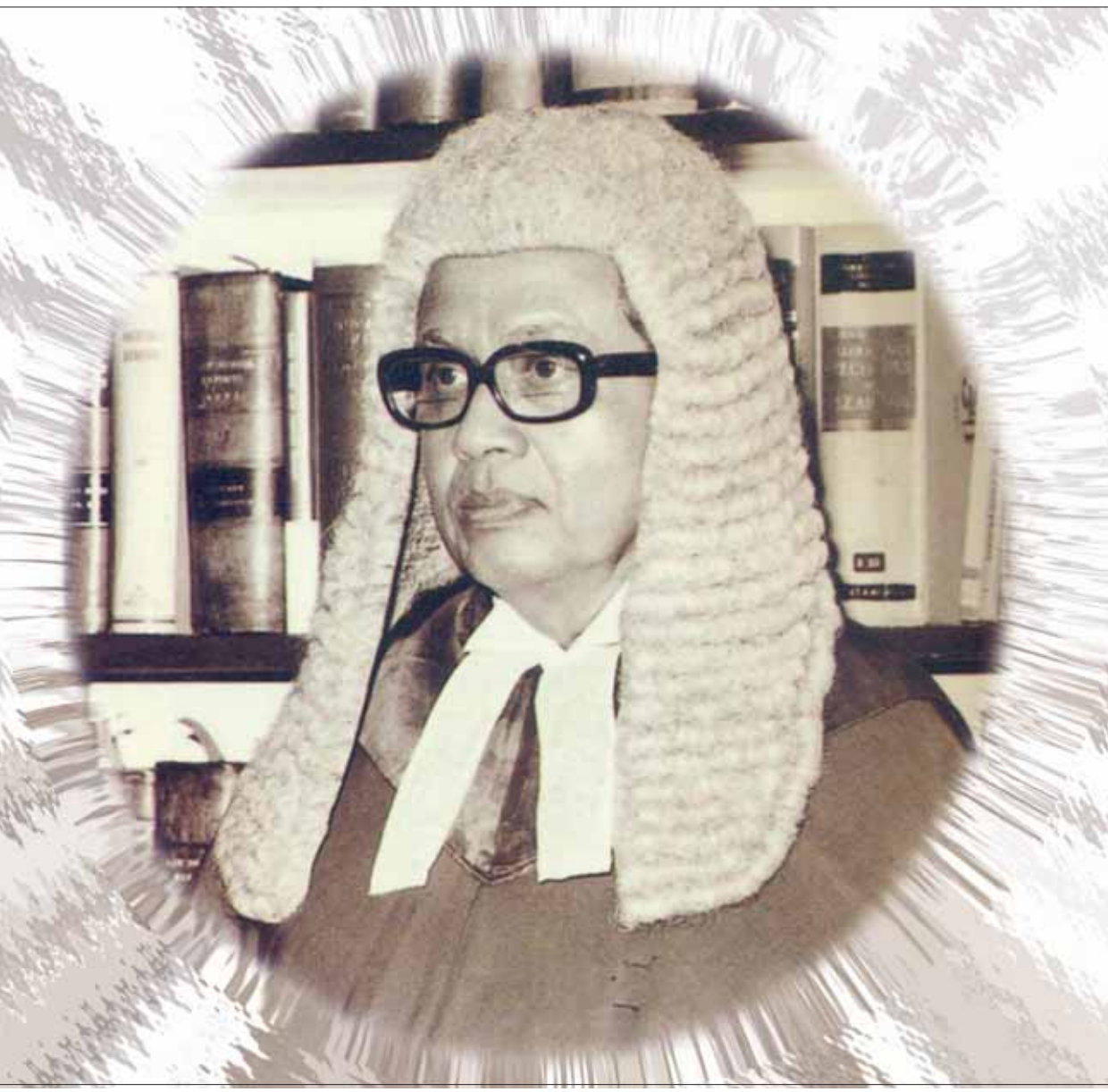
INSAF

THE JOURNAL OF THE MALAYSIAN BAR

Vol XXXV No 1 KDN PP 987/11/2006 ISSN 01268538 2006 (Volume 1)



