopt their foolish attitude of not being

bothered with detailed contract planning, and making sure that contractual remedies are sufficiently drafted to compensate them completely in all foreseeable eventualities. They would be foolish if they did not begin to see this coming their way, slowly but surely.

Perhaps now is time for them to open their eyes, and be more willing to exercise their legal rights as Ellenbogen seems to allude to below before it is too late…

> 'Commercial men may regard the law as unduly technical and inelastic for their purposes so long as trade is brisk., or at any rate steady; but when markets fluctuate or droop, and they stand to lose more than they can afford, they are more willing to stand on their legal rights.'[25]

BIBLIOGRAPHY

Beale, Hugh and Dugdale, Tony, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies,' (1975) *2 British Journal of Law and Society,* pp. 45-60.

Beale, Hugh, *Remedies for Breach of Contract,* Sweet & Maxwell, London, 1980, pp. 4-10, 211-214.

Devlin, Patrick, 'The Relation between Commercial Law and Commercial Practice,' (July 1951), *14 The Modern Law Review 3,* pp. 249-266.

Ferguson, Robert B., 'The Adjudication of Commercial Disputes and the Legal System in Modern England,' (1980) *7 British Journal of Law and Society*, pp. 141-157.

Guittard, Stephen W., 'Negotiating and Administering an International Sales Contract with the Japanese,' (1974) *8 International Lawyer 4,* pp. 822-831.

[25] Ellenbogen, 'English Arbitration Practice,' (1952) *Law and Contemporary Problems*, p. 677.

Kawashima, Takeyoshi, 'Dispute Resolution in Contemporary Japan,' in von Mehren, Arthur Taylor (ed), *Law in Japan – The Legal Order in a Changing Society,* Harvard University Press, Cambridge, Massachusetts, 1963.

Kercher, Bruce and Noone, Michael, *Remedies,* The Law Book Co., 1983, pp. 169-178.

Kurczewski, Jacek and Frieske, Kazimierz, 'Some Problems in the Legal Regulation of the Activities of Economic Institutions,' (1977) *11 Law and Society, Winter,* pp. 489-505.

Macaulay, Stewart, 'Non-Contractual Relations in Business,' (1963) *28 American Sociological Review 45,* abridged in *Sociology of Law,* (ed. Aubert, 1969, Penguin, London), pp. 195-209.

Macaulay, Stewart, 'Elegant Models, Empirical Pictures, and the Complexities of Contract,' (1977) *11 Law and Society Review,* pp. 507-528.

Tilbury, Michael, Noone, Michael and Kercher, Bruce, *Remedies: Commentary and Materials,* The Law Book Co., 2nd ed., 1993.