



**Badan Peguam Malaysia
Malaysian Bar**

www.malaysianbar.org.my

Wisma Badan Peguam Malaysia
2 Leboh Pasar Besar
50050 Kuala Lumpur, Malaysia
Tel : +603-2050 2050
Fax : +603-2050 2019
Email : council@malaysianbar.org.my

**Circular No 164/2026
Dated 22 May 2026**

To Members of the Malaysian Bar

Highlights from the Appellate Courts (No 9/2026)

The Publications Committee is pleased to circulate the ninth edition of this case note series for the year.

The cases covered in this edition are as follows:

- (1) ISM Sendirian Berhad v Queensway Nominees (Asing) Sdn Bhd & 10 Ors (FC)**
Company law – Claim for minority oppression – Alleged breach of terms of shareholders' agreement – Proposition in Jet-Tech Materials v Yushiro Chemical Industry – Scope of complaints under Section 181 of the Companies Act 1965
Written by Lee Suan Cui

- (2) Petroliam Nasional Berhad (Petronas) v Kerajaan Negeri Sarawak & Anor (FC)**
Constitutional law – Articles 4 and 128 of the Federal Constitution – Rule 30 of the Rules of the Federal Court 1995 – Leave to commence proceedings in the Federal Court to challenge legislative competence to enact laws
Written by Priscilla Faith Lim

- (3) Mohd Helmi Annuar Mohd Kassim v Public Prosecutor & Other Appeals (FC)**
Constitutional law – Articles 5 and 8 of the Federal Constitution – Motion for review under Rule 137 of the Rules of the Federal Court 1995 – Constitutionality of the sentence of whipping
Written by Lucy Lee Zhe Hui

The case notes may be accessed [here](#) (see page 2 onwards).

Sincerely,

**Gregory Das
Co-Chairperson
Publications Committee**

**INTERNATIONAL
MALAYSIA
LAW
CONFERENCE**
CREATING PRECEDENCE

**MAINTAINING CORE PRINCIPLES
IN A TIME OF CHANGE**

27-30 OCT 2026
MITEC, KUALA LUMPUR

www.imlc.com.my

Scan for more details

Highlights from the Appellate Courts

ISM Sendirian Berhad v Queensway Nominees (Asing) Sdn Bhd & 10 Ors (FC)

Company law – Claim for minority oppression – Alleged breach of terms of shareholders’ agreement – Proposition in Jet-Tech Materials v Yushiro Chemical Industry – Scope of complaints under Section 181 of the Companies Act 1965

Panel:

Nordin Hassan, FCJ

Lee Swee Seng, FCJ

Collin Lawrence Sequerah, FCJ

Introduction

In **ISM Sendirian Berhad v Queensway Nominees (Asing) Sdn Bhd & 10 Ors (Civil Appeal No.: 02(f)-9-03/2025 (W))**, the Federal Court granted leave to appeal for the two questions of law below:

- (i) Whether, as a matter of law, the true ratio decidendi of the Federal Court decision in *Jet-Tech Materials v Yushiro Chemical Industry* [2013] 2 CLJ 277 is that the breach of the terms of a shareholders’ agreement can be actionable under section 181 of the Companies Act 1965 when accompanied by findings of oppression, disregard of interest, unfair discrimination, or unfair prejudice against the complainant?
- (ii) Whether the proposition espoused by the Federal Court in *Jet-Tech Materials v Yushiro Chemical Industry* [2013] 2 CLJ 277 at paragraph 37 of the reported judgment that “breaches of a shareholders’ agreement cannot be a basis for bringing a petition under s. 181. A complainant under section 181 of the CA must be confined to matters relating to the affairs of the company. Shareholders’ agreement and breach of the same clearly not matters relating to the affairs of the company. They are private matters enforceable by the parties to the shareholders’ agreement ...” is correct in law by reference to the following authorities:
 - (a) *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33;
 - (b) *Gue See Saw & Ors v Heng Tang Hai & Ors* [2020] MLJU 46; and
 - (c) *The Wei Kian & Anor v Golden Plus Holdings Berhad & Ors* [2020] MLJU 1050.

