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THE JOURNAL OF THE MALAYSIAN BAR

Vol XXXIII No 4 KDN PP 987/11/2005 ISSN 01268538 2004 (Volume IV)

Published by the Bar Council, Nos. 13, 15 & 17, Jalan Leboh Pasar Besar, 50050 Kuala Lumpur, Malaysia.
Tel No. (03) 2031 3003. Fax Nos. (03) 2026 1313 / 2034 2825 / 2072 5818. E-mail: council@malaysianbar.org.my

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COVER PHOTO shows 'Bapa Malaysia', Tunku Abdul Rahman Putra Al Haj, father of Malayan Independence and the first Prime Minister with Tun Hussein Onn, the third Prime Minister of Malaysia, seen here at the Human Rights Seminar organised by the Malaysian Bar to Celebrate the 40th Anniversary of the Universal Declaration of Human Rights in December 1988.

Situating Automatism in the Penal Codes of Malaysia and Singapore*

by
Stanley Yeo**

Abstract

This article begins by clarifying the meaning of 'automatism' as being concerned with a lack of volition as opposed to lack of consciousness, as is sometimes thought. This is followed by a discussion showing that the Penal Codes of Malaysia and Singapore have failed to embed the concept of automatism and its larger counterpart of involuntariness in their provisions. This has repercussions for the application of the defences of unsoundness of mind, intoxication and diminished responsibility whose subject-matter inevitably involves these concepts. Suggestions are then made of ways by which the Malaysian and Singaporean courts could accommodate automatism and involuntariness into these provisions. The concluding part comprises a proposal for legislative amendments to be introduced which would rectify this deficiency in the Codes. In the course of the discussion, Australian and Canadian developments will be relied on for assistance.

The concept of automatism is rarely raised in practice, there being only two reported cases from Malaysia known to date,[1] and none from Singapore. The scarcity of cases does not, however, reduce the significance of this concept because it concerns a number of fundamental issues affecting criminal responsibility. They include questions about voluntariness, the meaning of the

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[1] *Sinnasamy v PP* (1956) 22 MLJ 36 (Malaya Court of Appeal) ('*Sinnasamy*'); and *PP v Kenneth Fook Mun Lee (No 1)* [2002] 2 MLJ 563 (High Court of Malaysia) ('*Kenneth Fook*').

term 'act' contained in the Penal Codes of Malaysia and Singapore,[2] the criminal law's handling of mental malfunctioning, and the issue of which party should bear the onus of proof where voluntariness is challenged. Since the relevant Code provisions are identical for both the Malaysian and Singaporean codes, the ensuing discussion will refer simply to the one Penal Code.

The term 'automatism' and the concept it denotes do not appear anywhere in the Penal Code because they are of relatively recent origin.[3] It is therefore understandable that the code framers failed to anticipate or provide for such a defence. However, since the underlying rationale of voluntariness, which underpins the concept of automatism, is so basic to questions about criminal responsibility, it must inevitably be found in the Penal Code in some form or other. Given this state of affairs, some innovative interpretation of the Code provisions by the Malaysian and Singaporean judges may be needed to achieve this objective.

This article will commence with an elucidation of the concept of automatism. It will be shown that, contrary to popular understanding, the concept is concerned with a lack of control rather than a lack of consciousness. This understanding of the true nature of automatism has ramifications for the law's treatment of cases where the accused had committed the alleged crime while suffering from such mental malfunctioning as an epileptic fit, a hypoglycaemic episode or sleepwalking. In Part 2, an attempt will be made to situate the concept of automatism within the words 'voluntarily' and 'act', which are terms used by the Penal Code. This exposition will enhance our understanding of these other concepts. I shall contend that the term 'voluntarily' under the Code focuses on the means used to cause an effect, as opposed to the intention to cause an effect. I shall also show that the concept of an 'act' under the Code is not restricted to a single act but can involve a series of acts

[2] *Penal Code Cap 224* (Singapore); *Penal Code Act 574* (, Malaysia). Since these codes are derived from the Indian Penal Code, this article should be of interest to scholars of Indian criminal law. However, certain differences between the Indian code and the Malaysian and Singaporean codes, notably the provisions on intoxication, justify confining the discussion to the Malaysian and Singaporean law.

[3] 'Automatism' is a twentieth century innovation. See J Ll J Edwards, 'Automatism and Criminal Responsibility' (1958) 21 *Modern Law Review* 375.

forming one transaction. The ramifications of this broad interpretation of 'act' to the determination of criminal responsibility will be noted.

Parts 3, 4 and 5will seek to situate the concept of automatism within the defences of unsoundness of mind and intoxication, and to compare the concept with the closely related defences of provocation and diminished responsibility. In Part 6, the issue of which party should bear the onus of proving or disproving automatism will be canvassed. Discussion of this procedural matter will confirm our understanding of the volitional nature of automatism and its role in negating the *actus reus* of a crime or as part of a true defence. In Part 7, the article concludes with a proposal to rectify by legislation the present difficulties created by the Code's failure to give voluntariness its proper role.

Legal developments from Australia and Canada concerning the concept of automatism will be relied upon throughout this article. Obviously, the laws of these other jurisdictions are not binding on the Malaysian and Singaporean courts which are restricted by the wording of the Penal Code. However, these developments are useful insofar as they shed light on the said concepts and will doubtless be of assistance to both the courts and legislatures when attempting to incorporate the concepts into the Code.

1 AUTOMATISM DEFINED

Automatism is often viewed as amounting to a lack of consciousness rather than a lack of volition, that is, an inability to control or contain one's actions. It was so regarded by the Malayan Court of Appeal case of *Sinnasamy v Public Prosecutor ('Sinnasamy'),*[4] which was an appeal against a conviction of murder by the appellant of his infant child. The appellant contended that he had no recollection of performing the fatal stabbing although he remembered in considerable detail the events and circumstances immediately preceding and following the stabbing. At the trial, a medical witness testified that the appellant was an epileptic but also that a person suffering from an automatistic state will not be conscious at the time. Based on the appellant's own evidence that

[4] (1956) 22 MLJ 36.

he remembered much of what had transpired immediately before and after the stabbing, the Court of Appeal concluded that the trial judge had been correct in holding that the appellant had been conscious at the relevant time and could therefore not have been in an automatistic state. Furthermore, the court endorsed the trial judge's acceptance of the prosecution's suggestion that the appellant had killed his child on an irresistible impulse.[5] Clearly then, the court regarded automatism as requiring a state of unconsciousness and that a lack of control, such as might be occasioned by an irresistible impulse, could not amount to automatism.

In the subsequent case of *Public Prosecutor v Kenneth Fook ('Kenneth Fook')*,[6] the Malaysian High Court had to consider the accused's claim that he had suffered a hypoglycaemic attack at the time of the alleged murder which produced a state of automatism. In his judgment, Paul J said that '[a]utomatism refers to a state of defective consciousness in which a person performs unwilled acts'.[7] While the latter part of this statement acknowledges that automatism involves a lack of volition, the earlier part continues to equate automatism with a lack of consciousness.

The correct view is that the primary feature of automatism is the total inability to control one's conduct. By 'control' is meant an inability to contain or restrain oneself. The Supreme Court of Canada in *Stone v The Queen ('Stone')* expressed the matter thus, 'voluntariness, rather than consciousness, is the key element of automatistic behaviour since the defence of automatism amounts to a denial of the voluntariness component of the *actus reus'*.[8]

Similarly, the High Court of Australia in *Ryan v The Queen* emphasised

[5] Ibid 37.
[6] [2002] 2 MLJ 563.
[7] Ibid 575.
[8] (1999) 134 CCC (3d) 353, 421 (Bastarache J). There is also the observation by La Forest J in the Canadian Supreme Court case of ***R v Parks*** (1992) 75 CCC (3d) 287, 302 that automatism is 'conceptually a subset of the voluntariness requirement.' Some European continental jurisdictions classify conduct resulting from automatism under the rubric of unconsciousness: see Roy Beran, 'Automatism: Comparison of Common Law and Civil Law Approaches – A Search for the Optimal' (2002) 10 *Journal of Law and Medicine* 61, 65-66.

that '[i]t is … the absence of the will to act or, perhaps, more precisely, of its exercise rather than lack of knowledge or consciousness which … decides criminal liability'.[9] Under this view of automatism, people can exercise their deliberative functions of the mind and at the same time be incapable of controlling their actions.

Persons acting while in an automatistic state may be fully conscious of what they are doing and intend the consequences of their actions while lacking any mental capacity whatsoever to restrain themselves. Regarded in this way, a state of unconsciousness or impaired consciousness may point to an accused's inability to control their conduct, but such a state is not essential for automatism to exist. This was the stance taken by the English Law Reform Commission, whose draft Criminal Code provides that:

> A person is not guilty of an offence if – (a) he acts in a state of automatism, that is, his act – (ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of his act …[10]

This interpretation of automatism is also consistent with the following oft-cited pronouncement by Lord Denning in the House of Lords case of *Bratty v Attorney-General for Northern Ireland ('Bratty')*:

> No act is punishable if it is done involuntarily: and an involuntary act in this context – some people nowadays prefer to speak of it as 'automatism' – means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from a concussion or whilst sleepwalking.[11]

In this passage, Lord Denning provides two categories of cases which he regards as being automatistic. He describes the first category as involving an absence

[9] (1967) 121 CLR 205, 214 (Barwick CJ).
[10] England and Wales Law Reform Commission, *A Criminal Code for England and Wales,* LC177, (1989) draft Code cl 33(1).
[11] [1963] AC 386, 409.

of any control of the mind over one's actions. As has been recognised by later decisions, this category covers actors who may have been conscious of what they were doing but who could not contain their actions. Lord Denning describes the second category of cases as involving a lack of consciousness. Yet, in respect of the examples of concussion and sleepwalking which he provides for this category, one can envisage apparently deliberative or goal–directed conduct performed by the defendant while concussed or in a state of sleepwalking. For instance, in the English case of ***R v T***,[12] the accused was regarded as being in an automatistic state when she committed an armed robbery involving stabbing her victim and leaning into the victim's car to take her bag. The clinical evidence supporting this mental state was that she was suffering from post-traumatic stress disorder after having been raped three days earlier. Such a disorder is closely similar in effect to that of concussion caused by a physical blow.[13] As for sleepwalking, the Canadian case of ***R v Parks ('Parks')***[14] exemplifies the judicial willingness to regard a sleepwalker as behaving in an automatistic state even though he had performed apparently goal-directed conduct such as driving a car to the house of his victims, going to their bedroom and stabbing them to death in their beds. The point made here is that the key component of the two categories of cases identified by Lord Denning in ***Bratty*** is an accused's inability to control their behaviour and not the loss or impairment of the conscious or deliberative functions of the mind.[15]

This legal view of placing the emphasis on control rather than consciousness is supported by clinical science.[16] Professor Michael Coles, a forensic psychologist and a leading expert on cases of automatism appearing before criminal courts, had this to say:

> on the basis of the available knowledge of human behaviour, it may be suggested that many of the crimes the courts have decided

[12] [1990] Crim LR 256.
[13] See also ***R v Rabey*** (1981) 54 CCC (2d) 1, 15 ***('Rabey')***
[14] (1992) 75 CCC (3d) 287.
[15] Significantly, North P in ***R v Burr*** [1969] NZLR 636, 744 relied heavily on the passage by Lord Denning in ***Bratty*** which he described as 'particularly informative' when expressing his views on automatism. With respect, those views show that he misunderstood the passage.
[16] Thus, the two fold categorization of cases by Lord Denning in ***Bratty***, mentioned earlier, can be scientifically substantiated: see Michael Coles and Suzanne Armstrong, 'Hughlings Jackson on Automatism as Disinhibition' (1998) 6 *Journal of Law and Medicine* 73, 81.

> were committed in an automatistic state – that is, in the absence of conscious, volitional control, or while the mind was a total blank – actually may have occurred in a state of diminished consciousness, with the diminished consciousness resulting in the diminished conscious control of behaviour. In other words, the individual becomes *disinhibited*, and behaviour that the individual would otherwise be able to [contain] gains expression.[17]

Coles' transformation of impaired consciousness into impaired control accords with his scientific understanding of automatistic behaviour.

At this juncture, it should be emphasised that automatism requires a *total* impairment of control as opposed to a partial one. In the words of the Queensland Court of Criminal Appeal, for automatism to succeed, '*impairment* of relevant capacities as distinct from total deprivation of these capacities [will not suffice] … it is fundamental to a defence of automatism that the actor has *no* control over his actions'.[18]

Reverting to the Malaysian case of *Sinnasamy*, the Court of Appeal may be strongly criticised for concluding that the accused was not in an automatistic state because he had been conscious of the events and circumstances immediately prior to and after the fatal stabbing. The court should have considered whether the accused's epileptic condition had resulted in a total impairment of control of his stabbing to death of his child. The court should also have taken cognizance of the scientific knowledge concerning epilepsy. This would include the fact that there are at least three different types of epileptic seizures – grand mal, petit mal and temporal lobe/psychomotor, and that seizures have three distinct phases, namely, the pre-ictal 'aura', the ictal phase comprising the seizure itself, and a post-ictal confusional phase. A person could confidently claim to be in an automatistic state of acting involuntarily

[17] Michael Coles, 'Scientific Support for the Legal Concept of Automatism' (2000) 7 *Psychiatry, Psychology and Law* 33 at 37 (original emphasis). The word 'contain' in parenthesis replaces the word 'control' which Coles, in personal correspondence with me, says is not as precise in its meaning as 'contain' in the context of my discussion. See further, Coles and Armstrong, above n 16.

[18] *R v Milloy* (1991) 54 A Crim R 340, 342-343 (Thomas J) (original emphases).

only in the ictal phase of the grand mal and petit mal forms of epilepsy.[19]

As for the other Malaysian case of ***Kenneth Fook***, the court was there solely concerned with the legality of the prosecution's application to adduce evidence to rebut the accused's claim of automatism.[20] Accordingly, the court did not have to determine whether the accused's hypoglycaemic attack had totally deprived him of his control over the death-causing conduct. Assuming that the court had been required to evaluate the effect of hypoglycaemia on the accused's behaviour, the proper course would have been to focus on the lack of volition as opposed to any lack of consciousness. This emphasis on volition is consistent with the clinical symptoms of hypoglycaemia which include headache, restlessness, irritability, lightheadedness, confusion and visual disturbances.[21] Based on these symptoms, the overall effect of a hypoglycaemic attack on a sufferer appears to be one of disorientation rather than of unconsciousness. In some cases, the severity of the symptoms may result in the sufferer losing control of his or her actions so as to support a claim of automatism.

2 AUTOMATISM, VOLUNTARINESS AND ACTS

As noted above, automatism is sometimes described in terms of voluntariness. The reason why the criminal law insists on the accused's conduct being voluntary is because, otherwise, the aims of punishment will not be met. As Koh Kheng Lian, Chris Clarkson and Neil Morgan in their criminal law text have put it:

> Where physical movements were involuntary but caused a harm, punishment would be undeserved and could serve no useful utilitarian purpose; involuntary conduct clearly cannot be deterred and such an 'actor' is in no need of incapacitation or rehabilitation. Accordingly, most legal systems have exempted such persons

[19] Coles, above n 17, 40.
[20] This required the court to determine which party had the legal burden of proof. This issue will be dealt with in Part 4 of this article.
[21] Coles, above n 17, 40.

> from criminal liability. They have not 'acted'; there is no *actus reus*.[22]

The need for voluntariness has also been explained by the Australian Model Criminal Code Committee as follows:

> At the minimum there needs to be some operation of the will before a physical movement is described as an act. The physical movements of a person who is asleep, for example, probably should not be regarded as acts at all, and certainly should not be regarded as acts for the purposes of criminal responsibility. These propositions are embodied in the rule that people are not held responsible for involuntary 'acts', that is, physical movements which occur without there being any will to perform that act. This situation is usually referred to as automatism.[23]

While the framers of the Penal Code used the word 'act' frequently, they left it undefined. Perhaps, they did so because they believed that its meaning was obvious to everyone, as indicated in the following comment in Gour's *Penal Law of India*:

> The word 'act'… must be construed in the light of common sense … 'Act' is nowhere defined. It … cannot, in the ordinary language be restricted to every separate willed movement of a human being; for when courts speak of an act of shooting or stabbing, it means the action taken as a whole and not the numerous movements involved.[24]

Once again, we note the equation of an 'act' with willed conduct which is the

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[22] Koh Kheng Lian, Chris Clarkson and Neil Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (1989), 37-38.

[23] Model Criminal Code Officers Committee, *Chapter 2, General Principles of Criminal Responsibility* (1992), 14-15. The Committee went on to propose a definition of 'conduct' which was in terms of voluntariness: see s 202 of the Model Criminal Code. Currently, each Australian state and territory has its own set of criminal laws. The Model Criminal Code Officers Committee was established with the support of all the Attorneys-General to produce a single national criminal code. Although most of the work of the committee has now been completed, adoption of its code by the various states and territories has been slow.

[24] Hari Singh Gour, *Penal Law of India* (10th ed, 1982) Vol 1, 262.

essence of voluntariness. Gour would therefore agree entirely with the proposition that human movement that is unwilled does not constitute an 'act' and therefore results in an absence of the *actus reus* of a crime.

While the Code framers left the word 'act' undefined, they did define 'voluntarily'. The relevant provision is s 39 which reads:

> A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

At first blush, this definition appears unhelpful because it seems to be concerned with the *mens rea* of a crime whilst automatism and voluntariness are concerned with the *actus reus*.[25] However, a closer analysis reveals that the definition provided in s 39 does encapsulate the concept of voluntariness and its subset of automatism. The analysis begins with the proposition that voluntariness comprises willed conduct where the actor was in control of his or her actions. The analysis next contends that this feature of will or control embodies a subjective mental state which is best described as an intention to perform the conduct. Such an intention is distinguishable from an intention to cause an effect. While the latter type of intention is a type of *mens rea*, the former is not and remains within the realm of the *actus reus*.

A study of the High Court of Australia case of *Ryan v The Queen ('Ryan')*[26] will help clarify this distinction. The appellant had entered a shop with a loaded rifle for the purpose of committing robbery. The appellant ordered the shop attendant to turn around and to place his hands behind his back. The attendant obeyed and the appellant approached him with one hand reaching into his pocket for a piece of cord and the other pointing the corked rifle, with a finger on the trigger, at the attendant's back. The attendant suddenly ducked and swung around which caught the appellant by surprise, causing him by a reflex action to discharge the gun. The bullet entered the neck of the attendant, killing him instantly. The question before the court was whether the charge of murder

[25] This was the view held by Koh, Clarkson and Morgan, above n 22, 37.
[26] (1967) 121 CLR 205.

had been made out in the circumstances. After noting the wording in the *Crimes Act 1900* (NSW) that 'murder shall be committed where the act of the accused … causing the death charged', Barwick CJ said:

> That a crime cannot be committed except by an act or omission is axiomatic. It is basic, in my opinion, that the 'act' of an accused … must be a 'willed', a voluntary act which has caused the death charged. It is the act which must be willed, though its consequences may not be intended.[27]

Applying this ruling to the facts of the case, Barwick CJ then proceeded to consider whether the appellant's discharging of the gun was willed so as to constitute an 'act' for the purposes of the murder charge. In doing so, his Honour left to one side the question of whether the appellant had intended to cause the consequences of his act.[28]

With the above in mind, we can now revisit the definition of 'voluntarily' in s 39 of the Penal Code. As a preliminary observation, it is noted that the section provides a restricted meaning of 'voluntarily' by casting it in terms of a person 'causing an effect.' Viewed in this way, the words 'intention', 'knowledge' and 'belief' in s 39 have all to do with the person's mental state concerning the causing of the effect, and have nothing to do with the voluntariness of that person's conduct. Instead, it is the term 'means' appearing in s 39 which is associated with the person having acted voluntarily. While the section does not expressly indicate the mental state accompanying the performance of those 'means', the clear implication is that the person must have intended to do so. It follows that s 39 incorporates the distinction articulated by Barwick CJ in *Ryan* between an intention to do an act (comprising voluntariness and therefore a part of the *actus reus*) and an intention to cause an effect (comprising a type of *mens rea*). What all of this says is that the definition of 'voluntarily' in s 39 of the Penal Code endorses the notion that the concept of voluntariness, from which automatism is derived, involves the willed or controlled conduct of an actor.

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[27] Ibid 213.

[28] See also the Privy Council decision, on appeal from Singapore, of *Mohamed Yasin v PP* [1975-1977] SLR 34, 36 for a similar distinction between 'meaning to performing conduct' and 'intending the consequences of such conduct'.

There is a further lesson to be gained by comparing s 39 of the Penal Code with the Australian case of ***Ryan***. It will be recalled that the appellant had claimed that the discharge of the gun was due to a reflex action. By doing so, he was contending that his conduct which caused the attendant's death was involuntary because it was unwilled. Despite accepting this contention, Barwick CJ still found the appellant guilty of murder by regarding 'the act causing death' as extending beyond the discharge of the gun to the appellant's particular handling of the gun prior to its discharge. His Honour felt justified in this finding because:

> [the trier of fact] could have concluded that the act causing death was the presentation of the cocked, loaded gun with the safety catch unapplied and that its involuntary discharge was a likelihood which ought to have been in the contemplation of the applicant when presenting the gun in the circumstances.[29]

The similarity between this ruling and s 39 is startling when we note the part of the section which states that:

> A person is said to cause an effect voluntarily when he causes it … by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

In the light of what has been said about s 39 and the decision in ***Ryan***, we may question the correctness of the comment in Gour's ***Penal Law of India*** that the word '['act'] must necessarily be something short of a transaction which is composed of a series of acts.'[30] Thus, in a case where part of the accused's conduct was involuntary but another part of it was voluntary, s 39 should be invoked to find the accused guilty of the offence charged if they had reason to believe that their voluntary conduct was likely to result in their performance of involuntary conduct with its ensuing effect.

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[29] ***Ryan v the Queen*** (1967) 121 CLR 205, 219. For a similar ruling of the High Court, see ***Jiminez v The Queen*** (1992) 173 CLR 572 which involved an appellant falling asleep at the wheel of a car which went out of control and caused the death of a passenger. The court held that, although driving while asleep did not constitute a voluntary act, driving while drowsy did and a driver would be guilty of dangerous driving causing death if he or she knew or ought to have known that there was a significant risk of falling asleep at the wheel.

[30] Gour, above n 24, 262.

3 AUTOMATISM AND UNSOUNDNESS OF MIND

The Code framers' failure to clearly articulate the concept of voluntariness and its subset of automatism has created difficulties with the interpretation of certain Code provisions. The first of these provisions is the defence of unsoundness of mind under s 84 of the Code. It reads:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

The ensuing discussion will explain the difficulty of reading automatism into s 84 and suggest a way around the difficulty. The discussion will also consider cases of automatism not occasioned by an unsound mind. The different dispositional outcomes of these cases, compared to those caused by unsoundness of mind, make it imperative for the law to devise an approach which clearly distinguishes these two types of automatism. Such an approach has been devised by the courts of other jurisdictions and was recently adopted by the Malaysian High Court in *Kenneth Fook*. A critique of this approach is therefore timely.

But first, it is necessary to consider the difficulty of reading the concept of automatism into s 84. Since automatism involves a volitional defect, caution is required when relating it to the defence under s 84 since that defence, as presently worded, involves a cognitive defect. The defence is so described because it concerns a defect of understanding which is evident in the requirement that the accused was 'incapable of knowing'. That s 84 does not appear to deal with a volitional defect is suggested by the requirement in the provision that something was 'done' by the accused. Like the word 'act', common sense infers that a person who had 'done' something means that he or she had engaged in willed human movement. Put in another way, s 84 assumes that the accused's conduct was voluntary in that he or she exercised control over the act. However, the section exculpates an accused who, on account of unsoundness of mind, is incapable of knowing the *nature* of the act by which is meant the act *and* its consequences. To illustrate, an accused person may be so unsound in mind that he believes he is breaking a twig when he is

really breaking a person's finger.[31] The accused's conduct would clearly have been voluntary in that his act of breaking the finger was willed and accompanied by an intention to do the act. However, the accused was so mentally deranged that he was incapable of knowing that it was a person's finger he was breaking and the harmful consequences to the victim of doing so.

