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COVER PHOTO shows Dr Radhakrishnan Ramani. Born in Madras, South India in October 1901, Dr Radhakrishnan Ramani obtained degrees in the Arts and Law before proceeding to England to further his legal studies. He was called to the Bar in England in 1929 and came to practise law in Malaya. He quickly made his mark in the profession here and soon joined Sir Roland Braddell in practice.

A vegetarian, teetotaler and austere in habits, he had a scholarly disposition and gave much of his time to the profession. He was described by the then Attorney General of Malaysia as 'one of [Malaysia's] most brilliant lawyers'. An outstanding feature of his advocacy was 'that he was at all times content to rest his case on one main ground, or at most two or three', a true measure of 'his acuity and confidence'.

In June of 1947 he was elected to serve as a member of the first self-elected Bar Council under the then Advocates and Solicitors Ordinance 1947. He went on to serve as Bar Council Secretary from 1947 to 1952. Dr Ramani was elected and served as Bar Council Chairman from 1953 to 1960. He returned to the post of Bar Council Chairman from 1961 to 1963. An expert in constitutional and public international law, Dr Ramani also served as Chairman of the Federation Branch of the International Commission of Jurists.

It was however in the international arena, in the UN Security Council that Dr Ramani left his greatest mark. From 1964 to 1968 Dr Ramani served as Malaysia's Permanent Representative to the United Nations. He distinguished himself in the post, serving as President of the Security Council in 1965. No other Malaysian would serve in that capacity for another 24 years!

In 1968, he returned to Malaysia and to his first love – the practice of law. It might perhaps be more accurate though to say that he never really left the profession. In the midst of the turmoil of whether or not to bar Singapore lawyers from practice in Malaysia, and while Dr Ramani still served with distinction at the United Nations, he was instrumental in diffusing the tense situation here, cautioning that perhaps the view of the entire membership of the Bar ought to be sought before a decision on so weighty a matter was taken.

In March 1969, in honour of his services to the country, Dr Ramani was appointed to the Senate. Dr Ramani was awarded an Honorary Degree of Doctor of Letters by University of Malaya at its convocation in June 1969. He passed away in New York in October, 1970 and was posthumously conferred an Honorary Degree of Doctor of Laws by the University of Plano, Dallas, Texas, USA.

The Lord President, Raja Azlan Shah (as His Highness then was) concluded that 'the death of Dr Ramani has deprived this country of one of her greatest lawyers – born with first class brains and endowed by nature with a tireless energy in the pursuit of knowledge and in the execution of his duties'. The Chairman of the Bar said '[Dr Ramani's] achievements both in and out of the country [are] a great source of inspiration to the us, the members of the Bar and we take great pride in him'.

LEGAL OPINION

by

Tommy Thomas

I have been asked to advise the Bar Council as to whether there is a requirement for a quorum for Annual General Meetings of the Malaysian Bar. The Malaysian Bar ("MB") is a body corporate established pursuant to Section 41 of the Legal Profession Act 1976 ("the Act"). In consequence, the MB is in the nature of a statutory body whose powers, functions, duties and the like are to be found within the four corners of the Act, and the matter under consideration is to be analysed by a detailed consideration of the relevant provisions of the Act.

2. Section 47(I) of the Act provides that for the proper management of the affairs of the MB a Council known as the Bar Council ("BC") shall be established, comprising 36 members, including 3 officers specified in Section 54 (l), that is, President, Vice-President and Secretary (although it has been settled practice for a fourth office-bearer, the Treasurer, to also to be appointed) Section 48 provides that the term of holding office for every member of the BC (including its office-bearers) shall be one year. Section 52 provides that every in-coming BC "shall take office on the conclusion of the annual general meeting next following and shall hold office until the conclusion of the annual general meeting in the following year". By virtue of Section 64 (l) the BC shall convene "an annual general meeting of the Malaysian Bar to be held before the first day of April ,Section 70 (1) provides that every State Bar Committee shall have its annual general meeting in the month of March; this is also significant because each State Bar Committee is to elect at its annual general meeting its Chairman and the State Bar representative to serve on the in-coming Bar Council.

3. A combined reading of the sections discussed in Paragraph 2 above will indicate that express provisions exist in the Act requiring all the State Bar Committees and the MB to hold their respective annual general meetings

("AGM") in the month of March of each year. This is not only a statutory meeting, but also a mandatory meeting. In other words, the BC and the State Bar Committees have neither power nor discretion not to hold the compulsory annual general meetings at all or in any other time of a year other than in the month of March.

4. Sections 64 to 67 of the Act deal with general meetings of the MB. The marginal note to Section 64 is "Annual General Meetings". Section 64(2) imposes an obligation on the BC to present two matters to the annual general meeting, namely,

> "(a) a report on the activities of the Malaysian Bar during its (BC) term of office and
>
> (b) proper accounts, duly audited, of all funds, property and assets of the Malaysian Bar for the 12 months terminating on the 31s" day of December immediately preceding such general meeting

5. Thus, Parliament's intention with regard to the AGM of the MB is very clear: it is a statutory meeting that must be held in the month of March of each year so that the Annual Report and Annual Accounts are tabled and passed and at the conclusion o f every AGM, the out-going BC retires from office and the in-coming BC takes office .

These are the objects and purposes of the AGM of the MB, and they must be accomplished "before the first day of April" see Section 64 (1). Most significantly, Section 64 does not contain any express requirement on quorum for AGM's of the MB.

6. One has to consider Section 65 next, the marginal note of which reads "General Meeting". Unlike 64 which specifically deals with AGM's, Section 65 deals with all other general meetings other than the annual general meetings: the language of Section 65 (1) confirms this position. Two types of general meetings other than the AGM (which are commonly described as Extra-Ordinary General Meetings or EGMs) are contemplated in Section 65. First, a general meeting convened by the written requisition of 50 members of the

MB. Secondly, a general meeting convened by the BC whenever it considers it "necessary or expedient" to do so.

7. Section 67 relates to quorum. It has 3 sub-sections and it is sufficient to consider two of them. Sub-section (1) provides that the "quorum for a general meeting" of the MB shall be 1/5 of the total number of members of the MB personally present and no business be transacted "at any general meeting" unless a quorum is present when the meeting proceeds to business. Sub-section (2) states that "any general meeting, whether convened pursuant to Section 65 (2) or convened pursuant to Section 65 (4), shall be dissolved if a quorum is not present within 1/2 hour from the time appointed for holding the meeting". Sections 65 (2) and (4) refer to general meetings requisitioned by 50 members; in the first sub-section, the meeting is convened by the BC within 30 days while in the second sub-section, because the BC failed to convene within 30 days, the requisitionists themselves convened the general meeting. Hence, in cases where the BC convenes a general meeting under Section 65 (1) the ½ time imposed by Section 67 (2) to achieve the requisite quorum does not apply. Finally, sub-section (3) to Section 67 throws no light on the quorum issue.

8. It would therefore be clear that the answer to the question whether a quorum is necessary for AGM of the MB turns to some extent on the interpretation that one gives to Section 67 (1). It is possible to interpret the opening words of Section 67 (1) "the quorum for a general meeting to include the AGM. It is equally possible to interpret the same words to exclude AGMs, and to confine their language to "a general meeting of the Malaysian Bar other than the annual general meeting" referred to in Section 65, that is, only to EGMs. This would mean that one construes Section 64 on its own terms and without reference to Section 67.

9. To resolve these rival contentions it would be relevant to contrast the position between the AGM of the MB and the. AGM of the State Bar Committee. Section 70 refers to the AGM of State Bars. Section 70 (2) provides "at every annual general meeting, the Chairman of the State Bar Committee shall preside... ...and the quorum shall be 1/3 of the total number of members of the State Bar". Section 70A pertains to general meetings of State Bar

Committees, that is, the EGMs. Section 70 A(1) provides that every State Committee may convene a general meeting other than the annual general meeting. Section 70 A(2) states that the quorum at every such meeting shall be 1/3 of the total membership of the State Bar, Accordingly, a significant difference in the Act on quorums for AGM of the MB and State Bar Committees is this for the State Bar Committees, Section 70 (2) expressly provides for a quorum; no equivalent express provision exists for the MB.

10 It should be observed that although Section 70 (2) imposes a quorum for an AGM of a State Bar, it goes on to provide that if a quorum is not achieved within 1/2 hour from the time appointed, the AGM shall stand adjourned to the same day on the following week and place. However, no quorum is expressly stated to be required for the adjourned AGM and all State Bars have uniformly interpreted that sub-section to mean that no quorum is so required, consistent with Parliament's purpose and object that all State Bars must hold their AGMs prior to the AGM of the MB and the taking of office of the incoming BC thereafter.

11 . A final relevant factor in determining the true and proper interpretation of the words ". . .the quorum for a general meeting...." in Section 67 (1) is the important consideration that while an AGM of the MB is mandatory and must be held in the month of March of every year, an EGM, however convened, is a matter of discretion and is not held every year. Instead, it is convened from time to time when the occasion arises. Thus, if one were to review the history of the MB from the time the Act came into force in 1977, that is, for a period of more than 25 years, the AGMs have been held without fail annually while EGMs have been much less in number than the AGMs and certainly have not been held in every year during that period.

12. Section 17 A of the Interpretation Act, 1948 and 1967, which has the marginal note "Regard to be had to the purpose of Act", reads:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object".

13. Section 17 A, which was introduced in 1996, recognises the common law canon of interpretation that a purposive approach ought to be taken for the interpretation of statutes. The Legal Profession Act, in its entirety, and the provisions I have discussed so far, should therefore be interpreted by applying the purposive approach . What is the purpose or object of the Legal Profession Act in so far as the AGM of the MB is concerned?

The purpose and object that Parliament has expressly in mind is to ensure that the AGM of the MB is held prior to the first day of April of each year so that

(i) the Annual Report is tabled and accepted;

{ii} the Annual Accounts presented and adopted;

(iii) the out-going Bar Council (including its office-bearers) complete its one-year term of office, and

(iv) the in-coming Bar Council (including its office-bearers) takes office for the following one-year period.

14. Quorum for the AGM is neither a purpose nor an object. In fact, an oppressive quorum (as the 1/5 requirement which at present is about 2,400 because the strength of the Bar is some 12,000 members) may be a hurdle or a hindrance to achieving the purposes and objects of the Act. That may explain why Parliament has not chosen to expressly specify a quorum for AGM of the Malaysian Bar while it has done so by way of Section 70 (2) for AGMs of State Bar Committees. In my opinion, it should not be implied. In consequence, the quorum requirements of Section 67 should be construed to mean only general meetings other than annual general meetings, that is, EGMs.

15. For these reasons, I am of the opinion that there is no quorum requirement for an Annual General Meeting of the Malaysian Bar.

LEGAL OPINION

by
Datuk N Chandran

I am asked by the Bar Council Malaysia ("the Council") to advise on whether there is a quorum requirement for purposes of transacting any business at an Annual General Meeting of the Malaysian Bar ("the AGM of the Malaysian Bar").

The query springs from the specific provisions of the Legal Profession Act, 1976 ("LPA") relating to the AGM of the Malaysian Bar, General Meetings of the Malaysian Bar, Annual General Meeting of the State Bar and General Meetings of the State Bar, and in particular, on the quorum requirement entrenched in the said provisions, other than the provision on the AGM of the Malaysian Bar.

I hasten to mention at the onset, that the provision in the LPA on the AGM of the Malaysian Bar, is silent on the issue of quorum required.

As opposed to this, the provision in the LPA relating to an Annual General Meeting of a State Bar, is explicit in that, the quorum required is stated to be one-third of the total number of members of the State Bar - Section 70 (2) LPA.

Section 67 of the LPA has also entrenched in it a quorum requirement of one-fifth of the total number of members of the Malaysian Bar to transact any business at a general meeting of the Malaysian Bar, and Section 65 of the LPA empowers the Council to convene a general meeting of the Malaysian Bar, other than the AGM of the Malaysian Bar, at any time the Council considers it necessary or expedient.

Section 70 A of the LPA, provides for a quorum of one-third of the total members at a general meeting of the State Bar.

Section 42 (2)(d) of the LPA empowers the Council to make rules governing the manner of convening general meetings of the Malaysian Bar and the procedure thereat. I have the Council's confirmation that there are, as of now, no rules made pursuant to that provision.

It is in the light of the above express statutory provisions and the confirmation of the Council that I have been asked to express my view on the query posed to me in the letter of the Council dated 1 April, 2004.

What follows herein then are my view on the specific point posed to me in the said letter.

Before proceeding to address the specific issue posed to me, I should perhaps state that what I am about to state herein are premised on the provisions of the LPA referred to and the several decisions of the Courts, both local and of other jurisdictions having at the forefront the well entrenched principle of law that the expressions of Judges in every judgment must be read and understood as applicable to the particular facts of the case before them and must also be understood in relation to the subject matter that was before the Court in those cases *Tan Lay Soon v Kam Mah Theatre Sdn Bhd* (1992) 2 MLJ 434 at page 440.

I entertain absolutely no doubts in my mind that the provisions of the several sections of the LPA adverted to earlier herein, are very much precise and unambiguous. However, to my mind, the problem at hand is not one of precision or unambiguity, but a problem of *casus omissus.*

The rule of literal construction of statutes, where the meaning of the words of the statutes are plain, precise and unambiguous, though very much still in force, has over the years, given way to the "purposive" approach .

The purposive approach which dictates a construction which will promote the general legislative purpose underlying the provision of any statute, has been adopted by the Courts of this jurisdiction, including the Apex Court. The decisions of our Federal Court in *Krishnadas Achutan Nair & Ors v Maniyam Samykano* (1997) 1 CLJ 636 and *Tan Kim Chuan 8r Anor v Chandu Nair*

Krishna Nair (1991) 2 CLJ 682 are on point.

The solution to the problem of *casus omissus* and which is a problem relating to a matter which should have been, but has not been provided for in a statute, necessitates the Courts when called upon, to construe and determine provisions of statutes to ascertain the intention of the makers of the said provisions, and if it is found that they have by mistake overlooked something to fill in the gaps so as to make sense of the provisions. The very strong sentiments on this approach to construction of statutory provisions as found expressed in the following decisions are on point.

1 . *Seaford Court Estates Ltd v Asher* (1949) 2 All ER 155 at page 164;

2. *Magor & St. Mellons Rural District Council v Newport Corporation* (1950) 2 All er 1226 at page 1236;

3. *Lucy v ST Henleys Telegraph Works Co Ltd* (1969) 3 All ER 456 at page 462 ;

4 . *Northam v London Borough of Barnet* (1978) 1 All ER 1243.

The principles of law as applicable to construction of statutory provisions to be distilled from the above cases, may be summarised as follows :-

(i) that the Courts should construe an Act of Parliament so as to effectuate the intention of the makers of it, and not to defeat such intention;
(ii) that, if it be found by the Courts that the makers of an Act of Parliament have by mistake overlooked something, then the Courts should do their best to smooth it out.
(iii) that, the Courts should construe an Act of Parliament so as to avoid absurdities and incongruities, and at the same time endeavour to produce a consistent and just result.
(iv) that, the Courts should not alter the material of which the Act is woven, but can and iron out the creases.
(v) that, where a defect appears in any provision of a statute, a Judge cannot

simply fold his hands and blame the draftsman and do nothing about it.

(vi) that, if need be, the Judge must supplement the written words so as to give "force and life" to the intention of the legislature.

With these principles of construction of statutes in mind, I now proceed to address the specific point on which my view is sought by the Council.

The reference to a general Meeting of the Malaysian Bar or the State Bar is but a reference to a meeting of the members of the Malaysian Bar or the members of the State Bar concerned.

The reference to an Annual General Meeting, be it an Annual General Meeting of the Malaysian Bar or an Annual General Meeting of the State Bar, is but a reference to such a general meeting in terms of duration, and nothing more.

The fact that it is designated as an Annual General Meeting does not make it any less a general meeting . Here I can do no better than to echo the words, which fell from the lips of Brinsden J in the case of *Harman v Energy Research Group Australia Ltd***,** *Davidson v Energy Research Group Australia Ltd* (1985) 3 ACLC 536 Where at page 538 the last paragraph (left hand column), the Learned Judge had this to say:-

> "There is no magic in the use of the word "general", If all the members meet, it seems to me that the meeting must be a general meeting although, at the same, it may also be an extraordinary general meeting or an annual general meeting."

I am accordingly of the view that nothing turns on the omission in **Section 64** of the LPA on the quorum required to transact any business at an AGM of the Malaysian Bar as is expressly provided for in **Sections 65, 70 and 70 A** thereof.

I feel fortified in this view taken by me by the fact that Section 64, like **Sections 65 and 67** fall under the general heading which reads **"General Meeting of the Malaysian Bar".** (emphasis added).

It is also my view that the problem at hand is purely one of *casus omissus* in

that, ideally the legislature in enacting **Section 64** of the LPA should have provided for the quorum requirement as is found entrenched in **Sections 67, 70 and 70A,** but did not do so.

I have difficulties in seeing the rationale and logic for the legislature to have intended to exclude the quorum requirement for an AGM of the Malaysian Bar, which as I stated earlier , is for all intents and purposes, a general meeting of the Bar, but in terms of duration held annually, when such quorum requirement is required for an AGM of the State Bar . To my mind, construing Section 64 of the LPA, giving it a literal construction, and thereby saying that there is no quorum requirement for an AGM of the Malaysian Bar, will render the provision absurd. Applying the "purposive" approach to construction of statutes, the Courts have of recent times declared that in such a situation the Courts can and should use their good sense to remedy such absurdity.

There is one other, and perhaps an important reason for having to read into Section 64 the quorum requirement as expressly spelt out in the other provisions of the LPA referred to and considered earlier herein, and this is the rationale for such quorum requirement.

It need hardly be mentioned that the basis for such quorum requirement is to ensure the presence at a general meeting, be it that of the Malaysian Bar or the State Bar of a minimum number of its members to partake in the deliberations on the matters listed in the agenda for the said meetings and which matters relate to and concern the members. In my view, this consideration must apply with equal force to a general meeting of the numbers of the Malaysian Bar held annually.

Concluding, taking into account the several sections of the LPA brought to my attention and the principles of law as laid down by the decisions of the Courts, both local and abroad, referred to earlier herein, and on my understanding of the rationale for the quorum requirement at any meeting be it an Extraordinary General Meeting or an Annual General Meeting. I am of the opinion that there is a quorum requirement for an AGM of the Malaysian Bar, and in consequence the position hitherto taken by the Council is in my view, indeed a correct position.

LEGAL OPINION

by

Cecil Abraham

A quorum is the minimum number of people who must be present at a meeting in order for business to be transacted. The number of people required to constitute a quorum is usually provided for in the Constitution of the organisation and in the case of the Bar Council, the quorum should be provided for in the Legal Profession Act 1976 ("LPA").

Is a quorum required for the Annual General Meeting ("AGM") of the Malaysian Bar?

In order to answer this question, it is necessary to construe Sections 64, 65 and 67 of the LPA. I have not set out Sections *in extenso.*

Section 64 of the LPA refers to an AGM of the Malaysian Bar being convened before the 1st day of April. Section 64 does not have a requirement for a quorum.

Section 65 refers to a general meeting of the Malaysian Bar other than the AGM. Therefore, it would appear it is the intention of Parliament to draw a distinction between an AGM of the Malaysian Bar to be held before the 1st day of April and the convening of general meetings. Section 65 also refers to the mode by which extraordinary general meetings may be convened by members.

Section 67 refers to a quorum for a general meeting of the Malaysian Bar as opposed to an AGM of the Malaysian Bar. Subsection (2) provides that if a quorum is not present within half an hour, the meeting is dissolved.

I am therefore of the view that there is no requirement for quorum as provided

by Section 67 when the AGM is held.

The Malaysian Bar has always taken the position that the quorum requirement of Section 67 of the LPA applies to an AGM of the Malaysian Bar. I am of the view that this can only be so if the Bar Council proposes to rely on some form of common law custom. If the Bar Council wishes to rely on this custom in view of the fact that it has in the past taken the view, then the quorum requirement specified in Section 67 is applicable.

If Section 64 does not provide a quorum, then the common law rule would apply, namely that a majority of the members of the body needs to be present to enable the general meeting to conduct business validly, that is, in a way in which it will have legal effect. See Merchants of the Staple of England v Bank of England (1887) 21 QBD 165, set out below an extract from the judgment :-

> "The acts of a corporation are those of the major part of the corporators corporately assembled…. in the absence of special custom, the major part must be present at the meeting, and of that major part there must be a majority in favour of the act or resolution. "

If the common law rule is applied, it would appear that there must be present a major part of the members of the Malaysian Bar and that a major part must be a majority in favour of the act for resolution that is being moved at the material time. It is not in my view equivalent to the quorum requirement specified in Section 67.

I am of the view that in view of the clear provisions of Section 64, so long as a sizeable number of members of the Malaysian Bar are present, that should suffice for the meeting to be held.

Is an AGM a variant o a general meeting?

Textbook writers have argued that an AGM is a variant of a general meeting.

Hence, if that view is accepted, then of course it can be argued that Section 67 would apply. The same would apply to the convening of extraordinary general

meetings. I take the view that Section 64 has deliberately referred to an AGM. Sections 65 and 67 refer to general meetings, hence it is the intention of Parliament to make a distinction between the AGM and general meetings of the Malaysian Bar and I am therefore of the view that in the context of the LPA, an AGM is not a variant of a general meeting.

State Bar Quorums

I now refer to Section 70 of the LPA.

Section 70 also refers to an AGM but Section 70 Subsection (2), the operative phrase "At every such meeting, the Chairman of the State Bar Committees shall preside, and the quorum shall be one-third of the total number of members of the State Bar", is clear indication that Parliament has again in its wisdom decided to draw a distinction between meetings of the State Bar and the AGM of the Malaysian Bar. In Section 70, it refers to a general meeting other than an AGM and the quorum is one-third. It will be noted that the provisions of Section 70 are worded differently. I am of the view that Section 70 does not assist in the interpretation of Section 64.

Quorum requirement of Section 67

I am of the view that the amendment made to Section 67 requiring one-fifth of the members for a quorum was enacted in order to prevent extraordinary general meetings from being called. It was not intended to qualify Section 64. It may well be that the Parliamentary draughts men made a mistake that until such time as Section 64 is appropriately qualified, the Malaysian Bar should rely on the unambiguous and clear wording of Section 64.

Conclusion

I am therefore of the view that Section 64 of the LPA given a purposive interpretation, does not require a quorum as envisaged in Section 67.

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9 January 2006

The President,
Bar Council
13,15&17
Lebuh Pasar Besar,
50050 Kuala Lumpur.

BY HAND

Dear Mr. President,

Re: Release of Opinion

I refer to your letter of October 24 and requesting consent to release my opinion of April 5 to members of the Bar in respect of the quorum issue for meetings of the Bar. I also received a reminder from Ms. Ambiga over the telephone recently.

I was not aware that at the AGM held on October 22, there was a resolution to release the opinions subject to consent of the authors. I was abroad at that material time and only learnt about it upon returning home.

I have given considerable thoughts to the matter. I am not persuaded that it is right that I give my consent.

The quorum issue is over. Much as we cannot borrow or steal yesterday's sun to shine for us today, we should not cumber ourselves with yesterday's baggage when facing tomorrow. It is not that I give lesser importance to transparency or that accountability is something I do not hold dear. It is that I treasure the continuing relevance and direction and purpose of the Bar more.

It is enough for me that Council Members tell me there were three favourable and two unfavourable opinions over the quorum issue. As a member, if I were to suspect their honesty or do not trust them over a matter as simple as that, it is the beginning of the end of the relevance of the Bar.

I dread the day when the Bar upon a resolution, will have to disclose all opinions and deliberations from mundane to controversial topics to satisfy curiosity or grandsire selfrighteousness. If this should come to pass or be allowed to prevail, the Bar will die in bitter poverty.

Yours faithfully,

Loh Siew Cheang

ANWAR IBRAHIM'S LONG STRUGGLE FOR JUSTICE

Report on Datuk Seri Anwar bin Ibrahim's Appeal against conviction
observed on behalf of the Australian Bar Association and
International Commission of Jurists

by
Mark Trowell QC

1. INTRODUCTION

Federal Court Upholds Anwar Appeal

On 2 September 2004, the Federal Court of Malaysia delivered its decision in the appeal brought by the former Malaysian deputy prime minister Datuk Seri Anwar Bin Ibrahim against convictions for sodomy.

By a majority of 2:1 the Court upheld his appeal overturning the convictions and ordered his immediate release from prison. The Court was later to reject his appeal against convictions for acting corruptly by using his office to interfere with the police investigation of the sodomy allegations.

The majority found the complainant on whose testimony the prosecution was based to be an unreliable witness. Given the various inconsistencies and contradictions in his testimony, the judges concluded that it was not safe to convict on the basis of his uncorroborated testimony alone. They found that Anwar Ibrahim should have been acquitted without having to enter a defence.

The Federal Court's decision was for Anwar Ibrahim the culmination of a 6-year struggle for justice after pleading his innocence through the various tiers of the Malaysian Court system.

The Political Crisis of 1998

This report does not attempt to analyse the political dynamics that ultimately led to the dismissal of Anwar Ibrahim, but some brief observations are important to put what happened in context.

Anwar Ibrahim had been Dr Mahathir's political protégé and favourite to succeed him as prime minister. He was seen as the moderate and progressive voice of Islam.

His political fortunes ended abruptly when on 2 September 1998 the Malaysian Prime Minister Dato' Seri Dr Mahathir bin Mohamad dismissed his heir apparent from the positions of Deputy Prime Minister and Finance Minister.

For some months there had been tension between them. For the most part it seemed to concern the issue of how best to respond to the growing Asian financial crisis, but increasingly as Dr Mahathir's public popularity fell the real possibility of a leadership challenge became apparent. Anwar had become the Prime Minister's chief rival.

By the late 1990's Prime Minister Mahathir had been in power for almost 20 years. He had certainly presided over a period of dramatic economic growth in Malaysia, but his popularity was falling while that of his deputy was on the rise.

Anwar Ibrahim was seen as the natural successor to the Prime Minister. He was popular and highly regarded internationally as Malaysia's finance minister. Some in fact preferred to credit him with the management of the "financial miracle" that had transformed the country.

It seems abundantly clear the Prime Minister was convinced Anwar was moving to replace him, but Dr Mahathir was not ready to leave office.

The smear campaign against Anwar Ibrahim started in the Malaysian newspapers only days after his sacking.

Traditionally favouring the Government, the media headlined that Anwar Ibrahim had been implicated in acts of sodomy with others. It is difficult to imagine that such allegations would have been made against the wishes of Dr Mahathir or that the police investigation and subsequent decision to prosecute Anwar Ibrahim would have taken place without his approval.

