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INFOLINE

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Editorial

The Establishment of LawCare : The Malaysian Bar Benevolent Fund

The establishment and the launch of LawCare is significant. It is a concrete indication of how the Bar has always, and will always, care for its own.

The Fund, administered by the Bar Council, will allow affected lawyers to not have to stand alone in their times of difficulty. Contrary to public perceptions, not many lawyers fade away as wealthy individuals. Those who do will in most cases have derived their wealth from efforts, other than those in the law. Those who operate purely as lawyers are sometimes not so fortunate. With rising inflation, rising costs and a devaluing ringgit, many a lawyer faces great uncertainty as regards his or her long term financial security. This coupled with the already uncertain nature of legal practice, as vulnerable to the ins and outs of the economy as any other profession or industry, many a times foreshadows a bleak and difficult future for those whose gains were not as well prophesized as the next, whose planning unfortunately went awry, or who were simply not in a position to do anything other than make ends meet. Then, there are those who have sacrificed themselves to the cause, forsaking large fees for the pursuit of ideals, for their vision of a better society.

There are some who adopt a more laissez faire attitude towards these matters and question the need for such a fund. They contend that it should be, as with most other professions and industries, a matter of the survival of the fittest. Individuals, they argue further, should make their choices responsibly and if one sees that a particular profession is leaving them vulnerable to uncertainties, that individual should consider a career change. There are several ways in which this cynicism can be responded to. Firstly, the legal profession is and has always been a noble profession, bred out of the need for justice and order in society. It is this order, which allows those who reap benefits, including these cynics, to do so. Those who embrace the law as a profession do so without any real expectation of enormous gains. Without individuals willing to do so, the profession would come to an end, and with it, perhaps the last bastion against anarchy.

Secondly, benevolent funds are not a novel concept. They have been tried and tested in various fields and have more usually been established in recognition of the valuable contributions the respective professions and their members have played in larger society. The Bar recognizes the vital role that its members play in Malaysian society.

Thirdly, uncertainties prey on anyone and everyone. There would be no clichés if it were otherwise. It is hoped that LawCare, will allow the Bar to buffer against these uncertainties. The Fund is perceived as being so significant, that DYMM Paduka Seri Sultan Perak Darul Ridzuan, Sultan Azlan Muhibuddin Shah, has graciously consented to acting as the patron of the same.

The success of LawCare is however in the hands of the Bar. While the Bar Council will provide a grant towards the establishment of the fund, much will depend on the generosity of members of the Bar and their associates. Fund raising is a vital aspect of LawCare and the Bar Council will have to ensure this aspect is effective at an optimum level. In order to kick-start the process, the Bar Council has organized a fund raising dinner scheduled to be held on 10 January 2004. It is vital to the success of this fund that this dinner be well attended as the price of the tickets will go towards the fund. More information on the dinner is set out inside this issue of Infoline.

Contents

4 Your Opinion
9 News
14 Comment
16 Press Statements
18 Articles
25 Diary
26 Notices
30 In Memoriam
31 Library Update

14 Admission to the Bar as Advocates & Solicitors
18 Payment by Cheque on Completion is No Good Payment
21 Striking Out a Notice of Appeal

Centrefold ...
1 Legalising Torture

Human Writes
(An Infoline Pull-Out)
Issue 5 Oct / Nov 2003

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BAR COUNCIL OFFICE BEARERS AND COUNCIL MEMBERS 2003/2004

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Infoline is the official newsletter of the Malaysian Bar, published monthly by the Bar Council of Malaysia. Its editor is Mr Malik Imtiaz Sarwar. Members of the Publications Committee are Hj Kuthubul Zaman Bukhari, Mr Yeo Yang Poh, Dato' Mohd Sofian Abd Razak, Mr Ragunath Kesavan, Mr M Mathialagan, Mr S Gunasegaran, Mr Benedict Cheang, Mr Yang Pei Keng, Mr Cecil Rajendra and Mr Jerald Gomez.

The Bar Council welcomes letters, articles, views and news (including photographs) for possible inclusion in the newsletter. However, the Bar Council reserves the right not to publish them or to edit those published as regards content, clarity, style and space considerations.

Articles from individuals that are published contain the personal views of the writers concerned and are not necessarily the views of the Bar Council.

RESULTS OF BAR COUNCIL ELECTION 2004/2005

Total number of Ballots issued	:	11,130
Total number of Ballots received	:	3,153
Number of spoilt Ballots	:	27
Number of Ballots undelivered	:	55

1	**Hendon Mohamed**	**1936**
2	**Sulaiman bin Abdullah, Haji**	**1431**
3	**Cecil Rajendra**	**1264**
4	**Cyrus V Das, Dato' Dr**	**1256**
5	**Mohd Sofian bin Tan Sri Abd Razal, Dato'**	**1240**
6	**Low Beng Cboo**	**1227**
7	**Hamid Sultan bin Abu Backer, Haji**	**1170**
8	**Mah Weng Kwai**	**1159**
9	**Christopher Leong**	**1109**
10	**Yasmeen binti Haji Muhamad Shariff**	**1100**
11	**Ambiga Sreenevasan**	**1088**
12	**Malik Imtiaz Sarwar**	**1060**
13	Jerald Gomez	1014
14	Manjeet Singh Dhillon	978
15	Zulkifli bin Noordin	877
16	Charles Hector	794
17	Shamsuriah binti Sulaiman, Hajah	780
18	Ragunath Kesavan	755
19	P Uthayakumar	715
20	A Zamani bin Mohammad, Haji	694
21	Serene S Ong	692
22	Mohd Abu Bakar bin Rautin Ibrahim, Dato'	652
23	Chia Loong Thye	630
24	Petra B A Oon	621
25	Sa'adlah binti Din	614
26	Andrew Khoo Chin Hock	609
27	Abu Zahar @ Azahar bin Datuk Anika Ujang, Dato'	607
28	S Ravichandran	605
29	Mohd Rafie bin Mohd Shafie, Dr Haji	593
30	Zamani bin Ibrahim, Haji	575
31	Hamzah bin Mohd Kassim, Dato' Haji	565
32	Steven T C Tai	565
33	Mohd Mahyudin bin Zainal	450
34	Toh Su Lin	310
35	Manjit Singh Sachdev, Dato' Dr	292
36	Chan View Hock	232
37	Sin Yoong Ming	194
38	Patrick Michael Dass	183

Dated this 1st day of December 2003

We declare the first twelve (12) persons abovenamed duly elected to the Bar Council for the year 2004/2005 on the assumption that the said persons were not disqualified from being nominated or from holding office under the Legal Profession Act.

Mr Vernon Ong

Dato' Dr Haji Yaacob Hussain Merican

Mr Inderjit Singh

Block Banks & Developers from Varying the Professional Fee for Non-Contentious Matters

Om Saravanadevi a/p Subramaniam
Advocate & Solicitor
10 November 2003

The following letter was written to the Bar Council in response to a letter written by Vasanthi Clement titled 'How long can our legal profession go?' on 22 August 2003, and published in the September issue of Infoline, 2003.

I refer to the letter dated 22/8/2003 by Vasanthi Clement @ Shanti, Advocate & Solicitor published in the Infoline, September 2003 issue.

I would like to support the sentiments made by Ms Shanti. Our legal fee for non-contentious matters is regulated and governed by s. 113 of the LPA. Is it not against s. 113 of the LPA 1976, when certain banks and developers vary or prescribe the professional fee by advertising 'legal fee waived', 'free moving cost for loan documentation' (50% slashed from the solicitor's bill to the bank).

I strongly urge the Bar Council to view this matter seriously and to interfere to block certain banks and developers from varying or prescribing the professional fee for non-contentious matters and to stop advertising 'legal fee waived', 'free moving cost for loan documentation' as these words appear to be making a mockery of our professionalism.

By allowing certain banks and developers to vary/prescribe fees for non-contentious matters tantamounts to allowing them to dictate and take control of our professional practice. CAN'T WE COLLECTIVELY PUT A STOP TO THESE PRACTICES IMMEDIATELY!

'Public Master' or 'Public Servants'?

Yang Pei Keng
10 October 2003

Of late, a citizen had an unpleasant encounter with a police officer when lodging a police report about a car accident. His car was knocked into from the rear by another car.

He made it a point to lodge the police report within 24 hours of the accident. He knew full well that it was his absolute legal right under the Road Traffic Act to do so. No one can deprive him of such right. Even if he were to lodge his report 24 hours after the accident, he is still legally entitled to do so, but on pain of having to pay a fine for being late in lodging a police report.

At the police station, he was shocked to come across a less than friendly police inspector on duty. The police inspector for no valid reason blamed him for lodging his report 'late'. He grumbled that the citizen should have lodged the report earlier, and should not have wasted the time of the police since the police were a busy lot.

The good-natured citizen tried to explain to the police officer that being a legal practitioner, he was bogged down with work. That is why he was unable to lodge the report earlier. In any case, he had lodged the report well within the 24 hours of the accident. There was nothing wrong with that.

The police inspector ought to be aware of the absolute legal right of a citizen to lodge a report within 24 hours. No one could curtail such a right. However, upon hearing the explanation given, for no rhyme or reason, the police officer flared up again and made the remark that the police were also a busy lot, implying that the rights of the police prevailed over a citizen's legal right. He seemed to be propounding the untenable 'theory' that a citizen's rights should give way to police rights.

He seemed to be oblivious of the fact that, as a police officer, it was his statutory duty to serve the public to the best of his ability. It was not the other way round. It was not for the public to serve the police.

Public servant or 'public master'?

The unreasonable attitude of the police inspector goes to show that he seemed to ignore the fact he was a public servant, paid by the taxpayers to perform his duty as a police officer. He is merely a public servant employed by the taxpayers, through the government of the day. He is there to serve the public, and not for members of the public to serve him.

His uncalled for remark and arrogant attitude betray his undesirable mentality: He was treating himself as the master of the public, and not as the servant of the public. He had elevated himself to the status of a 'public master'. He did not look upon himself as a public servant. He regarded himself as someone who could lord over the citizenry in total disregard of the law.

He seemed to have forgotten that he is to serve the people. He is entrusted with the duty and obligation to maintain law and order against bad hats, but not to treat the innocent in an unfriendly manner. Every person is entitled to his legal rights. It is not for any public servant to lord over any innocent citizen in the performance of his duty by way of curtailing the citizens' rights.

Surely it is not within his power to curtail the legal rights of a citizen, for example, to deny or curtail the legal right of a citizen to lodge a police report within 24 hours of an accident. It is not for

him to insist upon a citizen to lodge a police report early solely for the convenience of the police officer.

However, it would be an entirely different matter if he had politely requested for the co-operation of the citizen, and not unjustifiably demanded the curtailment of the legal rights of a citizen.

Why adopt such an arrogant attitude?

Why was the police inspector adopting such an arrogant and unfriendly attitude towards a member of the public?

One of the reasons is that there is a prevalent distorted view of what public service is. The concept of public service has undergone almost a radical change for the worse in recent years.

Some public servants today do not seem to regard themselves as servants of the public. It was entirely different in the early years. For instance, decades ago, police officers in this country would show great respect to legal practitioners as officers of the court. However, these days, no such due respect is shown. Of course, one does not deny that there are contributory factors on the part of certain members of the legal profession.

Solution

To alleviate the deteriorating situation, among other things, perhaps Suhakam may be able to play its role in this respect as a statutory human rights organization.

Suhakam has undertaken to introduce its human rights training programme for the police. It may add an appropriate module to the programme, reminding police officers of their duty to respect the rights of individuals. The police ought not to infringe upon the human rights and civil rights of the citizenry at their whims and fancies.

Apart from giving training and education to the police officers, there must be a 'follow-up' to see to it that police officers genuinely put into practice what they have learned about human rights and civil rights of every citizen.

More importantly, the upper echelon of the Executive must also play its role in setting a good example for the police force, as the Chinese saying goes: ***'If those high up do not set a good example, the subordinates cannot be expected to behave well.'***

The executive must truly uphold the rule of law - the bedrock of democracy, and protect and promote human rights in this country.

The following article was written in response to a news article titled 'Register, Care Centres told' published in Sunday Star on 21 September 2003 at page 21

Regulation of Care Centres

Alex Tan Ken Seng

In the Sunday Star of 21st September, at page 21, with the headline 'Register, care centers told' it was reported as follows:-

'SETIU: The Social Welfare Department has been directed to take legal action against care centers which are not registered with the department.

'National Unity and Social Development Ministry parliamentary secretary Datuk S. Veerasingam said the department had identified 312 centres which had failed to comply with the ruling.

'He said the centres were mainly orphanages, old folks homes and those catering to the handicapped and mentally impaired.

"We want all these bodies to register with the department so that there is proper control on their activities,' he said after a meeting with Social Welfare department directors at the Sutra Beach Resort here recently.

'Under the Care Centres Act 1993, he said operators of centers which were not registered with the department could be fined up to RM10,000.00 or 2 years' jailor both.

'If the centres continued to operate after being found guilty, they could be fined up to RM1,000.00 per day, he added.

'We normally advise operators to comply with the law. However, we will haul them to court if they continue to be stubborn,' he said.

'Veerasingam said only 240 care centres were registered with the department while another 72 were awaiting approval.

' Although the Government was appreciative of the role played by non-governmental organizations in running the centres, he said the Government must ensure that there was accountability.

'We do not want unscrupulous people to take advantage of those who are less fortunate,' he said.

'Veerasingam advised operators to seek help from the department if they were unsure of the procedures to get their centres registered.'

As can be seen from the above newspaper report, what the Social Welfare Department desires is proper control and supervision of the activities of orphanages, old folks homes and homes for the handicapped.

But what kind of control are we talking about here? What are the rules governing the running of such care centers? What is the Care Centres Act 1993 all about? What are the duties and responsibilities of the management of such orphanages and old folks homes? Just how much power does the Welfare Department have over such homes? This is what I intend to write about. However, the focus of this article will be on orphanages.

A cursory reading of the Care Centres Act reveals that it covers all kinds of care centres, including residential care centres.

The provisions are general in nature. It provides for preliminary things like the registration process and logistics. What

it does NOT do is regulate on the 'entrance' requirements for entry to such care centres.

For orphans, the only relevant piece of legislation appears to be the Child Act 2001 (previously the Child Protection Act 1991) **(See Note 1)**. Let us look at the relevant provisions of the Child Act. I propose to start by looking at the procedure backwards chronologically.

There is no reference anywhere in the Child Act to the Care Centres Act. The only relevant sections on institutions where orphans can be placed are sections 54 and 55.

Section 54(1) says 'The Minister may, by notification in the Gazette, establish or appoint any place, institution or centre to be a place of safety for the care and protection of children.'

Section 55(1) similarly says 'The Minister may, by notification in the Gazette, establish or appoint any place, institution or centre to be a place of refuge for the care and rehabilitation of children.'

Enquiries with the Welfare Department reveal that such places of 'safety' and 'refuge' are NOT orphanages registered under the Care Centres Act. There has not been any case where an orphanage registered under the Care Centres Act has been appointed as a place of 'refuge' or 'safety'. An example of a place of safety is the Tunku Budriah Home in Cheras specially set up under the then Child Protection Act.

So how do children end up being placed in places of 'safety' and orphanages? Let us consider places of 'safety' first. The relevant provision is Section 30(1) where it states 'If a Court For Children is satisfied that any child brought before it under section 19 or 25 is a child in need of care and protection, the Court of Children may - (d) make an order placing the child in a place of safety for a period of 3 years from the date of the order or until he attains the age of 18 years, whichever is the shorter; or'. **(See Note 2).**

The next question would be, how does a child end up in a Court For Children? Let us look at Section 19(1) which reads 'Subject to section 20, every child who is taken into temporary custody under section 18 shall be brought before a Court For Children within 24 hours exclusive of the time necessary for the journey from the place the child was so taken into custody to the Court For Children.'

Section 18 reads 'Any Protector or police officer who is satisfied on reasonable grounds that a child is in need of care and protection may **(See Note 3)** take the child into temporary custody, unless the Protector or police officer is satisfied that - (a) the taking of proceedings in relation to the child is undesirable in the best interests of the child; or (b) the proceedings are about to be taken by some other person.'

Let us then move on to the definition of 'a child in need of care and protection'. This is covered by Section 17 *extensively*. For example, as expected, a child is deemed in need of care and protection if there is substantial risk that the child will be physically injured or emotionally injured or sexually abused by his parent or guardian or a member of his extended family.

Another example is subsection (1)(d) where a child is deemed in need of protection where the parent or guardian has neglected or is unwilling to provide for the child adequate care, food, clothing and shelter.

Further, if there is such a conflict between the child and his parent or guardian, or between the child' s parents or guardians, that family relationships are seriously disrupted, thereby causing the child emotional injury, Section 17(1)(h) also considers the child as being in need of protection! Thus it can be seen that Section is 17 very wide and gives utmost protection to the rights of a child. **(See Note 4)**

What then about orphanages governed by the Care Centres Act? There is no requirement for the child to be subject to the stringent requirements under the Child Act. What usually happens is that the Welfare Department makes the referral on their own after investigations. What also happens is that the management of the orphanages also decide on their own whether to take a child in when someone refers a child to them, such child usually being the victim of abuse or abandonment. Finally there are also orphanages who take in children who would not come under the definition of a child in need of care and protection under the Child Act i.e. these children come from functional but poor families and could do with a more decent lifestyle!

It is my opinion that children who are NOT in need of care and protection as defined under Section 17 of the Child Act should NOT be allowed to be accepted into orphanages, even when it is the child's parent(s)'s wishes to do so. Child care experts will tell you that separating a child from his/her parents will only deprive the child of much need care and affection. It reflects badly on society today when the value of a family staying together is no longer cherished.

So why then do certain orphanages take in merely underprivileged children in addition to those who have been abused or abandoned? I can only surmise that either the management do not really understand about child developmental psychology or they have ulterior motives. In this respect, it will be noted that many orphanages nowadays are run by religious and semi-religious organizations. It is hard not to question whether the child in their care will be 'induced' to embrace the organisation's religion of choice.

To conclude, it is my humble suggestion that the laws be amended such that firstly, the press in their 'Happenings around Town' pages stop referring to the existing care centers governed by the Care Centres Act as orphanages. A more suitable word would be 'Children's Home for Abused, Abandoned and Underprivileged Children.' Further surely the mainstream press could be more responsible and also more creative in their writings about visits to such Homes for purposes of giving donations or fun outings organized for the benefit of the children living in the Homes. At present, the emphasis is always on the benefactors rather than the Home. This will only give rise to assumptions that such Children's Homes for Abused, Abandoned and Underprivileged Children merely exist so that rich corporations can get cheap publicity!

Ideally of course, the admission of children into such Homes should also be governed by stringent provisions similar to those in the Child Act. Otherwise, we may one day (if it hasn't happened already) have the ironic and very sad situation that an 'orphanage' is forced to cease their operations because a member of the domestic staff is found abusing the children which were put in that 'orphanage' specifically to protect the child from further abuse by their parent or guardian!

The recital to the Child Act 2001 reads loftily as follows:-
'Recognizing that the country's vision of a fully developed nation is one where social justice and moral, ethical and spiritual

developments are just as important as economic development in creating a civil Malaysian society which is united, progressive, peaceful, caring, just and humane:

'Recognizing that a child is not only a crucial component of such a society but also the key to its survival, development and prosperity;

'Acknowledging that a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, after birth, to enable him to participate in and contribute positively towards the attainment of the ideals of a civil Malaysian society;

'Recognizing every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status;

'Acknowledging the family as the fundamental group in society which provides the natural environment for the growth, support and well-being of all its members, particularly children, so that they may develop in an environment of peace, happiness, love and understanding in order to attain the full confidence, dignity and worth of the human person;

'Recognizing the role and responsibility of the family in society, that they be afforded the necessary assistance to enable them to fully assume their responsibilities as the source of care, support, rehabilitation and development of children in society;

'Now, therefore, enacted by the Parliament of Malaysia as follows:'.

It's time we practiced what we preach!

Note

1. The Child Act 2001 codifies the main legislation affecting children, the top 2 legislations being the Child Protection Act and the Juvenile Courts Act. Of course, not everything concerning children will be found within the Child Act. For other statutes with provisions affecting children, see the article entitled 'Memorandum on the Legal Rights of a Child" by Aneeta Kulasegaran in the August, 2003 issue of INFOLINE.

2. The other orders that the Court For Children can make under Section 30(1) are:-
   (a) order his parents or guardian to execute a bond to exercise proper care and guardianship for a period specified by the Court For Children;

   (b) make an order placing the child in the custody of a fit and proper person for a period specified by the Court For Children;

   (c) without making any other order or in addition to an order made under paragraph (a) and (b), make an order placing the child under the supervision of -
      (i) a Protector; or
      (ii) some other person appointed for the purpose by the Court For Children,

   for a period specified by the Court For Children;

   (e) in the case of a child who has no parent or guardian or who has been abandoned as described in paragraph 17 (1)(e), make an order placing the child in the care, custody and control of a foster parent found to be suitable by the Director General for a period of 2 years or until he attains the age of 18 years, whichever is the shorter, and pending that, place the child in a place of safety.

(For the benefit of family lawyers and children's rights activists, it should be heartening to note that Section 30(5) provides that 'In determining what order to be made under subsection (1), the Court For Children shall treat the best interests of a child as the paramount consideration.')

3. It is my humble opinion that 'may' in Section 18 should be replaced with 'shall' so as to dispel all doubts that a Protector or the police is practicing favouritism when dealing with potential cases of children in need of protection. However this issue (of substituting 'may' with 'shall') warrants a whole article of its own and hopefully someone will write such an article soon.