The Federal Court answered the second question in the affirmative and held that as a result, it was not necessary to answer the first question above.

Background Facts

Five joint venture companies were incorporated to acquire land for a project. The appellant, ISM Sendirian Berhad (“ISM”), held 30% of equity in the joint venture companies, and MPH Capital Berhad (“MPH”) held the remaining 70%. Eleven lots of land were acquired for the project, with two of these lots held by two other companies who are not in the joint venture, namely Caribbean Gateway Sdn Bhd (“Caribbean Gateway”) and MP Factor Sdn Bhd.

Subsequently, there was a proposal for Caribbean Gateway to hold all the lands held by three out of the five joint venture companies. It was also intended that Caribbean Gateway would obtain bank loans to finance land acquisition for the project.

Caribbean Gateway obtained four loans which were on-lent to the joint venture companies to repay the shareholder advances previously made by MPH to those companies. The proposal for Caribbean Gateway to hold the lands did not materialise.

MPH then presented a draft shareholders’ agreement to ISM, which stated that parties have agreed to use Caribbean Gateway as their joint venture company to acquire properties for the project and to develop those properties. However, no formal shareholders’ agreement was signed between ISM and MPH. Parties nonetheless agreed that the terms of the oral agreement between them are binding.

The main disagreement between the parties concerns the funding for the joint venture companies. ISM contended that the funding was to be divided into a cash portion and a loan portion apportioned on a 30:70 basis. On the cash portion, ISM would contribute 30% or 9% of the total funds required for each joint venture company. On the other hand, MPH is to contribute 70% of the cash portion and will also be liable to fund the entire loan amount at an interest rate of 8% per annum. ISM states that MPH should contribute 91% of the total funding required by each joint venture company for land acquisition.

However, MPH contended that the funding of the joint venture companies is in proportion to the parties’ agreed equity interests, that is, on a 30:70 basis, with 30% for ISM and 70% for MPH.

This dispute led to ISM filing an oppression action under section 181 of the Companies Act 1965 (“CA 1965”), on the following grounds:

- (i) The demand by MPH that ISM contributes 30% of the purchase price for the De Vegas land that was acquired by one of the joint venture company is contrary to ISM’s understanding of the shareholders’ agreement above;
- (ii) The rights issues shares undertaken by three out of the five joint venture companies had the effect of diluting ISM’s holdings in these companies;
- (iii) The imposition of interest on the shareholder advances made by MPH for the cash portion of the funding of the joint venture companies is contrary to ISM’s understanding of the shareholders’ agreement, that the cash portion was not to bear any interest;
- (iv) The refusal to re-elect Dato Ray Cheah as a director of the five joint venture companies; and
- (v) The transfer of one share in each of the three joint venture companies to another entity.

MPH filed a counterclaim against ISM to, among others, seek a declaration that the joint venture agreement had been

terminated as a result of ISM's breach of its obligation to contribute 30% of the total funding required.

High Court

The High Court first found that there exists an oral shareholders' agreement between ISM and MPH, and the terms are as argued by ISM (as explained above). The High Court ruled that ISM had proven its case of oppression on the first three grounds advanced above. The High Court rejected the other two grounds to establish oppression, namely the refusal to re-elect Dato Ray Cheah as a director, and the transfer of one share in each of the three joint venture companies to another entity. Crucially, the Appellant did not file any appeal on this finding of the High Court.

Court of Appeal

The Respondent filed an appeal to the Court of Appeal, which set aside the High Court's decision. It relied on the *Jet-Tech* decision by the Federal Court, and found that the dispute concerns the oral shareholders' agreement between ISM and MPH, and is not related to the company's affairs. It is therefore a private matter, and the issue of minority oppression under section 181 of the CA 1965 is not applicable under the circumstances.

Federal Court

The Federal Court granted leave for the two questions of law as cited above. The Federal Court answered the second question of law in the affirmative, and dismissed the Appellant's appeal. Before delving into the principles of law set out by the Federal Court, the Respondent at the outset raised a preliminary objection. It argued that the Appellant had raised 72 grounds in its memorandum of appeal and written submissions, which were not related to the questions of law allowed by the Federal Court. The Federal Court upheld the Respondent's preliminary objection, and ruled that the appeal should be confined only to the two leave questions allowed.