The public response to Anwar Ibrahim's sacking was immediate. A series of public demonstrations occurred culminating on 20 September 1998 with a rally of more than 30,000 people led by Anwar through the streets of Kuala Lumpur protesting his dismissal and demanding the Prime Minister's resignation.

The public protests confirmed that Anwar Ibrahim was not about to leave public office quietly. The massive crowd of demonstrators that gathered in Merdeka Square in the heart of Kuala Lumpur must have been viewed as a serious threat to Dr Mahathir's rule.

Dr Mahathir justified his decision to dismiss Anwar Ibrahim deeming him "*morally unfit to lead the country*". He argued it was based on allegations of sexual misconduct, tampering with evidence, bribery and threatening national security.

He was quoted as saying:

> "He has… hoodwinked the whole nation and appeared to be very religious. If he becomes prime minister, God help this country... We cannot have a leader who is easily swayed by his lust... We cannot accept a leader who has strange behaviour".
> *Agence France Presse, 25 September 1998*

He went on to allege that Anwar Ibrahim had wanted to topple the Malaysian government.

Anwar Ibrahim counterclaimed that he was a victim of a high-level conspiracy to prevent him from revealing corruption and cronyism within the government.

Anwar Ibrahim's Arrest

On the evening of 20 September, while Anwar Ibrahim was in the middle of an international press conference, a contingent of 250 armed and masked security police forced their way into his home smashing doors and manhandling a large number of supporters who had gathered there.

Anwar Ibrahim was immediately arrested under the Internal Security Act (ISA) and taken from his house. He was kept in solitary confinement in police custody for nine days, interrogated and severely beaten.

When finally brought before a court, Anwar Ibrahim was charged with several offences of corruption and sodomy.

The Trial Process

After a lengthy trial lasting many months Anwar Ibrahim was in April 1999 convicted for acting corruptly and was sentenced to 6 years imprisonment. At the culmination of another trial on 8 August 2000, he was also convicted of various acts of sodomy allegedly committed on his wife's driver. He was sentenced to an additional term of nine years imprisonment.

Both trials attracted considerable international attention.

Over the next six years, Anwar Ibrahim maintained his innocence until partially vindicated in September 2004 when the Federal Court upheld his appeal against conviction on the sodomy offences. Weeks later, the same court refused to reverse an earlier decision by it to uphold the convictions on the corruption charges.

During his lengthy period of incarceration, Anwar Ibrahim had become the symbol of political opposition to the Mahathir regime. *Amnesty International* declared him to be a prisoner of conscience, stating that he had been arrested in order to silence him as a political opponent.

Dr Mahathir was later to say:

> "I have always been able to stand up against the people who challenge my leadership and I have won. And I believe that even against Anwar, I would have won".

He stated at the same time that he had sacked Anwar Ibrahim for moral reasons and the sacking had nothing to so with disagreements over IMF issues. [*Straits Times*, Singapore, 12 October 2004]

However, while enjoying considerable international support Anwar Ibrahim's criminal convictions effectively removed him from the Malaysian political stage. No longer a member of the dominant political party *UMNO*, he became the titular head of the small opposition grouping formed around him calling itself the *National Justice Party (Parti Keadilan Nasional*, popularly known as *Keadilan*) that sprang out of the "reformasi" movement that has increasingly dwindled in membership and influence over the last few years.

Keadilan suffered a severe defeat in the national elections of March 2003, losing four of its five seats in Parliament, with Anwar Ibrahim's wife, Dr. Wan Azizah Ismail, barely winning the seat her husband held before his downfall.

Dr Mahathir's successor, Prime Minister Abdullah Ahmad Badawi, on the other hand, led his party to resounding victory, defeating the country's fundamentalist Muslim opposition party, (known as *PAS*) in one or two states it controlled and widening *UMNO's* majority in Parliament.

Prevented by legislation from returning to Parliament until April 2008, Anwar is still considered by many as having the potential to become prime minister of Malaysia.

Whether that happens or not only time will tell, but his continuing battle with the justice system provides insight into its development under the considerable influence of Mahathir bin Mohamad over the 22 years of his rule.

Purpose of Report

The primary objective of this report is to record my observations of Anwar Ibrahim's appeal against his convictions for sodomy that took place in the Federal Court of Malaysia at the newly constructed *Palace of Justice* at Putra Jaya in May 2004.

My report seeks to examine the way in which the Malaysian justice system, when dealing with Anwar throughout his legal battles, failed to act independently from the executive arm of government that for the most part was identified with the interests of Prime Minister Mahathir.

It also reflects the struggle, since the late 1980's, of the judiciary to regain some independence from executive government influence. It was then that Dr Mahathir stamped his authority firmly on the judiciary by dismissing the Chief Justice and other justices thought hostile to the Government or at least considered to be unwilling to comply with its will.

Since that time, the judiciary in Malaysia has been criticised for lacking the capacity to independently and impartially determine politically sensitive cases.

One may conclude that in Anwar Ibrahim's case the judiciary simply failed to respond fairly and impartially to his complaints until such time as the influence of Dr Mahathir Mohamad had been lifted from it by his departure from office in October 2003. Only then could the abuses and injustices of past legal proceedings be rectified.

Substantial complaints were made against the legal process, including the use of the infamous *Internal Security Act (ISA)* to arrest and isolate Anwar and other persons in custody for extended periods of time before charging them with substantive offences; the use of violence by police to interrogate Anwar and his alleged accomplices to obtain confessions; the use of tactics by the judiciary and prosecution to intimidate Anwar's counsel during his trial by bringing charges of contempt and sedition against them (1) ; the many unfair rulings made by the presiding Judges at the trials and the admission of obviously inadmissible evidence against the accused during those proceedings.

The Malaysian Court of Appeal later rejected all of these complaints.

The Federal Court of Malaysia represented the final court of appeal for Anwar.

The Events Leading to Anwar's Arrest

The investigation concerning Anwar was well underway before the massed display of public disobedience in Merdeka Square on 20 September 1998.

Sukma Darmawan Sasmitaat Madja was an Indonesian national who had obtained Malaysian citizenship. He was also the adopted brother of Anwar. On 6 September 1998, he was arrested without charge.

Microbiologist Dr Munawar Anees was born in Pakistan, but moved to Malaysia in 1988 where he became a respected Muslim writer and founder of several journals of Islamic studies. He was also a friend and occasional speechwriter for Anwar Ibrahim. On 14 September 1998 he was arrested under Section 73 (1) of the draconian *Internal Security Act (ISA).*

The arrest of both men was not coincidental.

Convictions for Sodomy

On Saturday 19 September 1998, both Sukma and Dr Munawar appeared in separate courts charged under Section 377 D of the *Penal Code* with "*outrages on decency*".

The essence of the charges was that they had "*allowed Anwar to sodomise them*". It was alleged the offences had occurred at residences occupied by Anwar Ibrahim in 1993 and 1998, but no exact dates or times were specified.

Pleas of guilty were entered through their lawyers and they were accordingly convicted of "*unnatural offences*" and sentenced to terms of imprisonment of 6 months.

Sections of the Malaysian Penal Code applying to "unnatural offences"

Homosexuality or homosexual acts are not defined in the Malaysian *Penal Code*. They are described by reference to "*unnatural offences*" deemed to be "*against the order of nature"* and are punishable by up to 20 years imprisonment and whipping.

Section 377 A of the Penal Code states:

> "Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature."

Section 377 B of the *Penal Code* states:

> "Whoever voluntarily commits carnal intercourse against the order

> of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping".

Section 377 D of the *Penal Code* states:

> "Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years".

In addition, under *Shariah* law in several Malaysian states homosexual acts between Muslims are illegal and can incur jail terms of up to three years as well as mandatory whipping.

Appeals against Conviction

The morning after the court appearances of each man, the Malaysian media published sensationalist stories of the convictions. Anwar Ibrahim responded by denying the allegations that he had sodomised the men saying the convictions were part of a conspiracy to discredit him. He claimed the guilty pleas had been "*extorted under dire circumstances and emotional trauma*".

On 29 September 1998, newly appointed lawyers on behalf of both men advised that each had retracted his confession claiming it had not been given voluntarily and confirmed that appeals against convictions would be lodged.

There were other concerns about the investigation and trial process.

There is little doubt both men had been ill-treated in order to coerce confessions from them and during their pre-trial detention neither had been allowed access either to family or lawyers appointed to act on their behalf. When they appeared in court lawyers appointed by the authorities represented them.

Amnesty International would later take the view that Sukma Darmawan Sasmitaat Madja and Dr Munawar Anees were prisoners of conscience who were prosecuted solely to secure a conviction against Anwar Ibrahim and to discredit him publicly.

However, more charges were to be brought against Sukma Darmawan. He was later to be charged jointly with Anwar Ibrahim that he had sodomised Azizan Abu Bakar, the former driver of Anwar's wife, at Sukma's apartment in Tivoli Villa, Bangsar between January and March 1993.

2. THE ARREST OF FORMER DEPUTY PRIME MINISTER ANWAR IBRAHIM

The stakes had become incredibly high.

After his dramatic arrest on 20 September 1998, Anwar had been detained in solitary confinement for nine days before being charged with sodomy and corruption. He was then remanded to Sungei Bolah prison there to remain in solitary confinement until trial.

When on 29 September 1998 Anwar was brought to court to answer the charges he showed visible signs of injury. It was obvious that he had a swollen eye and bruised arm, neck, hand and face. He told the court that after his arrest he had been handcuffed and blindfolded then severely beaten by police to unconsciousness. He protested that he was not allowed medical attention for five days after that.

He explained that:

> "I was boxed very hard on my lower jaw and left eye. I was also boxed on the right of my head and they hit me on the left side of my neck very hard. I was slapped very hard left and right until blood came out from my nose and my lips cracked. Because of this, I could not see and walk properly."

As a result of his complaints, the court ordered that Anwar be medically examined. The medical report confirmed that there was evidence of injury "*over the left forehead and neck and received blunt trauma that resulted in residual bruises over the left upper and lower eyelids...*". The doctor considered these injuries to be consistent with having been assaulted as he alleged.

The outrage at Anwar's treatment continued to gather momentum. On 10 October 1998, the *Malaysian Bar Council* at an Extraordinary General Meeting adopted a resolution calling for the appointment of an independent Royal Commission of Inquiry to investigate the complaint of assault.

On 5 January 1999, the Attorney General Mohtar Abdullah revealed that police officers were responsible for the injuries suffered by Anwar Ibrahim while he was in legal custody. The Attorney General stated that:

> "Based on medical reports and the investigation file of the Special Investigation Team as a whole, I am satisfied that several injuries alleged by (Anwar) are not true, while there are injuries on certain parts of his body which are proved to have been caused by police officers whilst he was in police custody. I am also of the opinion that the Royal Malaysian Police is fully responsible for the injuries to (Anwar) whilst he was in legal custody of the Police. Nevertheless, the investigations which have been carried out so far have not identified the person or persons responsible for such injuries."

Two days later, the Inspector-General of Police Rahim Noor resigned admitting his direct responsibility for the assaults.

On 3 April 1999, the Government appointed the *Royal Commission of Inquiry into the Injuries of Dato' Seri Anwar Ibrahim Whilst in Police Custody*.

The Commissioners reported to His Majesty the Yang di Pertuan Agong (the Malaysian King) on 6 April 1999 concluding that they accepted the testimony of Anwar that he had been assaulted as he had described. They identified the perpetrator as Inspector-General Rahim Noor, but they could find no evidence to suggest he was part of a police conspiracy against Anwar or that Prime Minister Mahathir abetted the assault.

More that two years later, on 30 April 2001, Rahim was convicted of the assault of Anwar and was sentenced to two months imprisonment and fined RM 525.

3. THE TRIALS AND CONVICTIONS OF ANWAR IBRAHIM

The Corruption Charges

The trial concerning the allegations of corruption took place from November 1998 until April 1999.

There were four charges.

The first charge read as follows:

> "That you between 12 August 1997 and 18 August 1997, at the official residence of the Deputy Prime Minister, No 47 Damansara Road in the Federal Territory of Kuala Lumpur, while being a member of the Administration, to wit, holding the post of Deputy Prime Minister and Minister of Finance, committed corrupt practice whereby you had directed Dato' Mohd Said bin Awang, Special Branch Director and Amir bin Junus, Special Branch Deputy Director II, Royal Malaysian police, to obtain a written admission from Azizan bin Abu Bakar to deny sexual misconduct and sodomy committed by you for the purpose of protecting yourself against any criminal action or proceedings and as a result of which Azizan bin Abu Bakar had thereby made a written admission dated 18 August 1997 to the Prime Minister as directed and you have thereby committed an offence punishable under Section 2 (1) *Emergency (Essential Powers) Ordinance No 22/1970*"

The three other charges alleged the same acts of misconduct, but on different dates, namely 27 August 1997 (Charge 2), between 12 August and 18 August 1997 (Charge 3) and 27 August 1997 (Charge 4). Charges 1 and 2 referred to Azizan bin Abu Bakar, while charges 3 and 4 spoke of another complainant Ummi Hafilda bte Ali.

Section 2 (1) of the *Emergency (Essential Powers) Ordinance No. 22/1970* provides as follows:

> "Any member of the Administration, Parliament or State Legislative Assembly or any public officer who commits a corrupt

> practice shall be liable to a term of imprisonment of 14 years or a fine of RM 20,000 or both".

The term "*member of the Administration*" includes a person holding office as a government minister. Relevantly, "*corrupt practice*" is defined as "*any act done by a member…in his capacity as such member…whereby he has used his public position or office for his pecuniary or other advantage…*".

The allegation against Anwar Ibrahim was that he had attempted to orchestrate a cover-up by asking police to secure retractions from two people who had accused him of sexual misconduct.

When it became obvious at the conclusion of the prosecution case there were difficulties with some of the evidence concerning these issues, the trial Judge permitted each charge to be amended by deleting the words "*…to deny sexual misconduct and sodomy committed by you for the purposes of protecting yourself from criminal action or proceedings…*".

Raja Aziz Addruse (Anwar Ibrahim's counsel) complained that it had been an abuse of process by the prosecution to make sensational allegations of sexual misconduct throughout the trial and then abandon them at the conclusion of its case.

He complained that:

> "Anwar's name…(was)…smeared throughout the trial and the prosecution now tells us that the sodomy and sexual misconduct allegations are not a major part of the charges."

Justice Augustine Paul (a judge with no previous High Court experience who had been transferred from the Malacca Sessions Court to conduct the trial) saw no prejudice to the accused and allowed the amendment.

In April 1999, Justice Paul found Anwar Ibrahim guilty of the charges and sentenced him to six years imprisonment on each charge to be served concurrently with each other.

During the proceedings, Anwar Ibrahim had explained what he believed to be the underlying motive behind his persecution. He told the court: "*I objected to the use of massive public funds to rescue the failed businesses of his (Mahathir's) children and cronies"*.

Justice Paul was later appointed to hear the controversial prosecution of Anwar Ibrahim's counsel, Karpal Singh, for allegedly uttering seditious words during the 'sodomy trial' when raising concerns that his client was being poisoned while in custody. After a series of adjournments of the trial, the Attorney General subsequently withdrew the charge on 14 January 2002.

The response by Anwar supporters to his conviction and sentence was predictable. A crowd of about 500 demonstrated outside the court voicing their anger at the decision.

They were met with a quick and violent police response. Using tear gas, baton charges and water cannon laced with eye irritant police dispersed the protestors arresting 24 of them.

An appeal against conviction was taken to the Court of Appeal, but it upheld the decision of the trial judge delivering its decision on April 2001. An appeal to the Federal Court was also rejected in 10 July 2002.

A detailed examination of this case is not part of this report, but the conduct of the trial Judge together with his misdirections and rulings has been the subject of much discussion by many observers who for the most part concluded that a miscarriage of justice undoubtedly occurred.

Lawyers for Anwar Ibrahim were later to make a fresh application in September 2004 to the Federal Court to review its own decision to refuse the appeal.

The Sodomy Charges

The trial took place from June 1999 until July 2000. Anwar Ibrahim was convicted by Justice Dato' Arifin Jaka and sentenced by him on 8 August

2000 to a term of imprisonment of nine years to be served cumulatively with the other sentence.

The accused Sukma Darmawan was sentenced to six years imprisonment with four strokes of the rattan. Anwar Ibrahim, because of his age, was spared the rattan.

Anwar Ibrahim appealed his conviction to the Court of Appeal, but again the trial judge's decision was upheld and the appeal refused on 18 April 2003.

On 21 August 2003, Anwar Ibrahim made a statement to the press in response to that decision.

It read as follows:

> "After studying the written Judgment of the Court of Appeal 2003 (Y.A. Dato' P.S. Gill; Y.A.Datuk Richard Malanjum and Y.A. Dato' Hashim Yusoff), not only is it totally devoid of legal substance, it reeks of deception and fraud and utter contempt for the truth".
>
> On the pivotal appeal issue raised by counsel, of the filing of a notice of alibi under Sec 402A CPC, and the consequent judgment on it by Court - was a brazen attempt by the court to hoodwink the public into believing that I had not filed it. On the contrary, it was duly filed and even the prosecution during the appeal had in no uncertain terms admitted to the effect.
>
> This is a matter of incontrovertible public record and can be verified. The reason for doing this is clear - that is to deny me of my legal right to have the proceeding against me vitiated. This in itself, I dare say, is where the Judges have blatantly overstepped judicial bounds - to the outright borders of committing Judicial Deception.
>
> The cavalier manner in which the Judges addressed the role of the two prosecutors who were caught red handed in their attempt

to procure fabricated evidence in order to secure my convictions is most deplorable. Any self-respecting Judge would have treated the matter with the utmost concern; particularly in the light of the Federal Court's decision, which found both the prosecutors (Tan Sri Abdul Gani Patail and Dato' Azhar Mohammad), and the said Judge Augustine Paul had acted as "defence counsel for the prosecutors". The Court of Appeal deliberately overlooked such flagrant violation on the part of the High Court Judge working hand in glove with the prosecutors.

Other glaring issues staring directly into the face of gross injustice are amongst others: the myriad contradictions and inconsistencies on the part of the prosecution witnesses; the unfair conduct of the prosecution in wantonly changing dates of the commission of offence (at the interval of years) and the Judge allowing the amendment with impunity; the lack of credit worthiness of the "star" prosecution witness who has contradicted himself countless number of times; Justice Ariffin Jaka's refusal to recuse after evidence was adduced of his ownership of shares in *Dataprep Berhad* where the PM's son Mirzan Mahathir was the major shareholder; the cruelty of the Judges in meeting out consecutive and very harsh sentences (the norm in Sec 2 Ordinance 22 corrupt practice sentencing has always never exceeded 2 years); and also the unprecedented ordering of the commencement of sentence from date of conviction rather than the date of arrest, being the norm. Despite all this, the fact that I was found guilty reinforces my conviction from the very outset, that the trumped up charges were designed to force me out of office and to relegate me to political oblivion.

Can there be any question therefore to the widespread perception of the public that these Judges, including Ariffin Jaka were handpicked, servile and compliant judges who have now been promptly and generously rewarded with promotions – unfairly bypassing independent judges of integrity.

> It is pathetic and an utter travesty that these Judges have wantonly sold their souls for worldly gains, failing to recognize the fact that they will still have to account for it someday!"
>
> ANWAR BIN IBRAHIM

Some commentators expressed their concern about the constitution of the Court of Appeal bench. On 22 April 2003, Dato' Param Cumaraswamy (at the time *UN Special Rapporteur on the Independence of Judges and Lawyers*) criticised the decision. He spoke of it in these terms:

> **Press Release: The Anwar Appeal**
> The oral judgments of the Court of Appeal dismissing Datuk Seri Anwar Ibrahim's and Sukma Darmawan's appeals against the decisions of High Court Judge Arifin Jaka's decision of August 8, 2000 come as no surprise. They once again reflect the state of the independence, impartiality and integrity of the Malaysian judiciary in politically sensitive cases.
>
> Anwar has exhausted all his appellate avenues over his conviction and sentence in the first trial. He has another right of appeal to the Federal Court from the judgment of the Court of Appeal delivered today.
>
> The three judges who heard this appeal are the most junior in the Court of Appeal. There are a few senior judges in that Court who could have been empanelled to hear this appeal. For reasons best known to whoever named the panel (it is not certain whether it was the former Chief Justice or the then President of the Court of Appeal who is now the Chief Justice, though by right it should be the President of the Court of Appeal) the seniors were excluded. Maybe the Chief Justice should explain this to the public.The public have a right to know.
>
> What is more, the present Chief Justice of Malaysia will empanel the Bench to hear Anwar's final appeal to the Federal Court from

> the decision delivered today. He had previously, as judge of the Court of Appeal, sat with two others and dismissed Anwar's appeal to that Court from the judgment of Justice Augustine Paul in the first trial.
>
> What hope has Anwar for justice in such circumstances?
>
> So long as there are judges who are prepared to, and continue to, compromise the values and principles of their high office in such cases there is no hope for judicial independence and impartiality in the Malaysian justice system.

The Court of Appeal's decision was taken on appeal to the Federal Court for final determination.

4. Appeal to the Federal Court against the Sodomy Convictions

The Federal Court listed the appeal to commence on 10 May 2004.

Various international legal and parliamentary organisations decided that it was necessary to send observers to monitor the appeal. These included Marzuki Darusman, the former Attorney General of Indonesia, representing the *Inter-Parliamentary Union* (*IPU*); distinguished advocate Desmond Fernando PC, Chairman of the *Sri Lanka National Commission of Jurists* and Former President of the *International Bar Association* (*IBA*); respected Sri Lankan lawyer and former President of the Bar Association of Sri Lanka (*BASL*) Upali Gooneratne representing *LAWASIA* and Mark Trowell QC, for the *Australian Bar Association (ABA)* and the Geneva-based *International Commission of Jurists (ICJ)*.

In a joint press release, the *International Commission of Jurists*, *Human Rights Watch* and *Amnesty International* called upon the Federal Court to fairly hear the application:

Malaysia: In Final Appeal, Anwar Must Get Fair Hearing

ICJ, Human Rights Watch, and *Amnesty International* urged Malaysia's highest court to provide a fair hearing on 10 May for the former deputy prime minister, Anwar Ibrahim, who has been in jail since 1998 on politically motivated charges of corruption and sodomy.

Malaysia's highest court must give Anwar Ibrahim a fair trial, *Human Rights Watch, Amnesty International,* and the *International Commission of Jurists* said today. On May 10, the Federal Court of Malaysia will hear the final appeal of the former deputy prime minister, who has been in jail since 1998 on politically motivated charges of corruption and sodomy.

"Judicial independence has been a serious concern in Malaysia for decades," said Linda Besharaty-Movaed, Legal Advisor for ICJ's Centre for the *Independence of Judges and Lawyers.* "This hearing is a tremendous opportunity for the Malaysian Federal Court to squarely rectify the defects of the past trial and ensure that, this time, Anwar's appeal is in full accordance with fair trial standards".

The hearing represents Anwar's final opportunity for judicial redress. The court will also hear the final appeal of Sukma Darmawan, Anwar's co-accused and adopted brother. Anwar has now served his sentence for the corruption conviction. If he loses his appeal before the Federal Court, he will have to serve out the remainder of his term for sodomy, and will not be eligible for release until April 14, 2009.

"This is Anwar's last chance at freedom," said Ingrid Massage, director of Amnesty International's Asia Program. "It is time that the injustices that marked the arrest, trial and imprisonment of Anwar Ibrahim be set right".

Anwar was initially held under Malaysia's draconian *Internal Security Act (ISA),* and was beaten by the former national chief of police while in custody. He was convicted of corruption and sodomy following two separate trials in 1999 and 2000 respectively and sentenced to consecutive terms of six and nine years.

Both the trials and appeals were marred by serious violations of due process. The prosecution repeatedly amended the charges against Anwar in an apparent attempt to nullify Anwar's alibi, and government witnesses made contradictory statements about their contact with the accused. One of Anwar's lawyers faced contempt proceedings when he tried to thwart the fabrication of evidence by the prosecution, and the prosecution relied on coerced "*confessions*" by Sukma Darmawan and others who later testified that they made their statements under threat of physical abuse from the police.

"Anwar was put in jail because of Mahathir's political vendetta against him," said Sam Zarifi, Deputy Director of Human Rights Watch's Asia Division. "The Federal Court needs to make sure that Anwar will finally get what he should've gotten in 1998: a chance to answer the charges against him without the outcome being a foregone conclusion".

In addition, Anwar Ibrahim is seeking to reverse previous rulings by lower courts that have refused him release on bail pending a final ruling of his sodomy appeal. Malaysian courts usually grant bail in the absence of any indication that the accused is a flight risk or a likely repeat offender. As a former deputy prime minister, Anwar and his attorneys argue that he is unlikely to fall into either category.

Malaysian and international human rights organizations have repeatedly called for Anwar's release, expressing concern that the charges of "*corrupt practices*" (interference in a police

investigation) and sodomy subsequently brought against him were a pretext to remove him from public life. Anwar's dismissal followed policy disagreements with Mahathir and rumors of a leadership challenge to the Prime Minister when Mahathir's popularity was at an all-time low. Amnesty International regards Anwar as a prisoner of conscience.

The ICJ's *Justice in Jeopardy: Malaysia 2000* report, published jointly with the *International Bar Association, the Commonwealth Lawyers Association*, and the *Union Internationale Des Avocats*, concluded that executive influence severely compromised the independence of the judiciary during Anwar's first two trials.

On Monday, the Federal Court will also hear the appeal of Anwar Ibrahim's co-accused, Sukma Darmawan, against his sentence of six years and four strokes of the cane. Malaysian and international observers have raised serious concerns about Sukma Darmawan's treatment: that he was prosecuted solely to secure a conviction against Anwar Ibrahim; that his complaints of ill-treatment, threats, and sexual humiliation by police to coerce a "c*onfession*" have not been fully investigated; and that the police who allegedly mistreated him have not been held to account. If his appeal is rejected, Sukma could soon face caning by prison officials.

Anwar Ibrahim's health has deteriorated while in detention, and he suffers from increasing pain due to a spinal injury apparently aggravated by the beating inflicted on him by the then-national police chief in 1998. His medical condition has not responded to the limited treatment available to him in jail. Anwar has worn a neck brace at his court appearances and has often had to be helped into the courtroom by police.

Malaysia's National Human Rights Commission, *SUHAKAM*, has called for Anwar to be allowed to travel abroad, on the recommendation of medical doctors to receive the recommended

specialized medical treatment unavailable in Malaysia. According to *SUHAKAM*, there are no provisions in Malaysian law that would prohibit him from doing so.

