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OBITUARY
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The late Justice Datuk K.P. Gengadharan Nair (hereinafter referred to as Datuk Genga) passed away on April 21, 2007 after a short illness. He was 63 years.

I had the privilege of knowing Datuk Genga since 1965 (for more than 40 years) when both of us were teachers and were actively involved in the National Union of Teachers (NUT). He was a close friend of mine and his untimely demise is a personal loss to me.

Datuk Genga was born on April 30, 1944. He is the son of the late Mr. C.R. Nair and Madam Lakshmi Kutty Amma. His elder brother, Dr. K.K. Nair who was a Professor of History specialising in African history at the University of Malaya passed away some years ago at the age of 46. His younger sister, Madam Komalam is a housewife and lives in Kuala Lumpur with her husband and daughter.

After completing his secondary education at the Victoria Institution (VI) he was selected by the Ministry of Education, Malaysia to undergo a two year teacher training course at the Malayan Teachers College, Brinsford Lodge, Wolverhampton, United Kingdom from 1963-1964. He was one of the 155 students selected for this course. His was the last batch of students sent to the Brinsford Lodge from Malaysia.

In 1964 upon completion of his course, he was posted as a trained teacher to the Victoria Institution, his alma mater. He was subsequently transferred in 1967 to Sekolah Menengah Serdang. This arbitrary transfer due to his active involvement in the legitimate activities of his union, the National Unions of Teachers (NUT) had influenced him to give up teaching and pursue a career in another noble profession that is the law. This transfer also played an important role in developing his passion subsequently to assist workers and the trade unions.

Datuk Genga resigned from the teaching service in January, 1970 and left for London to read law. He was called to the English Bar at the Honourable Society of the Inner Temple in 1972. Upon his return, he did his pupillage in Messrs Xavier & Vadiveloo. His pupil master was the late Mr. D.P. Xavier who was well known and highly regarded by the members of the Bar and the judiciary as a specialist in the area of industrial and employment law.

He was called to the Malaysian Bar in June, 1973. He decided to set up his own legal practice together with Mr. John R Gurusamy, his former teacher trade union colleague. When Mr. John R Gurusamy ceased active practice Mr. N. Mahalingam joined him as a partner. They continued to practice together until his elevation.

Datuk Genga decided to specialise in industrial and employment law. He regularly appeared in the Industrial Court as well as in the appellate courts in matters pertaining to dismissal of employees, non-compliance and interpretation of collective agreements entered into between trade unions and employers. He always acted for the workers and the trade unions. He never acted for the employers in all his years at the Bar.

After 30 years of active legal practice at the Bar Datuk Genga was appointed as a Judicial Commissioner in May, 2003 and posted to the High Court, Johor Bahru. He was elevated as a Judge of the High Court in December, 2004 and continued to serve in Johor Bahru until he was transferred in January, 2007 to Kuala Lumpur as a judge of the High Court (Appellate and Special Powers Division).

Many know his dedication and ability as a senior lawyer. He left an indelible mark in the area of Industrial and Employment Law. As a member of the Bar he would never do anything that was not in accord with the highest ethics of the profession. He never missed a single Annual General Meeting of the Bar as well as the Annual General Meeting of the Selangor Bar (later the Kuala Lumpur Bar). He considered it his duty to attend and ensure that there was the necessary quorum. He also served as a member of the Industrial Law Committee/Industrial Court Practice Committee of the Bar Council for many years.

The former Lord President, the late Tun Mohamed Suffian in 1982 speaking on the judicial qualities and attributes of a judge stated as follows:

> *"A good judge should be a person who has a sound understanding of general principles and his judicial temperament that is to say, he is a person who is willing to listen and is capable of learning more law as he goes along, who is courteous and has an instinctive feel for what is proper and what is not proper, for what is right and what is not right in and out of Court and a person who is not personal and vindictive, who will decide solely on the facts as disclosed in the evidence before him and in accordance with his perception of the law with his ideas of justice and in accordance with his conscience."*

Datuk Genga had all the qualities and attribute of a good judge as described by the former Lord President.

At the elevation ceremony of Datuk Genga in the Johor Bahru High Court on January 31, 2005 the then Acting Chairman of the Johor Bar, Mr. S. Balarajah in his speech, inter alia, stated:

"A ceremony of elevation is not unlike a call to the Bar ceremony where the antecedents of the Petitioner are made known. A lawyer is allowed to sit on the Bench having stood at the Bar for a long time. YA has been at the Bar for 30 years and with a clean record for 30 years. And I congratulated you."

"My Lord it gives me great personal happiness and pleasure to once again welcome and congratulate a friend and one who has for the past so many years been closely associated with the Bar on his elevation to the Bench of the High Court States of Malaya."

"Your Lordships elevation has the undoubted support and welcome of the Bar. The learned Advisor (Johor State legal advisor) has traced your Lordship's humble beginning and to the achievement of a permanent seat on the High Court Bench."

"Your Lordship has sat as a Judicial Commissioner from May 2003 and within a short span your elevation as a Puisne Judge has come about. During your stint as Judicial Commissioner you had shown utmost courtesy and respect for all litigants and counsel who appeared before you. Long may it continue."

"Your diligence my Lord is evidenced by 11 reported cases in the law journals though you were a judicial commissioner for only 17 months. This is a remarkable achievement."

Datuk Genga in his reply at the elevation ceremony, inter alia, stated:

"I am mindful of the heavy responsibility that sits on the shoulders of a Judge. He is the arbiter of both fact and law for criminal and civil matters which are initiated in the High Court and sits as an appeal Judge in many matters that proceed from the lower courts. Parties to disputes, accused persons and the victims of criminal acts rely on the Judges to be just and fair. Counsels and litigants expect to be heard and to be given every opportunity to present their case."

"Having been a member of the Bar and having appeared in cases before the Judges of the various courts for almost 30 years I know what it means to be given a good hearing even if the case is lost at the end of the day. And I know what it means to appear before a difficult judge — a judge who gives little time and who has little patience to listen. I wish to assure the Bar and the Attorney General's

Chambers that all who appear before me including witnesses will be treated with courtesy and that all cases before me will be heard with the impartiality and fairness that are the hallmarks of an independent judiciary."

Everyone who has appeared before Datuk Genga have all stated that he was a very fair and patient judge who treated everyone with courtesy. Many lawyers in Johor were very sad when they heard the news that Datuk Genga will be transferred to Kuala Lumpur.

Some of the close friends of Datuk Genga organised a memorial ceremony in memory of Datuk Genga on June 15, 2007 at the Royal Lake Club, Kuala Lumpur. It was attended by more than 250 persons. The Banquet Hall was packed to capacity. Among those present included the Hon'ble Deputy Minister in the Prime Minister's Department, YB Dato' M. Kayveas, the Rt. Hon'ble Chief Judge of Sabah and Sarawak, Y.A.A. Tan Sri Dato' Richard Malanjum, judges and retired judges of the Federal Court, Court of Appeal, High Court and the President and Chairmen of the Industrial Courts. There were also Ambassadors/High Commissioners from a number of countries who also attended the memorial. A number of officials of the Bar Council including the Chairman, Ms. Ambiga Sreenevasan and many past Presidents of the Malaysian Bar attended the memorial. Many of his friends from the legal fraternity trade union movement, teachers and members of Rotary Clubs also attended this memorial besides the members of his family.

One of the speakers at this memorial was the senior judge of the Court of Appeal, Malaysia, Justice Dato' Gopal Sri Ram. In his Lordship's speech he stated among other things that he and his brother judges had the opportunity to consider some of the judgments of Datuk Genga when the same came before them on appeal. Justice Dato' Gopal Sri Ram paid a glowing tribute to Datuk Genga by observing that the judgments were very well written. He said Datuk Genga had exercised great care when writing his judgments. He had a very good grasp of the law. Justice Dato' Gopal Sri Ram stated that he and his brother judges in the Court of Appeal had no reason whatsoever to disturb the judgments of Datuk Genga.

Two of his tutors at Brinsford Lodge, Dr. Eric H Jones and his wife Mrs. Siti K Jones who are in England were unable to attend the memorial. In a message for the memorial they, inter alia, stated:

"Everyone who had the privilege to know Genga quickly came to recognize qualities and characteristics which marked him out as someone who combined considerable intellectual ability with great humanity and a concern for others.

This was the Genga we first encountered over forty years ago at Brinsford Lodge. Already, he also evidenced the qualities of leadership which were no doubt to playa very significant part in his late career."

Datuk Genga as a Barrister of the Inner Temple was a member of the Malaysia Inner Temple Alumni Association. The Alumni informed the Treasurer of the Inner Temple, London of the demise of Datuk Genga. The Treasurer of the Inner Temple, Mr. Stephen Williamson QC in his letter dated 14th May, 2007 addressed to Datuk Genga's wife, Datin Devagey Raru expressing the condolences of the Inner Temple, London, inter alia, stated:

> *"I know that he was a keen supporter of the Malaysia Inner Temple Alumni Association and I regret that we did not have the opportunity to become better acquainted. I am certainly aware of his renowned reputation as a distinguished judge with a strong social conscience and particularly admired his work in his earlier career when he came to prominence as a lawyer who fought for the rights of the working classes."*
>
> *"I have no doubt that the Malaysian judiciary has benefited greatly from his inclusion amongst their number and I am sure he will continue to be an inspiration to the younger generation of Malaysian lawyers."*

He is an exemplary servant of the law and a fine gentleman. He never refused any one who sought his assistance. The late Justice Datuk K.P. Gengadharan Nair was truly an honourable man and we are all sorry that he is no longer with us.

The Bar Council on behalf of the Malaysian Bar wishes to express our sincere heartfelt condolences to his beloved widow, Datin Devagey Raru, his son, Mr. Shashikaran Nair, his sister, Madam Komalam and to all his other relatives. May his soul rest in peace.

GENDER AND AGE DISCRIMINATION: CONSTITUTIONAL REDRESS A SUB-SAHARAN CASE

by
Hlako Choma

Introduction

The twentieth and twenty first century has seen an increasing number of women and children applicants who are seeking redress against gender and age discrimination by invoking constitutional guarantees. It must be noted that most of them have been successful in their applications[1].

Although this development in itself justifies the study of how constitutional principles are developed and applied to protect women and children's rights particularly in the Sub-Sahara region, there is another reason why this development is significant. It can now be claimed that gender and age issues are becoming part of the dominant judicial discourse which in some ways assures the political visibility of women and children's issues[2]. On the other hand, such a surge of court litigation by women and children also raises other questions concerning its underlying causes. One such question is why has constitutional litigation occurred during the ninety's rather than before? What are the possible factors that have produced these cases? This paper will hopefully contribute to an understating of the ways in which these initiatives can be effectively harnessed to fight both women and children discrimination more effectively as we have moved from the twentieth century into a twenty-first century.

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[1]This is not to ignore instances of lost opportunities such as in the Kenya case *of Virginia Wambui Ottiono v Joash Ougo & Omolo Siranga*, Court of Appeal, Nairobi Civil App No 31 of 1987 where the Supreme Court of Kenya failed to consider the compatibility of Luo Customary Law with international human rights standards. Cited in E Cotran, *Casebook on Kenya Customary Law*. Professional Books and Nairobi University Press, 1987, at 331-345.

[2] Bart Rwawzaura Recent Experiences in the use of the constitutions to fight sex discrimination in selected African jurisdictions: *Conference on Trends in Contemporary Constitutional Law, University of Hong Kong 13-14 December 1996.*

1. The powers of the courts

In socio-economic rights cases, it is very unusual for a court to make an order that results in giving an individual direct material gain, for example ordering that Government must build a house for an individual[3].

The South African Constitution[4] gives the courts broad powers when deciding constitutional cases, including socio-economic rights, in the Bill of rights. A court may declare that a law, part of a law or conduct that infringes the constitutional provision invalid.

A court can also make any order that is "just and equitable", including deciding to delay declaring an action invalid in order to give the Government a chance to correct the problem. In *Grootboom v Oostenberg Municipality* and others", the Cape High Court was dealing with the right to shelter. The court ordered the state:

- To provide the children of a group of people who had been evicted from the land they were occupying (and were homeless) with shelter until the parents themselves are able to provide shelter for their children.
- To also provide the parents of the children with shelter as this was in the best interests of the children.
- To present under oath reports to the court on steps taken to implement the order within three (3) months from the date of the court order.
- The Court further decided:
- The applicants (the group who brought the case) must have an opportunity to comment on the proposals made by the state on how to provide shelter.
- The state must have a chance to respond to the applicants' comments on the state's proposals.

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[3] *Socio Economic Right in South Africa* edited by Sandra Liebenberg and Karrisha Pillay 67

[4] Act 108 of 1996 read with *Socio Economic Rights in South Africa* edited by Sandra Liebenberg and Karrisha Pillay 68. See also *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C).

The High Court's remedy in the Grootboom case is an important example of the kind of rememdy courts can give in socio economic rights cases[5].

The argument of this section is that although the disputes reported here emanated from different countries, raised somewhat different legal issues and have been decided by applying specific constitutional provisions of the relevant state, they still have certain common features that united them. They are united, for example, by the fact that all the cases have been instituted by women[6] who are alleging that they have been discriminated on basis of gender. More importantly perhaps, senior judges in the Sub-Sahara region have found these decisions very persuasive and have adopted them in their reasoning to decide similar cases before them. The effect is that the Sub-Sahara region is slowly generating a body of case law that might prove crucial for women and children in the years to come.

It is currently held that a women's decision to terminate her pregnancy is within her constitutionally protected right of privacy, and cannot be made conditional on parental or spousal consent. However, at some point during pregnancy, the state's interest in protecting the mother's life and in protecting pre-natal life become sufficiently "compelling" to justify state regulation of abortion.

The basic constitutional rule on abortion is found in the United States decision delivered in 1973[7]. The plaintiff (Roe) was unmarried and pregnant. She applied for a declaratory and injunction relief against the defendant (Wade a country district attorney) to prevent enforcement of Texas Criminal Abortion Statutes.

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[5] *The Bill of Rights Handbook*, Fourth Edition, Johan De Waal *et al* 343. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters.

[6] Bart Rwezaura Recent Experiences in the use of constitutions to fight sex discrimination is selected African jurisdictions: *Conference of Trends in Contemporary Constitutional Law, University of Hong Kong 13-14 December 1996.*

[7] *Roe v Wade* 410 US 113 (1973). The Court has generally recognized freedom of personal choice in matters of marriage and family life as a liberty protected by the fourteenth amendment. The Texas Statute directly infringed on the right to choose and is correctly invalidated, it was a concurring judgment of Stewart, J.

The issue was whether a state may constitutionally make it a crime to procure an abortion except to save the mother's life? The plaintiff claimed that it is her constitutional rights to terminate her pregnancy, based on the fourteenth amendment concept of personal "liberty", the Bill of Rights penumbras, and the nineth amendment[8]. The defendant claimed a state interest in regulating medical procedure insured patient safety and in protecting pre-natal life.

The right of privacy generally relates to marriage, procreation, contraception and it includes the abortion decision, however, it is not without restraint based on the state's compelling interests. The state's interest in pre-natal life of a *foetus* however, the foetus cannot be considered a "person" in the constitutional sense[9]. Unborn children have never been recognized in any area of the law as persons in the whole sense. However, the pregnant women cannot be isolated in her privacy. The state may decide that at same point in time another interest, that of health of the mother of that of potential human life, become sufficiently involved. The women's right to privacy must be measured accordingly.

The state's interest in the health of the mother becomes "compelling" at approximately the end of the first trimester, prior to which mortality in abortion is less than mortality in normal childbirth. Only from this point forward may the state regulate the abortion procedure as needed to preserve and protect maternal health.

The state's interest in potential life becomes "compelling" at viability. A state is interested in protecting *foetal* life after viability may prescribe abortion except when necessary to preserve the life of health of the mother[10]. The Court held

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[8] An abortion is not "private in the ordinary sense of the word". It was a dissenting judgment of Rehnquist, J

[9] *Maher v Roe*, 432 US 464 (1977). The State had excluded nontherapeutic abortions from its Medicaid-funded program, although it did cover childbirth. The Court applied a rationality standard of review instead of strict scrutiny. The Court held that *Roe v Wade* above did not preclude the states from favouring childbirth over abortion, so long as they did not over abortion, so long as they did not unduly interfere with the women's freedom to choose an abortion.

[10] The dissent argued that the exclusion effectively forced indigent women to bear children instead of procuring a desired abortion. See also *Beal v Doe* 432 US 438 (1977) and *Poelker v Doe* 432 US 519 (1977). They applied the same rationale to the programs.

that the Texas Statute is overbroad and therefore unconstitutional[11].

In South Africa, the Choice on Termination of Pregnancy Act[12] permits abortion on request by a woman during the first twelve weeks of her pregnancy, for medical or social reasons in the thirteenth to twentieth week of pregnancy and, after the twentieth week, to save the life of the woman or to prevent the foetus being born malformed or injured. Counselling is not obligatory.

In Christian Lawyers' Association of South Africa v Minister of Health[13], the Act was challenged in the High Court on the basis that it permitted the termination of human life. The High Court rejected the challenge on the basis that the word "everyone", used in section 11 to describe the bearers of the right to life and it does not include a foetus.

1.2. An Overview of the Issues Litigated in Sub-Sahara Countries

In February 1990, the High Court of Tanzania struck down a patrilineal rule of customary law governing succession to land on the ground that it violated the equality provisions enshined in the 1977 Constitution[14]. The offending rule provided that a woman, unlike her kinsmen, had no right to inherit clan land. The woman could only use such land during her lifetime where there is no male survivor but she could still not pass it on to her children or alienate it by sale. On the death of a female heir the land was supposed to revert to the claim[15]. The following year in June 1991, the High Court of Botswana held that section 4 of Botswana Citizenship Act was in conflict with the Botswana Constitution in that it discriminated against female citizens in the way it conferred nationality rights on children[16].

Under the 1984 Citizen Act, a person born in Botswana would be a citizen if at the time of his birth his or her father was a citizen, or in the case of a child born

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[11] The Texas Statute was overbroad in not permitting legal exceptions for rape and incest. It was a concurring judgment of Burger, CJ.
[12] 92 of 1996 read with *S v Makwanyane* 1995 (3) SA 391(cc)
[13] 1998 (4) SA 1113 (T), *The Bill of Rights Hand Book*, Johan De Waal *et al*. 243
[14] See *Ephrahim v Pstory and Another* (1990) LRC (Const) 757
[15] *Ephrahim Pstory and Another* (1990) LRC (Const) 574
[16] *A-G of Botswana v Unity Dow* (1991) LRC (Const) 574

outside marriage, his or her mother was a citizen. The effect of this law was to deny citizenship rights to national. The Court also held that by denying citizenship rights to such a child, the Act also circumscribed the mother's freedom of movement because she would be compelled to live with her child in a foreign land[17].

During the same year (October 1991) the High Court of Namibia held that although the cautionary rule in sexual offences was seemingly gender neutral, it nonetheless discriminated against women who were in the overwhelming majority of cases, the complainants. Such rule was potentially in conflict with the equality provision contained in the Namibian Constitution[18].

In November 1992, the High Court of Zambia held that the Intercontinental Hotels Ltd, by refusing admission to women patrons, unless they were accompanied by men, had contravened, the equality provisions in the Zambia Constitution which safeguards freedom of association and movement[19].

In June 1994, the Zimbabwean Supreme Court held that by denying a resident permit to a non-citizen husband married to a Zimbabwe citizen, the immigration authorities had directly contravened the wife's freedom of movement enshrined in the Zimbabwean Constitution[20]. It implies that if the temporary residence permit of the husband was not renewed, the wife would be compelled to leave Zimbabwe in order to be with her husband and children.

In 1995, the Botswana High Court of Appeal held that a local college regulation, providing that on becoming pregnant a female student was required to withdraw

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[17] *Rev Christopher Mtikila v The Attorney General, High* Court Civil Case No 5 of 1993, per Lugakingila J. The applicant challenging certain enactment statutes on the ground that they violate the constitution.

[18] *S v D and Another* 1992 (1) SA 513, Supreme Courts of Namibia, Nigeria and Zimbabwe have all handed down significant decisions that clearly signal their willingness to draw on international human rights norms to interpret domestic law including their international constitutions. See also *Abibatu Folami & Ors v Flora Cole & Ors*, All Nig LR 1990, 310-20

[19] *Sarah H Longwe v Intercontinental Hotels Ltd* (1993) r LRC 221 (High court of Zambia) read with *Ncube and Others v The State* (unreported) SC Zimbabwe 14 December 1987.

[20] *Ratigan v Chief Immigration Officer of Zimbabwe* (1994) 1 LRC 343 read with *Salem v Chief Immigration Officer of Zimbabwe* (1994) 1 LRC

from studies for one year, the college regulation was discriminatory and therefore, unconstitutional[21]. The Court held that one year of suspension from studies was too long compared to the three months of maternity leave currently enjoyed by civil service employees. It was further found that the regulation did not apply to married women who were students at the college and they were normally treated as special case, whenever they became pregnant.

1.3. Primogeniture, Gender Equality and Chieftaincy Succession in South Africa

Central to the customary law of intestate succession in South Africa is the rule of male primogeniture. Male primogeniture is inheritance by the eldest surviving male child. Women (and extra-marital children) are excluded. With the entrenchment of the Bill of Rights in 1996 Constitution, however, the constitutional validity of male primogeniture has often been challenged because arguably it discriminates unfairly on the ground of age, birth and most importantly, gender[22].

Two statutes govern intestate succession in South Africa. They are Intestate Succession Act[23] and the Black Administration Act[24]. Section 23 of the Black Administration Act read with regulations frame in terms of section 23(10) which contains provisions that deal exclusively with intestate deceased estates of Africans. The system of intestate succession set up by section 23 and Regulations purported to give effect to the customary law of succession. It prescribes which estates must devolve in terms of what they describe as "black law and custom" and details the steps that must be taken in the administration of those estates[25].

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[21] *Student Representative Council of Molepole College of Education v Attorney General of Botswana*. Civil Appeal No. 12 of 1994. Misc No. 396 of 1993. EL Quansal (1995) JAL 97-102

[22] Prof O Mireku balancing Male Primogeniture gender Equality and Chieftaincy Succession: *Nwamitwa v Philia and Others* 2005 (3) SA 536: *University of Fort Hare, Conference on Law and Transformative Justice in Post Apartheid South Africa*: 04-06 October 2006 Hosted by Nelson Mandela School of Law, University of Fort Hare.