4. Section 17 of the Child Act reads completely as follows:-
   (1) A child is in need of care and protection if -
      (a) the child has been or there is substantial risk that the child will be physically injured or emotionally or sexually abused by his parent or guardian or a member of his extended family;
      (b) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused and his parent or guardian, knowing of such injury or abuse or' risk, has not protected or is unlikely to protect the child from such injury or abuse;
      (c) the parent or guardian of the child is unfit, or has neglected, or is unable, to exercise proper supervision and control over the child and the child is falling into bad association;
      (d) the parent or guardian of the child has neglected or is unwilling to provide for his adequate care, food, clothing ;and shelter
      (e) the child -
         i. has no parent or guardian; or
         ii. has been abandoned by his parent or guardian and after reasonable inquiries the parent or guardian cannot be found, and no other suitable person is willing and able to care for the child;
      (f) the child needs to be examined, investigated or treated -
         i. for the purpose of restoring or preserving his health; and
         ii. his parent or guardian neglects or refuses to have him so examined, investigated or treated;
      (g) the child behaves in a manner that is, or is likely to be, harmful to himself or to any other person and his parent or guardian is unable or unwilling to take necessary measures to remedy the situation or the remedial measures taken by the parent or guardian fail;
      (h) there is such a conflict between the child and his parent or guardian, or between his parents or guardians, that family relationships are seriously disrupted, thereby causing his emotional injury;
      (i) the child is a person in respect of whom any of the offences specified 'in the First Schedule or any offence of the nature described in sections

31,32 and 33 has been or is suspected to have been committed and his parent or guardian -

i. is the person who committed such offence or is suspected to have committed such offence; or
ii. has not protected or is unlikely to protect him from such offence;

(j) the child is -

i. a member of the same household as the child referred to in paragraph (i); or
ii. a member of the same household as the person who has been convicted of the offence referred to in paragraph (i),

and appears to be in danger of the commission upon or in respect of him of a similar offence and his parent or guardian -

(aa) is the person who committed or is suspected to have committed the offence;
(bb) is the person who is convicted of such offence; or
(cc) is unable or unwilling to protect him from such offence;

(k) the child is allowed to be on any street, premises or place for the purposes of -

iii. begging or receiving alms whether or not there is any pretence of singing, playing, performing or offering anything for sale; or
iv. carrying out illegal hawking, illegal lotteries, gambling or other illegal activities detrimental to the health and welfare of the child.

Section 17(2) goes on to say as follows :-

'For the purposes of this Part, a child is -

(a) physically injured if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by, amongst other things, a laceration, a contusion, an abrasion, a scar, a fracture or other bone injury, a dislocation, a sprain, haemorrhaging, the rupture of a viscus, a burn, a scald, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth;
(b) emotionally injured if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by, amongst other things, a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development;
(c) sexually abused if he has taken part, whether as a participant or an observer, in any activity which is sexual in nature for the purposes of -

i. any pornographic, obscene or indecent material, photograph, recording, film, videotape or performance; or
ii. sexual exploitation by any person for that person's or another person's sexual gratification.

JABATAN PEMEGANG HARTA

Pertukaran Nama Ke Atas Cek-Cek Yang Dibayar Kepada Jabatan Pemegang Harta Malaysia

Dimaklumkan bahawa mulai **1 Januari 2004** semua cek, kiriman wang dan wang pos yang dibayar kepada Jabatan Pemegang Harta Malaysia Ibu Pejabat dan cawangan-cawangan hendaklah di atas nama **Ketua Pengarah Insolvensi.**

ZALIHA BINTI SULONG
b/p Penolong Pegawai Pemegang Harta
Cawangan Negeri Sembilan

NOTICE FROM THE BBC

The BBC wishes to hear from any Malaysian lawyers who have acted on behalf of clients seeking redress from the British Government or other parties as a result of the actions of Commonwealth forces or the British administration during the 1948-57 period of the Emergency. Of particular interest would be any information regarding the 1948 incident at Batang Kali where some 25 persons were allegedly murdered by British troops.

Please ring Jonathan Kent on 012 - 225 2165 if you are able to help.'

"Segregation...not only harms one physically but injures one spiritually...It scars the soul...It is a system which forever stares the segregated in the face, saying 'You are less than...' 'You are not equal to...'"

Dr. Martin Luther King, Jr.

Bar Council Ready to Launch LawCare

But what is LawCare?
Read on ....

LAWCARE
THE MALAYSIAN BAR BENEVOLENT FUND

Picture this .....

* *A young married couple, one a doctor in government service and the other a young legal assistant who has just set up her own practice. Out of their joint gross monthly income of RM5,500.00, after deductions for income tax and loan repayments, they and their 2 small children live on RM1,200.00 per month. The wife discovers that she has Breast Cancer. The surgery costs wipes out their total savings. She needs 6 courses of chemotherapy, each course costing over RM3,000.00. She is too ill to work. Her husband's income is insufficient to settle the loan installments, let alone pay for living expenses and medical treatment. What are they to do ?*

* *After 9 years in legal practice, he suffered a stroke that left him paralysed on the left side of his body. His movements are limited. He can't work. His wife has all along been a housewife. His 8 children are still schooling. He has no income. What is he to do ?*

* *She draws a basic salary of RM2,000.00 out of which she takes home RM1,500.00. She is diagnosed as suffering from lymphoma (cancer of the lymph nodes). Her savings have been wiped out by her medical treatment. She needs further treatment but hasn't got the money. What is she to do ?*

A little far-fetched? No. These are all true stories. Two of these people have applied to the Bar Council Sports, Charity and Welfare Committee for help. They all have 3 things in common.

* They are lawyers and members of the Malaysian Bar.
* Tragedy has struck unexpectedly and at an inopportune moment.
* They are in need of pecuniary assistance.

Because, contrary to public perception, the majority of lawyers are not high earners and very few are rich. Who can they to turn to for help ?

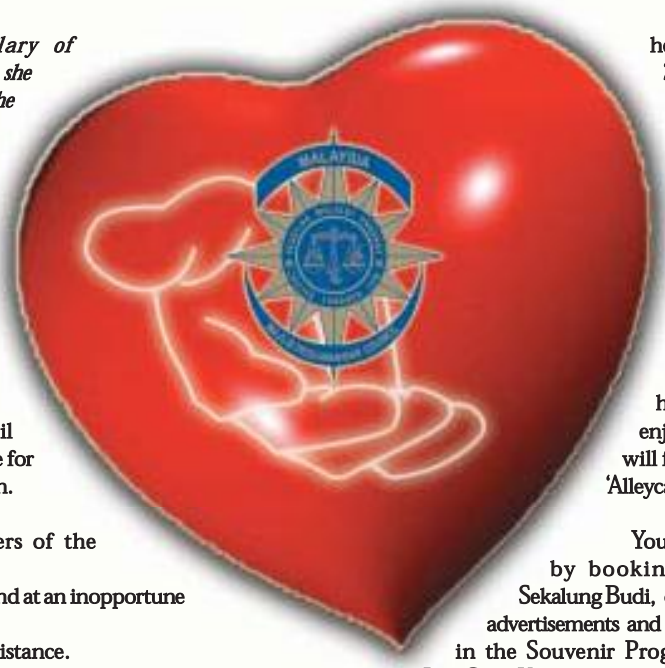
The Bar Council proposes to set up a Benevolent Fund for members of the Malaysian Bar called 'LawCare' to whom needy lawyers may turn for pecuniary assistance by way of outright grant or by loans. Why? Because the Malaysian Bar cares. And the Malaysian Bar is worth caring for.

Besides, the setting up of 'LawCare' falls within one of the statutory objectives and duties of the Malaysian Bar found in Section 42 (1) (k) which is

> *' To grant pecuniary or other assistance to members or former members of the Malaysian Bar and to the wives, widows, children and other dependants, whether of members, former members or deceased members who are in need of such assistance.'*

LawCare will be funded from donations, fundraising projects, subscriptions, levies and bequests.

To kick off the Malaysian Bar's benevolent fund, 'LawCare', the Bar Council's Sports, Charity & Welfare Committee is organising **'Malam Sekalung Budi'**, a fund raising dinner show and dance in aid of LawCare and the Malaysian Children's Aid Society. DYMM Paduka Seri Sultan Perak Darul Ridzuan Sultan Azlan Muhibbuddin Shah has graciously agreed to be the patron of LawCare. LawCare will be officially launched at the function.



The event will be held on **10th of January 2004 at 7.00 pm at the Grand Ballroom, Renaissance Hotel, Kuala Lumpur** which will be graced by the presence of DYTM Raja Muda Perak Darul Ridzuan Raja Dr Nazrin Shah Ibni Sultan Azlan Muhibbuddin Shah. An entertaining evening has been planned for the enjoyment of all. The show will feature the ever popular 'Alleycats'.

You may support LawCare by booking tables for Malam Sekalung Budi, obtaining and or placing advertisements and complimentary messages in the Souvenir Programme and donating towards LawCare. Your support is essential and invaluable.

Look out for the Circular about this event. For further enquiries, please contact Ms May Leng (Ext 103) or Ms Helena (Ext 160) of the Bar Council at telephone number 03 – 20313003.

LAWCARE IS FOR ALL OF US. COME HELP US HELP OURSELVES. HOPE TO SEE YOU THERE.!

Walter Abraham / C C Ayathurai Trophies 2003 - Langkawi Kedah

Alex De Silva
Sports, Welfare & Charity Committee Member

'Golf is like love - If you don't take it seriously it won't be fun, if you do it'll break your heart.'

As cliches go, this one was proven to be more right than wrong when 60 lawyers/golfers from around the country descended on the isle of Langkawi to compete in the Annual Walter Abraham and C C Ayathurai trophies. The tournaments were scheduled to take place over two days in two very different golf courses, The Golf Club Datai Bay and Gunung Raya Golf Resort.

The first day's play was scheduled in Datai Bay. It is one of the most scenic and beautiful courses in the country. It is also one of the most challenging as most of us who played there would testify. While the fact that the course completely blends in with mother nature's surrounding jungles, hills and streams almost without seams, adds immensely to its beauty, it makes playing the course extremely difficult. This especially for a bunch of lawyers who had decided to abandon their robes and be 'Tiger' for the weekend. Not sure how many succeeded being 'Tiger', though many found only the woods instead.

Some of the more industrious and ambitious amongst us came up to Langkawi a day earlier to do some 'getting-up', as the pros would, to study the lay-out of the fairways and the undulations of the greens. This may well have paid dividends to a few (perhaps only one), the rest just added on to the misery of playing badly on two days in a row. A good drive of 250 metres which would normally find one having an easy second shot to the green, would instead translate here to an extended search in a jungle for the ball. The search for the elusive small white ball would normally end with the golfer/lawyer running out after having a close encounter with an iguana staring rather suspiciously at this fellow who had so unceremoniously invaded his space. When the jungle was not in the way, there was always water. Whether it was a stream or the sea, the Malaysian Bar, contributed many golf balls to line its beds that day. Knowing that these balls would be retrieved by the locals and sold later, we donated generously. Whoever said that we are not a caring and generous lot. The scene at the golfer's terrace in the evening after completion of the round was filled with the usual tales of missed birdies, pars that got away and of course jungle trekking and close encounters with iguanas. But not being a lot that's easily discouraged, most drowned their sorrows with duty-free beverages and vowed to fight another day. There goes the tale of the lawyer/golfer in Datai Bay.



The next day's play scheduled for Gunung Raya was precipitated at the breakfast table at our official lodgings at Langkasuka Beach Resort with vows that we were all going to do justice to the game of golf. This of course, after shaking off the hang-overs from the previous night. When we arrived at Gunung Raya, we were all rather relieved to be welcomed by a course that did not seem to have anything resembling a jungle/river lining the fairways. No iguanas in sight as well. However, as we all got ready to set-off to repair tile damage done the previous day to our scores (not to mention our egos), mother nature decided to play another trick on us. Weather resembling that only found in Scotland during the British Open descended upon us. Strong winds, rain and lightning forced the day's play to be abandoned shortly after commencement of the round. With that, the scores from the day before at Datai Bay stood and decided this year's champions and prize-winners.

Finally, much appreciation from all who took part to the Kedah/Perlis Bar Committee and the organising committee of Malaysian Bar Sports, Welfare & Charity Committee Golf Section for organising a wonderful weekend of golf, camaraderie and a lesson in humility.



The winners of the respective trophies are as follows:-

Walter Abraham Trophy (Gross)
1. Soon Hock Gin
2. Dato' Radzi Sheikh Ahmad
3. Kevin Goh

C C Ayathurai Trophy (Nett)
1. Ken St James
2. Song Kok Full
3. S P Raman

The following press statement was released by the Executive Committee of HAKAM on 17 Oct 2003

The Irene Fernandez Verdict

The verdict on Irene Fernandez is another instance of the judiciary losing Its direction and bearing.

The trial has been followed closely by human rights activists in this country. Those who have read in media reports of the evidence which had been adduced during the trial will find the decision of the Magistrate quite incredible.

Her reasons for disbelieving the Bengladashi witnesses who had been called by the defence in 2001 to recount their harrowing experience at the hands of the police (while they were in the detention camp some five years before) are difficult to accept, especially to lawyers. The conclusion that what Irene Fernandez had alleged in her Memorandum to the government was false by reason that the Magistrate had not seen such things when she visited the detention camp, is highly absurd. Her rejection of the allegation that there had been a lack of food and water available to detainees in the camp during the material time (made in the Memorandum) on the ground that the police witnesses had testified to the contrary, borders on the naive, and disregards established principles for evaluating evidence.

It would seem from the Magistrate's reasoning that the only way to make her believe that there had been acts of police brutality and misconduct as alleged, was If she had seen them herself or if the police witnesses had admitted to them.

When a decision, such as this, defies the common man's sense of justice, public confidence in the judiciary is bound to be further undermined. Then there was the Magistrate's decision to suddenly bring forward the date for decision from March 17, 2004 to October 2003. This had made it impossible for Irene Fernandez's counsel, who was away overseas, to appear in court on the 14th. The fact that Irene Fernandez was thereby being deprived of her right to counsel



at such a crucial stage of the proceedings did not seem to be regarded as important. In the result, she had herself to make the submission in her own defence.

In saying that the allegations made in the Memorandum had brought disrepute to Malaysia and that the sentence of one year passed was to set an example, the Magistrate seemed to have set herself up as the public regulator of the citizens' right to freedom of speech. Setting deterrent sentences, other than in cases of prevalent crimes, is not her function. But that is but another regrettable aspect of the case.

There has already been a number of cases of deaths in police custody and cases of police brutality and misconduct. The Magistrate's decision will further encourage official lawlessness.

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Conferment of Honorary Membership of Medico-Legal Society

Citation for Yang Arif Dato' Mahadev Shankar

Dato' Dr Joseph Eravelly
20 September 2003



Yang Arif Dato' Mahadev Shankar

Mr President, Ladies & Gentlemen,

The Medicolegal Society was inaugurated 16 years ago with the blessings of the Bar Council and the MMA. It was promoted as a welcome bridge between two great professions - law and medicine. The driving force behind this idea was Yang Arif Dato' Mahadev Shankar. The society immediately received a stamp of respectability when Mahadev Shankar became the first President of the Medicolegal Society.

For the society, that was history - the birth of an organization. An organization that Shankar's guiding hand and reputation had unleashed on the Malaysian landscape. But for Shankar it was just an event, an episode in the life of a man marked by so many achievements. Many of them will I am sure be etched forever in the annals of history of this young nation of ours.

Ladies and Gentlemen those of us who have lived through the pre-Merdeka years and then in the years since then will realize how much this country has grown and changed. The critic will say that we were plain lucky. We had abundant natural resources, we were straddled in the path of international trade routes and we had much foreign direct investments.

True, but if you reflect carefully we grew and prospered in a turbulent world not because of those reasons alone and not because of luck, but because we had good people. People who used their God-given talents to go that extra mile for their fellowmen. People who gave of their blood, sweat and toil to contribute to what this country is today.

Today the Medicolegal society has decided to recognize one such individual who stands out from the pack. The Medicolegal Society will today confer for the first time in its history the Honorary Membership of the society on Dato Mahadev Shankar. It is with a great sense of privilege as well as a sense of trepidation and awe that I have accepted the honour of introducing him to you today.

Abigail Van Buren a Pulitzer Prize winner wrote that there are two ways of spreading light and illumination. You can be a mirror that reflects light or you can be the candle. Mahadev Shankar was a candle from the he beginning. Born in Kuala Lumpur, schooled at the Victorian Institution, he was just a brilliant student. He could have chosen to become anything he wanted and would have been good at it. His first ambition was to become a doctor but he was put off by the scenes of ragging that he saw in the only medical school of that day in Singapore. He was shocked that men of learning soon to become compassionate doctors could behave in that way. It was then that he decided to turn to law and to study in England.

He was called to the bar at the Inner Temple in London in 1955 and became an advocate and solicitor in Malaysia in 1956. He joined the firm of Shearn Delamore & Co and in 1961 he became a partner in that firm.

He soon became a famous attorney, a star on the legal landscape. They say that a telescope can magnify a star 1000 times and good public relations can do even better. But the country did not look at Shankar through a telescope and he did not seek or use PR.

He became a shining star because he possessed more of what others lacked - a superior intellect, the ability to focus, to filter out unwanted details and retain only essential information, an almost uncanny attention for detail, boundless energy and the capacity for hard work. Add to these qualities a sound legal knowledge, the ability to think fast on his feet and eloquence of communication in speech and writing and you had a formidable litigation attorney. An attorney who won almost everything that he took on virtually all the time. Like a world class athlete he was driven by a strong impulse to succeed and win.

To Shankar evidence was not just a collection of facts. It was the ability to take those facts and persuade the listener to interpret them in the way that he wanted. That required a logical analytical mind, a deep understanding of the law and the ability to simplify the language he used. To Shankar even Truth was not something static. It was a point of view. He took on many high profile cases in civil, criminal and constitutional law and left behind a trail of gawking admirers.

Shankar became an attorney that every client wanted. He was a bankers dream-maker. He was a teacher and a mentor that every young lawyer wanted to learn from. As a defence attorney for the Medical Defence Union, he was THE lawyer that every doctor who sensed trouble wanted to turn to. And he found time for doctors every time.

Public listed companies clamoured to have him on their Boards because they knew that Shankar always contributed something if he accepted. He especially enjoyed being on the Board of MAS in those turbulent years after Singapore separated from Malaysia and SIA became a strong competitor.

Shankar was forthright and honest in his practice of the law. As an attorney he set standards in the legal profession, standards that will be difficult to match or beat for years to come. Small wonder then that many of his colleagues and contemporaries have described him during his life time as an icon.

Shankar not only practiced as a lawyer for more than 25 years, he accepted invitations to study and change the law when this was needed and to craft new laws where they were none. Through law he saw life itself and the opportunity for change.

He served on many committees, where questions of law were involved. I shall just name a few. He was the man responsible for drafting and presenting a Private Bill, which led to the Divorce (Amendment) Ordinance 1959, whereby Malaysian resident wives deserted by husbands of non-Malaysian domicile for more than three years were given the right to present their divorce petitions in Malaysia. This is probably the first and only time that a Private Bill went through the Malaysian Parliament. He served on the National Goodwill Committee in 1969 when the country was breaking up from the racial riots of May 1969. He was the Royal Commissioner for the Reform of the Laws of Marriage and Divorce in Malaysia in 1971.

By the nineteen eighties Shankar was virtually at the pinnacle of his career. The candle had become a beacon of light. His life by then was one of success, fulfillment and a promise of more to come.

Yet in 1983 he accepted an appointment to the Bench as a High Court judge and in 1994 he was elevated to the Court of Appeal.

His friends and his colleagues were astounded. How could someone so brilliant, so gifted, surrounded by so much glamour and acclaim, so much hope for reward and the good life could give all this up for a life of relative recluse and isolation.

But that was Shankar. To him the practice of law from the Bar to the Bench was just the continuation of a mission to bring perfection to an imperfect world of confusion and injustice. This change was just a junction along this long and sometimes lonely road that he had chosen to travel on as his career. He was really a simple person by background and culture. To him fame and fortune were never actively coveted.

Shankar's guiding principle has always been honesty, integrity and high moral standards. He would still be involved with law as a judge but at a different level. His tenure on the Bench was a new experience. Although now shackled by the inefficiencies of a bureacratic support system he took to his new job with the same enthusiasm that he showed throughout his life. He was courteous and fair to members of the Bar who appeared before him. He made courageous judgments knowing full well that those decisions would have consequences. He believed in what Confucius said, 'Taking a line of least resistance often makes man and rivers crooked.'

Many of Shankar's rulings and decisions have become landmarks in legal history. They have been written with clear painstakingly simple language so that there will never be any misunderstanding as to what he intended.

Shankar retired from the Bench in 1996. But for Shankar retirement is a man made event, only a milestone in his life. For him his work and the desire to succeed is a journey, not a destination. Retirement from the judiciary was just a pit stop.

After leaving the judiciary he has continued to be actively involved with the law. In 1998 he was appointed a member of the Royal commission of inquiry into the injuries sustained by Dato Seri Anwar Ibrahim while in police custody. He wrote the guidelines for that Commission of Inquiry and drafted and published the findings and verdict. What he and his members of the Commission published, will become the guidelines for future Royal Commissions.

Since retirement he has been Visiting Professor to the University Malaya, to the Monash University and to the College of Law in Sydney, Australia. He is a Founder member of the Human Rights Commission of Malaysia. He is a panel member of the Arbitration Centre in Kuala Lumpur and the International Arbitration Centre in Singapore. He is a Paul Harris Fellow in Rotary International and has been recently nominated as an Advisory Jurist to the Asia Pacific Forum on Human Rights. He continues to work in his career at yet another level. Since 1999 has been a consultant in Zaid Ibrahim and Co.

As we move on in time and then when we look back we will see that over more than 45 years of his legal career, Mahadev Shankar has been attorney, advisor, counsellor, comforter and friend to thousands of people at home and abroad. Mahadev Shankar has not only left his footprints in the span of his outstanding career but his fingerprints and silhouette as well.

Let me conclude this Citation by quoting Werner Von Braun. He wrote, 'We are all travelling on a spaceship. That spaceship is Earth. Imagine 4 billion passengers and no skipper'. Thank God we have some good people on this spaceship.