International observers from the following organizations will monitor Anwar's trial:

Marzuki Darusman, *Inter-Parliamentary Union (IPU)*
Desmond Fernando PC, Chairman of the *Sri Lanka National Commission of Jurists*, Former President of the *International Bar Association (IBA)*
Mark Trowell QC, *Australian Bar Association (ABA)* and *International Commission of Jurists (ICJ)*

Meeting with Anwar Ibrahim's Wife & Family

The day before the commencement of the appeal, the foreign observers were taken by Dato' Param Cumaraswamy to meet with Anwar Ibrahim's wife, Dr. Wan Azizah Ismail, at the Anwar family home in Kuala Lumpur.

Together with members of the Anwar family we discussed the circumstances of his arrest, his incarceration, his declining health, the various legal proceedings that he had faced over the years and their hopes for his release.

Inter-Parliamentary Union Resolution

Anwar Ibrahim's plight had been brought to the attention of the prestigious international organisation of parliamentarians known as the *Inter-Parliamentary Union* a body founded in 1889.

At the 174th Session of the IPU Governing Council held at Mexico City on 23 April 2004, a unanimous resolution was passed concerning Anwar Ibrahim's plight. It is worth reproducing it in its entirety.

It read as follows:

Resolution adopted unanimously by the
IPU Governing Council at its 174th Session
(Mexico City, 23 April 2004)

The Governing Council of the Inter-Parliamentary Union,

Referring to the outline of the case of Mr. Anwar Ibrahim, a member of the House of Representatives of Malaysia at the time of the submission of the complaint, as contained in the report of the Committee on the Human Rights of Parliamentarians (CL/174/12(b)-R.1), and in the resolution adopted at its 173rd session (October 2003).

Taking also into account communications from Mr. Ibrahim's wife and defence counsel and from other sources dated 18, 24 and 31 January, and 3 and 4 February 2004.

Recalling that, having been dismissed from his post as Deputy Prime Minister and Finance Minister, Mr Anwar Ibrahim was arrested on 20 September 1998, initially under the *Internal Security Act* without any charge, and subsequently prosecuted on charges of abuse of power and sodomy he was found guilty on both counts and sentenced, in April 1999 and August 2000, respectively, to a total term of 15 years' imprisonment, which he is currently serving; on 10 July 2002, the Federal Court dismissed at final instance Mr. Anwar Ibrahim's appeal against the abuse of power charges; in August 2002 Anwar Ibrahim lodged an application with the Federal Court to review its own decision; the hearing of the application, originally set for 18 March 2003, was adjourned owing to a petition of the Attorney General for the application to be heard by a five-member instead of three-member panel; that request has been approved by the Chief Justice: however, no date has so far been set for a hearing, although the Chief Justice is said to have it announced for June 2003.

Recalling also that on 18 April 2003 the Appeal Court rejected Mr. Ibrahim's appeal in the sodomy case; he lodged an appeal with the Federal Court which is pending; considering that, in October 2003, he further lodged a petition in the Appeal Court for

a review of its own decision on the ground of serious flaws in its judgment: it not only, ignored an alibi notice given by Anwar Ibrahim but also failed to take account of the fact that he had been prevented from presenting a new alibi notice upon the amendment of the charges in June 1999; the charges had been amended upon presentation of Anwar Ibrahim's and his co-defendant's alibi notice proving that the building in which the offence had allegedly been committed was under construction at the time mentioned in the charges; the prosecution then changed the time frame from "*sometime in May 1992*" to "*between the months of January to March 1993*"; on 19 January 2004 the Appeal Court ruled that it was not competent to review its earlier decision,

Recalling further the serious concerns regarding the fairness of both trials, with particular reference to the attempts made by the prosecution to fabricate evidence against Anwar Ibrahim, the lack of credibility of the main witness, Azizan Abu Bakar, the lack of any medical evidence in the sodomy case, and the serious allegations about extraction of witness statements against Anwar Ibrahim,

Considering that, in May 2003, Anwar Ibrahim filed an application for bail under Section 57 of the *Courts of Judicature Act* pending the proceedings before the Federal Court; the application was rejected on 21 January 2004, reportedly without any reason being stated,

Considering also that, on 5 December 2003, Anwar Ibrahim's defence counsel denounced the provision of partly incorrect information by the parliamentary authorities in their report of September 2003 regarding Anwar Ibrahim's medical care: thus (a) he did not have "*for his exclusive use a large air-conditioned gymnasium which is equipped with the adequate equipment for him to carry out his prescribed physiotherapy exercises at his own convenience…*" but only "*one exercise bench and two*

dumbbells placed in a small air-conditioned living room adjacent to his small cell which is Spartan and certainly not air-conditioned..."; and (b) between the period of October 1999 to June 2003, he was taken from his cell to Kuala Lumpur Hospital on two occasions only and not, as the authorities affirmed, "*taken out of the prison for routine medical treatment*"; considering also that the parliamentary authorities have so far not replied to the Secretary General's letter of 9 December 2003 inviting them to comment on the matter,

Considering further that, given his increasing pain, Anwar Ibrahim's family requested in August 2003 that a medical examination be conducted by an orthopaedic neurosurgeon of their own choice; while this request has not so far been granted, Anwar Ibrahim was examined on 6 January 2003 by a government orthopaedic specialist, which examination revealed new medical complications; Anwar Ibrahim has since been taken for physiotherapy three times a week; he is dependent on the wheelchair and analgesics to alleviate his back pain; recalling that, in their report of September 2003, the authorities affirmed that Anwar Ibrahim was receiving appropriate medical treatment and that his health had significantly improved with conservative treatment,

Recalling that, contrary to the recommendation of the Malaysian *National Human Rights Commission (SUHAKAM)*, Anwar Ibrahim has so far not been allowed to undergo surgery abroad; considering that in its communication dated 24 March 2004, *SUHAKAM* reiterated that its stand on the matter of medical treatment remained unchanged,

Recalling also that it has repeatedly requested the parliamentary authorities to provide information on how the Malaysian Parliament, as a guardian of human rights, ensures follow-up to the recommendations made by *SUHAKAM* and that, in their

observations forwarded in August 2002, the parliamentary authorities under-took to provide these details:

1. *Regrets* that the parliamentary authorities have so far provided no clarification on the question of allegedly incorrect information provided by them in September 2003; and invites them to comment on the observations of the defence counsel regarding Ibrahim's medical treatment;

2. *Expresses deep concern* at Anwar Ibrahim's worsening state of health; urges the competent authorities to grant him bail without delay and to authorise him to undergo the medical treatment of his choosing, as recommended by the National Human Rights Commission; firmly believes that Parliament, as a guardian of human rights, should not hesitate to support the recommendations of the country's Human Rights Commission and make every effort to relay them favourably to the competent authorities; and calls once again on Parliament to do so;

3. *Notes with deep concern* that Mr. Ibrahim's alibi notice in the sodomy case has so far not been taken into consideration, the Appeal Court ruling that it was incompetent to review its earlier decision; considers that ignoring such an important item of evidence seriously infringes Mr. Ibrahim's right to defend himself;

4. *Trusts* that the Federal Court will rule on Anwar Ibrahim's petitions in a manner fully respectful of the rights of the defence, which the Court itself considers to be "*sacrosanct"* and "*a principle so fundamental to our system of justice*", and hopes that the relevant hearings will soon take place;

5. *Invites* the parliamentary authorities once again to provide information on how in general the Malaysian Parliament, as a guardian of human rights, ensures follow-up to the recommendations made by *SUHAKAM*;

6. *Requests* the Secretary General to convey this resolution to the competent Malaysian authorities and to the sources;

7. *Requests* the Committee on the Human Rights of parliamentarians to continue examining this case and report to it at its next session, to be held on the occasion of the 111th Assembly (September-October 2004).

5. THE APPEAL HEARING

On 10 May 2004, the Federal Court commenced to hear arguments on the appeal against Anwar Ibrahim's convictions for sodomy.

The appeal was to be heard in the courtroom located on the first floor of the newly constructed *Palace of Justice* at the new administrative city of Putra Jaya located 30 kilometres from Kuala Lumpur.

By nine o'clock that morning, the public gallery was filled with international observers, members of the national and international media, the family of the appellants and their supporters.

Foreign embassy officials were also present representing Australia, Canada, Denmark, France, Germany and the United States.

Security was particularly heavy both inside and outside the court building where a crowd of about 1000 Anwar supporters had gathered to express their support for him.

At one stage on that first day, supporters breached security and invaded the large entry hall of the building chanting slogans and calling out "*reformasi*" and "*Free Anwar*". Security officers soon dispersed the crowd and thereafter supporters were kept outside on the steps of the building to be admitted only after obtaining a pass from court staff. Otherwise, they were well behaved for the entirety of the hearing.

The bench comprised Federal Court justices Datuk Abdul Hamid Mohamad and Datin Paduka Rahmah Hussain sitting together with Court of Appeal judge Datuk Tengku Baharuddin Shah Tengku Mahmud.

The Malaysian Attorney General Tan Sri Abdul Gani Patail assisted by Senior Federal Counsel Datuk Mohd Yusof bin Zainal Abiden headed the large prosecution team.

It is of interest to note that the Attorney General had prosecuted at both of the Anwar trials. He was also one the prosecutors who was alleged by the defence to have attempted to procure false testimony against Anwar Ibrahim.

The defence team was equally as large. Veteran counsel Chris Fernando headed the team with distinguished advocate Karpal Singh. Assisting them were Sankara Nair, Kamar Ainiah Kamaruzzaman, Pawanchek Marican, Zulkifli Noordin, Saiful Izham Ramli and Marisa Regina.

Gobind Singh Deo assisted by Ram Karpal Singh Deo appeared for Sukma Darmawan.

6. PRELIMINARY APPLICATIONS

Application by Bar Council to Appear on Watching Brief

As is customary in court proceedings in Malaysia, the Bar Council will often make application to have counsel appear on its behalf to observe the proceedings at the bar table and if asked will make submissions on any points of law concerning its members or matters affecting the legal profession. It is described as a "*watching brief*". The right to appear is always a matter of judicial discretion and is not always granted. (2)

A member of the Bar Council sought leave to appear at the Appeal, but Justice Hamid refused the application on the basis he could see no reason for the Bar to be represented.

Application to Disqualify the Judges

Before the commencement of their submissions on behalf of Anwar Ibrahim, both Chris Fernando and Karpal Singh submitted to Justice Abdul Hamid that he should *recuse* himself from hearing the appeal because of remarks he had made at an appeal against sentence by *Negeri Sembilan* State Assemblyman, Waad Mansof, for offences of corruption under the same legislative provision used against Anwar Ibrahim.

Waad Mansof had been fined. The prosecution appealed against what it claimed was a lenient sentence. At the appeal, Justice Hamid defended the sentence by suggesting that Anwar Ibrahim's case involved issues of national security where there had been a "*threat to public order*".

It was submitted that by his remarks Justice Hamid had shown his prejudice towards Anwar and should not preside at his appeal.

Chris Fernando also submitted that Judge Tengku Baharuddin should disqualify himself because he was a relatively junior judge who was not even a Federal Court judge and was being asked to return a decision against a judge previously his senior in the appeal court.

Decisions on these matters were reserved until after lunch.

As court moved to adjourn for lunch, Anwar Ibrahim shouted his objections to the bench claiming that each of them had been handpicked to find against him and that Dr Mahathir had virtually destroyed the judiciary by appointing people who would maintain his control over it. The judges ignored the outburst and left the court.

Returning after lunch, Justice Hamid rejected the submissions that either judge should *recuse* himself on the basis that:

> 1. There was no personal bias on his part and his comments at an unrelated appeal did not relate to this case and he had merely made a distinction for the purposes of sentencing another accused.

> 2. Each judge of the court was presumed to be independent and impartial and to disqualify Judge Baharuddin for the reason advanced by counsel would undermine the independence of the judiciary.

At that point Anwar Ibrahim indicated that he did not wish to proceed with the appeal.

He shouted at the judges from the dock:

> "I am considering withdrawing the appeal as I have no confidence in the judges who are to hear my appeal. I see no point in continuing these proceedings. Your Lordships surely understand my predicament, as my counsels' arguments were not even properly addressed. What we are saying is that why more senior and qualified federal Court judges were ignored. I see no point in proceeding if this will be a foregone conclusion. This is a facade of a fair trial".

The proceedings were temporally adjourned while Anwar Ibrahim consulted with his legal team. When the Court reconvened, Chris Fernando announced to the Court that Anwar Ibrahim was "*pretty adamant he didn't want to proceed, but he has been persuaded that he should*".

Formal Recognition of Foreign Observers

The next application concerned the status of the international observers.

None of the observers had asked for any official status at the trial, but Anwar Ibrahim's counsel asked the Court to officially record our presence. Karpal Singh submitted to the Judges that there was precedent for that to happen.

However, Justice Hamid would have none of it.

He reminded counsel that in previous court proceedings involving Anwar Ibrahim only the names of counsel had been recorded. He further suggested that there was no need to officially record the names of any other persons

because all were equally welcome in the court. In fact, he stated he would prefer not to know who else was in court other than counsel.

Again, Karpal Singh persisted with the application suggesting that the recognition of the international observers was no more than a courtesy to them.

The application was refused.

Had a Notice of Alibi Been Filed & Served on Prosecution?

The final matter to be resolved was the issue of whether Anwar Ibrahim's lawyers had served an alibi notice on the prosecution?

This had been a matter of much controversy at the hearing before the Court of Appeal.

The service of an alibi notice is a statutory requirement under Section 402 of the *Criminal Procedure Code* that requires that it be served 10 days before any trial. Failure to file the document enables the prosecution to obtain an adjournment of the proceedings to investigate the alibi.

An alibi notice had in fact been filed and served on the prosecution during the original trial, but the trial Judge made no mention of that fact in his reasons for decision. Later during argument before the Court of Appeal a copy of the document was produced, but was not tendered as an exhibit. When the Court of Appeal delivered its decision it was clear from the reasoning that it did not accept that service of the alibi notice had been given, when in fact it had.

Anwar Ibrahim's counsel Karpal Singh had not missed the error and immediately challenged the Court of Appeal saying the judgement could not stand. The judges then suggested they had not seen the notice in court. The prosecution refused to contradict them.

This was a critical preliminary point for it was argued that by ignoring the alibi notice the judgement of the Appeal Court was flawed and should be overruled on that basis alone.

Justice Hamid asked counsel whether it could be agreed that the notice had been filed and if so then it was obvious the Court of Appeal had erred and the issue could cease to be a motion and become part of the substantive appeal for the court to determine whether or not it amounted to a miscarriage of justice.

In what appeared to be a surprise turn-around Attorney General Tan Sri Gani Patail conceded that a notice of alibi had either been served on the prosecution or if not the prosecution had been advised of it. He said he had difficulty recalling which because it had been so long ago.

Karpal Singh wanted the issue settled demanding that the prosecution concede that the Court of Appeal had been advised of the service of the notice of alibi before delivering its decision. The Attorney General finally conceded that it was so.

Accordingly, the controversy was resolved.

The Various Grounds of Appeal

Each counsel focused on particular appeal grounds of which there were many.

For Anwar Ibrahim, several grounds of appeal were argued that included the following:

1. That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge misdirected himself in admitting evidence of alibi in circumstances where he had determined that a notice of alibi had not been given to the prosecution. Section 402A of the *Criminal Procedure* Code imposed a mandatory requirement to provide notice of alibi and the trial Judge's failure to enforce that requirement constituted a miscarriage of justice.

2. That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge gave insufficient regard (if any) to the various retractions made by the complainant Azizan bin Abu Bakar both in his statements to the police and his testimony given at the trial and the adverse impact that had on his credit.

3. That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge failed to direct himself of the danger of convicting the appellant based on the uncorroborated testimony of the complainant.

4. That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge had failed to take account of evidence the appellant claimed established there had been payments made to witnesses to give false testimony.

5. That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge failed to have sufficient regard (if any) to the testimony of lawyer Manjeet Singh, Jamel Abdel Rahman and Raja Kamabiddin concerning attempts by the police and the prosecution to fabricate evidence against Anwar Ibrahim.

6. That the Court of Appeal erred in not upholding the appellant's submission that attempts by prosecutors to procure false testimony against him tainted the entire legal process and amounted to a miscarriage of justice.

7. That the Court of Appeal erred in not upholding the appellant's submission that the trial Judge had reversed the onus of proof by requiring the appellant to prove the existence of a political conspiracy and the fabrication of evidence against him.

8. That the Court of Appeal erred by not upholding the appellant's submission that the trial Judge should have disqualified himself from hearing the case because of financial links he had to Prime Minister Mahathir's son.

9. That the Court of Appeal erred in not upholding the appellant's submission that the prosecution should have been permanently stayed because of the delay in bringing the prosecution.

Finally, the appellant appealed against his sentence claiming it was manifestly excessive in all the circumstances.

The primary thrust of the appellant's attack was on the credit of the complainant Azizan bin Abu Bakar on whose testimony the respondent for the most part relied.

It should be recalled that Azizan testified at each of the two trials.

His testimony was relevant in the '*corruption trial'* because each charge had alleged that Anwar had instructed police to obtain a written admission from each of the complainants "*to deny sexual misconduct and sodomy committed by him*" for the purpose of protecting himself against any criminal action. In that trial, the prosecution set out to prove that acts of sodomy had taken place.

Azizan had maintained during examination-in-chief that he had been sodomised, but when cross-examined conceded that he had not. When pushed in re-examination he changed his mind yet again.

When re-examined he also changed the dates on which he alleged the offences had occurred. That resulted in an amendment to the charges.

At the '*sodomy trial'* Azazin again changed the dates when it was alleged the offences occurred. He was unable to explain why he had changed his mind, but again an amendment of the dates was allowed.

When pressed by defence counsel under cross-examination he admitted that he had changed the dates at the request of the police.

For Sukma, the primary attack focused on the involuntary nature of the confession obtained by police.

His counsel Gobind Singh submitted that "*the trial judge misdirected himself when he failed to consider the totality of the circumstances surrounding the appellant when he made the confession*."

He submitted the trial judge failed to direct his mind to the impact and effect of the detention on Sukma Darmawan, the manner of the interrogation and the oppression that resulted in the confession.

Further, he said, the judge failed to give proper weight to the fact that a witness had, during a trial-within-a-trial, agreed that police were only satisfied with his client's statement after 12 days of intense interrogation.

Respondent's Reply

In summary, the respondent replied to these appeal grounds by submitting:

(1) The issue of whether a notice of alibi had been given by the appellant was irrelevant because the trial Judge nevertheless considered the evidence of alibi given by the appellant. The respondent also submitted that in any event, Section 402 A of the *Criminal Procedure Code* was "*merely directory and not mandatory*" so that failure to enforce that requirement did not constitute a miscarriage of justice.

(2) The trial Judge was best placed to assess the credit of the complainant Azizan and was aware of his various retractions, but was nevertheless entitled to accept his testimony as being truthful and reliable.

(3) The trial Judge was also aware of the various allegations made against the police and the prosecution that each had attempted to fabricate evidence against the appellant, but he was not bound to accept that the allegations against Anwar Ibrahim had been fabricated.

(4) The trial Judge should not have disqualified himself from hearing the trial because any links he might have to the Prime Minister's son was only through his shareholding in a company and did not disclose a bias against Anwar Ibrahim.

(5) The charges brought against Anwar Ibrahim were not so old as to justify the court ordering a permanent stay.

(6) The trial Judge was well aware of the necessity to direct himself appropriately concerning the uncorroborated testimony of Azizan and did so.

(7) The confessional statement given by Sukma Darmawan to police was voluntarily given and not coerced from him by force or threat.

(8) There was no substance to the allegation that the prosecutors at the trial had attempted to procure fabricated testimony against Anwar Ibrahim.

Conference with Malaysian Attorney General

On the afternoon of 10 May 2004, the international observers were invited to attend at the Attorney General's Chambers to discuss aspects of the appeal with the Attorney General Tan Sri Abdul Gani Patail and his senior prosecutor Datuk Mohd Yusof bin Zainal Abiden. Joining the foreign observers at the meeting was Dato' Param Cumaraswamy.

The Attorney General participated in a very frank and far ranging discussion with the observers over a period of some hours.

Relevant to the appeal, the Attorney expressed the view that he had opposed the defence application to record the presence of international observers because it had the potential to intimidate judges hearing the proceedings. He said that he opposed the trend to incorporate foreign observers into the court process.

There had been a rumour that the Attorney General had together with the Prime Minister met with the appeal judges to discuss the proceedings. The Attorney denied any such meeting had taken place.

Finally, Marzuki Darusman asked the Attorney about the issue of clemency based on Anwar Ibrahim's deteriorating health. The Attorney responded by saying there were concerns that Anwar Ibrahim's health was not as serious as he claimed, but there was no reason why competent medical treatment was not available in Malaysia even when he complained he could only be treated in Germany.

The conference was very helpful in understanding the prosecution's view of the appeal. During the court proceedings the Attorney General always made himself available to discuss aspects of the case and provided material to us including copies of the appeal papers, submissions and legal authorities. The defence team also co-operated extensively with the foreign observers.

Reserved Decision

On 20 May 2004, the Federal Court adjourned the proceedings and reserved its decision.

Immediately after the hearing was adjourned, the following press release was released to local and international news organizations speaking on behalf of the *Australian Bar Association* and the *International Commission of Jurists*:

> **PRESS RELEASE**
>
> *20th May 2004 - Putrajaya, Malaysia*
>
> The final appeal of former deputy prime minister Datuk Seri Anwar bin Ibrahim against his conviction for sodomy ended today in the Federal Court of Malaysia at Putrajaya.
>
> The judges have reserved their decision. The question of whether Anwar should be released on bail pending that decision is to be heard tomorrow morning.
>
> International observer, Mark Trowell QC, representing the *Australian Bar Association* and *International Commission of Jurists* reflected on various aspects of the appeal at the conclusion of proceedings this afternoon.
>
> "Even though the judges refused an application by Anwar's counsel to officially record our presence at court, we appreciate their courtesy in welcoming us to observe the proceedings", said Mr Trowell.
>
> He further expressed gratitude to the Malaysian Attorney General, Tan Sri Gani Patail, for generously making himself available to the observers and supplying a large amount of appeal material to them.

> "Anwar's lawyers also provided considerable assistance to us,"he added.
>
> Mr Trowell said that the observers "make no complaint as to the conduct of the appeal proceedings". He said that the judges at the hearing "acted with courtesy, patience and apparent interest in the submissions made by counsel".
>
> "However", he emphasised, "the fairness of this appeal will be judged by the final decision of the Federal Court".
>
> "Whether the court has been fair and just shall be assessed by its response to the process of the original trial that was patently unjust and tainted by significant errors of law."
>
> Mr Trowell also expressed some concern about the deteriorating health of Dato' Seri Anwar. He said that Anwar's "failing health was deserving of some clemency and a compassionate response by the authorities to ensure that he received the necessary medical treatment".
>
> "We should also not forget the plight of Anwar's adopted brother Sukma Darmawan,"said Mr Trowell. "His counsel, Gobind Singh Deo, has raised serious concerns about his client's treatment while in police custody after his arrest when a confession was obtained after 12 days of harassment and interrogation by the police".
>
> Mr Trowell said that this evidence raised serious doubts that the statement was voluntary. "It substantially taints his confession and critically damages the case against him. That fact a lone deserves particular scrutiny by the judges,"he said.

Later that day, when asked by the media to express the general view of the international observers concerning the process most of them had witnessed over the previous two weeks, I responded by saying:

> "The international community has a clear perception that the original trial was patently unfair and contained many errors of law. That perception can only be overcome by the court acting objectively and dealing with the appeal on its merits without regard to any extraneous factors. Malaysia's reputation as a modern and democratic nation governed by the rule of law will be assessed by how the judges deal with this appeal".
> Aljazeera.Net, Saturday 22 May 2004
> Associated Press, May 22 2004
> The China Post, 24 May 2004

Bail Application

The next day counsel for Anwar Ibrahim made application to the Court that he be released to bail pending its decision.

The Court refused the application holding there were no special or exceptional circumstances that warranted a stay of execution. In his ruling, Justice Addul Hamid stated that at this stage the panel of judges would not like to prejudge their decision and in the circumstances they preferred to maintain the *status quo*.

Justice Hamid added:

> "However, let me repeat what I have said on Thursday. We give our promise that we shall come up with our written judgment as fast as we can and within a reasonable time. Please bear with us. Give us the chance to read the records and the numerous authorities submitted by both sides, consider the submissions and come up with an honest judgment whichever way it may go, based entirely on evidence and law, and nothing else".

Anwar responded by saying he had expected to be refused bail, adding that he believed he would probably also lose the appeal.

He told the media:

> "We are not going to get any honest or fair judgement. The judges are quite prejudiced".

Associated Press, 22 May 2004
The China Post, 24 May 2004

The *International Commission of Jurists* urged the Court to deliver a speedy decision. It issued the following press release on 28 July 2004:

Malaysia: No More Delays In Anwar Appeal

The *ICJ* urged the Malaysian Federal Court today to deliver its judgment expeditiously in the appeal of Anwar Ibrahim, the former deputy prime minister who is in jail on politically motivated charges of corruption and sodomy.

The International Commission of Jurists urged the Malaysian Federal Court today to deliver its judgment expeditiously in the appeal of Anwar Ibrahim, the former deputy prime minister who is in jail on politically motivated charges of corruption and sodomy.

"We are concerned that the Court vacated the date fixed for delivering the judgment, 22 July, without providing any reasons whatsoever and without fixing another date." said Linda Besharaty-Movaed, Legal Advisor for the *Centre on the Independence of Judges and Lawyers of the International Commission of Jurists*. "This is particularly worrying as Anwar continues to be held in detention where his health is reportedly deteriorating" she added.

After completion of the hearing on 20 May 2004, the Presiding Judge stated, "We are reserving our judgment. I promise we will sit down, work hard uninterruptedly and we will give the decision as soon as possible".

Malaysian and international human rights organizations have repeatedly called for Anwar's release, expressing concern that the charges of "corrupt practices" (interference in a police

investigation) and sodomy subsequently brought against him were a pretext to remove him from public life.

The *Australian Bar Association*, the *Bar Council of Malaysia*, the *International Commission of Jurists*, the *International Bar Association*, the *Inter-Parliamentary Union* and *LAWASIA* monitored the appellate proceedings.

7. THE DECISION

The Federal Court delivered its decision four months later on 2 September 2004.

The recently appointed Vice-President of the *International Commission of Jurists (*and former *UN Special Rapporteur)*, Dato' Param Cumaraswamy, was there to observe the handing down of the judgment.

By a majority decision of 2:1 Justices Hamid and Judge Baharudin upheld the appeal overturning the conviction based upon what they considered to be significant deficiencies in the prosecution's case, which caused them sufficient reason to doubt the case against each of the accused.(3)

> "*We allow the sentence and conviction to be set aside. We find the High Court misdirected itself. He should have been acquitted*," said Judge Abdul Hamid Mohamad, head of the three-judge panel.