In answering the second question of law in the affirmative, the Federal Court dissected its previous judgment in *Jet-Tech*, in particular paragraph 37 of the reported judgment. It held that paragraph 37 of *Jet-Tech* which states that "*breaches of a shareholders' agreement cannot be a basis for bringing a petition under s. 181. A complaint under s. 181 of the CA must be confined to matters relating to the affairs of the company*" must be analysed in its entirety alongside the other parts of the grounds of judgment in *Jet-Tech*, where the Federal Court had analysed the nature of the complaint in *Jet-Tech*, and found that it is not a matter relating to the company's affairs under section 181 of the CA 1965.

The Federal Court in paragraph 70 of its decision in *ISM Sendirian Berhad* emphasised that "*there is no express pronouncement or indication in paragraph 37 or any part of the grounds of judgment [of Jet-Tech] that any breach of the shareholders' agreement is not actionable under section 181 of the CA 1965. The lucid and express pronouncement in paragraph 37 is that the matter must relate to the company's affairs*".

This statement provides clarity that *Jet-Tech* cannot be used to argue, as a blanket rule, that a breach of a shareholders' agreement *ipso facto* cannot amount to oppression.

The Federal Court proceeded to consider the allegations of oppressive actions made by the Appellant, and found that they are unsubstantiated by evidence and without merits.

Written by
Lee Suan Cui
Member, Publications Committee

Petroleum Nasional Berhad (Petronas) v Kerajaan Negeri Sarawak & Anor (FC)

Constitutional law – Articles 4 and 128 of the Federal Constitution – Rule 30 of the Rules of the Federal Court 1995 – Leave to commence proceedings in the Federal Court to challenge legislative competence to enact laws

Panel:

Hashim Hamzah, CJM

In ***Petroleum Nasional Berhad (Petronas) v Kerajaan Negeri Sarawak & Anor*** (Motion No.: BKA-1-01/2026 (W)), the Federal Court granted Petronas leave to commence proceedings in the Federal Court against the Sarawak State Government and Government of Malaysia, pursuant to Articles 4(3), 4(4) and 128(1) of the Federal Constitution read together with Rule 30 of the Rules of the Federal Court 1995.

Petronas sought leave to commence proceedings to seek declarations that, amongst others, the Legislature of the State of Sarawak ("**LSS**") had acted beyond or outside its legislative competency or power to make laws when enacting, modifying, amending, revising or otherwise making certain legislations or provisions, thereby rendering the said impugned legislations or provisions invalid, void and unconstitutional.

In this regard, Petronas seeks declarations that various Sarawak laws are invalid and unconstitutional to the extent that they:-

- (1) define "*land*", "*State land*", "*territory of the State*", "*onshore or offshore land*", or similar expressions as including the continental shelf;
- (2) regulate offshore petroleum operations and continental shelf resources; and
- (3) regulate matters said to fall within the Federal List, including external affairs and petroleum regulation beyond mere gas distribution.

The impugned provisions include parts of:-

- (1) Sarawak Distribution of Gas Ordinance 2016;
- (2) Sarawak Oil Mining Ordinance 1958;
- (3) Sarawak Land Code 1958;
- (4) Sarawak Interpretation Ordinance 2005;
- (5) Sarawak Environment (Reduction of Greenhouse Gas Emission) Ordinance 2023;
- (6) Sarawak Land (Carbon Storage) Rules 2022;
- (7) Sarawak National Parks and Nature Reserves Ordinance 1998;
- (8) Sarawak Forests Ordinance 2015; and
- (9) Sarawak Flaring and Venting Rules 2025.

Background Facts

By virtue of the Petroleum Development Act ("**PDA**") 1974, the entire ownership, rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore of Malaysia, is vested in Petronas. In this connection, the vesting of Petronas' ownerships and exclusive rights took effect *vide* vesting agreements entered into by Petronas with the Government of Malaysia and Sarawak State Government respectively.