Mr President, may I now present Yang Arif Dato Mahadev Shankar as the first recipient of the Honorary Membership of the Medicolegal Society on this 20th day of September in the year 2003.



THE CHARTERED INSTITUTE OF ARBITRATORS
Malaysia Branch

FAST TRACK PROGRAMME
Assessment Workshop: 7 & 8 February 2004
Award Writing Examination: 6 March 2004

Admission to this Fast Track Programme is restricted to lawyers/arbitrators with over 10 years experience in litigation/dispute resolution. In addition the candidate must also be able to write an enforceable award during the Award Writing examination. Upon successful completion of the Assessment Workshop and Award Writing Examination, the candidate is required to undergo a prescribed period of pupillage under a Pupilmaster and to attend a panel interview before qualifying as a Fellow/ Chartered Arbitrator. Fees: RM4,250 (non-members), RM3,500 (members).

Those interested please register with a detailed curriculum vitae to CIArb Malaysia:

Tel: 03-2273 1718 Fax: 03-2273 1705
Email: ciarbmal@tm.net.my

Admission to the Bar as Advocates & Solicitors

S Balarajah

Having overcome all hurdles and examinations you now stand on the threshold of being admitted and enrolled on the Rolls Advocates & Solicitors of the Malaysian Bar. The legal profession is a lively profession. The law concerns people. It is administered by people.

Once so admitted you have the rights and privileges as bestowed in the Legal Profession Act 1976 the 'LPA'. The LPA is the Magna Carta of the legal profession. But all rights and privileges come with caveats.

Section 35(1) of the LPA gives you rights. It reads as follows:

'*Any advocate and solicitor shall subject to this Act and any other written law have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts and as between themselves shall have the same rights and privileges without differentiation.*'

Why subject to this Act? This is because the LPA controls conduct of members of the Bar and subjects them to disciplinary action if their conduct falls foul of the law and Rules - See s. 29(2)(b) LPA and s. 88 A of LPA.. You have the right to appear only if you have a valid practicing certificate and if the law in force in those Courts you propose to appear permits your appearance. For instance the Syariah Courts and small claims Courts have their own limitations and requisitions.

Section 29(2)(b) of the LPA empowers the Council to apply for the suspension of one's Practising Certificate . It reads:

'*where an advocate and solicitor is adjudicated bankrupt or a receiving order is made against him, the practicing certificate, if any, of that advocate and solicitor shall be suspended forthwith, until the consent of the Bar Council to reinstate it is obtained*'.

Section 88A of the LPA empowers the Bar Council to apply for an Order suspending a member of the Bar from practicing in which case be forfeits the right under s .35(1)LPA.

Section 88A LPA reads :

'*Where an advocate and solicitor:*

(a) has been found guilty by a court of law of any offence involving dishonesty, misuse of his client's moneys or dishonesty towards a client or in respect of any property belonging to a client;

(b) has been disbarred, struck off, suspended or censured in his capacity as a legal practitioner in any other country;

(c) in respect of whom a complaint has been made to the Bar Council concerning any dishonest act or acts committed by him in his capacity as an advocate and solicitor;

(d) has left the country or has not attended at his office in such circumstances that the Bar Council may reasonably presume that he has absconded; or

(e) is otherwise incapable from infirmity of body or mind or any other cause of effectively performing the functions of an advocate and solicitor;

and the Bar Council considers that it would be (in the public interest or) in the interest of his clients or of the profession that such advocate and solicitor be suspended from practice the Bar Council may apply by summons to the Chief Justice ex-parte for an order suspending such advocate and solicitor from practice until further order.'

There are also the Rules of Etiquette and Practice known as 'Legal Profession (Practice and Etiquette) Rules 1976'. You are compelled to adhere to the said Rules. Certain Rules limit and or prohibit your right to appear in Courts in some matters.

The relevant rules are Rules 3-6 which are as follows:

'*3. Advocate and solicitor not to accept brief if embarrassed*

4. No advocate and solicitor to accept brief if professional conduct likely to be impugned

5. No advocate and solicitor to accept brief if difficult to maintain professional independence

6. An advocate and solicitor not to accept brief if unable to appear'

Breach of these Rules may expose an advocate & solicitor to disciplinary action.

Once you are ordered to be admitted and enrolled onto the Rolls of the Malaysian Bar, you shall become a member of the Malaysian Bar under s. 43 of LPA. Membership is not voluntary. It is compulsory by way of statute.

s. 43 of the LPA reads:

'*Every advocate and solicitor shall without election, admission or appointment become a member of the Malaysian Bar and shall remain a member under this section so long as he has a valid practising certificate*'.

Now what is a Roll? s. 28 of the LPA reads:

'*(1) The Registrar shall keep a Roll of advocates and solicitors with the dates of their respective admission.*

(2) The name with the date of admission of every person admitted shall be entered upon the Roll in the order of admission.

(3) Every person admitted as an advocate and solicitor shall pay the prescribed fee and the Registrar shall deliver to him an instrument of admission signed by the Chief Justice or the Judge who admitted the petitioner.

(4) This section shall not apply to persons admitted under section 18.

(5) The Roll shall be open to inspection without payment by any person during office hours.'

Comment

It is pertinent to note that the fact that your name is on the Rolls does not give you a right per se to practice. See s. 36 LPA. You have to apply for a Practising Certificate under s. 29 of the LPA. Though the Registrar of the High Court issues the Practising Certificate you have to support the Application with the Sijil Annual which is controlled and issued by the Bar Council.

And the Sijil will not be issued to you until you produce an Accountant's Certificate, receipts of payments of all statutory dues to the Bar Council and to the State Bar Committees where you practice and policy of insurance covering you inter alia against professional negligence.

Though the powers to admit and enroll you to the Malaysian Bar is with the High Court, the Bar Council controls your right to practice at the Bar.

Disciplinary Action and powers of the body to discipline its members is vested in the Disciplinary Board headed by a High Court Judge. Under s. 94 of the LPA the Board has powers to suspend a member guilty of any misconduct from practice for any period not exceeding five years or having struck off the Roll. The instances of misconduct are stipulated in s. 94(3) and (4).

The function of the Disciplinary Board is of utmost importance to maintain professionalism of the Bar.

It is incumbent on the Bar to enhance uphold and improve its standing in the community and sustain the confidence it enjoys.

And according to the best traditions of the English Bar, a member of the Bar while acting with all due courtesy to the Court uphold fearlessly the interest of the his client without regard to any unpleasant consequences to himself or any other person.

As you enter an ancient profession from learning to earning I leave you with the thoughts of Francis Bacon (1561-1626):

> '*I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and ornament thereunto.*'

> "To accomplish great things we must not only act but also dream, not only plan but also believe"
>
> - Anatole -

Bar Council Secretariat Staff Extension List

Sijil Annual
1. Ms Visanini 140
2. Lynette Karen 116
3. Surinderjit Kaur 187
4. Ms Kwan 120
5. Imran 186
6. Dewi 115
7. Shahril 113
8. Jaya 119
9. Lesther / Nalini 183
10. Wan 114

ADR / GATS Committee
1. Kenneth Goh 147
2. Marianna 130

CLE / Seminar Dept
1. Ms Lynette Tan 142
2. Helena 180
3. Ms Thon 103
4. Pn Rozi 134

Complaint Dept
1. Ms Cindy Chan 108
2. Ravin 109
3. Roxiah 110

Infoline & Publications
1. Deepa 143
2. Khairul 146

Information Technology
1. Sharyn Lim 153
2. Alex 131

Library
1. Dr Pathama 156
2. Chandra 154
3. Wan Zurina 154
4. Anand 155
5. Edna 157
6. Radha 157

Human Rights
1. Leong Kar Yen 148

Secretaries
1. Josephine 105
2. Pn Rohani 129
3. Shegi 130
4. Lisa Lee 141
5. Chitra 101
6. Hafsyam 127

Family Law Intellectual Com.
1. Sharan Kaur 150

Account Dept
1. Norhayati 137
2. Lily 118
3. Shereen 123
4. Jeff Tay 125
5. Maha 111

Petition / Admission
1. Lilian 122
2. Amir 123
3. Sarah / Kogee 112

LAC
1. Vinodhini 149

Receptionist
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2. Abby 100

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PROFESSIONAL INDEMNITY INSURANCE TOP-UP FOR YEAR 2004

It has been brought to the attention of the Bar Council that members are encountering difficulties in obtaining quotations for top up coverage with Willis (M) Sdn Bhd Insurance Brokers. The Council is aware of the need to obtain your top up coverage without delay and would advise members to approach other Insurers for quotations. Meanwhile, steps have been taken by the Bar Council to hasten Messrs Willis (M) Sdn Bhd Insurance Brokers to furnish us with the top up quotations.

Should you require any further clarification please contact Ms Visahini at Ext 140 at the Secretariat.

INFOLINE

Human writes

ISSUE 5 OCT / NOV 2003

Legalising Torture

Edmund Bon

Paper presented at the joint Amnesty International and SUARAM's Open Forum 'Take a Step To Stamp Out Torture' on 1 November 2003

Wild animals never kill for sport. Man is the only one to whom the torture and death of his fellow creatures is amusing in itself.

Froude, James Anthony

Parameters

When I was asked to speak today, the parameters given to me was that I should speak on torture vis-à-vis legislation in Malaysia. I thought about it and said what is there to say? Surely I have known no legislation in Malaysia promoting or paving the way for torture.

Then I thought deeper and came up with this.

What does one mean when one speaks of 'torture'?

Article 1 of the *United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment* defines 'torture' as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

Article 2 of the *Inter-American Convention To Prevent And Punish Torture* states that 'torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose.'

In a nutshell, the act of 'torture' in its most common form is broken down as follows:

1. There is the torturer who is part of the State's enforcement agencies.

2. There is the tortured who is the victim.

3. There is a physical, as it is, 'coming together' of the torturer and the tortured.

   3.1 This 'coming together' is for a reason or purpose (ie, for the torturer to elicit or obtain information or confession from the tortured).

   3.2 This reason or purpose, it must be stressed, is *unilateral* (ie, a decision based on and resting entirely with the torturer and at his will, command or direction). The torturer initiates this process.

   3.3 There is no reason or purpose, on the part of the tortured, for him to 'come together' with the torturer.

   3.4 In just this, at the inception of the 'coming together, there is already inherently vested an amount of pressure or undue influence on the tortured when he 'comes together' with the torturer.

4. There is infliction of physical abuse or mental pressure by the torturer on the tortured.

   4.1 This infliction is to achieve the reason or purpose of the torturer.

   4.2 The question then - how does one define or recognise 'infliction of physical abuse or mental pressure'. The answer, I would suggest, would be to look at the aim of the 'coming together' between torturer and tortured.

   4.3 The broad definition in Article 2 of the *Inter-American Convention To Prevent And Punish Torture* as follows gives a good picture:

   'Torture shall also be understood to be the use of methods upon a person intended to *obliterate* the personality of the victim or to *diminish* his physical or mental capacities, even if they do not cause physical pain or mental anguish'.

   4.4 Torture is manifest, even without physical abuse or mental pressure, whenever the torturer attempts to or does 'break you down'. This should be the human rights yardstick when one speaks of 'torture'.

Precepts of a criminal justice system

Why a criminal justice system? What is the foundation for such a system? Why should we believe in such a system?

Why do I believe in the system? I would say because there are at least 4 important precepts such a system upholds. These precepts are fundamental to all human beings. They are:

1. Every individual human being born is born free.

2. No individual human being may be punished, executed or incarcerated by the State in secret.

3. Any individual human being who stands accused or charged with by the State of a certain act or crime, is entitled to a free, just, impartial, open, public and effective trial.

    3.1 This would include the right to call witnesses in his defence, to cross-examine the State's witnesses, to challenge the State's evidence and to put the State to strict proof for the State to prove its case beyond all reasonable doubt.

    3.2 Importantly, the court in a criminal case is not only presided over by the particular judge but by the people. It is a court of public opinion. The decision of the judge is (or should be) the decision of public opinion. That is why any criminal trial must be in the open and accessible to the public.

    3.3 This is the basic right availed to every individual human being. This is also enshrined in Article 5(1) of the Federal Constitution which reads:

    'No person shall be deprived of his life or personal liberty save in accordance with law.'

4. The State, with the backing of all its powerful tools and agencies, must establish its case, accusation or charge against the individual human being beyond all reasonable doubt without assistance from the accused or person charged.

    4.1 The traditional objection to compulsory interrogations was to prevent unreliable, involuntary statements or confessions being elicited from the detainee/tortured. This objection is still valid today.

    4.2 Blackstone in Comm iv 296 explained it: *'For at the common law, nemo tenebatur prodere seipsum: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men'*. No one is bound to betray himself.

    4.3 The danger in over-zealous interrogation, constant mental and physical pressure and torture as a means to elicit a statement or confession favourable to the interrogator/torturer far outweighs any tangible benefit from such a statement or confession. Hence, it had evolved a corpus of opinion establishing the right to silence and non-incrimination.

    4.4 The human rights perspective, it is submitted, must maintain upholding this right to silence. The right to silence is corrollary to the right to freedom of expression and on the other side of the coin, the right to freedom of non-expression.

    4.5 Justice Devlin in *R v Swaffield; Pavic v The Queen* [1998] HCA 1 said:

    'So great is our horror at the idea that a man might be questioned, forced to speak and perhaps to condemn himself out of his own mouth ... that we afford to everyone suspected or accused of a crime, at every stage, and to the very end, the right to say: 'Ask me no questions, I shall answer none. Prove your case'.'

This is meant by the 'right to trial' in a criminal justice system. The 'right to trial' is the life of the criminal justice system, it is axiomatic - the system is practised and in place for the sole reason of manifesting this right.

And therefore, it is parlance to say that every criminal case is a human rights case and every human rights case is a public interest case.

For the criminal justice system makes no distinction. Every legal system which has a criminal justice system believes in the 'right to trial' and in effect enforces, recognises and applies an inviolable human right.

With that in mind, I would like now to discuss 3 matters: legislation which has in one way or another espoused torture, the role of judges in an advanced criminal justice system and terrorism, torture and the future.

Criminal Procedure Code

The police is one of the State's enforcement agencies. When a police report is made or when the police are notified of an alleged offence, they commence investigations. The start of police investigations usually involve the detention of a suspect for questioning.

Section 117 of the Criminal Procedure Code allows a person to be detained by the police for a maximum period of 24 hours. The police is then obliged to produce the detainee before a magistrate if the police wishes to detain the detainee for more than 24 hours.

For such an application normally known as a 'remand application', the police would have to justify to the magistrate that investigations cannot be completed within 24 hours, there are grounds for believing that the accusation against the detainee is well founded and that it is necessary to detain him further. The police would also have to produce before the magistrate a copy of his investigation diary showing among others, the time at which the order for investigation reached him, the time he began and closed his investigation, the place(s) visited by him and a statement of the circumstances ascertained through his investigation.

A magistrate hearing such an application may order further detention of the detainee for any period not exceeding 14 days. For every further detention order made by a magistrate, there must be reasons for such an order and the same must

be recorded. It has been known in many instances that magistrates give the full 14 days at the first remand application.

Whilst it is acknowledged that the police should be given powers to detain a person for questioning, there is an important distinction to be drawn between 'questioning' and 'interrogating'. A person may be detained for questioning whereon which he may choose to say nothing. A person may however not be detained for interrogation (ie, aggressive questioning) whereon which any answer or statement he gives would be coerced. The line may be a fine one but the inherent danger that any answer or statement given as a result of interrogation may have been involuntary or unreliable far outweighs the benefit of having such an answer or statement.

In *Re Mohamad Ezam Bin Mohd Nor* [2001] 3 MLJ 372, Justice Wahab Patail made this distinction:

> *'It is true that there is no law that specifically provides that the police may not interrogate a suspect. But at the same time, it is equally true that there is no law that says that the police may interrogate a suspect. ... While s 112 of the CPC uses the term 'examine' in relation to witnesses, s 113 of the CPC uses the term 'questions'. Professional questioning is questioning in a systematic manner, and may be described as examining the person. Even so, it must be noted that the term examined in s 112 of the CPC is used in the context where there is an obligation to answer questions and to tell the truth as a witness, while in s 113 of the CPC only the term question is used. Now, s 113 of the CPC refers to answers by a person in custody to questions put to him. Asking questions of a person in custody or otherwise is based upon the right of freedom of speech. The person who is asked those questions has the right to refuse to answer or to answer to those questions put to him. Indeed, the purpose of s 113 of the CPC is to protect the person in custody by requiring that the caution under s 113(a)(ii) of the CPC must first have been administered, or as soon as possible. However, it is clear that s 113 does not state that there is any right conferred upon the authorities to examine or interrogate a person who is in custody. Ground 3 of the application for remand is 'Menjalankan soalsiasat ke atas suspek ...'. Now, in the Malay language 'soal siasat' can mean examine or interrogate. Provided these terms are confined to the meaning of question or questioning formally, closely and thoroughly there appears to be no contravention. However the terms interrogate and interrogation may be understood in other jurisdictions or countries, in Malaysia, they carry the meaning 'to question aggressively' (see Fajar-Oxford Advanced Learner's English-Malay Dictionary). The dangers arising out of the belief one could question aggressively requires me to address the issue in no uncertain terms. That the legislature chose to use terms other than 'interrogate' is clear indication that the legislature does not intend to retrogress to the laws of the age of inquisition under the courts of the Star Chamber. Interrogation in the sense of questioning aggressively is not simply asking questions, but questioning and insisting upon an answer until the interrogator is satisfied with his answers. The dangers of placing a person under remand so as to be so interrogated are heightened because he is not at liberty to walk out and walk away from such interrogation. The view that any evidence obtained from witnesses or accused persons under such interrogation, in other words, not of a voluntary nature, unlike that obtained from a person having the right not to answer the question, is so well accepted as inherently unsafe that even if the evidence is technically admissible it may still be excluded as being inherently unsafe to rely on (see Goi Ching Ang v PP [1999] 1 MLJ 507). ... To bring the question before us back into its proper perspective and focus, it must be borne in mind clearly that the issue before this court is whether the purpose of interrogating the suspect or to obtain cautioned statements under s 113 of the CPC are valid grounds to obtain an order for remand. Without the specific sanction of any law, the right to ask questions arises only from the right of freedom of speech: any person, even the police, can ask questions. But it is up to the person to whom the questions are asked to answer them or not. ... It is necessary to bear in mind the only grounds upon which the personal liberty of a person not yet proven beyond reasonable doubt to be guilty and not yet convicted, for such is the legal situation of a suspect, may be abridged by deprivation of it by arrest and remand before he is charged, in order to serve the public interest that laws are enforced and offenders be brought to justice for their offences are where the suspect is likely to abscond, interfere with witnesses and/or evidence. He is not remanded into custody as any form of punishment. It is also necessary to bear in mind that whilst cooperation in investigations is a factor to be taken into account for mitigation in sentencing, non-cooperation is not a factor for enhancing sentence as it would negate his right to remain silent. There is therefore, no basis to hold a person in custody until he cooperates. No matter how guilty a person may be, he is entitled to a trial where the burden is entirely upon the prosecution to prove, beyond reasonable doubt, that he is guilty of the offence with which he is charged. There is therefore no legal basis for any argument he may be interrogated until he is forthcoming and assists in the investigation against him. For all of the reasons above, I conclude that s 117 of the CPC does not authorize the remand of a person for the purpose of questioning him aggressively (interrogating) because ss 112 and 113 of the CPC do not in any case authorize interrogation of a suspect, and he may be questioned systematically (examined) only if he had been cautioned. A remand order for the purpose of interrogating a suspect, or examining him without showing he has been cautioned is therefore bad in law.'*

The remand provisions which allow police detention as highlighted above provides fertile ground for torture of detainees. These provisions allow for the 'coming together' of the torturer and the tortured at the behest of the torturer. As shown above, the inherent pressure at the 'coming together' is piled on by additional physical abuse and mental pressure during interrogation.

It is no wonder that from my practise at the criminal Bar, very rarely, if not hardly would you see the State attempt to adduce the accused's confession through his caution statement as part of the prosecution's case. This would be

because very frequently the confession would have been obtained through illegal means during police detention and the State would not want to go through the hassle of having the confession challenged by the defence resulting in the lengthening of the trial[1].

Cases of deaths in police custody have been widely recorded and compiled in media reports, memorandums, NGOs' annual reports and case law reports[2]. I will not repeat them here. Suffice to say, there is no denying that torture still takes place during police custody.

This is so because remand law weighs heavily in favour of the police and the supposed safeguards for the detainee are illusory. The weakness of the current legislation pertaining to remand of detainees are manifest as follows:

1. There is no clear, enforceable right for the detainee to see or to access his family or his counsel immediately upon his arrest. The courts have seen to that.

2. At the remand hearing, counsel for the detainee and/ or the detainee are not entitled to have a copy of or to scrutinise or to examine the police investigation diary. The legislation has seen to that.

3. Without early access to the detainee and without sight of the police investigation diary, counsel's role at the remand hearing is nothing but an eyewash; merely to 'legitimise' the remand process.

4. Again, without early access and without sight of the police investigation diary, counsel would not be able to tell or make any complaint regarding physical abuse or mental torture of the detainee. Counsel would not be informed of the locations the detainee had been brought by the police.

5. Whilst the legislation does not oblige the presiding magistrate during the remand hearing to enquire into the health and welfare of the detainee as well as to order medical examination, the apathy of the courts have also contributed to the declining standards in the treatment of detainees.

    5.1 The courts have seen their role as 'rubber-stampers' merely to process the police applications for futher remand. Usually, any complaints of ill-treatment or for medical treatment is met with the answer, respectively, that a police report be lodged or a request be made to the police for the same. But it is the same police force detaining the detainee which had inflicted the ill-treatment leading to the complaint!