The Judges decided the appeal on the preliminary question of whether:

> "… at the end of the prosecution's case, the prosecution had proved beyond reasonable doubt that, in respect of both appellants, the appellants had sodomised Azizan bin Abu Bakar ("Azizan") at Tivoli Villa one night between the month of January until March 1993 and, in respect of the second appellant only, whether he had abetted the offence committed by the first appellant".

First, the Judges found the confession of Sukma to be inadmissible because it was involuntary.

Secondly, the prosecution had alleged the offences took place on certain dates. The majority concluded that the period during which the offences were alleged to have been committed was an essential part of the charge and needed to be proved by the prosecution. Having rejected the confession of Sukma, the only evidence of the commission of the offences on those dates was the testimony of the complainant Azizan. They found him to be an unreliable witness whose testimony had not been corroborated in circumstances where he was obviously an accomplice. Accordingly, the majority concluded it was not safe to convict on the basis of his testimony alone.

The judges therefore concluded that as the prosecution had not managed to prove the case against each of the appellants beyond reasonable doubt both Anwar Ibrahim and Sukma should have been acquitted without having to enter a defence.

Justice Abdul Hamid Mohamad summarised the judgement of the majority in the following terms:

> "…even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law.
>
> We may be convinced in our minds of the guilt or innocence of the appellants, but our decision must only be based on the evidence adduced and nothing else. In this case Azizan's evidence on the '*date*' of the incident is doubtful as he had given three different 'dates' in three different years, the first two covering a period of one month each and the last covering a period of three months.

He being the only source for the "date", his inconsistency, contradiction and demeanor when giving evidence on the issue does not make him a reliable source, as such, an essential part of the offence has not been proved by the prosecution.

We also find the second appellant's confession not admissible as it appears not to have been made voluntarily. Even if admissible the confession would not support the 'date' of the commission of the offences charged.

We have also found Azizan to be an accomplice. Therefore corroborative evidence of a convincing, cogent and irresistible character is required. While the testimonies of Dr. Mohd. Fadzil and Tun Haniff and the conduct of the first appellant confirm the appellants' involvement in homosexual activities, such evidence does not corroborate Azizan's story that he was sodomised by both the appellants at the place, time and date specified in the charge.

In the absence of any corroborative evidence it is unsafe to convict the appellants on the evidence of an accomplice alone unless his evidence is unusually convincing or for some reason is of special weight which we find it is not. Furthermore, the offence being a sexual offence, in the circumstances that we have mentioned, it is also unsafe to convict on the evidence of Azizan alone.

For all the above reasons, we are not prepared to uphold the conviction. Since the applicable law in this case requires that the prosecution must prove its case beyond reasonable doubt before the defence may be called, the burden being the same as is required to convict the appellants at the end of the case for the defence, we are of the view that the High Court has misdirected itself in calling for the appellants to enter their defence. They should have been acquitted at the end of the case for the prosecution.

We therefore allow the appeals of both appellants and set aside the convictions and sentences."

8. THE RESPONSE TO THE DECISION

The day following the Federal Court decision, the *International Commission of Jurists* issued the following press release applauding the decision:

Malaysia: ICJ Welcomes Ruling in Anwar Appeal

The *International Commission of Jurists* welcomed Malaysia's highest court ruling yesterday overturning former Deputy Prime Minister Anwar Ibrahim's sodomy conviction and sentence of nine years imprisonment and setting him free.

"*The Federal Court's ruling is a step in the right direction in upholding the rule of law"*, said *ICJ* Secretary-General Nicholas Howen. "*Basic standards of fair trial were not followed in the first and second trials and Anwar should have been acquitted long ago*", Nicholas Howen said.

In a 2:1 ruling, Malaysia's Federal Court decided to overturn Anwar's previous conviction and found that the High Court had misdirected itself. The Court also found that the prosecution's key witness was unreliable and in effect involved in the facts that gave rise to the charge.

"*Finally justice has been done*," said *ICJ* Vice-President Dato' Param Cumaraswamy, who observed the handing down of the judgment on behalf of the ICJ. "*Since 1988, under the Mahathir regime, the Judiciary did not have the courage to dispense justice independently*", he added.

Anwar Ibrahim was jailed for six years for corruption in 1999.

> One year later he was sentenced to further nine years for sodomy. He always argued that the charges against him were politically motivated after former Prime Minister Mahathir Mohammed sacked him.
>
> "*The Malaysian Government should now take steps to bring the country's human rights record into line with international standards*", said the *ICJ* Secretary-General. "*I encourage the Government to ratify and implement core international human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights",* added Nicholas Howen.
>
> The ICJ has monitored Anwar Ibrahim's trial since its initial stages.
>
> Earlier this year, the *International Commission of Jurists*, the *Australian Bar Association*, the *Bar Council of Malaysia*, the *International Bar Association*, the *Inter-Parliamentary Union* and *LAWASIA* monitored the appellate proceedings at the Federal Court.

Amnesty International also responded to the decision issuing the following press release on 3 September 2004:

> **Malaysia: Anwar Ibrahim's release renews confidence in judicial independence**
>
> *Amnesty International* warmly welcomes today's decision by Malaysia's highest court to uphold the final appeals of former deputy prime minister Anwar Ibrahim and his adopted brother, Sukma Darmawan. Both men had been convicted on charges of sodomy.
>
> "*The Federal Court's decision to release Anwar Ibrahim marks an historic milestone in the restoration of confidence in the rule*

> *of law and respect for human rights in Malaysia*",said Catherine Baber, deputy Asia director at *Amnesty International.*
>
> The significance of Anwar Ibrahim's arrest and prosecution went far beyond the fate of one individual.
>
> "*It exposed a pattern of political manipulation of key state institutions including the police, public prosecutor's office and the judiciary, all of which are crucial in safeguarding the human rights of Malaysians,*" said Catherine Baber.
>
> Amnesty International hopes today's ruling will serve as a lasting reminder of the role the judiciary must play in scrutinising executive actions and preserving key principles — including freedom of speech and of political dissent — which are enshrined in Malaysia's constitution and international human rights standards.

Noting how the Federal Court drew attention to abuses by police as seeking to elicit an involuntary 'confession' from Sukma Darmawan, *Amnesty International* urged the government to continue efforts to reform the police and other justice institutions. *Amnesty International* welcomed Prime Minister Abdullah Badawi's creation earlier this year of a Royal Commission of Inquiry to examine the police and urges the Commission to make recommendations for wide-ranging reform. The commission is due to report in early 2005.

9. APPEAL TO THE FEDERAL COURT AGAINST CORRUPTION CONVICTIONS

Less than a week after the Federal Court quashed Anwar Ibrahim's sodomy conviction, his lawyers asked Malaysia's Federal Court to review its own decision, made in 2002, to refuse an appeal against the corruption conviction.

A bench comprising Court of Appeal President Datuk Abdul Malek Ahmad

and Federal Court judges Datuk Siti Norma Yaacob and Datuk Alauddin Mohamed Sheriff unanimously ruled that they could hear the application dismissing the preliminary objections of Attorney General Tan Sri Abdul Gani Patail that a review was beyond the court's jurisdiction.

"*We are of the unanimous view that we have the jurisdiction to deal with the motions filed*," ruled Judge Malik Ahmad. "*The preliminary objection is dismissed*."

The application had been brought under Rule 137 of the *Federal Court Rules (1995)*, which gives the court inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of process of the court.

The Rules provide for no automatic right to review a decision previously made by the Court, but allows it only in circumstances where it can be demonstrated that it has determined the issue based on some defect of the legal process.

Essentially, the appeal was based on two arguments.

The first argument was a constitutional point. Karpal Singh submitted that the basis for review was a defect in the process of delivering the judgement of the Federal Court. He argued that the power given to the Chief Justice under Section 94 (2) of the *Courts of Judicature Act* in delivering judgement in an appeal was unconstitutional in allowing him to split the decisions of the court between the issues of guilt or innocence and sentence.

The second argument related to fresh evidence which Anwar' Ibrahim's lead counsel Chris Fernando submitted should be considered by the Court.

On September 15, the Federal Court delivered its decision rejecting both arguments ruling unanimously that its previous decision to uphold a High Court ruling that found Anwar Ibrahim guilty was in order.

Having this appeal rejected by the Federal Court, the only avenue for redress would be for Anwar Ibrahim to obtain a pardon from His Majesty the Yang di-

Pertuan Agong. However, the pre-requisite to obtaining a pardon is an admission of guilt. That is something he has stated he is not prepared to do.

10. WHAT IS TO BE CONCLUDED FROM THE FEDERAL COURT DECISION?

Anwar Ibrahim's long struggle for justice certainly attracted international attention.

His struggle exposed fundamental issues confronting the Malaysian justice system, including the capacity of the judiciary to independently and impartially determine politically sensitive cases, allegations of police brutality and corruption and the use of the draconic *Internal Security Act (ISA)* in prosecuting alleged offenders.

These are longstanding complaints ever since Dr Mahathir's attack on the judiciary in the late 1980's.

Does the Federal Court decision to uphold Anwar's appeal and release him from prison represent a change of direction for the judiciary?

Was it an independent and impartial decision made without any political interference?

There is probably little doubt the Federal Court decision would not have been possible under Dr Mahathir's regime given his considerable influence over the judiciary.

Prime Minister Abdullah Badawi made it perfectly clear in media interviews he would not seek to influence the court decision emphasising it was entirely a matter for the judges.

Anwar Ibrahim's assessment of the result was clear. He told reporters on his release that he was grateful to current Prime Minister for not imposing his will on the judiciary:

> "You've got to recognise the fact that his predecessor (former Prime Minister Mahathir Mohammed) wouldn't have made this judgment possible",
> BBC World News, Thursday 2, September 2004

Prime Minister Abdullah Badawi was at the time keen to distinguish his style of governing from that of his predecessor. He had early in his term authorised prosecutions against politicians and businessmen for corruption and spoke constantly of the need for the government to be accountable.

Critics of the Government suggested his approach was no more than "*window dressing*" claiming the prosecutions were few and selective. They also took the view that the Prime Minister's public statements about judicial independence carried little weight given they were made at a time when Anwar Ibrahim was no longer a political threat.

However, there are signs that the system may be changing.

In May 2005, the Royal Commission appointed to inquire into the Royal Malaysian Police Force delivered its report.

The Commissioners found that the police had abused powers of preventative detention and recommended that the police should no longer be able to use internal security laws to sidestep courts and lock up suspects.

Foreign observers regularly take the view that the Malaysian judicial system should not be congratulated for doing what it should do and that is to decide cases based on the principles of law rather than be influenced by political considerations.

Perhaps the Federal Court decision indicates a shift in direction for a judiciary that for some 20 years had been subject to executive government influence?

It may be that by this decision the judiciary had shown itself capable of now acting in a more independent and impartial way. The Anwar appeal decision may well have been the turning point for the Malaysian judicial system.

Whether it is so is yet to be seen.

11. POSTSCRIPT

There are many persons to thank for their assistance in preparing this report.

First, may I extend my appreciation to both the *Australian Bar Association and International Commission of Jurists* for requesting that I represent their interests at the appeal.

Tony Glynn SC (at the time President of the *Australian Bar Association)* enlisted me to observe the appeal on behalf of the *ABA*. He was an enthusiastic supporter of the project believing the *ABA* should assume a more active role in promoting international human rights.

Ian Viner QC (now President of the *Australian Bar Association*) gave ongoing support during the final stages of the appeal and the writing of this Report. He shared his predecessor's commitment to promote human rights within the region.

Dato' Param Cumaraswamy (at the time Vice-President of the Geneva-based *International Commission of Jurists*) is a passionate advocate for human rights. He provided much valuable advice during and after the appeal and was responsible for the attendance of so many international observers at the appeal.

Chief Justice of Western Australia David K. Malcolm AC (also Chair of the Judicial Wing of *LAWASIA*) must be thanked for his encouragement and constant support after my appointment, on his recommendation, to observe the sedition trial of distinguished Malaysian lawyer Karpal Singh on behalf of LAWASIA in 2002-2003. Chief Justice Malcolm enjoys an international reputation as a jurist and his commitment to human rights is widely known. In fact, David Malcolm QC (as he then was) attended as the LAWASIA observer at the sedition trial of Dato' Param Cumaraswamy (then President of the *Malaysian Bar Council*) who at that time was under attack from the Malaysian Government in 1986.

I should also make mention of the assistance of the Federal Minister for Justice and Customs, Senator Christopher Ellison, for providing me with advice and diplomatic support in Malaysia.

My fellow observers were wonderful companions during the appeal process. They were a constant source of inspiration. I speak of Marzuki Darusman, the former Attorney General of Indonesia, representing the *Inter-Parliamentary Union* (*IPU*); distinguished advocate Desmond Fernando PC, Chairman of the *Sri Lanka National Commission of Jurists* and Former President of the *International Bar Association* (*IBA*) and respected Sri Lankan lawyer and former President of the *Bar Association of Sri Lanka (BASL)* Upali Gooneratne.

All of the lawyers involved in the appeal were very helpful to the international observers. At all times they were willing to discuss aspects of the case and provide written materials used by them at the appeal. We are also thankful to the various court staff and security personnel who assisted us always with courtesy and good humour.

Footnotes

(1) Zainur Zakaria, was sentenced to three months in jail for contempt for filing an affidavit alleging that two public prosecutors had attempted to fabricate evidence against Anwar. The Federal Court unanimously set aside the sentence, which had been upheld by the Court of Appeal, and acquitted Zainur. All three Federal Court judges criticized the decision of the lower court, stating that the lower court judge, Augustine Paul, had behaved more like a prosecutor than a judge. Justice Paul was later to preside over the more controversial prosecution of distinguished advocate Karpal Singh for sedition. For detailed consideration of this case refer to the report by the author to *LAWASIA* and *ABA* dated 6 December 2001 and 12 September 2002.

(2) The Malaysian Bar Council relies on the *Legal Profession Act 1976* (Act 166) to provide a basis for allowing it to appear in this capacity. Section 42 (1) (e) describes one of the Council's functions as "…*to represent, protect and assist any member of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia*".

(3) Refer to the majority judgements of Federal Court justice Datuk Abdul Hamid Mohamad and Court of Appeal judge Datuk Tengku Baharuddin Shah Tengku Mahmud; and dissenting judgement of Justice Datin Paduka Rahmah Hussain dated on 2nd September 2004. Also see the judgement of the Federal Court dismissing the appeal against the corruption convictions dated on 15 September 2004 [Ed.: The judgments may be accessed from the judiciary's website at http://www.kehakiman.gov.my/jugdment/fc/archive.html]

JURISDICTION OF STATE AUTHORITIES TO PUNISH OFFENCES AGAINST THE PRECEPTS OF ISLAM: A CONSTITUTIONAL PERSPECTIVE

by

Prof Dr. Shad Saleem Faruqi[*]

I: THE ENFORCEMENT OF MORALITY

Is it the business of the law to suppress vice and to enforce morality? Discussion of these issues is premised on the belief of the "legal positivists" that law and morality are two distinct spheres which can (and should) be kept apart. In fact, the distinction between legal and moral duties is not always possible.

It is also noteworthy that the debate on whether the law should enforce morality tends to concentrate on matters of sexual morality. It is time to broaden our moral horizons and to recognise that there is more to morality than sex. Socio-legal issues such as corruption and crime are also the stuff of morality.

Once morality is understood in a broader context, it becomes obvious that the enforcement of morality is one of the primary functions of the law.

But for reasons of human rights as well as for practical and economic considerations a line has to be drawn at which state intervention should cease and privacy is respected. Some criterion needs to be devised to justify state intervention in some situations and non-intervention in others.

Islam's requirement to prohibit all that is *munkar* and to promote all that is *ma'aruf* has to be borne in mind. At the same time Islam's respect for privacy must be honoured.[1] Harming fellow Muslims, trying to uncover their nakedness, committing espionage or reporting on the private affairs of others is forbidden in Islam. According to a *Hadith*, exposing the faults of others through suspicion

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[1] Refer generally to Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Berita Publishing, 1994, 119-122.

and esponiage, spying upon one another, trying to bare each others hidden failings and exposing or exploring the privacy and personal weaknesses of the people is regarded as reprehensible.[2] According to another *Hadith* "if anyone tries to uncover the nakedness of his Muslim brother, God will uncover his own nakedness.[3]

On the enforcement of morality through the law, legal philosophy offers many approaches.[4] John Stuart Mill proposes a "harm to others" test. It is not the business of the law to promote virtue and to punish vice. Enforcement of morality is not the function of the state. A distinction must be made between sin (which should remain a matter of private conscience) and crime (which consists of conduct that causes harm to others).

Lord Devlin proposes a "public morality" test. What constitutes society is the existence of shared values. The law must make it its business to protect these shared values and standards. But as far as possible privacy must be respected. Not every breach of public morality needs to be punished. Only such conduct as arouses widespread disapprobation, a mixture of intolerance, indignation and disgust, needs to be suppressed by the instrument of law.

HLA Hart rejects the "public morality" test. He believes that except on the most simple issues of morality, there is no community of beliefs in modern society and no unanimity on what constitutes immoral conduct. Instead, value pluralism is widespread. Hart, therefore, recommends a "critical morality" test. The law's decision to intervene in matters of private conscience must be based on a thorough, empirical collection and investigation of all facts and a critical analysis of the consequences. A similar, functionalist and pragmatic approach is recommended by the sociological school.

Perhaps the question whether or not laws should be used to uphold morality through direct prohibition is better dealt with on the basis of a calculus rather than on a simple formula like 'harm to others'. Prof. Dias suggests a calculus

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[2] Tirmidhi, *Sunan*, III, 255, *Kitab al-Birr*, Hadith no. 84.
[3] Sahih Muslim, K. *al-Birr wa al-sillah*. Al-Ghazali, *Kitab Adab al-suhbah*, pp. 242-43.
[4] Freeman, *Lloyds Introduction to Jurisprudence*, 7th edn., London, 2001, pp. 362-7

of seven factors: the danger of the activity to others; the danger to the actor himself; economy of factors needed for detection and pursuit; equality of treatment; the nature of the sanction; possible hardship caused by the sanction; and possible side-effects.[5] A combination of such factors can be used as a workable guide to state intervention.

Whatever test one adopts it is clear that in legal ideology it is not possible to set theoretical limits on the power of the state to regulate private conduct. But for practical reasons the state must stay away from the enforcement of some moral and religious rules.

Even where enforcement is desirable, the "criminalisation" of conduct is not always necessary. Alternative approaches to the enforcement of morality can be explored. Prevention and persuasion may be just as effective as the blunt instrument of penal sanctions.

II: CONSTITUTIONAL DIMENSION

Aside from legal philosophy there is in Malaysia a constitutional dimension to the debate on -

- which authorities (federal or state) have the power to punish transgressions of religious and moral injunctions, and
- to what extent and subject to what limitations may these authorities trespass into matters of private morality and conscience.

The Federal Constitution contains a number of features which are relevant to our discussion.

Supremacy of the Federal Constitution: Articles 4(1) declares the supremacy of the federal constitution. Supremacy is further strengthened by Article 162(6). The combined effect of these two articles is that Parliament is not supreme. There are procedural as well as substantive limits on Parliament's powers. State Assemblies are, likewise, 'limited' in their legislative competence. Courts have the power to review federal and state legislation on the ground of

[5] Dias, *Jurisprudence*, Fifth edition, p. 117

'unconstitutionality': Articles 4(1), 128 and 162(6).

Executive actions can be challenged on the ground of constitutionality: *Surinder Singh Kanda v Government of Malaya* (1962) 28 MLJ 169.

Federal-State division of powers: The Constitution creates a system of dual government. There is division of legislative, executive, judicial and financial powers between Centre and the States. This division is protected by the Constitution. Judicial review is available if federal or state agencies exceed their constitutional powers. For example in *Mamat Daud v PP* [1988] 1 MLJ 119 section 298A of the federal Penal Code was declared to be an unconstitutional trespass on state legislative power by the Federal Parliament.

The Constitution of Malaysia makes a two-fold distribution of legislative powers

- with respect to territory;
- with respect to subject-matter.

Territorial jurisdiction: As regards territory, Article 73(a) provides that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation. A law made by Parliament shall not be deemed to be invalid on the ground that it has extra-territorial operation, i.e., takes effect outside the territory of Malaysia. In the Indian case of *AH Wadia v Income-Tax Commissioner, Bombay* AIR 1949 FC 18, the Supreme Court held: "In the case of a sovereign legislature the question of extra-territoriality of any enactment can never be raised in the municipal court as a ground for challenging its validity. The legislation may offend the rules of international law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned." As to state legislatures, Article 73(b) provides that state assemblies may make law for the whole or any part of their states.

Subject matter: The legislative powers of Parliament and State Legislatures are subject to the provisions of the Constitution, *viz*:

- the scheme of distribution of powers contained in Schedule 9, Legislative Lists I, II and III. List I contains 27 paragraphs. In relation to topics in these

paragraphs the federal Parliament has exclusive legislative competence. List II outlines 13 areas for which State Assemblies have exclusive power. List III includes 12 topics in relation to which both the federal and state legislatures have concurrent power.[6]

- fundamental rights; and
- other provisions of the Constitution like Article 75.

Federal List: A look at List I indicates that the 27 paragraphs in this List cover 110 or more items. The Constitution has allocated the most important legislative matters like defence, finance and internal security to the federal Parliament. Two controversial areas within federal jurisdiction deserve special mention.

(i) Islamic Law: Included in the federal list are many topics on which classical Islamic law provides a wealth of principles and precepts. It must be remembered that like secular law, Islamic law addresses all fields of human endeavour, be they public or private, civil or criminal, national or international. Legal areas like pilgrimages, civil law, criminal law, contracts, employment, equity and trusts, mercantile law, banking, trade, commerce, treaties, defence, war and peace, betting, lotteries, taxes, education, labour and social security are all in the federal list. But any one familiar with Islamic legal systems will know that in relation to these fields there is a wealth of Islamic laws and principles.[7] However in the context of Malaysia these areas are exclusively in the hands of the federal Parliament. Thus, contracts, sale and purchase, banking, hire-purchase and employment agreements, whether by Muslims or non-Muslims, are governed by federal laws.[8] In *Bank Islam v Adnan Omar* [1994] 3 CLJ 735[9] it was

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[6] The Supplementary State List (List IIA) and the Supplementary Concurrent List (List IIIA) for Sabah and Sarawak are not relevant for our discussion.

[7] Tyser, Demetriades & Ismail Haqqi Effendi (Translators), *The Mejelle, An English Translation of Majallahel-Ahkam-I-Adliya and A complete Code on Islamic Civil Law,* Law Publishing Company, Lahore, 1962; Hamilton, Charles, *The Hedaya or Guide - A Commentary on the Mussulman Laws,* Premier Book House, Lahore, 1982; Ibn Taymiya, *Public Duties in Islam - The Institution of the Hisba,* The Islamic Foundation, 1983; Sayyid Qutb, *Social Justice in Islam,* The Open Press, Kuala Lumpur, 1983.

[8] Refer to the Contracts Act 1950, Islamic Banking Act 1983, Takaful Act 1984, Partnership Act 1961, Companies Act 1965.

[9] See also *Dato Nik Mahmud Daud v. Bank Islam* [1998] 3 MLJ 393; *Bank Kerjasama Rakyat v. Emcee Corporation* [2003] 1 CLJ 625.

argued that syariah courts and not the civil courts have jurisdiction over Islamic banking. The contention was rejected. Banking, whether Islamic or conventional, is a matter of federal jurisdiction and the civil courts are the proper forum to adjudicate disputes.

(ii) Criminal Law: Almost the entire field of criminal law is allocated to the central government. Extradition, fugitive offenders, alien enemies and enemy aliens, police, criminal investigation, registration of criminals, public order, prisons, reformatories, places of detention, probation of offenders, juvenile offenders, criminal law and procedure, corrupt practices, "creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law", betting and lotteries are all matters of federal jurisdiction even though there are Islamic laws on many of these points. In *Che Omar Che Soh v PP* [1998] 2 MLJ 55, a federal law against drug trafficking was unsuccessfully challenged as unIslamic. It was held that the declaration in Article 3 that "Islam is the religion of the federation" does not impose fetters on the power of Parliament to legislate on matters assigned to it by the Constitution.

From the above it follows that the assertion that all Islamic civil and criminal law is within State jurisdiction has no constitutional basis. On many areas of Islamic law, the federal Parliament is the authorised legislative authority.

State List: The Constitution's Schedule 9, List II has 13 paragraphs covering 31 or so items. For our purpose the most important paragraph is Paragraph I which stretches to 210 words and could be broken down into the following nine areas:

- Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;
- Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutional trusts, charities and charitable institutions operating wholly within the State;
- Malay customs;
- Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

- Mosques or any Islamic public places of worship;
- Creation and punishment of offences by persons professing the religion of Islamic against precepts of that religion, except in regard to matters included in the Federal List;
- The constitution, organisation and procedure of syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;
- The control of propagating doctrines and beliefs among persons professing the religion Islam;
- The determination of matters of Islamic law and doctrine and Malay custom.

The use of such generic words as "matters of Islamic law" has given rise to an engaging debate about the extent of the powers of the states to legislate on Islamic matters. One view is that State Assemblies have legislative monopoly whenever a measure, in its pith and substance, deals with an Islamic civil or criminal matter. The decision in *Mamat Daud v Government* [1988] 1 MLJ 119 lends credence to this view. The other view is that states have only a limited power confined to the explicitly mentioned areas of Islamic law in Schedule 9, List II, Paragraph I. The rest of the field of Islamic law is open to federal jurisdiction.[10]

It is submitted that the second view represents the constitutional scheme of things. The term "Islam" or "Islamic law" in Schedule 9 List II, Paragraph 1 does not refer to Islamic law in its entirety but only to such areas of Islamic law as are explicitly enumerated in that paragraph. This contention can be supported by the following submissions:

(i) By specifying with precision those areas of Islamic law that are assigned to the States, it is obvious that the intention of the Constitution was to confine state power to enumerated fields. If the intention was to allocate the entire field of Islamic law to the States there would be no need to use 210 words in

[10] Mohamed Ismail Mohamed Shariff, "The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law' [2005] 3 MLJ CV.

Paragraph I to enumerate specific areas of Islamic law. The contention that the words "Islamic law" must be interpreted broadly because "Islam is not just a mere collection of dogmas and rituals but … is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial"[11] is plausible. But it is submitted that this majestic and broad view of Islam is not incorporated into the Constitution.

In List II, Paragraph I the words "Islamic law" occur at two places. On the first occasion the item of "Islamic law is not a separate and independent head. It is not followed by a full stop, comma or semi-colon but is part of a long sentence running to 210 words. The sentence runs as follows: "Islamic law and personal and family law of persons professing the religion of Islam including the Islamic law relating to" (12 items of Islamic personal law). The implication is that "Islamic law and personal and family law" were meant to refer to only to these 12 enumerated matters.