[23] Act 81 of 1987

[24] Act 38 of 1927

[25] Adv TG Ramatsekisa, Comment on *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others, South Africa Human Rights Commission and Another v President of South Africa and Another* 2005 (1) BCLR 1 (CC) LLM dissertation, University of Venda 2005

In customary law of succession there is a principle of primogeniture. The general rule of the principle is that only a male who is related to the deceased qualifies as intestate heir. The problem with primogeniture is that it precludes widows from inheriting as the intestate heirs of their late husbands, daughters from inheriting from their parents, younger sons from inheriting from their parents and extra marital children from inheriting from their fathers. Women do not participate in the intestate succession of the deceased estate. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line[26]. It was contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination and that amount to inequality for women. *Bhe and Others v The Magistrate Khayelitsha and Others*[27]. The applicant was seeking no relief but brought the application in the following capacity:

- On behalf of her two minor daughters
- In the public interest, and
- In the interest of the female descendants, and descendants and extra-marital children of people who died intestate

The late Mogobane had two daughters with Ms Bhe. In this case the respondent is the Magistrate of Khayelitsha, who appointed the father of the deceased (the second respondent) as the representative of the estate. The president of the Republic of South Africa and the Minister of Justice and Constitutional development were cited as third and fourth respondents. After the death of the deceased the second respondent was appointed as the children were not considered as they did not qualify under the system of intestate succession

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[26] Olivier et al *Indigeous law*. See also TG Ramatsekisa *supra*.

[27] 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C). Section 23 of Act 38 of 1927 states that all movable property to a black and allotted by him or accruing under black law or custom to any woman with whom he lived in a customary union, or to any house shall upon his death devolve and be administered under the black law and custom.

[28] referred to above. The expression "illegitimate children" has been used by lawyers in South Africa for many years, and was used by the Cape High Court in the *Bhe* case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married.

flowing from section 23 of Black Administration Act[28] and regulations, in particular 2(e) to be heir of the deceased's father. The court paid attention and deliberated on the issue of extra marital children and intestate succession in case.

The Court had to decide on two main issues:

- The constitutional validity of section 23 of the Act, which precludes extra-marital children from inheriting from the estate of their father.
- The Court had to determine the constitutional validity of the principle of primogeniture in the context of the customary law of succession. The principle was contested to be discriminatory in nature since it does not allow woman to inherit the estate of their deceased husbands and illegitimate chidren to inherit from their fathers.

The Court held that section 23 and its regulations are ex facie discriminatory and in breach of section 9(3) of the South African Constitution[29] and it must therefore be struck down. The Court further held that the principle of primogeniture violates the rights of women to equality and human dignity guaranteed in section 9)(3) and 10 of the Constitution.

It might be argued that South Africa, by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and being part of a comity of civilized nations, has indicated a preparedness to rid itself of sex-based discrimination and, whenever possible, use CEDAW and other international instruments as aids to interpretation. Moreover, South Africa has a duty to comply with its obligations under CEDAW despite the fact that Parliament has not legislated itself to effectively discharging its responsibility to bring domestic customary laws into conformity with the requirements of international human rights law[30].

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[29] Act 108 of 1996. Se also Adv TG Ramatsekisa referred to above-Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black Law and custom shall not apply to the administration and distribution of so much of his estate as does not fall under subsection (1) or (2) and such administration and distribution shall in all respect be in accordance with administration of Estate Act, 24 of 1913.

[30] R Songca, A Critical Analysis of Customary Marriages, *Bohali* and the South Africa Constitution: *Lesotho Law Journal* Volume 10 1997 at 31

In the Southern African Development Community (SADC), of which Botswana is a member, there is a considerable body of judicial and academic authority which view corporal punishment as in human and degrading rather than rehabilitative[31]. The Zimbambean Supreme Court held that corporal punishment of an adult offender breaches section 15 of the Declaration of Rights encapsulated in the Constitution of Zimbabwe, as constituting a punishment which in its very nature is both inhuman and degrading[32]. The Supreme Court of Zimbabwe ruled that the imposition of judicial corporal punishment upon a juvenile was unconstitutional[33].

Corporal punishment has also been regarded as inhuman and degrading in a number of Southern African cases. While in Schools, children have a right to have all their other human rights protected. For this reason, section 10 of the South African Schools Act[34] prohibits the use of corporal punishment at schools. The High Court has decided that allowing corporal punishment at school would lead to violation of the right of children to dignity and not to be treated or punished in a cruel, inhuman and degrading manner[35]. This High Court decision was appealed to the Constitutional Court. Christian Education of South Africa argued that their religious and community rights had been limited by Parliament's blanket ban on corporal punishment in schools. The Constitutional Court decided that this ban was a reasonable and justifiable limitation of religious rights in an open and democratic society based on human dignity, equality and freedom[36]. The ban of corporal punishment in schools thus survived this constitutional challenge.

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[31] Siamisang Thebe, Juvinile Justice in Botswana*: Lesotho Law Journal Volume* 11 1998 at 121 author cited *S v Ncube*, *S v Tshuma*, *S v Ndluvu* 1987 1 2LR

[32] See the above cited cases and Siamisang Thebe his comments in *Lesotho Law Journal* cited above

[33] The majority ruling of A *juvenile v The State* has, however, reversed the Constitution of Zimbabwe Act No. 11 of 1990 which allows the infliction of moderate corporal punishment by persons *in loco parentis* or in the execution of a judgement or court order. See Siamisang Thebe above.

[34] 84 of 1996

[35] *Christian Education of South Africa v Minister of Education* 2000 (10) BCLR 1051

[36] South African Constitution (Act 108 of 1996) Section 36

Conclusion

In the beginning of this paper, it was noted that there has been a surge in the ninety's of constitutional litigation in which women and children are seeking redress against discrimination. The courts have generally been quite responsible to these demands. In performing this task, courts have not only generated new legal concepts but have also accorded a certain visibility to gender issues by moving the debate from the fringes of society into the mainstream of judicial discourse.

On the question why all this is happening during the twentieth and twenty-first century, the paper has argued that since attaining self-rule, Sub-Sarah has never enjoyed any meaningful form of constitutionalism. Instead it has been engulfed by an evil cloud of political authoritarianism, economic depravity and civil strife. Whatever may be the real cause of all these problems, the conditions were such that women could not come forward to demand their rights in courts of law, if anywhere.

However, in the years following that end of the cold-war and the implosion of the Soviet block, a number of forces have worked together to force African leaders to liberalise their economies and political systems. This has provided an idea opportunity not only to women but all citizens who now feel able to demand their fundamental rights. Courts also have recognized the gravity of their mission in acting as umpires between various competing interest in community. They have taken up the challenge very serious. In conclusion, while all these events are to be celebrated by all liberal minded people, women activists will need to recognize that whereas constitutional guarantees are an important resource in the struggle for gender equality, it is important to consider ways in which these court-room victories can be incorporated into a broader framework for social action so that these constitutional guarantees can be translated into a reality for every women in the Sub-Saharan region.

RIGHT TO A FAIR TRIAL versus WITNESS PROTECTION

by
Charles Hector

> *"When we talk about witness protection, we have to look at the competing concern, that is the right to a fair trial that has to be accorded to a victim of the criminal justice system – and one of the most important aspect of this right is the right to full pre-trial disclosure of all the documents, and information that is in the possession of the State (prosecution), i.e. "the police docket" – and this must include timely access to witnesses and also witness statements, and this must be done preferable even before the plea is entered."*

Fear & Witness "Protection"-Justification For Rights Denial

In Malaysia, an accused person only has the right to get a copy of the First Information Report, police reports, his/her own caution statements and copies of chemist/scientific reports. He did not have the right to have access to statements made by witnesses during the cause of police investigation – and most common rationale and reasons given for this denial of what should be a fundamental right, is what was also interestingly mentioned by Suffian, Lord President(as he then was) in the Federal Court case of ***Husdi –v- Public Prosecutor (1980) 2 M.L.J 80*** when he said:-

> "*We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court – because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared: they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify – let alone – arrest the offender, and yet complain that the police*

do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the courts, the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows."

The fact is the Malaysian Evidence Act has provisions[1] that allows for the impeaching of the credit of a witness, and one of the means to do this is by proving that a former statement made by him are inconsistent with the evidence that he gave in court but without access statements made to the police how can this be done. The defence would literally have to guess as to what is contained in the statement/s made by the said witness to the police.

In the Husdi case, the court also did say :- *"…when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the court should, on the request of the defence, refer to his police statement and may then, if the court thinks is expedient in the interest of justice, direct the defence to be supplied with a copy…."* Again, as was mentioned earlier I say that unless the defence lawyer or the accused is gifted with some super natural powers that enables them to know what is in the witness statement(which they do not have access to), what the court suggested about impeaching a witness based on a statement is, I believe, impossible.

In the earlier ***Husdi case (1979) 2 MLJ 304,***[2] this deprival of the right of the accused to statement/s made by a person to the police was justified by reason

[1] Section 145 and section 155(c) of the Evidence Act.

[2] This was also the case where the Federal Court made the pronouncement that witness statements were absolutely privileged – and the basis of this pronouncement were 2 defamation cases, where it was decided that statements made to the police were absolutely privileged. The Federal court said this : "…These two cases involve actions for defamation. But I am of the view that once police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes…". I believe that the learned judge erred in law on this point.

of 'public policy'. The judge delivering that judgment at the Federal Court had this to say: *"…Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements as there is a real danger of tampering with the witness.."*. Should not public policy be to ensure that justice is done and to prevent miscarriages of justice?

Protecting witnesses was one of the reasons seemingly that was given to deny the right of pre-trial full disclosure, and hence the right for a fair trial. Was it really to protect witnesses, or was it really to protect the prosecution's case? The use of the word "tampering" seems to suggest it was the later.

The risk of tampering witnesses was also a consideration in a bail applications, and hence when an accused is released on bail, reasonably one could argue that witness statements should be made available to the defence for after all the court had considered and concluded impliedly that there was 'no real danger of tampering with witness'. But still no access to witness statements because the highest court of the land had also declared that witness statements are "absolutely privileged" and as such, the accused person did not have a right to such witness statements.

Rights of the accused after the Husdi cases

Can the accused get **information about the name and address of the witness/person concerned and the fact that he had made a statement or not?** The ***Bryant and Dickson***, which was referred to in the Husdi cases said that the answer was yes. In the **R-Ward (1993) 2 All ER 577 at page 613 para c fol,** the court had this to say:

> *"...The names and addresses of these witnesses and the fact that they had made statements, if no more, were plainly disclosable under the R -v- Bryant and Dickson (1946) 31 Cr App R 146 rule.."*

What about **pre-trial access to prosecution witnesses?** After all, the Federal Court in the first Husdi case had said:- *"…So far as applicable to the present case, the principle that appears to be laid down in this case [referring to*

the case of R -v- Bryant and Dickson (1946) 31 Cr App R 146] *is that it is the function of the prosecution and the defence to prepare their own case: but the defence is not entitled to the police statement, as they themselves may record a statement from a prosecution witness if they so desire. The last part is merely a reiteration of the principle that there is no property to a witness – not to a document generally…"*

Therefore, even after the Husdi cases, the accused should have had the right to get the names and address of witnesses the police interviewed (or were looking for), information whether these witnesses had made statements to the police, the right to seek out these witnesses and to further record statements from them. But in reality, generally this did not happen. The police/prosecution generally never disclosed this information about witnesses, and lawyers for the accused also generally failed to pressed for these rights.

In Malaysia, many lawyers would come to court, listen to the evidence given by a prosecution witness during examination-in-chief, and then proceed to try to create reasonable doubt through cross examination. The fact that the defence had no access to these witnesses' statements to the police and no prior access to the names of this witnesses (and hence no opportunity to interview them before hand) greatly prejudices the defence during cross-examination.

The accused's fundamental right to a fair trial, the right to equality under the law and to equal protection of the law is denied by reasons of 'ignorance of the full extend of the rights of an accused under the law" and also by decisions of the highest courts of the land. And somehow the protection of witness (or rather the risk that prosecution witnesses would be tampered with) was one of the justification for this state of affairs.

Corruption an enemy of justice and a threat to witnesses

The other emerging problem in Malaysia today is the increase of corruption within the police force and other actors in the criminal justice system, and this has not only affected public confidence in the system but would also, I believe, protection of complainant/s and/or witnesses to crime.

The indifference of the ordinary Malaysian to crimes committed by their fellows

is now further enhance with the thinking "why waste time making reports or giving statements to the police for after all the police can be 'bought' and the guilty can get off scot-free more so if they have money, power and/or connections with the 'right people'". Even amongst the legal profession, there is today talk about a new breed of lawyers, which some call the "criminal settlement lawyers", who when appointed collect a large sum of money and then go and see certain police officers (or other persons in the criminal justice system) and try to work out a deal or a 'criminal settlement' – i.e. how much do you want for my 'client' to be released without being charged or without being tried and/or without being convicted.

Sometimes, a person is acquitted because some police officer or prosecution witness failed to do something during the course of investigation, and one wonders whether this was by reason of inexperience, negligence, inadequate training, incompetence or an innocent oversight – or was it a simply a conscious omission/action brought about possibly by corruption or other pressures.

Corruption Must End To Restore Public Confidence

When Abdullah Ahmad Badawi came in as the prime minister of Malaysia after the 22-year premiership of Mahathir Mohammad, he promised the people of Malaysia that he will fight corruption. Malaysians were hopeful and this was further enhanced when the new premier set up 2 Royal Commissions to look into the state of affairs within the Malaysian police. Both Commissions came out with numerous recommendations, and the most significant recommendation was for the setting up of a Independent Police Complaints and Misconduct Commission (IPCMC). The Royal Commission also did prepare a draft Bill and proposed timelines for the setting up of the said IPCMC. Datuk Seri Abdullah Ahmad Badawi assured Malaysians that he would set up the IPCMC but to date it is yet to become a reality and the deadline proposed has come and gone. Recently, on 14/11/2006 some 302 civil society organizations led by the Malaysian Bar handed over a petition, which was also signed by thousands of individual persons, urging the Government to speed up the establishing of the IPCMC.

For the cause of justice, corruption not only within the police but also all the other actors within the criminal justice system should be completely extinguished

and it can be done only if there is the necessary political will.

ESCAR – the kind of Witness Protection we do not need

The Essential (Security Cases) Regulations 1975 (ESCAR) introduced special procedures for security cases being cases where one is charged with security offences. Security offerences were described as being offences under certain sections[3] of the Internal Security Act 1960 (an act that also provides for Detention Without Trial) and also any offences against any other written law the commissioning of which is certified by the Attorney General to affect the security of the Federation.

The ESCAR allowed the court to take evidence of witnesses in the absence of the accused and his counsel. It allows the witness to give evidence without his person being seen and/or his voice being heard by the accused and/or his counsel. It permits the court to prevent questions being asked by the defence if it is in the opinion of the court will lead to the witness's identification. It has provision for keeping secret the identity of an informant, and for allowing a report of the said informant to be admissible in evidence without the informant being required to give evidence (and of course without the defence having the opportunity of cross-examination). The normal rules of procedure and evidence developed over the years to ensure that justice be done were ignored by the ESCAR.

When the ESCAR came into being the Malaysian Bar protested and lawyers boycotted trials conducted that used the ESCAR. The government reacted and amended the Legal Profession Act introducing various shackling provisions, including preventing lawyers below 7 years standing, Members of Parliaments and State Legislative Assemblies, office bearers of Political Parties and other classes of persons that could be added on later from being able to become members of the Bar Council, State Bar Committee and/or its committees.[4]

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[3] Section 57, 58, 59, 60, 61 or 62

[4] Some of these shackling provisions like the limitations placed on lawyers below 7 years standing, the onerous quorum requirements for a General Meeting of the Malaysian Bar and the State Bars were removed recently by the coming into force of the Legal Profession (Amendment) Act 2006. The new amendment Act however has in it an ouster of judicial review provision, and other provisions that go against the principles of natural justice and fairness.

The rights of the accused and witness protection must be considered together

Now, when we talk about witness protection, we have to consider first the fundamental right to a fair trial that must be accorded to an accused person in a criminal justice system. This right to a fair trial must necessarily includes the real ability for one to be able to prepare one's defence, and that means also having all the information and evidence in the hands of the prosecution (the State) way before the trial, preferably soon after one is charged with an offence. This means that there must be the right to full disclosure, and this would include list of witnesses (and other persons interviewed or persons the police were looking for during the course of their investigations, who the prosecution may not even consider calling as prosecution witnesses) and their statements.

The Development of the Right to Full Pre-Trial Disclosure

Full pre-trial disclosure became an important prerequisite to ensure fair trial and prevent miscarriages of justice after cases like Guildford Four and Birmingham Six exposed that serious miscarriages of justice that caused innocent persons to languish in prison for many years brought about by non-disclosure by the prosecution. **R-Ward (1993) 2 All ER 577** and the case of ***R -v- Maguire, CA, (1992) 2 All ER 433*** are other examples of cases of miscarriage of justice resulting from "non-disclosure".

The right to fair trial requires that "in criminal prosecution the accused should ordinarily be entitled to the information contained in the police docket relating to the case against him or her, including copies of statements of witnesses whether or not the prosecution intends calling such witnesses at the trial." ***(State –v- Scholtz(1997) 1 LRC 47).***

The Canadian Supreme Court in the case of ***R –v- Stinchcombe(1992) LRC(Crim) 68*** also affirmed the accused's right to full disclosure adding that – "*the right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted…*".

In ***R -v- Mills,*** quoting the words of judgment of the Supreme Court of Canada in ***R -v- Stinchcombe (1991) 68 CCC (3d)*** had this to say :- "*...the fruits of*

investigation which are in the possession of the counsel for the Crown are not the property of the crown for use in securing a conviction but the property of the public to be used to ensure that justice is done... The principle has been accepted that the search of the truth is advanced rather than retarded by disclosure of all relevant material."[5]

Today, India also recognizes the right to full disclosure, and the Indian position can be summarised from the following Indian Supreme Court case, an example of many similar judgments :-

> *"The right which the accused has got of obtaining copies of the statements made by witnesses during investigation is a very valuable right and the wholesale refusal to grant the same will be a serious irregularity, which would vitiate the entire trial."*
> ***Purushottam -v- State of Kutch (1954) AIR 700(Supreme Court)***

The Lesotho case of ***Malopo –v- Director of Public Prosecutions (1998) 2 LRC 146*** had this to say about the right to a fair trial and the concept of "All persons shall be equal before the law" : *"…a trial cannot be fair, just and balanced if the prosecution is allowed to keep relevant material such as witness statements close to its chest and thereby hope to spring a surprise on the defence for the purpose of securing a conviction…certainly cannot have been the intention of the framers of the Constitution [referring to the constitution that had the equality before the law provision] to place the accused at a disadvantaged in relation to the prosecution. Such a disadvantage in my view does not accord with the tenor or the spirit of the right of equality before the law.."*

When it comes to disclosure, the duty is placed on the prosecution and their duty is to disclose everything, including also material that will tend to weaken

[5] Page 796, para h fol.

the prosecution's own case, and even material that may even open up a new defence or that which will strengthen the defence's case.

> *"The **prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution's case or to strengthen the defence case**, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there was good reasons for not doing so.*
>
> *R-Ward (1993) 2 All ER 577,*

> *"...Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence"*
>
> ***R-Ward (1993) 2 All ER 577** at page 599, para b*

It is sad, but the reality is that many a time a criminal trial is perceived as a competition by the prosecution, and as such prosecutors are driven by this desire to win – and victory means successfully securing a conviction. Hence, what they would adduce as evidence to the court would be just the required evidence to secure a conviction. Evidence unfavorable to the prosecution may end up being ignored or consciously suppressed by the State, who forgets that the most important thing especially in a criminal trial is to ensure that justice is done and not securing a victory by getting an innocent man convicted.

Sometimes high-profile cases that receive media attention also puts additional and unnecessary pressure on the police to quickly find the "culprit", charge him and get him convicted and history has shown that it is in these kind of cases where there is a higher chance that an innocent man convicted, sentenced to prison and even death.

Disclosure Must Be Done At The Earliest Possible Time

The courts in various jurisdictions have also looked considered the question as

when this full disclosure should occur, and the answer generally seems to be as soon as possible.

In the Namibian case of ***State –v- Scholtz (1997) 1 LRC 67***, Dumbutshena Ab JA had this to say: *"For disclosure to be effective it must be done at the earliest possible time". As to when exactly, the court said that the "…overriding factor should be the sufficiency of time in which the accused should prepare his or her case. In my view it won't be sufficient time to hand witness statements and other materials to the accused a few minutes before plea. There should be reasonable time to allow the accused to prepare thoroughly his reply to the charge and his defence."*

Considering the various authorities from different jurisdictions[6] that now recognize this important right of full disclosure, it seems that this disclosure by the prosecution should happen even before the suspect is brought to court and charged.

Non-Disclosure By Reason Of Protection of Witnesses, etc..

Generally all statements to the police should be provided by the prosecution to the defence, but in exceptional cases when the prosecution do not want to disclose a particular statement claiming "public interest immunity" or "public policy" or "national security" or whatever other reason, this should be specifically claimed - and the matter will then have to be decided by the courts ,and not the police or the prosecution, after balancing interest of justice for the accused with whatever reasons forwarded by the prosecution.

In the case of ***R -v- Davis (1993) 2 All ER 643***, at page 647 para a-b - citing ***R-v-Hennessey (1978) 68 Cr App R 419*** with approval, the court had this to say:-

> *"...the judge is balancing on the one hand the **desirability of preserving the public interest in the absence of disclosure against**, on the other hand, the interest of justice. Where the*

[6] I must state that what I have considered to date are authorities from Commonwealth countries.

> *interest of justice in a criminal case touching and concerning the liberty or conceivably on occasion life, the weight to be attached is plainly very great indeed..**"(See R-Ward (1993) 2 All ER 577** at page 602 para j foll.) but the **ultimate decision is not with the prosecution but with the** **court."***

> *"...when the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of proceedings.....If, in a wholly exceptional case, the prosecution are not prepared to have **the issue of public interest immunity determined by the court**, the result must inevitably be that the prosecution will have to be abandoned"*

In ***Malopo –v- DPP (1998) 2 LRC 146***, the courts did consider protection of any informer (or witness) as one of the grounds that may be forwarded by the prosecution for non-disclosure, when it said:-

> *"…the state is entitled to withhold any information contained in the police docket if it satisfies the court on a balance of probabilities that it has reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be contrary to public interest such as for instance where the information sought would disclose the identity of an informer or where it would disclose police techniques of investigation which it is necessary to protect or where such disclosure might endanger the safety of a witness…"*

At the end of the day, in the event that the prosecution wants not to disclose certain material, they will have to make an application to the courts and the courts will have the final say and it is clear that in the interest of justice the right of the accused to full disclosure which would be a higher priority. Of course, the defence must be accorded the right to be heard in any such applications.