Given the nature of automatism put forward above, its role in relation to s 84 is not to establish that the accused was 'incapable of knowing' the nature of his or her act. Rather, it is to deny altogether that the accused's bodily movement was an 'act'. On its face, s 84 does not lend itself at all to accommodating this role since the provision is cast in terms of the accused doing something (inferring voluntariness), and of not having the capacity to know (inferring a cognitive defect). What then of a case where the accused was alleged to have committed an offence while in an automatistic state caused by unsoundness of mind? One possible outcome may be that such a person cannot rely on s 84 and will be convicted and punished as opposed to receiving the special verdict and the clinical treatment which comes with it. This is grossly unjust because it ignores the plight of an accused whose mental malfunctioning is arguably much more severe than one who had engaged in voluntary conduct but with a cognitive misunderstanding of the act performed and its consequences. Another outcome may be to regard the accused as not having committed an 'act' so that the prosecution had failed to establish the *actus reus* of the crime charged. The result would be an unqualified acquittal which would be completely unacceptable to society especially when the accused clearly needs to be kept under close supervision and be treated by the mental health authorities.

These unpalatable outcomes make it imperative that we seek a way of reading insane automatism into the wording of s 84. It is submitted that an innovative court could do so by reading the provision as follows:

> Nothing is an offence which is incapable of being done by a person … by reason of unsoundness of mind.

[31] Adapted from the illustration given by Dixon J in the Australian case of ***R v Porter*** (1933) 55 CLR 182, 188 of the meaning of 'not knowing the nature of the act' contained in the ***M'Naghten*** Rules. The Rules govern the common law defence of insanity in Australia and England.

Such a reading circumvents the voluntariness implied in the words 'done' and 'doing' appearing in s 84 as well as the reference in that provision to an incapacity to know.

The two Malaysian cases of *Sinnasamy* and *Kenneth Fook* which have dealt with automatism and s 84 can now be considered. In the light of the preceding discussion, we can safely assert that the suggestion by the Malayan Court of Appeal in *Sinnasamy*[32] that ***all*** automatistic states fall within the scope of the s 84 defence, is based on the erroneous view that those states invariably involve some form of cognitive defect. The correct position is that there may be certain types of automatistic states which are not covered by s 84 because they did not stem from unsoundness of mind. Where the automatistic state was due to unsoundness of mind, this finding should alone be sufficient to establish insane automatism[33] without needing to prove further that the accused was incapable of knowing the nature of his or her act or that it was wrong or contrary to law. If the courts insisted on proof of these additional matters, they would commit the mistake of reconstructing insane automatism into a form of cognitive defect, thereby ignoring the fundamentally volitional nature of an automatistic state.

Another error perpetrated by the Malayan Court of Appeal in *Sinnasamy* was its failure to acknowledge that, besides insane automatism, an accused may have experienced sane automatism. To be fair, it may be that the court was solely concerned with the case at hand which involved an accused who had allegedly experienced an automatistic state due to an epileptic fit. In these circumstances, the court may simply have been confirming earlier case authorities that the s 84 defence is the only one available to an accused who commits harm during an epileptic fit.[34] Nevertheless, the court would have

[32] (1956) 22 MLJ 36, 37(Good J).

[33] This description is adopted from jurisdictions having a defence of insanity. Strictly speaking, we should use the expression 'unsoundness of mind automatism' which more accurately reflects s 84, especially when the expression 'unsoundness of mind' may be broader than that of 'disease of the mind' required by the defence of insanity: see Gerry Ferguson, 'The Insanity Defence in Canada, Malaysia and Singapore: A Tale of Two Codes' (1990) 17 *Journal of Malaysian and Comparative Law* 1, 7. However, for the sake of brevity, I have used the term 'insane automatism' here to denote automatistic states caused by unsoundness of mind, and 'sane automatism' to describe automatistic states not so caused.

[34] For example, *Nga Ant Bee v Emperor* (1937) 38 Cr LJ 667.

brought clarity to this area of the law had it expressly stated that an automatistic state caused by epilepsy amounted to insane automatism and not sane automatism.

The distinction between insane and sane automatism is highly significant because it determines whether the accused person should receive a special verdict of not guilty by reason of unsoundness of mind or an unqualified acquittal. Once again, the Code framers' failure to clearly articulate these two types of automatism and their differing outcomes leaves much to be desired. Fortunately, this did not prevent the Malaysian High Court in ***Kenneth Fook*** from recognising them. The issue before the court was whether it should grant leave to the prosecution to adduce evidence rebutting the accused's claim of automatism. The court held that its answer depended on whether or not the accused's automatistic state was due to unsoundness of mind. If it was, the accused bore the onus of proving automatism and it was entirely proper to grant the prosecution the leave sought. However, if the automatism was not due to unsoundness of mind so as to fall outside the ambit of s 84, the prosecution bore the onus of disproving that the accused was in that condition at the time of the alleged offence. The court concluded that the evidence showed that the accused's automatistic condition was due to a hypoglycaemic attack which was not caused by any external factor, and was prone to recur. In doing so, the court drew upon English and New Zealand cases which have held that the distinction between sane and insane automatism depends on whether the automatistic condition was caused by a 'disease of the mind' (the common law equivalent of 'unsoundness of mind'), in which case, it is one of insane automatism.

The English and New Zealand courts and, one might add, their Australian and Canadian counterparts, have relied on two tests to determine whether the accused's mental dysfunctioning was due to a disease of the mind. These are the internal cause test and the continuing danger test which were expressly referred to by the Malaysian High Court in ***Kenneth Fook***. That court appears to have embraced these tests without referring to the criticisms which they have received. It would therefore be appropriate to briefly consider these

criticisms and the approach taken by the Supreme Court of Canada in *Stone*[35] to overcome them.

The internal cause test draws a distinction between a mental malfunctioning arising from a source primarily internal to the accused such as his or her psychological makeup or organic pathology, as opposed to a malfunctioning produced by some specific external factor such as intoxication or concussion.[36] Both judges and commentators have criticised this test for creating some arbitrary distinctions as to what is considered a disease of the mind. For example, hyperglycemia, an excess in blood sugar, has been treated as an internal cause leading to mental disorder automatism,[37] whereas hypoglycemia, a deficiency in blood sugar, has been regarded as a cause of non-mental disorder automatism.[38] Likewise, cases of sleepwalking raise unique problems which cannot be resolved by the internal cause test.[39] Consequently, the Canadian Supreme Court in *Stone* recognised that the test was not 'a universal classificatory scheme for 'disease of the mind' [because there were cases in which] the dichotomy between internal and external causes becomes blurred'.[40]

The second test of continuing danger holds that any condition of the accused which is likely to recur and thereby present a danger to the public should be treated as a disease of the mind. This test has likewise been criticised by judges and commentators on the ground that, if it was conclusively determinative of disease of the mind, a serious mental disorder could be excluded simply because it was unlikely to recur.[41] Acknowledging the strength

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[35] (1999) 134 CCC (3d) 353.
[36] *R v Rabey* (1977) 37 CCC (2d) 461, (Martin JA); approved by a majority of the Supreme Court of Canada in *Rabey* (1981) 54 CCC (2d) 1.
[37] *R v Hennessy* (1989) 1 WLR 287.
[38] *R v Quick* (1973) 1 QB 910. See further, Bernadette McSherry, 'Defining what is a 'disease of the mind': The untenability of current legal interpretations' (1993) 1 *Journal of Law and Medicine* 76, 84-85; Coles, above n 17, 40.
[39] See *Parks* (1992) 75 CCC (3d) 287, 307 (La Forest J). See further, McSherry, above n 38, 80-81, 85-86; Coles, above n 17, 37-39.
[40] *Stone* (1999) 134 CCC (3d) 353, 434 (Bastarache J) citing La Forest J in *Parks* (1992) 75 CCC (3d) 287, 309-310.
[41] *Rabey* (1981) 54 CCC (2d) 1, 17 (Dickson J); *Parks* (1992) 75 CCC (3d) 287, 309-310 per La Forest J. See also McSherry, above n 38, 83.

of this criticism, the Canadian Supreme Court in *Stone* held that the test 'must be qualified to recognise that while a continuing danger suggests a disease of the mind, a finding of no continuing danger does not preclude a finding of a disease of the mind'.[42]

Given these reservations over the internal cause and continuing danger tests, the Canadian Supreme Court felt it necessary to clarify the way these tests should be applied by trial judges. The court held that these tests should not be treated as exclusive and conclusive approaches as may be expected of a 'theory'. Rather, the tests should be regarded as inter-connected and flexible 'factors', which may be combined to help decide whether an accused was suffering from a disease of the mind. In the words of Bastarache J:

> I emphasize that the continuing danger factor should not be viewed as an alternative or mutually exclusive approach to the internal cause factor. Although different, both of these approaches are relevant factors in the disease of the mind inquiry. As such, in any given case, a trial judge may find one, the other or both of these approaches of assistance. To reflect this unified, holistic approach to the disease of the mind question, it is therefore more appropriate to refer to the internal cause factor and the continuing danger factor, rather than the internal cause theory and the continuing danger theory.[43]

The practical outcome of the *Stone* approach is that the internal cause and continuing danger factors should be viewed as merely analytical tools devised by the courts to meet the primary objective of societal protection. As such, these factors have no intrinsic value on their own nor are they fully determinative of the disease of the mind inquiry. In line with this, the Canadian Supreme Court in *Stone* was open to recognising other factors, besides internal cause and continuing danger, to help determine whether the defendant's automatistic state stemmed from a disease of mind. As Bastarache J said:

> In any given automatism case, a trial judge may identify a policy factor which [the Supreme Court] has not expressly recognized.

[42] *Stone* (1999) 134 CCC (3d) 353, 438 (Bastarache J).
[43] Ibid, 439.

> Any such valid policy concern can be considered by the trial judge in order to determine whether the condition the accused claims to have suffered from is a disease of the mind. In determining this issue, policy concerns assist trial judges in answering the fundamental question of mixed law and fact which is at the centre of the disease of the mind inquiry: whether society requires protection from the accused and, consequently, whether the accused should be subject to evaluation under the regime contained in Part XX.1 of the [Criminal] Code.[44]

In practical terms, what this means is that trial judges should not get bogged down by whether or not a particular factor has been established. Instead, they should have foremost in mind the overarching theme of societal protection. Consistent with this approach, trial judges should fully appreciate that factors such as an internal cause and a continuing danger merely attest to an accused's need for clinical treatment for the protection of the community. This translates into ensuring that expert evidence should be sought which will help the triers of fact (be it judge or jury) to decide whether there is such a need. Overall, there is much to be said in favour of the holistic approach propounded by the Canadian Supreme Court in ***Stone***, and Malaysian and Singaporean courts would do well to adopt it when next dealing with the issue of automatism.

4 AUTOMATISM AND INTOXICATION

The above discussion of externally caused automatistic states is developed further here with a consideration of the extent, if any, to which the Penal Code provisions on intoxication incorporate the concept of automatism. The short answer is that the provisions do not, leaving the courts with the task of having to find a way to rectify this omission.

[44] Ibid 440-441. The said regime is the Canadian equivalent of the one provided for under s 315 of the *Criminal Procedure Code* (Cap 68, Singapore) and s 368 of the *Criminal Procedure Code* (Act 593, Malaysia).

Even a cursory examination of the wording of ss 85[45] and 86[46] of the Penal Code reveals that these provisions do not accommodate the concept of voluntariness and its subset, automatism. Beginning with s 85(2), the provision opens with the statement that it is concerned with cases where the accused had committed an 'act or omission' which assumes that the accused's conduct was voluntarily performed. This conclusion is buttressed by the later part of the same statement which provides that the accused 'did not know that such act or omission was wrong or did not know what he was doing.' Clearly then, the provision is solely concerned with the effect of intoxication on the accused's cognitive faculties. What is to be made of the reference in s 85(2)(b) to 'insane' intoxication – does it cover cases of insane automatism occasioned by alcohol or drugs? The answer to this question is in the negative because s 85(2)(b) has to be read in conjunction with the opening statement of s 85(2) noted earlier, with its references to acts or omissions and to the cognitive inability to know what one was doing or that the conduct was wrong. As for s 86, the reference to 'intention' there is clearly to the *mens rea* type of intention as opposed to the 'intention to act' type of intention found in voluntary conduct.[47] This is on account of the words 'specific or otherwise' which describes the word 'intention' in s 86(1). This descriptor directly refers to 'specific intent' and

[45] Section 85 reads: '(1) Except as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –
(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
(b) the person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.'

[46] Section 86 reads: '(1) Where the defence under s 85 is established, then in a case falling under s 85(2)(a), the accused person shall be acquitted, and in a case falling under s 85(2)(b), s 84 of this Code and ss 314 and 315 of the Criminal Procedure Code shall apply.
(2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
(3) For the purpose of this section and s 85 'intoxication' shall be deemed to include a state produced by narcotics or drugs.'

[47] For the discussion which differentiates these two forms of intention, see the main text accompanying n 28 above.

'basic intent' offences found in the English common law.[48] For the purposes of the present discussion, it need only be said that both specific and basic intent offences require the accused to have intended to cause the effect of his or her voluntary behaviour.

How then should the Malaysian and Singaporean courts treat a case where the accused had committed an offence while in an automatistic state caused by intoxication? Based on the earlier discussion of sane and insane automatism, it is submitted that the answer will depend on whether or not the automatistic state was due to unsoundness of mind. Thus, if the automatism was due to an internal cause and was prone to recur, the accused would receive the special verdict of not guilty by reason of unsoundness of mind. In these cases, the accused would invariably have been suffering from longstanding abuse of alcohol or drugs which had manifested itself in physiological damage.[49] The operative provision could be either s 84 or s 85(2)(b) and, for the purposes of a dispositional order, it would not really matter which provision was relied upon.[50]

If the automatism was due to the temporary effect of alcohol or drugs, and there was no evidence that the condition was prone to recur, the condition could not be said to have been caused by an unsound mind (under s 84) or a disease of the mind (under s 85(2)(b)). It is submitted that in such a case, the Malaysian and Singaporean courts could opt for one of two competing outcomes. The first is that the accused will receive an unqualified acquittal and this will be the case even though his or her intoxication was self-induced. This is the result of treating the accused's conduct as unwilled and therefore a 'non-act' so that the prosecution has failed to establish the *actus reus* of the

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[48] See generally, Molly Cheang, 'The Intoxicated Offender under Singapore Law' (1986) 35 *International and Comparative Law Quarterly* 106, comparing s 86 with the House of Lords ruling in *DPP v Beard* [1920] AC 479.

[49] For example, alcoholic dementia or delirium tremens, the latter of which was the subject of the Singaporean High Court case of *PP v Tan Ho Teck* [1987] SLR 226 although the accused's condition was not so severe as to amount to an automatistic state.

[50] See Lee Kiat Seng, 'Casenote: *Public Prosecutor v Tan Ho Teck*' (1990) 2 *Singapore Academy of Law Journal* 332 for a discussion of the difference between s 84 and s 85(2)(b) created by the use of the term 'unsoundness of mind' in the former provision and 'insane' with its concept of 'disease of the mind' in the latter.

crime charged. This approach may be objected to on the ground that s 85(1) stipulates that 'intoxication shall not constitute a defence to any criminal charge' except as provided in ss 85 and 86, and that the negating of the *actus reus* by intoxication is not recognised by these provisions. By way of reply, it could be contended that challenging a component of the *actus reus* or offence element is not, strictly speaking, a 'defence' so that the limitation specified in s 85(1) does not really apply.[51]

This approach is found in the Australian common law[52] and was defended strenuously by a recent Australian law reform body in the following terms:

> it is a fundamental principle of criminal law that a person is not guilty of a criminal offence unless that person acted intentionally and voluntarily. This principle is based on 'an ethical principle generally shared in our society that a person should only be held responsible for decisions which are made voluntarily and with intention to do the acts prohibited'. To exclude evidence of self-induced intoxication from consideration of the finder of fact (be it a jury, magistrate or judge) is to seriously erode this ethical principle. It would mean that a voluntarily intoxicated defendant's ability to act intentionally and voluntarily would be evaluated hypothetically and any decision would, if the defendant was grossly intoxicated, be based on a legal fiction …[53]

The second and opposing outcome is that the accused will be convicted of the crime charged. This is because, while the particular conduct occurring at the time when the accused was severely intoxicated may have been involuntary, his or her consumption of alcohol or drugs at an earlier point in time was voluntary. It would therefore be open to a court to regard the accused's conduct

[51] In Part 6, we shall note that this division between an offence and a defence is reflected in the differing onus of proof for sane automatism (which negates the *actus reus*) and insane automatism (which is covered by the defence under s 84).

[52] The leading case is the High Court of Australia decision in ***R v O'Connor*** (1980) 146 CLR 64 (***'O'Connor'***). See especially the judgment of Barwick CJ who delivered the main majority judgment.

[53] Victorian Law Reform Committee, *Criminal Liability for Self-induced Intoxication* (1999) [6.84].

as voluntary on the whole so as to avoid treating the case as one of sane automatism. The court could rely on s 39 of the Penal Code to secure this result by interpreting the word 'means' appearing in that provision to include self-induced intoxication. The provision would then effectively read:

> A person is said to cause an effect voluntarily when he causes it under the influence of intoxication which, at the time of consuming alcohol or drugs, he knew or had reason to believe to be likely to cause it.

This is basically the position under English common law[54] the rationale of which was succinctly explained in the following terms:

> In these cases [of automatism], as in cases of drunkenness, the view is taken that the act charged is voluntary notwithstanding that it might not be ordinarily considered so by reason of the condition of the perpetrator, because his condition proceeds from a voluntary choice made by him.[55]

It is not an aim of this article to decide which is the preferred way of dealing with sane automatism caused by self-induced intoxication.[56] Suffice it to say that the Penal Code leaves much to be desired for failing to provide clear directions on this matter. Nevertheless, it appears that there are ways by which an innovative court could arrive at the desired result.

5 AUTOMATISM, PROVOCATION AND DIMINISHED RESPONSIBILITY

For the sake of completeness, a brief comparison should be made between

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[54] The leading case is the House of Lords decision in *DPP v Majewski* (1977) AC 443 which was strongly influenced by its earlier decision in *DPP v Beard* (1920) AC 479. Some Australian jurisdictions such as New South Wales and the Commonwealth of Australia, have replaced the High Court of Australia's approach in *O'Connor* with legislation which largely subscribes to the English law on intoxication.

[55] Per Mason J in his dissenting judgment in the High Court of Australia case of *O'Conno*r (1980) 146 CLR 64, 110 where he subscribed to the English common law.

[56] For a good account and critique of the various approaches to self-induced intoxication and criminal responsibility, see the report of the Victorian Law Reform Committee, above n 53, ch 6.

automatism and the defences of provocation and diminished responsibility. Provocation is recognised as a partial defence to murder under both the Malaysian and Singaporean Penal Codes,[57] while diminished responsibility is so recognised only by the Singaporean Code.[58] Accused persons who plead automatism, provocation and, in certain cases, diminished responsibility, have in common the fact that they suffered from defective self-control of their alleged criminal conduct.

Part 1 of this article included a quotation from Professor Coles, a forensic psychologist, on the nature of automatistic states. Insofar as Coles suggests that there are degrees of loss of self-control, his comment also provides scientific support for the related defence of provocation. This defence only operates where the loss of control is less than complete. As Lord Diplock has observed in the Privy Council case of ***Phillips v The Queen***,[59] there is an 'intermediate stage between icy detachment and going berserk' and it is only at this intermediate stage that the defence of provocation applies. Where the loss of self-control is total, the proper plea is automatism, not provocation.[60] This explains the different outcomes of successfully pleading provocation and automatism. With provocation, accused are not acquitted altogether because they had 'retained some control, albeit insufficient to resist the emotional impulse [such that they] may still be blamed for not in fact resisting'.[61] Where accused have gone berserk so as to lack control completely, they cannot be blamed at all for not resisting. This describes an automatistic state which can exist even where the accused may have been partially conscious of what they were doing. The descriptor 'irresistible impulse' accurately identifies the essence of this state as an inability to contain one's acts which may co-exist with an ability to perform co-ordinated, goal-directed acts.[62]

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[57] Exception 1 to s 300 of both Penal Codes.
[58] Exception 7 to s 300 of the Singaporean Penal Code.
[59] [1969] 2 AC 130, 137.
[60] See the New South Wales Court of Criminal Appeal case of ***R v Chhay*** (1994) 72 A Crim R 1, 8 (Gleeson CJ) and the Queensland Court of Criminal Appeal case of ***R v Milloy*** (1991) 54 A Crim R 340, 342-343 (Thomas J).
[61] Stephen Odgers, 'Contemporary Provocation Law – Is Substantially Impaired Self-control Enough?' in Stanley Yeo (ed), *Partial Excuses to Murder* (1991) 101, 103.
[62] See the Supreme Court of Canada case of ***R v Borg*** [1969] 4 CCC 262, 269-270 per Cartwright CJC; and the Privy Council case of ***Attorney-General for the State of South Australia v Brown*** [1960] AC 432, 449-450 (Lord Tucker).

Regarding diminished responsibility, the wording of that defence in Exception 7 to s 300 of the Singaporean Penal Code is lacking in detail as to what is meant by the term 'abnormality of mind' appearing in the provision. Since the provision was derived from the *Homicide Act 1957* (UK), the Singaporean courts have closely followed English judicial rulings on diminished responsibility. One of the most important of these decisions is the English Court of Appeal case of ***R v Byrne ('Byrne')*** where Lord Parker rectified the absence of a statutory definition of 'abnormality of mind' by describing it as follows:

> A state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal. It appears to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.[63]

From this definition, it is evident that there are three broad manifestations of an abnormality of mind. The first two manifestations may also satisfy the defence of unsoundness of mind under s 84 of the Penal Code or its counterpart of insanity according to the ***M'Naghten*** Rules found in English criminal law. These are cognitive incapacities, and their degree of severity will dictate whether the defence is unsoundness of mind or diminished responsibility. By contrast, the third manifestation of an abnormality of mind in the ***Byrne*** definition covers volitional defects. Accused may have been able to rationally perceive their acts and to know that those acts were wrong or contrary to law, but they lacked the capacity to control their actions in accordance with that rational judgment. The difference between this form of volitional incapacity and that of automatism is, once again, a question of degree of severity. Where the incapacity was total, accused will have been in an automatistic state and,

[63] [1960] 2 QB 396, 403. This definition has been approved in several Singaporean cases, for example, *Cheng Swee Hin v PP* [1981] 1 MLJ 1, 3; *Sek Kim Wah v PP* [1988] 1 MLJ 348, 351; and *Chua Hwa Soon Jimmy v PP* [1998] 2 SLR 22, 9-30. For a critique of the Singaporean judicial application of *Byrne*, see Stanley Yeo, 'Improving the determination of diminished responsibility cases' (1999) *Singapore Journal of Legal Studies* 47.

based on our earlier discussion, will receive the special verdict on account of insane automatism. Where the volitional incapacity was partial, the proper defence would be diminished responsibility. This result fits well with the part of Exception 7 to s 300 which states that the abnormality of mind 'substantially impaired' an accused's mental responsibility, with substantial impairment being judicially explained as being neither total nor minimal but somewhere in between.[64]

This brief comparison between automatism, provocation and diminished responsibility reveals a symmetry in the criminal law based on defective self-control. A total loss of self-control will result in an acquittal of the offence charged,[65] whereas a partial loss may result in the reduction on a charge of murder to culpable homicide not amounting to murder. Whether this reduction is due to the defence of provocation or of diminished responsibility will depend on the cause of loss of self-control, with the former defence premised on provocative conduct, and the latter on an abnormality of mind. More generally, what this comparative exercise between the defences of automatism, provocation and diminished responsibility does is to re-affirm the proposition that the concept of automatism is concerned with a lack of control as opposed to a lack of consciousness.

6 THE ONUS OF PROVING AUTOMATISM

As noted above, in cases where the accused was suffering from sane automatism, its effect would be to render his or her conduct a 'non-act' and thereby negate the *actus reus* component of the offence. Since the prosecution is required to prove all the elements of an offence, it bears the onus of disproving beyond a reasonable doubt that the accused was suffering from sane automatism at the time of the offence. However, in cases involving insane automatism, the onus of proving that the accused had experienced automatism at the time of the offence rests with her or him. This is because these cases will be covered

[64] *Chua Hwa Soon Jimmy* [1998] 2 SLR 22, 33, following the English Court of Appeal case of *R v Lloyd* [1967] 1 QB 175, 178-179.