The second reference to "Islamic law" at the end of Paragraph I of List II – "the determination of matters of Islamic law and doctrine" – is indeed very broad. It is submitted, however, that these words must be interpreted narrowly and in the context of the specific areas of Islam explicitly mentioned in the paragraph.

(ii) List I, Paragraph e (ii) expressly excludes from federal jurisdiction the specific items of Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate". This implies that other areas of Islamic law like banking, contracts, insurance are not outside the powers of the federal Parliament.

(iii) List II, Paragraph 4(k) gives to the federal Parliament power in relation to the "ascertainment of Islamic law and other personal laws for purposes of federal law". This means that the Constitution envisages that some federal laws will have an Islamic component. The states have no monopoly over these laws.

[11] Salleh Abbas, LP in *Che Omar Che Soh v. PP* [1988] 2 MLJ 55 at 55-56.

(iv) It is judicially accepted that topics in the Federal List are in federal hands even though they may involve an Islamic component. Thus, banking and insurance – whether Islamic or conventional – are federal matters.[12] Likewise contracts and partnerships are regulated by federal laws. The Practice Direction of 6 February 2003 by the Chief Judge established a *Muamalat* Division within the civil court system to handle federal laws with an Islamic content.[13]

Specially guaranteed fundamental rights: Articles 5 to 13 provide protection for several political and civil rights, among them personal liberty (Article 5), protection against double jeopardy (Article 7), right to equality (Article 8), freedom of speech and expression (Article 10(1)), freedom of association (Article 10(3)), freedom of religion (Article 11) and rights in respect of education (Article 12). These rights operate as constitutional limits on the powers of federal and state legislatures and as restraints on legislative exuberance. Legislative power in Schedule 9, Lists I, II and III is subordinate to the gilt-edged provisions of the chapter on fundamental rights.

In the light of this, sections 12(3) and 41(1) of the (Kelantan) Syariah Criminal Code II Enactment 1993 appear to be unconstitutional and violative of Article 8(2) of the Constitution because they discriminate against women in the matter of giving evidence in a court of law. Section 23(4) of the same Enactment appears to violate the right to property in Article 13 in that orders the forfeiture of property without any compensation.

Freedom of religion: In respect of religion, every person has the right to three things:

- to profess
- to practice, and
- subject to Article 11(4), to propagate his religion: Article 11(1)

The first refers to beliefs and doctrines. The second refers to exhibition of these beliefs through acts, practices and rituals. The third is about attempts at propagation.

[12] Refer to the Islamic Banking Act 1983 (Act 276); Takaful Act 1984 (Act 312).
[13] Arahan Amalan No.1/2003, Pendaftaran kes-kes Muamalat di Mahkamah (Kod Pengklasan).

The right to beliefs and doctrines is generally regarded as absolute. The last two aspects are, everywhere, subject to regulation on grounds of public order, public health and morality (Article 11(5)).

Article 3(4): The Constitution in Article 3(1) declares that Islam shall be the religion of the Federation. But it is provided in Article 3(4) that nothing in Article 3 derogates from any other provision of the Constitution. This means that Article 3 does not override any constitutional provision or extinguish any right guaranteed by the Constitution.

Article 121(1A): By Constitution (Amendment) Act 1988, (Act A704) which came into force with effect from 10 June 1988, it was provided that the High Courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts".

The purpose of this amendment was to separate the Syariah courts from the civil courts and to make the Syariah courts autonomous of the High Court *in matters within the jurisdiction of the Syariah courts***.** A grave defect of the amendment is that in cases of conflict of jurisdiction there is no guidance on who determines whether a matter is within or outside the jurisdiction of the Syariah courts.

From a mass of case law the following principles seem to emerge:

1. Article 121(1A) is not to be construed with retrospective effect: *Sarwari v Abdul Aziz* [2001] 6 MLJ 737.

2. In interpreting Article 121(1A) the court should construe the clause together with clause (1) of the Article and choose a construction which would be consistent with the smooth working of the court system: *Sukma Darmawan v Ketua Pengarah Penjara* [1999] 2 MLJ 241.

3. The expression 'jurisdiction of the Syariah courts' in Article 121(1A) refers to their *exclusive* jurisdiction. If a person professing Islam does a prescribed act which is punishable both under the Penal Code and the Syariah Criminal Offences (Federal Territories) Act 1997, then the ordinary criminal courts will have jurisdiction to try such an offence: *Sukma*

v Ketua Pengarah Penjara [1999] 1 MLJ 266. This view is correct because both laws were federal laws and both the Public Prosecutor under Article 145(3) and the syariah authorities had discretion to prosecute. However it is submitted that if an offence is punishable under a federal criminal law as well as a state syariah law, the state syariah law must yield to the federal penal statute because the state syariah law would be *ultra vires* for the following reasons. First, Schedule 9, List II Item I explicitly states that State Assemblies have criminal jurisdiction "except in regard to matters included in the Federal List". Second, Schedule 9, List I, Item 4(h) explicitly states that the Federal Parliament has authority to create offences in respect of any of the matters included in the Federal List *or dealt with by federal law.* Unnatural sex is dealt with by federal law in sections 377A-377C of the Penal Code and is, therefore, outside the jurisdiction of State Assemblies. Third, in case of competing provisions, Article 75 of the Constitution would give primacy to the federal law.

4. Article 121(1A) does not say that all disputes in which all the parties are Muslims should only be heard in the Syariah Courts: *Sarwari v Abdul Aziz (No.2)* [2001] 6 MLJ 737.

5. Is the jurisdiction of the Syariah Courts inherent or must it be derived from some existing state law? Must it be explicitly conferred or can powers be implied and imputed to the Syariah courts? In *Mohamad Habibullah v Faridah* [1992] 2 MLJ 793 Harun SCJ was the opinion that where there was a challenge to jurisdiction, the correct approach was to see whether the Syariah Court had explicitly been empowered by the State Assembly and not whether the State Assembly has power to enact the law. Regrettably, this eminently correct constitutional approach was overturned by *Md Hakim Lee v Majlis Agama* [1998] 1 MLJ 681. The Federal Court held that even if there is no express provision in the State Enactment giving jurisdiction to the Syariah Court on any particular subject matter, the Syariah Court can exercise jurisdiction if the matter is within the competence of the state legislature!

With all due respect, this is fundamentally wrong. Jurisdiction of state legislatures under the Federal Constitution and jurisdiction of the Syariah

Courts under State Enactment are two different things and are not co-terminus. A state Assembly may have a power and may deliberately not exercise it. A court whose power is derived from the law cannot claim implied jurisdiction because the empowering authority could have (but did not) empower it!

As a result of the "implied power approach", it has been held that Syariah courts can deal with apostasy cases although not expressly empowered by State Enactments: *Soon Singh v PERKIM* [1999] 1 MLJ 489.

6. Questions of jurisdiction must be decided by reference to the subject matter of the case and not by reference to the remedy prayed for: *Majlis Agama v Shaikh Zokaffily* [2003] 3 MLJ 705.

The overall approach of the civil courts appears to be that at the slightest whiff of an "Islamic law issue" the civil courts wash their hands off a case. This is so even if one party to the dispute is a non-Muslim, even if an issue of constitutional interpretation is involved, and even if the gilt-edged provisions of the chapter on human rights are being invoked.

It is submitted that issues of constitutionality belong to the civil courts, Article 121(1A) notwithstanding. Enforcement of constitutionally guaranteed human rights is the province of the High Court. Refusal of jurisdiction in such cases is a serious abdication of the solemn oath to preserve, protect and defend the Constitution.

Equally, when one of the parties is a non-Muslim, it is a grave act of injustice for the civil courts to deny jurisdiction. If the case involves some elements of Islamic law, the High Court can seek expert opinion and rely on it.

III: ISLAM AS THE RELIGION OF THE FEDERATION

Islam is the religion of the federation but there is freedom to other communities to practice their own religions in peace and harmony: Articles 3(1) and 11. Does the provision for Islam as "the religion of the federation" make Malaysia into an Islamic state?

Historical evidence: Malaysia's document of destiny does not contain a preamble. The word 'Islamic' or 'secular' does not appear anywhere in the Constitution. However, there is historical evidence in the Reid Commission papers that the country was meant to be secular. The intention in making Islam the official religion of the Federation was primarily for ceremonial purpose. In the White Paper dealing with the 1957 constitutional proposal it is stated: "There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular state…[14] This view of a secular history is strongly challenged by those who argue that before the coming of the British, Islamic law was the law of the land.[15] With all due respect, such a picture oversimplifies an immensely complex situation. A look at the legal system prior to Merdeka indicates the presence of a myriad of competing and conflicting streams of legal pluralism.

The Neolithic people who lived in the alluvial flood plains of Malaya between 2500 BC and 1500 BC possessed their own animistic traditions. Likewise the Mesolithic culture (encompassing the Senois of Central Malaya, the Bataks of Sumatra and the Dayaks of Borneo), the Proto-Malays and the Deutero-Malays had their own tribal customs.

Hinduism from India and Buddhism from India and China held sway in South East Asia between the first to the thirteenth centuries and left an indelible imprint on Malay political and social institutions, court hierarchy, prerogatives and ceremonials, marriage customary rites and Malay criminal law. The incorporation of the patriarchal and monarchical aspects of law are said to have been influenced by Hindu culture. Some of these influences linger till today.[16]

In Peninsular Malaysia Chinese traders brought with them their own way of

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[14] M. Sufian Hashim, 'The Relationship between Islam and the State in Malaya', *Intisari*, Vol. 1. No. 1, p.8.
[15] Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, Kuala Lumpur, 1987) p.54.
[16] Ibid, p.8.

life and the close relationship between Malacca and China during the days of the Malacca Sultanate opened the door to Chinese influence on Malay life.

Before 1963 Sabah and Sarawak were guided by their native customs and by British laws. The influence of Islam was marginal.

Islam came to Malacca only in the 14th century from various regions in Arabia, India and China. But it gained a legal footing in Malaya only in the 15th century. Since then the legal system of the Malays shows a fascinating action and reaction between Hindu law, Muslim law and Malay indigenous traditions. In some Malay states like Malacca, Pahang, Johore and Terengganu, vigorous attempts were made to modify Malay customs and to make them conform to Islamic law. But these attempts were thwarted by the British who relegated Islamic law primarily to personal matters. RJ Wilkinson says that "there can be no doubt that Muslim law would have ended by becoming the law of Malaya had not British law stepped in to check it".[17] There is very little doubt that at the time of Merdeka the "Islamic law" that existed in Malaya was "an Islamic law which (had) absorbed portions of the Malay *adat* and therefore not (the) pure Islamic law".[18]

Case law: It was held in *Che Omar Che Soh v PP* [1988] 2 MLJ 55 that though Islam is the religion of the federation, it is not the basic law of the land and Article 3 (on Islam) imposes no limits on the power of Parliament to legislate. Islamic law is not and never was the general law of the land either at the federal or state level. It applies only to Muslims and only in areas outlined in Item 1 of list II of the Ninth Schedule. In the law of evidence, for example, the Evidence Act applies to the exclusion of Islamic law: *Ainan v Syed Abubakar* [1939] MLJ 209.

The syariah courts have limited jurisdiction only over persons professing the religion of Islam.[19] It must also be noted, that the Federal Court has now overruled the High Court's decision in *Meor Atiqulrahman Ishak v Fatimah bte Sihi*

[17] R.J. Wilkinson, "Papers on Malay Subjects", (Kuala Lumpur, 1971).
[18] Ahmad Ibrahim and Ahilemah Joned, supra, note 7, p. 3
[19] Refer to Schedule 9, List II, Item 1.

[2005] 5 MLJ 375. The High court had side-stepped the *Che Omar Che Soh* decision and had ruled that Islam is *ad-deen* – a way of life and, therefore, Regulations violating Article 3 can be invalidated.

Adat: One must also note the very significant influence of Malay *adat* (custom) on Malay-Muslim personal laws. In some states like Negeri Sembilan, *adat* (custom) overrides *agama* (religion) in some areas of family law.

Article 4(1): Under Article 4(1) the Constitution and not the syariah is the supreme law of the federation. Any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

Article 162(6): Under Article 162(6) and (7) any pre-Merdeka law which is inconsistent with the Constitution, may be amended, adapted or repealed by the courts to make it fall in line with the Constitution.

Definition of 'law': Article 160(2) of the Constitution, which defines "law", does not mention the syariah as part of the definition of law.

Article 3(4): Though Islam is adopted as the religion of the federation, it is clearly stated in Article 3(4) that nothing in this Article derogates from any other provision of the Constitution. This means that no right or prohibition is extinguished as a result of Article 3.

Higher status of secular authorities: If by a theocratic state is meant a state in which the temporal ruler is subjected to the final direction of the theological head and in which the law of God is the supreme law of the land, then clearly Malaysia is nowhere near a theocratic, Islamic state. Syariah authorities are appointed by state governments and can be dismissed by them. Temporal authorities are higher than religious authorities. Except for those areas in which the syariah is allowed to operate, the law of the land is enacted, expounded and administered by secular officials.

Senior federal posts: The Yang di-Pertuan Agong must, of course, be a Muslim. But Islam is not a prerequisite for citizenship or for occupying the post

of the Prime Minister. Members of the Cabinet, legislature, judiciary, public services (including the police and the armed forces) and the Commissions under the Constitution are not required to be of the Muslim faith. In the Sixth Schedule, the oath of office for cabinet ministers, parliamentary secretaries, Speaker of the Dewan Rakyat, MPs and Senators, Judges and members of Constitutional Commissions is quite non-religious in its wording and does not require allegiance to a divine being or to Islam.

However there is plenty in the Constitution to suggest that Malaysia is, at least partly, an Islamic state.

Article 3(1): The implication of adopting Islam as the religion of the federation is that Islamic education and way of life can be promoted by the state for the uplifting of Muslims. Article 12(2) provides that it shall be lawful for the Federation or a State to establish or maintain Islamic institutions, provide instruction in the religion of Islam to Muslims and incur expenditure for the above purposes. Thus, taxpayers' money can be utilised to promote Islamic institutions and to build mosques and other Islamic places of worship and to keep them under the control of state authorities.

Islamic courts: Islamic courts can be established and syariah officials can be hired. The jurisdiction of the Syariah courts is protected by Article 121(1A) against interference by ordinary courts.

Muslims subject to syariah laws: All Muslims are subjected to Islamic law in matters of succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, wakafs, zakat, fitrah, baitulmal or similar Islamic religious revenue. A Muslim cannot opt out of Islamic law.[20] He/she can be compelled to pay *zakat* and *fitrah.*

Under Article 11(4) state law and (for federal territories) federal law may control or restrict the propagation of any religious doctrine amongst Muslims.

[20] However in many areas Muslims are allowed to have a choice between syariah provisions and ordinary civil laws. Among these areas are banking, trusts, adoption and a whole range of commercial transactions.

This Article is directed not only at non-Muslim attempts to convert Muslims but also at propagation to Muslims by unauthorised Muslims. Application of such laws, however, poses a serious constitutional objection. Syariah courts cannot have jurisdiction over non-Muslims and it appears that a federal criminal court will have to try a non-Muslim whose proselytising zeal violates a state law.

Islamic morality: State enactments can seek vigorously to enforce Islamic morality amongst Muslims. For example beauty and body building contests are forbidden to Muslims in many States. In areas permitted by the Ninth Schedule, Islamic civil and criminal laws are applied to all Muslims.

Islamic offences: Item 1 of List II of the Ninth Schedule permits State legislation to create and punish offences by persons professing the religion of Islam against the precepts of that religion. However, the power of the state to enforce Islamic criminal law is limited by the words "except in regard to matters included in the Federal list" or "dealt with by federal law".

State Constitutions: All State Constitutions in Malay states prescribe that the Ruler of the state must be a person of the Islamic faith. Some State Constitutions require that the Menteri Besar and state officials like the State Secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

Inter-religious marriages: As Muslims are not allowed to marry under the civil law of marriages, and must marry under syariah law, non-Muslims seeking to marry Muslims have to convert to Islam if the marriage is to be allowed to be registered. This has caused pain to the parents of many converts. Likewise it has led to several troublesome cases of apostasy by Muslims who, for reasons of the heart, wish to marry their non-Muslim counterparts.

Atheism: Does the right to believe include the right to disbelieve and to adopt atheism, agnosticism, rationalism, etc.? In most democratic countries the right not to believe is constitutionally protected. But in the light of the Rukun Negara ("Kepercayaan kepada Tuhan"); the language of Article 11(2) (no tax to support

a religion other than one's own); Article 12(3) (no instruction in a religion other than one's own); and the mandatory application of syariah laws to Muslims in many areas, it is possible to argue that atheism is not protected by Article 11 – at least not for Muslims.

Propagation of religion to Muslims: Under Article 11(4) of the Federal Constitution non-Muslims may be forbidden by state law from preaching their religion to Muslims.

IV: POWER TO PUNISH VIOLATIONS OF PRECEPTS OF ISLAM

The power of State Assemblies and the Federal Parliament in Schedule 9, List II, Item 1 to create and punish offences against the precepts of Islam is a residual power and not an unlimited or sovereign power. It is subject to the following constitutional limitations:

Not applicable to non-Muslims: Schedule 9, List II, Item 1 is quite clear that non-Muslims cannot be subjected to the syariah. They cannot be compelled to appear before the syariah courts[21]. "Syariah courts … shall have jurisdiction only over persons professing the religion of Islam". Kelantan's clever device of permitting non-Muslims "to elect" to be governed by Kelantan's Syariah Criminal Code II Enactment of 1993 will not remove the unconstitutionality. Jurisdiction is conferred by law. The act of election by non-Muslims cannot confer jurisdiction when none existed under the Constitution. See section 56(2) of the 1993 Enactment.

Applicable only to those professing Islam: The power to punish transgressors of the precepts of Islam applies only to those persons who profess the religion of Islam. In its dictionary sense the word "profess" means to affirm one's faith or belief in or allegiance to a religion. It also means to feign, allege,

[21] See also Articles 12(3) and 11(2). However under Article 11(4) of the Federal Constitution, state law and in respect of the federal territories, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. This permits the States to punish attempts by non-Muslims to proselytize Muslims. The prosecution will, however, have to be initiated in ordinary courts. For an illustration of such a law see Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1991, sections 4-9 (Johor).

assert, aver, openly declare, state, pronounce, announce, annunciate, enunciate, maintain, acknowledge, avow, claim to a quality or feeling, pretend to be or do, or to make a vow on entering an order or calling.

Professing is a matter of inner feeling. It is not something that can be imposed from outside. This means that those who deny the religion or voluntarily renounce it and become *murtads* or apostates are no more in a state of professing the religion of Islam. It could be argued that they should, therefore, be no more subject to the criminal jurisdiction of the syariah courts. The civil and syariah courts have both rejected this line of reasoning, and for understandable reasons. It is not exceptional to hold that status cannot be self determined. Status is almost always other-determined. Also, if during the pendency of syariah court proceedings, a person is allowed to renounce Islam, that would amount to a clever attempt to escape prosecution by depriving the court of its jurisdiction. In any case, the law applicable to a charge is the law at the time of the alleged commission of the offence and not by what happens afterwards.

A majority of judges handling apostasy cases[22] have said that renunciation must be done through the syariah courts. Till the syariah court determines the issue according to Islamic law, the apostate remains a Muslim and can be subjected to the syariah court's criminal jurisdiction. There are three serious problems with this point of view. First, the syariah courts often fail to adjudicate on a renunciation application despite an unconscionable passage of time. Statutory time limits must, therefore, be imposed to require the syariah courts to adjudicate on an application within a prescribed time frame. Second, no remedy seems to be available if a syariah judge indefinitely postpones the determination of an apostate's status. The administrative law remedy of Mandamus (Order under section 44 Specific Relief Act) is unlikely to lie because of the existence of Article 121(1A) of the Constitution. Third, syariah authorities denounce and effectively defeat an application to renounce Islam by prosecuting the applicant for insulting Islam.

Some judges have gone so far as to hold that Muslims cannot renounce their religion at all. This point of view is difficult to reconcile with Article 11's protection

[22] See Section V, Special Areas, Conversion and Apostasy, *infra*.

of freedom of religion. Further, Article 3 on Islam declares in its clause (4) that "nothing in this Article derogates from any other provision of this Constitution". Note must also be taken that in most Constitutions and under international law, the right to believe includes the right not to believe. The right to convert from one religion to another is a well-established aspect of freedom of religion both in international law and in most municipal systems.

Schedule 9, List II, Item 1: Contrary to what is believed, not everything connected with Islam is in the hands of state assemblies. State Assemblies have a power only over the matters explicitly included in paragraph 1 of the State List.[23] These matters relate to Islamic personal law, wakafs, Malay customs, zakat, mosques, offences against precepts of Islam (except those offences covered by federal law), syariah courts, propagation of religion to Muslim and determination of matters of Islamic law and Malay custom. All other matters of Islamic criminal and civil law are assigned by the Constitution to federal jurisdiction. For example, administration of the *Hajj* falls under the Federal List, Item 1(h). Likewise, much of the field of Islamic criminal law is assigned to the federal parliament. Thus, theft, murder and rape fall under Federal List, Items 4 and 4(h).

Under Schedule 9, List II, Item 1, States have authority relating to "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List"*. This means that List II acknowledges that certain areas of Islamic law are part of the federal jurisdiction. State powers over Islam are neither exclusive nor comprehensive. Among matters included in the Federal List are "civil and criminal law and procedure" (List I, Item 4) and "Betting and lotteries" (List I Item 4(l). The words "except in regard to matters included in the Federal List" and the assignment of criminal law and procedure and betting and lottery to the federal jurisdiction clearly imply that State power over Islamic law offences is subordinate to the federal power and is residual and not inherent. Crime is, mostly a matter for federal supervision.

Schedule 9, List I, Item 4(h): The assignment of Islamic criminal law offences

[23] See Section II, *supra*, paragraph on the State List.

to the States is further qualified and limited by List I, Item 4(h) which assigns "creation of offences in respect of any of the matters included in the Federal List *or dealt with by federal law* to the federal Parliament. Like Item I in List II, Item 4(h) in List I reiterates that the criminal law powers of state assemblies are purely residual.

Murder, theft, robbery, rape, incest and homosexuality are all offences in Islamic law but are clearly in federal hands due to Schedule 9, List I, Item 4(h) and the Federal Penal Code. Murder is covered by sections 300, 302 and 307 of the Penal Code. Theft is dealt with by sections 378 – 382A; robbery by sections 390 to 402; and rape in section 375 – 376. Incest and homosexuality can be covered by sections 377A to 377C of the Penal Code. State Enactments on these federal matters would, therefore, be ultra vires the powers of the States.

Betting and lotteries are Islamic law offences but are clearly in federal jurisdiction under Schedule 9, List I, Item 4(l) and the Lotteries Act 1952 (Act 288) and the Betting Act 1953 (Act 495). Many states laws are in disregard of this constitutional position.

A Selective survey indicates that the Syariah Criminal Offences (State of Penang) Enactment 1996 (No.3 of 1996) contains many provisions that overlap with federal criminal offences. Among them are:

- Section 7 on insulting or bringing into contempt the religion of Islam. This overlaps with section 298 of the federal Penal Code.
- Section 8 on deriding Qur'anic verses or *Hadith*. This too may be covered by section 298 of the Penal Code.
- Section 18 on gambling. This overlaps with the federal Gaming Tax Act 1972 (Act 65).
- Section 25 and 26 relating to *liwat* and *musahaqah*. These are covered by sections 377A to 377C Penal Code.
- Section 30 about giving false evidence which is also covered by section 191 of the Penal Code.
- Section 32 relating to the defiling of a mosque. This is similar to section 295 of the Penal Code.
- Sections 43 to 46 on Abetment. These sections overlap with sections 107 to 114 of the Penal Code.

The (Penang) Crimes (Syariah) Enactment 1992 contains many penal provisions which overlap with or trespass into federal jurisdiction. Among the provisions are: Section 14 (insulting or bringing into contempt the religion of Islam); section 15 (deriding Qur'anic verses or *Hadith*); section 26 (gambling); section 27 (giving false evidence); section 35 (disturbing a religious assembly or ceremony); section 36 (destroying or defiling a place of worship); section 37 (words that may cause breach of peace); section 39 (secrecy); and section 61 – 64 (abetment).

The state of Terengganu Syariah Criminal Offences (Takzir) Enactment No. 7 of 2001 in section 50 imposes a punishment for disturbing a religious assembly or ceremony. In section 52 prosecution maybe instituted for words that may cause breach of peace. Section 54 punishes any violation of the duty to observe secrecy. All the above matters are the subject of federal laws.

Another State law that encroaches on the federal power is the Syariah Criminal Code II Enactment 1993 of the State of Kelantan. It seeks to punish:

- Theft (sections 4(a), 6)
- Robbery (sections 4(b), 8)
- Carnal intercourse against the order of nature (sections 16, 19, 20, 21)
- Homicide (section 25)
- Causing death, injury, pain, harm, disease, infirmity or injury (sections 30, 34).

All the above are federal offences and, therefore, outside the powers of the state.

Whether in some future case, the superior courts will restore the constitutional scheme of things and declare that State Assemblies do not have an equal or concurrent power over crimes committed by Muslims remains to be seen. The picture today is mixed.

1. It has been stated admirably that Article 121(1A) does *not* say that all disputes in which all the parties are Muslims should only be heard in the Syariah Court: *Sarwari a/p Ainuddin v Abdul Aziz* [2006] 6 MLJ 737.

2. The High Court has held that civil courts cannot interfere with syariah courts when the issue is within the *exclusive* jurisdiction of the syariah courts. But if an act is an offence both under the Penal Code and the Syariah Criminal Offences (Federal Territories) Act 1997, as in *Sukma Darmawan v KP Penjara* [1988] 4 MLJ 742, then both sets of laws and both sets of courts may operate. If the charge is *liwat*, then the Sessions Court has no jurisdiction. But as the charge in the case was of gross indecency under the Penal Code, therefore Article 121(1A) did not apply.

It is submitted that the *Sukma* decision should be regarded as authority only for federal territories. In the territories of the states, it would be constitutionally wrong to concede that both sets of laws and both sets of courts may operate. If a crime like unnatural sex is covered by both a federal and a state law, then the state law's validity is highly in doubt because of Schedule 9, List I, Item 4(h).