In return for the vesting of Petronas' ownership and the exclusive rights mentioned above, Petronas is required to pay to the Sarawak State Government cash payments as may be agreed between both parties. To this end, Petronas had entered into a cash payment agreement with the Sarawak State Government.

Petronas' Case

In essence, Petronas contends, amongst others, that:

- (1) The LSS had neither power nor the competence to enact the impugned legislation to regulate matters under the Federal List;
- (2) The impugned legislations have either directly or indirectly extended the Sarawak State Government's activities beyond the distribution of gas as stipulated under the Borneo States (Legislative Powers) Order ("**BLO**") 1963, read together with Article 95C of the Federal Constitution; and
- (3) There was an attempt by the LSS to include the continental shelf or offshore as part of the Sarawak State Government's territory through the enactments or amendments to the law, which was unlawful. The Sarawak (Alteration of Boundaries) Order in Council ("**OIC**") 1954, which the Sarawak State Government relies on, is no longer valid law pursuant to Section 3 of the Malaysia Act 1963.

Sarawak State Government's Position

The Sarawak State Government's position rested principally on two propositions:

- (1) First, the OIC 1954 has never been repealed, amended or otherwise modified and accordingly remains valid law; and
- (2) Second, the question of whether the OIC 1954 has been superseded by federal law post-Malaysia Day is not a matter that falls for determination under Article 128 of the Federal Constitution, and therefore falls outside the original jurisdiction of the Federal Court invoked by Petronas.

Federal Court's Decision

The Federal Court allowed Petronas' application for leave on the following grounds:

- (1) Petronas' challenge against the impugned legislation falls squarely within the exclusive jurisdiction of the Federal Court. Petronas had demonstrated that leave is necessary and Petronas has an arguable case against the Respondents;

- (2) The enactment and the amendment of the impugned laws by the LSS may have some impact on its rights and obligations under the PDA 1974 and the related agreements;
- (3) Petronas' challenge against the competency of the LSS to enact the impugned laws is clearly reserved for the original jurisdiction of the Federal Court; and
- (4) Thus, all the issues pertaining to the constitutionality of the impugned laws should be fully canvassed before the Federal Court.

In view of the above, Petronas was granted leave to initiate the intended proceedings before the Federal Court.

Written by
Priscilla Faith Lim
Member, Publications Committee

Mohd Helmi Annuar Mohd Kassim v Public Prosecutor & Other Appeals (FC)

Constitutional law – Articles 5 and 8 of the Federal Constitution – Motion for review under Rule 137 of the Rules of the Federal Court 1995 – Constitutionality of the sentence of whipping

Panel:

Wan Ahmad Farid Wan Salleh, CJ

Azizah Haji Nawawi, CJSS

Lee Swee Seng, FCJ

In **Mohd Helmi Annuar Mohd Kassim v Public Prosecutor & Other Appeals** [2026 CLJU 1285], the Federal Court had to decide whether whipping was unconstitutional for violating Articles 5 and 8 of the Federal Constitution. The Applicants argued that whipping constituted cruel, inhuman and degrading punishment, carried a risk of death, and was therefore disproportionate and contrary to the right to life and equal protection under the Federal Constitution.

Background

Three Applicants, previously convicted under s.39B(1)(a) Dangerous Drugs Act 1952 and s.302 Penal Code, had originally received the mandatory death penalty.

Following the coming into force of the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023, the Federal Court resentenced the Applicants to terms of imprisonment together with whipping. The Applicants were each resentenced to 30 years' imprisonment and 12 strokes of whipping.

After resentencing, they learned of the death of Mohd Zaidi Abdul Hamid ("**Zaidi**"), who died days after being whipped at Pokok Sena Prison pursuant to the sentence imposed upon him. His death certificate recorded the cause of death as "*Septic Sequelae due to Blunt Force Trauma to the Gluteal Region*".

The Applicants then filed review applications under Rule 137 Rules of the Federal Court 1995 ("**RFC**"), seeking to set aside the whipping sentences on constitutional grounds.