The Right to Full Pre-Trial Disclosure in Malaysia

Even though this right of full pre-trial disclosure has been gaining recognition throughout the world, especially in the commonwealth countries, especially since the early 90s, sadly in Malaysia this right is yet to receive the necessary recognition in law. But to be fair, there were some amongst the Malaysian judiciary even as early as 1979 that felt the need for pre-trial disclosure, and such a sentiment was expressed by Wan Yahya J (as he then was) in the case of ***Haji Abdul Ghani Bin Ishak -v- Public Prosecutor (1979) 1 LNS 23*** when he said:-

> *"…An attitude of undue caution in the production of documents necessary for the defence of an accused person may unfairly give rise to the insinuation that the prosecution is resorting to a hide and seek method or reducing the defence to a game of blind man's buff..."*

Even though the right to full pre-trial disclosure is not recognized in Malaysia, there have been challenges[7] for the recognition of this right in the courts. The right to 2 appeals makes it very difficult for an application for full disclosure originating from a criminal matter in the magistrate and sessions court to reach the Federal Court[8]. Likewise the doctrine of stare decisis[9] has been an impediment.

It is sad that it is the Malaysian Judiciary that has deprived the accused person of the right of pre-trial full disclosure and even the right to immediate access to

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[7] One such case that is before the Court of Appeal now is Criminal Appeal No: W - 05 - 66 – 2003, MUZAMMIL IZAT BIN HASHIM –v- Public Prosecutor

[8] In Malaysia, appeals from the lower courts (Magistrate/Sessions Courts) goes to the High Court and thereafter to the Court of Appeal. A matter from the High Court is appealable to the Court of Appeal and thereafter to the Federal Court. Most criminal cases, save for capital punishment cases, generally is heard by the lower courts.

[9] "to stand by things decided") is a Latin legal term, used in common law to express the notion that prior court decisions must be recognized as precedents, according to case law. More fully, the legal term is "stare decisis et non quieta movere" meaning "stand by decisions and do not move that which is quiet" (the phrase "quieta non movere" is itself a famous maxim akin to "let sleeping dogs lie") – Wikipedia. Lower courts are bound to follow decisions of higher courts.

a lawyer for an arrested suspect upon arrest despite the fact that it was possible under the Malaysian Constitution and existing laws. If only we had a more progressive Malaysian judiciary, we would have had the necessary rights to ensure a fair trial for the accused person long ago.

The good news is that the right to full pre-trial disclosure may finally be entering the statute books of Malaysia[10], but as to when this would actually be enacted and come in force is still a question. From what I have heard (for which I could not get any positive confirmation to date), another Act for Witness Protection is being drafted and only after that 'Witness Protection Act" is passed and come into force would the right of full disclosure also become part of our law.

Witness Protection – Meaning, Scope and Extend

The term "witness protection" is a new term today for Malaysia whereby the old term commonly used was "witness tampering". "Witness tampering" seem to indicate concern about not destroying the evidence of the prosecution until it is adduced before the court. It was not directly concerned with the protection of the witness per se. It definitely was not about the protection of the witnesses after they had given their evidence in court.

Today, the new term "witness protection" looks at protecting witnesses not only until the day they adduced their evidence in court but also beyond that. In the United States of America, it talks about providing of a new identity and a re-location of the witness so that the accused/convicted and/or their friends/

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[10] Criminal Procedure Code (Amendment) Act 2006, which received Royal Assent on 27/9/2006 and was gazetted on 5/10/2006 is at present not yet in force. New section 51A – deals with pre-trial disclosure – but the real scope of what must be disclosed is still vague.

[Editor's note: Please be informed that the different sections of the Criminal Procedure Code (Amendment) Act 2006 [Act A1274] have since come into force vide through 3 Gazette notifications [PU(B)] as follows:
Criminal Procedure Code (Amendment) Act 2006 [Act A1274]
w.e.f:-6.3.2007 - PU(B)68/2007. ss.9, 20, paragraph 33(b),(f) and (h);
w.e.f. 2.7.2007 - PU(B)243/2007 - ss. 33(k) & 33(v);
w.e.f.:7.9.2007 - PU(B)322/2007, ss.2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, para.33(a),(c),(d),(e),(i),(j),(l),(m),(n),(o),(p),(q),(r),(s),(t),(u).

agents could not find these witness and visit harm/death on them by reason of revenge or as a deterrent to future witnesses.

Witness protection may be justifiable for crimes committed by persons linked to or in criminal gangs, organized crime families, mafias and such like groups of persons – but for the crimes committed by ordinary criminals, witness protection may not be justifiable especially if it goes against the right of the accused to a fair trial, which must include the right to full pre-trial disclosure.

Witness protection legislations itself may not be sufficient without the creation of a independent corruption-free body that would be able to deal and ensure an effective witness protection programme. Malaysia, unlike the United States of America and some of the other jurisdictions that have similar legislations and programmes, is a small country and provisions of a new identity and re-location within the country may not be effective and/or practical.

Further, unless and until we are able to eliminate corruption and other influences in the police force and other government agencies, witness protection will never be really effective.

In Malaysia, today there seem to be classes of persons who are above the law – and this include leaders in government and local government, certain political parties and persons connected to such persons[11]. This perception does no good in re-building confidence in the police and/or other government agencies and/or bodies involved in the criminal justice system.

Until we, in Malaysia have a corrupt-free and independent police force and other similar enforcement agencies, Public Prosecutor's office and Judiciary

11 Recently a Member of Parliament apparently admitted to possibly committing acts of corruption and possibly even involved in importing logs contrary to law but to date he is yet to be charged. We had a senior politician who contravened the law by taking cash monies above the permissible limit out of Malaysia to another country where he was charged in that country – but to date no charges seem to have been preferred against him in Malaysia. There are other such cases but no actions of arresting and charging them have happened. All these kinds of instances do not help the public perception of the criminal justice system is concerned.

that is also committed only to the upholding of the cause of justice without fear or favor, any Witness Protection Act or programme will not work.

I must state very clearly that for me the rights of the arrested and the accused persons to a free and fair trial, which should include that right to full pre-trial disclosure to enable the defence to effectively prepare and present a defence, is of a greater importance compared to any form of witness protection. Witness protection, even if it is to be, must be limited to crimes committed by certain classes of persons only and even in those cases it must never lead to a deprivation of the right of disclosure and definitely not the right of the defence to meet and take statements from such witnesses wy before the trial.

ARTICLE 121 (1A)

by
Zainur Zakaria

Much debate has been swirling around and is still going on regarding article 121(1A) of the Federal Constitution. Certain Non-Governmental organisations calling themselves 'Article 11' have been going around the country organising road shows in their effort to explain to the public the need for the repeal of article 121(1A), which they believe is in conflict with article 11 of the Federal Constitution, which guarantees freedom of religion. The road shows have attracted opposition from Muslims who consider the issues raised at these road shows as attempts to undermine Islam, resulting in a demonstration being held outside the hotel where the road show was held, in Penang recently.

There is no doubt that to a great extent the ongoing debate on article 121(1A) was brought about by the case of **Kaliammal alp Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (Jawi) & 2 Yg lain (2006) 1 AMR 498 (or better known as the 'Moorthy case'.** The subject has also attracted many, including a retired court of appeal judge to express his opinion in one of the major newspaper.

There seems to be no let up even though the government has made it clear that article 121(1A) will not be repealed.

Mindful of the sensitivity of the issue, I am writing this article in the hope that it will help to erase some of the confusion, misunderstanding and misgivings surrounding the said article 121(1A) which has become a bone of contention among Malaysians.

ARTICLE 121(1A)

Article 121(1A) which was introduced by an amendment to the Federal Constitution in 1988 reads as follows:-

> *"(1A) The courts (referring to the High Courts in article 121) referred to in clause (1) shall have no jurisdiction in respect*

of any matter within the jurisdiction of the Syariah courts."

In an article written by the late Tan Sri Datuk Professor Ahmad Ibrahim, a distinguished scholar and an expert both in the field of Civil and Islamic Law, which appeared in the 26 May 1989 issue of The Malayan Law Journal, the late Professor explained in detail the need for the introduction of article 121(1A). This explanation could have either escaped the attention of those who now clamour for the repeal of the said article in their pursuit of a more 'civil and liberal' society, and in their staunch belief that the rights of the individual should prevail over that of society, or they are just not convinced of the explanation advanced in the said article and the reasons given by the courts in their pronouncements relating to article 121(1A).

In his article, the learned Professor referred to specific cases where decisions of the High Courts gave rise to serious conflict between the decisions of the civil courts and the syariah courts. This conflict not only resulted in the civil courts assuming or ascribing to itself jurisdiction over Islamic law, but what is even more disconcerting, the civil courts have assumed the authority to disagree with rulings made by the Majlis Fatwa over precepts of the religion of Islam and to ascribe to itself the authoritative position of interpreting Islamic law including the precepts of the religion of Islam itself.

THE POSITION PRE-AMENDMENT

One of the cases referred to in the said article is the case of **Myriam v Ariff (1971) 1 MLJ 265**. This case concerns the custody of the children. In his judgment the learned judge expressed the view that:-

"In my endeavour to do justice I propose to exercise my discretion and have regard primarily to the welfare of the children. In doing so, it is not my intention to disregard the religion and custom of the parties concerned or the rules under the Muslim religion ***but that does not necessarily mean that the court must adhere strictly to the rules laid down under the Muslim religion.*** *The court has not, I think, been deprived of its discretionary power."*

Another case referred to in the said article is the case of **Commissioner for Religious Affairs Trengganu & Ors v Tengku Mariam (1969) 1MLJ 110.**_ In this case the High Court was asked to decide on the validity of a wakaf made by Tengku Chik for the benefit of his family and relatives, with an ultimate gift for religious purposes. The matter had been referred to the **Mufti who had issued a fatwa declaring the wakaf to be valid.** However the learned judge of the High Court ignored the fatwa and instead held the wakaf to be invalid. The learned judge said:

> *"I have given this matter considerable thought and am of the view* ***that even if it had been this court which had sought the fatwa, the court retains unfettered discretion as to how much of such fatwa it should accept, and may decline to be bound by it..*** *I can find nothing in the Enactment which has affected the power of the court to propound Islamic law, which power I now propose to exercise."*

In arriving at his decision the learned judge relied upon two decisions of the Privy Council, that is, the Indian case of **Abdul Fata Mohamed Ishak v. Russomoy Dhur Chowdhry (1894) 22 LA. 76 and the Kenyan case of Fatuma binti Mohamed v. Mohamed bin Salim (1952) A.C. 1.**

When the appeal was brought to the Federal Court, a majority of the Federal Court held that although the wakaf was invalid, the parties were estopped from challenging its validity as they or their predecessors had agreed to abide by the decision of the Mufti in the case.

Tun Suffian FJ, as he then was, said:

> *"I have examined the wakaf instrument and the authorities mentioned in the learned judge's judgment and those cited before us and I am satisfied that the wakaf here was essentially for the benefit of Tengku Chik's family and that the gifts to charity were illusory and that on the authority of the Privy Council decisions cited to us the learned judge was bound and we are bound to hold that the wakaf was therefore void,* ***notwithstanding the Mufti's ruling to the contrary."***

Azmi L.P. as he then was, though agreeing with Suffian, had a few words to say on the judgments of the Privy Council in the two cases relied upon by the learned High Court judge, and this is what he said:

> *"The results of their Lordships judgment was that a wakaf was valid only if the effect of the deed of wakaf was to give the property in substance to charitable uses. It was not valid if the wakaf was founded 'for the aggrandisement of the family' or where the gifts to a charity was illusory or merely nominal. This decision created a storm in India as it was deemed to go against the fundamental notions of Islamic law. Finally the Indian Legislature stepped in by passing the Mussalman Wakf Validating act 1913, which provides that wakafs for the support of a man's descendants and family are proper and lawful and where the person creating the wakaf is a Hanafi Mussaslman, it is also lawful for him to provide for his maintenance and support during his lifetime or for payments of his debts out of the rents and profits of the property dedicated provided that in both cases the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."*

The Indian government recognising that the Privy Council either disregarded or failed to apply fundamental notions of Islamic law in coming to its decision, took the necessary step to pass a new law to deal with the decision of the Privy Council, which decision was most unwelcome among the Muslim community.

Notwithstanding that he agreed with Suffian, the anxiety and concern of Azmi L.P. on the issue in question, and the effect of decisions of civil courts on matters of Islamic law, is borne out by his reference to the decision of the Privy Council in the Kenyan case of **Fatuma binti Mohamed,** wherein their Lordships of the Privy Council cited a passage in the judgment of Hamilton J. in another East African case of **Talibu bin Mwijaka v. executors of Siwa**

Haji Decd. (1907) 3 E.A.L.R. 33. This is what his Lordship Hamilton J. said in Talibu's case:

> *"A study of the question shows that while the Mohamedan law, uninfluenced by outside sources, permitted perpetuities and the erection of wakafs for family aggrandizement solely, the influence of English judges and of the Privy Council has gradually encroached on this position until decisions quite recently have decided that such wakfs are illegal, and it has now been clearly established that a wakf for family aggrandizement or security, the ultimate beneficiaries of which are poor, whether mentioned by name or supplied by implication, are invalid. The Mohamedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remain the same as when the Min Haj was written in the sixth century of the Hejira."*

Thus even though the Privy Council acknowledged that the influence of English judges undoubtedly applying English law had encroached and diminished the application of Islamic Law in matters relating to wakafs, Azmi L.P. as he then was, reluctantly resigned himself to the fact that Malaysian courts would be bound by the judgment of the Privy Council in Abdul Fata's case, but questioned whether that state of affairs should continue or not is a matter for the legislature.

Ali FJ in his **dissenting** judgment held that the respondents were precluded from challenging the validity of the wakaf as an authoritative ruling binding on them had been given by the Mufti and therefore the trial court had in the circumstances no jurisdiction to hear the case. He said:

> *"The subsection s 21 (3) of the Administration of Islamic Law Enactment, 1955 (1375) (Trengganu Enactment No. 4 of 1955)* ***is a legislative sanction against any further dispute on the validity of the wakaf. The court cannot but take notice of it. To ignore it is to exceed the jurisdiction."***

The learned Professor then went on to refer to a number of cases where

Islamic law was **not** applied.

The first was the case of **Ainan bin Mahmud v. Syed Abubakar (1939) MLJ 209.** In this case the High court decided that a child born to a Muslim woman four months after her marriage to a Muslim man is the legitimate child of that man. The court relied on the provisions of s 112 of the Evidence Enactment (now the Evidence Act 1956). According to the learned professor, it is clear that the decision of the High Court is contrary to the Islamic law. If the matter had been dealt by the syariah court, Islamic law would have been applied. This aspect of Islamic law has now been codified in the Act and Enactments dealing with Islamic family law for example ss 110 and 111 of the Islamic Family Law (Federal Territory) Act 1984.

Another case referred to by the Learned Professor, is the case of **Nafsiah v. Abdul Majid (1969) 2 MLJ 174, 175.** The plaintff in that case brought an action for damages for breach of promise of marriage, contending that the damages should be aggravated by reason of the fact that she had been seduced by the defendant and had given birth to a child. Both the plaintiff and the defendant had earlier been prosecuted under s 149(3) of the Administration of Muslim Law Enactment of Malacca and convicted. The plaintiff brought her action before the High Court. Sharma J. held that the High court had jurisdiction to hear the case and he eventually awarded damages of $1,200/-. In concluding that the High Court has jurisdiction, the learned judge said:

> *I find no provision in the Administration of Muslim Enactment 1959 that the Kathi has the exclusive jurisdiction in all matters relating to or arising out of the marriage of Muslims. The Courts of Judicature Act 1964 expressly gives jurisdiction to this court under ss 24(a) and 25(1)(a) to try matters arising in the present suit which is nothing more than a suit for damages arising out of a breach of promise to marry. Further, s 109 of the Courts Ordinance 1948, which has not been repealed by the Courts of Judicature Act 1964, clearly stipulates that in the case of any conflict between the provisions of the Courts Ordinance 1948 and the provisions of any other written law in force at the commencement of the*

> *Courts Ordinance, 1948, the provisions of the courts Ordinance 1948, shall prevail. While it is true that the Administration of Muslim Law Enactment No 1 of 1959 was not in force at the time of the coming into force of the Courts Ordinance 1948, the High Court has undoubtedly jurisdiction to deal with all matters relating to the rights of the parties who come before it, and there is no provision in any law which I can find, and no law has been referred to me, which excludes the jurisdiction of this court. I also find that s 4 of the Courts of Judicature Act 1964 provides that the provisions of the said Act must prevail in the event of any inconsistency or conflict between that Act and the provisions of any other written law other that the Constitution in force at the commencement of the Courts of Judicature Act 1964.*

The learned professor pointed out that no reference was made by the learned judge to s 119 of the Malacca Administration of Muslim Enactment 1959 which makes special provision for betrothal in the case of Muslims. As the case concerns the marriage of Muslims for which special provision is made in the Enactment giving jurisdiction to the Syariah Courts, the civil courts should have held it has no jurisdiction in the matter. Actions for breach of promise of marriage **in England have been abolished by the Law Reform (Miscellaneous Provisions) Act 1970 but in Malaysia the law based on the old English law still applies and was applied even to Muslims.**

In the case of **Roberts v Ummi Kathom (1966) 1 MLJ 163**, another case referred to by the learned Professor, his Lordship Raja Azlan Shah J, as he then was, decided that harta sepencarian was a matter of Malay adat. That case was followed in **Boto binti Taha v Jaafar bin Muhammad (1985) 2 MLJ 98** where Salleh Abas CJ, as he then was, said: **'Harta sepencarian is not so much based on Islamic jurisprudence as on customs practised by the Malays.'** The learned Professor commented, however, the Syariah Courts have also jurisdiction to deal with the divisions of harta sepencarian property and the Syariah courts are enjoined to apply the principles of the hukum syarak.

According to the learned Professor, the civil courts have not felt it necessary to seek the basis for harta sepencarian in the Islamic law. On the contrary, such efforts have been made by the Syariah Courts as seen, for example, in the Federal Territory case of **Zainuddin v Anita (1982) 4 JH.**

Other examples given by the learned Professor are cases in relation to wakaf, decided in Penang and Singapore, **where the civil courts held that the validity of a wakaf must be decided according to English law.** These are the cases of **Re Syed Shaik Alkaff (1923) 2 MC 38, Re Alsagoff's Trusts (1956) MLJ 244 and Ashabee v Mahomed Hashim (1887) 4 Ky 213.** The civil courts according to the learned Professor based their decisions in the above cases on the former equivalent of s 100 of the evidence act 1956 **which provides that in the States of Malacca, Penang, Sabah and Sarawak or any of them, wills shall subject to any written law be construed according to the rules of construction which would be applicable thereto if the are being construed in a court of justice in England.**

In view of the disturbing decisions in those cases, the learned Professor felt that the effect of the amendment to art 121 of the Federal Constitution was warranted to prevent future conflict between the decisions of the civil courts and the Syariah Courts, as such matters can only be brought to the Syariah Courts and the High Court will no longer have jurisdiction to deal with them.

Contrary to the fears and anxiety harboured by those calling for the repeal of art. 121(1A), and for the restoration of the status quo prior to the amendment, citing concerns that there is a serious attempt at Islamization, the need for the amendment was in fact the very opposite. It was the brazen decisions of the civil courts towards de-Islamization that necessitated the amendment to art. 121.

The Supreme Court in the case of **Mohd. Habibullah Mahmood v.Faridah Dato Talib (1993) 1 AMR 129 explained** why article 121(1A) was introduced.

Explaining the reasons as to why art. 121 (1A) was enacted, his Lordship the late Harun M Hashim SCJ as he then was said:

Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the constitution clearly intended that the Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the Constitution: see Item 1 of the State List:

"Muslim law and personal and family law of persons professing the Muslim religion the Constitution, organisation and procedure of Muslim Courts the determination of matters of Muslim law and doctrine and Malay custom."

His Lordship went on to say:

Indeed that Muslims in this country are governed by Islamic personal and family laws has been in existence with the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Syariah Courts but also by the civil courts. What Article 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic laws. In other words, Article 121(1A) is a provision to prevent conflicting jurisdictions between the Civil Courts and the Syariah Courts.

In **Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor (1999) 1 MlJ 266,** Justice Gopal Sri Ram CAJ had this to say of article 1 21(1 A):

" .... we think is useful to examine the legislative history of article 121(1A) which was introduced by amendment on 10 June 1988 by Act A704/88.

Prior to the introduction of article 121(1A), the ordinary courts had the power to review, and quite regularly reviewed, the decisions of Syariah Courts by certiorari. That this caused some concern among those entrusted with the task of administering Muslim law is reflected in the speech delivered

> ***in the Dewan Rakyat when introducing that Bill that eventually became Act A704/88."***

His lordship added:

> ***"In our view, article 121(1A) should receive the meaning which advances the purpose for which it was introduced into the Federal Constitution. If it becomes necessary to make an implication, as we think the present case does, then we shall make it. We are satisfied that such an approach would harmonise the article in question with the rest of the Constitution.***
>
> ***It would as contended by the respondents, certainly remove the spectre of conflict between that article and other provisions of the Constitution. "***

When the case went up on appeal to the Federal Court, the Federal Court in affirming the decision of the Court of Appeal said:

> **"We agree with the views expressed by the Court of Appeal on the necessity of article 121(1A) being introduced into article 121 of the Federal Constitution. It has to stop the practice of aggrieved parties coming to the High Court to get the High Court to review the decisions made by Syariah Courts.**
>
> **Decisions of Syariah Courts should rightly be reviewed by their own appellate courts. They have their own court procedure where the decisions of a court of a kadhi or kadhi besar are appelable to their Court of Appeal. Since the Syariah courts have their own system, their own rules of evidence and procedure which in some respects are different from those applicable to the civil courts, it is only appropriate that the civil courts should refrain from interfering with what goes on in the Syariah Courts."**

The explanation given in the above cases as to the need for the introduction of article 121 (1 A) are clear and there should no longer exist any doubts as to why Article 121 (1 A) should remain.