3. In *Soon Singh v PERKIM* [1999] 1 MLJ 489 the court gave an expansive interpretation of the Syariah Courts' power to deal with apostasy. The court held that the jurisdiction of the syariah courts to deal with apostasy, although not expressly provided in the State Enactment, can be read into them by implication derived from the provisions concerning conversion into Islam. With all due respect, apostasy raises critical constitutional issues about freedom of religion and the Federal Courts' decision in this case, overruling *Lim Chuan Seng v Pengarah Jabatan Agama* [1976] 3 CLJ 231 amounts to a refusal to recognise the constitutional issues involved and an indefensible delegation of its duty to the syariah courts. Despite their erudition in the *hukum syarak*, the judges of the Islamic courts have no experience in the canons of constitutional interpretation.

Syariah Courts Criminal Jurisdiction Act 1965: The powers of State Assemblies to legislate for crimes is a limited and derived power. It is not inherent. The Constitution in Schedule 9, List II, Item 1 says that syariah courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". The relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965. It confines jurisdiction to such offences as are punishable with maximum three years jail, RM5,000 fine and six lashes. Any state law like

the *hudud* laws of Terengganu and Kelantan imposing larger penalties would be *ultra vires* and unconstitutional.

Under the Syariah Criminal Code II Enactment 1993 of the State of Kelantan the following penalties are clearly *ultra vires* the power of the assembly:

- Amputation of right hand (ss 6(a), 6(b), 9(a))
- Imprisonment for such term as in the opinion of the court may likely to lead the convict to repentance (ss 6(c), 9(d)
- Death (ss 9(a), 9(b), 23(4), 27)
- Crucification (s 9 (a))
- Stoning to death (s11(1))
- Whipping (ss 11(2), 13)
- Repentance (s 23(3))
- Forfeiture of property (s 23(4))
- Imprisonment for life (s 29)
- Imprisonment not exceeding 14 years (s 31)
- Imprisonment not exceeding 10 years (s 33)
- Imprisonment not exceeding five years (ss 20, 21, 23 (4))

Fundamental rights: Federal and State legislative powers in Schedule 9, Lists I, II and III are subject to the gilt-edged provisions of the chapter on fundamental rights. Schedule 9 does not give to Parliament or to the State Assemblies a *carte blanche* to pass laws on Islam irrespective of the constitutional guarantees in Articles 5 to 13. Schedule 9 does not and cannot override the rest of the Constitution. It is noteworthy that Article 74 on the subject matter of federal and state laws states clearly that "the power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution." It is submitted that Schedule 9 cannot authorise punishments for acts which are protected by the guarantees of Part 2.

For example many state enactments penalise any criticism or challenge to a *fatwa*.[24] This appears to be a violation of Article 10(1)(a) and 10(2)(a) because

[24] Section 21, Crimes (Syariah) Enactment 3/1992 (Perak); Section 12 Enactment 3/1996 (Penang); Section 12, Act 559 (Federal Territories).

free speech can be restricted only on the grounds explicitly permitted by Article 10(2)(a).

The Syariah Criminal Offences (State of Penang) Enactment 1996 punishes "wrongful worship" in section 3; "false doctrine" in section 4; "defying or disputing a *fatwa*" in sections 9 and 12; and "printing a religious publication contrary to Islamic law" in section 12. All these sections raise constitutional issues relating to fundamental rights as guaranteed by Article 10 (free speech) and Article 11 (freedom of religion).

Laws against apostasy pose a severe challenge to freedom of conscience. This right was indirectly recognised in *Minister v Jamaluddin Othman* [1989] 1 MLJ 418 but is facing extinction now. Many State Enactments criminalise a conversion or attempted conversion out of Islam. Refer, for example, to section 12 and 13 of the Crimes (Syariah) Enactment 1992 of Perak.

The Enactment in sections 8 and 9 punishes deviationist teachings and practices. It is submitted that deviationism *per se* cannot be punished under the Constitution It is only when the deviationist practice has adverse implications for public order, public health and morality that Article 11(5) authorises penalties.

Sections 16, 21 and 22 of the Perak Enactment also punish any disobedience to or disputing of a *fatwa* and any religious publication contrary to the *Hukum Syarak*. These sections transgress Article 10(1) on freedom of speech and expression.

In section 56 the Enactment punishes any Muslim "woman who in any public place exposes any part of her body which arouses passion." This is a gender-biased provision conflicting with the Constitution's Article 8(2) because it singles out females for exposing their body in public. Males are quite capable of similar acts arousing similar passions in women.

The State of Terengganu Syariah Criminal Offences (Takzir) Enactment No. 7 of 2001 in many provisions seems to violate fundamental guarantees of equality (Article 8), freedom of speech and expression (Article 10) and freedom of

religion (Article 11). Section 7 seeks to punish apostasy. Section 15 on "manipulating the teaching of Islam or the Islamic Law" seems to clash with a citizen's right to express his views peacefully, respectfully and without inciting public disorder. Section 35 (woman who exposes her body in public) and section 68 (committing female offenders to approved homes) are distinctly gender biased and violate Article 8(2) of the Constitution.

Similar problems exist with the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559). Sections 4, 9, 11, 12 and 13 of the Act seem to violate freedom of speech and expression. Sections 3, 4, 6 and 11 show disregard for the Constitution's promise of freedom of religion. Sections 21, 36, 39 and 56 reflect an unconstitutional gender bias.

Nordin Salleh decision: It has been held in *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1 MLJ 343 that the power to restrict Article 10 rights belongs to the federal Parliament and not to the state Assemblies. This flows from the wording of Article 10(2): "*Parliament* may by law impose on the rights conferred … such restrictions as it deems necessary …"

Precepts of Islam: The criminal jurisdiction of the Federal Parliament and the State Assemblies in relation to Islam was conferred to enable them to protect the "precepts of Islam" i.e. the beliefs, tenets, dogmas, principles, articles of faith, canons, maxims, rules, doctrines and teachings of Islam. But if there is over-exuberance in the exercise of this power, and acts are made punishable that are not punishable in Islamic theory, there appears to be some scope for constitutional review. It is arguable, e.g. that Islam does not mandate criminal sanctions against those who miss prayers, show disrespect of *Ramadhan* or who, in honest disagreement, question the desirability of a *fatwa*.

Section 14 of the Syariah Criminal Offences (State of Penang) Enactment 1996 provides punishment for failure to perform Friday prayers. Section 15(a) criminalises the act of selling food, drink or tobacco to Muslims for immediate consumption during hours of fasting. Section 15(b) penalises eating drinking or smoking openly during the hours of fasting. Perak has similar provisions in section 23 and 24. The Syariah Criminal Offence (Federal Territories) Act 1997 in sections 14 – 15 contains similar laws.

It is questionable that a religion that admirably proclaims "let there be no compulsion in religion" will mandate the imposition of jail terms of six months and fines up to 1,000 ringgit for such minor failures of religious duties. However, there is no easy answer to the question as to who has jurisdiction to determine whether a law is in accord with the "precepts of Islam". Constitutional issues must be determined by constitutional courts. But, admittedly, whether an enacted law is or is not in consonance with the precepts of Islam requires an intimate knowledge and appreciation of Islamic jurisprudence. That will best be found in the syariah courts.

Article 75: In every federation jurisdictional conflicts between regional governments and the central government are common. There is also the possibility that on topics in the Concurrent List, both tiers of government may have enacted laws. To resolve conflicts where multiplicity of laws exist, Article 75 provides that "if any State law is inconsistent with a federal law, then the Federal law shall prevail and the State law shall, to the extent of the inconsistency, be void". In actual practice, however, state laws on Islamic matters seem to have administrative ascendancy over conflicting federal laws. For example, social security, workmen's compensation, insurance, pensions and provident funds are part of item 15 of the Federal List. But if a Muslim dies leaving any of the above funds, federal law seems to give way to the power of the syariah courts over Islamic succession. In recent years, several states are requiring mandatory HIV testing before Muslim marriages can be solemnised. This may well be in clash with the federal power over prevention of diseases in List III, Item 7 and long standing federal laws over disease control like Prevention and Control of Infectious Disease Act 1988 (Act 342).

Any other provision of the Federal or State Constitution: In Malaysia there is constitutional supremacy as opposed to parliamentary supremacy. Federal legislation must conform to the Federal Constitution. State legislation should honour both the federal and the state Constitution.

Section 48 of the (Kelantan) Syariah Criminal Code II Enactment 1993 appears to be unconstitutional because it seeks to curtail the Sultan's constitutional power to pardon a convicted person.

V: SPECIAL AREAS

Deviationist activities: Under Article 11(5) the religious conduct of non-Muslims can be regulated on the grounds only of public order, public healthy and morality. But Muslims are being subjected to many more religious restraints due to the power of the states to punish Muslims for offences against the precepts of Islam in accordance with Schedule 9, List II, and Item 1. The power of the states to punish Muslims for Islamic crimes was recently confirmed by the Court of Appeal in *Kamariah bte Ali lwn Kerajaan Kelantan* [2002] 3 MLJ 657.

The Court held that:

> Article 11 of the Federal Constitution (in relation to Islam) cannot be interpreted so widely as to revoke all legislation requiring a person of the Muslim faith to perform a requirement under Islam or prohibit them from committing an act forbidden by Islam or that prescribes a system of committing an act related to Islam. This was because the standing of Islam in the Federal Constitution was different from that of other religions. First, only Islam, as a religion, is mentioned by name in the Federal Constitution as the religion of the Federation and secondly, the Constitution itself empowers State Legislative Bodies (for States) to codify Islamic law in matters mentioned in List II, State List, Schedule Nine of the Federal Constitution ('List II').

Persons of the Islamic faith and Muslim religious groups that are not mainstream are subject to severe restraints in relation to what are deemed to be "deviationist activities".[25] From a constitutional law point of view laws that punish "deviationist activities" raise difficult legal issues. For example, section 69 of the (Perlis) State Islamic and Malay Customs Enactment criminalises "deviationist activities". This section may be constitutionally permissible under Item 1, List II of the 9th Schedule. But any one punished under it may put up a vigorous challenge that the law goes far beyond the permissible restrictions of Article 11(5). Article 11(5) of the Constitution gives to every person including

[25] See sections 8-11, Perak Crimes (Syariah) Enactment 3/1992; section 23, Kelantan Syariah Criminal Code II Enactment 1993.

a Muslim a right to profess and practise his religion save to the extent that he/she does not endanger public order, public health or morality. The difficulty is that the freedom in Article 11 seems to be, in the case of Muslims, qualified by Item 1 of the State List in the Ninth Schedule. State Enactments are permitted to create and punish offences by persons professing the religion of Islam against precepts of that religion.

It is submitted, however, that despite the undoubted grant of power to the states to punish Muslims for offences against Islamic precepts, some limits need to be drawn on this power so that the guarantee in Article 11 is not extinguished. Further, the proper recourse against deviationist activities is to resort to ex-communication and not to criminalisation. Ex-communication should be resorted to after the parties concerned have been given a full and fair opportunity to defend themselves and to explain their conduct.

Conversions and apostasy: The right to convert out of one's faith is not mentioned explicitly in the Malaysian Constitution though it is alluded to in Article 18 of the International Covenant on Civil and Political Rights 1966 and Article 18 of the Universal Declaration of Human Rights.

For non-Muslims the right to opt out of one's faith and choose another has been regarded as an implicit part of religious liberty guaranteed by the Constitution. But because of its implications for child-parent relationships, the court in the case of *Teoh Eng Huat* [1986] 2 MLJ 228 held that a child below 18 must conform to the wishes of his/her parents in the matter of religious faith. Thus, a Buddhist girl of seventeen had no constitutional right to abandon her religion and embrace Islam.

In relation to Muslims the issue of conversion or apostasy raises significant religious and political considerations. Many Muslims feel considerable disquiet about Article 18 of the International Covenant on Civil and Political Rights 1966 which was adopted at the behest of a Christian delegate from Lebanon despite strong opposition from the Muslim delegates who were in attendance. Christianity's link with the merchants, missionaries and military of the colonial era is still fresh in many minds. The disproportionately strong support that

Christian missionary activities receive from abroad also arouses fear and resentment. The adoption of Islam as the religion of the federation and the compulsory subjection of Muslims to the *syariah* in a number of matters are other reasons why the conversion of a Muslim out of Islam arouses deep revulsion and anger among the Malay/Muslim citizens. The situation is exceedingly complex due to the intermingling of politics, law and religion.

Many Muslim scholars argue that repeated references in the Holy Qur'an to the need for tolerance and non-compulsion[26] refer to the freedom of conscience of non-Muslims. Muslims themselves have an absolute duty to uphold their faith.

As Islam is the religion of the federation and Malays are, by constitutional definition, required to be of the Muslim faith, all Muslims are liable to prosecution if their conduct is violative of Islamic precepts. No Muslim can lay a claim to opt out of syariah laws – the constitutional guarantee of freedom of religion notwithstanding. The notion that freedom to believe includes the freedom not to believe is unlikely to be accepted in Malay society and has been rejected in national courts.[27] Despite international norms to the contrary in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Convenant on Civil and Political Rights (that freedom of religion includes freedom to change one's religious belief), the impact of local culture and beliefs cannot be discounted.

It is submitted, however, that Islam is a religion of persuasion, not force. The proposal to detain apostates may run counter to the spirit of Islam which is one of tolerance for the disbeliever. It is noteworthy that the Holy Qur'an nowhere prescribes a worldly punishment for apostates even though it is stated repeatedly that their conduct shall incur the wrath of Allah (SWT) in the hereafter.[28] In fact Surah Ali 'Imran 3:86-89 recognises the possibility of repentance and reminds us that Allah is all-forgiving. Only if the apostate turns against the Muslim community is he to be seized and killed (Surah Nisa 4:89), The Grand

[26] Holy Qur'an Surah 2 Ayat 256; Surah 109 Ayats 1-6; Surah 10 Ayat 99
[27] *Daud Mamat v Majlis Agama Islam* [2002] 2 MLJ 390
[28] Surahs Muhammad 47:25, 27-28; Ali 'Imran 3:86-89; Baqarah 2:217; Nahl 16:106

Imam of Al-Azhar, Sheikh Muhammad Sayyed Tantawi is of the view that as long as the apostates do not insult or attack Islam or the Muslims, they should be left alone. "Action should not be taken against them on the basis that they renounced Islam. Only when they insult Islam or try to destroy the religion, one should act (against them).[29] Tantawi bases his opinion on Surah An-Nisa (4:137): "Those who believe, then disbelieve, again believe and again disbelieve, then increase in disbelief, Allah will not forgive them nor guide them in the right path".

The difficulty is that there is a known Hadith ordering that apostates should be advised, imprisoned, and if they still persist, then beheaded. Some Muslim scholars like Prof Hashim Kamali are of the view that the Hadith must be read in the context in which it was made – in times of war, emergency and grave threat to the Islamic community. They also point out that the Prophet never ordered the execution of an apostate.[30]

In response to the Muslim *volksgeist*, a number of states have, in the last few years, enacted "rehabilitation laws" that permit detention and re-education of converts out of Islam. Variously referred to as Restoration of *Aqidah* or apostasy or *murtad* laws, these enactments shake constitutional theory to its roots.[31] They pit state law on apostasy against the Federal Constitution's guarantee of religious freedom.[32] From a constitutional law point of view, apostasy laws raise difficult constitutional issues under Articles 11, 5, 3, 10 and 12.

Article 11: The freedom of religion in Article 11(1) is broad enough to permit change of faith. Though Article 11(4) restricts propagation of any religion to Muslims, the law nowhere forbids voluntary conversion of a Muslim to another faith. In the case of *Minister v Jamaluddin Othman* [1989] 1 MLJ 369 the Supreme Court implicitly acknowledged the right of a Muslim to convert to

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[29] The Star, 29.8.98, p.22.

[30] For a view of the jurists see Mohammad Hashim Kamali, *Punishment in Islamic Law – an Enquiry into the Hudud Bill of Kelantan* (Institut Kajian Dasar, Kuala Lumpur, 1995) pp. 33-37

[31] Perak Crimes Syariah Enactment 3/1992, sections 12-13; Syariah Criminal Code II Enactment 1993 (Kelantan), sections 4(f).

[32] *Zubedyah Shaik Mohd v Kalaichelvan a/l Algapan* [2003] 2 MLJ 471.

another religion. A similar sentiment was expressed in *Kamariah bte Ali* [2002] 3 MLJ 657.

Article 5: Forced rehabilitation will be an interference with personal liberty guaranteed by Article 5(1). *Habeas corpus* may be applied for. But a difficult jurisdictional issue will arise whether due to the existence of Article 121(1A) a High Court can interfere with a detention order arising out of the judgment of a syariah court. Article 121(1A) states that the ordinary courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts". This leaves open the possibility of *habeas corpus* if the state law is unconstitutional or if the syariah court is acting outside its jurisdiction.

Article 3: The *aqidah* (basic faith) laws cannot be saved by Article 3's declaration that Islam is the religion of the federation because Article 3(4) clearly states that "nothing in this article derogates from any other provision of this Constitution". This means that Article 3 cannot override Article 11.

Article 10(1) (a): Article 10(1)(a) guarantees speech and expression. A *murtad* (convert out of Islam) may claim that the rehabilitation law violates his rights under Article 10 unless aspects of public order can be used to defend the *murtad* law.

Article 10(1) (c): Article 10(1)(c) guarantees the right to associate. Inherent in this right is the right to disassociate. See *Dewan Undangan Negeri Kelantan v Nordin b. Salleh* [1992] 1 MLJ 343 about the right to leave a political party and join another.

Article 12: Article 12(3) says that no person shall be forced to receive instruction or take part in any ceremony or act of worship of a religion other than his own. The forced rehabilitation laws will fall foul of this guarantee.

The *aqidah* laws are triggering a massive constitutional debate that pits religion against the Constitution and disturbs the delicate social fabric that has held all Malaysians together for 47 years. At the moment the following judicial attitudes and conflicts have emerged.

1. According to one High Court the act of exiting from a religion is not part of freedom of religion – at least not in the case of Muslims: *Daud Mamat v Majlis Agama* [2002] 2 MLJ 390.

2. A contrary view was recently expressed by the Court of Appeal in an appeal from a Kelantan High Court decision. It was held that a Muslim is not forbidden from renouncing Islam: *Kamariah bte Ali lwn Kerajaan Negeri Kelantan* [2002] 3 MLJ 657. But this renunciation cannot be done unilaterally. A Muslim who wishes to declare apostasy must first get the syariah court to confirm that he/she has left the religion. A statutory declaration of apostasy is not enough. The matter has to be determined by the syariah court using Islamic law: *Daud Mamat* [2002] 2 MLJ 390 and *Mad Yaacob Ismail* [2002] 6 MLJ 179. Until the act of renunciation is validated by the syariah court, a Muslim is deemed to be a person of the Muslim faith: *Kamariah bte Ali* [2002] 3 MLJ 657; *Zubeydah bte Shaik Mohd v Kalaichelvan a/l Alagapan* [2003] 2 MLJ 471; *Lina Joy v Majlis Agama Islam Wilayah* [2004] 2 MLJ 119; *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; *Majlis Agama Islam Negeri Sembilan lwn. Hun Mun Meng* [1992] 2 MLJ 67; *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681; *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793; *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah* [1994] 1 MLJ 690; *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117; *Priyathaseny v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak* [2003] 2 MLJ 302. A Muslim cannot escape the jurisdiction of the syariah court by a unilateral act of renunciation. The syariah court continues to have jurisdiction till the issue of status is determined at law.

3. In the absence of an inquiry by the syariah court, the civil court must accept a Muslim to be still a Muslim till the syariah court has made a pronouncement. Civil courts should not interfere with decisions of the syariah courts because of Article 121(1A).

4. The issue of whether an individual is an apostate or not was one of Islamic law and not civil law:

Hudud laws and jurisdictional issues: In the last few years a number of State Assemblies, as part of their quest for an Islamic state, are enacting "*hudud* laws" – i.e. laws relating to crimes, punishments, rights and duties that are mentioned in the Holy Qur'an.[33] The States are claiming to exercise this jurisdiction on the ground that under the Federal Constitution Islamic penal law is in State hands. Such a view amounts to an overstatement of the powers of the States for a number of legal reasons.

First, under Schedule 9, List II, Item 1, States have authority relating to "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List"* (emphasis added). This means that any matter assigned to the federal Parliament is outside the legislative competence of the States. In Schedule 9, List I, Item 4, criminal law and procedure, administration of justice, jurisdiction and powers of all courts, creation of offences in respect of any of the matters included in the Federal List or *dealt with by federal law* are in federal hands. It is well known that theft, robbery, rape, murder, incest, unnatural sex and gambling are all dealt with by the federal Penal Code. Therefore, the States are not permitted to enact *hudud* laws on these criminal matters even though these crimes are also crimes against Islam.

Second, Schedule 9, List II, Item 1 clearly provides that syariah courts "shall have jurisdiction only over persons professing the religion of Islam". This means that State Assemblies and syariah courts have no power to apply the *hudud* laws to non-Muslims.

Third, the jurisdiction of the syariah courts is not inherent but must be derived from federal law. The Constitution, in Schedule 9, List II, Item 1 says that Syariah courts "shall not have jurisdiction in respect of offences except in so

[33] Mohammad Hashim Kamali, *Punishment in Islamic Law – an Enquiry into the Hudud Bill of Kelantan* (Institut Kajian Dasar, Kuala Lumpur, 1995). See also Enakmen Kanun Jenayah Syariah II, 1993 (Kelantan).

far as conferred by federal law". The relevant federal law is section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). It states that the jurisdiction of the syariah courts shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. Any penalty like cutting of hands or stoning to death that is not mentioned in Act 355 is *ultra vires* the powers of the states and also unconstitutional.

The implication of the above is that the States and the State syariah courts have jurisdiction over only such Islamic criminal offences as are *not* dealt with by federal law viz, offences like consuming alcohol, not fasting during *bulan puasa*, *zina*, *khalwat* and missing Friday prayers.

Enforcement of *hudud* laws: In addition to the question as to who has the jurisdiction to enact *hudud* laws, there is the further constitutional problem of enforcement of *hudud* laws and the arrest and detention of syariah offenders. The State authorities are entitled to set-up their own enforcement units. But if they wish to seek the help of the federal police, there are legal dilemmas.

Under the Constitution's Ninth Schedule, List 1, Item 3(a) the police force is a federal force. Its powers and functions are derived from the Federal Constitution and from federal laws like the Police Act 1967 (Act 344). Under section 3(3) of Act 344, the Force shall be employed for "the prevention and detection of crime and the apprehension and prosecution of offenders". The control of the Force in any area or State is in the hands of the Commissioner, Chief Police Officer or such police officer as the IGP may specify: section 6.

However, section 19 states that every police officer shall perform the duties and exercise the powers granted to him under Act 344 *or any other law at any place in Malaysia where he may be doing duty* (emphasis added). It is arguable that the words in italics could cover state syariah laws. This could mean that police officers are obliged under section 19 to enforce State laws.

It must be remembered, however, that section 20(1) and (2) clarify that in the performance of his duties, a police officer is subject to the orders and directions

of his superiors in the Force and not the order of the State executive. Further, any state law that confers rights or imposes duties on the police is beyond the powers of the State Assembly because the police force is under federal jurisdiction. A State Assembly cannot order the police to undertake responsibilities in much the same way it cannot order the immigration, customs or EPF authorities to perform any acts.

Prisons: As with the police, prisons, reformatories, remand homes and places of detention are in the Federal List: Ninth Schedule List 1, Item 3(b). It is, therefore, submitted that state-run rehabilitation centers for *aqidah* offenders or *murtads* will be outside the powers of the state authorities.

VI: CONCLUSION

In Article 4(1), the Federal Constitution declares itself to be the supreme law of the federation. However, a wide gap has developed between theory and practice. In relation to Islamic matters, a silent, informal re-writing of the Constitution seems to have taken place. A great deal of legislation on Islamic matters appears to disregard constitutional limitations.

In creating and punishing offences against the precepts of Islam, fundamental liberties are being ignored. The chapter on fundamental rights appears to have been subordinated to federal and state jurisdiction to legislate on Islamic matters. Item 1, List II, Schedule 9 has trumped and triumphed over the gilt-edged provisions of fundamental liberties as in *Lina Joy v Majlis Agama Islam Wilayah* [2004] 2 MLJ 119. This is amazing. Legislative powers in Schedule 9 must conform to fundamental rights. It is not fundamental rights that must be whittled down to permit an unrestrained usage of law-making powers in Schedule 9.

The federal-state division of legislative power has broken down in relation to matters of Islamic law. The residual criminal law powers of state assemblies are being used expansively in disregard of the supreme constitution. State Assemblies are trespassing into areas the Constitution assigned in List I to the federal Parliament. State authorities are behaving as if the entire field of Islamic civil and criminal law is within their jurisdiction. Residual powers have blossomed

into inherent and unlimited powers. The significant limitation in Schedule 9 that states may create and punish offences against the precepts of Islam *except in regard to matters included in the Federal List*[34] *or dealt with by federal law*[35] is being sidestepped with no official protest from any other organ of state.

The jurisdictional limitations imposed by the Syariah Courts (Criminal Jurisdiction) Act 1965 are being flouted as in the case of *hudud* legislation.

The superior courts appear reluctant to intervene or to adjudicate whenever an "Islamic" law's constitutionality is challenged. Because of the passage of Article 121(1A) the civil courts are extremely reluctant to examine the constitutionality of syariah based legislation even when human rights violations are involved. It is submitted that Article 121(1A) was never meant to oust constitutional or jurisdictional issues.

Judicial reluctance or abdication is best illustrated by the 1992 case of the four disciples of Ayah Pin. In that case, sections 102(1), (2) and (3) of the Councils of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 were challenged as violating Articles 9, 11(1), 11(5) and 74 of the Federal Constitution. The Federal Court refused to answer the questions of constitutionality and failed to clarify the fundamental question of the right of Muslims to their personal faith.

Just as with the judiciary, the executive appears to lack the political will to restore the original constitutional scheme of things.

In some respects the country is undergoing increasing amount of "talibanisation". More and more conduct is being criminalised even though Islam does not mandate criminal sanctions for all transgressions of Islamic duties. It defies understanding that a religion with a universalist perspective and scripture that celebrates pluralism can be interpreted to show such aggression and intolerance towards "deviationists" and apostates. It is a matter of dismay that the Malay-Muslim

[34] Schedule 9, List II, Item 1.
[35] Schedule 9, List

tradition of tolerance and moderation is being replaced by a *Wahhabist* tradition of religious police forces, exclusivist interpretation and intolerance of both inter-religious and intra-religious plurality.

The denial of the authority of the Constitution, implicit in many of the above laws, is a matter of great concern.

At the social level, conversions from one religion to another are having serious implications for inter-religious and inter-racial harmony. The over-zealousness of many Muslim and Christian missionaries, as evidenced in many cases of conversions of minors against their parents' will, death-bed conversions and "cheque-book conversions" involving financial gains for the proselytisers and the proselytised, are posing a serious danger to national harmony. The families of those involved in these dubious conversions are complaining of cruelty, injustice and lack of compassion.