[65] Although an accused would, of course, receive the special verdict if the automatistic condition was the result of an unsound mind.

by the defence of unsoundness of mind under s 84 of the Penal Code. Being a true defence, the standard of proof that the accused has to discharge is on a balance of probabilities.[66]

The Malaysian High Court in *Kenneth Fook* endorsed the above propositions when it said:

> where the condition is a disease of the mind, it will fall within the *M'Naghten* Rules which is reflected in s 84 of the [Penal] Code. This section, read with s 105 [of the *Evidence Act* 1950] will place the onus on the accused to establish the defence. … If the condition does not produce a disease of the mind, the onus will be upon the prosecution to exclude the alleged incapacity.[67]

It is worthwhile noting in passing that the onus of proving sane automatism has been shifted to the accused in Canada as a result of a majority decision of the Canadian Supreme Court in *Stone*.[68] Consequently, in that jurisdiction, an accused bears the onus of proving the absence of voluntariness on a balance of probabilities. This decision has been roundly criticized for reversing the onus of proof.[69] As the dissenting judges in *Stone* noted, in the interest of preventing errorneous acquittals, the majority had accepted that people should be convicted even where there was a reasonable doubt as to whether they had control over their actions.[70] Surely, this is too high a price to pay.

A similar attempt was made to reverse the onus of proving sane automatism by some members of the High Court of Australia in the case of ***R v Falconer ('Falconer')***.[71] However, a majority of the court rejected this proposal and reaffirmed the ***status quo*** under Australian law which is shared by Malaysian and Singaporean law. It is submitted that this is the correct

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[66] See *Jayasena v The Queen* [1970] AC 618 interpreting s 105 of the Evidence Ordinance of Ceylon which is identical to s 105 of the Evidence Acts of Malaysia and Singapore.
[67] [2002] 2 MLJ 563, 575-576 (Paul J).
[68] (1999) 134 CCC (3d) 353.
[69] See Ron Delisle, '*Stone*: Judicial Activism Gone Awry to Presume Guilt' (1999) 24 CR (5th) 91; D Paciocco, 'Death by *Stone*-ing: The Demise of the Defence of Simple Automatism' (1999) 26 CR (5th) 273, 274-280.
[70] Stone (1999) 134 CCC (3d) 353, 384, [49].
[71] (1990) 171 CLR 30, 56-57 (Mason CJ, Brennan and McHugh JJ).

position for the reasons given by the critics of the Canadian ruling in ***Stone***. Admittedly, however, there is the possibility of confusion created by the differing onus and standards of proof depending on whether the evidence raises sane automatism or insane automatism.[72] Aware of this possibility, Toohey J who was one of the majority judges in ***Falconer***, gave the following guidance:

> The [trier of fact] should first ask itself whether the Crown has disproved, beyond reasonable doubt, non-insane automatism (the onus of proof in relation to that defence being on the Crown). If the Crown has failed to do so, then the accused will be entitled to an unqualified acquittal.

But if the Crown has disproved non-insane automatism, it may have done so, not because the acts said to constitute the offence were voluntary, but because they were the involuntary product of an unsound mind. Thus, if the answer to the first question is in the affirmative, the [trier of fact] should go on to ask a second question, namely, whether the accused has proved, on the balance of probabilities, insanity … (the onus of proof in relation to that defence being on the accused …). If the answer to that second question is in the affirmative, the [trier of act] should acquit but with the rider that the accused was of unsound mind at the relevant time …[73]

Malaysian and Singaporean trial judges should pay heed to this guidance when presiding over a case which requires them to consider both sane and insane automatism.

7 GIVING CLEAR EXPRESSION TO AUTOMATISM IN THE PENAL CODE

Our examination of the Penal Code has revealed a virtual non-recognition of the concept of voluntariness and its subset of automatism. While various suggestions have been made to read voluntarinesss and automatism into the Code provisions where one would most expect to find them, these suggestions involve a fair measure of ingenuity by a judge who acknowledges the

[72] An observation made by the minority judges in *Falconer* (1990) 171 CLR 30, 48-49.
[73] Ibid 77.

importance of the issue and is keen to resolve this defect in the Code. A far better solution would be for Parliament to introduce legislative amendments to the Penal Code which expressly incorporate the basic principle of the criminal law that a person is not guilty of a crime unless his or her conduct was voluntary. Based on our discussion, the legislation would need to define an 'act' as meaning willed conduct. It would also need to add volitional incapacity to the cognitive ones presently mentioned in the defence of unsoundness of mind under s 84, and of intoxication under s 85. Finally, the provision on diminished responsibility should be amended to expressly articulate the volitional and cognitive defects of an 'abnormality of mind' rather than resorting to judicial pronouncements, as is presently the case.

When undertaking this exercise, the Malaysian and Singaporean legislators could usefully refer to the *Queensland Criminal Code 1899*. They will find that the Code's framer, Sir Samuel Griffiths, and his successors, fully realised the importance of expressly embedding the concept of voluntariness into the relevant Code provisions. These provisions are reproduced below with those parts italicised which incorporate the concept of voluntariness.

First, the Queensland Criminal Code has a specific provision, s 23, dealing with an act or omission, the relevant part of which reads, 'a person is not criminally responsible for an act or omission that occurs *independently of the exercise of the person's will'*.

As for the defence of unsoundness of mind, the equivalent Queensland Criminal Code provision is s 27, the relevant part of which reads:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of *capacity to control the person's actions*, or of capacity to know that the person ought not to do the act or make the omission.

Regarding the defence of intoxication, s 28 of the Queensland Criminal Code expressly relies on the defence of insanity under s 27, thereby incorporating

the volitional incapacity contained in the latter provision. The section reads:

(1) The provisions of section 27 apply to the case of a person whose mind is disordered by intoxication or stupefaction caused without intention on his or her part by drugs or intoxicating liquor or by any other means.

(2) They do not apply to the case of a person who has, to any extent intentionally caused himself or herself to become intoxicated or stupefied, whether in order to afford excuse for the commission of an offence or not and whether his or her mind is disordered by the intoxication alone or in combination with some other agent.

(3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

It is observed that the Queensland provision does not recognise a defence of self-induced intoxication except under s 28(3). Since that sub-section has to do with the *mens rea*, it need not concern us here although it may be noted in passing that s 28(3) takes the opposite position to s 86(2)[74] of the Penal Code. As indicated earlier in Part 4, whether or not the Malaysian and Singaporean legislatures should adopt the stance taken by the Queensland Code concerning self-induced intoxication resulting in automatism is outside the scope of this article. The point made here is that the Penal Code provision on intoxication needs to expressly declare the effect on criminal responsibility of intoxication-induced automatism.

As for the defence of diminished responsibility, the Singapore legislature should follow the Queensland Criminal Code to incorporate the *Byrne* ruling into the wording of Exception 7 to s 300 of the Penal Code. Section 304A of the Queensland Code reads in part:

> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of

[74] Reproduced in n 46 above.

> mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or *the person's capacity to control the person's actions*, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

All told, the Queensland Criminal Code stands in stark contrast to the Penal Code in expressly recognising the concepts of voluntariness and automatism. In doing so, the Queensland Code achieves a highly desirable symmetry among its provisions which is not found in the Penal Code. More importantly, the Queensland Code incorporates a fundamental principle of criminal responsibility which is currently lacking in the Penal Code. Doubtless, the framers of the Penal Code would be quick to rectify their oversight if they were given the chance to do so. Until these defects are rectified by legislation, the approaches suggested in this article warrant close judicial consideration.

The Role of Lawyers in Mediation: What the Future Holds

by

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Abstract

The role of lawyers in mediation has become increasingly important as society views mediation as an effective alternative dispute resolution mechanism to litigation. This paper attempts to explore such a role in three phases of the mediation process – the pre-mediation, during the mediation meeting, and post-mediation. The second part of this paper discusses the role of lawyers in the future of mediation – the common pressures against lawyers' proper involvement in mediation, and what lies ahead, both on the international front as well as the Malaysian position.

'The true function of a lawyer is to unite parties riven asunder.'
Mahatma Ghandi

'A dispute is a problem to be solved, together, rather than a combat to be won.'
Woodrow Wilson

Introduction

The fundamental role of a lawyer at any time is that of a skilled adviser. In fact, the lawyer is a well-informed champion of the client, advising on the law and procedure, articulating the client's views to others, and above all, pursuing the client's best interests at all times.

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By and large, the typical lawyer probably gives very little thought to the nature of the dispute or conflict in his client's case. Others are reluctant to advise the clients to seek alternative dispute resolution (ADR) mechanisms such as mediation. This reluctance could stem from their unwillingness or inability to appreciate the advantages of non-adversarial proceedings.

To paraphrase psychologist, Abraham Maslow, 'if the primary tool you have is a hammer, you tend to see every problem as a nail!' However, there are some litigation lawyers who see it as their duty to seek an early resolution of a dispute outside of the court system, and to act in the best interests of their clients. Therefore, it follows that there is a role for lawyers in mediation.

In recent times, there has been much attention focussed on the role of lawyers in the mediation process. Most lawyers are used to the requirements of their role in litigation, but few have grasped the different, and subtler, application of that role in mediation.

Elements in Mediation

There are three essential pre-requisites to understanding the importance of the role of a mediator, and in evaluating the legal profession's influence on the mediation process.

Neutrality

The mediator is a neutral third party. He is neither a representative nor an agent of the parties in dispute, nor an advocate for their interests. The mediator is simply a helper, i.e. a catalyst to the negotiations between the parties. The mediator exercises a wide array of inter-disciplinary skills involving communicating, listening, observing, analyzing, questioning, drafting, problem-defining and problem-solving. Hence, the mediator's behaviour must be impartial.

Individual responsibility

While the mediator must express neutral behaviour, the parties to the dispute must express individual responsibility in a number of ways. One of the two ways is where the parties must illustrate a decision to 'stand up for themselves'.

It is the mediator's responsibility to ensure that each party stands up for himself or herself.

The second way is where the parties take individual responsibility for decisions in the mediation process. Any ultimate substantive decision or agreement is the responsibility of the parties. The neutral mediator has no power to impose a decision on the parties.

Mutual fairness

This is the third essential prerequisite. The objective of the mediation process is for the parties to reach an agreement that they each believe is mutually fair. The neutral mediator helps the parties reach this agreement but the parties have the responsibility for agreeing to what is fair.

There are two factors which affect mutual fairness in the mediation process. Firstly, mutual fairness demands that self-interests are not the only focal point. The needs of the other parties in the dispute must be understood and recognised. Fuller referred to this when he described the 'central quality of mediation.'[1]

> '…its capacity to reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.'

Secondly, mutual fairness allows the parties to evaluate and weigh societal norms or values in reaching an agreement. Hence, mutual fairness may be affected by the parties' perceptions of how an agreement affects human values. In evaluating societal norms and values, the parties decide what is mutually fair. The neutral mediator does not impose his or her advice.

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[1] L. Fuller, *Mediation, Its Form and Functions,* (1971) 44 S. Cal. L. Rev. 305. This is a similar concept to the problem solving approach to negotiation referred to in R. Fisher & W. Ury, *Getting to Yes*, (1981), and C. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, (1984) 31 U.C.L.A. L. Rev. 754.

Extent of the Lawyer's Role

A lawyer may be involved in mediation in a variety of ways. His role does not differ in either voluntary mediation or mandatory mediation. He may give advice on the subject of engaging in mediation as a mechanism to resolve the conflict or dispute at hand, or he could be told by the client that the client desires to mediate, or the lawyer could be the mediator himself. These will be discussed in greater length in turn.

Where the lawyer represents the client

Here the lawyer will be confronted with determining what his role will be. He could advise the client before and/or after the mediation, but not attend it himself, or he could attend but not actively participate, or he could attend and actively participate. These options are distinct roles which require different skills and a full and comprehensive understanding of the dynamics of mediation.

In representing the client in mediation, the lawyer's basic duty, to act in the best interests of the client, does not change. However, the lawyer has to understand that there are differences in the way this duty can be effectively carried out.

Firstly, the lawyer must have regard to the fact that the client has chosen to resolve the dispute in a consensual, that is, non-adjudicatory, manner. This means that the lawyer needs to familiarise himself with the mediation process and to work within its rules and principles.

Secondly, the client has selected an approach which seems to have moved away from the adversarial mode of practice. Thirdly, the lawyer can still achieve results for the client in a way which does not necessarily mean defeating the other party, but by seeking solutions which are beneficial to all parties, as far as possible.

The main challenge facing the lawyer is how his legal advice to the client fits and interplays into the mediation process. Hence, the role of the lawyer can best be appreciated in three phases of the mediation process, namely:

1. Phase One: Pre-Mediation;

2. Phase Two: During Mediation; and
3. Phase Three: Post-Mediation.

1. Phase One: Pre-Mediation

It is here that the lawyer must first take into consideration with the client in selecting the mediation forum and the mediator, agreeing on the rules and procedures for the mediation and preparing for the mediation, including dealing with the documentation and preliminary exchange of information so that the dispute can be most effectively and appropriately addressed from the following aspects:

Is the dispute suitable for mediation?

The first part of the lawyer's role is to ascertain which ADR mechanism is most appropriate for the dispute, that is, 'to fit the forum to the fuss' as quoted by Professor Maurice Rosenberg[2]. Every case should be viewed on its own merits, and the ultimate decision should be based on a spectrum of ADR mechanisms available, rather than a simple decision of whether it is mediation or litigation.

The lawyer should be mindful of the trap of expecting a mediation to cure a bad case on the merits.[3] Educating the client about the process is an important phase in the preparation for mediation. The lawyer is also required to explain the fundamental characteristics of mediation, for example, its 'without prejudice' nature.

At the same time, the lawyer should also warn that each party will know more about each other's interests, aims and motivations as a result of the mediation. In the early stages of mediation, parties should be encouraged to be flexible about their expectations of the terms of the settlement.

In essence, the role of the lawyer here is to remind the client that successful mediations are the product of a compromised solution, and to encourage the

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[2] Goldberg, S, F. Sander and N. Rogers, *Dispute Resolution, Negotiation, Mediation and Other Processes* (2nd ed., Little Brown & Company, Boston, 1992), at p 435.
[3] D Golann, *Seminar Notes: Lawyer's Role in Mediation*, CEDR, May 2000.

client to have an open mind when submitting to mediation. There is no ability to mediate in good faith unless the client is willing to compromise. Hence the attitude of the parties is the overriding factor to determine whether a matter is suitable for mediation.

Is the timing good for mediation?

Generally speaking, a dispute which has been referred to mediation at an early stage stands a better chance of being resolved. If the parties wait for too long before they decide to mediate, they may not be able to settle due to the amount of acrimony which has been generated, and the costs which have been incurred. On the other hand, opting for mediation at an early stage may have its drawbacks. The parties may need a cooling-off period before they decide that they are ready for mediation.

Hence, the lawyer must be able to assess the situation and, thereafter, to advise his client accordingly.

What kind of mediation is required?

The lawyer must advise the client on the many types of mediation available, and which of these types are suitable for the dispute at hand. It is a question of whether to use facilitative mediation - where the mediator tries to facilitate the settlement based on the parties' interests and needs rather than their rights, and will not express any views as to the merits of the issues but to leave it to the parties to obtain these views from the parties' respective advisers; or to use evaluation mediation - where the mediator provides formal evaluation to both or all of the parties, or an informal evaluation to either, both or all of the parties; or to use therapeutic mediation if the case involves family disputes. It is also important to consider whether the mediator will be willing to consider making settlement recommendations.

Does the mediator need to be an expert?

It is important to have a mediator who is an expert in the mediation process. However, if there is a choice to be made between process expertise and expertise in the subject matter of the dispute, then the process expertise will prevail. Based on the lawyer's advice, it is also possible to engage a mediator

who has expertise in the subject matter of the dispute as well as process expertise, if evaluation mediation is preferred by the client. Further, the client has to be made aware by the lawyer that mediation process expertise in one field may not necessarily indicate expertise in another field.

Whether a preliminary meeting is held

In some situations where the mediator may hold a preliminary meeting with the lawyer, the lawyer plays a key role at this stage.

Firstly, such a meeting allows the lawyer to form a preliminary view about appointing the mediator to deal with the case, if this decision has not yet been made by the client. Secondly, the lawyer could take this opportunity to discuss and agree with the mediator the procedural aspects such as preparing and submitting the parties' statements and bundle of documents, and the mediation schedule.

Thirdly, if the case concerns commercial or civil issues, the lawyer will be able to obtain a brief outline of the kind and length of the presentation expected of him. He would be able to make preparations ahead of time. Lastly, the lawyer could advise the mediator on the preliminary sense of the issues in question and to outline any relevant personal or business considerations.

According to Michael Noone,[4] at the outset, the lawyer's role is a consultative one which is quite different from the combative role in adversarial proceedings. It is always the parties who control the content and occupy the spotlight at the centre of the mediation stage where the parties become the primary negotiators in mediation. Essentially, before mediation, the role of the lawyer involves the following tasks, namely:

a. To thoroughly prepare to be a good legal consultant at the mediation. This involves knowing the client's case as well as it would be known for a courtroom trial, includes working out a tentative settlement range and gathering any detailed information about the case and about costs which may need to be consulted upon in working out an agreement.

[4] Noone, Michael, *Mediation*, Cavendish Publishing, London, 1996.

b. To advise the client comprehensively about how mediation works and to encourage the client to fully participate in the process. This includes planning how to best prepare by discussing realistic alternative negotiating strategies, which the client may or may not decide to adopt.

c. To discuss with the client what aspects of the case should or should not be disclosed to the other side and to the mediator in private session. The client should be made aware that the chances for a successful mediation are optimised if he is frank in private session with the mediator, and does not withhold any important information. The lawyer also bears the responsibility to explain to his client the legal limits of confidentiality in mediation.

2. Phase Two: During Mediation

It is in this phase that we see lawyers and mediators play very different, yet complementary, roles in the mediation process. The mediator facilitates negotiations while the lawyer offers specific legal advice and counsel. Generally, during the mediation meeting, the role of the lawyer would cover the following areas, namely:

a. To allow the mediator to conduct the process and to provide support to the mediator where appropriate.
b. To acknowledge the validity of the other party's real needs in settlement.
c. To permit and encourage the client to participate fully and directly in the process.
d. To focus the client upon the future, rather than upon the past, and on their real personal and commercial interests, as opposed to their legal rights.
e. To assist the client to communicate accurately and comprehensively and to negotiate constructively and productively.
f. To participate in the generation of new ideas and options for settlement, giving ongoing realistic predictions about likely outcomes in court or other non-mediation processes and their relative advantage or disadvantages.
g. To assist with the drafting of the terms of settlement, and the formalisation of the mediation in appropriate ways.

Specifically, the role of the lawyer can best be seen in each of the following aspects during the mediation meeting.

Presentation of the case

It is a safe assumption that, where the client is represented by a lawyer, the task of presentation of the case usually falls to the lawyer, though this practice is not highly encouraged as parties are empowered to present their original versions of the dispute. If at all, the lawyer is required to present the case, he must focus his presentation to the other party or parties, and not to the mediator, who is a neutral in the mediation meeting. This is quite unlike the adjudicatory process where the lawyer would aim his presentation to the judge or adjudicator who has the power of making decisions.

This shift in approach, from an adjudicatory process, means that the lawyer, while addressing the mediator, will have a more complex agenda. He must present the argument in such a way that it is persuasive but not aggressively contentious. The aim is not only to persuade the mediator of the rightness of the case, but also to raise sufficient doubts in the mind of the other party to create a climate for negotiations in which the other party will consider making reasonable concessions.

In short, the approach used by the lawyer to the presentations should be to concentrate on the main issues and not to diffuse energy, time or attention in dealing with peripheral issues or technical procedural points, which can be reserved if considered appropriate.

Negotiating and communicating

A key element in successful negotiation is for the lawyer to have an understanding of, and respect for, the client's position, concerns and interests, and for the client to trust the lawyer sufficiently. The lawyer will need to be fully prepared for the mediation by analysing the case, understanding its strengths and weaknesses, and expressing a frank and honest opinion to the client.

What is important is for the lawyer to be able to identify the client's aims and concerns, and try to achieve the best realistic results from the mediation

meeting. What is equally important is for the lawyer to understand the other party's interests and issues. Fisher and Ury[5] offer two suggestions:

(1) Ask why. The lawyer has to put himself in the other party's shoes and ask why he or she would be taking a particular negotiating position. What could be the desires, concerns, fears, hopes behind it?

(2) Ask why not. Again, the lawyer has to put himself in the other party's shoes and ask why he or she has not embraced his client's negotiating position. What desires, concerns, fears, hopes are precluding it? Are they legitimate? If not, what can the lawyer do or say to help the other party see that they are not legitimate? If they are legitimate, what can the lawyer advise his client to modify the negotiating position so that the other party's needs and interests can be better satisfied?

During negotiation, the lawyer should not bargain on the basis of 'bottom lines' or 'final offers'. Such positional bargaining does not necessarily produce the best results as sometimes it may be difficult to move away from such positions taken. Instead, parties may prefer to engage in principled negotiation which aims for a fair outcome using objective criteria.[6]

Hence, the lawyer, as negotiator, is likely to have a negotiation strategy. The lawyer will know what the client's expectations are, what the other party's expectations are likely to be, how the next move may be envisaged, at what point the discussions should be called off, and generally, at what pace, and in what direction, the negotiation should move.

The lawyer should be aware of the problem-solving approach and should be willing to consider constructively, with the client, any approaches that would enable all parties to gain an advantage from a suggested outcome. When considering making settlement proposals, the lawyer and the client should examine these from the vantage point of all parties, and not just their own. A constructive and creative approach does not need to be at the expense of the client's best interests, and a problem-solving method can be mutually beneficial.

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[5] Ed, Fisher, Ury & Patton, *Getting to Yes: Negotiating Agreement Without Giving In,* 1981.
[6] Ibid.

The lawyer and the client should test the workability of the suggested options by engaging in assessing the Best Alternative to a Negotiated Agreement (BATNA) or the Worst Alternative to a Negotiated Settlement (WATNA) or the Most Likely Alternative to a Negotiated Agreement (MLATNA).[7]

The lawyer should advise the client's alternatives insofar as their BATNAs, WATNAs and MLATNAs should the mediation be called off or discontinued. In the event that the mediation is terminated, the lawyer should advise the client the likely outcome of adjudication. If the assessment points to a favourable outcome in adjudication, then the lawyer would advise the client to terminate mediation and abandon the negotiation process.

Lawyer's role in family mediation

In family mediation, after the lawyer has given preliminary advice to the client, and the client has gone off to family mediation, there is likely to be a period of silence while the mediation takes place. Family mediation takes place with the couple directly, and the lawyer does not have a participatory role during this phase.

In the early days of mediation, it was unclear what the lawyer's role might be while the client was engaged in mediation. The lawyer needs to understand that family mediation involves an element of personal empowerment of the parties by working with them individually and without constant recourse to their professional advisers.

On the other hand, the client may not be choosing mediation in order to empower themselves, but rather to achieve the resolution of their issues in a fair, effective and expeditious way. The client may still wish to be supported by the lawyer through the process. In this case, the lawyer has a duty to support the client in achieving this, and should be available to advise and support the client through the mediation process.

Some mediators may recommend to the parties that both should get independent legal advice at certain points during the process, especially on

[7] ibid.

important points such as a general indication of the position before embarking on mediation, and to consider whether mediation is appropriate.

The lawyer may be invited to attend mediation meetings though this is unusual and generally occurs only in an impasse between the parties, or where the lawyer has advised at the end of a mediation, which proposed terms are unacceptable. In such an event, the lawyer should check with the mediator as to what is expected of him at the mediation meeting. A short, non-contentious presentation might be required, or the lawyer might be invited to support the client without having a dominant role.

3. Phase Three: Post-Mediation

At the end of the mediation meeting, if total or partial resolution is achieved, the role of the lawyer is to ensure that some record of the terms will have to be prepared, that is, finalising and formalising any settlement arrived at. This is the Mediation / Settlement Agreement which the lawyer must draft with care and precision to ensure that there will be no misunderstanding amongst the parties as to the terms of the settlement.

The lawyer has the responsibility to reassure the client who has second thoughts, advising them of the options in dealing with problems in the implementation of the agreement, including through a return to mediation. The client must also be assured that confidentiality of the mediation meeting is maintained at all times.

In summary, the lawyer plays an integral role in mediation. The lawyer is central in deciding the strategy and tactics for mediation. The lawyer eases communication between both the client and the mediator, and the client and the other party. This communication works both ways in that the lawyer helps to support the client and interpret the case to the other party, as well as to interpret the mediator's comments and questions to the client.

Lastly, the lawyer will be important in dealing with legal and procedural issues, including in drawing up the Mediation / Settlement Agreement.