THE POSITION - POST AMENDMENT

After the amendment came into effect, several cases dealing with the effect of art. 121(1A) either directly or indirectly were decided by the civil court and among the cases are, **(i) Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2) (1991) 3 MLJ 487,(ii) Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor (1992) 1 MLJ 1,(iii) Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain (1992) 2 MLJ SC 244,(iv) Hajjah Halimatusaadiah bte Hj. Kamaruddin v Public services Commission, Malaysia (1992) 1 MLJ 513, (v) Majlis Agama Islam, Negri Sembilan v Hun Mun Weng (1992) 2 MLJ 676, (vi) Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah (1999) 2 AMR 1211 and (vii) Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan 2 Lagi (2005) 5 AMR 663.**

I do not propose to deal with all the cases, since the central issue in most of these cases are rather similar and that is, article 121(1A). The cases I intend to refer to are those cases laying down the law or principle as to how matters or issues that transgress into the realm of syariah law are to be dealt with in relation to article 121 (1 A). I propose to start with the case of **Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No.2) (1991) 3 MLJ 487.**

In this case the plaintiff is the widow of Lee Siew Kee ('the deceased') who died on 2 May 1991. She sought, inter alia. a declaration that the deceased was a Buddhist during his lifetime and at the time of his death. At the hearing of an application for interlocutory injunctions against the second defendant not to deliver the remains of the deceased to anyone but to her, and against the first defendant not to take possession of the remains of the deceased or interfere with the delivery of the remains of the deceased by the second defendant to the plaintiff, the first defendant's counsel raised a preliminary objection and challenged the jurisdiction of the High Court to entertain the plaintiff's claim. Counsel for the first defendant argued that this is a cause or matter which falls

within the jurisdiction of the syariah court of the Federal Territory of Kuala Lumpur.

His Lordship Eusoff Chin J, as he then was, in dismissing the preliminary objection held:-

(1) The Federal Constitution, Ninth Schedule, List II - State List (para 1) specifically gives powers to the state legislatures to constitute Muslim courts which when constituted, shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in that paragraph. A syariah court therefore derives its jurisdiction under a state law or for Federal Territories, an act of Parliament, over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.

(2) If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.

(3) The main issue in this application is the determination of whether the deceased was or was not a Muslim at the time of his death. Section 45(2) and (3) of the Selangor Administration of Muslim Enactment 1952 gives jurisdiction to the syariah court over matters enumerated there and these do not include the jurisdiction to determine if a person is professing and practising the Muslim religion or not.

(4) Since there is nothing to show that the syariah court has the jurisdiction conferred on it by any written law to determine the issue of whether a person was or was not a Muslim at the time of his death, the High Court is not precluded from determining that issue. **(This reasoning by the learned judge is clearly shown to be flawed in view of the decision of the Supreme Court in the case of Dalip Kaur).**

The unmistakable error of the learned judge in coming to his conclusions on the various issues, is amplified in the other cases which I have mentioned earlier, and which I propose to deal with. This is necessary in order for us to appreciate the decisions in the **'Moorthy' and 'Lina Joy'** cases.

As can been seen, most if not all these cases concern the question of which is the proper forum to determine the central issue that arose for determination. In a majority of these cases, the central issue concerns the religious status of the deceased at the time of death.

The important question as to which is the right forum to determine whether the deceased was or was not a Muslim at the time of his death was came up for determination once again in the case of **Dalip Kaur.**

In this case the appellant (Dalip Kaur) had applied for a declaration that her deceased son at the time of his death on October 1990 was not a Muslim and/ or had renounced the Islamic faith and for the consequential declaration that she was entitled to the body of the deceased. The deceased was born a Sikh and brought up in the Sikh faith. He converted to Islam on 1 June 1991 before the District Kadi of Kulim and the conversion was duly registered with the Majlis Agama Islam Kedah in accordance with s 139 of the Administration of Muslim Law Enactment 1962 of Kedah. The Appellant had contented that subsequent to the conversion the deceased by a deed poll on 9 September 1991 renounced the Islamic faith and resumed the practice of the Sikh faith. It was also alleged that the deceased had been rebaptized by a Sikh priest at a Sikh temple and that the deceased had regularly attended the congregation at the Sikh temple. It was also contended that the deceased continued to eat pork and had not been circumcised. There was evidence that the deceased was engaged to be married to a Muslim girl and that the marriage was scheduled to take place on 25 November 1991.

At the trial before the High Court, the learned judicial commissioner found that the signature on the deed poll was not that of the deceased and he also rejected the evidence of the Sikh priest and that of the deceased's brother with regard to the rebaptism and the congregation at the Sikh temple. He held that the

deceased was a Muslim at the time of his death. The appellant appealed. At the hearing of the appeal, the Supreme Court remitted the case to the High court for the learned judicial commissioner to refer certain questions of Islamic law that arose to the Fatwa Committee of Kedah. This was done and after receiving the fatwa the learned judicial commissioner confirmed his earlier findings and decision. The appellant appealed to the Supreme Court.

The Supreme Court dismissed the appeal. In dismissing the appeal his Lordship Hashim Yeop A Sani CJ as he then was held that the judicial commissioner was entitled to accept the answers of the fatwa committee to the questions which were referred to it and which were agreed to by all the parties. The fatwa committee **was of the opinion that the deceased was a Muslim as he had been duly converted to Islam and there was no decision of a syariah court which decided that he had renounced or left the Islamic faith.**

Mohamed Yusof SCJ as he then was, dealt with what he felt was the foremost question to be determined, and that is, which is the forum to decide whether the deceased had renounced Islam during his lifetime and concluded that the only forum qualified to answer the question is the syariah court.

In coming to his decision aforesaid, his Lordship dealt not only with article 121(1A) but also the competency of the civil courts to deal with questions or matters that transgress into the realm of syariah law.

In order to appreciate his Lordship's reasoning, reference to those relevant part of his Lordship's judgment is necessary and this is what his Lordship said:

> **The foremost question to be determined in whether the deceased had effectively renounced the Islamic faith during his lifetime.** The evidence that have been advanced to the court were that the deceased had been baptized by a Sikh priest at his temple, he had executed a deed poll renouncing the Islamic faith and that his conduct did not conform to a person who professed to be a Muslim.

Quoting from a book by Prof Dr Ala'aul Deen Kharroufah entitled *The Judgment of Islam on the Crimes of Salman Rushdie,* Mr Karpal Singh on behalf of the appellant said that pronouncing adherence to Islam should not be accepted from hypocrites and that actions on the part of the deceased implied disbelief from his own conviction. Learned counsel quoted from p 54 of the book to show that the deceased had become an apostate:

> *Apostasy according* to *the Shafei school is cutting one's adherence* to *Islam by intending* to *do so, by saying something which would cause one* to *fall into disbelief,* or *by action. No difference here is to be observed between whether this was done with the intention* of *sarcasm and satire* or *through conviction.*
>
> *Apostasy is the grossest form of disbelief and merits the heaviest punishment. It abrogates the good effect of one's good deeds if the apostate does not repent and return to Islam before death. An apostate's blood is* to *be spilled lawfully on account* of *his gross crime.*
>
> *In evidence* of *their opinion, Shafeis provide the Quar'anic verse that whoever leaves Islam and dies* a *disbeliever will lose all his deeds and reside in hell.*

Learned counsel also cited **Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor** wherein the learned judge considered the conduct of the deceased in that case (almost similar as here) as a determining factor in deciding that the deceased there was not a Muslim. The learned judge in that case amplified his grounds (at p 177) **in** holding that:

> *Murtad (apostasy) means* a *Muslim who renounces his religion (Islam) wither by clearly declaring that he is no longer* a *Muslim or by his conduct which clearly shows that he is not* a *Muslim.*

In the present case the learned judicial commissioner in declaring that the deceased was a Muslim observed in his judgment that:

> Tetapi tidak makan babi bukan syarat terdahulu (condition precedent) menjadi Islam. Kedudukannya adalah seperti seorang Hindu yang memakan daging lembu, seorang Kristian yang berzina atau jika tidak silap saya, seorang Sikh yang menghisap rokok. Perbuatan itu tidak menjadikan seseorang itu tidak beragama Hindu, Kristian atau sikh, nengikut yang berkenaan.

He further observed:

> Alegasi yang lebih serious ialah si mati bersembahyang di kuil Sikh dan dibaptisekan sebagai seorang beragama Sikh. Jika salah satu perbuatan ini terbukti tentulah dia telah murtad.

In coming to his decision that the proper forum to determine the question whether a person was a Muslim or had renounced the faith of Islam before death is the Syariah Court, his Lordship said:

> It is apparent from the observation made by the learned judicial commissioner **that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which need serious considerations and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had**

> **said his prayers at a Sikh temple he was definitely an apostate.**
>
> **The present question, in my view cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law.**
>
> **Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.**
>
> **On this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the syariah court.**

With regard to the effect of article 121(1A), this is what his Lordship had to say:

> In my view, Mr Karpal Singh's suggestion is not feasible. The amendment to article 121 (1 A) of the Federal Constitution which came into effect on 10 June 1988 and the provision of the new art 121 (1 A) has taken away the jurisdiction of the High court in respect of ANY matter within the jurisdiction of the syariah court and th is is such a matter which the syariah court has to determine. Further, I am also of the opinion that the provision in s 37(4) of the Kedah Administration of Muslim Law Enactment 1962 has been overtaken and superseded by the constitutional amendment in art 121 (1 A) of the Federal Constitution and on that view the request by Mr Karpal for this court to direct the learned judicial commissioner to refer the matter for a ruling by the fatwa committee under the impugned section is not tenable.

The reason why I have reproduced in extenso the judgment of his Lordship Mohamed Yusoff SCJ is that his judgment addressed two very important issues.

Firstly, the question whether a person was a Muslim at the time of his death, transgress into the realm of syariah law. (This issue was however not addressed or dealt with by the learned judge in the case of Ng Wan Chan).

Secondly, the civil court **is not competent** to determine such a question. Such a serious issue need consideration b**y eminent jurist who are properly qualified in the field of Islamic jurisprudence and that it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so, and the only forum qualified to do so is the syariah court.**

The view taken by his Lordship on the competency of the civil courts to determine issues that falls within the precepts of a religion obtain unequivocal support from earlier **Privy Council** decisions.

In the case of **Masjid Sahidgani v Gurudwara 44 CWN 957,964: 67 1A 251: A 1940 PC 116**, though the Privy Council was dealing with the issue of expert opinion on legal principles of Hindu and Mohamedan law and Section 49 of the Indian Evidence Act 1872, the judgment of the Privy Council propounded in no uncertain terms the need for those who sit in judgment over issues relating to matters that falls within the precepts of the religion of Islam must possess the competency to determine such issues **on their own.**

The relevant part of the judgment of the Privy Council delivered by Sir George Rankin (on behalf of the Committee including Lord Thankerton, Lord Russell of Killowen, Lord Justice Goddard and Mr. M. R. Jayakar) which I consider of great significance, is reproduced below:

> "A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mohamedan law is by taking evidence. The authority of Sulaiman J. to the contrary (Aziz Bano v. Muhammad Ibrahim Hussain (1925) T.L.R. 47 A 823,835) was cited to him but he wrongly considered that Section 49 of the Evidence Act was applicable to the ascertainment of the law. He seems also to have relied on the old practice of

> obtaining the opinions of pandits on questions of Hindu law and the reference made thereto in Collector of Madura v. Moottoo Ramalinga Sathupathu (1868) 12 Moo 1.A. 397, 436-439. No great harm, as it happened was done by the admission of this class of evidence, as the witnesses made reference to authoritative texts in a short and sensible manner. **But it would not be tolerable that a Hindu or a Muslim in a British Indian court should be put to the expense of proving by expert witnesses the legal principles applicable to his case, and it would introduce great confusion into the practice of the courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses, and so forth.**

British India has no common law in the sense of law applicable prima facie to everyone, unless it be in the statutory codes, e.g. Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian courts to certain classes of matters and to certain classes of people **as part of the law of the land which the court administer as being within their own knowledge and competence.**

The system of "expert advisers" (Muftis, maulavis or, in the case of Hindu law, pandits) had its day, but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is a matter of evidence, but not the law itself.

Their Lordships desire to adopt the observations of Sulaiman J in the case referred to (Aziz Bano v Muhammad Ibrahim Hussain):-

> ***"It is the duty of the Courts themselves to interpret the law of the land and to apply it and not depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party."***

The Privy Council made it very clear, and that those who sit in judgment over

matters relating to precepts of a religion, which is the law of the land, must interpret the law themselves and not rely on the views of experts, as one of the process adopted in the past by our civil courts.

There is no doubt whatsoever that very few if not most of the judges of the civil courts cannot claim to be eminently qualified in the field of religious jurisprudence. In the case of Islam, bearing in mind that our civil courts comprise not only of judges professing the Muslim religion but also nonMuslim judges, the conclusion of his Lordship Mohamed Yusoff SCJ in **Dalip Kaur** that theSyariah Court is the only forum qualified to determine whether the deceased was a Muslim at the time of his death, is indisputable. This view of the learned judge, as I have shown above, find support even among nonMuslim judges, in the **Privy Council** in the case of **Masjid Sahidgani.**

The status of Islamic law as the law of the land was reasserted in the case of **Ramah v Laton (1927) 6 F.M.S.L.R. 128.** The Court of Appeal in that case, held that since **Islamic law was not foreign law but local, as part of the law of the land, the Court would have to take judicial notice of the law and not allow evidence to be led.**

The above cases laid down three very important principles, and they are:-

Firstly, Islamic law is the law of the land.

Secondly, those who sit in judgment over matters that transgresses or falls within the precepts of the religion of Islam must be eminently qualified in the field of Islamic Jurisprudence.

Thirdly, these judges must interpret the Islamic law themselves and not depend on evidence provided by witnesses though such witnesses may be experts.

The importance of these pronouncements by the Privy Council in **Masjid Sahidgani** and our Supreme Court in **Dalip Kaur** is better understood and fully justified when one consider the case of **Fatimah bte Sihi & ors v Meor Atiqulrahman bin Ishak & Ors (2005) 3 AMR 11.**

My purpose in referring to this case is not to question the correctness of the decision, rather the competency of the civil courts to determine the question of whether a certain religious practice is an essential and integral part of that particular religion.

In this case, the respondents were Muslim pupils of a public school who were expelled by the principal (first appellant) for attending school dressed in headgear (serban). The respondents commenced proceedings against the appellants, claiming that their fundamental right of freedom of religion as guaranteed by Article 11 (1) of the Federal constitution had been breached. It was contended by the respondents that the wearing of the serban was part of their religious right. The High Court found in favour of the respondents and ordered that they be restored as pupils of the said school.

The appellant appealed to the Court of Appeal. In allowing the Appeal, the Court of Appeal, held:

1. The correct test to apply whenever any person of any religion claims a violation of his right under Article 11 (1) of the Constitution is whether his "right to profess and practice" had been violated.

2. Whether the wearing of a serban is an integral part of the religion of Islam is a question of evidence. No evidence to that effect was adduced by the respondents to confirm that the wearing of serban is a mandatory and integral part of Islam.

3. At common law, every educational institution is entitled to prescribe the appropriate uniform that is to be worn by its pupils.

4. A complaint under article 11 (1) of the Constitution can be legitimately made only where observances as to dress, food, ceremonies and modes of worship which are regarded as integral parts of a religion are denied by state action

His Lordship Gopal Sri Ram, in delivering the decision of the Court of Appeal said:

> *"The main issue and indeed the only issue canvassed before us in this appeal is whether a constitutionally guaranteed right under Article 11(1) had been infringed by what the principal did. That article is in the following terms:*
>
> > Every person has the right to profess and practise his religion and, subject to clause 4, to propagate it.
>
> *For present purposes, the reference in the article to clause 4 is not relevant. As I have already said,* ***what is relevant is whether by refusing the respondents permission to attend school wearing a serban, the appellants had violated their "right to profess and practise" the religion of Islam. That would depend on whether the right to wear a serban is an integral part of the religion of Islam. This is my judgment, is the correct test to apply whenever any person of any religion claims a violation of his Article 11(1) right."***

Based on his understanding of the decisions in the cases of **The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirta Swamiar AIR 1954 SC 1954 282, Sardar Syedna Taher Saifuddin Saheh v State of Bombay AIR 1962 SC 853, Javed v State of Haryana AIR 2003 SC 3057, Commissioner of Police v Acharya Jagadishwaranada Avadhuta (2004) 2 lRI 39, Halimatussaadiah bt Hj Kamaruddin v Public Services Commission Malaysia & anor (1994) 3 MlJ 61,** his Lordship went on to hold:

> *"The question then arises as to whether the wearing of a serban is an integral part of the religion of Islam. This,* ***as I have already said, is really a question of evidence*** *and it was for the respondents to adduce sufficient relevant admissible material to prove that that is indeed the case. But there is no such evidence."*

With respect, the view which his Lordship Gopal Sri Ram took was clearly that which the Privy Council in **Masjid Sahidgani,** the Supreme Court in **Dalip**

Kaur and the Court of Appeal in **Rahmah v Laton**, have all decided as no longer appropriate and incorrect.

In the case of **The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra** referred to by Justice Gopal Sri Ram, the Indian Supreme Court in dealing with Article 25 of the Indian Constitution which is equipollent of our article 11 (1) expressed the view that:

> *"a religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief.* ***A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of the religion, and these forms and observances might extend even to matters of food and dress."***

Applying the above decision, can it be said that the wearing of the serban is not an integral part of the religion of Islam?

The next question is, is the civil court the proper forum to determine whether the wearing of the serban as in the case of **Fatimah binti Sihi**, is or is not an integral part of the religion?

Applying the decisions in the cases of **Masjid Sahidgani, Ramah v Laton and Dalip Kaur,** the answer is a clear **No**, for the following reasons.

Firstly, the question of whether the weari ng of the serban is or is not an integral part of the religion of Islam transgress into the realm of Syariah Law.

Secondly, the judges of the civil courts do not possess the necessary competence to interpret the Syariah law themselves.

Thirdly, the process of determining such question by relying upon evidence

adduced even by experts is no longer acceptable.

The decision of the Court of Appeal in **Fatimah binti Sihi** has been criticised by Professor Abdul Aziz Bari, a law professor with the International Islamic University Malaysia in his article entitled **"The test to apply in Claims of right to Religious freedom under the Constitution: The rulings in Fatimah bte Sihi & Ors v Meor Atiqulrahman bin Ishak & Ors"** appearing in the Law Review 2006 issue.

One cause of grave concern among non-Muslims arising out of the **Moorthy case** was the impression created that non-Muslims who find themselves in similar situations are without any legal remedy.

This unfortunate impression was unwittingly created by Counsels who appeared for the rei igious authority and the other respondents. When asked by the learned High Court judge as to whether the family of the deceased (the applicants) has any remedy as a result of the decision of the Syariah Court on (an **exparte** application made by the respondents) declaring the deceased to be a Muslim at the time of his death; the immediate answer given by counsels for the respondents was that the appl icants have none. The learned judge himself was taken aback.

Not only was the learned Judge surprised, I too was shocked by the stand taken by the Counsels for the Respondents; for I believe that no one can be denied access to justice. And in order for such access to be meaningfully realised there must exist a forum where the aggrieved parties can confidently seek the determination of their dispute.

It is unfortunate that this impression has affected the decision of the learned judge, resulting in the applicants and others questioning the correctness of his Lordship's decision.

It is the view of the writer that it is not the decision of the learned judge that is incorrect, rather it was the approach adopted by the Majlis and the other respondents rushing to the Syariah Court for the exparte declaration and using the article 121(1A) argument that have caused the applicants and others to

question the existence of article 121(1A).

However the result of the decision in **Moorthy's case** seems to have created the impression that Article 121(lA) is fundamentally flawed and its existence should be re-considered.

I take the view that Article 121 (1 A) should remain. What needs to be done is to consider changes in our legal system to overcome the problems encountered in the **Moorthy's** case.

Our Federal Constitution as it stands, by virtue of List II - State List, restricts the jurisdiction of the Syariah courts only over persons professing the religion of Islam. Non-Muslims do not have the right of audience in the Syariah courts since the Syariah courts has no jurisdiction over non-Muslims.

When the family of the late **Nyonya Tahir** was allowed to present evidence in the Syariah court to prove that the deceased was not a Muslim, many felt that it was a balancing exercise on the part of the powers that be to pacify the unhappiness resulting from the High Court decision in **Moorthy's** case.

There is no doubt whatsoever that the issues that arose in the **Moorthy, Nyonya Tahir, Lina Joy** cases concerns matters that transgress into the realm of Syariah law, which the Civil Court is clearly incompetent to decide.

In the **Lina Joy** case, the issue for determination is not confined to the interpretation of Article 11 of the Federal Constitution in the context of the human right of the individual, or the administrative powers of the National Registration Department but involves serious issues of Islamic religious jurisprudence, that is the **determination of the foremost question whether Lina Joy is or is not a Muslim** which only the Syariah Court is competent to determine.

It must not be forgotten that the position of Islam is defined in our Federal Constitution unlike the other religions, and the jurisdiction to determine matter of Islamic law or matters that transgress into the realm of Syariah law is conferred solely on the Syariah Court. This position has been made crystal

clear by the pronouncements of our highest Civil Court.

The outstanding question then is, where do the aggrieved parties in the **Moorthy, Lina Joy** and other like cases go to air and seek a just determination of their grievances.

I had in an article written in the Insaf, (The Journal of The Malaysian Bar) July, 1995 issue, suggested the setting up of an Islamic Bench of the Civil Court with original and appellate jurisdiction, comprising of judges properly qualified in the field of Islamic jurisprudence. These judges can be drawn from both the Civil Court and the Syariah Court. The competency of the judges is of paramount importance as their decisions will have far reaching consequences on the religion of Islam and lives of Muslims in this country, and without disrespect to non-Muslim judges serving in the Civil Courts/ they will not qualify for obvious reasons.

Of course this proposal will require a major amendment to the Federal Constitution. This amendment is necessary as the Civil Court presently has no jurisdiction over matters that transgress into the realm of Syariah law.This will overcome the Constitutional restriction confining the jurisdiction of the Syariah court as aforesaid, by allowing non-Muslims the right of audience for determination of the kind of disputes such as those that arose in the cases I have referred to above, which I forsee will only increase in the future.

Sejauhmanakah kekebalan dan keadilan Undang-undang Timbangtara di Malaysia yang berasaskan Akta Timbangtara 2005

oleh
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"Timbangtara adalah proses persendirian antara pihak-pihak ahli-ahli tribunal timbangtara. Oleh itu, perbicaraan, dijalankan secara tertutup, dan orang-orang luar hanya boleh hadir apabila dipersetujui oleh pihak-pihak berkenaan. Pada umumnya, tribunal timbangtara mempunyai kuasa budi bicarayang luas..."