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

Kedudukan Bahan Bukti (Exhibit) Elektronik Dan Digital Dalam Keterangan : Masalah Dan Cabaran Masa Kini*

oleh

Prof Madya Dr Mohamad Ismail Bin Hj Mohamad Yunus[**]

Pengenalan

Revolusi alam siber dan teknologi komputer masa kini telah mengubah cara kehidupan masyarakat berkomunikasi, mengendalikan sistem teknologi maklumat dan kaedah pengurusan perniagaan secara elektronik. Terdapat pelbagai jenis maklumat yang memainkan peranan yang penting dan berguna di dalam proses pengendalian kes-kes di mahkamah sivil dan jenayah di mana maklumat-maklumat penting disimpan dan direkodkan di dalam sistem komputer.[1]

Terdapat banyak syarikat dan individu yang bergantung penuh kepada penggunaan komputer dalam melancarkan urusan seharian. Tidak ketinggalan juga peguambela dan pihak pendakwa yang telah menyedari kelebihan dan kepentingan penggunaan perkakasan elektronik dalam membantu mahkamah menyelesaikan kes-kes.

Justeru, penemuan dan penggunaan maklumat-maklumat yang bersumberkan elektronik dapat digunapakai di dalam semua kes yang dikendalikan di mahkamah. Kaedah ini dikenali sebagai "penemuan maklumat secara elektronik". Keterangan berbentuk elektronik telah digunapakai untuk pelbagai tujuan dalam kes-kes terkini, di antaranya:

---

[*]Pertandingan Munulis Makalah Undang- Undang 2005Anjuran Jawatankuasa Bahasa Melayu, Majlis Peguam dengan kerjasama Dewan Bahasa Dan Pustaka serta Institut terjemahan Negara Pemenang Hadiah Pertama

[**] Timbalan Dekan (HEP), Kulliyyah Undang-Undang Ahmad Ibrahim, Universiti Islam Antarabangsa Malaysia. Sekalung penghargaan ditujukan kepada Puan Shamshina Mohd Hanifa dan Puan Rohana Md Yusup di atas kerjasama serta sokongan yang telah diberikan di dalam menjayakan penulisan artikel ini

[1]. Pooley & Shaw, *The Emerging Law of Computer Networks – Finding Out What's There: Technical and Legal Aspects of Discovery* (1996).

a) Untuk mengukuhkan alasan pertuduhan dalam kes gangguan seksual.[2]
b) Untuk membuktikan kecurian rahsia perniagaan yang dilakukan oleh pekerja[3] atau pihak lain.[4]
c) Untuk mengesahkan penciplakan hakcipta atau mengenalpasti penyalahgunaan perisian berlesen.[5]
d) Untuk memperolehi maklumat tentang harta persendirian.
e) Untuk mendapatkan keterangan mengenai kes penipuan atau aktiviti-aktiviti jenayah.
f) Untuk mengukuhkan alasan kes-kes pemecatan kerja secara tidak sah.[6]
g) Untuk memberikan keterangan transaksi jualbeli.[7]
h) Untuk membuktikan pertalian di antara mangsa pembunuhan dan tertuduh.[7a]
i) Untuk memberikan keterangan mengenai ugutan bunuh melalui e-mail.[8]
j) Untuk mengenalpasti identiti penjenayah.[8a]

Berdasarkan kepada asas dan skop penggunaan bahan bukti elektronik dan digital dalam keterangan seperti yang telah diputuskan dalam kes-kes di atas, timbul persoalan sejauhmanakah keterangan tersebut relevan, berkesan serta boleh digunapakai sebagai bahan bukti di mahkamah? Apakah pula kelemahan, masalah dan cabaran yang dihadapi oleh pihak pendakwa dan peguambela di dalam mengemukakan bahan bukti elektronik dan digital?

---

[2]. *Knox lwn State of Indiana*, 93 F.3d 1327 [7th Cir (Ind) 1996] di mana keterangan utama di dalam kes gangguan seksual adalah berbentuk e-mail yang mana penyelia secara berulangkali meminta khidmat seks.