Majority Judgment

(Wan Ahmad Farid Wan Salleh, CJ and Azizah Haji Nawawi, CJSS)

The majority judgment dismissed all three review applications and upheld the constitutionality of whipping.

Rule 137 threshold satisfied

The Court held that Rule 137 of RFC could be invoked where the factual substratum necessary to support the constitutional challenge was not available at the time of the earlier decision. As the Applicants could not previously have relied on Zaidi's death, the threshold for review was met.

The Court also clarified that the categories for invoking the review powers of the Federal Court in *ASEAN Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* were not exhaustive.

Article 5(1): No violation of the right to life

The Court reaffirmed the prismatic approach toward the interpretation of the Federal Constitution established in *Lee Kwan Woh v PP and Alma Nudo Atenza v PP*, emphasizing that fundamental liberties must be interpreted to give meaning to abstract concepts such as life and personal liberty. Under this approach, a challenge to the right to life under Article 5(1) would engage Article 8(1), requiring the state action to meet the test of proportionality.

However, the majority held that the Applicants failed to discharge the burden of proving that whipping is unconstitutional. The Court found no sufficient medical evidence establishing a causal link between the whipping itself and Zaidi's death.

The majority noted that the proximate cause of death of Zaidi was not the punishment itself but a *novus actus interveniens*, if at all, in the form of subsequent medical mismanagement. The Court also noted that:

- (a) there was a nine-day interval between the whipping and Zaidi's complaint of illness;
- (b) the Applicants themselves had not adduced medical evidence showing that they were medically unfit to undergo whipping; and
- (c) the Criminal Procedure Code ("**CPC**") contains safeguards, including medical certification requirements.

Accordingly, the Court held that the Applicants failed to establish that whipping deprived them of life contrary to Article 5(1).

Whipping was not a cruel, inhuman or degrading punishment

The Court held that punishment, by its very nature, is punitive and necessarily entails hardship or discomfort. The majority rejected the proposition that whipping was uniquely cruel or degrading, observing that all lawful forms of punishment inevitably encroach, to some extent, upon an individual's personal dignity and comfort. The mere possibility of adverse consequences does not, in itself, deprive a punishment of its legal legitimacy.

Separation of Power: Legislative vs Judiciary

The majority further held that determining whether a punishment is morally oppressive or degrading is ultimately a matter of public policy falling within the Parliament's legislative competence.

Relying on the majority judgment in *Letitia Bosman v PP* which established that the formulation of policy regarding the constitutionality of the mandatory death penalty falls outside the judicial remit, the Court held that controversial questions involving punishment and competing moral considerations are matters for legislative determination rather than judicial intervention.

The Court cautioned that the judiciary should not assume the role of a "super-legislature" by substituting its own moral preferences for Parliament's policy choices.

Proportionality under Article 8(1)

The Court held that because no violation of Article 5 was established, a proportionality analysis under Article 8 was not strictly necessary.

Nevertheless, even if applied, the whipping provisions were proportionate because:

- (a) the legislation pursued legitimate objectives, namely deterrence and public protection;
- (b) whipping bore a rational connection to those objectives; and
- (c) the punishment was proportionate when viewed together with the safeguards under the CPC, including:
 - (i) medical supervision;
 - (ii) limits on the rattan size;
 - (iii) statutory caps on the number of strokes at 24; and
 - (iv) the reduced minimum of 12 strokes (lowered the previous minimum of 15 strokes) introduced under Act 846, the Abolition of Mandatory Death Penalty Act 2023.

Article 8(2): Gender discrimination

The Malaysian Bar, appearing as amicus curiae, submitted that the exemption of women from whipping under s. 289 of the Criminal Procedure Code was inconsistent with Article 8(2) of the Federal Constitution.

The Court rejected this contention, clarifying that discrimination under Article 8(2) requires an element of "unfavourable bias" and does not prohibit preferential treatment that serves as a positive measure specifically carved out in favour of women.