- Dato Dr. Peter Mooney [1]

I. Pengenalan

Sebagai illustrasi, sebuah firma tempatan, Firma Shamroz Enterprise yang bercadang membina satu kawasan perumahan seluas 5000 hektar telah menandatangani perjanjian dengan sebuah syarikat pembinaan yang bernama Syarikat Gombak Properties. Dalam perjanjian di antara Firma Shamroz Enterprise dengan Syarikat Gombak Properties, terdapat satu fasal yang memperuntukkan seperti berikut:

"Sebarang pertikaian atau perselisihan yang timbul daripada perjanjian ini atau perlaksanaan perjanjian ini yang tidak dapat diselesaikan dengan memuaskan oleh pihak-pihak yang mengikat perjanjian ini hendaklah diselesaikan secara muktamad mengikut peruntukan Akta Timbangtara 2005 oleh seorang atau beberapa orang penimbangtara yang dilantik di bawahnya. Keputusan timbangtara hendaklah muktamad dan mengikat pihak-pihak berkenaan ".

[1]. "Representations in Arbitrations in Malaysia and Singapore". (1989) 2 MLJ cvii.

Dengan fasal yang sedemikian yang dimaktubkan di dalam sesuatu perjanjian di antara Firma Shamroz Enterprise dengan Syarikat Gombak Properties maka wujudlah apa yang dikatakan "rujukan pertikaian atau perselisihan kepada timbangtara". Persoalan pokok di sini ialah sejauhmanakah kekebalan serta keadilan yang dijamin oleh pendekatan proses kaedah timbangtara yang berlandaskan undang-undang timbangtara di Malaysia yang berasaskan kepada Akta Timbangtara 2005?

Sebagai jawapan kepada persoalan pokok di atas, maka, makalah ini akan mengulaskan tentang kedudukan undang-undang timbangtara di Malaysia. Memang tidak dapat dinafikan fakta yang mengatakan bahawa dewasa ini terdapat arah aliran dari pihak-pihak yang bertikai, terutama mengenai hal-ehwal undang-undang kontrak, mengenai pembekalan barangan, membuat kerja-kerja pembinaan, insurans, jual dan beli dan seumpamannya, merujuk pertikaian mereka kepada tribunal timbangtara. Ianya merupakan alternatif prosiding selain daripada membawanya terus ke mahkamah untuk diselesaikan. Selanjutnya, makalah ini akan menerangkan apakah kelebihan dan kebaikan membuat rujukan pertikaian ke tribunal timbangtara. Huraian ringkas sebagai rujukan dan autoriti yang dipetik dari peruntukan-peruntukan yang relevan dari Akta Timbangtara 2005 juga akan diperjelaskan.

II. Apakah yang dikatakan kaedah Timbangtara?

Timbangtara adalah rujukan sesuatu perselisihan atau pertikaian kepada seseorang atau beberapa orang digelar penimbangtara. Rujukan kepada timbangtara merupakan suatu pilihan lain kepada guaman di mahkamah. Dengan itu jika di sebalik kes itu tidak dijadikan kes mahkamah, maka pihak-pihak yang berkenaan bolehlah bersetuju untuk menyerahkan kes tersebut kepada penimbangtara untuk diselesaikan.

Menurut A. G. Guest:

"Tidaklah di bantah terhadap kontrak yang mengandungi fasal bahawa setiap pertikaian atau perselisihan antara pihak-pihak hendaklah dirujuk dan diselesaikan melalui timbangtara. Fasal sedemikian adalah sah dan mengikat, tetapi ia tidaklah boleh melucutkan hak kepada pihak-pihak untuk membawa sebarang persoalan undang-undang bagi ditentukan oleh mahkamah biasa".[2]

Di Malaysia, peruntukan mengenai rujukan kepada timbangtara adalah seperti termaktub dalam Akta Timbangtara 2005. Seksyen 2 Akta Timbangtara 2005, mentakrifkan 'perjanjian timbangtara' ertinya suatu perjanjian timbangtara sebagaimana yang ditakrifkan di bawah seksyen 9.[3]

Kebanyakan perjanjian biasanya memasukkan satu fasal di dalamnya yang menyebut bahawa jika ada pertikaian atu perselisihan antara pihak-pihak dalam perjanjian maka rujukan dibuat kepada timbangtara, begitu juga dalam perjanjian perkongsian, biasanya fasal yang serupa akan dimasukkan. Fasal dalam perjanjian mungkin memperuntuk pelantikan seorang penimbangtara atau dua orang penimbangtara iaitu seorang dari setiap pihak yang bertelingkah. Mengikut seksyen 12(2)(b) Akta Timbangtara 2005, jika dalam perjanjian tidak disebut selainnya, maka andaiannya ialah pihak-pihak yang bertelingkah melantik seorang sahaja penimbangtara. Jika dalam perjanjian ada fasal yang memperuntuk perlantikan dua orang penimbangtara, maka seksyen 13 (3) Akta Timbangtara 2005 menghendaki kedua-dua penimbangtara itu melantik seorang penimbangtara pengerusi. Selain rujukan timbangtara melalui persetujuan kedua-dua pihak, rujukan timbangtara juga dibuat apabila Mahkamah Tinggi memerintahkannya mengikut kuatkuasa seksyen 13 (7) Akta Timbangtara 2005, iaitu apabila mana pihak yang bertikai memohon kepada Mahkamah Tinggi kerana adanya persetujuan timbangtara.

III. Kelebihan dan Keutamaan Kaedah Timbangtara.

Proses kaedah timbangtara dianggap sebagai suatu kaedah alternatif prosiding selain membawanya terus ke mahkamah untuk diselesaikan. Di antara kelebihan dan kebaikan yang terdapat pada kaedah ini adalah seperti berikut:

a. Semasa menjalankan proses timbangtara, perkara dan peraturan prosedur yang teknikal seperti yang terdapat di Mahkamah Sivil tidaklah diikuti

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[2]. Anson's Law of Contract, Edt 24, London: E.L.B.S. & Oxford University Press, 345

[3]. Seksyen 9 (1) Dalam Akta ini, 'perjanjian timbangtara' ertinya suatu perjanjian oleh pihak-pihak untuk mengemukakan kepada timbangtara semua pertikaian atau pertikaian tertentu yang telah timbul atau yang mungkin timbul antara mereka berkenaan dengan hubungan di sisi undang-undang yang ditetapkan, sama ada kontraktual atau tidak.

dengan secara ketat (rigid). Oleh itu proses perjalanan timbangtara adalah mudah dan senang jika dibandingkan dengan proses perjalanan perbicaraan di mahkamah.

b. Proses timbangtara boleh dijalankan di mana-mana dan pada bila-bila masa mengikut kelapangan pihak-pihak yang bertikai dan penimbangtara. Seksyen 21, 22 dan 23 Akta Timbangtara 2005 membenarkan penimbangtara, dalam keadaan biasa, menentukan kaedah tatacara timbangtara, tempat timbangtara serta masa permulaan prosiding timbangtara.

c. Kadangkala perkara yang dipertikaikan melibatkan hal-hal peribadi, persendirian atau ia mungkin merupakan rahsia perniagaan. Jika dibincangkan dalam tribunal timbangtara ia tidak akan tersebar luas kepada orang luar. Ini berbeza daripada perbicaraan yang diadakan di mahkamah terbuka di mana hal itu boleh didengar oleh para hadirin termasuk wartawan dan pihak media cetak. Seksyen 26 Akta Timbangtara 2005 memperuntukkan tatacara pendengaran kaedah timbangtara yang tidak membolehkan mana-mana pihak di benarkan mendengarnya melainkan dengan persetujuan kedua-dua belah pihak yang terlibat.

d. Biasanya tempoh bagi membuat award timbangtara adalah lebih pendek daripada perbicaraan di mahkamah, atau dengan kata lain, proses timbangtara adalah lebih cepat.

e. Lazimnya penimbangtara dilantik kerana kepakarannya dalam bidang yang akan di selesaikan melalui proses timbangtara. Hakim-hakim mahkamah pula biasanya bukanlah pakar teknikal dalam perkara-perkara komersil, dan biasanya perkara-perkara yang dipertikaikan di prosiding timbangtara adalah fakta-fakta komersil yang tulin dan amat sedikit melibatkan aspek undang-undang. Seksyen 28 Akta Timbangtara 2005, juga membenarkan pelantikan pakar oleh tribunal timbangtara.

f. Seksyen 24 Akta Timbangtara 2005, membenarkan pihak-pihak yang terlibat bebas untuk memilih bahasa yang akan digunakan di dalam prosiding timbangtara.

g. Pada kebiasaannya, bayaran dan kos bagi urusan timbangtara adalah lebih murah jika dibandingkan dengan bayaran dan kos perbincangan di mahkamah. Seksyen 44 Akta Timbangtara 2005, dengan jelas memperuntukkan bahawa kos dan belanja timbangtara hendaklah mengikut budi bicara tribunal timbangtara.

IV. Aplikasi Akta Timbangtara 2005.

Seperti yang telah dibincangkan di atas, peruntukan mengenai rujukan kepada kaedah timbangtara adalah seperti dalam Akta Timbangtara 2005. Seksyen 5 Akta ini memperuntukkan bahawa Akta Timbangtara 2005 hendaklah terpakai bagi semua rujukan kepada timbangtara di Malaysia termasuklah Kerajaan Persekutuan atau Kerajaan Negeri jika ia menjadi pihak dalam kes untuk rujukan timbangtara.

Perlulah disebut bahawa dalam kebanyakan perkara yang berkaitan dengan pertikaian atau perselisihan yang timbul daripada sesuatu perjanjian, seperti kepada siapa atau siapa-siapa akan dirujuk, perlantikan penimbangtara, prosedur yang perlu diikuti untuk rujukan, pemanggilan saksi untuk diperiksa dan pemberian kuasa-kuasa tertentu kepada penimbangtara pengerusi, adalah tertakluk kepada perjanjian / kontrak diantara pihak-pihak. Perkara ini dengan jelas dinyatakan dalam seksyen-seksyen 8, 13(1), 15, 17(2)(3), 19(1)(3), 23, 25(3), 26(1), 27 Akta tersebut yang memulakan seksyen masing-masing dengan menyebut "Melainkan jika diperuntukkan atau dipersetujui selainnya…" (iaitu dalam perjanjian), yang bermakna jika ada dinyatakan secara jelas dalam perjanjian maka peruntukan dalam perjanjian hendaklah dipakai.

V. Perjalanan Prosiding Timbangtara.

Prosedur dalam sesuatu rujukan timbangtara pada amnya sama seperti dalam perbicaraan kes di Mahkamah Sivil. Seksyen 20 hingga 29 Akta Timbangtara 2005 adalah berkaitan dengan prosedur timbangtara. Pihak-pihak yang bertikai boleh bersetuju untuk diwakili oleh peguam, boleh membenarkan affidavit atau ikrar diterima sebagai keterangan dan mereka boleh memberi kenyataan lisan secara bersumpah. Tiap-tiap pihak dikehendaki memberitahu atau bersedia memberitahu pihak yang satu lagi mengenai dokumen-dokumen yang berkaitan yang ada dalam milik atau kawalan atau jagaan (di sebut proses interogation). Penimbangtara hendaklah mendengar sendiri kes dan mengambil keterangan

dengan dihadiri oleh kedua-dua pihak yang bertikai untuk memastikan prinsip keadilan semulajadi (principles of natural justice) diikuti dan dipatuhi.

VI. Sejauhmanakah Kekebalan dan Keadilan Undang-undang Timbangtara yang sediada di Malaysia?

Kekebalan di sini membawa maksud mana-mana pihak, institusi, agensi ataupun firma yang ditetapkan atau diminta oleh pihak-pihak yang terlibat untuk melantik atau mencadangkan seorang penimbang tara, tidak akan bertanggungan bagi apa-apa jua yang dilakukan (commission) atau tidak dilakukan (omission) dalam melaksanakan tugas sebagaimana yang sepatutnya melainkan jika dibuktikan perbuatan atau peninggalan itu adalah dengan tidak secara suci hati (not in a good faith @ *mala fide*).

Seksyen 47 dan 48 Akta Timbangtara 2005, dengan jelas mengariskan prinsip kekebalan institusi timbangtara dengan menegaskan bahawa seseorang penimbangtara tidak bertanggungan bagi apa-apa perbuatan atau peninggalan berkenaan dengan apa-apa yang dilakukan atau tidak dilakukan dalam melaksanakan fungsinya sebagai seorang penimbangtara melainkan jika ditunjukkan yang perbuatan atau peninggalan itu adalah dengan niat jahat. Pengarah Pusat Timbangtara Serantau Kuala Lumpur atau mana-mana orang lain atau institusi yang ditetapkan atau diminta oleh pihak-pihak untuk melantik atau menamakan seorang penimbangtara, tidak bertanggungan bagi apa-apa jua yang dilakukan atau ditinggalkan tidak dilakukan pada menunaikan fungsi itu melainkan jika ditunjukkan perbuatan atau peninggalan itu adalah dengan niat jahat.

Di dalam kes *Hodgkinson* lwn *Fernie & SL*[4], ada disebutkan bahawa adalah menjadi perkara yang diakui bahawa keputusan seorang penimbangtara, sama ada ia seorang peguam atau orang biasa, mengikat pihak-pihak dalam kedua-dua perkara iaitu undang-undang dan fakta kecualilah dapat dibuktikan bahawa wujudnya niat jahat atau penipuan di pihak penimbangtara atau adanya kesilapan undang-undang (mistake of law) yang jelas atau disengajakan pada sesuatu keputusan itu.

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[4]. 140 E.R.712.

Sebagai tambahan, seksyen 8 Akta Timbangtara 2005, dengan jelasnya memperkukuhkan lagi kekebalan institusi timbangtara serta melindungi pihak-pihak yang terlibat secara suci hati di dalam mengendalikan prosiding timbangtara. Seksyen berkenaan menyatakan bahawa melainkan jika diperuntukkan selainnya, tiada mahkamah boleh campurtangan dalam apa-apa perkara yang dikawal oleh Akta ini.

Sebagai contoh di dalam kes *Scott* lwn *Avery*[5] telah diputuskan bahawa sesuatu perjanjian yang mensyaratkan bahawa mereka perlu menangguhkan hak masing-masing untuk membuat tuntutan selagi award tidak dibuat oleh penimbangtara tidaklah menyalahi dasar awam (public policy) dan bahawa syarat sedemikian bukanlah mengetepikan bidang kuasa mahkamah.

Seksyen 17 dan 18 Akta Timbangtara 2005, juga telah memberi kuasa kewibawaan kepada tribunal timbangtara untuk membuat keputusan mengenai bidang kuasanya tanpa campurtangan ataupun gangguan dari mana-mana pihak atau institusi. Peruntukkan ini dengan jelas telah menzahirkan kekebalan institusi timbangtara sebagai sebuah institusi yang bebas dan berkecuali dari sebarang bentuk pengaruh.

Sebagai fakta sokongan terhadap prinsip kekebalan yang terdapat pada undang-undang timbangtara ialah keputusan sesuatu timbangtara tidak boleh dirujuk sekali lagi kepada timbangtara yang lain. Perkara ini telah diputuskan oleh mahkamah di dalam kes *Tee Liam Toh* lwn *National Employer's Mutual General Insurance Association Ltd.*[6] Fakta kes ini adalah seperti yang berikut: Pemohon telah mengambil polisi insurans pampasan pekerja dari syarikat MGIAL untuk melindungi pekerja-pekerja pemohan daripada kemalangan. Terdapat satu kes yang pekerja pemohon ditimpa kemalangan di tempat kerja dan meninggal dunia. MGIAL enggan membayar pampasan walaupun kes itu dirujuk ke Pejabat Buruh. Kes itu kemudiannya dirujuk kepada penimbangtara di bawah seksyen 30 Ordinan Pampasan Pekerja 1952. Penimbangtara telah memutuskan pemohon (iaitu majikan kepada pekerja yang meninggal itu)

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[5]. (1855) 5 HLC 811.

[6]. (1964) MLJ 320.

dikehendaki membayar pampasan dan dengan itu pemohon menuntut MGIAL membayar indemniti tetapi MGIAL enggan berbuat demikian dan telah menggunakan satu fasal dalam syarat polisi insurans untuk merujuk kes itu kepada penimbangtara LPT. LPT kemudiannya membuat award iaitu MGIAL tidak perlu membayar bagi pihak pemohan kepada pekerja itu kerana pekerja itu mati bukan kerana kemalangan tetapi kerana sakit semula jadi dan bukan mati pada masa kerja. Pemohon tidak puas hati dengan keputusan LPT dan merujuk kes ini ke Mahkamah Tinggi untuk diketepikan. Mahkamah Tinggi memutuskan bahawa apabila liabiliti telah ditentukan melalui keputusan sesuatu timbangtara maka ianya tidak boleh dirujuk sekali lagi kepada timbangtara yang lain atau dengan lain perkataan, pihak yang tidak berpuas hati dengan keputusan penimbangtara tidak boleh membawa persoalan yang sama sekali lagi kepada penimbangtara yang lain untuk dipertimbangkan.

Dari segi prinsip keadilan yang dijamin oleh kaedah timbangtara ialah dari segi layanan sama rata terhadap mana-mana pihak yang terlibat. Seksyen 20 Akta Timbangtara 2005 dengan jelasnya menyatakan pihak-pihak yang telibat hendaklah diberi layanan sama rata dan setiap pihak hendaklah diberi peluang yang adil dan munasabah untuk mengemukakan kes mereka. Prinsip yang telah digaris oleh seksyen 20 adalah selari dengan prinsip keadilan asas perundangan (equality of law) di dalam memastikan yang setiap pihak diberi layanan dan keistemewaan yang seragam tanpa mengira agama, bangsa, darjat dan keturunan.

Ketua Hakim Singleton di dalam kes *David Taylor & Son Ltd*. lwn. *Barnett Trading Co*.[7] menekan mengenai pegangan prinsip keadilan seorang penimbangtara. Menurut beliau:

> *"Tanggungjawab seseorang penimbangtara ialah untuk memutuskan persoalan-persoalan yang dikemukakan kepadanya mengikut hak atau menurut kacamata undang-undang pihak berkenaan dan bukan kepada apa yang dirasakan saksama dan munasabah dengan mengikut perasaan atau persekitaran".*

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[7]. (1950) 1 WLR 562.

Berdasarkan prinsip di atas, di dalam menegakkan keadilan dan kesaksamaan seseorang penimbangtara perlulah merujuk kepada fakta kes (facts) dan prinsip undang-undang (law) yang berkaitan (relevant) dengan kes yang dirujukkan kepadanya.

Demi keadilan! kaedah timbangtara memberi jaminan bahawa apabila mana-mana pihak dalam pertikaian memohon kepada Mahkamah Tinggi untuk melucutkan seseorang penimbangtara yang gagal untuk mengendalikan pertelingkahan tersebut dengan sewajarnya (seperti kedua-dua penimbangtara bertelingkah dalam award mereka atau lambat dalam membuat award atau dalam mengendalikan kes) maka Mahkamah Tinggi boleh melucutkan penimbangtara tersebut.

VII. Kesimpulan

Mahkamah di dalam kes *Williason* lwn *Quinn*[8] , telah merumuskan bahawa sesebuah tribunal timbangtara bukanlah sebagai mahkamah; perjalanan prosiding dan kaedahnya adalah berbeza daripada apa yang dijalankan di mahkamah biasa; proses pencarian faktanya adalah tidak sama dengan pencarian fakta kehakiman; dan ia tidak mepunyai peruntukan mengenai pemakaian peguamcara tempatan atau luar negara bagi tujuan perbicaraannya. Ia merupakan prosedur kehakiman yang tidak rasmi yang menjadikannya satu cara yang berkesan, cepat, mengikat dan jimat di dalam membantu menyelesaikan sesuatu perselisihan atau pertikaian.

Isu mengenai kekebalan serta keadilan undang-undang timbangtara di Malaysia sudah tidak dapat disangkalkan lagi. Perkembangan penggunaan kaedah timbangtara yang kini lebih dikenali dengan kaedah 'Alternative Disputes Resolution (ADR)' yang berasaskan kepada peruntukkan Akta Timbangtara 2005 menyemarakan lagi hasrat pihak-pihak yang mengalami masalah, perselisihan atau pertikaian komersil untuk menggunakan kaedah alternatif prosiding ini dari membawa kes mereka terus ke mahkamah untuk diselesaikan di mana proses yang bakal dilalui akan memakan masa yang panjang, prosedur yang ketat yang harus dituruti serta akan memakan belanja yang lebih besar.

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[8]. (1982) 537 Supp. G. 13.

Kekebalan dan keadilan yang dijamin oleh Akta Timbangtara 2005 terhadap pendekatan kaedah timbangtara telah banyak menyakinkan pihak-pihak yang bertelagah untuk menyelesaikan masalah mereka melalui proses tersebut. Pada masa kini, banyak firma-firma guaman, agensi-agensi awam dan persendirian telah diberi mandat dan galakkan oleh pihak kerajaan untuk menjalankan perkhidmatan timbangtara, ini secara tidak langung akan banyak membantu mahkamah di dalam menyelesaikan kes-kes yang tertangguh serta dapat memberi tumpuan dan perhatian kepada kes-kes yang di luar skop atau bidangkuasa undang-undang timbangtara untuk mendengar serta menyelesaikannya.

Kini terdapat banyak institusi-institusi pengajian tinggi awam dan swasta yang memperkenalkan matapelajaran ADR kepada para pelajarnya agar para pelajar tersebut dibekali dengan ilmu pengetahuan, selok belok, tatacara perjalanan serta undang-undang timbangtara sebagai suatu langkah persediaan untuk menyahut permintaan perkhidmatan timbangtara untuk masa hadapan di mana ianya mungkin akan bersifat mandatori dan tidak lagi bersifat alternatif seperti sekarang ini.

Sebagai mengakhiri ulasan tajuk perbincangan dapatlah disimpulkan bahawa Akta Timbangtara 2005, benar-benar menjamin kekukuhan kekebalan undang-undang timbangtara di Malaysia serta keutuhan keadilannya adalah amat menyakinkan!

POTENTIAL IMPACT OF THE CHANGES IN THE MALAYSIAN PENAL CODE

by

Baljit Singh Sidhu

Introduction

July 2006 marked an important milestone in criminal jurisprudence in Malaysia for on the 18th day of July, the Penal Code (Amendment) Bill 2004[1] (hereinafter referred as the "Penal Code") and the Criminal Procedure Code (Amendment) Bill 2004[2] were passed by the Parliament. The amendments were to commence on 1st January 2007. It was reported that the Minister in charge of Legal Affairs in the Prime Minister's Department Datuk Seri Nazri Aziz has deferred the enforcement of both Acts until further notice. Therefore as of now both Acts have not come into operation.[3]

I will now deal with the amendments to the Penal Code.

The Amendments

Basically the amendments relate to the following areas:-

a. Sexual Offences

- Revisit the definition of rape. A new classification was added;[4]
- Creation of a new category of offence committed during marriage, somewhat akin to marital rape;[5]

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[1] See Act A1273

[2] See Act A1274

[3] Section 1(2) of the respective Act provides that the amendment would come into force on that date appointed by the Minister in the Gazette.