    5.2 Judicial scrutiny is of low quality and insufficient. Had the respective remand magistrates been more vigilant, the spate of deaths in police custody cited above could have been avoided. It could be that the sheer volume of remand applications have overwhelmed the remand courts but administrative inefficiency can never be an excuse to disregard a human's life. Judges should now go through human rights education and SUHAKAM can play a very important role in that.

    5.3 Not many remand orders go up on appeal or in revision to the High Court for review. The few which have gone up have been found wanting - eg: lack of written reasons for further remand, no proper application of the magistrates' mind to the facts and law on remand and no proper investigation diary produced[3]. The reason not many are appealed or revised is because by the time the hearing of the appeal or revision is fixed, the remand would have ended and the issue rendered academic.

6. There is nothing in the legislation prohibiting successive remand orders (also known as 'chain-smoking' or 'roadshow' orders). In other words, a detainee may be detained for 15 days at one police station and then released only to be arrested by another police station on another police report and this would go on consecutively. Many of the deaths in police custody cases reveal such orders being made in respect of the detention of the victims.

Internal Security Act, 1960

Section 73 of the Internal Security Act, 1960 allows the police to detain any person for up to 60 days. The police may without warrant arrest and detain any person firstly, for 24 hours; and subsequently, for more than 24 hours with the authority of a police officer of or above the rank of Inspector. The police may further detain the person for more than 48 hours with the authority of a police officer of or above the rank of Assistant Superintendent.

If the detainee is detained for more than 48 hours, he may not be detained for more than 30 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

You will note that really, there is no independent body which is to authorise the continued detention of the detainee. The police arrest, the police detain and the police is to

[1] A brief study was done on the cases reported in the Malayan Law Journal from 1980 to 2002 where the admissibility of cautioned statements by accused persons was challenged. It was revealed that in twelve (amounting to 48%) of the relevant 25 cases, cautioned statements were ruled to be inadmissible by the courts for being in breach of section 113 of the Criminal Procedure Code or its equivalent, section 37A Dangerous Drugs Act, 1952. Out of the twelve cases, five of them were due to various forms of oppression, threat or promise.

[2] S. Tharma Rajen, M. Uthayamaran, M. Ragubathy, P. Veveshanu, Sundara Raju and Prakash Moses are but a few names. See also Edmund Bon, *'Cop-land'*, paper delivered on 26 April 2003 at the Bar Council's Seminar on 'Police Powers and Rights of Detainees'.

[3] See examples in cases such as Re *Mohamad Ezam Bin Mohd Nor* [2001] 3 MLJ 372, *Saul Hamid v Public Prosecutor* [1987] 2 MLJ 736, *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477, In Re *Syed Mohammad b Syed Isa & 3 ors* (unreported) Kuala Lumpur Criminal Revision Nos 43-03-2001, 43-05-2001, 43-06-2001 & 43-07-2001 and Re The Detention of *R Sivarasa & Ors* [1996] 3 MLJ 611.

authorise further detention. One and the same. There is no 'safety valve'.

In all, the police may detain any person for a maximum period of 60 days. Thereafter, the detainee must be released or under normal circumstances, the Minister of Home Affairs will issue a detention order under section 8 of the Internal Security Act, 1960 allowing detention of that person for any period not exceeding 2 years. This may be renewed for any period not exceeding 2 years at the end of every 2 years. There is no fetter to this renewal. Issuance of a section 8 order by the Minister will see the detainee being placed from police lock-up (during the 60 days) to a serene camp at Kamunting.

Unlike the provisions of the Criminal Procedure Code, the Internal Security Act, 1960 is 'special law' enacted under Article 149 of the Federal Constitution. The police therefore need not produce the detainee before a magistrate during the 60 day period. There is thus no judicial monitoring during 60 days of police detention under the Internal Security Act, 1960 unlike during the remand applications after the first 24 hours of arrest and detention under the Criminal Procedure Code.

It gets worse. Under section 8B of the Internal Security Act, 1960, judicial review of any form, be it a writ of habeas corpus to free the detainee or any other application, suit or legal action challenging the Minister's order made under section 8 of the Internal Security Act, 1960 is completely barred save as to procedural questions (also known as the 'ouster clause'). The courts are precluded from examining and looking into the substance of the Minister's order – eg, whether there are sufficient, admissible facts which merit making of the order, whether the grounds substantiating the order really exists and are proved and whether the order was made in bad faith.

There can absolutely be no challenge except on procedural grounds. In this, the detainee whilst being denied his basic human right to a fair, free, open and public trial is also denied the bare minimum - judicial safeguards and scrutiny of his detention.

The Internal Security Act, 1960 is well-known for the wrong reasons. It denies the fundamental right to a free, fair, open and public trial. Abuse, inhuman, degrading treatment and torture of detainees are well-documented[4]. Mental anguish and psychological abuse are frequent[5].

Most of the time, the arrests would happen late into the night, teams of police personnel will swamp the detainee's house, the detainee would be handcuffed and blindfolded, their families would not be told where they would be detained, the detainee himself would not know where he is and no one would be able to access the detainee until long after the arrest.

The most recent use of the Internal Security Act, 1960 was when scores of people were at different times in different batches arrested and detained by the police for allegedly being members of 'Kumpulan Militan Malaysia'. After being detained for the full 60 days, they are serving section 8 detention orders in Kamunting allegedly for being members of the now infamous organization known as 'Jemaah Islamiah'.

From numerous interviews with these detainees, they were constantly interrogated during the 60-day detention by different police teams using known police interrogation techniques and deception such as playing 'good-cop' and 'bad-cop', veiled threats against family members, inducement of early release in exchange for confessions and fictional betrayals of trust – telling the detainee that a friend of his in detention had 'leaked information' and 'confessed' thereby encouraging the detainee to do the same.

It was also a common feature that police detention during the 60 days would be with the aim of 'breaking down' the detainee mentally and psychologically to such an extent that by the end of the 60 days, the detainee would be so disorientated that he would be inclined to 'obey' his captors/ torturers. Solitary confinement is reportedly a tool. If one is detained for 60 days without social interaction, without normal stimulation of intellect, family and friends and one's link to the outside world is only through one's captors/ torturers, it would not be difficult to imagine a situation whereby the detainee becomes as it is 'bonded' or 'attached' to his captors/torturers. When interrogation continues, that 'bonding' or 'attachment' allows the captor/torturer to manipulate or twist statements or facts to suit the situation as against a helpless, mentally disfigured detainee. Statements would then be signed, confessions made. Many say they were tricked and forced into admitting and signing statements they did not make. This may not sound as horrific as beatings or physical torture but I would regard this as worse - a manipulation of one's emotions and mind.

I have also been told that a great deal of so-called evidence against the detainees brought forth by the police are manufactured to 'suit' the allegations of religious extremism and terrorism. Matters such as praying ever so often at a secluded mosque would be interpreted as holding meetings and pledging allegiance to the cause of setting up a Pan-Islamic state; listening to preachers from Indonesia would be interpreted similarly as above; going to nature hikes and camping would be interpreted to be military training.

The only 'crime' I can make out for these detainees is that they were found to have been too pious, too devout and too religious in the study and practice of Islam. But this certainly cannot be a crime - everyone is entitled the freedom to practice, profess and propogate his own religion. This is guaranteed by Article 11 of the Federal Constitution.

Interviews with these detainees also reveal that during their 2 year detention orders under section 8 of the Internal Security Act, 1960, there would be frequent mass lectures and classes which include preaching by officers of the State in an attempt to 'turn over' or 're-educate' the detainees in

[4] See Amnesty International, *'Report of an Amnesty International Mission to the Federation of Malaysia'*, 18-30 November 1978, Amnesty International, *'Malaysia - 'Operation Lallang': Detention Without Trial under the Internal Security Act'*, December 1988, Amnesty International, *'Malaysia - Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy'*, September 1999 and Suara Rakyat Malaysia (Suaram), *Malaysian Human Rights Report: Civil and Political Rights'*, 1999.

[5] See Nicole Fritz & Martin Flaherty, *'Unjust Order: Malaysia's Internal Security Act'*, 2003.

their religious beliefs and political thoughts. Those who do not attend the lectures or classes would be threatened that their detention orders will be extended and 'privileges' such as playing football would be denied.

Besides facing the 'ouster clause', the detainees and their families would be told by police officers not to take up any legal action or seek legal advice lest the detainees' detentions are extended. In fact, promises of early release are made to secure confidence in the detainees not to take up legal action.

Family access at Kamunting is restrictive. They would have to meet each other behind bars. Physical contact is minimal. Food for the detainees cannot be given except fruits. Then, whenever there are complaints regarding their conditions of detention made by the detainees directly to SUHAKAM or to us as their lawyers and which are forwarded to various NGOs, and these complaints come to light, family access at Kamunting would be even more restrictive. In effect, punishing the families of the detainees for them to place more pressure on the detainees. And remember, these detainees have not been found guilty by a court of law.

I could list the kinds of trauma faced by the current set of detainees in Kamunting but it would be too long. Suffice to say, whenever the detainees have complained about conditions of detention which need looking into, various families and NGOs have gone forward to SUHAKAM to make the necessary complaints. These complaints have been documented.

It would not be unfair if I sum up the discussion on this point in this way - detention under the Internal Security Act, 1960 is oppressive and constitutes torture as the torturer holds all the reins and controls the lives of the detainees. Whenever the detainee/tortured acts in a way, the captor/torturer would react to counteract in another way. What more when there is no certainty as to the length of time a detainee is to be detained. This fact is far worse than even punishment after a trial where there is a certainty as to the length of the sentence passed.

It must also be remembered that there were a few detainees in Kamunting who gave video link evidence during the trial in Indonesia of alleged Jemaah Islamiah leader, Abu Bakar Bashir. The Bar Council[6] and various bodies denounced this for the position taken was that no reliable, credible or voluntary evidence could have been given by someone in detention against his will on matters against his personal self-interest. The same person being deprived of a right to a trial is being used as a witness to given evidence against another in the latter's trial.

You will note that after giving of such evidence, when we visited one of them - he expressed shock when he was told that he need not have given such evidence. The question is - who knows what coercion was put on these detainees when they gave such evidence. The other detainees who gave evidence refuse to meet with any lawyers so to date we have not been able to ascertain the truth of the matters.

Leaving this, the clearest indication that the State do not have sufficient evidence to prosecute the detainees now held for allegedly being a terrorist threat and that is why they are being housed under the Internal Security Act, 1960 came from our now Prime Minister, Datuk Seri Abdullah Ahmad Badawi, who on 23 September 2003, he said[7]:

> '*Investigations are still on-going not only in Malaysia but regionally to determine their connections with the terrorist network. ... We are not detaining them without reasons. We will continue our investigations and all information obtained are filed and recorded. We decide later whether to charge them in court or not.*'

This cannot be right for the section 8 detention orders are to be supported by grounds of detention and facts justifying those grounds for detention. One is either part of a terrorist network or one is not. If one is not or if there are no grounds and facts to evidence it, a suspicion is not sufficient to prosecute detain or incarcerate a person. That person must be released.

Detention under section 8 of the Internal Security Act, 1960 cannot and is not to be used for investigation or investigatory purposes. That is a mala fide utilisation of the legislation.

Role of judges in an advanced criminal justice system

The participants in a criminal justice system include the police, the prosecutor, the defence counsel and the judge. Law is only enforceable to the extent judges interpret it. The Criminal Procedure Code and the Internal Security Act, 1960 paves the way for torture by the State within an institutionalised and legalised framework to take place. The only safeguard is the judiciary. When the judiciary fails to check or properly scrutinise the use of the said legislation, there is really little hope for minimising the opportunities for torture. Of course, I am not forgetting the work NGOs and independent bodies play within the non-legal framework in the fight against torture - documentation, leading public opinion/outcry and creating public awareness.

As put forth above, a criminal justice system is based on the human right principle of the 'right to trial'. This system, being adjudicated by a judge, is therefore a human rights model and the judge is a 'human rights defender'.

The criminal justice system is part of a human rights initiative. The judiciary must therefore in this 21st century transform itself drastically and view itself as a human rights defender. Judges must understand fully their constitutional role in upholding rights of mankind[8]. Just as in the 21st century we become more technologically savvy and advanced in new areas, human rights should not be viewed with disdain or fear or a dismissive attitude left for the West only. It is for all humans; and human rights is not only for the accused, it is also for the victim.

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[6] See Bar Council's press statement, *'Giving Evidence by ISA Detainees'*, 8 July 2003. It refers to 2 reported Singapore cases where under the same legislation in Singapore, complaints of duress were later made by detainees that they had been coerced into making confessions by way of televised interviews while in detention.
[7] *The Star*, 24 September 2003.

If we do not catch up with the times, we would be a, how would you say it, '21st century country with 19th century mentality'. Human rights is here to say whatever you might wish to call it. The ever expanding markets and globalisation will force us to re-think our strategy for the future and how we interact with other countries with a far advanced human rights record. It will only be good if we acknowledge it now.

As a human rights defender, the function of the court is to protect each human being within its jurisdiction and province. The function of the court is not to apply rules or legal norms or law mechanically. Rules, legal norms or law are merely there as a guide to 'best practices'. They are not the end all and be all, they should not be. The judiciary cannot be too legalistic and the legislature cannot play god. The judiciary must decide with a conscience, the judge must be one with a conscience. If the law is bad, change it, interpret it differently, make law - so long as it is an act of human rights defending. With respect, and in this area, history shows that the judiciary in Malaysia lacks courage, innovation, invention and is ultra-conservative. Everytime the term 'human rights' is used it sounds to the judiciary like an 'expletive' or 'bad word'. It is not often you see the term 'human rights' used in law reports.

For example, it may have been the case that the law says Anwar Ibrahim's allegations of political conspiracy would be irrelevant in deciding the charge against him. Nevertheless, as a human rights defender, when a human being faced against the might of the State makes a credible and not spurious allegations of conspiracy - the court ought to look into that - for it affects the credibility of the State's enforcement agencies such as whether the police investigation was tainted, whether the allegations were trumped up, whether evidence was fabricated and whether witnesses were influenced.

For example, evidence of a certain crime such as a confession beaten out of the accused should be held to be tainted and inadmissible in court - 'fruit of the poisonous tree' argument. Any evidence of torture is antithetical to and seriously damages the integrity of the right to trial and any trial. However, the law in Malaysia now is that such evidence would still be admissible.

And that is why also because the criminal justice system is a human rights system, there must be possessed of honest, fair and independent prosecutors as well as judges and defence counsel. People who will own up to say they are wrong when they are wrong. We all know that many times, no law will find out the real truth and the truth will only be out when conscience makes itself known.

I am attempting to expound an idea that the criminal justice system need not be an adversarial 'us' v 'them' battle but an inquisitorial 'us together with them' concept for both prosecutor and defence who are seeking truth and justice. This concept may be the way forward in enhancing human rights in this country. It is and should be a system of conscience.

Terrorism, torture and the future

It is clear that torture is unreliable as a means of eliciting truth. It is also clear that torture is to be condemned because it is revolting and inhumane. However, actions have been taken which appear to convey the message that torture may be permissible for crimes involving terrorism.

After 9/11, America detained over 1,200 non-citizens primarily from Middle Eastern, South Asian and North African countries[9]. They used immigration charges as a pretext to detain 766 non-citizens while investigating possible links to terrorism. Their identities are unknown and the majority of them had their immigration hearings in secret. Many of them have no links with terrorists or were innocent persons caught unawares at the wrong place at the wrong time[10].

Abuse is rife, torture common[11]. Reports indicate that Taliban and Al-Qaeda detainees held at Guantanamo Bay are confined 'in small cages with chain-link sides, concrete floors and metal roofs'[12]. 'The prisoners were held initially in wire cages then transferred to tiny isolation cells, where they are confiend, except for two short shower and exercise sessions a week. Detainees have been subject to intense interrogation, including the use of psychological stress techniques, which are classified under international law as torture. Only a handful of the more than 600 men in Guantanamo Bay have been released, even though the war in Afghanistan is over.'[13]

We must be careful with the arguments made as to the use of torture for terrorism. America would say that terrorism is a special type of crime requiring special methods for dealing with it. Malaysia would say the same, hence the use of the Internal Security Act, 1960. But this is problematic as it runs into the 'slippery slope argument'. Without a clear, accepted universal definition of terrorism and countries tending to use a 'broad-brush approach' when attempting to define terrorism, who knows, tomorrow it might be you in detention, tortured on allegations of being a terrorist or being involved in terrorist activities.

It is precisely because terrorism is a special type of crime, all the more, we should be more vigilant when dealing with it to ensure human rights are protected. The pretext for investigation into alleged terrorist activities defined broadly would be a carte blanche for human rights abuses.

The new Bill presented in Parliament recently to amend the Penal Code of Malaysia proposes definitions of 'terrorist' and 'terrorist act' as follows:

"terrorist' means any person who—

(a) commits, or attempts to commit any terrorist act; or

[9] See Gopal Sri Ram, *'The Role of Judges and Lawyers in evolving a Human Rights Jurisprudence'*, November 2001.
[9] See Human Rights Watch, *'US: Justice Department Report Confirms 9-11 Detainee Abuses'*, 2 June 2003.
[10] See Greg Miller, *'Many Held at Guantanamo Not Likely Terrorists'*, 22 December 2002.
[11] For a comprehensive report, see Human Rights Watch, *'Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees'*, August 2002, Vol. 14, No. 4(G).
[12] See Human Rights Watch, *'Geneva Conventions Apply to Guantanamo Detainees'*, 11 January 2002.
[13] See Socialist Equality Party (Australia), *'Release David Hicks and all Guantanamo Bay detainees'*, 15 July 2003.

(b) participates in or facilitates the commission of any terrorist act, ...

(2) For the purposes of this Chapter, 'terrorist act' means an act or threat of action within or beyond Malaysia that—

(a) involves serious bodily injury to a person;

(b) involves serious damage to property;

(c) endangers a person's life;

(d) creates a serious risk to the health or the safety of the public or a section of the public;

(e) involves the use of firearms, explosives or other lethal devices;

(f) involves releasing into the environment or any part of the environment or distributing or exposing the public or any part of the public to—
(i) any dangerous, hazardous, radioactive or harmful substance;
(ii) any toxic chemical; or
(iii) any microbial or other biological agent or toxin;

(g) is designed or intended to disrupt or seriously interfere with, any computer system or the provision of any services' directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;

(h) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;

(i) involves prejudice to national security or public safety; or

(j) involves any combination of any of the acts specified in paragraphs (a) to (i),

where the act or threat is intended or may reasonably be regarded as being intended to—

(aa) intimidate the public or a section of the public; or

(bb) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization to do or refrain from doing any act,

and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [Act 307].

These definitions are just too wide. No consultation was had with the Bar Council or NGOs on this and the government appears to want to rush this through. There are enough legislated crimes in the Penal Code already which cater for terrorist activities: sections 121 - 130A of the Penal Code provide offences and punishment for offences of waging war against the State and the King. These are sufficient and adequately limited in scope. And does it mean that when the government passes the new legislation, all the detainees in Kamunting will be charged under the new law?

Numerous papers have been presented as to how investigation into and curtailment of terrorism may and should be compatible with human rights and how in pursuing the former, it cannot overshadow or disregard the latter[14].

As it is now, do we have adequate legislation to combat terrorism? The short answer is yes. Under the Criminal Procedure Code - at any one time, a person may be detained for up to 15 days. Under the Internal Security Act, 1960 - a person may be detained firstly for 60 days then 2 years. These time frames provide opportunites for torture as documented. The judiciary must keep up with the times to ensure these legislations do not infringe human rights; rather, to promote them although I am not able to see how anyone can justify the Internal Security Act, 1960 as a legislation founded on human rights principles.

The new legislations said to be draconian introduced in America and United Kingdom to combat terrorism do not match up to the severity of the Internal Security Act, 1960. Under America's Patriot Act, the powers introduced applies to foreign aliens (suspected of terrorist activities) only whereby the person must be charged no later than 7 days after he is first detained. If he is not charged, he must be released. If however the release of the person will threaten the national security of America and removal of the person from America is unlikely in the forseeable future, he may be detained for up to 6 months only. Habeas corpus and judicial review applications are available to the person detained. Under the United Kingdom's Terrorism Act, 2000, a person detained (suspected of terrorist activities) must be released no later than 48 hours after his arrest. Reviews of the person's detention must be done periodically by a review officer at intervals of not more than 12 hours. If the person needs to be detained for more than 48 hours, the police must obtain from the courts a warrant of further detention which shall end not later than 7 days beginning with the time of the person's arrest. Further, under the United Kingdom's Terrorism, Crime and Security Act, 2001 which provides for powers of deportation to deal with 'suspected international terrorists', those powers automatically expire at the end of the period of 15 months beginning with the day on which the said legislation was passed.

Even in Indonesia, Abu Bakar Bashir has been charged for allegedly being the leader of Jemmah Islamiah but his trial collapsed on this count. Some of those involved in the Bali bombings have been convicted whilst there are numerous awaiting trial. In the United Kingdom, Lotfi Raissi, an Algerian, was arrested under the new Terrorism Act, 2000 but was subsequently released after 5 months after the district judge ruled that there was no evidence to substantiate his involvement in terrorism. When will our alleged terrorists in Kamunting be charged or released? At the moment, all we can say and presume is that there is no evidence against them which will stand up within the criminal justice system.

[14] See papers delivered at the Bar Council's 'Forum on Terrorism and Human Rights' on 6 September 2003 and Karpal Singh, *'Enhancing Democracy - Human Rights Protection and the Common Good'*, 16 April 2003.

Custodial Torture

P Uthayakumar

[Paper presented at theConference on Torture jointly organised by Al Malaysia & Suaram on 1 November 2003 at Stanford Hotel, Kuala Lumpur]

INTRODUCTION

The 10,000 strong Royal Malaysian Police Force is one of the most efficient in this region in some ways for example when it comes to elimination of the communist terrorist. However in the field of criminal investigations and torture of suspects they are viewed as one with about the most brutal and ruthless track records.

THE LEGAL POSITION

Article 5 of Federal Constitution provides for right to life and limb.