There appears to be lack of political will to work out satisfactory solutions of the type that inspired the drafting of the *Merdeka* Constitution. The spirit of accommodation, moderation and tolerance that animated the body politic in 1957 seems to have dissipated. The Constitution stands at a crossroads.

FIRST WORLD INTELLECTUAL PROPERTY RIGHTS, THIRD WORLD WRONGS[1]

by

Anne Khoo

Abstract: *The velvet-gloved iron hand extended by the First World to its Third World brethren promises trade and economic wealth, but extracts a severe price by requiring sovereign Third World nations to submit to the intellectual property rights held by the First World. This 'information feudalism' has come at a high cost as developing nations surrender not just their sovereignty and access to cheap drugs and technology but are also subjected to theft of their cultural knowledge.*

The mention of 'New World' exploration invokes thoughts of Columbus and his discovery of the Americas, and what a wonderful thing it was. After all, look at the United States today – a marvel of modern technology and a world super-power. But driving every conquest is the greed for more lands, more power, the theft of indigenous cultures and exploitation of the native peoples and their valuable natural resources.

This very same exploitation is happening today – the quest of the powerful to exert dominance over the vulnerable – albeit in a much more modern context. The velvet-gloved iron hand extended by the First World to its Third World brethren promises trade and economic wealth, but extracts a severe price by requiring sovereign Third World nations to submit to the intellectual property rights held by the First World, in what has been termed an 'information

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The 'First World' is commonly used to refer to wealthy countries in the northern hemisphere (also referred to as 'the North' or the developed world), while poorer developing countries located mostly in the southern hemisphere (or 'the South') are classified as 'Third World'.

feudalism'.[2]

In the first part of this paper, I will argue that developed nations, particularly the US, use their economic power to coerce developing countries into submitting to oppressive intellectual property regimes under the guise of TRIPS[3] without any regard to its adverse consequences on developing countries or their circumstances. In the second part, I will argue first, that intellectual property rights have been used to rob indigenous populations of their traditional knowledge without any recognition of prior rights or recompense, and secondly, to deprive the Third World of access to affordable drugs. In the third part, I will attempt to show that intellectual property rights in the digital age harm rather than promote innovation and development, and highlight some recommendations of the Commission on Intellectual Property Rights.[4] Finally, I will enumerate some of the public and private responses to this inequity and summarise suggestions for reform.

A. *Intellectual Property and TRIPS*

The very first form of intellectual property is said to have manifested itself in the form of patents in 15th century Venice, while copyright, which protects authors' rights over their original literary works, arose in the wake of the introduction of the mechanical printing press to England in the 17th century. The passing of the Statute of Anne in 1709 marked the first formal conferment of copyright, and since then the scope of intellectual property has expanded from copyright to trademarks, and in some jurisdictions, moral rights. Whatever their origins, intellectual property rights have since developed into an entire stream of rights today which have sought justification on the basis of, inter alia, providing incentives and encouragement to create and innovate.

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[2] Peter Drahos with John Braithwaite, *Information Feudalism: Who owns the Knowledge Economy*,' (Earthscan, 2002), edited extract by The Corner House <http://www.thecornerhouse.org.uk/item. shtml?x=85821> accessed 12 September 2005.

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), one of the agreements that concluded the Uruguay Round of Multilateral Trade Negotiations that began in 1986, ibid at p. 1.

[4] Established by the British Government in May 2001, report published in September 2002 <http://www.iprcommission.org/graphic/documents/final_report.htm> accessed 12 September 2005.

In 2001, the developed world (mainly the US, Europe and Japan) accounted for 84% of international patent applications.[5] This is not so surprising considering that innovation to a large extent requires research and development, which in turn require funding. Developing countries which are struggling to provide basic necessities for their poor, often have little or nothing left over to fund any research. Conversely, these countries in order to survive and/or increase productivity, are often dependent on innovations coming out of developed nations, such as technology and medicines.

Countries in Africa, which accounted for 2.3 million of the 3 million AIDS deaths in 2003,[6] simply cannot afford to spend large sums of money on expensive patented drugs as many of them are suffering civil wars, droughts and displacement of their peoples. Why is it then, that governments of developed countries such as the USA, have not only failed to address this social tragedy, but instead used their political and economic clout to coerce poorer countries to submit to its (mostly corporate) intellectual property rights owners?

The story told by Drahos and Braithwaite[7] of how intellectual property rights came to be hijacked by corporations to be used as a vehicle for corporate America's protection of its monopoly profits through organisations like the World Trade Organisation ('WTO') and instruments such as the General Agreement on Trade and Tariffs ('GATT') and TRIPS,[8] is a thought-provoking one. It is a story of greed, politics and power.

The idea of linking investment and intellectual property with trade, which ultimately gave birth to TRIPS, is attributed to American pharmaceutical giant Pfizer. During the rise of the Asian 'tiger' economies of the 1970s-1990s and a depressed American job market, it was not difficult to play on the insecurities

[5] International Federation of Inventors' Associations Geneva, Switzerland, *Worldwide Patent Applications: Current Situation* (2003) <http://www.invention-ifia.ch/worldwide_patent_application .htm> accessed 12 September 2005.
[6] World Health Organisation, *Global AIDS epidemic shows no sign of abating; highest number of HIV infections and deaths ever*, 25 November 2003 <http://www.who.int/mediacentre/news/releases/2003/prunaids/en/> accessed 12 September 2005.
[7] Drahos and Braithwaite, above note 2.
[8] More than 100 nations signed TRIPS in 1994, ibid at p. 1.

of the American masses and convince them that the deficit position in the US trade balance could only benefit from stronger intellectual property protection imposed on the Asian 'pirates'. The story of how one corporate dream became a weapon as strong as TRIPS is a study of brilliant strategy.[9]

Along with setting the stage for TRIPS, the US armed itself with a highly effective weapon in its efforts to make developing countries toe the line of its intellectual property interests by amending s 301 of its Trade Act in 1984.[10] The amended section 301 gave the US President the power to withdraw trade benefits from a country or impose duties on its goods if it failed to provide 'adequate and effective' protection for US intellectual property rights. Countries that denied 'adequate and effective' protection of intellectual property rights or which denied 'fair and equitable market access' to US intellectual property owners were put into one of three categories: watch list, priority watch list and priority foreign country. Countries which, in the opinion of the US, had 'the most onerous or egregious acts, policies or practices' in relation to intellectual property, were labelled 'priority foreign countries' and ran the risk of possible trade retaliation by the US in the form of, inter alia, denial of access to the lucrative US markets. This weapon was in fact used against Brazil, to force adherence to the US intellectual property rights agenda.[11]

Just how a domestic law like Section 301 became of international application is another example of US determination to force developing nations to submit to its economic might. Indeed it has been noted that unilateral action such as that which the US allows itself to take under section 301, is 'contrary to the letter and spirit of GATT'.[12]

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[9] Drahos and Braithwaite, above note 2 at pp. 8-15 (note 64).

[10] Ibid at p. 13. Also known as 'Special 301', Haley Stein, 'Intellectual Property and Genetically Modified Seeds: The United States, Trade, and the Developing World', 3 *Northwestern Journal of Technology & Intellectual Property* 160 [46] <http://www.law.northwestern.edu/journals/njtip /v3/n2/4/> accessed 12 September 2005, referring to Robert J Penchman, 'Seeking Multilateral Protection for Intellectual Property The United States "TRIPS" over Special 301', 7 *Minnesota Journal of Global Trade* 173, 183.

[11] Drahos and Braithwaite, above note 2 at pp. 16, 27.

[12] Liz Dunshee, 'Legal and Economic Strategies for Intellectual Property Protection: The Case of Software', *Major Themes in Economics* (Spring 2003) 48, 55, University of Northern Iowa, College of Business Administration <http://www.cba.uni.edu/economics/dunshee.pdf> accessed 12 September 2005, referring to *Harvard Law Review* (2003) para 18.

Hence using forums like the WTO, developed countries have exploited the promise of market access and reduction in subsidies and tariffs (through the Generalised System of Preferences) to lure developing nations into the trap of surrendering their sovereignty over intellectual property issues. In fact, the principles of free trade are the very opposite of intellectual property with its monopolistic nature and protectionist history. Thus the intellectual property battle was legitimised under the guise of a fight for fundamental rights – individual property ownership, reward for labour and fairness.[13]

Developed countries particularly the US also use the WTO's progeny of 'Free Trade Agreements' ('FTAs') to compel developing countries to give effect to intellectual property rights under conditions which are far from being 'free'. WTO meetings have been described as venues where 'conspiratorial and undemocratic practices and … blatant manipulation, bullying, coercion and blackmail' prevail.[14] This description corroborates Drahos and Braithwaite's observation that 'real power in the modern world comes from sitting on committees that filter out other interested decision-makers or parties from key decisions',[15] and is clearly illustrated by the description of what occurred at the WTO meeting at Doha where:

> Six men were selected by the chairman as 'Friends of the Chair' to facilitate discussions around six key issues. These Green Men, also referred to by developing countries as 'Friends of the Superpowers', continued the process of secret, select meetings, 'with developing country delegates forced to sit around in corridors, trying to find out when meetings are held'. (World Development Movement briefing from Doha).[16]

The exclusion of the developing world's delegates from decisions which affect the futures and livelihoods of millions of the world's poorest as described above clearly illustrates the very real imbalance of power between rich and poor nations and makes a mockery of the consultative process.

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[13] Drahos and Braithwaite, above note 2 at p. 9.
[14] Anna Pha, 'WTO at Doha: "A disaster for the world's poor"', *The Guardian*, 28 November 2001 <**http://www.cpa.org.au/garchve4/1073wto.html> accessed** 12 September 2005.
[15] Drahos and Braithwaite, above note 2 at p. 11.
[16] Pha, above note 14.

B. *Culture Theft*

Proponents of the intellectual property regime argue that economic incentives are necessary to encourage research and development which are essential to producing technological advances and to encourage an entrepreneurial culture[17] without which there may be no development, let alone Third World development.

Whilst there is some basis to this argument, it has been suggested that developing countries have two main complaints about the intellectual property agenda pursued by developed nations.[18] The first is that while traditional knowledge and raw genetic materials from the developing world are freely appropriated by developed nations, the intellectual property protection afforded to the developed world's corporate interests in respect of the commercially valuable products derived from these materials and knowledge renders them prohibitively expensive. The second complaint is that intellectual property is heavily biased towards technological innovation and fails to recognise the 'incremental, informal and highly collective form of agricultural innovation' of generations of farmers, and the threat to genetic diversity posed by genetically engineered monocultures.[19]

Following the 1980 US Supreme Court decision upholding a patent on a genetically-engineered oil-digesting bacteria,[20] the US experienced a stampede of patent claims which included organisms, life forms and DNA sequences. The new expansive definition of patentability brushed aside the previously-held prerequisite that a potential patented invention had to show usefulness, and patents were sought and granted over things for which there were no clear ascertainable public benefits.[21]

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[17] Griffith B. Price Jr., 'Protecting Intellectual Property: How New Democracies Stand to Gain', <http://
www.cipe.org/publications/fs/ert/e17/ip3_95.htm> accessed 12 September 2005.

[18] Charles R. McManis, 'The Interface Between International Intellectual Property and Environmental Protection: Biodiversity and Biotechnology', 76 *Washington University Law Quarterly* 255, <http://law.wustl.edu/WULQ/76-1/761-18.html> accessed 12 September 2005.

[19] Ibid.

[20] *Diamond v Chakrabarty*, 447 US 303 (1980).

[21] Drahos and Braithwaite, above note 2, at p. 19 (box).

It is paradoxical therefore, that some of those same companies which initiated and pushed for greater intellectual property protection against 'piracy' of their intellectual property by developing nations, have themselves been accused of bio-piracy – the theft of traditional medicines and knowledge – against indigenous peoples of the Third World.[22] However, by the time evidence of bio-piracy by pharmaceutical companies emerged, patents had been registered and TRIPS was a done deal.[23]

An early example of uncompensated biodiversity exploitation is American pharmaceutical company Eli Lilly which earned hundreds of millions of dollars from its patent on the cancer-fighting qualities of the Madagascar rosy periwinkle plant, without providing any compensation to Madagascar, the traditional owners.[24] When one considers that about one-quarter of all prescription drugs in the US contains an active ingredient derived from plants,[25] and that the world market for biotechnology is expected to be worth $38 billion in 2005,[26] the threat posed by predatory developed nations to vulnerable developing countries' biodiversity is all too apparent.

The oft-cited story of the neem seed in India is another good illustration on point.[27] In the 1980s, WR Grace, a US chemical company registered a patent in respect of the process of extracting an emulsion from the neem seed which had been proved to be an effective pesticide. The neem tree is an evergreen tree native to India (and South Asia), and had been cultivated and used by the local Indians for hundreds of years. Ancient Indian texts referred to the neem tree as 'the blessed tree' and the 'cure for all ailments'.[28] The neem tree's components such as its leaves, seeds, twigs, etc, have antibacterial qualities

[22] Ibid at p. 9, note 40.
[23] Ibid at p. 9.
[24] McManis, above note 18.
[25] Ibid.
[26] Evdokia Moïsé, 'Intellectual property: rights and wrongs', *Trade Directorate OECD* (2 April 1999), <http://www.mindfully.org/GE/Intellectual-Property-Rights-Wrongs.htm> accessed 12 September 2005.
[27] Case Western Reserve University English Department Authorship Collaborative, 'Neem Seed (India)' <http://home.cwru.edu/~ijd3/authorship/neem.html> accessed 12 September 2005.
[28] Third World Network, 'More than 200 Organisations from 35 nations challenge US patent on neem', <http://www.twnside.org.sg/title/neem-ch.htm> accessed 12 September 2005.

and have for generations been used by the Indians in various ways, eg the twigs were used as antiseptic toothbrushes and the oil was used in products as diverse as soap, spermicides, medicines and pesticides. Indian law did not allow the patenting of agricultural products and Indian culture was ethically opposed to the patenting and ownership of nature.[29]

In 1971, the tree's unique qualities came to the attention of an American timber importer, and he began importing the neem seed to America.[30] He conducted tests on the neem seed's pesticidal extract, called it Margosan-O, and obtained Environmental Protection Agency approval for it in 1985. Three years later he sold the patent for the product to WR Grace & Co. WR Grace sought to enforce its rights as patent owner by taking several Indian companies to court for producing the pesticidal emulsion. The pesticide which had previously been widely and cheaply available in India, rose dramatically in price, causing severe effects on the poor.[31] A most disturbing aspect of this was the fact that the traditional owners (ie the farmers) of the knowledge were made to pay royalties to an undeserving patent owner (WR Grace), in respect of knowledge which they themselves had nurtured yet refused to patent.[32]

This gave rise to mass protests and violent demonstrations in India, and galvanised more than 200 organisations from 35 countries to challenge the patent.[33] India successfully proved that the process over which WR Grace owned its patent had been discovered as early as 1962 by Indian scientists and the patent was eventually revoked.

Another example of bio-piracy by the West was the patenting of the 'Basmati' rice and name by US company RiceTec Inc in 1997. Basmati had for millenia been grown in the foothill areas of the Himalayas, and was the rice favoured

[29] Ibid.
[30] Vandana Shiva, 'The neem tree – a case history of biopiracy', *Third World Network* <http://www. twnside.org.sg/title/pir-ch.htm> accessed 12 September 2005.
[31] 'Neem Seed (India)', above note 27.
[32] See 'More than 200 Organisations from 35 nations challenge US patent on neem', above note 28; Shiva, above note 30.
[33] Ibid.

by maharajahs.[34] RiceTec Inc had, prior to its patent, unsuccessfully attempted to market its US-grown product under the names 'Kasmati' and 'Texmati'. With its patent, it was now able to call its product 'Basmati' and also export under that name. This would allow it to compete with India and Pakistan, hitherto the sole exporters of 'Basmati' rice, thereby diminishing their market share.

It was widely believed that the patent had been taken out by RiceTec because of India's then non-existent intellectual property laws and philosophical attitude that natural products should not be patented.[35] India challenged the patent on the ground, inter alia, that it violated the geographical indications provision of TRIPS, ie the quality, reputation or other characteristics of Basmati rice were essentially attributable to its geographical origin, and on the ground that the Basmati plant varieties which were the subject of the patent were already in existence and could not be patented. The US Patent Office eventually cancelled most of RiceTec's claims in relation to its patent, and allowed only those which were 'deemed free of prior art'.[36]

While both the neem seed and basmati rice patents were eventually revoked, it was not until much injustice and, in the case of the neem seed, suffering and death, had resulted.

University medical schools have historically produced the greatest breakthroughs for human health, without regard to profit.[37] The commercialism of university medical research following the Bayh-Dole Act in the US (which allowed patenting of government-funded inventions)[38] had the adverse effect of placing medical research into the hands of big business. The result was to take medicines and medical research out of the domain of need into the domain of want – to those who could pay, rather than those who needed it most.

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[34] Agricultural and Processed Food Products Export Development Authority TED Case Studies, 'Basmati' <http://www.american.edu/projects/mandala/TED/basmati.htm> accessed 12 September 2005.
[35] Ibid.
[36] Global Action, 'Victory in Basmati rice US patent issue', 28 August 2001 <http://www.cb3rob.net/ ~merijn89/ARCH1/msg00372.html> accessed 12 September 2005.
[37] Drahos and Braithwaite, above note 2 at p. 26 (box).
[38] Ibid at p. 27.

But what is most disturbing about the whole intellectual property agenda is its unspoken foundation of greed – the seemingly unshakeable focus of pharmaceutical companies on profits and the upholding of their patent rights even in the face of pandemic human suffering and death.

At the Fourth Ministerial Meeting of the WTO at Doha, it was argued that African nations' proposals in relation to improving protection of traditional rights over natural resources and traditional knowledge against bio-piracy, banning patenting of life and recognising countries' rights to prevent release of genetically modified seeds, should take precedence over WTO rules – this argument was rejected.[39] It was also reported that the US and Swiss attempts to do the bidding of their pharmaceutical corporations became a 'struggle over whether lives took priority over patents'.[40] The lives versus patents debate is clearly illustrated by the generic drugs production cases.

Due to its legal framework and governmental attitude towards patents,[41] India had developed a strong generic drug production capability. Zidovudine was the first anti-retroviral ('ARV') drug registered for the treatment of AIDS.[42] It was originally developed as a cancer drug with the aid of US federal grants and although it failed in treating cancer, it was found to have significant effect as an AIDS treatment when used in combination with other drugs.[43]

India had in fact been producing generic ARVs and supplied an estimated 50%[44] of Third World AIDS drugs needs at a cost of about $350 per person per year.[45] This was in stark contrast to patented AIDS drugs sold at an average

[39] Pha, above note 14.
[40] Ibid.
[41] See 'More than 200 Organisations from 35 nations challenge US patent on neem', above note 28; Shiva, above note 30.
[42] Edwin Cameron with Jonathan Berger, 'Patents and Public Health: Principle, Politics and Paradox' (Inaugural British Academy Law Lecture at the University of Edinburgh, 19 October 2004) [Part II] <http://www.britac.ac.uk/pubs/src/_pdf/cameron.pdf> accessed 12 September 2005.
[43] Ibid.
[44] Donald G McNeill Jr, 'India Alters Law on Drug Patents' <http://www.econ.ubc.ca/kotwal/255 nytimes.pdf> accessed 12 September 2005.
[45] Vandana Shiva, 'Living on the Frontline', *The Guardian* (United Kingdom), 8 September 2003 <http://www.guardian. co.uk/wto/article/0,2763,1037988,00.html> accessed 12 September 2005.

cost of $15,000 per person per year.[46]

Now that India has legislated to meet its TRIPS obligations, it has to pay licensing fees to pharmaceutical companies as patent owners. As a result, the Third World countries that depend on India's hitherto cheap but effective generic drugs face the very real possibility that the cost of AIDS treatment in their countries will now increase significantly.[47]

Another example of intellectual property being used to choke off supplies of affordable drugs is where Thailand, which has a serious national AIDS problem, evinced its intention to issue a compulsory licence allowing it to manufacture a generic ARV. It was put under pressure from the US Trade Representative to refrain from doing so.[48]

The WTO system also allows for cross-retaliatory sanctions, where a breach of undertakings in one area can be punished in another area of trade. Ironically, developed nations will be able to use labour standards to exclude or restrict imports[49] from developing nations' "sweat shops". The seeming interest by developed countries in labour conditions of developing countries is hypocritical when the same developed countries are prepared to allow millions of poor people die rather than see their market share, and hence profits, elude them through generic production of patented drugs.

As we have seen, intellectual property rights, which are generally regarded as a reward system for originality and innovation, have through the complex machinations of the WTO now encroached into areas of trade, with compliance demanded under threat of economic sanctions. It has become modern day feudalism, with the feudal lords being the all-powerful developed nations, extracting monopoly rents from the rest of the world,[50] not just for things that

[46] Ibid.
[47] McNeill, above note 44.
[48] Charles W. Schmidt, 'Drugs as intellectual property', (2001) 4(6) *Modern Drug Discovery* 25 <http://pubs.acs.org/subscribe/journals/mdd/v04/i06/html/06rules.html> accessed 12 September 2005.
[49] Pha, above note 14.
[50] Drahos and Braithwaite, above note 2 at p. 29.

could legitimately be claimed as intellectual property, but even for use of that which have and should remain in the public domain.[51]

The results of this feudalism can be seen in, inter alia, the widening gulf between rich and poor, increased ceding of sovereignty by developing nations to the developed world, moral and ethical issues about the research, use and direction of biotechnology and access to health.[52]

C. *Intellectual Property Harms*

On argument in support of strict protection for intellectual property is that it stimulates the flow of time and money towards innovation whereas weak protection decreases stimuli for innovation.[53] Conversely, it has been argued that if patents were 'truly designed to secure innovation they would encourage … basic research without commercial application', as rewards can take various forms, not necessarily economic, and it does not necessarily follow that exclusive patents are the appropriate form of recompense for developing new innovations.[54] Furthermore, the reality is that in markets where there are no consumers, ie persons who are willing and *able* to buy, patents have no part in encouraging innovation or commercialism.[55] It has also been pointed out that US economic evidence does not support the premise that increased intellectual property protection increases research and development funding.[56]

Under TRIPS, developing countries would have to establish an intellectual property infrastructure including patent offices, courts and judges, which require funding – an already scarce commodity in most of these countries who

[51] For example, seeds – Stein, above note 10 at para 13.
[52] Drahos and Braithwaite, above note 2 at p. 31.
[53] Dunshee, above note 12 at p. 49.
[54] Cameron and Berger, above note 42 at Part III – rewards can be in the form of honours, non-patent privileges and public esteem.
[55] Ibid. The illustration provided is telling – privately-funded pharmaceutical research concentrates its resources on areas which bring highest monetary returns, eg drugs for the rich to pamper themselves, regenerate hair growth, relieve impotence and improve enjoyment of life, but largely ignores research into drugs which would alleviate the sufferings of the developing world.
[56] Peter Drahos, 'Creative Pursuits' <http://www.choice.com.au/files/f114279.pdf> accessed 12 September 2005.

struggle to find funds to provide basic infrastructure.

Poorer nations who cannot afford basic infrastructure have populations which can barely afford to stay alive. Those who can afford more than the basic necessities, cannot necessarily afford computers in schools or elsewhere. And those who can afford personal computers often cannot afford to pay for a (usually expensive) suite of software applications to run the computers. Furthermore, poor nations which are forced to implement a strong intellectual property system, will force its students and universities to pay exorbitant prices for textbooks,[57] thus putting education further out of the reach of the poor. Thus the poor and the poorer will always be lagging behind the rich and richer who can afford to keep pace with technology.

A report by the Commission on Intellectual Property Rights ('the IPR Commission')[58] called for WIPO and the WTO to recognise the benefits and costs of intellectual property protection for developing countries by taking into account the needs and interests of not just the beneficiaries of intellectual property rights but also those adversely affected by those rights.[59]

The IPR Commission recommended that developing countries should be allowed to set their own compliance dates with TRIPS based on each country's development milestones and not arbitrary dates set by the TRIPS Agreement, a recommendation that was ignored at Doha. The transitional provisions of TRIPS allowed developing nations varying amounts of time to enact complying national intellectual property regimes – four years for developing nations and 10 years for least-developed countries.[60] These provisions drew criticism from the US pharmaceutical manufacturers association for being too long despite the fact that US and European intellectual systems had taken centuries to evolve. The IPR Commission's chairperson, Prof. Barton[61] was of the opinion that

[57] Schmidt, above note 48.
[58] Above note 4.
[59] Chakravarthi Raghavan, 'IPRs costly for Third World, don't help reduce poverty', *Third World Network*, from *Third World Economics* No 289 (16-30 September 2002) <http://www.twnside.org.sg /title/ twe289a.htm> accessed 12 September 2005.
[60] Drahos and Braithwaite, above note 2 at pp. 28-29.
[61] George E. Osborne Professor of Law, Stanford University.

while developed nations have the ability to take advantage of the benefits of intellectual property rights and assume that what is good for them is probably good for the developing countries, this was not necessarily true. He was of the view that developing nations should be allowed to adopt appropriate rights regimes and not be encouraged or coerced into adopting stronger intellectual property rights regardless of their impact on their development. The IPR Commission also concluded that the global expansion of intellectual property rights further reduces competition for many products and services, an issue which is particularly important in countries where competition is already weak and developing countries play second fiddle to developed nations' first claim to intellectual property rights. Professor Barton also pointed out that at similar stages of their own development, most developed countries did not have the restrictive levels of intellectual property protection which they now seek to impose on developing countries.[62]

Apart from the moral and ethical issues discussed above, intellectual property also finds itself faltering in the face of 21st century explosions in the use of personal computing and the internet.

By virtue of its real-property-based historical concepts, the issue of intellectual property in software fails to fall neatly into any given area. Some writers object to the term intellectual *property* on the basis that the word 'property' connotes scarcity, which may or may not apply to ideas,[63] while the 'economic' view differentiates intellectual property from tangible property on the basis of rivalrous consumption, namely that tangible property once consumed cannot be consumed again whereas multiple copies of a software can be produced without interference with the owner's possession or use of his/her copy.[64]

Software is a creature which the law had not envisaged and which the courts were ill-prepared to deal with.[65] In the early days of software development,

[62] Raghavan, above note 59; IPR Commission report, above note 4 at pp. 18-22.
[63] 'Intellectual property', <http://en.wikipedia.org/wiki/Intellectual_property> accessed 12 September 2005, referring to Stephen Kinsella, 'Against Intellectual Property', (2001) 15(2) *Journal of Libertarian Studies* 1 <http://www.mises.org/journals/jls/15_2/15_2_1. pdf>.
[64] Ibid.
[65] See for example, the Australian Federal Court decision in *Apple Computers v Computer Edge* (1980) 50 ALR 581.

few foresaw the advent of the personal computer and fewer still foresaw the impact that personal computing would have on our daily lives in the 21st century. While in the 1950s IBM encouraged programmers to share source code, made its own code available, and was against patenting of software, its attitude changed in the 1970s.[66] Hence to protect the rights of large US software manufacturers such as IBM and Microsoft, computer programs were moulded to fit (somewhat uncomfortably) into the category of literary works and hence afforded protection as copyright.[67]

Supporters of intellectual property protection argue that strong protection gives developing countries better access to foreign technology in the form of technology transfer together with instructions on how to properly operate such technology.[68] However, this is a weak argument as the digital age enables some technology transfers to occur almost instantaneously and at minimal cost over the internet and, through reverse engineering, most if not all of the mysteries of a new software can be uncovered. Copyright protection merely serves to isolate technology and potentially retard its development.