International human rights treaties and norms

The Applicants relied on international human rights instruments and norms, including the Universal Declaration of Human Rights ("UDHR"), to argue that whipping amounted to cruel, inhuman and degrading punishment contrary to internationally accepted human rights standards.

The majority of the Court held that international treaties and norms do not form part of Malaysian domestic law unless formally incorporated by Parliament. The majority concluded that the Constitution itself is the "ultimate acid test" of constitutionality and that unincorporated international norms cannot override it or be used to override or invalidate statutory provisions.

Dissenting Judgment (Lee Swee Seng, FCJ)

Rule 137 properly invoked

The dissenting judgment held that the Federal Court possessed inherent power to revisit decisions to prevent grave injustice. His Lordship accepted that the Federal Court had jurisdiction under Rule 137 to review the whipping sentences because, if unconstitutional, the punishment would amount to an unlawful sentence causing grave injustice, observing that once carried out, "a person whipped cannot be un-whipped".

Article 5 and cruel, inhuman punishment

His Lordship considered that the fresh evidence concerning Zaidi's death raised concerns as to whether whipping constitutes punishment "in accordance with law" under Article 5(1).

His Lordship attached significant weight to the irreversible nature of whipping, the risk of death and the severe physical consequences arising from the punishment. In describing the nature of judicial whipping, His Lordship emphasised that the punishment involves the offender being stripped and tied to a whipping frame before being struck with a rattan cane with considerable force on the buttocks. The force used causes the skin to tear and blood to ooze out, leaving wounds that may take weeks to heal.

His Lordship regarded the punishment as intentionally inflicting physical suffering and humiliation, inconsistent with the State's duty to safeguard life.

Article 8(1): Proportionality

His Lordship took a broader view of proportionality, holding that Article 8(1) protects against arbitrary, oppressive, or excessive punishment. His Lordship considered that punishments involving the intentional infliction of extreme pain and the risk of death require intervention, as the state must not descend to the level of the criminal.

Article 8(2): Gender discrimination

Regarding the exemption of women from whipping under s. 289 of the CPC, His Lordship held that this differential treatment is not constitutionally discriminatory.

His Lordship found that the exemption is a form of special treatment rather than adverse discrimination against men. It recognises the different impact corporal punishment has on women, specifically the risk to their child-bearing ability and the trauma associated with the execution of the sentence.

His Lordship used this exemption to highlight the nature of the punishment itself. He observed that the legislature's aversion to subjecting women to such a risk underscores the acknowledged inhumanity of whipping.

Review power of the Court

His Lordship offered a counter-perspective on the separation of powers, finding that the judiciary is allowed, and indeed duty-bound under Article 4(1), to intervene where legislative policy infringes fundamental liberties.

Accordingly, where a punishment is cruel, inhuman or degrading, the Courts must strike it down as being disproportionate and inconsistent with Articles 5 and 8 of the Federal Constitution.

International human rights treaties and norms

Unlike the majority, the dissent was receptive to international human rights norms as interpretive aids in construing fundamental liberties, noting that Malaysia has given statutory recognition to the UDHR through s.4(4) of the Human Rights Commission of Malaysia Act 1999, insofar as it is consistent with the Federal Constitution.

Referring to the UDHR's prohibition against cruel, inhuman, or degrading punishment, His Lordship emphasised that Malaysia, as a member state of the United Nations, has a moral obligation to uphold the dignity of individuals in the penal system.

His Lordship found that whipping is unconstitutional being in violation of and inconsistent with UDHR which is part of the constitutional framework of human rights in Malaysia, noting that ignoring such norms risks making the nation an "*outcast among nations*".

Conclusion

The majority ultimately upheld the constitutionality of whipping, holding that the Applicants failed to establish any violation of Articles 5 or 8 of the Federal Constitution. The Court further held that questions concerning the desirability of whipping are matters for Parliament rather than the judiciary.

In dissent, Lee Swee Seng FCJ declared and struck down the whipping provisions under the CPC and Federal penal statutes (excluding Syariah and school discipline) as unconstitutional, and ordered that such declaration be applied prospectively.

Written by
Lucy Lee Zhe Hui
Member, Publications Committee