Lawyer's role in family mediation

One of the principles of family mediation is that parties will have the opportunity before finalising any Mediation Agreement to obtain independent advice from their respective lawyers about the acceptability of the proposed terms. Where the lawyer has been involved in the mediation from an early stage, the proposed terms should not be a surprise, and the lawyer should be able to advise on them without difficulty.

On the other hand, it is more difficult for a lawyer who has had little or no role in advising the client during the mediation, to endorse the settlement terms. This can be seen from two aspects.

Firstly, the lawyer has not had the benefit of working through the process and understanding the reasons for the terms having been arrived at. Secondly, the lawyer has the legal responsibility for the terms, and may be liable in negligence if he allows the client to enter into a settlement on disadvantageous terms.

In essence, the whole point of deferring the finalisation of these agreements, to allow parties to seek independent advice, is to give them a genuine opportunity to review their proposals. Having the lawyer vet through the proposed terms is the safeguard built into the family mediation process.

Hence, the lawyer should not shy away from challenging terms when they are inappropriate. Equally, the lawyer should support the client who has gone through an arduous process and who has arrived at the accepted terms.

Where the lawyer is the mediator

The lawyer may find himself functioning as the mediator himself. 'If he acts as a formal mediator in a dispute not involving present or past clients, there are few professional problems. He is required to clearly differentiate his role as a lawyer from that of a mediator.'[8] As a mediator, he is not to give legal advice. As long as the roles are kept separate, the lawyer may act as a mediator.

[8] Pirie A.J., "The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?" (1985) 63 *Canadian Bar Review* 378.

However, the lawyer may find himself in a difficult situation where he seeks to mediate in a dispute which involves one of his clients. The issue of ethics then arises.

The issue of ethics

There are numerous bodies and institutions in the legal profession which provide for rules and guidelines on lawyer mediators in the United States of America and Canada. From the ethical point of view, there would be grave consequences for the mediation process if there is an ethical rule that absolutely restricts the lawyer from practising mediation. However, it can be seen that such absolute restrictions on the lawyer acting as the mediator is a major theme of many rules of professional conduct.

Major developments can be seen in development of the American Bar Association (ABA) Model Rules of Professional Conduct (Kutak Commission)[9] where Rule 2.2 permits the lawyer to act as intermediary between clients with imposed conditions, namely:

(1) the lawyer explains the advantages and risks associated with common representation and obtains each client's consent to the common representation;
(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to interests of any of the clients if the contemplated resolution is unsuccessful; and
(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

The lawyer must withdraw as intermediary if any of these conditions is not satisfied or if any client requests so. On withdrawal, the lawyer is prohibited from representing any of the clients unless it is clearly compatible with the lawyer's responsibilities to the other client.

[9] Unlike the 1969 Code, the new Model Rules of Professional Conduct provide much more specific regulation of the lawyer as mediator. The 1969 Code (EC 5-20) specifically addressed the issue of lawyers as mediators.

The 1981 opinion of the New York City Bar Association Committee on Professional and Judicial Ethics[10] absolutely restricted the lawyer from acting as the mediator when the lawyer was asked to exercise 'professional legal judgment.' The Committee stated:

> '…in some circumstances, the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions…make it virtually impossible to achieve a just result.'

In addition, the Standards of Practice for Lawyer-Mediators in Family Disputes, the Family Law Section of the ABA adopted six standards of practice for family mediators that were approved by the ABA in 1984[11]. These six standards are as follows:

1. The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.
2. The mediator shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants.
3. The mediator has a duty to be impartial.
4. The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.
5. The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.
6. The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.

Yet another major source of rules used to regulate the lawyer as the mediator are the Association of Family and Conciliation Courts Model Standards for Practice: Family and Divorce Mediation[12].

These Model Standards, 'intended to assist and guide public and private,

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[10] Opinion No. 80-23 (1981), *7 Family Law Report* 3097.

[11] ABA Standards of Practice for Lawyer Mediators in Family Disputes, adopted by the House of Delegates of the American Bar Association, August 1984, and printed in American Bar Association, *Summary of the Actions of the House of Delegates, Report of Sections 22-23.*

[12] Denver, Colorado, May 22-23, 1984. The Standards approved at the symposium were adopted by the A.F.C.C. at its mid-winter meeting in December 1984.

voluntary and mandatory mediation',[13] are made up of thirteen guidelines dealing with initiating the process, impartiality and neutrality of the mediator, costs and fees, confidentiality and exchange of information, full disclosure of information, self determination, professional advice matters, the parties' ability to negotiate, concluding the mediation, training and education, advertising, relationship with other professional and the advancement of mediation.

Of key importance to the lawyer-mediator are the standards dealing with impartiality and independent legal advice. Firstly, the Model Standards require the lawyer-mediator to maintain impartiality towards all participants. However, the standards state that 'a mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time.'[14]

Therefore, the standards provide two rules to deal with past and future relationships. The first rule states that 'the mediator shall not proceed if previous legal or counselling services have been provided to one of participants', and the second rule states that 'the mediator should be aware that post-mediation professional or social relationships may compromise the mediators continued availability as a neutral third party.'[15] Here, it would be read that the second rule seems to strongly discourage future relationships with the parties involved in the mediation.

On professional advice, the Model Standards make a clear distinction between independent expert advice and independent legal advice. While the mediator is required to 'encourage and assist the participants to obtain independent expert information and advice when such information is needed'[16], a separate provision is created for independent legal advice.[17]

The Florida opinion also states that the guidelines provided by the ABA and many state bars indicate that it is permissible for a lawyer to act as a

[13] Preamble to the Model Standards.
[14] Rule II, B (1).
[15] Rule II, B (1)(2).
[16] Rule VII, A.
[17] Rule VII, C.

divorce mediator, including preparation of a settlement agreement reflecting the decisions made by the parties during mediation, if he adheres to the following precautions and standards:

1. Before undertaking mediation the lawyer must conduct an orientation session to explain the mediation process. He must explain the limitations of his role as a mediator, specifically that he does not represent either of the parties and will not be able to represent either of them in obtaining the dissolution of marriage or in any matter related to the mediation. He should explain the risks of proceeding without legal counsel. The mediator should explain that because he is not representing the parties, the lawyer-client privilege may not apply to communications between the parties and himself. The lawyer should proceed with the mediation only if he is satisfied that the parties understand the nature and risks of mediation and the significance of the fact that he represents neither party.
2. The lawyer must not undertake or continue mediation unless he is satisfied that he can be impartial. Thus, the lawyer should not undertake mediation if he previously provided legal representation to the parties.
3. The lawyer should not mediate if the issues are too complex and difficult for the parties to resolve prudently without independent legal counsel.
4. The lawyer should explain the fees payable, which should not be contingent on the outcome of mediation.
5. The lawyer may define the legal issues and advise the parties on the legal consequences of various courses of action, but only in the presence of both parties.
6. The lawyer may prepare a settlement agreement provided the parties are advised to consult independent counsel before signing it.

The Oregon Supreme Court amended its Code of Professional Responsibility in 1986 to provide as follows under DR 5-106: Mediation:

A. A lawyer may act as a mediator for multiple parties in any matter if:
    1. The lawyer clearly informs the parties of the lawyer's role and they consent to this arrangement; and
    2. The lawyer gives advice to a party only in the presence of all parties in the matter.

B. A lawyer serving as a mediator may draft a settlement agreement but must advise and encourage the parties to seek independent legal advice before executing it.
C. A lawyer serving as a mediator may not act on behalf of any party in court nor represent one party against the other in any related legal proceeding.
D. A lawyer shall withdraw as mediator if any of the parties so request, or if any of the conditions stated in DR 5-106(A) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to act on behalf of any of the parties in the matter that was the subject of the mediation.

In 1991 the Oregon Bar Association issued an opinion regarding ethical problems presented if a lawyer and psychologist form a domestic relations mediation service. According to the Oregon opinion (Formal Opinion 1991-101), a lawyer who acts as a mediator under DR 5-106 does not represent any of the parties.

However, the mediator may be engaged in the practice of law if any part of the service involves 'the application of a general body of legal knowledge to the problem of a specific entity or individual.' The opinion states that the drafting of the settlement agreement constitutes the practice of law. Thus, if the mediators gives legal advice or drafts the agreement, a partnership or fee-splitting arrangement with the psychologist would be prohibited by the ethics code.

Outside of the United States of America, the Conduct Code in Mediation of the Ontario Association for Family Mediation was responsible for preparing a draft conduct code for family mediators in 1984.[18] As the first of its kind in Canada, the Code is the legal profession's regulation of the lawyer as the mediator.

Of special interest are two relevant rules. The first rule which ensures impartiality prohibits a mediator from undertaking mediation 'if the mediator is a lawyer who has represented one of the parties beforehand.'[19] The second

[18] Published in 1984, 2 O.A.F.M. Newsletter.
[19] Rule 5 (c).

rule which deals with independent legal advice imposes clear requirements. The mediator must advise clients 'of the availability of independent legal advice for each spouse' and 'the advisability of obtaining it from the outset of the mediation'.[20]

In British Columbia, the British Columbia Family Law Mediation Ruling[21] comprises four key components, of which two are of relevance here, i.e. Disqualifications and Mediator's Duties.

The ruling on Disqualifications prohibits a lawyer from acting as a family law mediator if the lawyer, or a partner, associate or employee of the lawyer, has represented either party in relation to their matrimonial affairs, or in any matter which may reasonably be expected to become an issue in the mediation.

The ruling on Mediator's Duties, on the other hand, requires that the lawyer who acts as a family law mediator must ensure that 'he or she actively encourages each spouse to obtain independent legal advice before executing' any agreement reached by the parties.

The Malaysian position

The Malaysian Mediation Centre (MMC) Code of Conduct[22] has a specific provision on Impartiality where the mediator is required to be:

> '…impartial and fair to the parties, and be seen to be so. Following from this, he will disclose information which may lead to the impression that he may not be impartial or fair, including that:
> (a) he has acted in any capacity for any of the parties;
> (b) he has a financial interest (direct or indirect) in any of the parties or the outcome of the mediation; or
> (c) he has any confidential information about the parties or the dispute under mediation derived from sources outside the mediation.

[20] Rule 8.

[21] The Professional Standards Committee of the Law Society of British Columbia recommended a draft ruling on Family Mediation was added to the Professional Conduct Handbook and was subsequently approved, with revisions, by the Benchers of the Law Society on July 29, 1984.

[22] Rule 2.

Further, under the MMC Mediation Rules[23], the mediator is required to abide by the terms of the Mediation Agreement and the Code of Conduct[24]. Neither the mediator nor any member of his firm or company should act for any of the parties in connection with the subject matter of the mediation.[25] The Rule goes further to state that the mediator and the MMC are not agents of, nor acting in any capacity for, any of the parties. The mediator is not an agent of the MMC.

Rule 6 of the same deals with Disqualification of the mediator where a person who has any financial or personal interest in the result of the mediation will be disqualified, except where the parties have given their written consent.

Advantages and disadvantages of a lawyer-mediator

In recent times, the arrangement of a lawyer-mediator seems to offer the best possibilities for the appropriate use of the law and lawyers in mediation. The lawyer-mediator, who is an expert on law, can attempt to provide impartial legal information while making clear the risks to the client in his doing so, besides helping the parties free themselves from the influence of the legal norms so that they can reach for a solution which is appropriate to them.

Further, the lawyer-mediator can offer a variety of business arrangements in order to meet the objectives of the parties. Such options could become part of the decision process, and the legally trained mediator, who is present at all the sessions and who is thoroughly familiar with the various needs of the parties, can propose alternatives which could be tuned to such needs.

In addition, the lawyer-mediator can identify the myriad legal issues that must be addressed in the final agreement, and press the parties to reach decisions. He could incorporate the results in a draft final agreement. Based on the lawyer-mediator's skill in identifying issues and preparing documents, the draft final agreement would be less vulnerable to interference by outside lawyers than if it were drafted by a non-lawyer-mediator.

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[23] Rule 5.3.
[24] Malaysian Mediation Centre Code of Conduct.
[25] Rule 5.4, Malaysian Mediation Centre Mediation Rules.

Common mistakes made by lawyer-mediators

It is also important for lawyers to avoid certain pitfalls or making common mistakes when carrying out this role.[26] Such mistakes can be seen in situations where the lawyer fails to communicate that he is willing, ready and able to go to trial if necessary; or where he makes aggressive 'opening statements' which would only be detrimental to the client's readiness to bargain in good faith; or where he advises mediation to take place too early, or too late, in the case; or where he fails to adequately prepare the case, as he ought not underestimate the ground work necessary for a mediation to be successful; or even where he fails to adequately prepare the client as to the general nature of the mediation process, as well as its benefits before the mediation, of the lawyer's evaluation of the case..

The Future of Mediation

In today's environment, most lawyers neither understand nor perform mediation to a great extent, nor do they seem to have a keen interest in this area. To a great extent, lawyers are bound by the 'lawyer's philosophical map'[27] where the lawyer makes two wrong assumptions, namely, that all disputants are adversaries: where one party wins, the other party must lose; and that disputes must be resolved by a third party through an application of some general principle of law.

These two assumptions are total opposites of what mediation is all about. It is unfortunate that lawyers use this 'map' to navigate themselves in their journey through the world of the legal profession.

It is certainly undeniable that the legal education process and content today have, to a great extent, moulded the mindsets and souls of lawyers to practise the adversarial system of Act-oriented rules. In short, our legal education has institutionalised and instilled this 'battle of wits' mentality amongst lawyers.

Based on all that has been discussed above, there is a great need for the

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[26]Spier R.G., "The Ten Biggest Mistakes Lawyers Make in Mediation," October 2000.
[27] Riskin, L.L., "Mediation and Lawyers" (1982) 43 *Ohio State Law Journal* 29, at p 43.

role of lawyers in mediation to be enhanced for the future of mediation. The challenge facing the legal profession today is to continue to promote mediation as an ADR mechanism and to deliver the highest standard of service in this area. It is not only for the benefit of the client, but also to enhance the reputation of the lawyer as dispute resolvers in today's society.

In a nutshell, I am of the opinion that this challenge could well be overcome if two key areas are addressed, namely, the attitudes and mindsets of lawyers today, and the extent of their involvement in the processes of mediation. Let me elaborate further on both these points in turn.

In re-moulding the attitudes and mindsets of lawyers to view mediation in a positive light, the key lies in mediation education. It is a fact that lawyers have never been educated in mediation nor trained in mediation skills in law school. Until today, they have had little or no opportunity to do so.

The situation in America is starting to improve. There have been mediation workshops and programmes which offer training to lawyers such as by the Family Mediation Association's five-day program around the US[28], and the Centre for the Development of Mediation in Law[29] which organises workshops designed primarily for lawyers.

There have also been increasing efforts at heightening awareness of non-adversarial perspectives of the law in the legal curricula of Harvard Law School under the Harvard Law School's Fellowship in Law and Humanities Program[30] and at Columbia Law School where human dimensions such as interviewing and counselling, human relations training, planning and negotiation have been taught alongside the more traditional law subjects.

But what is the position in Malaysia? The Bar Council of Malaysia has

[28] The Academy of Family Mediation, Divorce Mediation: A Five Day Introductory Training Program, February 11-15, 1982.
[29] Centre for the Development of Mediation in Law, The Practice of Mediation, A Workshop for Lawyers and Other Professionals, August 19-23, 1981.
[30] Kirshen, "Humanization of Lawyers at Harvard" (1975) 61 *American Bar Association Journal* 223.

taken the positive step of encouraging mediation as an ADR mechanism between parties, e.g. by setting up an ADR Sub-Committee entrusted with the task of training members of the legal profession to be mediators. Such training includes courses in mediation conducted by experienced foreign and local mediators.

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

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

It is not known whether such workshops and programs have been structured on a regular basis, or to what extent have these programs been successful with Malaysian lawyers. Judging from the low popularity of mediation practice amongst these lawyers, it is safe to submit that the success rate has not been significant, or encouraging, to say the least.

The crux of such workshops and programs is whether they have been instrumental in influencing our lawyers' attitudes and mindsets to be open about mediation. My view is that a lot really depends on the lawyers' personalities[31] (where Redmount's categorization of the 'emphatic, conciliatory' personality tends towards mediation), and their initial exposure to legal education and training.

Therefore, it is recommended mediation be made an optional / a compulsory

[31] Redmount R., "Attorney Personalities and Some Psychological Aspects of Legal Consultation" (1961) 109 *U. PA. L. Review* 972, 974 where the other two personalities, "zealous, aggressive" and "coping, competitive" do not tend towards mediation.

subject in the legal education curriculum for all undergraduate law students before they embark into the world of the legal profession, as well as to postgraduate law students in their continuing legal education. Such a curriculum should be governed, and strongly supported, by the Bar Council as well as by the respective Law Faculties in our institutes of higher learning. It is indeed a warm and encouraging welcome to have Mediation Skill Workshops incorporated in the post-graduate law programs in higher institutes of learning such as University Malaya.[32]

But then again, even if this is strictly practised, the role of the MMC remains crucial insofar as to how mediation can be promoted. Needless to say, the true and correct messages about mediation must be communicated effectively to lawyers – that mediation is not an alternative to speed up the litigation process in the backlog of court cases, nor should mediation be seen in the light of being the solution to cases which command low legal fees!

Besides the MMC, there are other professional bodies which have also started to take a lead in this regard. Amongst those include The Institute for the Study and Development of Legal Systems (ISDLS) where the MMC and ISDLS delegates plan to discuss the feasibility of incorporating court-guided mediation into the pre-trial process. A mediation seminar has been planned for 2004.[33]

At least four other industries have formed their respective mediation committees and bureaus to assist consumer disputes or complaints against its member companies. They are currently the General Insurance Association of Malaysia (Persatuan Insuran Am Malaysia or PIAM) Complaints Action Bureau & Insurance Mediation Bureau[34], the Malaysian Institute of Architects (Pertubuhan Akitek Malaysia or PAM) Arbitration & Mediation Bureau[35], the Malaysia Banking Mediation Bureau under the ASEAN Bankers Association[36]

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[32] The Master of Laws programme offers "Alternative Dispute Resolution" as a subject where the Mediation Skill Workshops are planned to be conducted by mediation practitioners from the Malaysia Mediation Centre.

[33] See website http://www.isdls.org/projects_malaysia.html

[34] See website http://www.piam.org.my/complain.htm.

[35] See website http://www.pam.org.my/arbitration_mediation200203.asp.

[36] See website http://www.aseanbankers.org/aba.

and most recently, the Construction Industry Development Board (CIDB).

Hence, mediation education for lawyers is truly essential if we wish to make the best of mediation for our society. But what is mediation education without hands-on mediation practice and mediation experience? This leads to my second point, the extent of the involvement of lawyers where an expansion of the lawyer's knowledge about mediation itself is not sufficient. The second ingredient completes it all.

For effective practice of mediation, lawyers must begin to function explicitly as mediators. As we have seen in the preceding sections of this discussion, the role of a lawyer is very different in cases where the lawyer is himself a mediator. Clients view lawyers as their source of help and advice in achieving, protecting or perfecting their rights. Hence, to most clients, lawyers will remain as the initial consultants in processing their disputes, and in some cases, the lawyers will take control over how these disputes are handled.

I strongly think that if more lawyers are able, and willing to serve as mediators, clients and cases which are suitable for mediation will have a better chance of getting access to mediation. Some cases may be mediated because the disputants would choose a lawyer mediator, whilst others because the clients may chance upon a lawyer who mediates. Yet there may be others, referred to mediation by lawyers who feel confident in playing their role as law-trained mediators, using their combined skills of mediation and law as compared to just playing the role of a traditional lawyer.

In essence, the lawyer who has experienced the mediation perspective would be more open to acknowledge the serious difficulties in the current adversarial system. The mediation experience would also encourage the lawyer to 'think out of the box' to come up with breakthrough thinking solutions in the best interests of the clients.

The lawyer would also be able to break out from his conventional and traditional mindset. For all intents and purposes, this 'break out' would lead to not just mediation but to legal services which are more responsive to the needs

and interests of clients specifically, and of society in general.

In fact, certain areas of the law have moved significantly in this direction, of taking the 'middle road', shifting away from the strict adversarial '*winner takes it all'* approach. Distinct examples could again be cited in cases involving divorce[37], or where a number of state jurisdictions now have statutes requiring conciliation attempts for certain kinds of issues before proceeding to litigation.[38]

Conclusion

It is undeniable that the role of lawyers in mediation is not a simple one. On the one hand, it is consultative in nature, yet it is also an integral one. It is one which creates a non-adversarial climate for disputants in order to reach their *'win-win'* solution.

In Malaysia, there is still a lot of room for mediation to spread its wings within our legal profession. Unlike in America, mediation is still very much at its infancy stage and has not gained sufficient popularity amongst our lawyers.

Recognising the similar root causes of the current attitudes and mindsets of our lawyers, certainly, the MMC has a significant role to play in promoting meditative activities amongst our lawyers in this country. Since its inception, the MMC has been instrumental in living up to its mission, to help our legal practitioners see the real benefits of mediation, as well as the lawyers' value add in meditative activities in both roles - where the lawyer represents the clients in mediation, as well as in cases where the lawyer is the mediator. In fact, a set of guidelines on the role of lawyers in mediation is currently in the process of being formalised by the MMC.

In both of these roles, though very different in nature and extent, the

[37] The popularity of joint custody of children in divorce cases where both parents have access to their children post divorce.

[38] Section 4607, California Civil Code (West Supp. 1980); Section 767.081 Wisconsin State Ann. (West Supp. 1980). See also new contracts being drafted for the Malaysian construction industry where it is expressly provided that mediation is the first process for dispute resolution between parties to the contract.

common thread running between them is that the client's best interests must be of paramount importance, at all times, in every dispute resolution. For lawyers to live up to the traditional reputation of playing the role of dispute resolvers, it is crucial that they see themselves as having the knowledge, ability and competency to assist and counsel the clients to reach creative '*win-win*' solutions for the benefit of all parties involved. After all, this is exactly what mediation is all about…

'If you come at me with your fists doubled,
I think I can promise you that mine will double as fast as yours;
but if you come to me and say,
'Let us sit down and take counsel together;
and if we differ from one another,
(let us) understand why it is that we differ from one another
(and understand) just what the points at issue are,'
we will presently find that we are not so far apart after all,
that the points on which we differ are few
and that if we only have the patience and the candour
and the desire to get together, we will get together.'

Woodrow Wilson

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A Victory For Human Rights?

by
Valerie Yeo*

An Analysis of the Case of A (FC) & Others (F) v Secretary of State for the Home Department, X (FC) & Another (FC) v Secretary of State for the Home Department

On 16 December 2004, the House of Lords delivered its long awaited and landmark judgment in respect of human rights and national security law in the case of *A (FC) & Others (F) v Secretary of State for the Home Department, X (FC) & Another (FC) v Secretary of State for the Home Department.*[1] The decision of the House of Lords in this case was in respect of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ('the ATCSA 2001'), specifically the power of the Home Secretary, under Section 23 of the ATCSA 2001, to detain without trial non-nationals of the United Kingdom who are suspected of being international terrorists. This decision was greeted as a great victory for human rights as the House of Lords basically held that Section 23 of the ATCSA 2001 was discriminatory against non-UK nationals and breached the obligations imposed on the United Kingdom by virtue of international law and further held that Section 23 of the ATCSA 2001 was incompatible with certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

There is no doubt that this was an extremely important case. This is evidenced by the fact that no less than nine[2] Law Lords heard and decided this appeal. The fact that this was a decision by the highest court of the United Kingdom, home of the common law, and in respect of the legality of a major

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[1] [2004] UKHL 56
[2] The nine Law Lords who heard this appeal were (i) Lord Bingham of Cornhill, (ii) Lord Nicholls of Birkenhead, (iii) Lord Hoffman, (iv) Lord Hope of Craighead, (v) Lord Scott of Foscote, (vi) Lord Rodger of Earlsferry, (vii) Lord Walker of Gestingthorpe, (viii) Baroness Hale of Richmond, and (ix) Lord Carswell.

new post-11 September 2001 ('9/11') anti-terrorism piece of legislation and of a power that many governments regard as being instrumental in combating terrorism especially in the aftermath of the attacks of 9/11, means that this judgment deserves to be studied more carefully. To do so effectively, it would be beneficial to look at:-

(i) firstly, the circumstances that led to the passing of the ATCSA 2001;
(ii) secondly, the ATCSA 2001 and the provision in question;
(iii) thirdly, the facts of the case;
(iv) fourthly, the judgment of the House of Lords;
(v) fifthly, a comment on the judgment of the House of Lords;
(vi) sixthly, the consequences of the judgment of the House of Lords; and finally
(vii) the conclusion.