[4] See the Act A 1273, section 5 wherein a new paragraph is now added to section 375, which states as follows:-
(f) with here consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her.

[5] See section 6 of Act A1273 where a new section 375A is introduced which reads:-Husband causing hurt in order to have sexual intercourse 375A. Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years.

- Creation of a new category of offence categorized as sexual connection by objects;[6]
- Bifurcating the category of rape into:-
  i. Rape; and
  ii. Aggravated rape

  each attracts different kind of punishment with the latter category incurring greater punishment.[7]

b. New category of robbery
- Matters involving snatch thefts are categorized as robbery as a specific illustration is now inserted.[8]

c. Amendment Pertaining to Terrorism Offences
- The penal Code (Amendment) Act,[9] which has yet to come into force, is further amended.[10] Various categories of offences are listed.

d. Increase in the punishment.

e. Miscellaneous other amendments.

I will in this short period of time allude only to certain key areas.

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[6] See section 8 of Act A1273 where a new section 377CA is introduced which reads:-
377CA. Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping

[7] See Section 7 of Act A1273 where section 376 is amended to reclassify the categories of rape. See also sub-section (3) of the all new section 376 which introduces the category of aggravated rape which carries a minimum sentence of 8 years imprisonment and not more than 30 years and whipping of not less than ten strokes. It is clear from the language of this sub-section this new category covers the incidence of incestuous rape.

[8] See section 9 of Act A1273 which inserted a new illustration in section 390 which reads (e) Z is walking along a road. A on a motorcycle snatches Z's handbag and in the process causes hurt to Z. A rides away with Z's handbag. A has therefore committed robbery.

[9] Act A1210

[10] See section 26 of Act A1273 where the new section 130B, which was introduced by the Amendment in 2003 vide Act A1210 is further amended.

Amendment to section 375 of the Penal Code

As stated earlier the amendment, introduced a new paragraph to section 375, namely paragraph (f) which reads:

> *"With her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her".*

This amendment prima facie has received thumbs up by the Women Action Groups and various other NGOs.

The Bar Council on the other hand maintained that this provision may open door of abuse in the sense that "an innocent man may be easily accused of rape".[11] The Council went on to illustrate the following:-

i. Consent obtained by imposing authority or any form of coercion or duress is no consent and therefore rape and hence this offence is redundant and the existing laws are sufficient;
ii. Consent which is obtained by a professional relationship or relationship of trust is vague. It can be misused for example in a circumstance whereby the relationship fails and this section is used for revenge purposes.
iii. The women basically have options to refuse since there is no immediate threat or danger posed to them to engage in sexual intercourse. She can always lodge a report the offender to the authorities, family etc.
iv. In the event the woman offers herself to submit to the man, but unsuccessful, this Section can be used to accuse the man of rape.
v. Women can use this Section to "tie" their boyfriends who refused to marry them or even blackmail them.

The fears stated by the Bar Council are not totally unfounded. Indeed during

[11] See Malayasian Bar Council's Views and Comments on the Laporan Jawatankuasa Pilihan Khas Dewan Rakyat Untuk Mengkaji Rang Undang-undang Kanun Keseksaan (Pindaan) 2004 dan Rang Undang-undang Tatacara Jenayah (Pindaaan), 21st June 2006.

the debates on the Bill members of both Houses repeatedly warned that the provisions may be abused.[12]

It is also pertinent to note that this section covers a much wider spectrum than that originally intent; to address the offence committed by the "bomoh" (medicine man) against women seeking treatment.

The fears aside, in my view the enactment of this provision is necessary to curb the prevalence of abuse on the part of the employer who prey on unsuspecting and naivety of the employee. It is indeed a harbinger of what awaits the offender who got away with sexual harassment and wishes to take it further to a new level.

The insertion of Section 375A

The new Section of 375A reads:

> *"Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years".*

At first blush one would be forgiven if he were to think that this section is intended to include marital rape as an offence. A scrutiny of the section however would prove otherwise. This new provision punishes the husband who causes hurt in order to have sexual intercourse with the wife. Therefore the *actus reus* for the offence is hurt[13] and not the sexual intercourse itself. An example would be where the husband wishes to have sex with the wife but the wife refuses. Not taking "no" for an answer, the husband gave a few slaps and punches or putting fear, without physical touch, to the wife and forces himself into the wife. Therefore, as a result of the slaps and punch or putting fear into

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[12] See Parliamentary Debates especially on 18th July 2006 available at http://www.parlimen.gov.my/eng-op.php

[13] Section 319 of the penal Code defines hurt as "causing bodily pain, disease or infirmity". In my view the word "infirmity" is wide enough to cover non-physical hurt, as its meaning clearly suggests.

the wife, the husband would be committing an offence under this section i.e. for causing hurt to the wife.

Apart from creating a special category of hurt with a greater punishment this section does not appear to come anywhere near to criminalizing marital rape.[14] Although one may be disappointed with the fact that marital rape is still considered lawful, this section at the very least a step in the correct direction and is considered an "unhappily-happy" middle way especially considering the differences of opinion among the races and religious leaders in Malaysia. One may at least say that this is unique to Malaysia where the sexual act is not criminalized but the prelude to that sexual act is criminalized.

In terms of evidence, I am of the opinion that this offence is easier proven as compared with the offence of "marital rape" where cogent evidence is required. By emphasizing the *mens rea* of the offence to that of "hurt" instead of sexual intercourse the evidential requirement associated with the offence of rape is side skirted.

The purpose of this section is clear: to protect the wives who have been beaten up by their husbands especially in a failing marriage in order to have sex or the husbands are not fully satisfied. However, the following matters should be reviewed as well:

i. This Section can easily be abused especially if the marriage is breaking down.
ii. It is easy for a woman to accuse her husband of putting her in fear of death or hurt and very difficult for the man to rebut as no physical evidence is needed for this accusation.
iii. A man who causes hurt or fear or hurt on his wife can be charged under other sections of the Penal Code. And this Section is redundant e.g. section 323 and 324 of the Penal Code.

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[14] The exception to section 375 proves to be the biggest stumbling block to criminalizing marital rape. It would appear from the Hansard that this new section 375A is intended to be a "middle way' between criminalizing and not criminalizing marital rape. See the Debate on 18th July 2006 especially at page 83;

iv. Women can use this section for revenge purposes against their husbands.

The Amendment to Section 376

As stated earlier the punishment for rape now depends on category of rape.

For the first category the section provides

(1) Subject to subsections (2), (3) and (4), whoever commits rape shall be punished for a term, which may extend to twenty years, and shall also be liable to whipping.

For the second category (aggravated rape) the section provides

Whoever commits rape on a woman under any of the following circumstances:

a) At the time of, or immediately before or after the commission of the offence causes hurt to her or to any other person;
b) At the time of, or immediately before or after the commission of the offence, puts her in fear of death or hurt to herself or any other person;
c) The offence was committed in the company of or in the presence of any other person;
d) Without her consent, when she is under sixteen years of age;
e) With or without her consent, when she is under twelve years of age;
f) With her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her; or
g) At the time of the offence the woman was pregnant,

Shall be punished with imprisonment for a term of not less than five years and not more than thirty years and shall also be liable to whipping.

Few matters may be noted. First, in relation to paragraph (g). The issues arises as to whether the Prosecution has to prove knowledge on the part of the man that the woman is pregnant when convicted with this aggravated rape or is this a strict liability offence, where the man's knowledge that woman pregnant is

irrelevant. This new amendment should deal with this issue clearly.

Secondly, in relation to Statutory Rape which falls under section 376 (1), the minimum period of custodial sentence has been taken away where with the new amendment no minimum period is prescribed. At present the minimum period is fixed at not less than 5 years.

In my view this is a welcome amendment as the sentencing ought to be left to the discretion of the Court. For example mandatory imprisonment may not be suitable where sexual relationship was consensual especially involving teenagers, who understand the nature and consequences of their action,

The insertion of Section 377 (CA)

Section 377 (CA) speaks of sexual connection by object. This Section stipulates:

> *" Any person who has sexual connection with another person by the introduction of any object into vagina or anus of the person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping".*

Exception- This Section does not extend to where the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping.

It would appear that this Section is applicable to both genders i.e. male and female. The emphasis of this Section is to the object of "inanimate thing"[15] for example piece of wood, broomstick, cloth, hanger, bottle etc as illustrated in the cases that surface in the media. On the other hand, parts of human body for example fingers or tongue does not fall within the ambit of an object.

Therefore, the element of consent is material in the said Section. In other words the purport of this section is to unsanctioned the use any object in sexual

[15] See the speech by the Minister in the Hansard dated 18th July 2007 at page 113

connection into the vagina or anus of the other person without his/her consent.

An exception to this section was created whereby the introduction of the object is sanctioned for "law enforcement purpose". This in my view is too wide. It may lead to abuse by the law enforcement authorities.

The amendment to Section 390

This amendment is made by an insertion of paragraph (e) in illustration, which states:

> *" Z is walking along the road. A on a motorcycle snatches Z's handbag and in the process causes hurt to Z. A rides away with Z's handbag. A has therefore committed robbery".*

The amendment is required due to the rampancy of the offence. The media reports of late are replete with cases involving snatch thefts. In many cases the victims died or were grievously hurt.[16] The statistics are also alarming. In Penang alone between January to May 2004 there were 374 reported cases.[17] Perak Chief Police Officer reported a total of 374 cases of snatch thefts in the state during January to May 2004.[18] It was revealed in Parliament that there had been an increase in the number of reported snatch thefts these past years: from 14,368 reported cases in 2001, to 14,640 cases in 2002, to 15,798 cases in 2003[19].

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[16] There are so many cases reported in the media. Chin Wai Fung died in Brickfields in May when she fought back against a snatch thief. Then Chong Fee Cheng fell, went into a coma and died while resisting a snatch thief in Johor Baru in mid-June. This was followed by the killing of Rosli Mohamed Saad who had gone to the aid of an Indonesian woman whose bag was snatched in Ampang in June 29. Rosli chased and caught the thief who then stabbed him twice. Other cases of snatch thefts were also reported. The headlines included: "Four in court for snatch thefts", referring to cases which occurred in Sungai Petani; "Teenager remanded for seven days for snatch theft", referring to another case in Kuala Lumpur; "NS trainee helps bring habitual snatch thief to justice", an incident occurring in Tampin; "Policewoman's handbag snatched," a case in Malacca; "Suspect pays with his life in botched handbag grab" in Klang. "Victim who was left paralysed", was the headline of an interview with a victim of a snatch theft in Damansara in 1996; "Snatch thief gets 30 months", a case in Kuala Lumpur; and "Snatch thieves get MPs' attention".

[17] The Star, 16 June 2004 and 19 June 2004

[18] The Star, 8 July 2004

[19] The Star, 6 July 2004.

The problem is deepening. Based on a survey which it conducted between 1-6 June involving 337 respondents, Nanyang Siang Pau[20] reported that 50% of the respondents had been victims of robbery, snatch thefts and sexual harassment. Of these victims, 61% were females while 89% lived in urban areas. Significantly, only about half of the victims (50.3%) had lodged police reports. Among the reasons offered for not reporting to the police were: "Police unable to help" (45.2%); "no evidence" (29%); and "procedure for lodging report was troublesome" (11%). It is pertinent to note that that many victims of snatch thefts did not lodge police reports in the media.

The alarming statistics has lead to a public outcry for a tougher action and in order to arrest further inflammation of this offence which can no longer be described as petty, which it was once described (this offence was previously categorized as "petty theft") this illustration was introduced.

Amendment to Section 391

This section cuts down the number of persons acting together to fall under the category of gang robbery. The number of person is reduced from 5 previously to only 2 persons.

Amendment to Section 392

The amendment of this Section is to standardize the punishment for robberies to a maximum 14 years imprisonment, as to whether it was committed between sunset and sunrise is no longer relevant.

Deletion of the Penal Code Sections:

As part of the amendments, certain sections have been deleted for instance in Section 444 (lurking house-trespass by night), Section 446 (house-breaking by night), Section 454 (lurking house-trespass or house breaking in order to commit an offence punishable with imprisonment), Section 456 (punishment for lurking home-trespass house-breaking by night) and Section 458 (lurking house-trespass or house breaking by night after preparation made for causing hurt to any person).

[20] 6 July 2004

Minor Amendments

Minor amendments were made on the following sections:-

i. Section 406;
ii. Section 160;
iii. Section 186;
iv. Section 225B;
v. Section 408;
vi. Section 447;
vii. Section 448:
viii. Section 453;
ix. Section 455;
x. Section 457A;
xi. Section 460

Amendment under Section 130B:

These amendments are in relation to amendments pursuant to the Penal Code Amendments 2003 [Act 1210]. The amendment provides for a meaning of "terrorist act" that is:

"an act or threat of action within or beyond Malaysia".

This amendment stipulates that the act is done or threat is made with the intention of advancing political, religious or ideological cause and thereby would constitute a terrorist act but the act or threat is intended to intimidate the public or to influence them.

The amendment is required to restrict any abuse of interpretation and to provide a better meaning.

Before the amendment, it does provide a broad ambit. The opposition political parties and other NGOs are worried and concerned whether the section will also include demonstrations, speech condemning the Government etc. They are worried that such acts will also be considered as a terrorist act.

Nonetheless, the meaning of **"terrorist act"** is now somewhat limited to embrace an act done for the purpose of extending a political, religion or ideology. The previous interpretation does not contain these three elements. The new

interpretation excludes an act of advocacy, protest, dissent and any industrial actions for example a strike, which is not intended to cause hurt, harm or death or to create a serious risk towards health and safety of the public. Therefore, the new interpretation provides much needed clarification. With this amendment, the meaning of the section is clearly understood. It resolves the concerns of the opposition political parties and other NGO who fear that their rights to voice out their stands or comments as falling under the section.

Conclusion

The Amendments took two year before they saw the light at the end of the tunnel. Now that the date of coming into force has been deferred an eclipse appears to have greeted the amendments. One hopes that the amendments should be enforced soon.

I have had the privilege of appearing before the Select Parliamentary Committee representing the Bar Council and forwarded the views of the Bar Council on the amendments. We have emphasized the need to look at the draft Bills very carefully and undesirability of making piecemeal amendments as mere stopgaps. We have forwarded the view that the entire Code is in need of an overhaul to ensure consistency and to avoid conflicting provisions.

I have when discussing the relevant amendment set out my view on the merits of the amendments. I wish to say a few words on the general tenor of the amendment. On would easily noticed that with every amendment one disturbing fact is ever present: the increase in the punishment. It is very much doubtful that by the increase of sentence from 20 to 30 years the crime sought to be prohibited would go on the decline. It must be pointed out that the aim of prevention and aim of deterrence have taken over as the foremost consideration in the aims of sentencing. Needless to say, the aim of retribution is the last sword to invoke. The aim of rehabilitation has been abandoned sadly, even for first time offenders. Perhaps the clarion call by the eminent judge Wan Yahya J in Ram Segal v Public Prosecutor [1981] 1 MLJ 165 went unheeded. This what the imminent judge said.

> *"Our courts have a long time since progressed from the "eye for an eye" and "tooth for a tooth" type of justice. The avowed aims of punishments are retribution, justice, deterrence,*

> *reformation and protection, but it is never intended to act as a vehicle of vengeance. This court does not sit here to hand out to victims of aggression their "pound of flesh" but generally to protect society by enforcing justice".*

It is clear that based on public sentiment and outcry, the sentence of many sexual offences has been raised to 30 years by the recent amendment. Does is indicate that in the years to come we would increase the punishment to 40 years to reflect the seriousness of the offence?

The amendments have not addressed the issue of counseling, medical treatment to the offender for purpose of reformation, alternative sentencing such as structure community service.

Sadly this is the sorry impact of the recent amendment. It reflects our stand of obstinately clinging on to the retributive concept of punishment at the expense of rehabilitation.

The State of Human Rights in Malaysia and What Can We Do?[1]

by

Edmund Bon Tai Soon[2]

I. What is "human rights"?

The concept of "human rights" is an ideology of standards. An "ideology" has been defined as the "science of ideas", a "visionary speculation" and as "ideas at the basis of some economic or political theory or system"[3]. It started as a "formal" body of general principles post-1945 after the world bore witness to atrocities committed by Nazi Germany during the horrors of World War II. This is written in the Preamble to the Charter of the United Nations[4] to remind us that inequality and discrimination of men and women of different colour and creed can never have a place in our world social order:

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

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[1] Text of continuing legal education talk delivered at Ipoh on 13 October 2006 organised by the Perak State Bar Committee.

[2] Advocate and Solicitor, High Court of Malaya.

[3] See *"The Concise Oxford Dictionary of Current English"*, 4th edition (1959), Oxford University Press.

[4] The Charter entered into force on 24 October 1945.

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.
…"

The Preamble to the Universal Declaration of Human Rights is set in similar context[5]:

> *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*
>
> *Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,*
>
> *Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,*

[5] The Declaration was adopted and proclaimed on 10 December 1948.

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
…"

Despite being a relatively young movement of 61 years old, human rights has achieved much. It survived communism with the fall of the Berlin Wall in 1989, it galvanised legitimate political contestations around the world such as the anti-apartheid resistance in South Africa, it is propelling a raft of international obligations on States to respect and promote the rights of their own citizens and others, it is at the core of the responsibility to protect discourse in the United Nations where States submit themselves to criticisms of independent experts and bodies, it is empowering local communities to articulate claims and stand up to oppression and abuse by their governments, and the recent decision in *Salim Ahmed Hamdan v Donald H. Rumsfield, Secretary of Defense et al.*[6] is evidence that human rights is more powerful than the greatest military force in the world, the United States of America[7].

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[6] Supreme Court of the United States decision on 29 June 2006 at http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf (last visited on 11 December 2006).

[7] See Ralph Steinhardt, *"Historical and Philosophical Origins of Human Rights Law"*, Mst. in International Human Rights Law lecture at University of Oxford, United Kingdom (4 July 2006).

Human rights norms cover a broad spectrum of important matters on the menu of our daily lives – civil and political, economic, social and cultural concerns – administered by internationally accepted treaties such as the International Covenant on Civil and Political Rights[8] and the International Covenant on Economic, Social and Cultural Rights[9]. To meet new challenges, the elaboration of these norms and clarification of existing standards are being shaped daily. In 2003, human rights found its way into regulating business practices of transnational corporations[10], and on 13 December 2006 after more than 4 years of drafting meetings and negotiations, the landmark Convention on the Rights of Persons with Disabilities is due to be adopted by the United Nations General Assembly[11]. It is aimed at protecting the rights and dignity of about 650 million persons with disabilities.

The developing nuances of human rights law rests on the flexibility of their sources. Article 38 of the State of the International Court of Justice[12] identifies the following as applicable:

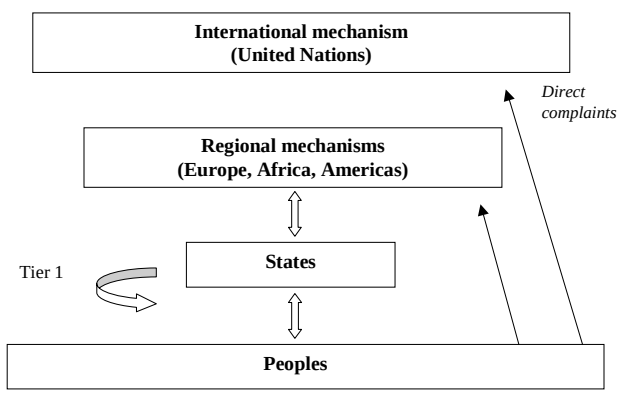
- international conventions establishing rules expressly recognised by contesting States (ie, treaties, declarations or agreements signed between States)
- international custom as evidence of general practices accepted as law
- general principles of law recognised by civilised nations
- judicial decisions and teachings of the most highly qualified publicists of various nations

[8] The Covenant entered into force on 23 March 1976.
[9] The Covenant entered into force on 3 January 1976.
[10] See the ***"Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights",*** **U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) which was a**pproved on 13 August 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).
[11] See *"Landmark Convention on the Rights of Persons with Disabilities to be Adopted on 13 December"* at http://www.un.org/disabilities/convention/news061206.shtml (last visited on 11 December 2006).
[12] Established by article 92 of the Charter of the United Nations.

The jurisprudence which emanates from these sources continues to guide the expansion of rights law, and is a useful resource in their elucidation.

II. The paradox of implementation

"Speaking rights to power" is the term usually ascribed to advocating the language of human rights with ruling governments of the day. It includes the creation of rights awareness, fact-finding, litigation and redress assistance. A necessary component of human rights work is extensive lobbying initiatives with governments. This manifests the paradox of implementation. Whilst the biggest violators of rights continue to be governments in power, key implementers of rights governance lie with the same governments. This clash ensures a careful line is drawn in the lobby work of rights groups. The emphasis in Malaysia has substantially been on domestic implementation[13], but increased resort to international mechanisms in the United Nations is becoming quite common[14]. The hopeful establishment of the ASEAN Human Rights Mechanism[15] will allow complainants an intermediary tier on a regional level where their complaints may be dealt with. The diagram below is indicative of the process:



[13] Known as "Tier 1" work.

[14] With the ratification of certain international treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women and Convention on the Rights of the Child, State parties are required to regularly submit reports to expert bodies set up under the said treaties, and be prepared to defend their rights records. Where applicable, State parties are expected to procure legislative changes to domestic laws of their countries in conformity with their international obligations. Domestic human rights bodies are also heard and allowed to file "shadow reports" in rebuttal. This form of check and balance has been effective.

[15] See the aims of the Working Group for an ASEAN Human Rights Mechanism at http://www.aseanhrmech.org/ (last visited on 11 December 1006).

III. Debunking the myths

Human rights empowers people, and cuts back on State excesses. Politicians and governments are interested in resisting the articulation of rights because it will necessitate greater demands for their accountability. In the debate about rights particularly in the "Asian context"[16], myth-making by leaders such as Tun Dr. Mahathir Bin Mohamad and Lee Kuan Yew has been rife. It is imperative that certain general misconceptions about human rights are debunked:

- *Human rights is a "Western" idea not applicable in Asia*. A simple test only needs to be carried out where an American and an Asian are separately asked to list ten things they would consider as necessary in their lives. Albeit expressed in different terms, one would find their lists matching in concurrence with most of the rights in the Universal Declaration of Human Rights!

- *Human rights is an unattainable set of principles, and which are unenforceable*. Developments around the world such as the United Nations' treaty-reporting systems, Charter-based complaints mechanisms[17], jurisprudence emanating from regional human rights courts[18]and regional human rights commissions[19], enforcement of

[16] See for example Vitit Muntarbhorn, *"Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?"* 8 Transnational Law and Contemporary Problems (1998) 407 and Li-ann Thio, *"Implementing Human Rights in ASEAN Countries: 'Promises to keep and miles to go before I sleep'"* 2 Yale H.R. & Dev. L.J. 1.