[3]. Sebagai contoh, lihat *People lwn Eubanks & Wang*, Nos C R 6748 (Ca Supr Ct) yang melibatkan pendakwaan terhadap pembocoran rahsia perniagaan oleh bekas Naib Presiden Borland. Salah satu daripada penyalahgunaan yang dilakukan melibatkan kakitangan di Bahagian Jualan, yang menyalahgunakan maklumat mengenai senarai pelanggan, sebut harga dan maklumat pemasaran.

[4]. *First Technology Safety Systems Inc lwn Depinet*, 11 F 3d 641 [6th Cri. (Ohio) 1993].

[5]. *Lauren Corp lwn Century Geophysical Corp*., 953 P 2d 2000 (Colo App, 1998).

[6]. *Kelley lwn Airborne Freight Corp*., 140F 3d 335 [1st Cir (Mass), 1998].

[7]. *Smith lwn SEC*, 129F 3d 356 [6th Cir (Tenn) 1997].

[7a]. *R lwn McShane* [1977] Crim LR 737. Alat rakaman audio visual telah digunakan untuk membuktikan perbuatan jenayah.

[8]. *US lwn Machado* (Feb 12 1998), yang melibatkan penghantaran e-mail ugutan bunuh oleh tertuduh terhadap seorang pelajar Asia yang menuntut di University California.

[8a]. *Taylor lwn Chief Constabel of Cheshire.* [1987]1 All ER 225. Pengawal keselamatan telah mengenalpasti identiti penjenayah melalui CC TV.

Definisi Keterangan Elektronik dan Digital Menurut Akta Keterangan 1950

Penemuan dan penggunaan alat elektronik dan digital telah meningkat secara mendadak sejajar dengan perkembangan era globalisasi. Dalam beberapa dekad kebelakangan ini mahkamah telah membenarkan penggunaan e-mail, SMS, fotograf berbentuk digital, transaksi ATM, rangkaian penggunaan internet, kandungan memori komputer, alat sokongan data komputer, bahan cetakan komputer, video berbentuk digital dan fail audio sebagai bahan bukti yang boleh diterimapakai. Mahkamah juga telah mendapati bahawa bahan bukti yang berbentuk elektronik dan digital dapat memberi maklumat yang jelas lagi terperinci, sukar untuk dimusnahkan tetapi mudah untuk diubahsuai, disalin dan mudah dikendalikan. Isu yang sering dipertikaikan di mahkamah apabila bahan bukti elektronik dan digital dikemukakan ialah berhubung kesahihan dan ketulenan bahan bukti tersebut.

Keterangan elektronik dan digital boleh didefinisikan sebagai sebarang bentuk maklumat probatif yang disimpan atau direkodkan atau disalurkan dalam bentuk elektronik di mana bahan tersebut boleh dikemukakan di mahkamah sebagai bahan bukti untuk menyokong atau menyangkal sesuatu dakwaan. Sumber bahan bukti elektronik dan digital ialah seperti chip VLSI, SDD, *hard disks*, telefon selular, kamera digital, komputer, alat cetak, mesin fotostat, pita sokongan, Kad SDD, alat pengimbas, CD, DVD, VCD, rangkaian internet, perisian dan protokol komunikasi.[8b]

Menurut seksyen 3, Akta Keterangan 1950, istilah 'dokumen' merangkumi sebarang bentuk perkara yang menerangkan atau menghuraikan sesuatu sama ada berbentuk abjad, angka atau tanda atau gabungan satu atau lebih bentuk-bentuk yang dinyatakan di atas bertujuan untuk digunakan atau boleh juga digunakan untuk tujuan merekodkan perkara tersebut. Sebagai ilustrasi, perkataan yang dicetak, litograf atau fotograf merupakan dokumen.

[8b]. Vacca J., *Digital Forensics – Computer Crime Scene Investigation*, Charles River Media 2002.

Persoalannya di sini adakah keterangan elektronik dan digital dapat diklasifikasikan sebagai dokumen dalam konteks seksyen 3 Akta Keterangan 1950?