The circumstances that led to the passing of the ATCSA 2001

Although terrorism is not a new problem[3], the scale and dimension of terrorist attacks changed irrevocably, in February 1998, when Osama bin Laden, the leader of al-Qaeda, and his closest comrade-in-arms, Ayman al-Zawahiri, publicly issued a *fatwa* in the name of the World Islamic Front, which was arranged to be published in an Arabic language newspaper in London, calling for the killing of every American on earth[4]. This was followed by a number of interviews and messages by bin Laden which reinforced the contents of the February 1998 *fatwa*.[5]

Although the initial role played by al-Qaeda was in providing training, weapons and financial assistance to any terrorist group that planned to attack

[3] The word 'terrorism' entered into the popular lexicon after the French Revolution in 1789 as in the early years after the revolution, the French revolutionary government usually used force and violence to impose a radical new order on a reluctant citizenry. In 1798, the *Academie Francaise* defined 'terrorism' as the 'system or rule of terror'.

[4] The *fatwa*, stated that the killing of Americans was 'the individual duty of every Muslim who can do it in any country in which it is possible to do it' (see page 47 of the Final Report of the National Commission on Terrorist Attacks Upon the United States).

[5] For example, an interview given three months later in Afghanistan for ABC-TV where Bin Laden stated, inter alia, that 'we do not have to differentiate between military or civilian. As far as we are concerned, they are all targets'.

Americans,[6] this soon changed after Bin Laden fled Sudan for Afghanistan and received covert support from the Taliban regime which was then ruling Afghanistan. Between 1993 and 1998, Bin Laden began to play an active role in plans which would eventually lead to the near-simultaneous truck-bombing of two American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, respectively on 7 August 1998. Although none of the 11 people killed in the Tanzanian embassy bombing were Americans, the Kenyan embassy bombing claimed the lives of 12 Americans and 201 others, almost all of whom were Kenyans. In addition, a further 5,000 people were injured. This success emboldened al-Qaeda and was soon followed by the bombing of the American guided missile destroyer, *USS Cole*, as the ship was in the Yemeni port of Aden on 12 October 2000. This attack claimed the lives of 17 sailors and injured 39 others.

It is arguable that the weak response by the then Clinton administration to these attacks was a factor in encouraging al-Qaeda and those who supported it to plan more ambitious and destructive attacks on America. There is no doubt that the heinous attacks of 9/11 on both the World Trade Centre and the Pentagon by al-Qaeda operatives represent the high water marks of terrorism as well as being, as at the date hereof and in terms of the number of victims killed[7], the most successful terrorist attack ever launched in modern history.

The scale of the 9/11 attacks shocked and horrified people all over the world. It also led to many governments passing new laws in the area of national security and anti-terrorism which in all cases greatly strengthened the power of the executive branch in taking action against and/or detaining those suspected of committing, aiding or abetting or supporting any kind of terrorist activity.

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[6] For example the December 1992 bombing of two hotels in Aden which were routinely visited by American troops en route to Somalia was carried out by members of a terrorist group headed by a Yemeni member of al-Qaeda. In addition, the four perpetrators of the November 1995 bombing of the joint American-Saudi Arabian facility used to train the Saudi national guard (which claimed the lives of five Americans and two Indian officials), admitted that they had been inspired by Bin Laden and it was later discovered that al-Qaeda had a year earlier shipped explosives to Saudi Arabia as they had planned to attack an American target in that country and some of Bin Laden's associates later took credit for this attack.

[7] As of 16 September 2004, the total number of victims killed in the 9/11 attacks were 2,996 people, which comprised 2,948 dead, 24 reported missing and a further 24 reported dead.

As the main ally of the United States of America, the government of the United Kingdom was rightly concerned that it would not be too long before that country too suffered a catastrophic terrorist attack. This concern was heightened and justified by periodic reports of taped messages from the leader of al-Qaeda, Osama bin Laden, which not only praised the perpetrators of the 9/11 attacks but also gave dire warnings to all who supported the United States of America[8]. Against such a background, it is easy to see what led the British government to pass new national security laws such as the ATCSA 2001 and earlier, the Terrorism Act 2000.

The ATCSA 2001

The ATCSA 2001 was presented to Parliament by the British Government on 12 November 2001, was swiftly passed by Parliament and received the Royal Assent on 14 December 2001. Out of all the provisions of the ATCSA 2001, the part that came in for the heaviest criticism both by members of the legal profession involved in human rights law as well as human rights organisations such as Amnesty International[9] and the National Council for Civil Liberties ('Liberty')[10] was Part 4 of the ATCSA 2001, entitled 'Immigration and Asylum', specifically Section 23, which was also the provision being challenged in the House of Lords.

The commencement date of Part 4 of the ATCSA 2001 was 14 December 2001. The most relevant provisions of Part 4 for the purposes of this article

[8] See for example, the taped message of 12 February 2003 by Osama bin Laden, in which he stated, inter alia, that 'We also point out that whoever supported the United States, including the hypocrites of Iraq or the rulers of the Arab countries, those who approved their actions and followed them in this crusade war by fighting with them or providing bases and administrative support, or any form of support, even by words, to kill Muslims in Iraq, should know that they are apostates and outside the community of Muslims. It is permissible to spill their blood and take their property.'

[9] See for example, the article by Livio Zilli, of Amnesty International in Issue 23 of The Barrister, entitled 'Amnesty International's Concerns About Part 4 of the Anti-Terrorism, Crime and Security Act 2001'.

[10] Notably, 'Briefing by Liberty: The Anti-Terrorism, Crime and Security Bill 2001' in November 2001.

are Sections 21, 22 and 23 of ATCSA 2001, particularly Section 23. Section 21 of the ATCSA 2001 reads as follows:-

'21. Suspected international terrorist: certification

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably -
   (a) believes that the person's presence in the United Kingdom is a risk to national security, and
   (b) suspects that the person is a terrorist.

(2) In subsection (1)(b), 'terrorist' means a person who -
   (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,
   (b) is a member of or belongs to an international terrorist group, or
   (c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if -
   (a) it is subject to the control or influence of persons outside the United Kingdom, and
   (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part -
   'terrorism' has the meaning given by section 1 of the Terrorism Act 2000 and
   'suspected international terrorist' means a person certified under subsection (1).'

As a matter of clarification, Section 1 of the Terrorism Act 2000[11] defines 'terrorism' as 'the use or threat of action where the action falls within subsection (2) of Section 1 of the Terrorism Act 2000[12]', the use or threat is designed to

[11] The Terrorism Act 2000 was enacted in July 2000 and contains 131 sections and 16 Schedules.
[12] Subsection (2) of Section 1 of the Terrorism Act 2000 states that 'Action falls within this subsection if it (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system'.

influence the government or to intimidate the public or a section of the public[13] and the use or threat is made for the purpose of advancing a political, religious or ideological cause.[14]

To continue, Section 22 of the ATCSA 2001 reads as follows:-

'22. Deportation, removal etc.

(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of -

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration.'

Among the actions specified in subsection (2) of Section 22 of the ATCSA 2001 is the making of a deportation order.

Section 23(1) of the ATCSA 2001, which is the provision most directly challenged in this case, provides as follows:-

'23. Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by -

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration.'

Section 23 of the ATCSA 2001, therefore, enabled a suspected international terrorist who was a non-U.K. national to be detained indefinitely in the event he/she could not be deported from the United Kingdom for either of the reasons stated in Section 23(1)(a) or (b) of the ATCSA 2001, for example, if the

[13] Section 1(b) of the Terrorism Act 2000.
[14] Section 1(c) of the Terrorism Act 2000.

deportation of such a person would be a breach of Article 3 of the ECHR which provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

It should be noted that Section 23 of the ATCSA 2001 represented a departure from the usual legal position under Article 5(1)(f) of the ECHR (which should be read together with Article 1 of the ECHR which states that all ECHR contracting states undertake to secure ECHR rights and freedoms to '*everyone* within their jurisdiction') which essentially stated that a person may only be detained during the process of his/her deportation from the United Kingdom, which was also a position upheld by European case law.

Among the more important domestic and European cases which upheld this point respectively were ***R v Governor of Durham Prison, ex p Singh***[15] and ***Chahal v United Kingdom***[16]. In the first case, it was held that the power to detain a non-national is limited to such time as is reasonable to enable the process of deportation to be carried out. It was also held that deportation should follow promptly upon the making of a deportation order. Therefore, this meant that the power of detention of a non-national should not be exercised unless the non-national in question could be deported within a reasonable time. As a consequence of this decision, it has been generally accepted that under the Immigration Act 1971, it is not possible to detain someone pending deportation unless it was known that a deportation is possible. In the *Chaha*l case, it was held by the European Court of Human Rights that to deport someone who, if the order of deportation was executed, could suffer torture would constitute a violation of Article 3 of the ECHR. The court also made it clear that detention for an excessive period would be a breach of Article 5(1) of the ECHR. After *Chahal*, the legal position was not in dispute. It was accepted that the Home Secretary could only detain a non-national pending deportation, when such detention was necessary for national security reasons, if the deportation could be carried out within a reasonable time, but not otherwise.

[15] [1984] 1 WLR 704
[16] [1996] 23 EHRR 413

The ATCSA 2001 further makes provision for the grant of bail[17] by the Special Immigration Appeals Commission (SIAC)[18], for appeal to SIAC against certification by a certified suspected international terrorist,[19] for periodic reviews of certification by SIAC,[20] for periodic reviews of the operation of Sections 21 to 23 of the ATCSA 2001[21] and most importantly, for the expiry (subject to periodic renewal) of Sections 21 to 23 and for the final expiry of those sections, unless renewed, on 10 November 2006.[22]

In addition to the enactment of the ATCSA 2001, the British Government also made the Human Rights Act 1998 (Designated Derogation) Order 2001 ('the Derogation Order') by which the United Kingdom gave notice to the Secretary General of the Council of Europe of the proposed derogation of the United Kingdom from its obligations under the ECHR.[23] The Derogation Order was made in pursuance of Article 15 of the ECHR ('Article 15') which provides as follows:-

> 'Derogation In Time of Emergency
>
> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

In other words, a derogation is only permissible if, firstly, there was a 'public emergency threatening the life of the nation' and secondly, the derogating

[17] Section 24 of ATCSA 2001

[18] SIAC was established by the Special Immigration Appeals Commission Act 1997 and deals with appeals in cases where the Home Secretary exercises statutory powers to deport or exclude someone from the United Kingdom on national security grounds or for other public reasons, or to certify a person to be an international terrorist and detain them under Part 4 of the ATCSA 2001

[19] Section 25 of the ATCSA 2001

[20] Section 26 of the ATCSA 2001

[21] Section 28 of the ATCSA 2001

[22] Section 29 of the ATCSA 2001

[23] The core articles of the ECHR were given domestic effect in the United Kingdom by virtue of the Human Rights Act 1998.

measures must only be 'to the extent strictly required by the exigencies of the situation' and finally, the derogating measure must not be 'inconsistent with [the derogating state]'s other obligations under international law'.

In addition to informing the Secretary General of the Council of Europe, the derogating member state must also inform that official of the measures the state has taken and the reasons for doing so. The derogating member state must also inform the Secretary General of the Council of Europe when the measures have ceased to operate and the provisions of the Convention are again being fully executed. Although Article 15 is not expressly incorporated into British domestic law by the Human Rights Act 1998, Section 14 of the Human Rights Act 1998 does make provision for prospective derogations by the United Kingdom to be designated for the purposes of the Act in an order made by the Secretary of State. Therefore, it was in exercise of this power that the Home Secretary made the Derogation Order on 11 November 2001, which came into effect two days later.

The Derogation Order was in respect of Article 5(1)(f) of the ECHR which states as follows:-

'(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

……

(f) the lawful arrest or detention of…a person against whom action is being taken with a view to deportation…'

Therefore, according to Article 5(1)(f), and contrary to Section 23(1) of the ATCSA 2001, no non-U.K. national, whom the Home Secretary wishes to have removed from the United Kingdom, may be detained indefinitely. Such a person may be detained only pending his/her deportation. Otherwise, Article 5(1)(f) of the ECHR is considered to have been breached.

The facts of the case

Exercising the powers granted to him under Part 4 of the ATCSA 2001, the Home Secretary issued the Section 21 of the ATCSA 2001 certificate in respect

of eight of the appellants on 17 or 18 December 2001. These eight appellants were subsequently detained under Section 23 of the ATCSA 2001 on 19 December 2001. The ninth appellant had his certificate issued on 5 February 2002 and was detained on 8 February 2002. Two of the eight appellants who were detained in December 2001 exercised their right to leave the United Kingdom; one went to Morocco on 22 December 2001 and the other to France on 13 March 2002. All of the nine appellants were non-UK nationals and none was the subject of any criminal charge.

The appellants exercised the right of appeal to SIAC granted to them under Section 25 of the ATCSA 2001. In their appeal to SIAC, the appellants challenged every aspect of their detention. One of the appellants main arguments, and the one on which the appellants appeal before SIAC was upheld by SIAC, was that they had been discriminated against in being detained. The appellants argued that Part 4 of the ATCSA 2001 and the Derogation Order were discriminatory based on the fact that they allowed only suspected terrorists who were non-UK nationals to be detained whereas there are equally dangerous UK nationals who are in the exact same position as the appellants but who were not detained. They also argued that such discrimination was a breach of Article 14 of the ECHR which states that

> 'The enjoyment of the rights and freedoms set forth in (the) Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

It should be noted that the Derogation Order did not include derogation from Article 14 of the ECHR.

The respondents subsequently appealed SIAC's decision to the Court of Appeal pursuant to Section 27 of the ATCSA 2001 which stated that the decisions of SIAC are subject to a further appeal but only on a point of law. Before the Court of Appeal, the appellants made several primary submissions, of which the more important ones are as follows:-

(a) Was the Home Secretary right to say that because he chose immigration

control (i.e. deportation) as the way to respond to the alleged 'public emergency', it is therefore, correct to treat nationals and non-nationals differently? Or was SIAC correct in upholding the appellants' submission that it was necessary to look at the reasons behind the Home Secretary's choice and ask why, in response to a threat posed by both nationals and non-nationals, the Home Secretary chose to focus solely on the non-nationals?

(b) As the Derogation Order gave the threat posed by al-Qaeda to the United Kingdom as the reason for the necessity of the measures which derogated from the ECHR, this meant that Part 4 of the ATCSA 2001 was both over-inclusive (in that it empowered the detention even of foreigners who were not involved or associated with al-Qaeda as per the Derogation Order) and discriminatory as its provisions are aimed at a different and wider target than that claimed by the Derogation Order (i.e. al-Qaeda).

(c) Part 4 of the ATCSA 2001 fails to satisfy the test laid down by Article 15 of the ECHR in that it is not proportionate to the threat faced by the United Kingdom. This is because the main aim of Part 4 of the ATCSA 2001 was to reverse the effect of the decisions of cases like *Chahal* and ex p Singh and as such, Part 4 of the ATCSA 2001 is both over-inclusive (in that in the *Chahal* case, Chahal did not pose a threat to the United Kingdom but only against foreign states) and under-inclusive (in that Part 4 of the ATCSA 2001 does not apply equally to British citizens whose presence in the United Kingdom does pose a direct and immediate threat of a terrorist attack to the United Kingdom).

(d) The fact that the evidence before SIAC and the words of the legislation itself show that Part 4 of the ATCSA 2001 was also intended to include foreign citizens who posed no direct threat to the security of the United Kingdom means that Part 4 of the ATCSA 2001 goes beyond the strict exigencies required by the claimed national emergency.

(e) For the purposes of an analysis of Article 14 of the ECHR (i.e. the non-discrimination clause) to decide if Part 4 of the ATCSA 2001 breaches Article 14 of the ECHR or not, the class of persons to whom suspected foreign terrorists who cannot be deported from the United Kingdom should be compared to are British suspected terrorists as these persons also cannot be removed from the United Kingdom and not, as the Home Secretary

argued, other foreigners who present a security threat to the United Kingdom but can be removed.

In response to the above submissions, the Court of Appeal[24] held as follows (*per* Lord Woolf, CJ):-

(a) As to the appellants' first submission, it was 'impossible' for the court to differ from the Home Secretary's decision that action was only necessary in respect of non-national suspected terrorists as such a decision fell within the realm of national security and as such, considerable deference had to be shown by the court to the Home Secretary's view, as the Home Secretary was in a better position to judge exactly what type of action was required. The court based its decision on this matter on such cases as *Brown v Stott*[25] and *Home Secretary v Rehman*[26].

(b) In respect of the appellants' second submission, the court accepted that the language of Part 4 of the ATCSA 2001 was over-inclusive. However, in practice, the court did not find this to be a matter of substance as the powers contained in Part 4 of the ATCSA 2001 could only be used 'to the extent' they were covered by the Derogation Order, failing which, they would breach Article 5 of the ECHR. The court also pointed out that the Home Secretary was required to give reasons for is decision and SIAC was empowered to inquire into those reasons. As such, there was no real risk of anyone who was not the target of the Derogation Order being targeted by Part 4 of the ATCSA 2001.

(c) As for the issue of Part 4 of the ATCSA 2001 (specifically Section 23) being discriminatory and in breach of Article 14 of the ECHR, the court initially pointed out that although a non-national must be allowed to remain in the United Kingdom, if he could not be deported, this does not in and of itself create a right to remain but only a right not to be removed. This is because if the non-national in question can be deported at a later time, he can be removed from the United Kingdom. This distinguishes a non-national from a national as the latter has a right of abode in the United Kingdom.

[24] In this case, the judges who heard the appeal were Lord Woolf, CJ, Brooke, LJ and Chadwick, LJ.
[25] [2001] 2 WLR 817
[26] [2001] 3 WLR 877

The Court of Appeal also pointed out that the critical question that should be asked in this instance was 'Are there objective, justifiable and relevant grounds' for the Home Secretary's decision to make the distinction he did. The court held that in this case, the question should be answered in the affirmative due to the fact that non-nationals have no right of abode in the United Kingdom, unlike nationals.

The court also noted that it would be 'surprising' if Article 14 of the ECHR or any other international law requirement not to discriminate prevented the Home Secretary from taking a restricted action which he thought was necessary. In this case, if the appellants' arguments were accepted, it would mean that the action the Home Secretary decided to take (i.e. detention without trial) would be applied equally to British citizens as well as non-citizens. The Court of Appeal correctly pointed out that such a result would not promote human rights at all and instead be an additional intrusion into the rights of nationals.

The appellants subsequently appealed to the House of Lords. The appellants challenged the lawfulness of their detention and argued that 'such detention was a breach by the United Kingdom of the obligations imposed on that country by the ECHR and that the United Kingdom was not legally entitled to derogate from those obligations; that even if it was entitled to derogate, such derogation was inconsistent with the ECHR and so was ineffectual to justify their detention and finally, that the statutory provision on which their detention is based is incompatible with the ECHR'.

The judgment of the House of Lords

The leading judgment in this appeal was delivered by Lord Bingham.

The first major issue addressed by the court was whether the Derogation Order satisfied the requirements laid down in Article 15 of the ECHR (i.e. was there was a 'public emergency threatening the life of the nation' and secondly, whether the derogating measure was proportional to the emergency faced and finally, the derogating measure must not be 'inconsistent with [the derogating

state]'s other obligations under international law'), which the appellants argued it did not. According to the appellants' submissions, there had been no public emergency threatening the life of the nation[27] for three reasons: firstly, if the emergency was not actual, it must be shown to be imminent (which could not be shown in this case); secondly, it must be temporary (which again could not be shown here); and finally, the practice of the other countries in the European Union, none of whom had exercised their right of derogation.

In response to these submissions, the court held that this threshold test of Article 15 of the ECHR had been satisfied. The court pointed out that in the case of *Lawless v Ireland* (No. 3), the European Court had no problem in concluding that the threshold test of Article 15 of the ECHR had been satisfied although the extent of the losses suffered in that case were unclear and were in any case definitely lower than the losses caused by the 9/11 attacks. As such, the British Government was undoubtedly justified in concluding that there was such a public emergency in the United Kingdom in the light of the 9/11 attacks. The court also decided that 'great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament' on this issue as this was a political and not a legal question.

As to the question of proportionality, the court upheld the appellants' contention that the Derogation Order and Section 23 of the ATCSA 2001 are disproportionate to the threat posed as it allowed non-national suspected terrorists to leave the country 'with impunity' while leaving British suspected terrorists at large. Under this heading, the appellants' submissions that the Derogation Order and Section 23 of the ATCSA 2001 had been disproportionate

[27] The phrase 'public emergency threatening the life of the nation' had been considered in the European case of *Lawless v Ireland (No. 3)* [1961] 1 EHRR 15 where it was held, inter alia, that the phrase refers 'to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.' In that case, the court had no trouble concluding that 'a public emergency threatening the life of the nation' did exist based on a combination of several factors, firstly, the existence ….. of a secret army engaged in unconstitutional activities and using violence to attain its purposes, secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the State with its neighbour and finally, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.

had essentially been as follows:-

(a) The threat to the security of the United Kingdom did not derive solely from foreign suspected terrorists as much evidence was presented to show that there was also a major threat from suspected terrorists who were British citizens.

(b) Sections 21 and 23 of the ATCSA 2001 did not rationally address the security threat to the United Kingdom from suspected terrorists because it did not address the threat presented from suspected terrorists who were British citizens and in addition, allowed foreign nationals who were suspected terrorists to leave the United Kingdom (as Section 23 provided for the detention only of those who could not be deported from the United Kingdom if such persons would face the threat of torture or death in their own country) and finally, it was disproportionate because it allowed for the certification of those persons who were not suspected of presenting any threat to the security of the United Kingdom as al-Qaeda members or supporters.

(c) The requirement of proportionality is not satisfied as it has not been shown why measures which have been taken to address the threat from British suspected terrorists, which incidentally, did not involve the infringement of the right of personal liberty, could not similarly be applied to foreign suspected terrorists.

(d) Any restrictions on the right to personal liberty which is among the most fundamental of the rights under the ECHR must be scrutinised carefully by the court.

(e) In view of the above arguments, the appellants submitted that neither Sections 21 and 23 of the ATCSA 2001 or the Derogation Order could be justified.

In response to submission (a) above, the court acknowledged that SIAC had evidence presented before it that showed 'beyond argument' that there was a serious threat to the security of the United Kingdom caused predominantly, albeit not exclusively, and more immediately from foreign nationals. The court also upheld this submission of the appellants as the same was not challenged by the respondents.

In respect of submission (b) above, the court also upheld the appellants' submission and agreed that it was 'clear' from the language of Section 21 of the ATCSA 2001, read together with the definition of 'terrorism' in Section 1 of the Terrorism Act 2000, that Section 21 of the ATCSA 2001 is 'capable of covering those who have no link with al-Qaeda. The court also held that it was irrelevant that other sections of the ATCSA 2001 did apply to British nationals as those sections were not subject to the derogation, applied equally to foreign nationals and were not the subject of the appeal.

As for submission (c) of the appellants, the court also upheld the appellants' submission on this point and found that 'it is hard to see' why measures which have been used effectively for British suspected terrorists could not be applied equally to non-nationals suspected of being terrorists. Among the steps listed by the court are the wearing at all times of an electronic monitoring tag by the suspect concerned, the requirement that the suspect not have any computer equipment, mobile telephone or other electronic communication device and installation at the suspect's premises of a dedicated telephone line permitting contact only with a designated security company and the removal of the suspect's existing telephone line.[28]

Submission (d) above was the submission most heavily challenged by the respondents. The respondents submitted that as it was Parliament and the executive who were responsible for assessing a threat to the nation, so it was that it was those two bodies, and not the courts, who were responsible for deciding what course of action should be taken to address the particular threat. The court declined to uphold the respondents' challenge to the appellants' submission as stated in (d) above on the grounds that Parliament had expressly legislated in Section 6 of the Human Rights Act 1998 to 'render unlawful any act of a public authority, including a court, incompatible with a Convention right' and in Section 3 of the Human Rights Act 1998, has required courts, as far as possible to give effect to ECHR rights and conferred on courts a right of appeal on derogation issues. As such, the court held that the Derogation Order and Section 23 of the ATCSA 2001 failed the proportionality requirement of

[28] See the case of *G v Secretary of State for the Home Department* (SC/2/2002, Bail Application SCB/10, 20 May 2004).

Article 15 of the ECHR. The court also stated that the court could not approach questions of proportionality as questions of pure fact, which the Court of Appeal had earlier done.