Under Section 20 of the Police Act 1967 and Section 15, Section 112, Section 113, .Section 115 and Section 117 of the Criminal Procedure Code the Police are supposed to investigate and not 'interrogate' the alleged crime committed by a suspect. The police have a paramount public/ fundamental duty to investigate first and then to arrest. But in Malaysia it is the other way around. Most often they arrest first and only then start investigating. This is where all the torture and deaths in police custody tragically occurs.

Note: Case studies as compiled and provided by the Police Watch and Human Rights Committee.

a) CUSTODIAL TORTURE (INCLUDING DEATHS IN CUSTODY)

CASE STUDY NO 1

Name of Victim: Mohd Anuar b. Sharip
Age: 31
Place of Death: Rawang Police Lock-up

Brief Facts: The deceased was arrested on 10/8/1999 at about 12.00 p.m. while sleeping with his family at his house. On 18/8/1999 the police left a note at the deceased's mother in law's house which stated 'Please contact the Rawang Police Station Chief, your son Mohd Ariuar b Sharip is dead'.

Torture / Injuries:

- he sustained 'multiple laceration lesions on the neck, chest, abdomen and back region ranging from one to two centimetres'
- suffered blue-black marks on his abdomen as if he was viciously kicked and punched by the police
- the family believes that the deceased was tortured and beaten to death during the course of interrogation.

Cause of death as per Death Certificate:

- Lung Congestion (Paru-paru Berair)

File Status of Court Proceeding:

- Civil suit filed and pending Hearing
- no Inquest initiated by the Attorney-General despite numerous representations

CASE SIUDY NO 2

Name of Victim: Tharma Rajan a/l Subramaniam
Age: 19
Place of Death: Detained in Stadium/Brickfields/Cheras/ Putrajaya Police Lockup and died at Putrajaya Hospital.

Brief facts: The deceased was a healthy youth who plays football and never suffered from any serious illnesses. He was arrested on 3/4/2002, put on an unlawful 'serial remand' in the Stadium/ Brickfields/Cheras and finally detained at the Putrajaya Lock-up under the Emergency Ordinance, when he succumbed to his injuries on 21/6/2002 (after two months and eighteen days) and died at the Putrajaya Hospital with both his handcuffs on until his last breath.

Torture / Injuries:

- The deceased told his brother and mother that he was slapped until he had a toothache, hit on the sole of his feet with a rubber hose, beaten up especially on his body and hands, left to sleep on cement flooring, not given a blanket and/or allowed to wear a T-shirt and interrogated naked in on air conditioned room.
- The deceased pleaded with the police and then with his mother, brother and family to get the police to send him to the hospital as he had breathing difficulties, feeling cold, was shivering, vomiting, his lips were cracking and he could not eat his food.
- The police mercilessly denied the family's pleadings and the deceased continued to suffer in silence.
- He was finally sent to the hospital when he became critical and after a few days he succumbed to his injuries.
- Note: the victim was treated so badly that he was handcuffed to his Hospital bed until his last breadth.

Cause of Death as per Death Certificate:

- Pneumonia

Cause of Death as per second Post Mortem Report:

- extensive Pulmonary (Lung) Tuberculosis and
- malnourished emaciated body of a young male with small abrasions

Status of Court Proceeding:

- Inquest in progress

CASE STUDY NO 3

Name of Victim: Ragubathy a/l Muniandy
Age: 22
Place of Death: Putrajaya Hospital

Brief facts: The deceased was a heart patient having gone through an open-heart surgery some ten (10) years prior to his death. Though the deceased was a 'fragile' detainee the Court granted him a ten (10) days Remand Order with effect from 18/7/2002 to 27/7/2002.

Torture / Injuries:
- According to the deceased cousin brother's statutory declaration (who was also arrested and detained with the deceased) the deceased was hit by the Police on the soles, body and face.
- The deceased with effect from 20/7/2002 (2 days after arrest) could not sleep when his chest pain started and as he did not have his medication.
- The deceased pleaded with the Police three (3) to four (4) times a day to be brought to the hospital but to no avail.
- On 23/7/2002 he became serious and could not eat for three (3) days and was vomiting.
- He couldn't sleep for four (4) days and could not lie down as he had breathing difficulties if he did so. So he tried to sleep straight / upright.
- On 26/7/2002 he was looking pale, had breathing difficulties and was struggling in pain.
- On 27/7/2002 he was taken to hospital and within twenty-four (24) hours on 28/7/2002 at 3.00 a.m. the deceased died.

Cause of Death as per Post Mortem Report:
- Congestive Cardiac Failure
- Stonosed Mitral Valve Prosthesis

File Status of Court Proceedings:
- no inquest commenced by the Attorney-General despite numerous representations

CASE STUDY NO 4
Name of Victim: Vivashanu Pillai
Age: 24
Place of Death: Klang River but while under the custody of the Dang Wangi Police Station

Brief Facts: The deceased was arrested by the police on 1/8/2002 at about 3.00 a.m. by a group of about twelve (12) Policemen. Upon arrest he was handcuffed and assaulted right in front of his relatives. On 3/8/2002 the police informed the family that the deceased had escaped from the police custody. On 4/8/2002, a dead body was brought to the hospital and on 6/8/2002 the family was asked to identify the dead body. A fellow detainee named Mariappan who was brought to identify the body of the deceased positively identified the deceased and pointed out to a bruise on the upper right buttock and injuries to both his wrists which was inflicted by the police in custody. Mariappan further said that both the victim's hands were tied to the roof and he was beaten with a cable on his body and he was severely injured. Then chilly (cili padi) was applied to the wound and the deceased was screaming in pain. When the deceased was killed he was thrown into the Klang river so that his cause of death could not be ascertained. (Source: deceased's mother's police report)

Cause of Death as per Death Certificate:
- Unascertained Advanced Decomposition.

File Status of Court Proceedings:
- Attorney-General yet to hold Inquest despite numerous representations.

CASE STUDY NO 5
Name of Victim: Ho Kwai See
Age: 28
Place of Death: Kota Damansara / Sungai Buloh Police Lock-up

Brief facts: On 5/8/2003 the police telephoned the family and informed them that the deceased had died on 4/8/2003 at about 8.30 p.m. At the mortuary photographs were taken of the deceased with blue-black marks and injuries on his back (bruise), posture (bruise) below his left hand (blue black), lower part of stomach (blue black) and on top of right shoulder (bruise).
Note: despite a request for a second Post Mortem, the hospital authorities and the police refused to conduct/order one. On 20/8/2003 (after 16 days) the Kuala Lumpur High Court rejected the family's request for a Second Post Mortem.

Cause of Death as per Death Certificate:
- Perforated Ulcer in the stomach

Status of Court Proceeding:
- No Inquest commenced by the Attorney-General despite numerous representations made.

CASE STUDY NO 6
Name of Victim: Azli bin Hamzah
Age: 22
Place of Death: Kuala Selangor River

Brief Facts: On 12/6/2003 the deceased and a few of his friends were playing cards along the Kuala Selangor River. Suddenly three (3) Policemen chased/shouted/threatened them. The deceased was in fear and ran towards the river and was still pursued by the police. The deceased who did not know how to swim panicked and jumped into the river when all his other friends did so. The trained policemen watched the deceased drown and left the place quietly without making any effort to save him. Source: Police report of deceased's father who is himself a retired policeman.

Cause of Death:
- Asphynation to drowning

Status of Court Proceeding:
- No Inquest commenced by the Attorney- General despite numerous representations made

CASE STUDY NO 7 AND NO 8
Name of Victims: Lingeswaran a/l Perumal and Poobalan a/l Purecheveran
Age: Both 19

Place of Incident: Balai Polis Petaling Jaya

Brief Facts: At about 9.00 p.m. on 27/2/2003 both these youths were arrested by the police. On 28/2/2003 at about 5.00 p.m. on being produced at the Petaling Jaya Magistrate Court the police were caught of guard as members of the public complained to laywer P Uthayakumar who was attending to another matter about these two youths who were beaten up by the police. Upon submissions by Counsel both victims were released by the Court but were re-arrested that very night at about 9.00 p.m. at the University Hospital when they went there to receive treatment. Even on Counsel's express request and a police report being lodged, the doctor at University Hospital refused to take photographs of the injuries.

Injuries to Poobalan:
- Reddish beating marks of about six inches at the back of the shoulder and right hands, swells on the head, feet and legs.

Injuries to Lingeswaran:
- six inches reddish beating marks on his right and left shoulders swells on the head, feet of both legs. Both his cheeks were affixed with a police rubber stamp.

Status of Court Proceeding:
- No criminal action instituted against the said policeman as of date

CASE STUDY NO 9
Name of Victim: A Sri Ramulu a/l K Appalasamy
Age: 34

Brief Facts: Sometime in 1998 the victim was arrested for murder just because the real culprit implicated him. The victim was blindfolded and handcuffed and put in a room where any and every policemen who passed by started beating, hitting, punching and kicking him up. Then one policeman beat him with a rubber hose. The pain was so unbearable that he 'confessed' that he shot the murder victim and threw the gun around there when the said victim was actually stabbed to death using a knife. The real culprit was then charged and convicted. Source: from the victim's own version to his lawyers.

Residue of Injuries:
- on examination a few black stripes still exist even after four (4) over years.

CASE STUDY NO 10
Miscellaneous Cases

1) **Barbeque**
Ho Kwai Sang was handcuffed with his hands at the back. A wooden pole was put between his hands and his buttocks and put across two chairs. Any and every policemen passing by would 'swing' him and/or beat him up.

2) **Beaten Up with 'internal injuries and sole of feet'**
Rejendran was arrested and beaten up and was told with 'internal injuries that would surface only a few years later'. He was also beaten on the sole of his feet .with a rubber hose. The pain was so unbearable and having hit 'rock bottom' he then told the police that 'even if you now hang me I can tell you that I am not involved'. Upon his release a letter was sent to the Inspector General of Police. Though it is 13 years now not only has the police not replied to the said letter but the policemen who beat him up was never prosecuted and neither was Rajendran prosecuted (this proves his innocence).

3) In 1985 a senior policeman one Acting Superintendent of Police telling friends during the break of a Port Dickson murder trial at the Seremban High Court was relating an incident where he put his cigarette butt on the penis of a suspect and it became septic. At the hospital the doctor was 'convinced' that the suspect was a notorious criminal and on request diagnosed the injury as 'syphilis'.

4) Lawyer P Uthayakumar was told to strip right up to his underwear in the presence of 9 policemen. He was then filmed and video of him was taken. This lawyer has since filed two (2) civil suits against the police.

5) A shop assistant in Seremban on the evening of Deepavali in 2000 had his shop raided by a group of 10 -15 policemen in a high-handed manner. When asked if he was a Bangladeshi, he replied that he was 'an Indonesian'. One policeman was provoked and hit the head of the victim with his handcuffs. The victim fainted under a pool of blood. This group of policemen immediately 'ran away' and it was the family who had to rush the victim to the hospital. The victim sustained about 10 stitches on his head and was hospitalised for a few days. Up to date the policeman responsible was never charged for his crime.

6) A lady (Saratha a/p Ponnambalam) was arrested together with her husband and was coerced to confess to a crime 'she never committed'. As part of the interrogation another male detainee was brought in and she was told to perform oral sex on him: When she refused the investigating officer opened the zip of his pants and told her to perform oral sex on him. Then the said investigation officer told the lady suspect that he would rape her 18 years old daughter that night at 2.00 a.m. Note: this information was related to the learned Magistrate of the Rawang Magistrate Court when she was produced for extension of Remand.

7) The latest episode is that of V Vikines (19) an STPM student who was shot dead along with two others at Nilai, N Sembilan on 11/10/2003. Three (3) days after his cold blooded and ruthless killing by the police Vikines' parents received his SPM single paper results where he obtained a credit. Independent checks by the Malay Mail with his school (15/10/2003 at page 4) reveals that Vikines does not even have disciplinary problems at school and his fellow students are surprised that Vikines is involved in the 'supposed serious crime'. Three (3) police reports have been lodged that the three (3) suspects had injury as follows:-

   a) bleeding nose, swallen lips, scars on body, beaten on back etc and believed to have been interrogated, tortured and then executed by the police.

(Note: Item 7 verbally outlined on 1/11/2003 and updated on 10/11/2003)

Introductory Remarks at the Forum on Terrorism & Human Rights on 6 September 2003.

Cecil Rajendra

On 20 September 2001, the President of the United States, George W Bush, in response to the horrific events of 11 September 2001, declared The War on Terror.

The President addressed all nations of the world and ordered them to make a choice:

> 'Every nation in every region now has a decision to make. Either you are with us or you are with the terrorists.'

This War on Terror was effectively inaugurated with the bombing of Afghanistan and subsequently extended to justify the invasion of Iraq, on the dubious premise that Iraq had a huge cache of weapons of mass destruction and posed an imminent threat to world peace.

If the first casualty of every War is Truth, then we can say that the biggest casualty of this so-called War on Terror has been human rights.

'There is an erosion of civil liberties in the name of combating terrorism', observed Mary Robinson, UN High Commissioner for Human Rights.

'We are getting reports from human rights defenders, trade unionists and journalists around the world that measures are being taken by countries saying that they're combating terrorism but, in fact, clamping down on political opposition, freedom of the press, branding activities as being terrorist which were not so described before 11 September 2001', she continued.

Taking their cue from the US, who at the very outset has demonstrated that it was not interested in pursuing a path under international law - detaining over 3,000 people in Guantanamo Bay, Egypt, Jordan and elsewhere without trial, charge or legal rights and often subjecting them to torture - many governments around the World are today using this so-called War on Terror as an excuse to carry out repressive policies and suppress internal dissent and opposition touting their own internal struggles as battles against terrorism e.g. Egypt, Israel, Russia, etc.

The most blatant example of the use of the war on terror for gross violation of human rights is the policy of Israel against the Palestinians. Ariel Sharon, the Prime Minister has repeatedly referred to Palestinian leader Yassir Arafat as 'our Bin Laden', and, claimed that his government's fight against the Palestinians as part and parcel of the war on terror.

In Egypt, the government has brushed off criticisms of torture and summary trials, suggesting that Western countries should 'think of Egypt's own fight against terror as their new model'. And as thanks for its contribution to this War on Terror, Egypt has secured for itself massive aid from the US Govt and tacit acceptance of its human rights violations.

In Russia, President Putin has embraced anti-terrorism rhetoric to defend his Govt's brutal campaign in Chechnya playing up alleged links between Osama and Chechen rebels.

And Malaysia, not to be outdone, in the true spirit of 'Malaysia Boleh', no less a person than the first Chairman of SUHAKAM - The Malaysian Commission of Human Rights - went on record asking whether it was time for human rights to take a back seat after the events of Sept 11?

It is questions such as these and the larger implications that the campaign on terror has had on human rights that this forum seeks to explore.

The Lessons Posed by the Amina Lawal Case of Nigeria

Salbiah Ahmad

The acquittal of Amina Lawal from death by stoning 'rajm' for the hudud offence of adultery 'zina' in the state of Katsina in Nigeria was seen by proponents of hudud in Nigeria and in Malaysia as the triumph of the Syariah.

However, the case also exposes the substantive and procedural problems of enforcing the hudud law.

Nigeria is a federation of 36 states. Sixteen of the nineteen Muslim majority states have passed hudud laws. Criminal law under the 1999 Nigeria Constitution is a matter in the state list. Parliament has no power over criminal law.

Amina Lawal, 35 has been divorced for two years. She was unmarried when she was found pregnant. She is twice divorced, her first marriage was at age 14. She was divorced, impoverished with no financial means to support the children left in her care.

She was charged and found guilty of zina on account of her pregnancy. This is not part of the hudud legislation although a variant Maliki opinion allows pregnancy as circumstantial evidence of rape. The sentence of death by stoning is part of the written law in the state.

There was evidence that she had confessed to the hudud offence although counsel argued in the trial court that the accused did not know that she was confessing to zina which attracted death by stoning.

The Sharia Upper Court confirmed conviction and sentence of the Lower Sharia Court. Her appeal to the Sharia Appeal Court on Sept 25 2003, succeeded in her acquittal in a 4:1 majority decision.

The acquittal was reasoned as follows:

1. The trial court (lower sharia court) was not properly constituted.
2. The arraignment was defective in that it was based on one complaint. Following the 4 eyewitness rule, the complaint must be lodged by 4 eyewitnesses before action can be taken.
3. Pregnancy is not proof of zina. Zina is only proved by 4 eyewitnesses to the sexual intercourse.
4. A single confession to zina is not acceptable proof of zina.
5. An accused may retract a confession at anytime before execution of sentence. It was wrong of the Upper Sharia Court to refuse the retraction.

The minority opinion view the single confession as weightier than proof of 4 eyewitnesses. The learned Khadi did not find the retraction proper as it was not retracted by the accused but by counsel on her behalf.

Counsel also brought to the Sharia Court of Appeal's attention, a variant legal opinion of the period of gestation of a child at 5 years. The majority opinion accepted this point.

For some, the acquittal was seen as a response to international pressure to release Amina from the ordeal. The so called 'technical grounds' upon which the Sharia Appeal Court relied on were seen as selective.

The dilemma as seen in the case, is the choice or selection of opinions. The varying legal opinions of fiqh support both majority and minority opinions in the case. No one in Nigeria can be certain as to whether it was law or public opinion which prevailed in the Amina Lawal case.

The case does suggest that even if there is positive law (as opposed to general law) on the point in question, that matter may still be challenged by raising legal opinions (fiqh as general unlegislated syariah) if counsel can persuade the judges to accede the point. The case raises problems of substantive law, evidence and procedural law in the enforcement of zina in the courts.

The Universal Islamic Declaration of Human Rights

Islamic Council, 19 September 1981

WHEREAS the age-old human aspiration for a just world order wherein people could live, develop and prosper in an environment free from fear, oppression, exploitation and deprivation, remains largely unfulfilled;

WHEREAS the Divine Mercy unto mankind reflected in its having been endowed with super-abundant economic sustenance is being wasted, or unfairly or unjustly withheld from the inhabitants of the earth;

WHEREAS Allah (God) has given mankind through His revelations in the Holy Qur'an and the Sunnah of His Blessed Prophet Muhammad an abiding legal and moral framework within which to establish and regulate human institutions and relationships;

WHEREAS the human rights decreed by the Divine Law aim at conferring dignity and honour on mankind and are designed to eliminate oppression and injustice;

WHEREAS by virtue of their Divine source and sanction these rights can neither be curtailed, abrogated or disregarded by authorities, assemblies or other institutions, nor can they be surrendered or alienated;

Therefore we, as Muslims, who believe

a) in God, the Beneficent and Merciful, the Creator, the Sustainer, the Sovereign, the sole Guide of mankind and the Source of all Law;
b) in the Vicegerency (Khilafah) of man who has been created to fulfill the Will of God on earth;
c) in the wisdom of Divine guidance brought by the Prophets, whose mission found its culmination in the final Divine message that was conveyed by the Prophet Muhammad (Peace be upon him) to all mankind;
d) that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul, and, knowing that the teachings of Islam represent the quintessence of Divine guidance in its final and perfect form, feel duty-bound to remind man of the high status and dignity bestowed on him by God;
e) in inviting all mankind to the message of Islam;
f) that by the terms of our primeval covenant with God our duties and obligations have priority over our rights, and that each one of us is under a bounden duty to spread the teachings of Islam by word, deed, and indeed in all gentle ways, and to make them effective not only in our individual lives but also in the society around us;
g) in our obligation to establish an Islamic order:
   i) wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language;
   ii) wherein all human beings are born free;
   iii) wherein slavery and forced labour are abhorred;
   iv) wherein conditions shall be established such that the institution of family shall be preserved, protected and honoured as the basis of all social life;
   v) wherein the rulers and the ruled alike are subject to, and equal before, the Law;
   vi) wherein obedience shall be rendered only to those commands that are in consonance with the Law;
   vii) wherein all worldly power shall be considered as a sacred trust, to be exercised within the limits prescribed by the Law and in a manner approved by it, and with due regard for the priorities fixed by it;
   viii) wherein all economic resources shall be treated as Divine blessings bestowed upon mankind, to be enjoyed by all in accordance with the rules and the values set out in the Qur'an and the Sunnah;
   ix) wherein all public affairs shall be determined and conducted, and the authority to administer them shall be exercised after mutual consultation

(Shura) between the believers qualified to contribute to a decision which would accord well with the Law and the public good;

x) wherein everyone shall undertake obligations proportionate to his capacity and shall be held responsible pro rata for his deeds;

xi) wherein everyone shall, in case of an infringement of his rights, be assured of appropriate remedial measures in accordance with the Law;

xii) wherein no one shall be deprived of the rights assured to him by the Law except by its authority and to the extent permitted by it;

xiii) wherein every individual shall have the right to bring legal action against anyone who commits a crime against society as a whole or against any of its members;

xiv) wherein every effort shall be made to

(a) secure unto mankind deliverance from every type of exploitation, injustice and oppression,

(b) ensure to everyone security, dignity and liberty in terms set out and by methods approved and within the limits set by the Law;

Do hereby, as servants of Allah and as members of the Universal Brotherhood of Islam, at the beginning of the Fifteenth Century of the Islamic Era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam.

I Right to Life

a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law.

b) Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

II Right to Freedom

a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law.

b) Every individual and every people has the inalienable right to freedom in all its forms¾ physical, cultural, economic and political and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle.

III Right to Equality and Prohibition Against Impermissible Discrimination

a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

b) All persons shall be entitled to equal wage for equal work.

c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

IV Right to Justice

a) Every person has the right to be treated in accordance with the Law, and only in accordance with the Law.

b) Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the Law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person.

c) It is the right and duty of every person to defend the rights of any other person and the community in general *(Hisbah).*

d) No person shall be discriminated against while seeking to defend private and public rights.

e) It is the right and duty of every Muslim to refuse to obey any command which is contrary to the Law, no matter by whom it may be issued.