[17] See articles 55, 56 and 68 of the Charter of the United Nations, United Nations Economic and Social Council resolution 728F (XXVIII), 28 U.N. ESCOR Supp. (No. 1) at 19, U.N. Doc. E/3290 (1959), United Nations Economic and Social Council resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc.E/4393 (1967) and United Nations Economic and Social Council resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N.Doc. E/4832/Add.1 (1970). Pursuant to resolutions 1235 and/or 1503, country and thematic rapporteurs may be appointed to investigate rights abuses.

[18] There are two active regional courts: the European Court of Human Rights established under the European Convention for the Protection of Human Rights and Fundamental Freedoms which entered into force on 21 September 1970 and the Inter-American Court of Human Rights established under the American Convention on Human Rights which entered into force on 18 July 1978. Judges to the African Court on Human and Peoples' Rights were sworn in on 2 July 2006. The said Court was established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights which entered into force on 25 January 2004.

[19] The Inter-American Commission on Human Rights established under the American Convention

ratified rights norms in domestic courts, and political pressure resulting in subsequent legislative interventions by erring States describe an entirely different story.

- *Human rights is only about litigating cases in the courts*. As illustrated above, human rights work is not plainly about litigation. The most effective strategy is chosen, and sometimes there is a plurality of approaches. Litigation is usually the last resort, after all means have failed.

- *Human rights is a carte blanche for extreme abuses*. Rights standards are merely minimum values which every State and non-State actor must respect and promote. There are certain restrictions to some of these standards carefully circumscribed, and expected to be enforced. Human rights is not an excuse for extremities, and the challenge is one of where the line ought to be drawn.

- *Law necessarily promotes rights values*. This is untrue. The discriminatory legislations enacted in Nazi Germany and apartheid-South Africa were laws validly passed by the governments. While the law does not necessarily promote human rights, the rule of law does, along with its attendant notions of justice and equality. The objective is to ensure that the substantive content of laws passed necessarily conform to international human rights standards.

- *There is nothing which can be done to improve the human rights situation in Malaysia*. This is the defeatist attitude usually taken in the face of the mighty State machinery. For years now, the struggle for a better Malaysia has always been on the agenda of its peoples. The fight is a never-ending one, but it is a worthwhile immersion. Lawyers, non-governmental organizations, civil society organizations, national human rights institutions and the people themselves have had successes in many areas, within and without the country. There is little reason to be disheartened as long as the struggle is a sincere and genuine one.

IV. Malaysia's game- an overview

Human rights in Malaysia is nothing new. It may have been packaged differently under our Federal Constitution in 1957 and called "Fundamental Liberties" under Part II but it substantially mirrors most of the rights granted under international law:

- right to life and personal liberty[20]
- right to equality and non-discrimination[21]
- right to freedom of speech, peaceful assembly and association[22]
- right to profess, practice and propagate religious beliefs[23]
- right to non-discrimination in education[24]
- right not to be deprived of property without adequate compensation[25]

This is not surprising, and it is definitely not alien to speak about international rights law vis-à-vis our Constitution. International law of course goes further than our Constitution in many ways, and there is a need for greater acceptance of these international concepts by the Government and Judiciary; but the continuous process of engagement currently on foot between rights advocates and the authorities bodes well for the nation. The next crucial step forward for the Government is to ratify international treaties[26] such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[27], the International Convention

on Human Rights and the African Commission on Human and Peoples' Rights established under the African Charter on Human and Peoples' Rights are two emerging examples with encouraging case-laws and fact-finding reports.

[20] See Article 5.

[21] See Article 8.

[22] See Article 10.

[23] See Article 11.

[24] See Article 12.

[25] See Article 13.

[26] Malaysia has only ratified the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women (both with heavy reservations and which arguably may amount to non-ratification subject to objections by other State parties), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, the Convention on the Nationality of Married Women and the Convention on the Prevention and Punishment of the Crime of Genocide.

[27] The Convention entered into force on 26 June 1987.

on the Elimination of All Forms of Racial Discrimination[28] and the Convention Relating to the Status of Refugees[29].

The dilution of our fundamental liberties by Parliament[30] and the silent re-writing of the Constitution by our Judiciary[31] is a worrying trend. There have been no additional categories of rights accorded in our Constitution or existing ones read in a wider fashion despite the exhortation in **Dato' Menteri Othman Bin Baginda & Anor v Dato' Ombi Syed Alwi Bin Syed Idrus**[32] that our Constitution should be read "with less rigidity and more generosity". The reverse has in fact occurred.

With Malaysia's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women requiring her to submit reports to the Committee on the Elimination of Discrimination Against Women, we have witnessed the judgment of our highest court in ***Beatrice a/p A.T. Fernandez v Sistem Penerbangan Malaysia & Ors***[33] being subject of some criticism for violating international law[34]. The necessity to criminalise marital rape, and to substantially reduce reliance on Sharia principles with the goal of eliminating gender discrimination are also borne out in the comments of the Committee to Malaysia. She is now required to look into the Committee's recommendations, and accordingly reform Malaysian policies and legislation where applicable. In the long-run, this form of implementation is effective as it allows the process of dialogue and engagement to take its course as opposed to other forms of confrontational methods. After all, rights advocates recognise the essentiality of ownership of rights norms, and respect the sovereignty of governments as the way forward in the promotion of rights.

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[28] The Convention entered into force on 4 January 1969.
[29] The Convention entered into force on 4 October 1967.
[30] See for example section 8B of the Internal Security Act, 1960, section 59A of the Immigration Act, 1959/63 and section 72 of the Pengurusan Danaharta Nasional Berhad Act, 1998.
[31] See for example **Kerajaan Malaysia v Nasharuddin Bin Nasir [2004] 1 CLJ 81**, **Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72** and **Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2004] 2 MLJ 257**.
[32] [1981] 1 MLJ 29.
[33] [2005] 3 MLJ 681.
[34] See *"Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Malaysia"*, CEDAW/C/MYS/CO/2, 35th Session (15 May – 21 June 2006).

Unfortunately, an overview of Malaysia's current civil and political rights record will evidence the following[35]:

- the use of emergency laws in cases of non-emergencies
- the practice of arbitrary detention without trial
- the retention of the death sentence in certain capital cases
- the violation of free speech, peaceful assembly and association rights
- the toleration of custodial deaths and police brutality
- the reinforcement of the Executive's dominance over the Judiciary
- the pursuit of policies of religiosity and religious homogeneity
- the long-term maintenance of affirmative action policies for the majority based on the criteria of race

Further, the much-vaunted Royal Commissions[36] set up have had modest achievements and effect, save for enchanting the media and opportunities to spout rhetoric. Concrete proposals made therein have largely been ignored. Anecdotal evidence that the Commissions were set up to "buy time" or give an appearance of responsiveness by the Government is holding true.

V. What can we do?

Firstly, we have to change our mindsets. It is the deeply-ingrained culture of ambivalence and apathy which has to be discarded. If there is any profession which can make a difference, it is the legal profession. Lawyers are trained to mediate, litigate, resolve disputes and struggle for what is right and just. We need greater participation, and it is wrong to think that our individual participation makes no difference. Activism takes different forms, and writing a letter of appeal to the Government to call a stop to abuses is probably the simplest act.

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[35] See also Suara Rakyat Malaysia, *"Human Rights Report 2005: Civil and Political Rights"* (2006), Amnesty International, *"Amnesty International Report 2005: The State of the World's Human Rights"* (2005) and Human Rights Commission of Malaysia, *"2005 Annual Report"* (2006).

[36] See the *"Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police"* presented to the Yang Di-Pertuan Agong on 29 April 2005 and the *"Report of the Commission to Enquire into the Standard Operating Procedure, Rules and Regulations in relation to the conduct of Body Search in respect of an arrest and detention by the police"* presented to the Yang Di-Pertuan Agong on 16 January 2006.

Structures and processes are also important. Platforms such as the Malaysian Bar, human rights bodies and local community associations are important, and they need good, diligent activists. It is very easy to criticise and destroy, but difficult to constructively build and work in areas of reform that matter.

It is nevertheless worth remembering that human rights is not so much about arguing over laws or regulations than positing oneself in the place of those in need, and asking what can be done. A failure to do this is a failure to understand the rights agenda.

The Veil of Incorporation in the Context of Group Companies

by
Loganathan Krishnan

Abstract
The field of company law secured its importance due to the much celebrated decision of ***Salomon* v *A Salomon & Co Ltd* (1897) AC 22**. The decision expounded the concept of separate legal entity which became the distinctive feature from other forms of business organizations such as sole trader and partnership. Businesspersons enjoy the advantages of the concept and their limited liability. Nonetheless, the concept could be misused by businesspersons who form companies to shield from responsibility and liability. In such cases, the veil of incorporation is lifted to identify the person responsible and hold the person liable. Nevertheless, in the context of group companies, it is an intricate matter. Thus, this study investigates the approach taken by the courts in lifting the veil of incorporation in the context of group companies. The study then examines whether the litmus test fashioned by the courts in determining responsibility and liability is adequate. The study proceeds to scrutinize the provisions of the Companies Act 1965 governing this area. A comparative study is carried out to explore the legal position in England and Australia. Finally, the study concludes by proposing necessary legal measures to address the *lacunae* in this area.

I. Background Of Study

A. Introduction

The field of company law is important in corporate atmosphere as it governs incorporation, finance, management, administration and dissolution of companies. It must be able to muddle through commercial challenges and changes. Draftsmen, practitioners and academics must be industrious in ensuring that it is in tandem with current atmosphere and able to meet future trends.

Primarily, doing business via companies is more widespread compared to sole trader and partnership as they are conventional methods. They are popular in

preceding years but now the tide has changed. In England, the earliest corporate bodies were monasteries and local government boroughs.[1] Conversely, today companies are not restricted to such purposes. Moreover the number of companies formed in Malaysia has increased considerably.[2] Thus, the Companies Commission of Malaysia[3] must incessantly and intermittently be on its toes monitoring those companies. Its duty is not merely administrative but supervisory too and thus it acts as a regulatory body.

B. The Concept of Separate Legal Entity

The underlying reason for company to be more widespread is due to the 'concept of separate legal entity'. It was expounded by Lord MacNaghten in *Salomon* v *A Salomon & Co Ltd.*[4] It is a peculiar and unique nature of a limited company.[5] It resulted to notable features of a limited company and thus has caused the dawn of a new 'company law'. The decision is the cornerstone of company law.[6] Lord Templeman described the concept as an 'unyielding rock'.[7] Nonetheless, the concept was severely criticized.[8]

Separate legal entity means that a company is a separate legal person. It is separate from its members, officers, employees and those who formed the company *i.e.* promoters. It has its own existence and identity. Its existence and identity do not depend on members, officers, employees and promoters. A company in the eyes of the law is a person.[9] Nonetheless the company is a fiction of law.[10] In *Great Eastern Railway* v. *Turner*[11] Lord Selbon declared

1 Phillip Lipton & Abe Herzberg, *Understanding Company Law*, 9th ed., LBC: Sydney, p 2
2 As of 31st December 2005, there are 717,953 companies in Malaysia, see http://www.ssm.com.my
3 Hereinafter referred as CCM
4 (1897) A.C. 22
5 The concept was recognized earlier in the case of *Edmunds* v *Brown & Tillard* (1668) 1 Lev 237 although it was not conceptualized until *Salomon's* case.
6 Stephen W. Mayson, Derek French & Christopher L. Ryan, *Mayson, French & Ryan, Company Law*, Blackstone Press Ltd: London (1997), p 126
7 "Forty years on" (1990) 11 Co Law 10
8 Law Quarterly Review (1897) 13 LQR 6; Otto Kahn-Freund (1944) 7 MLR 54 who said that the case of Salomon v A Salomon Co Ltd (1897) A.C. 22 is a calamituous decision
9 Dewey, "The Historical Background to Corporate Legal Personality" (1926) 25 Yale LJ 655
10 John H Farrar & Brenda Hannigan, *Farrar's Company Law*, 3rd ed., Butterworths: London, (1991), p 72
11 (1872) LR 8 Ch 149

the concept to be an abstraction of the law.

This is because a company does not have physical existence.[12] Thus, it cannot be treated as a natural person. It is a juristic and metaphysical person. It is an artificial person as opposed to individuals who are natural persons.[13] Nonetheless, the artificial personality is real as declared by Sumner LJ in *Gas Lighting Improvement Co Ltd v IRC.*[14] Essentially it is composed of natural persons.[15] Hence, in order to manage, represent and act on behalf of the company, the Board of Directors is required to perform those functions.

Fundamentally, the concept crept into other jurisdictions[16] such as Australia,[17] New Zealand,[18] United States of America, Canada and the European Union.[19] In Malaysia, the concept was confirmed by the Shankar J in *Abdul Aziz b Atan v Ladang Rengo Malay Estate Sdn Bhd.*[20] Conversely, the concept is not found or defined in the Companies Act 1965[21] although the legislature had the opportunity to do so since *Salomon* v *A Salomon & Co Ltd* was decided in 1897, whereas 'the CA' was enacted in 1965.

Nevertheless, it does not mean that 'the CA' is mute on this matter. S.16 (5) of 'the CA' provides that when a company is incorporated, it is capable of performing all the functions of an incorporated company; capable of suing and being sued; has perpetual succession and shall have a common seal; has power to acquire, hold and dispose of property; and liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act. These are owed to the concept of separate legal entity. Thus the

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12 Palmer, Francis Beaufort, *Palmer's Company Law*, 22nd ed., Stevens: London, (1976), p 149
13 Arjunan K. & Low C.K., *Understanding Company Law*, LBC: Sydney (1995), p 9
14 [1923] AC 723, 740-741
15 Harry G Henn & Alexander J. A., *Corporations*, 3rd ed., West Pub Co St. Paul: Minnesota, (1983), p 145
16 Berna Collier, "The Application of the Rule in *Salomon* v *Salomon* in Malaysian Company Law" [1998] 2 MLJ lxv
17 *Walker* v *Wimborne* (1976) 137 CLR 1
18 *Lee* v. *Lee's Air Farming Ltd* [1961] AC 12
19 *Belgium* v *Spain* ICJR vol. 1970 p.3 (1970); ILR col.46, p.178 (1973)
20 [1985] 2 MLJ 165
21 Hereinafter known as 'the CA'

provision will have no legal effect if not for the concept. Hence the legislature was effusively responsive to the concept.

In a limited company, a member has limited liability. If it is limited by shares, the liability is the amount unpaid on the shares.[22] If it is limited by guarantee, the liability is the amount of undertaking contained in the Memorandum of Association.[23] A member is only liable for what he has undertaken. He is not liable beyond that. Neither is he liable for the company's debts even if the company's assets are insufficient to meet the company's debts. This can be seen in *Salomon* v *A Salomon & Co Ltd*[24] where the liabilities of the company exceeded the assets of the company by an amount of £7,733 and Salomon was not liable to pay off the debts.

Coupled with the concept of separate legal entity is the principle that the identity of the company's members, officers or controllers is not germane. There is a curtain like or mirror like principle, which conceals their identity. The only person who is of concern to an outsider or a creditor is the company. This principle is known as the 'veil of incorporation'.

In the light of the principle of veil of incorporation, this study attempts to answer the following questions:

a. How do the courts apply the principle of veil of incorporation in the context of group companies?
b. Is there a lucid litmus test created by the courts to determine whether to lift the veil of incorporation?
c. To what extent the Companies Act 1965 offers guidance in this situation?
d. What is the legal position in England and Australia?
e. What are the necessary legal measures to deal with the situation?

22 See S.4 and S.18(1)(d)
23 See S.4 and S.18(1)(e)
24 (1897) A.C. 22

II. Veil Of Incorporation

A. Meaning and Understanding

The principle of veil of incorporation is beneficial to members, officers and employees of a company. This is because whatever actions taken or debts incurred by the company are not attached to them. Thus it is a risk free business entity. However, it is unfavorable to an outsider or creditor especially where the company has insufficient assets to pay off the debts.[25] The outsider or the creditor could only bring an action against the company.

B. The Need to Lift the Veil of Incorporation

In some cases, members, officers or employees are cognisant that the company has insufficient assets. This is so particularly involving directors since they manage, represent and act on behalf of the company and yet allow it to continue trading. Thus it is a misuse of the principle of veil of incorporation.[26]

It was pointed out that "a desire for foolish consistency should not blind the courts to reality where justice necessitates a lifting of the veil".[27] Thus the courts have found its wisdom in allowing the veil to be lifted to identify the person responsible.[28] Various terms such as pierced, raised, removed or penetrated were employed by the courts. Staughton LJ in *Atlas Maritime Co SA* v *Avalon Maritime Ltd (No 1)*[29] stated that it basically means such a person will be made liable for the company's actions or debts. Thus, it is an exception to the separate legal entity concept. This is because the company's actions and debts have been treated as the person's actions and debts *i.e.* the company and the person are treated as one.

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25 Lee Mei Pheng, *General Principles of Malaysian Law,* 2nd ed., Fajar Bakti: Shah Alam, (1995), p 274
26 Smith K & Keenan DJ, *Company Law,* 3rd ed., Pitman: London (1977), p 10
27 Walter C M Woon, *Company Law*, Longman, p 34
28 Pamela Hanrahan, Ian Ramsay, Geof Stapledon, Aiman Nariman Mohd Sulaiman & Aishah Bidin, *Commercial Applications of Company Law in Malaysia,* CCH: Singapore, (2002) p 53
29 [1991] 4 All ER 769, 779

Lifting the veil is laudable otherwise company law has failed in its objective, purpose, functions and role in striking an apposite balance among the competing interests of the company, its members, officers, employees and creditors. Prominently, the Court of Appeal in *Nedco Ltd* v *Clark*[30] felt that "the fact that the courts lift the corporate veil for specific purpose in no way destroys the recognition of the corporation as an independent and autonomous entity for all other purposes." Nonetheless, it should be noted that the categories where the veil is lifted are probably not closed.[31]

Iii. Lifting The Veil Of Incorporation In Group Companies

A. Development of Group Companies

Previously businesspersons form, run and manage their business using a single company. The idea of holding company originated from the United States of America[32] as early as 1832 and it became popular in 1890 onwards. Currently it is common that businesses are carried out in the form of group companies.[33] The aim is to limit their liabilities within each entity, for taxation purposes or to run different types of businesses in different locations. Interestingly, it is to share risks and take advantage of economics of scale.[34]

'The CA' does not define or interpret the term 'group companies'. However Ss. 5,[35] 5A[36], 5B[37] and 6[38] of 'the CA' defines a holding company, ultimate holding company, wholly-owned subsidiary and related corporations respectively.

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30 (1973) 43 DLR (3d) 714, 721

31 Arjunan K, *Company Law in Malaysia, Cases and Commentary*, Malayan Law Journal: Petaling Jaya (1998), p 13

32 Hereinafter referred as US

33 John Birds, Eilis Ferran & Charlotte Villiers, *Boyle & Birds' Company Law*, 3rd ed., Jordans: Bristol, (1995), p 21

34 Ray August, *International Business Law: Text, Cases and Readings*, 4th ed., Pearson: New Jersey, (2004), p 202

35 A corporation shall be deemed to be a subsidiary of another corporation, if – (a) that other corporation (i) controls the composition of the board of directors of the first mentioned corporation; controls more than half of the voting power of the first-mentioned corporation; or (iii) holds more than half of the issued share capital of the first mentioned corporation; or (b) the first-mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary

Furthermore by virtue of S. 5(1) of 'the Act' there can be sub-subsidiaries too.[39]

Mason J in *Walker* v *Wimborne*[40] found that group companies are in cases where a number of companies are associated by a common or interlocking shareholdings, allied to unified control or capacity to control. Thus two factors are outstanding namely shareholding and element of control. In the definition of holding company, subsidiary company, ultimate holding company, wholly-owned subsidiary company, sub-subsidiary company and related corporations, these two factors are present. Thus it is submitted that group companies consist the above type of companies.

B. The General Rule

In *The Albazero*[41] Roskill LJ proclaimed that "each company in a group of companies ….is a separate legal entity possessed of separate rights and liabilities".

In the domestic front, the ensuing decision deserves discussion. In *The People's Insurance Company (M)* v *The People's Insurance Co Ltd*[42] the plaintiff company, incorporated in Malaysia, is a subsidiary of the defendant company, incorporated in Singapore. Four senior officers of the holding company are the directors of the subsidiary company. The auditors of the subsidiary company stated that the company may not be able to meet claims amounting to $2,001,725.

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36 A corporation shall be deemed to be the ultimate holding company of another corporation if - (a) the other corporation is a subsidiary of the first-mentioned corporation; and (b) the first-mentioned corporation is not itself a subsidiary of any corporation

37 A corporation shall be deemed to be a wholly-owned subsidiary of another corporation if none of the members of the first mentioned corporation is a person other than the second-mentioned corporation. corporation

38 Where a corporation – (a) is the holding company of another corporation; (b) is a subsidiary of another corporation; or (c) is a subsidiary of the holding company of another corporation, that first-mentioned corporation and that other corporation shall be deemed to be related to each other

39 "….(b) the first-mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary"

40 (1976) 137 CLR 1

41 [1977] A.C. 744

42 [1986] 1 MLJ 68

At the Board of Directors' meeting, the four directors said that the holding company would guarantee any shortcomings faced by the subsidiary company. Subsequently there was a shortcoming and the subsidiary company claimed the amount from the holding company on the basis of the guarantee given. However, the holding company denied liability on the grounds that every company is a separate entity of its own. .

Zakaria Yatim J found that the holding company is a separate entity from its subsidiary company. The four officers who sat in the board meeting, sat as directors and agents of the subsidiary company and not of the holding company. A company cannot be made liable or responsible for the debts or actions of another company within the group. Thus, the debts of the company belong to itself.

Notably, the dispute does not impinge or concern the outsiders or creditors. It concerns the subsidiary and the holding company. However, it does not accord with the purpose the guarantee was given. Essentially, there was reliance by the subsidiary company on the guarantee. Thus, the subsidiary company should have been allowed in its claim.

In *Sunrise Sdn Bhd* v *First Profile (M) Sdn Bhd & Anor*[43] Chong Siew Fai CJ in the Federal Court made it clear that a company is a separate legal entity from its members even if the members are corporate bodies.