Berdasarkan ilustrasi seksyen 3 yang dinyatakan di atas, tidak dapat dinafikan bahawa fotograf misalannya adalah merupakan dokumen menurut skop takrifan seksyen 3. Oleh yang demikian, berdasarkan analogi, dapatlah disimpulkan bahawa perkataan 'menerangkan atau menghuraikan sesuatu' tidaklah terhad kepada proses secara manual malah ia juga dapat diinterpretasikan sebagai penerangan atau penghuraian berbentuk automatik, elektronik dan digital. [8c] Good J di dalam kes *Munah Bte Ali lwn PP* [9] telah memutuskan bahawa rakaman video yang melibatkan proses elektronik boleh dikategorikan sebagai dokumen menurut takrifan seksyen 3 Akta Keterangan 1950.

Selari dengan pembangunan sains dan teknologi serta perkembangan era globalisasi istilah dokumen haruslah dikembangkan dengan memasukkan bahan berbentuk elektronik dan digital dalam skop interpretasinya. Ini dapat dilihat menerusi seksyen 3 Akta Keterangan India 1872.[10]

Kepentingan Keterangan Elektronik dan Digital Masa Kini

Kepentingan bahan bukti elektronik dan digital kepada para peguam, pihak pendakwa dan penyiasat tidak dapat disangkal lagi. Penemuan keterangan yang berasaskan elektronik dan digital telah banyak membantu pihak-pihak yang terlibat di dalam pengendalian perbicaraan kes-kes sivil dan jenayah di mahkamah, malah ada yang berpendapat bahawa keterangan elektronik bukan sahaja bertindak sebagai satu kaedah pembuktian tetapi juga berperanan sebagai 'senjata' yang efektif dalam proses pembelaan dan pendakwaan.

Oleh yang demikian, pihak pendakwa, peguambela dan penyiasat sewajarnya meningkatkan penguasaan dan ilmu pengetahuan serta kemahiran di dalam

---

[8c]. S. Augustine Paul, *Electronically Recorded Evidence* [1992] 2 CLJ xxi.
[9]. [1958] MLJ 159, 165 (CA).
[10]. Istilah 'keterangan' bermaksud termasuk sebarang bentuk dokumen termasuk rekod berbentuk elektronik untuk pemeriksaan mahkamah.

bidang teknologi elektronik dan digital. Kefahaman yang mendalam mengenai teknologi elektronik serta istilah-istilah yang berkaitan dengannya adalah penting kerana ini akan banyak membantu mereka di dalam perkara-perkara berikut:

a) Dapat mengenalpasti secara terperinci jenis serta sumber bahan bukti elektronik yang dikendalikan dalam sesuatu kes. Ini akan dapat membantu dan memudahkan pihak mahkamah menangani serta menyelesaikan isu-isu yang timbul atau yang berkait rapat dengannya. Lantaran itu, ia akan membantu menjimatkan masa mahkamah dalam membicarakan sesuatu kes[11];
b) Dapat memahami dengan jelas persoalan pokok (*facts in issue*) serta dapat bertindakbalas dengan berkesan, dengan mengemukakan fakta-fakta yang relevan sama ada untuk menyokong atau membantah; dan
c) Dapat menyediakan dan mengemukakan soalan-soalan yang bersesuaian, munasabah dan relevan terhadap sesuatu isu.

Ini tidak bermakna pihak-pihak yang terlibat harus menjadi atau bertindak sebagai pakar di dalam bidang teknologi elektronik, sebaliknya mereka cuma harus memahami prinsip-prinsip asas teknologi elektronik dalam menyediakan serta mengemukakan soalan-soalan yang relevan agar tidak menyimpang daripada isu pokok sesuatu kes. Dengan pengetahuan yang ada mereka dapat memastikan bilakah sepatutnya mereka perlu mendapatkan khidmat pendapat pakar forensik teknologi elektronik.