The IPR Commission urged against the imposition of strict protection against copying of software and digital media so as not to diminish the benefits that digital media and the internet could bring to developing countries in terms of accessing educational and scientific information at low cost.[69] It also noted that TRIPS restricts the ability of developing countries to fully utilise reverse-engineering to improve domestic technological capability.[70]

As Drahos and Braithwaite point out, 'by dismantling the publicness of knowledge, intellectual property will eventually rob the knowledge economy of much of its productivity'.[71]

[66] Drahos, above note 56.

[67] Drahos and Braithwaite, above note 2 at p. 23 (note 102) – the long duration of copyright protection (life of the author plus 90 years) does not seem appropriate for software, which is more appropriately ascribed as a technological device rather than a literary work. Also Dr. Dan Hunter, lecturing on *Intellectual Property in the Digital Age*, University of Melbourne, 6-12 July 2005.

[68] Schmidt, above note 48.

[69] Raghavan, above note 59; IPR Commission report, above note 4 at p. 99.

[70] IPR Commission report, above note 4 at p. 24.

[71] Drahos and Braithwaite, above note 2 at p. 27 (box).

Among the IPR Commission's recommendations was the use of compulsory licensing and differential pricing, which would lower the prices of drugs. In using the latter however (which would allow prices of drugs in developing countries to be lower than that in developed countries), it issued a caution to both developing and developed countries that they should take steps to prevent the lower-priced drugs finding their way into the developed economies.[72] Differential pricing (also known as price discrimination or market segmentation) has also been raised as a viable option in software distribution.[73] Apart from the issues of bio-piracy, a very real threat of biotechnology companies' control over production is the development of 'Terminator Technology', a method of genetically modifying seeds to ensure that the 'next generation of seeds self-destructs and is unable to reproduce', thus ensuring that farmers are dependent on continued supply from the producer (the seed patent holder).[74]

In a chilling prediction, it has been prophesised that unless countries challenge the hold of multinational companies' intellectual property rights over biotechnology (which affects all aspects of food, reproduction and environment), the 'gossamer threads' of these companies' intangible property web will grow 'ever tighter around their economies and their people'.[75]

Recognising the issue of bio-piracy, the IPR Commission's report urged developed nations to require disclosure of the geographic source of any genetic material for which patent protection was sought, so as to enable developing countries to be notified of patent claims affecting their traditional knowledge and to take action if their interests have been overlooked. The report also called for developed countries such as the US, to broaden its recognition of prior art knowledge to beyond its borders, so as to give rise to reforms which would make it more difficult for commercial interests to claim intellectual property rights over developing countries' traditional knowledge in medicines and culture.[76]

[72] Ibid; IPR Commission report, above note 4 at pp. 41-49.
[73] Albeit from the perspective of reducing software piracy, Dunshee, above note 12 at pp. 61-62.
[74] Stein, above note 10 at paras 36-37.
[75] Drahos and Braithwaite, above note 2 at p. 20.
[76] Raghavan, above note 59; IPR Commission report, above note 4 at p. 75-91.

The IPR Commission also acknowledged that while developing countries can technically import patented medicines from cheaper sources, this would change in 2005 once India was obliged to pass domestic intellectual property laws to honour its TRIPS obligations.[77] It has been pointed out that in the past, developing countries shied away from importing cheap generic drugs because major industrialised nations, in particular the US, threatened action in the WTO and most developing nations cowered in fear of this threat.[78] This was because even if the US were to fail in its action in the WTO, any trade policies it makes while the matter was waiting to be heard, could have irreversible and catastrophic effects on a developing nation's fragile economy, as was clearly demonstrated by the Brazil-US face-off.[79]

The IPR Commission was also at pains to point out that the impeding role of intellectual property rights should not be overstated because even in the total absence of intellectual property rights, the problems facing developing nations in terms of access to medicines and the lack of medical and other facilities would not disappear.[80]

The IPR Commission recommended that developing countries should seek to learn from the experience of developed countries in devising suitable intellectual property systems so as to take into account their own public interests and ensure that abuses of any resulting monopoly rights do not unduly affect the public interest.

As can be seen, the cumulative effect of the IPR Commission's report was to openly acknowledge that strict intellectual property systems of the kind pursued by developed nations is detrimental to the Third World.

D. *The public and private responses*

As the information economy develops, the implications of [TRIPS and its effects] for widening inequality in the world system, even within the US and Europe,

[77] As has already occurred, see McNeill, above note 44.
[78] Raghavan, above note 59.
[79] See Drahos and Braithwaite, above note 2.
[80] IPR Commission report, above note 4.

will become even more profound. There will be a digital divide, [and] an access-to-drugs divide …[81]

In the US, the fiercest defence of the public domain, particularly in the area of copyright, has come from its academics.[82] This defence of the public domain as commons property has been heralded as a Marxist struggle, where it has been argued that the revolution is in the 'rise of open source production and dissemination of cultural content'.[83]

The Free Software Movement ('FSM'), founded by Richard Stallman, has been an important voice in the airing of views contrary to that expounded by Corporate America. It is a movement that advocates non-ownership of software on the basis, inter alia, that the flexibility of digital technology makes copying of digital information so easy that it fits very badly into a copyright system.[84] The strong following of FSM has put paid to the concept that only monetary rewards generate innovation and as Richard Stallman says, 'society needs to encourage the spirit of voluntary cooperation in its citizens'.[85] Another initiative against the 'closed' copyright system is the Open Source movement, such as Linux, which enables knowledge to be shared and developed in the public domain without incurring the costs a private, profit-motivated enterprise such as Microsoft would.[86] Additionally, the open source movement takes us back to the era of pre-commercialised academic collaboration in pursuit of knowledge for the public good.

The Creative Commons endeavour was officially launched in 2001 by founder Lawrence Lessig, a strong opponent of extended intellectual property rights. The Creative Commons is a non-profit organisation aimed at allowing owners of copyright material to share their creative work with others. This is done through a licensing arrangement chosen by the copyright owner by which the

[81] See Drahos and Braithwaite, above note 2 at p. 31.
[82] Ibid.
[83] Dan Hunter, 'Culture War' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586463> accessed 12 September 2005.
[84] Richard Stallman, 'Why Software Should Not Have Owners' <http://www.gnu.org/philosophy/why-free.html> accessed 12 September 2005.
[85] Ibid.
[86] Drahos and Braithwaite, above note 2 at p. 31.

owner retains copyright while allowing others to use the material in certain permissible ways.[87] The Creative Commons therefore provides an avenue to make material which would otherwise be strictly protected as copyright, available for sharing and building upon.[88]

Organisations such as Cambia seeks to address 'neglected priorities of disadvantaged communities by tapping the huge potential of their own creativity'. The Cambia Bios Initiative[89] has adopted as part of its manifesto, the duty to 'increase fairness in access to the tools of innovation as a fundamental human right, … and distribute inventions under new, public-good binding licenses …, and is involved in fostering an open-source-based protected commons of biological technologies which will be freely available to all'.[90]

Yet other responses are private-public sector partnerships aimed at alleviating some of the harsher outcomes of the current intellectual property climate.[91] For example, the Consultative Group for International Agricultural Research ('CGIAR') consists of 16 international research centres which aim to increase public access to seeds, and is responsible for 'Golden Rice', a vitamin A enriched rice which helps to arrest Vitamin A deficiency, a major cause of malnutrition.[92] Another example is the Public Intellectual Property Resource for Agriculture ('PIPRA') which was formed to assist public agricultural institutions to gain 'access to intellectual property to develop and distribute improved staple and specialty crops'.[93]

Pressures brought to bear on the WTO by developing countries and their supporters, also finally reasserted that which should have been a given – that member countries had the right to protect their public health. The Agreement

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[87] 'Creative commons' <http://creativecommons.org/> accessed 12 September 2005.
[88] 'Creative commons' <http://en.wikipedia.org/wiki/Creative_Commons> accessed 12 September 2005.
[89] 'Cambia BIOS Initiative – Biological Innovation for Open Society' <http://www.bios.net/daisy/bios /10/version/live/part/4/data> accessed 12 September 2005.
[90] 'BioForge' which is part of the Bios initiative, is a protected commons allowing biological innovation projects to be initiated and developed using enabling technology.
[91] Stein, above note 10, para 64.
[92] Ibid para 65.
[93] Ibid para 67, notes 193-195.

on Implementation of Paragraph 6 of the Doha Declaration ('the Agreement') makes it easier for member governments to import or produce cheaper generic drugs in national emergencies.[94] However, not all developing countries have taken advantage of this right, and it has been suggested that one reason for the inaction is the fear that any tampering with the protection of intellectual property (in this case patents) would send the wrong message to the Western world, who provide much-needed foreign investment in the developing world.[95] While appearing to strike a balance, the Agreement has been criticised by non-governmental organisations ('NGOs') such as Medecins San Frontieres and Oxfam, for further encumbering the issuing of compulsory licences, as developing countries will bear the burden of proving before the WTO that they satisfy the requirements specified under the Agreement – a process that requires time, money and other resources they can ill afford.[96]

Therefore, to make itself heard over the cacophony of the First World's ever-expanding claims to intellectual property rights, the Third World must overcome its differences and unite against its modern-day feudal lords. Commons ownership and sharing of knowledge and resources is one vehicle for the New World cultural revolution as the masses 'take up the means of production for themselves',[97] thus marking the start of the end for the Old World order of knowledge ownership.

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[94] Global Trade Negotiations, Center for International Development Harvard University, *Intellectual Property Summary*,
'The Agreement on Implementation of Paragraph 6 of the Doha Declaration on IPRs enables developing countries to import a generic drug if they can provide evidence of the public health concern, demonstrate the inability of the domestic pharmaceutical industry to produce the drug itself, and prove that it will only use the drug for public, non-commercial purposes', <http://www.cid.harvard.edu/cidtrade/issues/ipr.html> accessed 12 September 2005.

[95] Cameron and Berger, above note 42 at Parts VII-VIII.

[96] It is feared that the WTO will insist on complete production incapability and refuse to allow importation of generic drugs where there is a domestic production ability which is insufficient to meet demand, above note 94.

[97] Hunter, above note 83 at p. 30.

ABUSED CHILD'S EVIDENCE: MEASURES TAKEN TO FACILITATE THEIR TESTIMONY

by

Yasmin Norhazleena Bahari Binti Md Noor[*]

Introduction

Testifying in court is a daunting experience, what more to a child who has to recollect every minute, agonizing detail of his/her traumatic experience in front of strangers. To ferret the truth from the abused child is akin to finding a needle in haystack as the child might be reluctant to testify due to several factors. This paper strives to point out the reasons abused children are not able to testify i. e. impediments in testifying as well as to highlight the steps taken in Malaysia to facilitate the abused child in testifying. Moreover parties who play major roles in enabling the abused child to testify smoothly are identified. Without doubt, their effort and experience in implementing this measure will also be the centre piece of this article. Furthermore, this paper will also shed some light on whether this effort has reached its objective.

Definition of a child

Child Act 2001 states that "child"- (a) means a person under the age of eighteen years; and (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act 574].

The Key Players

The Police

The police have to be vigilant, proactive, alert and discreet in handling child abuse cases. They also to handle the child with great care and sensitivity. In PP v Mohd Yusof Rahmat (hereinafter referred as *Ayah Su*'s case) the victim

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in this case is a five year old girl who alleged that she was raped by the Accused who was the husband of a nursery owner. The victim was sent to the nursery for day care. Chief Inspector Tan Poh Cheok, was the final prosecution witness. She testified that upon the victim's discharge from the General Hospital, she brought the child along with her grandmother to the nursery (alleged crime scene). Upon arrival, she noted that the child became aggressive, terrified and refused to enter the house. Upon being persuaded, she relented and proceeded to the lounge and sat on a chair. She was still afraid and remained quiet. The inspector then asked the child to show the room where she was allegedly raped, the child looked terrified and refused to budge. The inspector brought her to three rooms. The victim said neither the first two rooms was the place where the crime took place. However when they were in front of the third room, the victim said that it was where the crime occurred. There was a big mattress in the room. The inspector brought the child inside the room and the victim spontaneously cried loudly and told the inspector that Ayah Su inserted his penis into her vagina in that room. The inspector instructed her assistant to take photographs of the room and the exterior of the nursery. She also ordered her aides to place the nursery under surveillance. Upon identifying the suspect, he would be arrested.[1]

Commentary

The police was able to determine that the child was telling the truth based on her obvious fear and screams when she was brought to the crime scene. However, whether such action was justified is another matter. Should the affirmation/confirmation be attained at the child's peril? Based on the report, it is obvious that the child was traumatized and fearful when she was brought to the crime scene.

Psychiatrist

In *Ayah Su*'s case, a key prosecution witness was Dr Zasmani Shafie, Consultant Psychiatrist and Specialist on Children & Youth, Universiti

[1] Srihanasham Noordin, "Ayah Su ibarat syaitan", Harian Metro, 25 Julai 2003.

Kebangsaan Malaysia (hereinafter referred as the psychiatrist). The psychiatrist noted that at their first meeting, the victim seemed scared and was clinging to her grandmother whom she lived with. The psychiatrist asked the child to do something but the child proceeded to do other than what she was instructed to do. For instance, initially she refused to play with the toys in the room but agreed to draw something. She went on drawing a house without any doors nor windows. The psychiatrist observed that she pressed the pencil colour forcefully as if she was venting her anger. The psychiatrist concluded that the child was suffering from severe depression and in a state of fear. In their second meeting (after a 21-day-gap) the victim was able to play without the presence of her grandmother and was playing with dolls and a doll house. The victim identified and segregated two sets of dolls which she classified as "good dolls and bad dolls". She placed the good dolls in the house and shut all doors and windows. She also put the detachable staircase leading to the entrance, inside the house. Upon being asked the justification of her action, she said that she wanted to prevent the bad guys from coming into the house. She also took a toy knife and upon being asked what does she intend to do with the knife, she replied that she wanted to use it to kill the bad guys. The psychiatrist met the child for the third time after 49 days. She could only be left alone with the child for ten minutes before the latter requested her grandmother's presence. This time around, she drew a house with doors, windows and blue drapes. She did not identify nor segregated "good dolls and bad dolls". However she still looked terrified. The psychiatrist drew a conclusion upon their third meeting that the child was afraid of something or someone but she was not able to identify what or whom. Their fourth meeting was convened after a 40-day-gap, there was a marked behavioral difference for the worst. She was scared and didn't want to be separated from her grandmother. He grandmother informed the psychiatrist that 7 days earlier the child went to court. Soon after, she was not her usual self. She experienced nocturnal bed wetting and disturbed sleep. Moreover she became temperamental and constantly whined. Upon being asked what was she afraid of, she said that Ayah Su placed a snake 'ular' on her umm. . umm (vagina). The psychiatrist showed a doll to the victim but the victim became more afraid and refused to touch the doll. However, the victim pointed to the frontal part of the doll namely the hole in between the doll's legs (vagina). The victim did not explain what transpired

but her fear intensified. The psychiatrist persuaded the victim to tell the former whether Ayah Su is a man or a woman, she replied that he is a man and requested to be allowed to play outside.[2]

The psychiatrist in another meeting requested the victim to explain what she meant by 'ular'. The child said 'Pendek. Ayah Su pegang dengan tangan letak kat umm. . umm" (short and Ayah Su held it with his hand and put it into my vagina). The victim identified the penis of the male adult doll showed by the psychiatrist as 'ular'. The victim used the doll to show that the Accused took off his and her pants and turned her body before inserting his penis into her vagina. The psychiatrist asked the victim whether the putting of the penis in her vagina caused her any pain, to which she replied in the affirmative. The psychiatrist asked her what she did after that, and she replied that she cried.[3]

In another news report[4], the psychiatrist testified that the victim angrily threw a male doll labeled as "Ayah Su"/the Accused Person (which signified a male adult) and called "Ayah Su", 'Orang Jahat' (Bad Person) during their meeting on 13th August 2002. She also angrily threw a female doll (which signified a female adult) termed as "Ummu Sarah" (The Accused person's wife & owner of the nursery where victim was sent) and also called her 'Orang Jahat'. Upon being asked by the deputy Prosecutor, the relevance of the victim's action throwing both dolls, the psychiatrist stated that such action showed that "Ayah Su" and "Ummu Sarah" are somehow connected with the matter which caused great fear to the victim. The psychiatrist further added that a child does not simply throw a doll and utter "orang jahat" while simultaneously . exhibiting intense fear.

Commentary

The psychiatrist was able to ferret from the child the cause of her fears. She used the dolls to facilitate the child's communication. Her experience handling 50 sexual abuse cases is evident from her acute observation and the methods

[2] Minarni Mat Saad, "Mangsa baling patung jahat", Harian Metro, 26 September 2002.
[3] Ibid.
[4] Minarni Mat Saad, "Kanak-kanak tunjuk sikap marah, benci", Berita Harian, 26 September, 2002.

she applied in order to assist the child to testify without traumatizing her nor forcing her to speak.

Time Taken to Extract the Truth

It is noteworthy to highlight that the counseling session was conducted within the span of four months. In order to gather the truth, it cannot be accomplished overnight. Trust does not develop just from the first meeting.

There are communication as well as psychological barriers which need to be overcome.

Gynecologist[5]

In *Ayah Su*'s case the consultant gynecologist of Kuala Lumpur General Hospital, Dr Wan Hamilton Wan Hassan testified that there was reddish bruise on the right side of the victim's private part. There was also three o'clock vaginal tear assumed to have been caused by a hard object.[6]

Welfare Officials

A Kuala Langat welfare department officer, Rizalina Manaf was a prosecution witness in PP V Jamikin Arshad (hereinafter referred as Jamikin's case).[7] The victims' mother as well as two of the victims sought her help last September. She helped them to locate the third victim and lodged a police report. The accused is now on trial for rape, molest as well as carnal intercourse against the order of nature, of three young girls.

Impediments in Testifying

- The child is too young to know the acts committed towards him/her are wrong.

[5] For Duty of Medical Officer to report suspected child abuse, refer to section 27 and section 116 of Child Act.
[6] Supra note 2.
[7] Rita Jong, "Man Faces 200-Year Jail Term for Rape", Malay Mail, 27th May 2004.

- The child is unable to explain and describe the acts committed as his/her vocabulary is limited.
- Those who are close to the child do no believe him/her.
- The child is warned and threatened by the abuser to not disclose to anyone or else he/she would be harmed.
- The child finds the court room setting too intimidating seeing strangers as well as the accused person.

Psychiatrist's Viewpoint

Child's Communication Skills

According to Dr Zasmani, key witness and psychiatrist in *Ayah Su*'s case, the 5 year old victim is a child whose ability to form complete sentences and to narrate incidents perfectly is not fully developed. However using puppets and dolls as means of communication and demonstration, the child was able to relate her traumatic experience to the psychiatrist.

Whether a child should testify in court

Dr Zasmani upon being asked what is the most conducive environment for a victim to testify, she replied that it is very difficult for a child as young as five to testify in open court. The child need to be given the opportunity to be interviewed/examined in a place where she feels safe and secure with the presence of those who have good relationship with her. Ideally there should be less people in the room and only women should be present as the victim is extremely terrified of men. Those who want to interview/examine her must adopt the spirit of 'give and take'. They cannot labour in the misapprehension that the victim will simply narrate the whole incident perfectly like any other non-abused children.[8]

Effort taken to enable the child to testify in court

The Psychiatrist's Effort

Dr Zasmani testified that the victim undergone two "witness preparation

[8] Minarni Mat Saad, "Takut sebab Ayah Su letak ular", Harian Metro, 27 September 2004.

session" on 30th April 2003 and 7th May 2003. She used the aid of an Activity Book "My Court Colouring Book". The book contains pictures of the court and the persons usually in the court such as the Judge, Prosecutor, Counsel for the Accused and the Accused Person. The objective of giving the bird's eye view of a court to the victim is to acclimatize the child with the court's surroundings as well as to alleviate the child's fear to testify in court.[9]

Testimony Via Video Link

The victim in *Ayah Su*'s case did not see the accused person 'face to face' when she identified him. She identified him via video-link.[10]

Child Care Unit & Child Witness

The idea to establish Child Care Unit, also known as the Victim Care Centre, was mooted in February 2001 when the Government (upon talks with representative of the United Kingdom) aimed to introduce "Child Friendly Policing" in Malaysia. As mentioned earlier, testifying in court is a daunting experience for adults, what more to abused children. Under this "Child Friendly Policing", instead of testifying in court, children's testimonies are recorded by video. Thus the video recording is used as evidence in court without the need for the victim to give oral evidence in court. In January 2003, ten police officers were trained by experts from United Kingdom in an experts' course in recording children's testimony. To date 112 recordings have been made of child abuse victims since 6th February 2003. In each recording session, 2 officers are needed namely the recording as well as technical officers. The former interviews the victim as well as witnesses while the latter ensure that the recording proceeded smoothly.[11]

For the first time, on May 31 2004, a video recording of the evidence of a sexually abused child was presented in court. Prosecutors used the recording in the Magistrate's Court to prevent the victim from suffering courtroom trauma.

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[9] Supra note 1.
[10] "Children should be loved and not abused, says judge", New Straits Time, 4th June 2004.
[11] Marina Hashim, Unit Perlindungan Kanak-kanak, http://www. rmp. gov. my/

The child was abused by her father. Federal Police Child Protection Unit head Assistant Superintendent Nor Azilah Jonit said the victim's statement was recorded last year, but as the evidence was strong, it was introduced during the proceedings. "Video statements by children who were victims of violence and sexual abuse are being considered under the Child Witness Evidence Bill 2004, to eliminate courtroom trauma," she said. Victims would only need to make a single statement in such recordings, which will then be referred to by all parties involved - the Welfare Department, hospitals, public prosecutors, police and the courts.[12]

Commentary

The government's move to spare child witnesses from courtroom trauma is a laudable one. It is noteworthy to point out "the Pigot Report proposed that certain children and other vulnerable victims should not have to give evidence in open Court. The report further recognised the disturbing effect of open Court confrontation between the witness and the accused which it says to be a harmful, oppressive and often traumatic experience and may particularly have long lasting injurious effect on children having to give such evidence. The report recommends that videotaped evidence should generally be advisable in crown Court proceedings for child abuse cases. As a recognition of the problem the report stated "In other parts of the world where the quality of justice is not inferior to our own, listening to what very small children have to say and providing the suitable means for children to describe their experiences outside the public arena of the courtroom is not regarded as unusual, unreasonable, or a threat to the principle that the prosecution must discharge the burden of proof."[13] It is clear that in order to bring about justice, measures need to be taken. It is pertinent to highlight here, Saidina Ali was the first judge who separated witnesses as well as suspects in trials in order to ensure that justice is not only done but seen to be done.

[12] Jassmine Shadiqe, "A first in court: Video evidence by abused child", New Straits Times, 19th May 2004.
[13] Abu Bakar Munir, "Video-taped Evidence of Children in Malaysia" [1991] 3 CLJ xciv, footnote 28.

The Media

The Prime Minister at the start of a dialogue with women's groups on ways to stop sexual crimes called on the media to highlight cases of rape and sexual violence. "I say we should continue to let people read about such crimes. We have to create anger in our society and the realisation that something needs to be done," said Datuk Seri Abdullah Ahmad Badawi. "We have to create a sense of responsibility and awareness that the measures to fight such crimes involve all of us. "

He said he was aware that some were disgusted by the daily diet of reports on sexual crimes and felt the media should ease up on such coverage. But he believed that if the media were stopped from doing their job, sexual violence would continue unabated. The Prime Minister also noted the spike in the number of sexual crimes. In 2002, there were 1,418 reported rapes, a 17 per cent increase over the 1,210 cases in 2000. Of these, 50 to 60 per cent of cases involved girls below the age of 16.[14]

However, there need to be reconciliation between publicity of crimes on children by the media and section 15 of Child Act. It contains "restrictions on media reporting and publication not only at the pretrial, trial and post-trial stages in criminal cases, but also regarding any child taken into custody for being in need of care and protection under Part V of the Act, the child in respect of whom any of the offences in the First Schedule has been or is suspected to have been committed, and any proceedings under Part VI, in relation to children who need protection and rehabilitation. Subsection (2) specifies not only a picture of any child concerned be not published in any newspaper, magazine or transmitted through any electronic medium, <u>but also a picture of any other person, place or thing which may lead to the identification of the child so concerned</u> … (emphasis is mine). Subsection (4) provides the penalty of a fine not exceeding RM10,000, or imprisonment not exceeding 5 years or both for any contraventions of the aforesaid prohibitions."[15] However subsection (3) states that a Court for Children may permit publicity if the Court

[14] "Highlight rape cases, Abdullah tells media", New Straits Times, 12th May 2004.
[15] Abd Hadi Zakaria, 2002. "The Child Act 2001 Some Significant Features", In Siri Undang-Undang Mimi Kamariah, Akta Kanak-kanak 2001, Kuala Lumpur: Penerbit Universiti Malaya.

For Children is satisfied that it is in the interest of justice to do so. Furthermore the Court for Children shall dispense with the requirements of this section to such an extent as the Court may deem expedient in the event an application by or with the authority of a Protector.[16]

I am deeply aggrieved by the newspaper reports of *Ayah Su*'s case whereby the nursery's name and address were printed.[17] Those curious might just go to the nursery to enquire the victim's identity. There's a saying in Malay, *Mulut tempayan boleh ditutup tapi mulut manusia tidak boleh ditutup*.

Conclusion

The key players, were presented. Their effort, duly shown. However, there is always room for improvement in order to protect the victims. Their innocence, savagely robbed, their misery must cease, spare them undue pain, that's the least we could do.

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[16] Under Section 2 (1) of Child Act, "Protector" means- the Director General; the Deputy Director General; a Divisional Director of Social Welfare, Department of Social Welfare; the State Director of Social Welfare of each of the States; any Social Welfare Officer appointed under section 8 of Child Act.

[17] Supra notes 1, 2 and 4.