C. Cases Where The Veil is Lifted

To espouse an absolute view that within group companies, every company is separate from another occasionally causes unsatisfactory results. Fundamentally the issue is whether the holding company is liable for the debts incurred by the subsidiary company. Therefore there have been cases where the courts treated group companies as a single entity. Nevertheless, it must be dealt with prudence. It should not be done out-rightly and in all cases. It was precisely pointed out by Richmond P in *Re Securitibank Ltd (No 2)*[44] that "any suggested departure

43 [1996] 3 MLJ 533
44 {1978} 2 NZLR 136, 159

from the doctrine laid down in *Salomon* v *Salomon & Co Ltd* should be watched very closely". Otherwise the idea of forming group companies would overwhelm its very purpose.

Advocate General Warner's advice before the European Court of Justice in two related cases[45] that, "…there is a presumption that a subsidiary will act in accordance with the wishes of its parent because according to common experience they generally do so act…" Thus, to hold group companies as a single entity seems the most logical and lawful thing to do.

One of factors the court took into account is whether the company's business is so undercapitalized that it could not have been running its business independently.[46] It could be in cases where the holding company formed a subsidiary company but did not provide sufficient financial resources for the subsidiary or did not allow the subsidiary to seek capital independently. In such cases the courts are bound to lift the veil.[47]

Another factor taken into account is on grounds of agency relationship. This is the most familiar ground argued in the courts.[48] The court in *Smith, Stone and Knight* v *Birmingham Corp*[49] had to determine the controllers of the subsidiary company. In order to find agency relationship, Atkinson J stated50 that the ensuing factors have to be weighed namely (a) were the profits of the subsidiary those of the parent company? (b) Were the persons conducting the business of the subsidiary appointed by the parent company? (c) Was the parent company the 'head and brains' of the trading venture? (d) Did the parent company govern the adventure? (e) Were the profits made by the subsidiary company made by the skill and direction of the parent company? (f) Was the parent

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45 *Intituto Chemioterapico SpA & Commercial Solvents Corp* v *The Commission (Joined Cases 6 & 7/73)* [1974] E.C.R.223

46 Wahab Ghows J, "Asean Promoter", Admiralty in Rem No 703 of 1979 (unreported) (High Court, Singapore)

47 Ford H. A. J., Austin R.P. & Ramsay I.M., *Ford's Principles of Corporations Law,* 9th ed., Butterworths: Sydney, (1999), [4.370]

48 Ramsay I. & Stapledon D., *Corporate Groups in Australia,* Centre for Corporate Law and Securities Regulation: Melbourne (1998), p 20

49 [1938] 4 All ER 115

company in effective and constant control of the subsidiary? If the answers are in the affirmative, then a subsidiary company can be considered as an agent of its holding company.

Since a company is a legal person, it can act as an agent for another company. This is particularly in a holding company, which usually has functional and managerial control over its subsidiary. Hence, the principal can be made liable for the actions and debts of the agent. Notably it is not necessarily that a subsidiary company is always an agent of its holding company. There can be situations where the holding company is an agent of its subsidiary company. This was the case in *William Cory & Son Ltd* v *Dorman Long & Co Ltd*[51] which was based on the surrounding circumstances.

Another factor is where a company is under the total control, direction and management of another company. Thus, there is 'functional integrality' between the entities. The subsidiary company is under the managerial and financial control of its holding company. In order to determine the presence of this factor, the holding company must usually produce consolidated group accounts; the profits or losses and the assets and liabilities of the whole group.[52]

The term 'functional integrality' is interpreted by reference to the relationship between the two companies, the extent of control by one company against another and whether there are any common directorships and shareholdings. There must be functional unity among the companies within the group. There are two aspects to this namely unity of ownership and unity of control. If functional unity is not present, there will be no justification to treat group companies as a single entity.

In *The Roberta*,[53] bills of lading were signed by the holding company on behalf of a subsidiary company. At the hearing an argument was raised that the holding

50 [1938] 4 All ER 116
51 [1936] 2 All ER 386
52 Chan, K.C., Cheah, F.C. & Heng, C.P., Handbook of Malaysian Company Law, Asian Centre for Professional Development: Petaling Jaya (2003) p 5
53 (1937) 58 L.L.R. 159

company must pay for the bills. The trial judge held that this is acceptable because the companies are separate "in name only and probably for the purposes of taxation".[54] The holding company holds all the shares and supplied two out three directors. Therefore the holding company was made liable to pay on the bill of lading.

It is evident that the court treated the group as a single entity on grounds of common shareholding and management between the companies. Furthermore it was a wholly-owned subsidiary. It is doubtful whether the courts will continually do so in all cases involving wholly-owned subsidiary.

In *Spittle* v *Thames Grit & Aggregates Ltd*[55] the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90% of its shares. Although it is not a case of wholly-owned subsidiary, the holding company holds majority shareholding in the subsidiary company. Moreover, the shareholding was a determining factor for the decision.

In *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council*[56] the holding company claimed compensation for disturbance of business conducted by a subsidiary on its premises. The Court of Appeal found that it was appropriate to treat the companies as a single entity. The idea is based on the business enterprise.[57] This is especially where the holding company and subsidiary company carry on the same business.[58]

Support has also been found in the domestic front. *Hotel Jaya Puri Bhd* v *National Union of Hotel, Bar and Restaurant Workers*[59] is a case concerning employees of a restaurant, which is a subsidiary company of Hotel Jaya Puri Bhd, which is the holding company. The subsidiary carried on business in the

54 (1937) 58 L.L.R. 159, 169
55 [1937] 4 All ER 101
56 [1976] 1 WLR 852
57 Berle Jr A.A., "The Theory of Enterprise Entity", (19470 47 Colum L Rev 343
58 Nicholas Bourne, *Company Law,* 2nd ed., Cavendish: London, (1995) p 14
59 [1979] 1 LNS 32

premises of its holding company. The managing director is the same for both the companies. The employees were retrenched by the subsidiary company. The issue was whether the holding company can be considered as an employer of the workers. The President of the Industrial Court found that (a) the hotel and the restaurant were inter-dependent; (b) there was functional integrality and unity of establishment between the hotel and the restaurant; and (c) a number of senior officers were common to both the hotel and the restaurant. Therefore the hotel is an employer of the employees. On appeal to the Federal Court, Salleh Abas FJ upheld the decision. It is observable that the courts employed the 'functional integrality' considering the business enterprise of group companies.

In *Pek Seng Co Pte Ltd & Ors* v *Low Tin Kee & Ors*[60] the court lifted the veil since a dominant director of a company and its wholly-owned subsidiaries was concealing assets from the creditors. The court found that the director had full and untrammeled control over the companies. The decision shows that the conduct of the dominant director was the determining factor to treat the group companies as a single entity. Furthermore the creditors were taken for a ride which the law should disallow.

The above approach can also be seen in *Creasey* v *Breachwood Motors Ltd.*[61] The plaintiff, was unfairly dismissed by a company. He discovered that after the claim was brought against the company, all its assets were transferred to another company owned by the same individuals. The directors were the same as the earlier company. The earlier company was then dissolved. Richard Southwell QC sitting as a deputy High Court judge substituted one company for another as defendant to a legal action, holding that the second company was responsible for the liability of the first company. There factors were taken into account namely dissipation of assets, common shareholding and management.

In *Re Bank of Credit and Commerce International SA (no.3)*[62] the court

60 [1989] 1 LNS 175
61 [1993] BCLC 480
62 [1993] BCLC 1490 and (No. 10)[1995] 1 BCLC 362

approved a compromise under which the assets and liabilities of several companies in liquidation would be pooled because their affairs were so hopelessly intertwined that it would make no sense to spend vast sums of money and much time in trying to disentangle them. The decision shows that there was no distinct line separating the relationship among the group companies. On the other hand it can be argued that the courts treated the group as a single entity out of convenience.

D. Cases Where The Veil is Not Lifted

Notably the veil is not lifted in all cases. In *Gramaphone and Typewriter Co Ltd* v *Stanley*[63] the court avowed that the fact a holding company holds all shares or a substantial number in a subsidiary does not make the subsidiary the company an agent of its holding company. Cohen LJ in *Ebbw Vale Urban District Council* v *South Wales Traffic Area Licensing Authority*[64] remarked that "under the ordinary rules of law, a parent company and subsidiary company, even a 100 percent subsidiary company, are distinct legal entities…."

These decisions are in unequivocal contradiction with the decisions of *The Roberta*,[65] and *Spittle* v *Thames Grit & Aggregates Ltd.*[66] Seemingly the courts felt that mere shareholding relationship should not be a decisive factor. This is commendable since common shareholding is commonly found in group companies. That is the nature of group companies. Thus the courts must ensue to search for other factors.

In *Firestone Tyre and Rubber Co Ltd* v *Lewellin*[67] an English subsidiary company manufactures for its American holding company. The subsidiary did so as the agent of the holding company. However, there was no element of control by the holding company. Thus the court found that the companies are not a single entity. Element of control was the determining factor in this case. It also shows that mere relationship between holding company and subsidiary

63 [1908] 2 KB 89
64 [1951] 2 K.B. 366
65 (1937) 58 L.L.R. 159
66 [1937] 4 All ER 101
67 [1957] 1 All ER 561; [1957] 1 WLR 464

company does not necessarily mean that there is an element of control.

In *Woolfson* v *Srathclyde Regional Council*,[68] Lord Keith observed that it is appropriate to pierce the corporate veil only where special circumstances exist such as companies formed as mere facade to conceal the true facts. Thus, the House of Lords refused to treat the group of companies as a single economic entity. Further, it doubted the correctness of *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council*.[69] However, the case was not overruled.

The case of *Woolfson* v *Srathclyde Regional Council* seems to constrict the scope of lifting the veil to only special circumstances. It did not proceed to explain what the special circumstances are. Nonetheless, element of control was the key factor. Thus both the cases were using the same factor *i.e.* element of control as its deciding factors. Notably, the distinguishing feature is that there was no element of control in *Woolfson* v *Srathclyde Regional Council* unlike *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council.* The In *Re Southard & Co Ltd*,[70] Templeman LJ found that

> *"A parent company is not responsible for the debts of its subsidiary. Further, English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."*

68 (1978) 38 P & CR 521, HL
69 [1976] 1 WLR 852
70 [1979] 1 WLR 1198, 1208

In *Bank of Tokyo* v *Karoon*[71] the plaintiff company which is the holding was doing business in London. Its subsidiary company was doing business in New York. The defendant was a customer in both companies. He complained that the subsidiary company disclosed his account details to the parent company in breach of a bank's duty of confidence. The plaintiff company argued that economically both the companies were one. Robert Goff LJ proclaimed that the court is not concerned with economics but law and held that the companies were separate. The court refused to explore whether there was functional integrality or common business enterprise.

In *Kleinwort Benson Ltd* v *Malaysia Mining Corporation Bhd*[72] the Court of Appeal held that the parent company is not liable for the debts of its subsidiary. This is even where the parent company has expressed in a comfort letter of policy of supporting the subsidiary company. The decision is similar to the standpoint taken in *The People's Insurance Company (M)* v *The People's Insurance Co Ltd*[73] In *Lonrho Ltd* v *Shell Petroleum Ltd*[74] the holding company wanted to compel its foreign subsidiary and sub-subsidiaries to release documents in their possession. This is to comply with an order for discovery of documents in litigation against the holding company. The House of Lords refused to treat the group companies as a single entity.

In *Adams* v *Cape Industries plc*[75] the defendant company is an English registered company. Its business was mining asbestos in South Africa and marketing it worldwide. The court had to determine whether judgments obtained in the US against the defendant company would be recognized and enforced by the English courts. This depends on whether the defendant company is considered as to be present in the United States through its wholly-owned subsidiaries.

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71 [1987] AC 45
72 [1989] 1 WLR 379
73 [1986] 1 MLJ 68
74 [1980] 1 WLR 627
75 [1990] Ch 433; [1990] B.C.L.C. 479

The court refused to pierce the veil of incorporation with respect to an action brought against one company in a group with respect to liability for another company in that group in another country. This is because the cause of action had not accrued at that time. Each company within the group was held to be separate legal entities. The Court of Appeal declared that the veil will only be lifted in cases where the companies are a mere facade concealing the true facts. Slade LJ pointed out that there is no presumption that a subsidiary is an agent for its holding company. The decision of *Woolfson* v *Srathclyde Regional Council*[76] was preferred over the decision of *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council*.[77]

The court also emphasized that the motive of forming a subsidiary will be looked into. Further, there must be express agreement to show there is agency relationship between holding company and subsidiary company. The Court of Appeal stated that, "…save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon* v *A Salomon & Co Ltd* merely because that justice requires so". Further it was stated that "Notion of justice should prevail to protect the interest of the outsiders and creditors to make a holding company liable, does not hold water. There must be something more concrete".

Nonetheless it is imprecise what makes a company a 'mere facade'. The court regrettably declined to endeavor a comprehensive definition of the above principle. Arguably, if a subsidiary company is a mere facade for the holding company whereby the subsidiary company is merely acting as a puppet or mere sham or cloak to disguise the fraud of the holding company, then the latter could be made liable.

In *Allied Irish Coal Supplies Ltd* v *Powell Duffryn International Fuels Ltd*[78] a request was made to make a holding company liable for the debts of its subsidiary company but was rejected. The court stated that to lift the veil in

76 (1978) 38 P & CR 521, HL
77 [1976] 1 WLR 852
78 [1997] 1 ILRM 306

such cases is "fundamentally at variance with the principle of separate corporate legal personality".

In *Ord v. Belhaven Pubs Ltd*[79] the Court of Appeal refused to pierce the corporate veil. The court rejected any idea that a group of companies could be regarded as a single entity except in very limited circumstances where there was some improprietary or the company was a facade concealing the true facts.[80] Even in that situation it was suggested that the situation was best dealt with by applying the insolvency laws.[81] The court also explicitly stated that the decision in *Creasey* should no longer be regarded as authoritative.

The above English position is dissimilar to the stance taken by the European Court of Justice (ECJ).[82] The English Courts will face difficulty in cases where group companies are spawned within the European Union (EU). Surely the English Courts must follow the principles laid down by the ECJ since England courts are bound by the decisions of the ECJ.

The standpoint in Australia is divergent[83] where it was found that although there are provisions requiring group accounts, every company has its own identity separate from another. Thus the courts are reluctant to treat group companies as a single economic entity. The courts prefer to stick to the rule that every company is a legal person on its own.

The Supreme Court of New South Wales in *Pioneer Concrete Services Ltd* v *Yelnah Pty Ltd*[84] expressly disapproved the decision of *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council*.[85] In this case an agreement was entered between the plaintiff and Hi-Quality Concrete (NSW) Pty Ltd

79 [1998] 2 BCLC 447
80 Charlesworth and Morse, *Company Law*, 16th ed., Sweet & Maxwell, London, (1999), p 22
81 *Ibid*
82 See *Intituto Chemioterapico SpA & Commercial Solvents Corp* v *The Commission (Joined Cases 6 & 7/73)* [1974] E.C.R.223
83 See cases such as *Walker* v *Wimborne* (1976) 137 CLR 1 and *Industrial Equity* v *Blackburn* (1977) 137 CLR 567
84 (1987) 5 ACLC 467
85 [1976] 1 WLR 852

which is a subsidiary of Hi-Quality Concrete (Holdings) Pty Ltd. The plaintiff claimed that the holding company is in breach of the agreement. Young J found that an undertaking was merely given by the subsidiary company. The agreement was carefully drafted and settled between the solicitors of the plaintiff and the subsidiary company. Thus there is no agency relationship between the holding and subsidiary company. Furthermore, it was noted by Rogers AJA in *Briggs* v *James Hardie & Co Pty Ltd*[86] that the mere potential to exercise control over a subsidiary was not enough to justify piercing the corporate veil.

Iv. Statutory Provisions

A. The Companies Act 1965

Observably, the courts have cracked the principle of veil of incorporation even without the aid of a legislative sledgehammer.[87] Nevertheless it has always been recognized that the legislature can forge a sledgehammer capable of cracking open the corporate shell.[88] The ensuing discussion will show the extent this is done in domestic front.

The legislature has enacted provisions where the veil is to be lifted[89] but it did not do so in cases where the holding company is liable for the debts of the subsidiary company. The closest reference made to group companies is found in Ss. 168, 169 and the Ninth Schedule of 'the CA'.[90] It provides that directors of a holding company must prepare consolidated accounts consolidating the financial position of the holding company and its subsidiaries. Thus 'the CA' does not treat each company within the group separately but as a single entity.[91] It was the intention of the legislature to treat group companies as a single entity for the purposes of consolidated accounts.

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86 [1989] 16 NSWLR 549
87 Gower, *Principles of Modern Company Law*, 6th ed., Stevens & Sons: London, (1997), p 112
88 *Ibid*
89 Such as S.36, S.121(2), S.365(2)(b), S.199A, S.67(3), S.303(3) and S.304(1)
90 Introduced in England by Companies Act 1948 and in New South Wales by Companies Act 1961 (NSW)
91 Shanthy Rachagan, Janine Pascoe & Anil Joshi, *Concise Principles of Company Law in Malaysia*, Malayan Law Journal: Kuala Lumpur (2005), p 25

Although, there are no specific statutory provisions empowering the courts to hold the holding company liable in such cases, there is a general provision that could be resorted to which is S. 304(1) of 'the CA' which reads

> *"if in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that* ***ANY PERSON***[92] *who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs."*

If it can be proved that the holding company controls, directs and manages the business of the subsidiary company with intent to defraud creditors, the holding company can be made liable for the debts of the subsidiary company. The term "…**ANY PERSON**…" can include a company since it is a person in the eyes of the law. Thus, holding company must be careful in carrying out their controls, directions and the managing of a subsidiary company's business. This is because such factors could easily be found. Nevertheless, to prove that business was carried on with intent to defraud creditors is an uphill task as it concerns issues of evidential matters.

It should be noted that S. 17(1) of 'the CA' provides that a corporation cannot be a member in its holding company. Any such allotment or transfer of shares shall be void. In order to determine whether the relationship is of holding and subsidiary, the veil of both companies must be lifted to. Thus although the provision does not directly deal with lifting the veil, the provision can only operate with the help of lifting the veil. The provision shows that although holding companies are permitted to be a member in a subsidiary company the *vice versa* is not permitted. 'The CA' treats group companies are separate in relation to subsidiary company being a member is a holding company.

S. 67(1) of 'the CA' provides that a company is prohibited from providing financial assistance to anyone in the acquisition of shares in the company. In the event the company is a subsidiary company, the company is not permitted to provide financial assistance for the acquisition of shares in its holding company. Two issues can be observed. Firstly the veil must be lifted to determine whether the relationship is one of holding and subsidiary company. Secondly, the prohibition only applies to the subsidiary company. Thus if financial assistance is given to any person in the holding company for the acquisition of shares in the subsidiary company it is not caught by the provision. Again it can be seen that the 'the CA' treats holding companies and subsidiary companies differently.

A wider approach can be seen in S. 133(1) of 'the CA'. The provision does not allow a company to give loans to its directors or to the directors of any related corporation.[93] In this provision the prohibition is wider as it applies to all companies within the group. In S. 133A(1) of 'the CA' loans cannot be given by a company to persons connected[94] to its directors or its holding company. The provision is worded similar to Ss 17(1) and S 67(1) of 'the CA'.

S. 199A of 'the CA' provides that an inspector is authorized to investigate the affairs of a related corporation if he thinks it is necessary to do so. Thus this provision has used the broad approach as in S. 133(1) of 'the CA'. It is not clear as to the basis of inconsistency in the wordings of the provisions. Nonetheless, it is observable that the legislature is able to treat group companies as a single entity if it wishes.

B. Cross-Jurisdictional Statutory Position

In England recommendations were made to make a holding company liable for the debts of the subsidiary company[95] but it was not accepted. However there

92 Emphasis added

93 Related corporation is defined in S. 6 and discussed under Part III.A

94 This is defined in S. 122A

95 Cork Report, Chapter 51, paras.1922-1929; German Federal Republic has imposed liability on holding companies. The EC Ninth Draft Directive proposes reform on similar lines on other member states

is an academic opinion[96] that S. 213 Insolvency Act 1986 can apply to such situations.[97]

Notably in Australia,[98] there is a provision exclusively dealing with this matter *i.e.* S. 588V(1) whereby the holding company can be made liable for the debts of its subsidiary company where it is insolvent.[99] However, it must be a case where the holding company knew or ought to have known that the subsidiary company was insolvent. The difference between S. 304(1) of 'the CA' and the Australian provision[100] is the latter's requirement that the subsidiary company be insolvent. In S. 304(1), insolvency of the subsidiary company is not required. As long as the business of the subsidiary company was carried on with intent to defraud creditors, the holding company can be made liable provided they are responsible in running the business.[101] On the other hand if a company is insolvent, it does not necessarily mean that there was fraud. Thus it is submitted that the Australian provision is better than the Malaysian provision since the former is broader in its scope and it is difficult to prove fraud for S. 304(1). Thus there must be a specific provision enacted to make a holding company liable for the debts of the subsidiary company similar to the Australian position which does not require fraud. This is especially where the subsidiary company does not have any independent decision making authority, or may have been induced to enter into a transaction beneficial to the holding company but detrimental to the subsidiary company and creditors.

V. Conclusion

When the veil of incorporation is lifted it removes the separate identity of each company within group companies. Thus it is an anti-thesis to the concept of

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96 Sealy L.S., *Cases and Materials in Company Law*, 4th ed., Butterworths: London, (1989), p 59

97 This is similar to the discussion concerning S. 304(1) of 'the CA'

98 There are also specific provisions in the company law of New Zealand and the Irish Republic, which give the courts, the power to order a pooling of company's assets to pay off the debts.

99 Corporations Law

100 *Ibid*

101 There are also specific provisions in the company law of New Zealand and the Irish Republic, which give the courts, the power to order a pooling of company's assets to pay off the debts

separate legal personality. The veil has been lifted to treat group companies as single economic entity, based on agency, functional integrality, mere facade, express agreements or some form of improprietary. Nevertheless, the courts have not made much progress in producing a lucid litmus test to determine whether the veil is lifted. There is also no conclusive answer of when the court will lift the veil to make a holding company liable for the debts of its subsidiary company. The Companies Act has been completely unhelpful in this matter unless the courts are creative enough to develop S. 304(1). The legal position in England is no better although credit must be given to Australia for enacting S. 588V Corporations Act 2001. Thus, as far as Malaysia is concerned, one will never know whether the veil would be lifted unless and until the matter comes to the court. This is unsatisfactory as litigants and legal enthusiasts must be able to predict at least to some extent what the legal position is. The Malaysian courts must declare when the opportunity arises as to whether to follow the legal position as laid down in *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council*, *Woolfson* v *Srathclyde Regional Council* or *Pioneer Concrete Services Ltd* v *Yelnah Pty Ltd.*

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