Pihak-pihak yang mengabaikan kepentingan, kelebihan serta kecanggihan bidang keterangan elektronik dan digital adalah terdedah kepada tindakan tuntutan malpraktis (malpractice claims).[12]

Penerimaan Keterangan Elektronik dan Digital di Mahkamah

Sejajar dengan hasrat kerajaan dalam merealisasikan aspirasi Wawasan 2020, kerajaan telah menubuhkan pusat Koridor Raya Multimedia (MSC) yang

---

[11]. M.R.Overly, *Effective Discovery of Electronic Evidence*, Orange Country Lawyer Magazine (Jan 1997).

[12]. Chester, *Must Litigators Use Computers or Face Malpractice? Winning With Computers, Trial & Practice in the 21st Century* (Tredennick & Eidelman eds, 1991) .

bertujuan meningkatkan kefahaman dan kemahiran penggunaan komputer serta penerokaan alam siber di kalangan masyarakat Malaysia. Pelbagai kempen telah dijalankan oleh kerajaan Malaysia demi untuk menggalakkan penggunaan komputer, alat-alat elektronik dan digital di kalangan masyarakat, di antaranya kempen 'satu rumah satu komputer'. Pembelian komputer melalui potongan caruman Kumpulan Wang Simpanan Pekerja (KWSP) menerusi kempen 'Oda Saja' dengan kerjasama Pos Malaysia jelas menunjukkan visi dan misi kerajaan untuk menjana perkembangan teknologi elektronik di kalangan rakyat agar bertaraf antarabangsa.

Pendedahan kepada sistem elektronik dan digital terhadap kanak-kanak di peringkat pra-sekolah, sekolah rendah dan menengah adalah merupakan satu langkah yang bijak lagi berkesan oleh pihak kerajaan di dalam mengimplementasikan hasrat murni kerajaan. Ini dapat memastikan bahawa setiap rakyat celik teknologi elektronik.

Dari perspektif sistem kehakiman, adalah didapati bahawa banyak sistem perundangan di negara maju dan membangun telah menerimapakai bahan bukti elektronik dan digital sebagai salah satu kaedah pembuktian yang relevan dan berkesan.

Sebagai contoh, di dalam kes *Tecoglas Inc lwn Domglas Inc*[13] & *R lwn Minors*,[14] Mahkamah Rayuan telah memutuskan bahawa undang-undang keterangan harus mengambilkira realiti dan amalan semasa urusan perniagaan. Penggunaan komputer, mini komputer dan mikro komputer memainkan peranan yang penting dalam masyarakat. Ada kalanya maklumat-maklumat penting dalam sesuatu kes tidak dapat diingat dengan baik tetapi ia dapat dikesan dengan cepat, tepat dan jelas melalui rekod yang disimpan di dalam komputer.

Masalah dan Cabaran Masa Kini

Walaupun tidak dapat dinafikan yang bahan bukti elektoronik dan digital telah banyak memberi kesan positif di dalam kelancaran perbicaraan kes-kes di

[13]. (1985), 51 O.R. (2d) 196 (Ont HC).
[14]. [1999] 2 All E.R. 208 (Eng CA).

mahkamah, namun ia tidak terlepas daripada beberapa kekurangan, kelemahan, masalah dan cabaran di alaf ini. Di antara beberapa masalah dan cabaran ketara yang dapat dikenalpasti adalah seperti berikut:

a) Kelemahan Sistem Pengurusan Bahan Keterangan.

Teknologi maklumat lazimnya kurang terurus berbanding informasi yang berasaskan kertas di mana dokumen-dokumen dijilidkan, difailkan dan dokumen yang berkaitan disimpan di dalam fail yang sama sebagai rujukan apabila diperlukan pada bila-bila masa. Pada kebiasaannya, dalam data komputer, nama fail harus dipendekkan atau menggunakan singkatan dan kadang-kala tidak mengandungi maklumat yang dikehendaki. Pita rakaman juga tidak dikatalogkan dengan baik atau disenaraikan, justeru, ia menyukarkan serta mengelirukan usaha mengesan semula sesuatu pita dengan berdasarkan kata kunci (*keyword*). Di samping itu maklumat berasaskan audio atau video perlu dimainkan semula berulang kali dalam mengkaji serta meneliti sesuatu kes.[14a]

b) Isu Kesahihan (*Authenticity*), Ketepatan (*Accuracy*) dan Keselamatan (*Security*) bahan bukti elektronik.