V Right to Fair Trial

a) No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.

b) No person shall be adjudged guilty except after a fair trial and after reasonable opportunity for defence has been provided to him.

c) Punishment shall be awarded in accordance with the Law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed.

d) No act shall be considered a crime unless it is stipulated as such in the clear wording of the Law.

e) Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.

VI Right to Protection Against Abuse of Power

Every person has the right to protection against harassment by official agencies. He is not liable to account for himself except for making a defence to the charges made against him or where he is found in a situation wherein a question regarding suspicion of his involvement in a crime could be *reasonably* raised

VII Right to Protection Against Torture

No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.

VIII Right to Protection of Honour and Reputation

Every person has the right to protect his honour and reputation against calumnies, groundless charges or deliberate attempts at defamation and blackmail.

IX Right to Asylum

a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.

b) Al Masjid Al Haram (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

X Rights of Minorities

a) The Qur'anic principle "There is no compulsion in religion" shall govern the religious rights of non-Muslim minorities.

b) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.

XI Right and Obligation to Participate in the Conduct and Management of Public Affairs

a) Subject to the Law, every individual in the community *(Ummah)* is entitled to assume public office.

b) Process of free consultation *(Shura)* is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

XII Right to Freedom of Belief, Thought and Speech

a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.

b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.

c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state.

d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law.

e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.

XIII Right to Freedom of Religion

Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.

XIV Right to Free Association

a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right *(ma'roof)* and to prevent what is wrong *(munkar).*

b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities.

XV The Economic Order and the Rights Evolving Therefrom

a) In their economic pursuits, all persons are entitled to the full benefits of nature and all its resources. These are blessings bestowed by God for the benefit of mankind as a whole.

b) All human beings are entitled to earn their living according to the Law.

c) Every person is entitled to own property individually or in association with others. State ownership of certain economic resources in the public interest is legitimate.

d) The poor have the right to a prescribed share in the wealth of the rich, as fixed by Zakah, levied and collected in accordance with the Law.

e) All means of production shall be utilised in the interest of the community *(Ummah)* as a whole, and may not be neglected or misused.

f) In order to promote the development of a balanced economy and to protect society from exploitation, Islamic Law forbids monopolies, unreasonable restrictive trade practices, usury, the use of coercion in the making of contracts and the publication of misleading advertisements.

g) All economic activities are permitted provided they are not detrimental to the interests of the community*(Ummah)* and do not violate Islamic laws and values.

XVI Right to Protection of Property

No property may be expropriated except in the public interest and on payment of fair and adequate compensation.

XVII Status and Dignity of Workers

Islam honours work and the worker and enjoins Muslims not only to treat the worker justly but also generously. He is not only to be paid his earned wages promptly, but is also entitled to adequate rest and leisure.

XVIII Right to Social Security

Every person has the right to food, shelter, clothing, education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves due to some temporary or permanent disability.

XIX Right to Found a Family and Related Matters

a) Every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture. Every spouse is entitled to such rights and privileges and carries such obligations as are stipulated by the Law.

b) Each of the partners in a marriage is entitled to respect and consideration from the other.

c) Every husband is obligated to maintain his wife and children according to his means.

d) Every child has the right to be maintained and properly brought up by its parents, it being forbidden that children are made to work at an early age or that any burden is put on them which would arrest or harm their natural development.

e) If parents are for some reason unable to discharge their obligations towards a child it becomes the responsibility of the community to fulfill these obligations at public expense.

f) Every person is entitled to material support, as well as care and protection, from his family during his childhood, old age or incapacity. Parents are entitled to material support as well as care and protection from their children.

g) Motherhood is entitled to special respect, care and assistance on the part of the family and the public organs of the community *(Ummah).*

h) Within the family, men and women are to share in their obligations and responsibilities according to their sex, their natural endowments, talents and inclinations,

bearing in mind their common responsibilities toward their progeny and their relatives.

i) No person may be married against his or her will, or lose or suffer dimunition of legal personality on account of marriage.

XX Rights of Married Women

Every married woman is entitled to:

a) live in the house in which her husband lives;
b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting *(iddah)* means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own rights;
c) seek and obtain dissolution of marriage (*Khul'a)* in accordance with the terms of the Law. This right is in addition to her right to seek divorce through the courts.
d) inherit from her husband, her parents, her children and other relatives according to the Law;
e) strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her interests. A similar responsibility rests upon her in respect of her spouse or ex-spouse.

XXI Right to Education

a) Every person is entitled to receive education in accordance with his natural capabilities.
b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments.

XXII Right of Privacy

Every person is entitled to the protection of his privacy.

XXIIIRight to Freedom of Movement and Residence

a) In view of the fact that the World of Islam is veritably *Ummah Islamia,* every Muslim shall have the right to freely move in and out of any Muslim country.
b) No one shall be forced to leave the country of his residence, or be arbitrarily deported therefrom without recourse to due process of Law.

Explanatory Notes

1 In the above formulation of Human Rights, unless the context provides otherwise:

a) the term 'person' refers to both the male and female sexes.
b) the term 'Law' denotes the *Shari'ah*, i.e. the totality of ordinances derived from the Qur'an and the Sunnah and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence.

2 Each one of the Human Rights enunciated in this declaration carries a corresponding duty.

3 In the exercise and enjoyment of the rights referred to above every person shall be subject only to such limitations as are enjoined by the Law for the purpose of securing the due recognition of, and respect for, the rights and the freedom of others and of meeting the just requirements of morality, public order and the general welfare of the Community *(Ummah)*.

4 The Arabic text of this *Declaration* is the original.

Glossary of Arabic Terms

SUNNAH -	The example or way of life of the Prophet (peace be upon him), embracing what he said, did or agreed to.
KHALIFAH -	The vicegerency of man on earth or succession to the Prophet, transliterated into English as the Caliphate.
HISBAH-	Public vigilance, an institution of the Islamic State enjoined to observe and facilitate the fulfillment of right norms of public behaviour. The "Hisbah" consists in public vigilance as well as an opportunity to private individuals to seek redress through it.
MA'ROOF -	Good act.
MUNKAR -	Reprehensible deed.
ZAKAH -	The 'purifying' tax on wealth, one of the five pillars of Islam obligatory on Muslims.
'IDDAH -	The waiting period of a widowed or divorced woman during which she is not to re-marry.
KHUL'A -	Divorce a woman obtains at her own request.
UMMAH ISLAMIA -	World Muslim community.
SHARI'AH -	Islamic law.

All statements were issued by Haji Kuthubul Zaman Bukhari, Chairman, Bar Council 2003/2004 unless stated otherwise

12th Malaysian Law Conference Evolving A Malaysian Nation: The Role of Law and Lawyers

22 October 2003

The 12th Malaysian Law Conference will be held at the Hotel Nikko Kuala Lumpur from 10-12 December 2003.

The Biennial Conference will be declared open by His Royal Highness DYMM Paduka Seri Sultan Perak Darul Ridzuan, Sultan Azlan Muhibbuddin Shah.

The theme of the Conference is '*Evolving a Malaysian Nation: The Role of Law and Lawyers*'.

A keynote address on the theme will be delivered by veteran politician and former Minister of Finance, YBM Tengku Razaleigh Hamzah.

Special addresses over the three-day Conference will be delivered by the Minister of International Trade and Finance, YB Dato Seri Rafidah Aziz on '*WTO and its Impact on the Services Sector*'; by the Attorney-General YB Tan Sri Abdul Gani Patail on '*Prospects of a Common Bar Exam*'; by the Minister in the Prime Minister's Department YB Dato Seri Utama Dr Rais Yatim on '*The Role of Law & Lawyers in Nation Building*'; and by Dr Chin Jing Jih, Chairman of the Ethics Committee of the Singapore Medical Association on '*Ethical Issues in Performing High Risk, New Frontier Surgery*'.

This Conference departs from previous Conferences in that there will be two special sessions which will not be speaker-based but will be in the form of open debate and dialogue. The first one will be on Tuesday afternoon, 11 December with a debate on the recent surgical operation on the Bijani twins in Singapore. The debate topic is on the proposition that 'The Operation was Proper from a Medico-legal and Ethical Standpoint'. A doctor/lawyer team will appear for each side for and against the proposition. This session is being organised with the co-operation of the Malaysian Medical Association and is open also to doctors.

The next special event is on Friday morning, 12 December with an open dialogue and discussion on the important subject of "Have our Institutions—Parliament, Judiciary and the Public Services—Strengthened or Declined?' This open discussion will be led by senior lawyer YM Raja Aziz Addruse and well-known TV talk show moderator cum lawyer Norina Yahya.

The Conference will also discuss regular topics on commercial law and banking, intellectual property law, mediation, criminal law and syariah law. A number of distinguished speakers and panellists have been invited to lead in the discussions.

The Conference details may be obtained from Ms Catherine Eu at Tel: 03-20313003; Fax: 03-2034 2825/ 2072 5948/ 202 31313; E-mail: council@malaysianbar.org.my.

Dato' Cyrus Das
Chairman
Organising Committee

Proceedings Concerning Constitutionality of Laws

3 November 2003

The proceedings before the Federal Court, challenging the constitutionality and legality of the provisions of the Syariah Criminal Offence (Hudud and Qisas) Terengganu Enactment 1432H/2002M (commonly known as "the Terengganu hudud laws"), has generated a great deal of public interest.

The Attorney General is reported to have decided to apply to intervene in the said proceedings. According to a report in the New Straits Times (3/11/03, on page 7), this has attracted comments from a Terengganu State Executive Councillor that the Attorney General *"should be unbiased and remain neutral"*, *"should not file an application to be a party on behalf of the Federal Government to the proceedings"*, and should not act as *"messengers"* (presumably of the Federal Government).

On the assumption that the above report is accurate (and we make this qualification because another report in the Star on the same day, i.e. 3/11/03 on page 10, appears to differ in some important aspect), the Bar Council wishes to state its strong disagreement with those comments, for the following reasons.

When an application is made to declare a law to be invalid, Article 4(4) of the Federal Constitution provides that the Federation shall be entitled to be a party to such proceedings. Hence, it is entirely proper for the Attorney General (representing the Federal Government) to apply to intervene in the current proceedings relating to the Terengganu hudud laws. Indeed it is commendable that the Attorney General, as a guardian of public interest, is taking a positive step to be heard in an issue of such public importance. While the Attorney General should be unbiased and neutral in the sense that he should not have regard to extraneous matters such as the politics of the day, he is duty-bound *not* to remain neutral when it comes to upholding the Constitution; in that the Attorney General is entitled to, and indeed must, take a position that goes to upholding the Constitution, whatever the political climate of the day may be.

The New Straits Times has also reported that the Pas Dewan Muslimat deputy chief has remarked that the Attorney General's chambers are "*challenging God's laws*" and are "*acting against the Sultan of Terengganu*" (simply because the Terengganu hudud laws have received royal assent). The Bar Council deeply regrets that such misplaced and misleading arguments have once again been put forward for public consumption. They completely distort the real issues at hand, and are in the same desperate and untenable vein as the cries of "sedition" and "disloyalty to the King" that are too often heard in our society when a debate on an issue of crucial public interest is proposed.

Use of ISA Against 13 Students

14 November 2003

The Internal Security Act (ISA) has once again been used, this time in relation to 13 young Malaysians aged between 16 and 25. According to reports, they have been detained under the ISA for investigation into their alleged involvement in terrorist activities.

Terrorism is, without a doubt, abhorrent. The cruel and inhuman means employed by a terrorist (in disregard of the rights of others) is deplorable and unjustifiable, no matter how 'right' the terrorist may feel about his own motive or objective. This is clear illustration that the end does not justify the means.

In combating terrorism, the same principle must apply. No matter how noble one holds the objective of fighting terrorism, and no matter how bona fide one may feel about one's own good intention, it does not justify one employing methods which disregard the fundamental rights of others; for the end again does not justify the means.

Hence, the Bar Council deplores the use of the ISA. There are ample existing mechanisms (such as under the Criminal Procedure Code) by which bona fide investigations into alleged criminal activities may be properly carried out. Resort to the ISA is not justified, and only goes to discrediting the battle against terrorism. One cannot legitimately claim to protect the human rights of a group of persons by trampling on the human rights of another group of persons.

Detention without trial is repugnant to the basic tenets of justice, and is no solution to the problem of terrorism. The history of the use and abuse of preventive detention laws in Malaysia has had a chilling and negative effect on its society. The Government today has openly advocated a wind of change. In order for this to truly happen, the old wind of ISA must stop blowing.

IMPORTANT NOTICE

Members are kindly requested to take note of the following:-

At present, if a current account holder issues (3) cheques which are dishonored, Bank Negara would suspend the operation of all his accounts for 6 months upon default of the 3rd cheque and would also inform all banks so that the defaulter would not be able to operate any account for that period. Subsequently, the defaulter would be under probation for a period of (1) to (2) years. This is only applicable if the cheques are dishonoured due to insufficient funds.

Recently, Bank Negara proposed (to the Bar Council) that the office account of a law firm be suspended if the firm issues a **clients' account cheque which is dishonored.** The Bar Council has expressed that it has no objections to their suspending the said account on the basis that there is an element of dishonesty involved.

In light of the above, members are advised to exercise caution in issuance of cheques.

DISCIPLINARY ORDERS

- **Suspended**
  Order under s 94(4)(c) Legal Profession Act 1976
  1. Santiran Mogan a/l Rengasamy (immediate effect from 11 November 2003, until further notice)
  2. Magalah a/p Doraju (immediate effect from 11 November 2003, until further notice)
  3. Shahrir bin Mohamad Noor (immediate effect from 11 November 2003, until further notice)
  4. Nachiappan Shanmugam (immediate effect from 11 November 2003, until further notice)
  5. Mohamed Ridza bin Busu (immediate effect from 11 November 2003, until further notice)
  6. Mohd Zaim Al-Amin bin Kamaruddin (immediate effect from 11 November 2003, until further notice)
  7. Chandragesan a/l Suppiah (immediate effect from 11 November 2003, until further notice)
  8. Ganesan a/l Mariapan (immediate effect from 11 November 2003, until further notice)
  9. Salmiah binti Alias (immediate effect from 11 November 2003, until further notice)

- **Penalty**
  Order under s 103D Legal Profession Act 1976
  1. YM Raja Mohd Azrin bin Raja Ahmad - 11 November 2003 (RM5,000)
  2. Peter Yip Shou Shan - 11 November 2003 (10,000)
  3. Che Khalid bin Md Ali - 11 November 2003 (RM7,000)
  4. Chung Wai Meng - 11 November 2003 (RM7,000)
  5. Bryan Shankar - 11 November 2003 (RM7,000)
  6. Siti Norbaya binti Abdul Jabar - 11 November 2003 (RM3,000)
  7. Abdul Malik bin Abdul Hakim - 11 November 2003 (RM1,000)

- **Struck Off**
  Order under s 103D Legal Profession Act 1976
  1. Razalli bin Hassan (w.e.f. 21 days from 11 November 2003)
  2. Azizan bin Othman (w.e.f. 21 days from 11 November 2003)
  3. Arafat bin Haji Sharar (w.e.f. 21 days from 11 November 2003)
  4. Azmi bin Serhood (w.e.f. 21 days from 11 November 2003)

An incompetent lawyer can delay a trial for months or years. A competent lawyer can delay one even longer



Payment by Cheque on Completion is no Good Payment

Yang Pei Keng

Payment by cheque is no good payment

In normal conveyancing practice, payment by cheque of the balance of the purchase price upon completion is no good payment.

This is by virtue of decisions handed down by the courts of various jurisdictions over the years. It is settled law that a seller is not bound to accept any cheque in payment of price [*Haddy v Paul* (1918) 18 SR (NSW) 621 at 631.

Based on past decisons, I have expressed such a view in my article *'Is the vendor obliged to accept payment by cheque on completion of the transaction?'* [See Infoline -October 1995 issue].

So far, there is no authority to the contrary.

Has it been changed?

However, of late, some legal practitioners have harboured some doubts about the validity of such a principle. They feel that given the current practice in the modern commercial world, payment by cheque should be deemed good payment.

The reason proffered is that a cheque is legally a negotiable instrument. It ought to be accepted as good payment on completion. Perhaps they feel that the modern trend is to accept payment by cheque in ordinary commercial transactions.

On the face of it, such a view may sound reasonable. However, the basic fact that a cheque is merely a *conditional payment* does not seem to have been taken into account. In other words, payment by cheque is good payment only upon fulfillment of the condition that there are sufficient funds in the particular bank account when the cheque is presented for payment.

If no sufficient funds are available in the particular bank account when the cheque is presented for payment, it will be dishonoured. Therefore, a cheque is no good payment until it is cleared.

Issuing postdated cheques from the client account?

The legal pravtitioner has to be more cautious than a trader or businessman when making any payment by cheque. Unlike a trader or businessman, a legal practitioner does not issue postdated cheques. He will always make sure that there are sufficient funds in his account before issuing any cheque from his account, especially from his client account.

This is because there must be sufficient funds in a solicitor's client account before he is entitled to issue a cheque from that account. If there is no funds available in the solicitor's client account, no cheque ought to be issued from that account.

If a solicitor issues a postdated cheque, prima facie, it would imply that he has insufficient funds in his account at the time of issuing such a cheque. He does so at his own peril, as there may be insufficient funds to meet the payment, and this may render him liable to disciplinary proceedings.

Therefore, it is always inadvisable to issue postdated cheques from the solicitor's client account. Before issuing a cheque from his client account, a solicitor must see to it that the client concerned has already paid the amount in question into his client account.

Completion

Completion is where payment is made by the buyer in exchange for documents from the seller. There must be actual payment by the buyer to the seller before the seller's solicitor can part with the documents [the title and the transfer].

Payment by cheque is conditional payment. It is not actual payment. Therefore it is no good payment in exchange for the seller's documents.

Acceptable methods of payment of purchase price

Legal experts on conveyancing have consistently expressed the view that so far there are two acceptable methods of payment of purchase price on completion. That is, by bank draft or by telegraphic transfer. [To this may be added the modern method of payment by on-line transfer, which is made possible by computerisation.]

The appropriate form of payment may consist of payment by bank draft, telegraphic transfer and on-line transfer. In normal practice, a solicitor's client account cheque is also an acceptable form of payment.

i Bank drafts

Payment by bank draft is as good as cash.

A bank draft [or banker's draft] is a cheque issued by a bank [not by a customer] for use in a different town. It has the solid backing of the bank in question. The likelihood of a bank draft being dishonoured upon presentation for payment is minimal.

On the other hand, an ordinary cheque is issued by a bank customer. There is likelihood that it may be dishonoured upon presentation for payment for certain reasons, for example, when there are insufficient funds available in the customer's account.

Professor I.R. Storey from the Nottingham Trent University, Law School, in his authoritative book on *Conveyancing,* had this to say on the methods of payment of purchase price upon completion [1993 : 232-233]:

> '*The buyer's solicitor must make preparations to pay the purchase price on completion. Depending on how and when completion is to take place, there are in practice two methods of payment.*
>
> *'The first is by banker's draft. This is rather like a cheque drawn on a bank, rather than on a particular account at the bank, and is thus virtually as good as cash.*
>
> *'It will be made out in favour of the seller's solicitor... The disadvantage of a using banker's draft in a postal completion is that the draft must be obtained a day or two before completion so that it can be posted..'*
>
> *'Although it is clearly safer for a seller's solicitor to insist on a banker's draft, he might in some situations be willing to*

accept the buyer's solicitor's client account cheque, particularly if accompanied by an undertaking that it will be honoured on first presentation.'

It is to be noted that an undertaking has been suggested , when payment is made by a solicitor's client account cheque.

In the circumstances, it is certainly not prudent conveyancing practice to accept a client's cheque for payment of purchase price on completion, bearing in mind that it is more likely to be dishonoured for various reasons.

If that happens, the seller's solicitor will be held liable for negligence for parting with the client's documents (i.e. document of title, transfer, etc.) before he receives payment from the buyer.

ii Telegraphic transfer

'*The other method of payment is by bank telegraphic transfer ["TT" for short], or credit transfer as it is sometimes called. This can be used to transmit the completion money to the seller's solicitor if completion is by post.*

'The seller's solicitor will provide the buyer's solicitor, before completion, with the name and address of his bank and the number of the client account.

The buyer's solicitor asks his own bank to transfer the completion money from his client account to the seller's solicitor's client account. This can normally be done very quickly. The receiving bank can be asked to notify the seller's solicitor as soon as the funds are received.'

It is clear from the simple and lucid analysis by Professor I.R. Storey, that even in modern times, the methods of payment are still limited to two: namely, payment by bank draft or by telegraphic transfer.

No mention has ever been made of payment by a client's cheque. The irresistible conclusion is that payment by a client's cheque is no good payment.

In fact, Kenny and Bevan on *Conveyancing Law* have cautioned the buyer's solicitor not to accept a cheque from the buyer in payment of the balance of the purchase price:

'*If a loss is caused because the purchaser's solicitor accepts a cheque (or any other form of conditional payment) then he is personally liable.*'

Although the decision in *Pape v Westacott* (1894)1QB 272, enunciating the principle that payment by cheque is no good payment, was a decision handed down in 1894, nevertheless, the principle still holds good today. Modern times have not changed the nature of a cheque as a conditional payment, particularly so in the absence of any authority to the contrary.

The fact that a cheque, unlike cash, is only a 'conditional payment', has not been altered by modern technology. Its payment is, among other things, conditional upon sufficient funds being available in the client's particular account.

Payment by bank draft and by telegraphic transfer are introduced for the purpose of eliminating the disadvantages of cash payment. The main disadvantage of payment in cash is that it is highly impractical to carry a large amount of cash around for payment of purchase price.

iii New technology: on-line transfer

In addtion to the two conventional methods of payment by bank draft and telegraphic transfer as discussed above, another method of payment may be added, that is, on-line transfer. Computerisation has made on-line transfer possible. It is a speedy form of payment.