The appellants had also submitted that Section 23 of the ATCSA 2001 was discriminatory as it was only targeted towards non-national suspected terrorists and that as such, it was a breach of Article 14 of the ECHR. The appellants also submitted that Section 23 of the ATCSA 2001 discriminated against them in their exercise of their right to liberty under Article 5 of the ECHR.

The court addressed this submission by first pointing out that being foreigners did not preclude the appellants from claiming the protection of the ECHR, as under Article 1 of the ECHR, the contracting states undertook to secure the rights under the ECHR 'to everyone within their jurisdiction'.

The court then pointed out that the United Kingdom did not, either expressly or impliedly, derogate from Article 14 of the ECHR or the corresponding Article 26 of the International Convention of Civil and Political Rights ('the ICCPR').

Addressing the issue of discrimination, the court pointed out that to determine if a certain measure was discriminatory, the questions that are to be asked are those expressed in the case of *R (S) v Chief Constable of the South Yorkshire Police*[29] and are as follows:-

'(1) Do the facts fall within the ambit of one or more of the [ECHR] rights?
(2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
(3) If so, was the difference in treatment on one or more of the proscribed grounds under Article 14 of the ECHR?
(4) Were those others in an analogous situation?
(5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?'

[29] [2004] UKHL 39, [2004] 1 WLR 2196

In answering questions (1) and (2) above, the court held that the facts of the case clearly fall within Article 5 of the ECHR and the appellants were treated differently from non-national suspected terrorists who could be removed and from U.K. citizens who were suspected terrorists and could not be removed. Thus, there was no doubt that the difference in treatment was on the grounds of nationality or immigration status (which was one of the proscribed grounds under Article 14 of the ECHR).

The respondents had submitted that the chosen comparators to the appellants should be non-U.K. nationals who were suspected terrorists but could be removed from the United Kingdom whereas the appellants had submitted that the chosen comparators should be suspected terrorists who were U.K. nationals as this group also could not be removed from the country. The court pointed out that a chosen comparator had, on the authority of ***R (Carson) v Secretary of State for Work and Pensions***[30] to satisfy the question as to whether their two circumstances were so similar 'as to call in the mind of a rational and fair minded person for a positive justification for the less favourable treatment of one party in comparison with the other party'. In this case, the House of Lords upheld the appellants' submission as 'in the present context, they [i.e. U.K. nationals who were suspected terrorists] share the most relevant characteristics of the appellants'.

The court also differed from the Court of Appeal that there were 'objective and reasonable justification for the differential treatment of the appellants'. Thus, the House of Lords upheld the appellants submission that Section 23 was discriminatory due to the fact that Article 14 of the ECHR had not been derogated from and thus remained in full force and effect and effectively prohibiting discrimination on the grounds of nationality. The court pointed out that 'what has to be justified is not the measure in issue but the difference in treatment between one person or group and another'. In the court's judgment, it was a violation of Article 14 of the ECHR to detain one group of suspected terrorists on the grounds of their nationality or immigration status and not another.

[30] [2003] 3 All ER 577

As a result of the above findings, the House of Lords allowed the appellants' appeal. Consequently, an order quashing the Derogation Order and a declaration under Section 4 of the Human Rights Act 1998 that Section 23 of the ATCSA 2001 is incompatible with Articles 5 and 14 of the ECHR insofar as it is disproportionate and discriminatory on the grounds of nationality was issued.

A Comment on the judgment of the House of Lords

There is no doubt that the House of Lords decision in A *(FC) & Others (F) v Secretary of State for the Home Department and X (FC) & Another (FC) v Secretary of State for the Home Department* overjoyed many human rights advocates and was a triumph for human rights over the security concerns of the State. The decision of the House of Lords effectively undermined a major plank in the British government's anti-terrorism efforts. However, it is submitted that the Court of Appeal decision was the better decision for several reasons.

Firstly the evidence in this case clearly showed that there existed a grave threat against the security of the United Kingdom from foreigners who were suspected terrorists. Although the threat to the security of the United Kingdom did not emanate exclusively from this group, they undoubtedly posed a grave security risk to the United Kingdom. As this group was a recognised threat, the question then arose as to what measures should be taken to address this threat.

One of the appellants' arguments was that an immigration measure (i.e. deportation) was used to address a security threat. However, the deportation of non-citizens from a sovereign country has always been governed by immigration legislation. An important point that should be borne in mind and which was pointed out by the Court of Appeal, was that foreigners had no right of abode in a country of which they were not citizens. Only the citizens of a country have a right of abode in that country. Foreigners merely have a right not to be removed. Furthermore, it should be borne in mind that all sovereign states have the right to control who can or cannot be allowed to enter and stay in its country.

Due to the above, it is also submitted that the respondent's submission that the chosen comparator in this case should be other foreign citizens who also present a threat to the security of the United Kingdom but can be removed is correct. The case of ***R (Carson) v Secretary of State for Work and Pensions*** required that a chosen comparator satisfy the question as to whether their two circumstances were so similar 'as to call in the mind of a rational and fair minded person for a positive justification for the less favourable treatment of one party in comparison with the other party'.

In this case, the similarity of the two groups according to the respondent's submission is found in the fact that both groups are foreigners and both groups presented a threat to the security of the United Kingdom. The only difference between the two groups was that one group could not be removed from the United Kingdom ***for the time being*** due to Article 3 of the ECHR. The comparator submitted by the appellants and upheld by the House of Lords (i.e. British citizens who were also suspected terrorists but could not be removed from the United Kingdom due to the fact that they were British citizens) is submitted to be faulty.

This is because the non-removal of foreign suspected terrorists such as the appellants is only temporary unlike British citizens suspected of being terrorists. Foreign suspected terrorists such as the appellants may be removed or deported from the United Kingdom at such time when there is no possibility of Article 3 of the ECHR being breached. This was clearly evidenced by the fact that two of the appellants had chosen voluntarily to leave the United Kingdom. Unlike the appellants, a British citizen suspected of being a terrorist, can never be subjected to deportation from the United Kingdom. In other words, the appellants cannot be deported from the United Kingdom ***only for the time being*** unlike British citizens who ***cannot be deported at all***. As such, it is submitted that Section 23 of the ATCSA 2001 is not discriminatory.

Consequences of the judgment of the House of Lords

As at early March 2005, it has been reported in the media that the British government, in response to the House of Lords judgment, is attempting to

pass a new piece of anti-terrorism legislation currently entitled the 'Prevention of Terrorism Bill'. Under this bill, it is proposed that both British citizens and foreigners who cannot be deported from the United Kingdom and are suspected of international terrorism could be subjected to house arrest, curfews or electronic tagging.[31] Unfortunately, this bill came in for some fierce criticism when it was discovered that it was proposed that it was the Home Secretary and not a judge who would determine who would be subject to a 'control order' authorising a suspect to be placed under house arrest.

On Monday, 28 February 2005, the government backed down and amended the much-criticised provision so that a judge would be authorised to hear an application on placing a suspect under house arrest within 24 to 48 hours.[32] As at the date of this writing, the Bill is currently being debated by the British Parliament.

Conclusion

The decision of the House of Lords in this case was clearly of great significance as can be seen in the British government having to put forward a new piece of anti-terrorism legislation. It remains to be seen if this new legislation is passed by Parliament, and if it is, whether it will be successful in preventing or minimizing terrorist attacks while at the same time upholding the principles of human rights.

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[31] See, for example, the article entitled 'Terror Suspects Face House Arrest' on 26 January 2005 at *http://news.bbc.co.uk/1/hi/uk_politics/4207295.stm*

[32] See the article entitled 'U.K. Government Amends Terror Law' on 28 February 2005 at *http://edition.cnn.com/2005/WORLD/europe/02/28/uk.detentions.reut/*

Whither Malaysia: the Hague-Visby or Hamburg Rules?[1]

by

Abdul Ghafur Hamid @ Khin Maung Sein[2]

The Hague Rules were adopted in 1924 to standardise the law governing the carriage of goods by sea. There are, nevertheless, unresolved problems that are inherent in these Rules. The Visby Amendments were adopted in 1968 to resolve some of these problems, and in conjunction with the Hague Rules, are now known as the Hague-Visby Rules. Some interests, mainly in developing countries, were not, however, satisfied with the reforms made by the Visby amendments and thought that a new comprehensive approach to the carriage of goods by sea was needed. The work of the UNCITRAL along this line culminated in the adoption of the Hamburg Rules in 1978.

Malaysia is still in the shadows of the Hague Rules of 1924, which can be said as a British colonial heritage. These Rules have been brought into legal effect in Malaysia, by virtue of the Carriage of Goods by Sea Act 1950 (revised 1994).

Against the foregoing background, the present paper focuses on the difficulties in applying the Hague Rules, analyses the practice of major trading partners of Malaysia, like the USA, Japan and China, and examines the international practice in this respect. The paper points out that a new law is inevitable for Malaysia. Then, which regime Malaysia should adopt: the Hague-Visby or Hamburg? The paper finally suggests that it is in the best interest of Malaysia to adopt a hybrid regime of the Hague-Visby and Hamburg Rules, taking into account the fact that Malaysia is still a nation of shippers rather than shipowners.

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[1] This is the updated version of a research paper presented on 11-12-2003 at the International Conference on Law, Commerce and Ethics, Victoria Law School, Victoria University, Melbourne, Australia.

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1. INTRODUCTION

There is no doubt that the carriage of goods by sea plays an enormous role in the future economic prosperity of Malaysia as 90% of Malaysian trade is seaborne. However, we should not lose sight of the fact that there must be a delicate balance of development of trade and that of law. Without the necessary changes in law which are in line with the development of trade, Malaysia's aspiration to be a fully developed nation by the year 2020 cannot be achieved. The two major objectives of the present paper, therefore, are: first to examine whether it is in the interest of Malaysia as an emerging economy to still stick to the century-old; and secondly, if the answer is in the negative, to analyse the international practice, especially that of the major trading partners of Malaysia, in order to be able to determine which regime is the best for Malaysia: the Hague-Visby, the Hamburg, or a hybrid of the two.

2. MALAYSIA STILL IN THE SHADOWS OF THE CENTURY-OLD HAGUE RULES

The governing law in respect of the carriage of goods by sea in West Malaysia is the Carriage of Goods by Sea Act 1950 (as revised in 1994). The Act was originally the Carriage of Goods by Sea Ordinance 1950 [3], which adopted the Hague Rules of 1924, by incorporating it in its Schedule. Therefore, we can say that the Malaysian COGSA 1950 is a replica of the COGSA 1924 of the United Kingdom. The Hague Rules are also extended to the East Malaysian states of Sarawak – by virtue of the Merchant Shipping (Implementation of Conventions relating to the Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960, and Sabah – by the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961.

[3] The provisions of the Malaysian Carriage of Goods by Sea Ordinance 1950 was modelled on the United Kingdom Carriage of Goods by Sea Act 1924. In the United Kingdom, the old COGSA 1924 has been repealed by Carriage of Goods by Sea Act 1971, which applies the Hague-Visby Rules.

The defects of the Hague Rules

(1) Conflict of laws problems

The scope of application of the Hague Rules is stated in Article X of the Convention: 'The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States'. When the Hague Rules were promulgated in Malaysia by virtue of the Carriage of Goods by Sea Ordinance 1950, Article X was omitted and the scope of the Ordinance was restricted in the Ordinance itself under section 2. The Ordinance was revised in 1994 and section 2 of the Act (the Malaysian COGSA) now states'

Subject to this Act, the Rules set out in the First Schedule ('hereinafter referred to as the Rules') shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Malaysia to any other port whether in or outside Malaysia.

It is clear from the wordings of the section that the Hague Rules shall automatically applies to the carriage of goods by sea if the shipment is 'outward' (ie. shipment from a port of Malaysia to a foreign port). This provision is supplemented by Section 4 of the Malaysian COGSA 1950, which includes a 'clause paramount' stating that 'every bill of lading or similar document of title, issued in Malaysia which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the said Rules as applied by this Act'. This is a common legislative technique for countries applying the Hague Rules.[4]

We have already seen that the Hague Rules are normally applied only to an 'outward shipment'. However, if both countries involved in a dispute are parties to the Hague Rules, there can be no escape from the application of the Rules whether the shipment is outward or inward. The best example in the

[4] The effect of the 'choice of law' and 'choice of forum' clauses are a common problem for all systems and not a peculiar feature of the Hague Rules only. For a case where a stay of action was allowed on the ground that the parties expressly selected the Japanese COGSA as the governing law and Japanese court as the forum, see *Owners of Cargo on Board the ship 'Asian Plutus' v The owners of the Ship 'Asian Plutus'*, [1990] 3 CLJ 823. For a discussion of *The Epar* [1985] 2 MLJ 3, see Jeremy M. Joseph. ' Carriage of Goods by Sea: Hague-Visby for Malaysia?' [1998] 1 MLJ 1.

Malaysian context is the case of *KMA Abdul Rahim v Owners of 'Lexa Maersk'*[5] where goods were shipped from Karachi to Singapore. The defendants argued that the Hague Rules could not be applied to the case because there was no outward shipment. However, the High Court of Malaya rejected the argument and held that as the Hague Rules have been adopted in Pakistan by virtue of the Indian Carriage of Goods by Sea Act 1925, the Rules applied.

Thus if all the trading partners of Malaysia are also parties to the Hague Rules, no problems of conflict of laws will arise. However, as a matter of fact most of the trading partners of Malaysia are parties to the Hague-Visby Rules and some are subject to a hybrid regime of Hague-Visby/ Hamburg. This is really a crucial problem for Malaysia.

(2) The period when carrier is liable, too limited

The carrier's liability only covers the period from the time when the goods are loaded on to the time when they are discharged from the ship[6]. This period is sometimes referred to as extending 'tackle-to-tackle'. Thus, while sitting at dock or in storage at dock, prior to or after shipping, the carrier would not be liable for damage to such cargo. Then the problem is: who would be liable?[7] That deficiency, in turn, gives rise to the requirement of a 'Himalaya Clause', which is a contractual mechanism that extends the convention's liability limits to dockside agents of the carrier.[8]

(3) The scope of the subject-matter in respect of which carrier is liable: not complete

Deck cargo is excluded from the subject matter for which the carrier may be

[5] [1973] 1 LNS 60, High Court of Malaya, Kuala Lumpur.

[6] Article I (e): 'Carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

[7] See Leslie W. Taylor, 'Proposed Changes to the **Carriage of Goods by Sea** Act: How Will They Affect the United States Maritime Industry at the Global Level', (1999) 8 Currents Int'l Trade LJ 32, 34.

[8] For an analysis of the 'Himalaya Clause', see Wilson, John F., Carriage of Goods by Sea, 4th Ed., Longman, Pearson education Ltd. Harlow, 2001.

held liable[9]. This reflects the reality of a time when such on-deck stowage was much more prone to damage or loss at sea than is the case today.

(4) Statements in the bill of lading: only *prima facie* evidence

The bill of lading is only *prima facie* evidence of the receipt by the carrier of the goods as described therein.[10] As it is not conclusive evidence, it is open for the carrier to deny liability for the loss of or damage to the goods by proving to the contrary.

(5) No liability for 'delay' in delivery of the goods

The Hague Rules impose liability only for loss of or damage to the goods. There is no liability on the part of the carrier for 'delay'. In modern international trade, delay in delivery of the goods in many cases is fatal to the business opportunity of the shipper or the consignee.

(6) 'Navigational fault exception' of the carrier: not realistic

The carrier may escape liability for loss of or damage to cargo arising or resulting from 'act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship'.[11] Many oppose the continuance of this defence, as it is felt to no longer be a realistic ground for the exoneration of liability. It is argued that advances in communication technology, vessel navigation and safety, and employee education and training provide the carrier with a higher degree of control of the vessel and cargo than was available in the previous century when this defence was adopted.

(7) The maximum limit of carrier's liability, too low

The limitation of liability of the ship owner to the maximum of 100 Pound Sterling per package or unit[12] has become entirely unpractical and inadequate as a realistic means of balancing compensation and liability.

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[9] Article I (c), the Hague Rules: 'Goods' includes…. except live animal and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
[10] Article III rule 4.
[11] Article IV, rule 2(a).
[12] Article IV, rule 5, the Hague Rules

(8) The Hague Rules are not compatible with container transport.
The use of the term 'package' as a criterion for limitation of liability may create uncertainty because of the increasing use of container transport by the shipping industry.

(9) The Hague rules are not compatible with 'electronic commerce'
The Hague Rules fail to allow for modern commercial reality with respect to bills of lading. Widespread use of electronic communication and data transfer systems are not within the scope of the Hague Rules' recognised forms of sea-carriage documentation. Electronic commerce is the most sophisticated advancement of international trade and there is an increasing use of electronic bills of lading in the shipping industry. The Bolero Project is a good example.[13]

As the years passed, technology, commercial practices and worldwide economies all underwent considerable change. The Hague Rules came to be much criticised especially after the emergence of innumerable newly-independent States after the Second World War. The Rules were viewed as being too much weighted in favour of ship owner interests. For instance, the right of carriers to limit their liability to 100 Pound Sterling per package or unit became ridiculous with inflation. The low rate of compensation also arguably affected the cost of insurance and the balance of payments position of developing countries. It also became evident that the Hague Rules were beginning to get out of line with technological advances in sea transport and with the container revolution.[14]

3. THE HAGUE-VISBY RULES

The Comit'e Maritime International (CMI) initiated a reconsideration of the Hague Rules. The CMI's proposals were considered at a diplomatic conference at Brussels, culminating in the adoption of a Protocol to amend the Hague

[13] See Abdul Ghafur Hamid & Khin Maung Sein, 'The Legal Implications of Electronic Bills of Lading: a Challenge of the New Millennium', Conference Paper, International Conference on Law and Commerce 2002, The Malaysian Current Law Journal, July 2002, 300, at 305.
[14] See Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2nd. ed., 1994, 548-49.

Rules on 23 February 1968.[15] The 1968 Brussels Protocol brought the Hague Rules a little more in line with the needs of the changed world.[16] The amended Hague Rules have become known as the 'Hague-Visby Rules'. They retained the underlying structure of the old Hague Rules in order to avoid disruption to the established laws and procedures that had grown up internationally. The following are some of the important modifications by the Visby Amendments to its predecessor.

(1) To solve the conflict of laws problems of the Hague Rules, the Hague-Visby Amendments provide that the Rules apply in three types of voyages where: (a) the bill of lading is issued in a Contracting State; or (b) the carriage is from a port in a Contracting State; or (c) the contract of carriage expressly provides that the Rules shall apply.[17]

(2) The Hagues-Visby Rules increase the maximum amount for limitation of liability of a carrier and introduce a new weight-based criterion: 10,000 francs[18] per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged.[19] By virtue of the SDR Protocol, 1979, the limitation of liability is again amended to 666.67 SDRs per package or unit, or 2 SDRs per kilo[20].

(3) They also provide unlimited liability for the carrier, where the carrier's actions involved intentional damage or recklessness. [21]

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[15] Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, done at Brussels, 23 February 1968 (Hereinafter referred to as the Hague-Visby Rules or the Brussels Protocol, 1968)

[16] See Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea*,2nd Ed., Butterworths Asia, Singapore, 1994, 316.

[17] Article X of the Hague Rules was deleted and replaced by the above provision.

[18] A franc means a unit consisting of 65.6 milligramme of gold of millesimal fineness 900. Article IV rule 5 (d)

[19] Article IV rule 5 (a). See also Mendelsohn, Alan I., 'The Best Way To Update Cargo-Damage Limits', J. of Comm., August 3, 1999, at 8.

[20] According to the SDR Protocol 1979, the unit of account is the 'Special Drawing Right' (SDR) as defined by the International Monetary Fund (IMF).

[21] Article IV rule 5(e)

(4) They include a container clause, in recognition of the new cargo packaging techniques adopted throughout the shipping industry.[22]

However, for many who are critical of the Hague Rules, the Hague-Visby Rules do not deal adequately with some of the major defects in the Hague Rules. For instance, the position concerning a carrier's right to exclude liability for negligent navigation and management of the ship was not changed. It has also been said that the limits of a carrier's liability remain low under the Hague-Visby Rules.

4. THE HAMBURG RULES

Some interests, principally in developing countries, were not satisfied with the 'reform' of the Hague Rules by Visby Amendments and thought that a new comprehensive approach to the carriage of goods by sea was needed. This time the UNCITRAL took the initiative to reexamine the appropriate rules to regulate carriage of goods by sea. This movement culminated in the adoption of the United Nations Convention on the Carriage of Goods by Sea in Hamburg, in 1978. The Convention, known as the 'Hamburg Rules', entered into force on 1 November 1992.[23] The following are salient features of the Hamburg Rules.

(1) A distinction between 'carrier' and 'actual carrier'

One of the main features of the Hamburg Rules is to draw a distinction between a 'carrier' and an 'actual carrier'. The 'carrier' is the person who enters into a contract of carriage with the shipper.[24] The 'actual carrier' is the person to whom the actual carriage of the goods has been entrusted.[25] In many instances the carrier will himself perform the carriage as, for example, where a liner operator accepts cargo direct from a shipper. In such a case the liner operator will be the 'carrier', there being no delegation of carriage by him to an 'actual carrier'. Conversely, whether the carrier sub-contracts all or part of carriage

[22] Article IV rule 5 (c)
[23] For an analysis of the Hamburg Rules, see Mankabady, S., (ed.), *The Hamburg Rules on the Carriage of Goods by Sea*, 1978; Tetley, W., [1979] *LMCLQ* 1.
[24] Article 1. 1, the Hamburg Rules

to another person, that person becomes an 'actual carrier' within the meaning of the Hamburg Rules. By virtue of Article 10, the carrier remains primarily responsible for the entire carriage, notwithstanding any delegation, while the actual carrier is jointly and severally liable for that part of the carriage which he undertakes.

(2) Wider definition of 'contract of carriage'

The Hamburg Rules are not restricted to contracts of carriage 'covered by a bill of lading or other similar document of title' as stated in the Hague Rules.[26] The definition of a 'contract of carriage by sea' is wide enough to include any contract of affreightment (except a charter party)[27]. Where the contract is for the carriage of goods partly by sea, for example carriage under a combined transport bill of lading or through bill of lading, the rights and liabilities prescribed by the Convention will apply to the sea leg of the carriage only. The Hamburg Rules are not restricted to negotiable bills of lading and may be applicable to non-negotiable bills of lading, sea way bills and electronic documents.

(3) Period of carrier's responsibility is extended

The responsibility of the carrier for the goods covers the period during which he is in 'charge' of the goods at the port of loading, during the carriage, and at the port of discharge, ie. normally from the time he has taken over the goods from the shipper until the time he has delivered to the consignee, subject to local port regulations.[28]

(4) Basis of carrier's liability: 'presumed fault'

The Hamburg Rules adopt an entirely different approach from the Hague-Visby Rules with regard to the basis of a carrier's liability. The liability of the carrier under the Hamburg Rules is based on the principle of 'presumed fault', which means that, as a rule, the burden of proof rests on the carrier. It envisages three important points. First, the carrier is, without more, liable for loss of or

[25] Article 1. 2, the Hamburg Rules
[26] See Article 1(b), the Hague Rules
[27] Article 1. 6, the Hamburg Rules
[28] Article 4, the Hamburg Rules

damage to goods as well as for delayed delivery if such loss, damage or delayed delivery of goods occurred while the goods are under his charge. Secondly, the carrier is absolved from liability if he, his agents or servants have taken all measures which could reasonably be required of them to avoid the loss, damage or delayed delivery in question. Thirdly, in contrast to the position under the Hague-Visby Rules, it is for the carrier to prove that he has not been at fault.

(5) Abolition of 'exceptions' to the carrier's liability

An important feature of the Hamburg Rules is the absence of familiar 'exceptions' to a carrier's liability contained in Art. IV rule 2 of the Hague and Hague-Visby Rules.[29] In so far as the majority of the exceptions are concerned, the effect of the abolition would be minimal. However, one major shift of responsibility is envisaged by the abolition of the exception covering the 'negligence in the navigation and management of the ship'.[30] Cargo interests have long contended that it is unreasonable that a carrier, in complete control of vessel and cargo, should exclude such liability which is basic to the contract of carriage. Moreover it is a form of protection which is not extended to the carrier in any other mode of transport. Carrier interests are naturally reluctant to forgo such traditional protection and argue strongly, *inter alia*, that such a change would result in a substantial increase in freight rates.

(6) Liability for delayed delivery of goods

The Hamburg Rules, unlike the Hague-Visby Rules, impose liability on the carrier for delayed delivery of goods unless he has taken all measures which could reasonably have been taken to avoid the delay and its consequences.[31] This brings the Hamburg Rules in line with three international conventions concerning other modes of transport of goods, namely: the Warsaw Convention 1928 (air); the CMR Convention 1956 (road); and the CIM Convention 1962 (rail).