Bahan bukti elektronik dan digital lebih terdedah kepada korupsi dan pencerobohan. Penyiasatan serta penelitian perlu dilakukan untuk menjamin keselamatan, ketepatan dan kesahihan bahan yang bersumberkan elektronik agar nilai keterangannya (*evidential weight and value*) tidak dipertikaikan. Perlu diambil kira juga ialah manipulasi tarikh dan masa dalam program DOS/Windows.[14b] Di dalam kes *Alliance dan Leicester Building Society lwn Ghahremani*[15], pihak defendan memperkenalkan bukti daripada cetakan komputer berhubung satu senarai untuk membuktikan kebenarannya. Mahkamah berpendapat bahawa adalah mudah untuk mengubah masa/kelendar pada komputer agar sesuatu fail dapat disesuaikan dengan sesuatu tarikh yang dikehendaki. Selain itu, di dalam kes ini juga, maklumat lain berhubung

---

[14a]. Prosise C, Mandia K, Pepe M, *Incident Response and Digital Forensics*, McGraw-Hill (2003) 89.

[14b]. Hosmer C, *Proving the Integrity of Digital Evidence with Time*, International Journal on Digital Evidence, Summer 2002 vol 1: 2.

[15]. [1992] R V R 198 (Eng Ch Div).

ruang kosong dalam disket yang diserahkan kepada mahkamah menimbulkan kemusykilan tentang kesahihan senarai cetakan komputer tersebut. Mahkamah telah memutuskan untuk mengetepikan bukti terbabit.

c) Isu dalam mengkategorikan bahan bukti elektronik.

Isu yang sering juga dipertikaikan ialah sama ada bahan bukti elektronik dan digital harus dikategorikan sebagai bahan bukti dokumentari atau fizikal (*real evidence*) di dalam menentukan kaedah pembuktian (*media of proof*). Menurut Sybil Sharpe, bahan bukti elektronik dan digital boleh diterima oleh mahkamah samada ianya berbentuk dokumentari atau fizikal. Sebagai contoh pita rakaman itu sendiri (*material object*) telah diterimapakai oleh mahkamah sebagai keterangan fizikal apabila kandungan pita tersebut bukanlah merupakan isu pokok kes tersebut, tetapi sebaliknya apabila kandungan bahan elektronik tersebut merupakan persoalan pokok di dalam menentukan ketulenan atau kesahihan maka statusnya akan bertukar kepada keterangan berbentuk dokumentari.[16] Di dalam kes *R M Malkani lwn State of Maharashtra*,[17] Ray J telah memutuskan bahawa apabila mahkamah membenarkan sesuatu bahan elektronik sama ada berbentuk dokumentari atau fizikal untuk penilaian dan pemeriksaan maka bahan bukti tersebut adalah dianggap sebagai relevan dan boleh diambilkira statusnya.

d) Isu dalam menentukan sama ada bahan bukti elektronik dan digital harus dikategorikan sebagai bahan bukti utama (*primary/original*) atau sekunder (*secondary*).

Menurut Viadia Lingam J di dalam kes *Rama Reddy lwn V V Giri*,[18] bahan bukti elektronik merupakan bahan bukti utama untuk tujuan koroborasi (*corroboration*) atau kontradiksi (*contradiction*). Pandangan yang sama telah dinyatakan oleh Thompson CJ. di dalam kes *Ng Yan Pee lwn PP*,[19] di mana bahan bukti elektronik telah diambilkira

[16]. Sybil Sharpe, *Electronically Recorded Evidence* (2002) 18.
[17]. [1973] AIR SC 157.
[18]. [1971] AIR SC 1162, 1166.
[19]. [1959] 3 MC 249, 252.

sebagai bahan bukti utama dalam mengkoroborasikan perbualan pihak tertuduh dalam beberapa situasi yang berlainan.

e) Isu dalam menentukan sama ada bahan bukti elektronik harus diterimapakai dengan berhati-hati (with caution) atau dengan sewenang-wenangnya.