With computerisation, banks are able to transfer funds from one branch to another with ease and speed. This has led to the adoption of a new method of transfer of funds from one town to another, that is, the 'on-line transfer'.

When the purchase price of a property is paid by on-line transfer, one has to go to one of the branches of a particular bank and pay in the cheque. The amount of the cheque will be transferred from the local branch of the bank on the same day to another branch of the same bank as directed.

For such speedy transfer of funds, it must be a cheque from the same bank an not from a different bank. The funds will be transferred from the local branch to another branch as directed on the same day.

For example, a buyer's solicitor in Johor Bahru may issue an X bank Johore Bahru cheque in favour of the seller's solicitor's client account in X bank Kuala Lumpur. The seller's solicitor will receive the payment on the same day in his client account.

The important points about payment by on-line transfer are: one, the seller's solicitor must have an account with the same bank in another town; two, a local 'house cheque' that is, a cheque issued from the same bank must be used; and three, the seller's solicitor must furnish the buyer's solicitor with his [seller's] client account number.

The 'house cheque' has to be used so that it will be cleared on the same day, and the seller's solicitor will be able to receive the payment on the same day. This is a speedy method of payment made possible by computerisation.

If it is not a house cheque, but a cheque from another bank, then it may take two to three days to clear. There is no immediate payment. It does not amount to settlement of purchase price if it is paid on the day of completion.

Acceptance of cheque by a solicitor

If both the parties agree, the seller may accept a cheque from the buyer for payment on the day of completion in exchange for the seller's documents. However, such practice will be highly detrimental to the interests of the seller if the cheque is dishonoured on presentation for payment.

A prudent practitioner will not accept a cheque on the day of completion. This is because he will be personally liable if the cheque is dishonoured on presentment for payment.

'*Prime facie, a solicitor who accepts a cheque [bank or otherwise] on behalf of her or his client and gives the payer a discharge on that client's behalf will be liable for the sum represented by the cheque if it is dishonoured. It has been observed that:*

'*A solicitor who has authority to accept a tender accepts anything*

short of tender in cash at his own risk. No doubt, it is usual for solicitors to trust each other and to accept each other's cheques, and the practice is generally desirable because it promotes good feeling and facilitates business. But I think it would be going much too far to say that a solicitor has authority to accept a cheque because he has authority to accept a tender according to the law of the land.' (*Blumberg v Life Interests & Reversionary Securities Corp* [1897] 1 Ch 171 at 173 per Kekewich J.)

It is therefore inadvisable for the seller's solicitor to accept a buyer's cheque and hand over the documents on completion.

'...strictly speaking, a seller's solicitor should not hand over the title or any transfer until the cheque is paid, and to do otherwise is to abrogate a basic responsibility in the completion of the transaction. Every possible risk factor to clients which can be eliminated, should be eliminated.'

[See *Duncan & Jones: Sale of Land in Queensland*, 4th Edn. at 343]

There is no denying that it is practically impossible to settle a large sum on completion in cash. Nowadays nearly every transaction is settled by the use of a banker's cheque [or a cashier's order as it is sometimes called]. A banker's cheque is to be used for a local transaction, and a bank draft for a non-local transaction.

Buyer to pay bank commission for 'outport cheques'

If a local cheque or a banker's cheque is used for payment 'outstation', that is, in a different town, the buyer's solicitor must see to it that the necessary bank commission is added to the payment. Otherwise, the so-called full payment of the balance of the purchase price is not 'full payment', but only a 'partial payment'.

This is because the seller's solicitor will receive such cheque as an 'outport cheque', that is, a cheque received from 'outstation'. Bank commission is payable. The actual amount received by the seller's solicitor is less than the balance of the purchase price, that is, the balance of the purchase price less the bank commission.

It is therefore not full settlement, but partial payment of the purchase price. This is tantamount to the buyer's non-compliance with the terms of the contract, and therefore it is a breach of the contract. The buyer has failed to pay the final balance of the purchase price on the completion date as agreed. The seller may, if he so wishes, annul the agreement and treat it as null and void.

Conclusion

A seller's solicitor may agree to accept a cheque for payment of purchase price on the day of completion. However, such practice involves some risks on the part of the seller's solicitor. It works to his detriment if the cheque is dishonoured upon presentation for payment.

The appropriate methods of payment of purchase price on completion therefore remain the same: by bank draft, telegraphic transfer [TT], cashier's order or on- line transfer. A solicitor's client account cheque is also acceptable.

When forwarding an 'outport cheque' from a different town, the buyer's solicitor must see to it that the bank commission is added to the purchase price. Failure to do so amounts to non-compliance with the terms of the contract and the seller is entitled to treat the contract as null and void.

It may be true that modern technology has improved the banking system in this country. However, the nature of a cheque as a form of 'conditional payment' has yet to be changed. It may be dishonoured upon presentation for payment for a variety of reasons. In the circumstances, a cheque given on completion for settling the balance of the purchase price is no good payment.

CORPORATE INSOLVENCY SEMINAR

14 February 2004
Bar Council Auditorium

The Corporate Law Committee, a sub-committee of the Conveyancing Practice, Corporate & Banking Law Committee will be organizing a half-day seminar on the topic of Corporate Insolvency. The seminar will seek to dispel some of the doubts and uncertainties in this area faced by practitioners everyday, as there is no separate and specific legislation concerning insolvency of companies and corporations. The presenters, Mr. Lim Tuck Sun and Mr. Tommy Thomas will discuss the topics, *"Should banks freeze the accounts of its corporate customers when a petition to wind up the company is presented against the customer?"* and *"The Effects of Winding-Up"* respectively, followed by a question and answer session.

Do not miss this excellent opportunity to enhance your practice and learning. Watch out for more details in the next issue of Infoline and our Website.

For further information please contact *Vinodhini Samuel* at the Bar Council Secretariat :
Tel :03-2031 3003 / Ext 149

Striking out a Notice of Appeal

Mohd Arief Emran bin Dato' Arifin

Introduction

The Rules of the High Court 1980, in particular Order 18 rule 19, set out a specific provision to enable a party to a civil suit to strike out pleadings on either of the following grounds:

(a) that the pleading discloses no reasonable cause of action or defence; or

(b) that the pleading is scandalous, frivolous or vexatious; or

(c) that the pleading may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Courts.

The Court of Appeal is however not provided with an express power under the Rules of the Court of Appeal to strike out a notice of appeal. Therefore, there is a danger that in most civil suits, parties will merely file an appeal irrespective of the merits of the case. This will cause unnecessary delay and will cause backlog at the Appellate stage.

Power of the Appellate Courts to strike out a notice of appeal - English and Hong Kong Jurisdictions

However, it is the author's view that the Appellate Courts in Malaysia have an inherent power to strike out a notice of appeal in special circumstances. Such powers have been exercised by the Appellate Courts in England and Hong Kong.

In the case of *Aviaeents Ltd v Balstravest Investments Ltd* [1966] 1 All ER 450, the Appellant were tenants of premises under the Landlord and Tenant Act 1954. At the trial the parties surveyors gave evidence that the rent should be calculated at something in excess of £6 and something less that £4 a square foot respectively. His Honour Judge Herbert held that the rent of the premises be fixed at £5 per square foot therefore at the rate of £1,980 per annum.

The tenants were unhappy with the decision and appealed to the Court of Appeal on the following grounds '(i) that the learned Judge misdirected himself in holding that the proper rent for the premises was £5 per square foot; (ii) that the learned Judge's order was against the weight of the evidence'.

The landlords applied by motion for an order that the notice of appeal be struck out on the ground that the only grounds of appeal, were questions of fact or alternatively that the tenant be ordered to give security for costs of the appeal. Counsel for the landlords argued that the appeal does not come within section 109 of the County Court Act 1959 so as to admit the possibility of an appeal on fact.

Counsel for the tenants contended that the English Court of Appeal had no power to take the drastic step of striking out the notice of appeal and submitted that the Court may only declare that the appeal was merely an abuse of process and grant the landlords' application for security of costs. Similarly there were no express provisions under the then English rules to allow for the striking out of a notice of appeal.

The English Court of Appeal disagreed and struck out the notice of appeal quoting the old English case of *Hives v Dawson* [1927] 138 LT 238. Wilmer LJ held that the English Court of Appeal retains the inherent power to control its own proceedings and that the power extends to striking out a notice of appeal in a case where an appeal is 'plainly not a competent appeal.'

Davies LJ further held as follows:-

'It is quite obvious that this appeal is an attempt to do that which is not permitted by the rules, viz to appeal on a question of fact. That being so, what follows? Counsel for the tenants, as I understood his argument, submitted that if that were so (which of course, he does not admit) this court has no power to do anything about it. He says first that there is no express power in this court to strike out the notice of appeal in such circumstances. I think that is probably true. I doubt very much whether any assistance can be derived from a perusal of the Rules of the Supreme Court, which deals with the powers of the High Court and the incorporation to some extent of those powers into the powers of this court. '*In my view the matter has to be approached from the other side. It is not so much a question whether we are empowered to strike out the notice of appeal. We plainly have no power to hear the appeal at all. It does not lie. It is not a competent appeal. This court has an inherent power to control its own proceedings, and when it is confronted with an attempt to appeal in circumstances where no appeal lies, it seems to me clear that the court has power to give effect to its decision and to strike out the notice of appeal*'.

The issue of striking out a notice of appeal again arose in the case of *Burgess v Stafford Hotel Ltd* [1990] 3 All ER 222. Similar to the case cited above, the appeal was concerning a tenancy under the Landlord and Tenant Act 1954. One of the issues that arose was with regard to the power of the English Court of Appeal to strike a notice of appeal. The Court of Appeal held that it had the jurisdiction to do so.

Glidewell LJ quoted the judgment of Staughton LJ in the unreported case of *Deersdale Ltd v Hilton International Hotels (UK) Ltd* 16 June 1989, where the latter said as follows:

'There is jurisdiction to strike out an appeal on that ground. It may be that it is part of the inherent jurisdiction of the court, or else it is derived from RSC O. 19 r. 10 (1) In relation to an appeal the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court...' That there is such power, for one reason or another, appears from the judgment of this court in *Ghadami v Petticoat Lane Rentals Ltd* (unreported) 12 May 1986; Court of Appeal. There Parker LJ said 'This application for an order that the appeal be struck out succeeds, in my view, on two grounds (a) because the notice of appeal is itself not in compliance with the rules, and (b) because the matters raised are matters which as grounds of appeal on the material we have before us, I regard as plainly frivolous. ' Woolf LJ and Sir Deny Buckley agreed.

Glidewell L.J. agreed with the above statement of law and added:

'*The jurisdiction to make orders striking out notices of appeal is*

one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases. It should not be utilised, and an order to strike out should not be made, where any extensive inquiry into the facts is likely to be necessary.'

The power to strike out a notice of appeal was also exercised by the English Court of Appeal in the case of *Barclays Bank v Khaira* [1993] 1 FLR 343. In that case, the husband and wife had charged the matrimonial home to the bank as security. The husband defaulted and was made a bankrupt. The bank then began proceedings for possession of the house. The husband tried to take part in the proceedings but was refused by the Judge as he had failed to obtain the consent of the trustee in bankruptcy. The wife unsuccessfully opposed the bank's application. The husband filed a notice of appeal against the said order. The Bank applied for the notice of appeal to be struck out on the grounds that the (1) husband had no right to serve a notice and (2) that the appeal was, in any event, frivolous or an abuse of the process of the court.

The English Court of Appeal duly struck out the notice of appeal. Legatt LJ held :-

'***There is no doubt that this court has an inherent jurisdiction to strike out a notice of appeal upon that ground. It is a ground analogous with that expressly given by O.18 r. 19 of the Rules of the Supreme Court. It is a power that can be exercised but rarely, and only in circumstances where there is no possibility that the grounds in the notice are capable of argument or that the court would entertain new grounds relating to matters not raised in the court below.***'

Parker LJ also held that:

'It is clear that there is jurisdiction to accede to an application to strike out a notice of appeal. It is also clear that it is a jurisdiction which should be exercised only in the clearest case where there is nothing raised in the notice of appeal fairly capable of argument.'

The Hong Kong Court of Appeal has also exercised this inherent power to strike out a notice of appeal as stated in the case of *Ng Shek Po v Director of Lands* [1996] 4 HKC 616.

> *'In my view the matter has to be approached from the other side. It is not so much a question whether we are empowered to strike out the notice of appeal. We plainly have no power to hear the appeal at all. It does not lie. It is not a competent appeal. This court has an inherent power to control its own proceedings, and when it is confronted with an attempt to appeal in circumstances where no appeal lies, it seems to me clear that the court has power to give effect to its decision and to strike out the notice of appeal'.*

Conclusion

The Jurisdiction of the Malaysian Appellate Courts

Rule 76 of the Rules of the Court of Appeal provides for the following powers to the Court of Appeal.

'***The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.'***

Therefore, the Malaysian Court of Appeal is empowered, in appropriate circumstances, to invoke powers that are provided for under the Rules of the High Court. This should include the powers to strike out a notice of appeal under Order 18 rule 19 of the Rules of the High Court. Furthermore, as stated in the above quoted cases the Court of Appeal should have the jurisdiction to control its own proceedings and this should extend to powers to strike out a notice of appeal.

By having such powers, the Appellate Courts in Malaysia would then be able to weed out incompetent notices of appeals that are merely clogging the court dockets. However, the power to strike out a notice of appeal should be exercised rarely. On the reading of the above quoted cases it is this author's personnel view that the inherent power of the Appellate Courts should be exercised inter alia in the following circumstances:

(a) The appeal is clearly frivolous and vexatious;

(b) The appeal is clearly an incompetent appeal i.e. where there is no right to appeal;

(c) To allow the appeal in its normal cause will cause undue hardship to the respondents.

The case laws on Order 18 Rule 19 of the Rules of the High Court 1980 should be of assistance in dealing with this inherent and discretionary power.

It is to be noted that in a recent case of *Contour Build Sdn Bhd v Anna Toh Bee Jit & 2 ors* (Rayuan Sivil No W-02-259-2003), the Malaysian Court of Appeal did exercise its powers to strike out a notice of appeal. Nevertheless, this decision is subject to an application for leave to appeal to the Federal Court and the grounds of the decision of the Court of Appeal have not been delivered.

Schedule G & H Agreements Need for Further Revision

Seah Choon Chye

The revised statutory sale purchase agreements vide Schedule G and Schedule H prescribed under the renamed Housing Development (Control and Licensing) Rules 1989 ('the Rules') pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966 ('the Act') introduced on 1.12.2002 appear to be still ineffective in protecting the interests of purchasers on account of the following omissions therefrom: -

1. Preamble

(a) It does not disclose whether the land is subject to any restriction-in-interest.
(*It is believed some purchasers might re-consider entering into the agreement if they were informed that the housing accommodation or parcel is erected on land subject to such restriction*).

(b) In the event the title is subject to an existing charge, the redemption sum required to obtain a discharge or disclaimer from the chargee should be stated in the preamble.
(*This is to ensure that the balance of the purchase price, excluding the 5% retention sum, would be sufficient to meet this liability*).

(c) Unless a separate title has been issued, it should be confirmed not only the sub-division of the land has been approved but the conversion premiums and other requisite fees due and payable to the State Authority have been settled in full.
(*This confirmation is necessary to protect the interests of the purchasers and to preclude the possibility that the Certificate of Fitness for Occupation ('COF') could not be obtained because the conversion premiums etc have not been paid and consequently, the land is still technically, agricultural land*).

(d) The relevant approved plan reference number should be mentioned (unless the said particulars are stated in the Building Plan annexed to Schedule G or Schedule H) to enable the purchasers to liase with the Appropriate Authority to seek clarifications thereform if desired.

After all, would any consumer be willing to pay ten percent deposit on a car (and further progressive payments to boot) and agree to take delivery thereof upon the expiry of two or three years after paying the deposit?

2. Clause 2(2)

The Developer should not be permitted to create further encumbrances to secure additional financing *after the date of the agreement* merely because the financiers concerned have given a disclaimer and undertaking to exclude the housing accommodation or parcel from any foreclosure proceedings.

In the event the Developer should face further financial problems after utilising the additional facilities the purchaser's interest could be adversely affected should the project could be abandoned or the COF could not be issued because the Developer could not comply with the various requirements owing to financial constraints.

Under these circumstances, it is also unlikely the individual or strata titles could ever be available to enable the purchaser and his financiers to acquire indefeasibility of title and interest under Section 340 of the National Land Code.

3. Interest on late Payments (Clause 9)

Clause 9(2) should be expanded to include a further provision i.e.

(a) that if the said property is subject to a restriction-in-interest no interest shall be payable on any instalment(s) due unless and until the Developer have obtained the relevant consents(s) from the State Authority and

(b) no interest shall likewise be payable on any instalment(s) due in the event the Developer's financiers shall neglect to deliver the relevant discharge or disclaimer of interest within 14 days after the receipt of the redemption sum.
(*It is obviously inequitable that the purchaser be penalised for the Developer's default or the inefficiency of the Developer's financiers*).

4. Consent to Assignment/sub-sale (Clause 12)

There should be a proviso that if no individual or strata title has been issued after a lapse of, say, 3 years after the issue of the relevant COF no 'administrative fee' shall be payable to the Developer for the consent(s).

(*It is only fair that the Developer should not be permitted to benefit from its own default as the absence of separate title is prejudicial to the long term interest of the purchaser and his financiers*).

5. Manner of Delivery of Vacant Possession

Clause 24 Schedule G/Clause 27 Schedule H). This is one important issue the Ministry continues to dodge since the inception of the Act, much to the dismay of the purchaser.

Despite the inclusion of additional 'conditions' which the Developer need to comply prior to handing over of 'vacant possession' the fact remains that the purchaser does not have the right to occupy the housing accommodation or parcel until issue of the COF.

There is no rationale for compelling the purchaser to take delivery of the keys when it would be illegal to occupy.

If the Developer had indeed comply with all the 'conditions' (which are implied by law in any event) obtaining the COF should be a mere formality.

(*If the said property were a motor vehicle would any purchaser be willing to part with his money and accept the keys when the vehicle could not be driven on the road because the authorities have not certified it is roadworthy?*).

6. THIRD SCHEDULE

To ensure that the Developer would have an 'incentive' to expedite the issue of separate titles, there should be an additional provision to retain at least 5% per cent of the purchase price if no separate strata title has been issued on or before the delivery of possession (with COF).

This would also be in the interest of both purchaser and his financiers as the absence of such title would render it exceedingly difficult to protect their respective interests effectively under the Code.

7. FURTHER (SUGGESTED) AMENDMENTS

(1) While Section 2(1)(a) & (b) of the Act have been deleted to remove the exemption previously enjoyed by co-operative societies and statutory or other bodies or agencies controlled by the Federal or State Government, the Ministry should have taken the opportunity to include the sale of commercial and industrial properties under its jurisdiction by widening the definition of 'housing accommodation' in Section 3.

The current Schedule G and Schedule H agreements could readily be modified or additional Schedules added to the Rules to provide for commercial and industrial properties.

Given the developers of such properties adopt the same modus operandi i.e. collecting the purchase price by progressive payments it is difficult to understand the rationale for exempting such activities from the purview of the Act and the Rules.

(2) Another increasingly 'popular' housing activity that should be checked by the Ministry is the practice of selling housing accommodation by requiring the unsuspecting purchaser to enter into two separate agreements, viz.,

(a) Sale Purchase Agreement in respect of the housing lot (with the developer);

(b) Building Agreement (with the developer's nominated contractor).

Perhaps the Ministry may be labouring under the mistaken impression that since no statutory form of agreement has been prescribed under the Rules in regard to the selling of vacant housing lots, it is permissible for such housing activity to be carried out without a developer's license.

With respect, the Ministry should take note that '*the sale of more than four units of housing lots by the landowner or his nominee with the view of constructing more than four units of housing accommodation by the said landowner or his nominees*' constitutes '*housing development*' with the definition of that term under Section 3 (affirmed by Federal Court in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* (1985) 1 MLJ 285.

The Ministry should accordingly take appropriate action against the errant developers (licensed or unlicensed) for exploiting the so-called 'loophole' and should categorically declare for the benefit of the public that such housing activity is illegal under the Act.

CONCLUSION

The Ministry should at all times appreciate that the Act was introduced in 1966 'for the *protection* of purchasers of new houses and for the control and licensing of housing developers' as aptly put by the *Privy Council in Loh Wai lian v SEA Housing Corporation Sdn Bhd* (1987) 2 MLJ 1 (See also comments of Suffian LP in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* (1982) 2 MLJ 31).

Judging from the increasing number of unresolved complaints against developers, licensed and unlicensed, it would appear the Ministry is unable to fulfil its statutory duties satisfactorily, notwithstanding the various amendments to the Act and Rules since 1966.

Perhaps the time has come for the Government to consider the ultimate solution i.e. to adopt the '*build-then-sell*' concept of selling properties by developers.

This would effectively protect the purchasers and weed out developers without adequate financial resources from the housing industry thereby reducing the need for public funds to be used to revive abandoned projects.

After all, would any consumer be willing to pay ten percent deposit on a car (and further progressive payments to boot) and agree to take delivery thereof upon the expiry of two or three years after paying the deposit?

The Bar Council

presents a forum on **The Anti-Money Laundering Act 2001**

All members are invited to attend to air their views and concerns on the implications of the Anti-Money Laundering Act, which affects all members of the Malaysian Bar.

Speakers
1. Mr Krishna Dallumah
2. A representative from Bank Negara
3. A representative from the Institute of Accountants

Date: Monday 5 January 2004
Time: 5.00-7.00pm
Venue: The Bar Council Auditorium, 1st Floor 13,15 & 17 Lebuh Pasar Besar, 50500 KL
Fee: Members of the Bar **RM10.00**
Non-Members **RM15.00**

** Light Refreshments will be served before the Forum*

For details and registration, please contact the Bar Council Tel: 20313003, Ms Lynette Tan (Ext 142), Ms May Leng (ext 103), Pn Rozi (Ext 134) or Ms Helena (Ext 160)

Conference Diary

6TH WORLD CONGRESS OF CONSTITUTIONAL LAW

12-17 JANUARY 2004

To be held at the Pontificia Universidad Catolica de Chile, Santiago, CHILE. The Conference will be followed by a Sunday Reception held on 18th January, 2004 at the Palace of Ancient National Congress, Cathedral No. 1158, Santiago, CHILE. The official language of the Conference will be in English, French & Spanish.