[29] Article 5. 1, the Hamburg Rules
[30] Article IV rule 2(a)
[31] Article 5. 1, the Hamburg Rules

(7) Higher limitation of liability

In respect of the carrier's right to limit his liability, the Hamburg Rules impose higher limits than those imposed under the Hague and the Hague-Visby Rules. The liability of the carrier for loss of or damage to goods is limited to 835 SDRs per package or other shipping unit or 2. 5 SDRs per kilo of gross weight of the goods.[32] The liability for the carrier for delay in delivery is limited to an amount equivalent to 2. 5 times the freight payable for the goods delayed (but not exceeding the total freight payable under the contract of carriage).[33] The carrier is not entitled to limit his liability if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.[34]

Jurisdiction; wider choice of courts: Under the Hamburg Rules, the plaintiff is given a wide choice of courts in which to initiate judicial or arbitral proceedings[35]. Provided that the court selected is competent in terms of its own domestic law, the plaintiff has an option of instituting proceedings in any court situated in one of the following places:

- the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- the port of loading or the port of discharge; or
- any additional place designated for that purpose in the contract of carriage by sea.[36]

Apart from the aforesaid, an action may be instituted in the courts of any port or place in a contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with the normal

[32] Article 6. 1(a), the Hamburg Rules
[33] Article 6. 1(b), the Hamburg Rules
[34] Article 8. 1, the Hamburg Rules
[35] Under Article 22, the parties may provide by agreement evidenced in writing that any dispute be referred to arbitration.
[36] Article 21. 1, the Hamburg Rules

legal procedures. In such a case, however, the defendant can demand the removal of the trial to one of the jurisdictions referred to in the above paragraph, provided that he is prepared to furnish security sufficient to cover any possible judgment against him.[37]

From a pure legalistic point of view, the Hamburg Rules appear to be much more comprehensive and much better in terms of giving solutions to the defects or shortcomings of the other two regimes. At the same time, it is to be admitted that when compared to either the Hague Rules or the Hague-Visby Rules, the Hamburg Rules are clearly in favour of the shipper. It is, therefore, not surprising that the Rules have not been warmly received by ship-owners and their insurers.

Those critical of the Hamburg Rules fear that the application of the Rules so favour cargo interests to such an extent that increased claims will be encouraged, resulting in increased carrier liability. They also point out the fact that because the Hamburg Rules have higher limits of liability, the amount of damages recovered from carriers will be higher. This increase in liability in turn result in higher insurance costs and inevitably in higher freight rates. This may put a financial squeeze on carriers and their insurers at a time when the shipping industry is depressed and the insurance industry is facing troubled times.[38]

5. CARRIAGE OF GOODS BY SEA LAW IN THE BEST INTEREST OF MALAYSIA

The first thing which is very clear is that the century-old Hague Rules are no more relevant for Malaysia as an emerging economy. The increasing use of Electronic Data Interchange and multimodal transport in Malaysia is not at all compatible with the Hague Rules. The change is inevitable. In fact, Malaysia is very much lagging behind its trading partners in particular and the practice of the international community in general so far as the law regulating carriage of goods by sea is concerned.

[37] Article 21. 2(a), the Hamburg Rules

[38] See Johnsen, Neils F., 'A Comparison of the Hague, Hague-Visby, and Hamburg Rules:

Malaysia's selection of a new regime for the carriage of goods by sea should largely depend on the practice of the major trading partners. It should also take into account the current trend of the international practice and the interests of the Malaysian ship owners, shippers, insurers, and forwarding agents.

5.1 The practice of major trading partners

Malaysia's top ten trading partners, in order of trade value, for the year 2002 are, (1) United States of America; (2) Singapore; (3) Japan[39]; (4) People's Republic of China; (5) Taiwan; (6) Hong Kong; (7) Republic of Korea; (8) Thailand; (9) Germany; and (10) Indonesia.

The United States of America

The United States have adopted the Hague Rules by virtue of the US Carriage of Goods by Sea Act 1936. The Maritime Law Association (MLA) of the United States prepared a new draft COGSA and submitted it to the Senate in 1996. The Senate Sub-committee improved it and the sixth draft was out on April 16, 1999 (commonly referred to as the Senate COGSA 1999).

The proposed US COGSA (Senate COGSA 1999) contains some useful Hague-Visby Rules and Hamburg Rules provisions, but the other particular provisions, apparently adopted in the negotiations with various interests, would seem to put it far out of the mainstream of international law on carriage of goods by sea. It is a completely different statute from anything in the shipping world. That is why Professor Tetley has rightly asked: ' Would it have not been better to have gone the route of China, Australia, New Zealand, the Nordic countries, or Canada and adopted changes to US COGSA 1936 which were compatible with the Hague-Visby Rules 1968/1979 and the Hamburg Rules 1978, thus placing the US in a position to accept new international legislation in the future, while leaving it with a regime that is not out of step internationally?[40]

Much Ado About (?)', (1996) 70 *Tulane Law Review*, 2051.

[39] In terms of imports, Japan is the top importer to Malaysia and the USA and Singapore rank the second and the third respectively.

[40] Tetley, William, 'The Proposed New United States Senate COGSA: The Disintegration of

The major shortcoming of the proposed US COGSA is its lack of conformity with established international maritime regulation. That drawback has attracted criticism from America's trading partners and has made the adoption of it unlikely. For the time being, the bill is still awaiting congressional attention. Furthermore, there is a close linkage between the proposed US COGSA and the UNCITRAL's Draft Instrument on Carriage of Goods.[41] Therefore, it is not surprising for the Chairman of the US MLA Committee on Carriage of Goods to state: ' For the time being, the proposal to amend the current COGSA will not be addressed by the US Congress until such time as the UNCITRAL document has been completed'.[42] It will take some years for the UNCITRAL Draft Instrument to complete.

Singapore

Singapore, Malaysia's immediate neighbour and a fellow ASEAN member, shares the same legislative history with Malaysia. It was, however, very prompt to be up-to-date with its laws and has adopted the Hague-Visby Rules since 1972. Its Carriage of Goods by Sea Act 1972 was amended in 1995 to be able to cope with the modern situations.[43]

People's Republic of China

Since China emerged as a major maritime nation, it has faced increasing pressure from trade partners to adopt reasonable laws and regulations. Within the last twenty years, it has enacted over twenty shipping-related laws and regulations including a Code of Maritime Law (Maritime Code).[44] The Chinese

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Uniform International Carriage of Goods by Sea Law', (1999) 30 *Mar. L. & Com*. 595, at 605.

[41] It seems that the main authors of the two instruments are the same. See Tetley, William, 'Reform of Carriage of Goods – The UNCITRAL Draft & Senate COGSA 99', MLA CLE Presentation, New York, May 2, 2003.

[42] Excerpt of the formal report of William R. Connor III, Chair of the US MLA Committee on Carriage of Goods at San Diego meeting of the US MLA in the Fall of 2002; cited from the website: http://tetley.law.mcgill.ca.

[43] Singapore's Carriage of Goods by Sea Act was enacted by Parliament on 3 November 1972 and came into force on 16 January 1978.

[44] *See* MARITIME LAW OF THE PEOPLE'S REPUBLIC OF CHINA [Maritime Code] (Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress), *available at* http://www.qis.net/chinalaw/lawtranl.htm.

Maritime Code 1993, leans heavily towards the Hamburg Rules 1978 [45], while retaining a few important Hague-Visby principles[46] in regulating the carriage of goods by sea. It also contains some provisions on multimodal transport resembling, in general, those of the Multimodal Convention 1980, and a number of original provisions on other matters. Therefore, the Chinese practice appears to be the hybrid regime of both Hamburg and Hague-Visby, supplemented by special innovative rules adapted to suit China's unique circumstances.[47]

Japan and Republic of Korea

Japan adopted its Carriage of Goods by Sea Act in 1992[48], which entered into force on 1 June 1993. In this way, Japan has become a member of the Hague-Visby regime with the full support of both Japanese ship-owners and shippers. Similarly, by virtue of Korean Commercial Code (revised), entered into force on January 1, 1993, Republic of Korea has also incorporated the Hague-Visby Rules into its national law.[49]

Thailand, Taiwan, Indonesia, and Germany

Thailand, a neighbour of Malaysia and an ASEAN member, has passed the Carriage of Goods by Sea Act 1991, (BE 2534), primarily based on the Hague-Visby Rules but supplemented by certain provisions of the Hamburg Rules.[50] Taiwan, a major trading partner of Malaysia, and Indonesia, an ASEAN member, apply the Hague-Visby Rules by virtue of their respective national

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[45] Among the provisions broadly similar to Hamburg are the definitions in general, and especially the definitions of 'contract of carriage by sea' (art. 41); 'carrier' (art. 42(1)) and 'actual carrier' (art. 42(2)); the port to port period of responsibility (although limited to containerised goods); the joint and several liability of the carrier and actual carrier (art. 63); liability for delay (art. 57); and the rule on the contents of the bill of lading (art. 73).

[46] The major rules of the Code reflecting the Hague/Visby Rules are the due diligence obligation of the carrier (art. 47); the carrier's duty to care for the cargo (art. 48); the one-year time for suit (art. 257); the tackle-to-tackle period of responsibility for non-containerized goods (art. 46); the excepted perils (art. 51); the rule on deviation (art. 49, second sentence); and the 666.67 SDR per package and 2 SDR per kilo limitations (arts. 56 and 277).

[47] See, Hamilton , Mark S., 'Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission', (2002) 3 *Asian Pacific Law and Policy Journal* , 10.

[48] See the Japanese Carriage of Goods by Sea Act, 1992, translated into English by Prof. Kazuo Iwasaki, Nagoya Keizai University, Japan.

[49] See Rok Sang Yu & Jongkwan Peck, ' The Revised Maritime Section of the Korean Commercial Code', [1993] LMCLQ, 403, at 408.

[50] The Carriage of Goods by Sea Act 1991 of Thailand entered into force in February 1992.

legislation.[51] Germany is a party to the Hague Rules and has incorporated the Visby Protocols into the German Commercial Code in 1986. Germany may therefore be considered, for practical purposes, as a Hague-Visby State.

5. 2 Current International Practice: Towards fragmentation

It is clear that there are at present three regimes that regulate the carriage of goods by sea: the Hague, Hague-Visby, and Hamburg Rules. The Hague Rules, however, appear to be no more relevant to the contemporary world even though a few former colonies and small entities (excluding the United States of America) are still parties to them. 52 States, including almost all of the world's major maritime nations, are either parties to the Hague-Visby Rules or have the Rules in their national laws. To date, 29 States are parties to Hamburg Rules[52]: they are mostly developing States. It is very unlikely that any major shipping nation will become a party to the Hamburg Rules. The competition between the two regimes (Hague-Visby versus Hamburg) is quite a natural one and it reflects the competition between carrier interests and cargo interests. Neither of the two competing regimes can attract the overwhelming majority of States. The primary objective of the unification of the law governing carriage of goods by sea has already been frustrated by the conflict of interests within the shipping industry itself.

In the meantime, we should not lose sight of the activities of the two organisations which were responsible for the adoption of the two regimes: the Comit'e Maritime International (CMI) for the Hague-Visby, and the United Nations Commission on International Trade Law (UNCITRAL) for the Hamburg Rules. In May 1998, the CMI finally decided to drop any attempt to amend the Hague-Visby Rules. It decided to initiate a new project. On December 10, 2001, the CMI adopted its 'Draft Instrument on Issues of Transport Law', and delivered it to the UNCITRAL for further action. Based on the Draft Instrument of the CMI, the UNCITRAL has commenced its new

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[51] See http://tetley.law.mcgill.ca/maritime/table.htm.

[52] Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tunisia Uganda, United Republic of Tanzania, and Zambia. http://www.uncitral.org.

mega project on the preparation of its 'Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]'[53]. It means that at the moment, the UNCITRAL is in the early stage of its negotiations on a new international convention that may some day replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.[54]

The UNCITRAL Draft is to be a Multipurpose Convention, comprising of complicated and demanding subjects – multi-modal carriage, negotiability, electronic commerce, freight, lien, etc. It is indeed an enormous task to draft such a convention and the ambitious project is a long way from completion.[55] But the important question is whether it is realistic to expect the nations of the world to adopt such a document in the near future (if it were successfully drafted) when we have failed to agree on 'port to port' (Hamburg, 1978) or multi-modal carriage (The multi-modal Convention, 1980[56]).

The current international practice relating to carriage of goods by sea is indeed disappointing. Many shipping nations, in despair, are going off on their own and adopting non-uniform changes to their national carriage of goods by sea laws. In some cases, their national legislation includes 'hybrid' provisions, combining elements drawn from both the Hague-Visby and Hamburg regimes, as well as original rules peculiar to the State concerned. The unfortunate result of these 'municipal' statutes is a further fragmentation of the law governing carriage of goods by sea.

The only feasible solution to this fragmentation of international practice is to look for what the world wants right away; the world wants a solution without delay to major hardcore problems of carriage of goods by sea, among

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[53] See 'Draft Instrument on the Carriage of Goods [Whole or Partly] [by Sea]', UNCITRAL Working Group III (Transport Law), Twelfth Session, Vienna, 6-17 October 2003, Doc. A/ CN.9/ WG.III/WP.32

[54] See Robertson, David W., and Sturley, Michael F., 'Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits', (2003) 27 *Mar. Law*, 495.

[55] See Tetley, William, 'Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ' 99' , MLA CLE Presentation, New York, May 2, 2003, http://tetley.law.mcgill.ca

[56] More than twenty years have passed and the Multi-modal Convention 1980 was ratified by only 10 States. Ratification by 30 States is required to bring it into force.

others, a realistic amount of limitation of liability and a fair jurisdiction clause. The bases for any attempt to draft a future convention should be (1) the Hague-Visby Rules (because currently 75% of the world trade is done under the Hague-Visby Rules) and (2) the Hamburg Rules (because 29 States have adopted those Rules). Therefore, the Hague-Visby Rules should be slightly amended by the CMI or by the UNCITRAL, adding the jurisdiction and arbitration provisions, (and perhaps eliminating the exception of navigational fault and adding port-to-port liability) of the Hamburg Rules.

5. 3 Suggestions for Malaysia's new Carriage of Goods by Sea Act

It is interesting to note that there was a move to adopt the Hague-Visby Rules in Malaysia. About thirty years ago, the Carriage of Good by Sea Bill 1970, was tabled in Parliament. The proposed Bill would repeal the Carriage of Goods by Sea Ordinance 1950 and its equivalent statutes applicable to Sarawak and Sabah respectively. The Bill would adopt the Hague-Visby Rules with some minor modifications. It was intended to be a consolidated legislation incorporating the Hague-Visby Rules and some other maritime conventions. It proposed changes to the Merchant Shipping Ordinance 1952.[57] Unfortunately, the Bill was never passed.[58] It is nevertheless good for Malaysia for two reasons:

(1) A consolidated legislation for shipping law is not appropriate for Malaysia at present because it is based on a civil law model and would have some clashes with common law ideas with which Malaysia has been familiar for so many years. It is the submission of the present writer that the best way is to draft a pure Carriage of Goods by Sea Act without any mixture with other merchant-shipping matters. These matters would form subjects for separate statutes.

(2) More than thirty years have passed after the proposed Bill and during this period we have witnessed the shortcomings of the Hague-Visby Rules and also found ways and means to remedy them. Now is the best time for

[57] For an analysis of the proposed Carriage of Goods by Sea Bill 1970, See Cecil Abraham, 'Proposed Changes in Malaysian Shipping Law', in Peter Koh Soon Kwang, ed., *Carriage of Goods by Sea*, Butterworths, Singapore, 1986, 145, at 147-52.

[58] See, Jeremy M. Joseph, 'Carriage of Goods by Sea: Hague-Visby for Malaysia?', [1998] 1 *MLJ* 1, at 2.

Malaysia to draft a new Carriage of Goods by Sea Act, taking into consideration the experience of other countries.

The analysis of the international practice in the previous section clearly indicates that all the major trading partners of Malaysia, with the exception of the United States of America, are adopting either the Hague-Visby Rules or a hybrid regime of Hague-Visby and Hamburg (eg. China). The current international practice reveals that the majority of States, including the major shipping nations where carrier interests are dominant, adopt the Hague-Visby Rules whereas not a negligible number of States, mostly developing ones where cargo interests are dominant, adopt the Hamburg Rules. Again, we can see that some of the Hague-Visby States, in order to remedy the short-comings of the Hague Visby Rules; and perhaps to be fair and just to the cargo interests, apply in their national law certain provisions of the Hamburg Rules.

For example, in Australia, the Carriage of Goods by Sea Act 1991 provided for the implementation of the Hague-Visby Rules and for their automatic replacement by the Hamburg Rules after three years. In 1994, introduction of the Hamburg Rules was delayed until 1997 by a resolution of the Parliament. In 1997, due to the opposition to the Hamburg Rules, the Carriage of Goods by Sea Amendment Act 1997 was passed to replace the 'automatic trigger' mechanism of the 1991 Act for implementing Hamburg Rules with a requirement for reviews at five-year intervals. As a result, Australia continues to be bound by the Hague-Visby Rules. The next year, the Carriage of Goods by Sea Regulations 1998 were promulgated, to add some modifications to the 1991/ 1997 COGSA. These include 'port-to-port period of responsibility' and damages for delay, both of which are Hamburg Rules principles.[59]

Again, in Thailand, although the Carriage of Goods by Sea Act 1991 is based on the Hague-Visby Rules, it also contains certain Hamburg Rules principles of 'port-to-port period of responsibility' and damages for delay

[59] For the details of the modifications made by the Carriage of Goods by Sea Regulation 1998, see Sarah Derrington & Michael White, 'Australian Maritime Law Update: 1998' (1999) 30 *Mar. L. & Com.* 419, at 420.

(limited to 2.5 times the freight payable for the goods delayed)[60]. The same is true with the Nordic countries (Denmark, Finland, Norway, and Sweden).[61]

Against this background, which regime is the best for Malaysia? It is indeed a fact that Malaysia is still a country of shippers rather than ship owners. Therefore, it is submitted that it would be in the best interest of Malaysia to adopt a new Carriage of Goods by Sea Act, incorporating a hybrid regime of the Hague-Visby and Hamburg Rules, supplemented by special innovative rules adapted to suit Malaysia's unique circumstances.

Malaysia should adopt the following Hague-Visby Rules provisions:

- 'Tackle-to-tackle' period of responsibility for non-containerised goods;
- Due diligence obligation of the carrier;
- Carrier's duty to care for the cargo;
- The excepted perils (except the national fault exception);
- Limitation of liability for loss of and damage to goods – 666.67 SDRs per package and 2 SDRs per kilo;
- One-year time for limitation of action.

Malaysia should adopt the following Hamburg Rules provisions:

- Definitions of the 'contract of carriage by sea', 'carrier', and 'actual carrier';
- 'Port-to-port' period of responsibility for containerised goods;
- Liability for delay in delivery of goods – 2.5 times the freight payable for the goods delayed; and
- Jurisdiction and arbitration clauses.

[60] See Tilleke & Gibbins, 'Maritime Claims', *Thailand Legal Basics*, March 2003, 151.

[61] A new Maritime Code was adopted by the Nordic countries in 1994. The Nordic Maritime Code 1994 constitutes an attempt to add parts of the Hamburg Rules to the Hague-Visby Rules to which all four countries continue to be parties. The Hamburg Rules principles to be found in the Nordic Code include: the port-to-port period of responsibility, liability for delay, and some of the jurisdictional provisions. See Tetley, William, 'The Proposed New US Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law', (1999) 30 *Mar. L. & Com.*, 595, at 612-3.

6. CONCLUSION

The international practice regarding carriage of goods by sea has been very much fragmented. The UNCITRAL is now initiating negotiations for the Draft Instrument on Carriage of Goods [Wholly or Partly] [by Sea]. We have to wait and see how much the work will be successful. Since it is an enormous project involving complicated issues to be solved, what is certain is that it will take some years to complete. Even after its completion, no one can guarantee that it will attract the acceptance of the overwhelming majority of States. It is, therefore, advisable for Malaysia to proceed with the reform of its Carriage of Goods by Sea Act, which needed overhaul some 20 years ago.

It is the submission of the present writer that the new Carriage of Goods by Sea Act of Malaysia should adopt a hybrid regime of Hague-Visby and Hamburg Rules, added with some Malaysian flavour. In this way, the new law would be in tandem with that of Malaysia's major trading partners and also with international practice. It would also do justice to both carrier interests and cargo interests.

The Protection of Refugee Children in Malaysia: Wishful Thinking or Reality?

by

Amer Hamzah Arshad[1]

"I'm for truth, no matter who tells it. I'm for justice, no matter who it is for or against. I'm a human being first and foremost, and as such I'm for whoever and whatever benefits humanity as a whole."

Malcolm X

Introduction

The United Nations Convention Relating to the Status of Refugees 1951 (hereinafter referred to as the "1951 Convention") was the first international treaty approved by the United Nations that dealt with issues concerning refugees. The 1951 Convention clearly defines a refugee and sets out the kind of legal protection and the minimum assistance, social and basic human rights to be accorded to them by state parties to the Convention. The 1951 Convention emphasises that the rights to be accorded to refugees should, at the very least, be equivalent to the rights enjoyed by foreign nationals living legally in a given country. More developed countries could go further and even bestow rights upon a refugee that are similar to that of a citizen of a State.

Initially, the 1951 Convention was limited to protecting mainly European refugees in the aftermath of World War II, but in 1967 a Protocol was introduced ("the 1967 Protocol") that expanded the scope of the Convention as the problem of displacement spread around the world. The 1967 Protocol removes the geographical and time limitations written into the 1951 Convention.

To date the 1951 Convention and the 1967 Protocol are the two main international instruments that regulate the treatment of those compelled to leave their homes due to persecution in their country of origin. These two

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instruments are the bedrock of and guiding light for the office of the United Nations High Commissioner for Refugees (hereinafter referred to as the "UNHCR") in its efforts to help and protect more than 17 million[2] 'people of concern'[3] to the UNHCR.

Refugees in Malaysia

There are 145 countries that are parties to the 1951 Convention and/or the 1967 Protocol.[4] Unfortunately, Malaysia is one of the few remaining countries that has ratified neither the 1951 Refugee Convention nor the 1967 Protocol, even though there are approximately 27,000 refugees in Malaysia (excluding asylum seekers), 4,600 of whom are children.[5]

Malaysia has also failed to enact any legislation for the protection of refugees. As such refugees (adults and children) in Malaysia are treated as "illegal immigrants" by the authorities and are subjected to harsh penalties[6], detention[7] and deportation[8] under the Immigration Act 1959/63 (hereinafter referred to as "the Immigration Act"). The Immigration Act does not recognise refugees and due to the lack of such recognition in the Malaysian context, refugees have been placed in a state of uncertainty, inevitably resulting in human rights violations.

Since Malaysia is neither a state party to the 1951 Convention nor the 1967 Protocol, and does not provide for the protection of refugee children under the Immigration Act, one wonders what protection exists for refugee children.

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[2] As of 1 January.2004. Figure from UNHCR's table in ***Refugees by Numbers***, Edition 2004.
[3] Asylum seekers, refugees, internally displaced people returned refugees and stateless persons.
[4] As of 15 February 2005.
[5] As of 28 February 2005. Statistics obtained from UNHCR office, KL.
[6] Section 6(3) of the Immigration Act 1959/1963. If convicted, a person shall be liable to a fine not exceeding ten thousand Ringgit (RM 10,000.00) or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes
[7] Section 34 of the Immigration Act 1959/1963.
[8] Sections 31 and 32(1) of the Immigration Act 1959/1963.

Over the years, apart from the 1951 Convention and the 1967 Protocol, other international or regional treaties which directly or indirectly deal with the protection of refugees and those who seek asylum have been developed. One of the more relevant and noteworthy ones is the Convention on the Rights of the Child ("the CRC"), primarily because Malaysia has ratified it.

This paper will therefore look into the basic protection that should be accorded to refugee children under the CRC as well as its application in Malaysia in general.

Convention on the Rights of the Child

The CRC is important to children in general because it sets comprehensive standards for almost all aspects of a child's life – from health and education to social and political rights. The CRC was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and came into force on 2 September 1989. Malaysia signed and ratified the CRC on 17 February 1995.