Full Conference details along with the programme and registration forms can be obtained from the conference website : http://www.iaclworldcongress.org. The reception of the registration forms at the Congress Secretariat will close on 31st December, 2003

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3RD MSC INTERNATIONAL CYBERLAWS CONFERENCE

2-3 MARCH 2004

The Multimedia Development Corporation Sdn Bhd together with the Bar Council of Malaysia and the Asian Strategy & Leadership Institute will be organising the 3rd MSC International Cyberlaws Conference, scheduled to be held in Kuala Lumpur in February 2004.

The Conference will discuss the regulation, practice, implementation and enforcement of Cyberlaws, under the theme "*Advancing Cyberlaws: Educate, Regulate, Practise and Enforce*". Specifically, this Conference aims to:

* Identify legal issues and recommend changes in line with the objectives of the MSC
* Highlight global trends and developments of Cyberlaws
* Promote efficient implementation and enforcement of Cyberlaws
* Enhance knowledge and understanding of Cyberlaws

The Bar Council Auditorium is located at 1st Floor, Nos 13, 15 & 17, Leboh Pasar Besar, 50050 Kuala Lumpur.

HEALTH, LAW AND ETHICS

MARCH 2004

The following conferences would be held at Hilton Hotel in Eilat, Israel in March 2004:

1. The 3rd International Conference on Medical Ethics sponsored by the UNESCO Chair in Bioethics at the International Center for Health, Law and Ethics
2. The 1st International Conference on Psychiatry, Law and Ethics

For more information, please contact Aryeh Lewis at the conference secretariat, e-mail: meetings@isas.co.il, tel: 972-2-6520574, fax: 972-2-6520558.

For more information on the 21st International Conference on Death and Bereavement, please visit http://www.isas.co.il/escwgacc2004/db.pdf .

INTER-PACIFIC BAR ASSOCIATION THE 14TH ANNUAL MEETING AND CONFERENCE

2-5 May 2004

This conference will be held at Hotel Lotte, Seoul, Korea. The conference will include the following topics:

- Anti Terrorist Measures at Harbours
- Deregulation of the Korean Energy Supply Industry & Its Privatisation-Local & International Context
- Keeping the Yankee Firms out of Asia – Restrictions on International Firms
- Environment Protection v Economic Development: Is Sustainable Development Really Viable.
- Protecting Trade Secrets & Employee Privacy
- Contract Manufacturing in Asia – Tax Issues for the Investor and the Manufacturer.

For details and a conference registration brochure, contact IPBA 2004 Conference Secretariat at c/o Convention Team, Hanjin Travel Service Co., Ltd, 5F, Marine Centre New B/D, # 51 Sogong-dong, Jung-gu, Seoul 100-070, Korea. Tel: 82-2-726-5556, Fax: 82-2-778-2514, E-mail: ipba@2004seoul.com



MADAM CHIN KEE YEUN, DECEASED
NRIC NO: 130311-08-5028

We act for the family of Madam Chin Kee Yeun who passed away on the 24/10/2003.

Anyone having knowledge of or is in possession of a will executed by the late Madam Chin Kee Yeun in Malaysia, please contact:

MESSRS KEAN CHYE & SIVALINGAM
No 10A-10C, Jalan Panglima
30000 Ipoh, Perak Darul Ridzuan.
Tel: 05-253 1979
Fax: 05-255 7981

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MAICSA Publications

1. Directors and Corporate Officers - Case Summaries
This publication comprises a collection of headnotes relating to litigations involving Directors and Corporate Officers comprising company secretaries, receivers and managers, liquidators, shareholders and senior management executives. The cases in this exclusive publication date from as far back as the 1950s and are categorised under several key and relevant areas. Each case summary includes the facts, issues in dispute, historic appeals and binding decisions without compromising on the accuracy of the actual case report. Topics covered in the book are as follows:

Part A - Directors: Appointment and Qualification · Vacation of Office, Removal and Disqualification · Rights and Powers · Remuneration · Duties · Breach of Duty, Negligence and Oppression · Injunctions
Part B - Other Officers and Shareholders: Company Secretaries · Receivers and Managers · Liquidators · Senior Executives and Other Officers · Shareholders

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2. Perspectives on Corporate Governance and Management (Volume2)
This is a compilation of selected articles that have been published under the MAICSA Perspective Column that appeared in The Star from 1998 to 2002. Written by practitioners from diverse professional background and with sound experience including tax consultants, academicians, lawyers and company secretaries, the articles include topics ranging from management, company secretarial to corporate governance. Readers will find these articles an interesting read in the wake of recent corporate scandals involving major corporations.

The book produced in partnership by MAICSA and The Star provides a reference to practitioners of good corporate governance with interesting topics such as:
- Anomalies Faced By Corporate Practitioners
- Using Trademarks In Cyber World
- Indemnity Scheme To Protect Professional Firms

Price: MAICSA/ICSM members RM25.00
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3. Independent Directors - Principles and Best Practices
The second in the MAICSA Series published for Independent Directors came about in the wake of a new awareness among independent and non-executive directors, of their onerous roles and responsibilities owed to the companies where they serve. The Kuala Lumpur Stock Exchange in amending the Listing Requirements has ensured that board members of listed issuers have one third of their members who are independent and non-executive and these directors are given greater independent powers in their decisions.

Price: MAICSA/ICSM members RM29.00
Non-members RM49.00
Discounted price: RM39.00

Note: *MAICSA/ICSM members are advised to purchase their publications directly from the Association to enjoy further discounts.*

7 October 2003

Amendments to Listing Requirements Pertaining to Share Buy-Backs

Pursuant to section 9 of the Securities Industry Act 1983, amendments have been made to the Listing Requirements of the Kuala Lumpur Stock Exchange in relation to share buy-backs ('the said Amendments'), attached herewith as Appendix 1.

Objectives

The said Amendments are aimed at facilitating listed companies in undertaking share buy-backs. Amongst others, the renewal of shareholder authorisation for purchase of own shares ('Shareholder Mandate') has been made more flexible to reduce cost and expedite the process. These Amendments are part of the continuing efforts of the Exchange to enhance expediency and efficiency in the market.

Key changes

The key changes encompassed in the said Amendments are as follows:

For the purpose of renewing an existing Shareholder Mandate, a listed company may either issue a shareholders' circular (as previously required) or alternatively, issue a statement ('Share Buy- back Statement') accompanying the notice of general meeting, the minimum contents of which have been prescribed;

A listed company may appoint up to two Member Companies for the purpose of purchasing its own shares or reselling treasury shares on the Exchange; and

More flexibility has been accorded as regards the resale price of treasury shares.

Implementation

The said Amendments shall take effect from 1 November 2003.

Additional information

Please take note that the said Amendments are available for reference on the KLSE web site at http://www.klse.com.my

APPENDIX 1
AMENDMENTS TO THE LISTING REQUIREMENTS PERTAINING TO SHARE BUY-BACK

	EXISTING PROVISIONS		AMENDED PROVISIONS
12.06	Circular to shareholders for purchase of own shares	12.06	Circular to shareholders for purchase of own shares
	New provision		(1) A listed company seeking authorisation from its shareholders to purchase its own shares other than by way of a renewal of an existing authorisation, must issue a circular to its shareholders that complies with the requirements of subparagraph (3) below.
	New provision		(2) A listed company that is renewing its existing authorisation must either issue:- (a) a statement accompanying its notice of general meeting (hereinafter referred to as 'Share Buy back Statement'), in substitution of the circular; or (b) a circular, as referred to in subparagraph (1)above. Where a listed company issues a Share Buy-back Statement, it must ensure that such Statement complies with the requirements of subparagraph (4) below.
	(1) Without limiting the generality of paragraph 8.11, a listed company must ensure that a circular seeking shareholders' authority required under paragraph 12.03 above, for the purchase by a listed company of its own shares includes the information set out in Appendix 12A and all such information concerning the proposed purchase as shareholders and their professional advisers would reasonably require and would reasonably expect to find in the circular for the purposes of making an informed assessment as to the merits of approving the proposed purchase and the extent of the risks involved in doing so.		(3) Without limiting the generality of paragraph 8.11, the listed company must ensure that the circular referred to under subparagraph (1) above includes the information set out in Part A of Appendix 12A and all such information concerning the proposed purchase as shareholders and their professional advisers would reasonably require and would reasonably expect to find in the circular for the purposes of making an informed assessment as to the merits of approving the proposed purchase and the extent of the risks involved in doing so.
	New provision		(4) The listed company must ensure that the Share Buy back Statement includes the information set out in Part B of Appendix 12A and all such information concerning the proposed purchase as shareholders and their professional advisers would reasonably require and would reasonably expect to find in the Share Buy-back Statement for the purposes of making an informed assessment as to the merits of approving the proposed purchase and the extent of the risks involved in doing so.

	(2) The draft circular must be submitted to the Exchange together with a checklist showing compliance with Appendix 12A. (3) For the avoidance of doubt, a listed company must issue a circular to shareholders each time the authorisation of shareholders is sought in accordance with paragraph 12.03 including for a renewal of an existing authorisation.		(5) The draft circular or the draft Share Buy-back Statement, as the case may be, must be submitted to the Exchange together with a checklist showing compliance with Parts A or B of Appendix 12A respectively. Deleted
12.16	Appointment of stockbroker A listed company intending to purchase its own shares and or resell treasury shares on the Exchange may only do so if that listed company appoints one Member Company of the Exchange and secures all dealing(s) through that Member Company only.	12.16	Appointment of stockbroker A listed company intending to purchase its own shares and/or resell treasury shares on the Exchange may appoint up to 2 Member Companies for that purpose. The listed company must ensure that all dealing(s) in its own shares/treasury shares are made through the aforesaid Member Companies only.
12.17	Notice of appointment of stockbroker A listed company must lodge a notice of the ppointment of a Member Company with the Exchange immediately and the listed company must open one securities account in its own name with that Member Company designated as 'Share Buy-Back Account' which must solely be used for the purchase of its own shares and/or resale of treasury shares.	12.17	Notice of appointment of stockbroker A listed company must lodge a notice of the appointment of the Member Company(ies) concerned with the Exchange immediately and the listed company must open one securities account in its own name with such Member Company(ies) designated as 'Share Buy Back Account' which must solely be used for the purchase of its own shares and/or resale of treasury shares.
12.19	Resale price A listed company may only resell treasury shares on the Exchange at a price which is not less than the weighted average market price for the shares for the 5 market days immediately prior to the resale.	12.19	Resale price A listed company may only resell treasury shares on the Exchange at a price which is:- (a) not less than the weighted average market price for the shares for the 5 market days immediately prior to the resale; or (b) not less than 5% below the weighted average market price for the shares for the 5 market days immediately prior to the resale provided that:- (i) the resale takes place no earlier than 30 days from the date of purchase; and (ii) the resale price is not less than the cost of purchase of the shares being resold.
	New provisions	Appendix 12A Part B	Contents of Share Buy-Back Statement (1) A statement that the Kuala Lumpur Stock Exchange takes no responsibility for the contents of the circular, makes no representation as to its accuracy or completeness and expressly disclaims any liability whatsoever for any loss howsoever arising from or in reliance upon the whole or any part of the contents of the document; (2) A statement with regard to the reasons for the proposed purchase; (3) The amount of retained profits and share premium based on the latest annual audited accounts and the latest management accounts (where applicable); (4) The source of funds for the proposed purchase, including where applicable, details relating to financing for the proposed purchase, the repayment capabilities of the listed company and the impact on its cash flow;

(5) The direct and indirect interests of the directors and substantial shareholders and any person connected with the directors and/or substantial shareholders in the proposed purchase of shares or resale of treasury shares; (6) Both the potential advantages and disadvantages of the proposed purchase to the listed company and its shareholders respectively; (7) Any material financial effect on the listed company or group if the proposed purchase(s) were to be carried out in full at any time during the proposed authorised period (such as the working capital of the listed company as compared with the position disclosed in the most recent published audited accounts); (8) A statement as to the consequences of the proposed purchase on the listed company and its shareholders with regard to the Malaysian Code on Take-Overs and Mergers 1998;	(9) A statement referring its shareholders to the relevant parts of its annual report where information on purchases made by the listed company of its own shares in the last financial year, is set out; (10) The public shareholding spread of the listed company, as at the last practicable date; (11) A statement by the board of directors whether the proposal is in the best interest of the listed company; (12) A recommendation from the board of directors as to the voting action that shareholders should take; and (13) Any other information concerning the proposed purchase as shareholders and their professional advisers would reasonably require and would reasonably expect to find in the Share Buy-back Statement for the purposes of making an informed assessment as to the merits of approving the proposed purchase and the extent of the risks involved in doing so.

7 November 2003

AMENDMENTS TO LISTING REQUIREMENTS IN RELATION TO DOCUMENTS TO BE PROVIDED IN RESPECT OF AN APPLICATION FOR QUOTATION

Pursuant to section 9 of the Securities Industry Act 1983, amendments have been made to the Listing Requirements of the Kuala Lumpur Stock Exchange ('the said Amendments') in relation to the documents to be filed with an application for quotation, attached as Appendix 2.

Prior to the said Amendments, an application for quotation of securities by a listed issuer must include a confirmation to the effect that all notices of allotment have been issued and despatched to all successful applicants. In view of the above Amendments, such confirmation is no longer required to be filed. However, in substitution thereof, an undertaking that all notices of allotment will be issued and despatched to all successful applicants prior to the date for listing and quotation of the securities must be filed as part of an application for quotation.

The said Amendments are implemented in conjunction with the launch of a reduced time frame for initial public offerings announced by the Securities Commission on 29th October 2003. The said Amendments form part of the collective efforts of the regulators and the industry participants to enhance efficiency and investor protection for the markets.

The said Amendments shall take effect from 1st December 2003.

For the avoidance of doubt, the said Amendments shall apply in respect of applications for quotation that are received on or after 1st December 2003.

APPENDIX 2

	Existing Provision		Amended Provisions
Appendix 3A Part C	Documents to be filed with an application for quotation (paragraphs 3.08(2) and 4.17(2)) An applicant must file the following documents in support of an application for quotation:- (a) [Existing provision] (b) A confirmation that all notices of allotment have been issued and despatched to all successful applicants. (c) to (h) [Existing provisions]	Appendix 3A Part C	Documents to be filed with an application for quotation (paragraphs 3.08(2) and 4.17(2)) An applicant must file the following documents in support of an application for quotation:- (a) [No change] (b) An undertaking that all notices of allotment will be issued and despatched to all successful applicants prior to the date for listing and quotation of the securities. (c) to (h) [No change]
Appendix 5A Part B	Documents to be filed with an application for quotation of call warrants (paragraph 5.08(2)) An issuer must file the following documents in support of an application for quotation of call warrants:- (a) [Existing provision] (b) A confirmation that all notices of allotment have been issued and despatched to all successful applicants. (c) to (e) [Existing provisions]	Appendix 5A Part B	Documents to be filed with an application for quotation of call warrants (paragraph 5.08(2)) An issuer must file the following documents in support of an application for quotation of call warrants:- (a) [Existing provision] (b) An undertaking that all notices of allotment will be issued and despatched to all successful applicants prior to the date for listing and quotation of the call warrants. (c) to (e) [Existing provisions]

In Memoriam

Sarjit Singh Randhawa

12 August 1938 - 7 July 2003

The late Mr Sarjit Singh Randhawa was born on 12th August 1938 and had his early education in Johor Bahru.

He was admitted as a Barrister at the Lincoln's Inn in 1972 and called to the Malaysian Bar on October 1973. He joined the Judicial Service, Government of Malaysia on 31st January 1974 and served as a Magistrate, President of the Sessions Court and Senior Assistant Registrar of the High Court. Served in various capacity in the state of Johore, Kedah, Perak and Selangor. 14 ½ years of service in the Judicial Department of Government of Malaysia. He took optional retirement from the Government Services in 1988.

He joined Messrs. Abdul Raman Saad & Associates in 1988 as a Legal Assistant and later joined Messrs. Abbas & Ngan in 1990. In 1995 he became the Managing Partner of Messrs Abbas & Ngan until the year 2001. Messrs Abbas & Ngan was dissolved in 2002 and Mr Sarjit Singh practised under the name of Messrs Sarjit & Sharmizah until his demise. Mr Sarjit Singh Randhawa died of the age of 65 and leaves behind his wife and two children.

May he find eternal rest.

By Saranjit Kaur Pannu
(Mrs Sarjit Singh)

R Muthu

21 April 1945 - 6 October 2003

The late Mr R.Muthu a senior member of the Johore Bar passed away peacefully on the 6th October 2003. Muthu a former police officer graduated with a Bachelor of Laws Degree from the University of London in 1976. Thereafter he read for the Bar and was called to the Bar by the Honourable Society of Middle Temple London in 1977.



Upon his return to Malaysia he read in chambers at M/s Shearn Delamore & Co., KL and was called to the Bar States of Malaya on the 26th October 1978. He commenced his career at the Bar as a Legal Assistant in the firm of M/s Tahir & Salleh, Johor Bahru. Subsequently in 1990, he commenced practice as a sole proprietor in M/s R.Muthu & Co.

Muthu was an ardent golfer and prided himself as having started as a caddie at the Sentul Golf Club. He was a single-handicapper and was instrumental in organising the Annual Deepavali Golf Tournament at the Royal Johor Country Club, Johor Bahru. Muthu was a member of the Johore Bar Committee for the term 1989/90. He was also the Hon. Secretary of the Johore Cultural & Sports Club. He was 58 years old when he passed away.

Our condolences go to his wife Lucy and his 2 daughters, Sharminee and Shaemala.

By S Balarajah

The Bar Council and the Malaysian Bar extends to the bereaved families of the above members deepest sympathies and condolences. The deceased members will always be remembered for their contribution to the profession.

BILLS 2003

TITLE	FIRST READING	TAM NO.
1.Employee's Social Security (Amendment) Act 2003	*13.10.2003*	*9*
2.Malaysia Academy of Law Act 2003	*29.10.2003*	*9*
3.Trustees (Incorporation) (Amendment) Act 2003	*29.10.2003*	*9*

PRINCIPAL ACTS 2003

ACT 627...	**Payment Systems Act 2003** An Act to make provisions for the regulation and supervision of payment systems and payment instruments and for matters connected therewith. *w.e.f:-1.11.2003 -P.U.(B) 308/2003*
ACT 628...	**National Service Training Act 2003** An Act to provide for the registration and attendance of persons for national service training in Malaysia based on the philosophy of the Rukun Negara, to establish a National Service Training Council for the purposes of such national service training, and for matters connected therewith and incidental thereto. *w.e.f:-16.11.2003 [P.U.(B)346/2003]*
ACT 630...	**Langkawi International Yacht Registry Act 2003** An Act to provide for the establishment of an international registry in Langkawi for yachts and yachting entities, including its administration and operation, and for matters connected with it. *w.e.f. 2.10.2003 - PU (B) 301/2003*

AMENDING ACTS 2003

ACT NO	TITLE
ACT A1193...	**Moneylenders (Amendment) Act 2003** *Notes:-Amends Long Title, ss.2, 2A,4, 5, 6, 8, 9, 11, 12, 15, 16, 17, 18, 19, 21, 23, 25, 26, 27 and 29. Inserts new Parts I, II, III, IV, V , VI, ss.4A, 5A, 5B, 5C, 5D, 5E, 5F, 9A, 9B, 9C, 9D, 9E, 9F, 9G, 10P,11A, 17A, 29A, 29B, 29C, 29D, 29E, 29F, 29G and 29H.Deletes ss.3, 7, 10, 13, 14, 22, 24, 28, 30, 30A and Sch 2.* *w.e.f:-1.11.2003 [P.U.(B) 332/2003]*

INDEX TO P.U.(B) SERIES 2003

TITLE	P.U.(A) NO.
BANKING AND FINANCIAL INSTITUTIONS ACT 1989 [ACT 372] REVOCATION OF FINANCE COMPANY LICENCE *Notes:-Visia Finance Berhad* *w.e.f:-30.6.2001*	298/2003
COUNTERVAILING AND ANTI-DUMPING DUTIES ACT 1993 [ACT 504] COUNTERVAILING AND ANTI-DUMPING DUTIES REGULATIONS 1994 NOTICE OF AFFIRMATIVE FINAL DETERMINATION (AD 01/03) *Notes:-Dumping margins exist with respect to newsprint in rolls which is classified under Harmonized System Code originating in or exported from Canada, the Republic of Indonesia, the Republic of Korea, the Republic of the Philippines and the United State of America into Malaysia.* *w.e.f:-27.9.2003*	297/2003
LANGKAWI INTERNATIONAL YACHT REGISTRY ACT 2003 [ACT 630] APPOINTMENT OF DATE OF COMING INTO OPERATION *w.e.f:-2.10.2003*	301/2003
MONEYLENDERS (AMENDMENT) ACT 2003 [ACT A1193] APPOINTMENT OF DATE OF COMING INTO OPERATION *w.e.f:-1.11.2003*	332/2003
NATIONAL ARCHIVES ACT 2003 [ACT 629] APPOINTMENT OF DATE OF COMING INTO OPERATION *w.e.f:-10.10.2003*	300/2003
NATIONAL SERVICE TRAINING ACT 2003 [ACT 628] APPOINTMENT OF DATE OF COMING INTO OPERATION *w.e.f:-16.11.2003*	346/2003
PAYMENT SYSTEMS ACT 2003 [ACT 327] APPOINTMENT OF DATE OF COMING INTO OPERATION *w.e.f:-1.11.2003*	308/2003

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