What may be of particular interest to refugee children is Article 22 of the CRC. This is because Article 22 of the CRC specifically endorses the rights of refugee and asylum seeking children to appropriate protection and humanitarian assistance. Article 22 of the CRC states as follows:

"Article 22

1. States Parties shall take appropriate measures to ensure that **a child who is seeking refugee status or who is considered a refugee** in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receiv**e appropriate protection and humanitarian assistance** in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

> 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Initially, when Malaysia became a state party to the CRC, Malaysia had 12 reservations, one of which was this particular article. However, in March 1999, the reservation on Article 22 was removed.[9] The removal of the reservation on Article 22 of the CRC can be seen as a conscious act and a positive assertion of the Malaysian government to the world at large that Malaysia does recognise the need to protect and render humanitarian assistance to refugee children.

The CRC has gained importance because of the near-universal ratification of the treaty.[10] The CRC standards have been agreed to by almost every region and most countries of the world that represent every type of political system and religious tradition. The widespread ratification is also important for another reason; when a state is a party to the CRC but not to any refugee treaty, the CRC may be used as the **primary basis** for protecting refugee children.

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[9] To date Malaysia has also removed three other reservations. The reservations that remain are: Article 1 (Definition); Article 2 (Non-Discrimination); Article 7 (Name and Nationality); Article 13 (Freedom of Expression); Article 14 (Freedom of Thought, Conscience and Religion); Article 15 (Freedom of Association); Article 28 (1) (a) (Free and Compulsory Education at Primary Level); and Article 37 (Torture and Deprivation of Liberty). The reservations were made as it was found to be "incompatible with Malaysia's constitution, laws and ethics".

[10] There are 192 state parties as of 9 June 2004. Only 2 countries have yet to ratify the CRC.

Article 22, in particular clause (1) makes it clear that all state parties must provide appropriate protection and assistance to recognised refugee children as well as those who are seeking asylum. However, Article 22 of the CRC does not embark further to spell out what protection and assistance should be given to refugee children. Reference therefore has to be made to the Vienna Convention on the Law of Treaties[11] ("Vienna Convention") which provides for interpretational principles to be used when interpreting an international instrument. The Vienna Convention, *inter alia*, states that:

i) a treaty, shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose;[12] and

ii) the norms or the principles enunciated in the said treaty should be applied and performed in good faith and State parties should not frustrate the achievement of the object and purpose of the treaty.[13]

Read together, these rules call for good faith in the interpretation and performance of the CRC. Clearly, it follows that Article 22(1) of the CRC must be interpreted with reference to the object and purpose of extending international protection to refugee children and state parties must not interpret the Article in a manner that would frustrate or defeat the object and purpose of the CRC as a whole, in particular Article 22(1).

The purpose of the CRC is to ensure that special care, assistance and necessary protection are accorded to children because they are vulnerable and dependent in nature. Article 22(1) of the CRC, in particular seeks to ensure that refugee children will receive the same care and assistance as well as the appropriate protection accorded to refugees.

In the refugee context, the main "protection" and "assistance" envisaged under Article 22 of the CRC, would *inter alia*, include:

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[11] Malaysia is a state party to this convention.
[12] Article 31(1) of the Vienna Convention on the Law of Treaties.
[13] Article 26 of the Vienna Convention on the Law of Treaties. Also known as the principle *pacta sunt servanda.*

i) The prevention of the return of refugees to the country or territory in which their life or liberty may be endangered;

When a child is compelled to flee his country of origin due to a well-founded fear of being persecuted, his immediate concern is protection against expulsion or *refoulement*. Such protection is necessary for preventing further human rights violations. This is because a forcible return to his country of origin may endanger his life and safety.

Due to this, the international community has recognised the principle of *non-refoulement*, which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.[14].

This principle of *non-refoulement* can be found in Article 33 of the 1951 Convention and has also been considered by a number of scholars as a rule of customary international law[15]. It is thus binding on all states without exception and regardless of whether they have ratified the 1951 Convention or the 1967 Protocol.

ii) To prevent them from penalties for entering into the country of refuge without any documents.

Since a refugee is person who flees his country of origin to avoid persecution, it would be akin to rubbing salt into an open wound if he is prosecuted and punished on account of his illegal entry into or presence in the country where he is seeking refuge.

It must be emphasised that the situation of a refugee differs from that of an ordinary alien, who holds a national passport and enjoys the protection of the authorities of his country, to which he may return if he so desires. This is not so in the case of a refugee. Having entered the country in an irregular manner, a refugee is immediately at odds with the authorities of the country of reception. A refugee does not enjoy the luxury of

[14] *The Scope and Content of the Principles of Non-Refoulement; Opinion*, Sir Elihu Lauterpacht and Daniel Bethlehem.

immigration through normal customary channels, and thus find himself compelled to seek asylum by irregular entry to a safe country.[16] It is for these reasons that Article 31 was incorporated in the 1951 Convention.

iii) To reunite unaccompanied refugee children with their families.

In cases of unaccompanied refugee children, Article 22(2) of the CRC requires the state parties to assist such children to trace their parents and/ or family members and to reunite them.

This Article must be read in conjunction with Article 9[17], Article 10[18] and Article 20[19] of the CRC.

iv) Right to education.

Education is vital to the development of children and will contribute enormously to their well-being. The right to education is a recognised universal human right and Article 28[20] of the CRC binds state parties to fulfill their obligation in providing it. The mere fact that refugee children are being uprooted does not negate their rights to education nor does it negate the state's responsibility to provide it.

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[15] Deborah Perluss & Joan F. Hartman, *Temporary Refugee: Emergence of A Customary Norm*, 26 Va.J. Int'l L. 551 (1986)) - argues that temporary refuge should be recognised as a norm of customary international law. However, Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857 (1986) – disputes the emergence of a customary norm.

[16] See *The Law of Refugee Status*, by James C. Hathway, Butterwoths.

[17] Article 9 of the CRC requires states parties to ensure that a child shall not be separated from his or her parents against its will

[18] Article 10 of the CRC states that applications by a child or the child's parents to enter or leave a state party for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner. States parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for members of their family.

[19] Article 20 of the CRC states that where a child is temporarily or permanently deprived of the child's family environment, it shall be entitled to special protection and assistance provided by the State. States parties shall in accordance with their national laws ensure alternative care for such a child. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

[20] The Malaysian government's reservation on Article 28 paragraph 1(a), is limited to the fact that primary education is not compulsory and available for free to all. However the Malaysian government declares that primary education is available to everybody and as such, it should also be made accessible and available to refugee children.

In reality, refugee children in Malaysia are deprived of their right to education. Even though there is a provision which enables non-citizen children to be enrolled and admitted in local schools, such provisions do not include refugee children.[21]

Effects of the ratification on the Convention on the Rights of the Child

Ratification of international conventions should not be considered as a mere public relations exercise. It requires the state parties to take pro-active steps and actions in order to promote the principles of the conventions in the domestic context. The ratification of the CRC and the operation of Article 22 of the CRC (read together with Article 3 and 4 of the CRC), require state parties to legislate laws or amend existing laws to incorporate the fundamentals *vis-à-vis* the protection of refugee children into the realm of their respective domestic laws.

In the Malaysian context, the existing immigration laws at least must be amended to incorporate the principles pertaining to refugees in statutory form.

Be that as it may, no specific law has been legislated nor any amendment been made to the existing immigration laws *vis-à-vis* refugees in general, and refugee children in particular. This pathetic state of affairs begs the question as to what would then be the effects of ratifying the CRC from the domestic jurisprudential point of view.

Malaysia has generally taken the conservative approach in dealing with international law and instruments. This conservative approach is that the rights or principles in a convention or treaty have no application and cannot be incorporated into the local jurisprudence until an Act of Parliament decrees it

[21] Regulation 5 of the Education (Admission of Pupils to Schools, Keeping of Registers and Conditions under which Pupils May be Retained in Schools) Regulation 1998, states that only a child of a staff of embassy; a child whose parent is also a non-citizen, working in government service or agency, statutory body or any other place with a valid working permit; or a child whose parent is a permanent resident of Malaysia may be admitted to a school, provided that a student pass is issued by the Department of Immigration, among others.

so.[22] If at all, such instruments are only persuasive in nature as long as they do not contradict any express statutory provisions.[23] This approach is illustrated in the recent Federal Court decision of *Mohamad Ezam v Inspector General of Police*[24]. In *Ezam*'s case, Siti Norma Yaakob FCJ delivering one of the judgments of the apex court, and referring to the Universal Declaration of Human Rights 1948, said:

> "In my opinion, the status and the weight to be given to the 1948 Declaration by our courts have not changed. It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms. Since such principles are declaratory in nature, they do not, I consider, have the force of law or binding on member states."[25]

Force of Law?

Even though the above quoted passage appears to disapprove of the application of international documents in the domestic context; interestingly, Siti Norma FCJ in the same case went one step further to suggest a way for the incorporation of international instruments into the local jurisprudence. Her Ladyship said that:

> "If the United Nations wanted those principles to be more than declaratory, they could have **embodied them in a convention or a treaty** to which member states can **ratify or accede** to and those principles will then have **the force of law**".
>
> [emphasis added]

[22] See *Merdeka University Berhad v Govt of Malaysia* [1981] CLJ 191 (Rep).
[23] *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543
[24] [2002] 4 MLJ 449.
[25] Ibid. At page 514

This approach is heartening because it appears to suggest that the Malaysian courts are willing to consider evolving its jurisprudence away from the conservative approach that has been dominating the Malaysian Judiciary's approach in dealing with international instruments.

Legitimate Expectation and substantive relief?

The approach seems to suggest that since Malaysia has ratified the CRC, it would have the force of law and thus bind the Malaysian government in its dealings with refugee children. It is also apparent that by the same token, the ratification of the CRC would be the basis for a legitimate expectation of the protection offered and rights bestowed where refugee children are concerned. More importantly, it would enable the courts to provide relief to refugee children who have not been accorded such protection and rights.

In fact this is the position in Australia where in the case of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*[26] the following was held:

> "Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act (see *Minister for Foreign Affairs and Trade v Magno* [1992] 37 FCR 298 at 343; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266), particularly when the instrument evidences internationally accepted standards to be applied by Courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather**, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with**

[26] [1995] 2 CLJ 855.

> **the Convention (cf. *Simsek v Macphee* [1982] 148 CLR at 644) and treat the best interests of the children as "a primary consideration"**.[27]
>
> [emphasis added]

Therefore by ratifying the CRC, the Malaysian government has effectively made a positive statement to the world at large that the executive government and its agencies will act in accordance with the Convention and thus render the appropriate protection to refugee children.

The English courts have seen it fit to take the Australian position a step further. The Court of Appeal in England in the decision of *R v Secretary of State for Home Department ex-parte Mohammed Hussain Ahmed and others*[28] has since moved to interpret *Teoh* to say that not only does the concept of legitimate expectation demand that the state take into account the best interests of an aggrieved party, a breach of the same gives a right to relief to the aggrieved party. This case held as follows:

> "I will accept that the entering into a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. **This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country had undertaken**. This is very much the approach adopted by the High Court of Australia in the immigration case of *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273. The case was concerned with art 3 of the UN Convention on the Rights of the Child."
>
> [emphasis added]

[27] Ibid. At page 868.
[28] [1999] Imm AR 22.

Further to the English position, it could be argued further that the principle *pacta sunt servanda*, as enunciated in Article 26 of the Vienna Convention, which requires that a treaty in force should be performed by the parties to it in good faith, as creating an obligation on the parties to the convention.[29] In the present context, this, among others, would require the state party to refrain from actions incompatible with the object and purpose of the CRC, in particular Article 22(1) of the CRC, and that the state party must exercise its rights consistently with its other obligations under international law i.e. to protect refugee children. Consequentially, it is possible to argue that Article 22(1) of the CRC does create an obligation the breach of which may give rise to some kind of substantive relief as discussed in the case of *Muhammed Hussain Ahmed*.

Since the Malaysian government had made a representation to the world that it will act in accordance with any obligations which had been accepted under the CRC, it is the writer's contention that such a representation creates a legitimate expectation on the part of refugee children. This in turn gives a right to relief against the Malaysian government or any of its agencies in situations where they have acted, without reason, in a manner inconsistent with their obligations under the CRC.

As such, it may well be argued that if any refugee child is prosecuted in court for entering into Malaysia without a valid pass under Section 6(1)(c) of the Immigration Act, a challenge may be made to such criminal proceedings. The refugee child may commence appropriate proceedings by motion to a High Court to quash the charge and the proceedings by producing evidence to satisfy the court that the charge has been preferred without any basis or jurisdiction.[30] It is patently unacceptable for the Malaysian government to

[29] The International Court of Justice stated in the Nuclear Test Case:
"One of the basic principles governing the creation and performance of legal obligations, whatever the source, is the principle of good faith …" Nuclear Tests (Australia v France) Case, ICJ Reports, 1974, 253, 268, para 46.

[30] See *Karpal Singh & Anor v Public Prosecutor* [1991] 1 CLJ (Rep)183, where the Supreme Court discussed on the inherent power of the High Court. The Supreme Court held that the High Court has inherent power to quash an indictment if on the face of the indictment or if it is shown by way of an affidavit that the charge has been preferred without jurisdiction or has a

ratify the CRC and then act in a manner clearly contradictory, inconsistent and incompatible with the CRC, for example, by prosecuting refugee children as illegal immigrants.

Such conduct does not sit well with the legitimate expectation and/or obligation that had been created by virtue of Articles 3[31], 4[32] and 22[33] of the CRC (read together with the article 31 of the 1951 Convention, and Articles 26 and 31 of the Vienna Convention), and any such breach could therefore give rise to a right of relief.

External Aid to Interpretation?

Sadly, the local jurisprudence is stagnant and the courts appear very reluctant to develop interpretational principles that would allow the importation of the international instruments without an Act of Parliament. There is, however, an approach that should be considered and that has been long used in more developed legal jurisdictions to circumvent the conservative approach.

It has been widely accepted in other jurisdictions that the principles or norms of international instruments may also be incorporated through the process of common law. This involves the exercise of the interpretative jurisdiction of the courts. Courts may, through the interpretation of municipal law introduce and adopt principles of international human rights law into the domestic system. In *Ahmad v Inner London Education Authority* [1978] QB 36, Lord Scarman

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substantial and apparent defect. The Supreme Court further adds that where any party feels that the charge and consequent proceedings are illegal on the face of record, then his remedy is to take up appropriate proceedings before a High Court by way of a motion to quash the charge and whole proceedings producing evidence to the satisfaction of the trial Judge to adopt such a case.

[31] The best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

[32] States parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

[33] Supra.

held that:

> "Today, therefore, we have to construe and apply section 30 not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on grounds of race, religion, colour or sex. Further, **it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach conclusion consistent with our international obligations**".
>
> [emphasis added]

Similarly, in Australia, the *Teoh's* case has recognised that international instruments can be referred to as an aid to interpretation. It was said that:

> "But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. **Where a statute or subordinate legislation is ambiguous, the Courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party** [*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 381], at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.
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> **It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international l**aw

[*Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81]."

[emphasis added]

The principles in *Teoh*'s case have been followed and applied in two Indian Supreme Court cases; viz*, People's Union for Civil Liberties v Union of India & Anor*[34] and *Vishaka & Ors v State of Rajasthan and Ors*[35] In the *Vishaka* case, it was held that:

"**It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law** when there is no inconsistency between them and there is a void in the domestic law. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of gender equality, right to work with human dignity in Articles 14, 15, 1991)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. **Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and the content thereof, to promote the object of the constitutional guarantees**."

[emphasis added]

What these cases clearly show is that international instruments are not to be disregarded as not having local relevance simply because no Act of Parliament has been enacted to import it into a country. To cling to the opposite view is not only disappointing because no attempt has been made to develop the local interpretational jurisprudence, it would also suggest that Malaysia's ratification of the CRC is nothing more than a public relations exercise on an international level.

[34] AIR 1997 SC 1203.
[35] AIR 1997 SC 3011.

The writer contends that the Malaysian judiciary must, and not merely should, have regard to international conventions and norms for the purpose of interpreting domestic law; and that such interpretation must be made in "good faith" in accordance with the ordinary meaning to be given to the terms of the convention or treaty in their context and in the light of its objective and purpose.[36]

The cumulative effects of the operation of Articles 3, 4 and 22 of the CRC require that all three branches of the government consider the best interest of children in all of their actions, and to undertake all appropriate legislative, administrative and other measures for the implementation of the rights of the refugee children.

Therefore, in a situation where a refugee child is charged in court under Section 6(1)(c) of the Immigration Act; it is possible to argue that the Immigration Act is silent *vis-à-vis* its application on refugees, or, at the very least, that Section 6(1)(c) of the Immigration Act is ambiguous and obscure in its application to refugees, and to apply Section 6(1)(c) of the Immigration Act to refugees would result in absurdity. Hence, regard must be had to the CRC, in particular Article 22(1), as well as the Vienna Convention, in particular Articles 18 and 31(1) thereof.

To apply Section 6(1)(c) of the Immigration Act to refugee children would clearly be against the object and purpose of Article 22(1) of the CRC and the principle of "good faith" as espoused in Articles 18 and 31(1) of the Vienna Convention.

Reality

From the Malaysian government's point of view, asylum seekers and refugees (whether adults or children) are nothing more than unwanted statistics or a modern-day version of the plague-rats who have the potential to cause social problems in the current market-driven society. Notwithstanding the ratification

[36] Article 31(1) of the Vienna Convention on the Law of Treaties.

of the CRC, the actual protection and assistance given to refugee children is virtually non-existent. It is an undisputed fact that refugee children in Malaysia are vulnerable and suffer due to the lack of recognition of their status as refugees. There are cases where refugee children as young as 10 years have been arrested, are being detained[37], have been charged in court or been subjected to penalties merely on account of entering into Malaysia without valid documentation.

The incarceration of refugee children in detention or remand centres may cause serious physical and psychological health problems to refugee children. Refugee children in immigration detention are denied anything remotely resembling a normal life. They are constantly exposed to an environment detrimental to their physical and psychological well-being.[38]

In Australia for instance, the Royal Australian and New Zealand College of Psychistrics (RANZCP) having conducted a study on refugee children detained in detention centres as asylum seekers found that 80% of the refugee children had attempted to harm themselves, and that all the children met the diagnostic criteria for major depression and post-traumatic stress disorder.[39] The combination of pre-migration trauma, the detention environment and parental depression was "damaging" the children.[40] Even though there has been no proper study undertaken by the Malaysian government or the medical fraternity *vis-à-vis* the impact of detention on refugee children yet, based on the interviews and psychological assessment conducted by UNHCR as well as interviews conducted by the writer, there is empirical evidence to prove that refugee children in Malaysian detention centres do suffer from fear, severe depression, and emotional and traumatic experiences whilst in detention.

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[37] As of 28 February 2005, there are approximately 40 refugee children who are in detention centres. Source from the office of UNHCR, Kuala Lumpur.

[38] Comments by Dr Jon Jureidini, psychiatrist and spokesperson, Justice for Refugees SA.

[39] Royal Australian and New Zealand College of Psychiatrics (RANZCP)'s Media Release dated 11 November 2003. E.g. there is a case where a seven year-old boy who has been diagnosed with acute and chronic Posttraumatic Stress Disorder (PTSD) as a result of traumatic experiences in his fourteen months in Woomera and Villawood Detention Centres. The story of this child was featured on Four Corners on ABC TV, Australia in August 2001.
Source from http://www.chilout.org/information/childrens_cases.html#badraie.

[40] Ibid.

Apart from the psychological issue, there are also cases where refugee children have been beaten up by other detainees.[41] Must we wait until a death in custody occurs before the Malaysian government will seriously consider rectifying the appalling situation of refugee children in detention?

Refugee children who are not in detention are in no better position. They are deprived of basic needs which are available to other normal children. They are deprived of shelter, nutritious food, education and healthcare. The living conditions of the refugee children leave a lot to be desired. They live in uninhabitable huts and shacks, which are set up in secluded areas with no basic amenities or sanitary system.[42] Some of the more fortunate live in squatter houses. Food and clothing are scarce, and if they are lucky they may receive assistance from some non-governmental organisations, or from the UNHCR. At other times, they will just have to cook and eat the centre of a banana tree as their 'main course'.[43]

Formal education is denied to refugee children due to the fact that they are considered illegal immigrants by the Malaysian government. The law as it stands does not allow them to be enrolled in public schools.[44] The only education they receive is from informal classes organised by non-governmental organisations.

In short, whilst the children in Malaysia are blessed and enjoy the basic needs and luxuries that any capitalist society can offer, refugee children in Malaysia on the other hand are unfortunate and are denied the basic needs which are rightly due to them. Refugee children, by virtue of the CRC, should receive the necessary protection and assistance from the Malaysian government. They should not be ignored and left uncared for. They should not be arrested and charged in court.[45] Neither should they be locked up in detention

[41] Such information was communicated by the refugee children to the writer.
[42] The writer had the opportunity to visit a refugee settlement in the Klang Valley, and these are the things that the writer had observed.
[43] This was demonstrated by one of the refugees to the writer.
[44] Supra note 21
[45] The writer has represented refugee children who had been arrested and charged in court under Section 6(3) of the Immigration Act 1959/1963. In most of the cases, the charges were discontinued after representations were made to the Attorney General's Chambers.

centres.[46]The lack of commitment and political will on the part of the Malaysian Government to acknowledge their moral responsibilities only serves to perpetuate the plight of refugee children.

Solutions

Even though the Malaysian Government has yet to ratify the 1951 Convention and/or the 1967 Protocol or any of the international conventions pertaining to refugees and human rights, the Malaysian Government, at the very least, can still ensure and provide the most basic protection to a refugee such as immunity from penalties under the Immigration Act merely due to the fact that they entered into Malaysia irregularly, and to also provide them with protection from *refoulement*.

For a start, the Malaysian Government is in a position to use the present laws to achieve this goal. The Immigration Act, particularly Section 55, states that the Minister may, by order, exempt any person or class or persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto.

The Malaysian enforcement agencies, including the Attorney General's Chambers must adopt a policy which is reflective of, and in line with, the Malaysian Government's international obligation, which is created as a result of the ratification of the CRC. There must be strict adherence to such policy.

The judiciary can also play an important role through the process of common law. As stated above, the judiciary may adopt the principles of international human rights law relating to refugees into our domestic system through the interpretative process. The authorities which have been discussed above have clearly paved the way for the judiciary to move forward; the only question that remains is whether they have the intellectual honesty to do so.

The Malaysian Government must also realise that the refugee problem is the social responsibility of the Malaysian Government itself. Hence, the

Malaysian Government must consider establishing an inter-ministerial taskforce on the refugee situation in Malaysia in order to work out concrete measures and practical solution-oriented arrangements for all categories of persons of concern to UNHCR, in particular refugee children and asylum seekers.[47]

Ultimately, the Malaysian Government must sign and ratify the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, conduct comparative studies with other jurisdictions which are parties to the 1951 Convention and/or 1967 Protocol, and thereafter revise the relevant domestic laws, in particular the immigration laws to cater for the protection of refugees. Additionally, a proper mechanism for the determination of refugee status must be set up either within the existing Department of Immigration or through an independent tribunal.

Conclusion

Due to the growing refugee problem in the world today, some effective means must be adopted in order to solve this problem. The Malaysian government's paranoia of the influx of asylum seekers and refugees in the event the government ratifies the Refugee Convention is an unfounded fear which the government must overcome. As far as the writer is concerned, the supposed justification for the government not ratifying the Refugee Convention is nothing more that an attempt to avoid dealing with pressing humanitarian problems that are beleaguering thousands of asylum seekers (adults and children alike) in and around Malaysia.

It must also be remembered that since the Malaysian Government has ratified the CRC, its action must not contravene the principles as laid out in the CRC. Otherwise, the Malaysian Government will be seen as being ignorant of its international obligation and blatantly disregarding the protection of human rights norms and values.

[46] Supra note 38.

[47] Non-Paper prepared by UNHCR for the Roundtable Discussion on *Problems Associated with the Presence of Refugees in Malaysia* organised by Suhakam on 15 December 2004.

Furthermore, it is often said that the level of civility of a country is measured by how we treat our guests – and refugees are our guests. We must treat them with respect. There is much that the government can still do to ensure the treatment of refugees in a humane and civilised manner. The ratification of the CRC is a step in the right direction and, if a child refugee can be recognised, the next logical step is the recognition of adult refugees because in truth, what is difference between a child refugee and an adult refugee except their age? Lest we forget, the responsibility to protect and advocate the rights of refugee children is not the sole responsibility of the Malaysian government, non-governmental organisations or the UNHCR but the responsibility of each and every citizen in this country.