Marshall J di dalam kes *R lwn Maqsud Ali*[20] dengan jelasnya telah memutuskan bahawa segala bentuk bahan bukti elektronik seharusnya diambilkira serta diterimapakai secara berhati-hati. Darjah kewaspadaan di dalam mengambilkira keterangan berbentuk elektronik sebagai fakta relevan adalah bergantung kepada keadaan dan fakta sesuatu kes. Sebaliknya, Ralph Gibson J di dalam kes *Taylor lwn Chief Constabel of Cheshire*[21] telah menyatakan bahawa status keterangan bahan bukti elektronik adalah setaraf dengan bahan-bahan bukti yang lain. Oleh itu sebarang bentuk perhatian khusus tidak perlu diberikan kepadanya.

Memandangkan isu ini mempunyai dua pendekatan yang berbeza maka adalah difikirkan wajar untuk mahkamah menilai serta mengkaji nilai keterangan (*evidential value*) bahan bukti elektronik yang dikemukakan kepadanya. Sekiranya tiada sebarang bantahan atau keraguan dari mana-mana pihak tentang kesahihan, ketepatan serta keselamatan bahan bukti tersebut maka ia boleh dianggap sebagai relevan dan diterimapakai.

f) Isu berhubung bidang kuasa mahkamah untuk menerima atau menolak keterangan bahan bukti elektronik.

Marshall J dalam membincangkan isu kerelevenan dan status keterangan bahan bukti elektronik di dalam kes *Maqsud Ali*[21], telah mengutarakan pendapatnya mengenai sama ada mahkamah memiliki budi bicara untuk menerima atau menolak bahan bukti tersebut. Menurut beliau walaupun isu ini berkaitan dengan isu undang-undang tetapi mahkamah juga

---

[20]. [1965] 2 All ER 464, 469.
[21]. [1987] 1 All ER 225, 229.
[21]. [1965] 2 All ER 464, 469. Lihat *R lwn Nilson* [1968] VR 238 (FC).

mempunyai budi bicara untuk menerima atau menolak bahan bukti tersebut.

Seksyen 136 Akta Keterangan 1950 telah memperuntukkan budi bicara khusus kepada mahkamah untuk menerima atau menolak sebarang bentuk keterangan yang dikemukakan kepadanya. Maka bahan bukti elektronik juga tertakluk kepada budi bicara ini. Sekiranya mahkamah mendapati bahan bukti elektronik yang dikemukakan adalah kukuh dan terhindar dari segala bentuk keraguan maka mahkamah harus menerima serta mengambilkira keterangan tersebut sebagai fakta relevan.

g) Isu sama ada proses perbicaraan di dalam perbicaraan (trial within trial) perlu atau tidak dalam menentukan ketulenan serta kesahihan sesuatu bahan bukti elektronik sebelum ia diterimapakai oleh mahkamah.

Walaupun terdapat tiga kes[22] yang memberikan gambaran secara analogi yang proses perbicaraan di dalam perbicaraan perlu dijalankan dalam memastikan ketulenan serta kesahihan sesuatu bahan bukti elektronik sebelum ia diterimapakai oleh mahkamah namun pada dasarnya ia tidak diaplikasikan secara praktikal.

Mahkamah Agung India di dalam kes *Z B Bukhari lwn B R Mehra*[23] telah menyenaraikan kriteria-kriteria yang sepatutnya diambilkira oleh mahkamah sebelum menerimapakai sesuatu bahan bukti elektronik. Walau bagaimanapun mahkamah tidak pula menyatakan bahawa proses perbicaraan dalam perbicaraan merupakan salah satu kriteria yang perlu diambilkira. Oleh itu bolehlah disimpulkan di sini bahawa proses perbicaraan di dalam perbicaraan bukanlah merupakan salah satu prasyarat yang diperlukan untuk menerima bahan bukti berbentuk elektronik.

---

[22]. *R. lwn Maqsud Ali* [1965] 2 All ER 464; *R lwn Stevenson* [1971] 1 All ER 678; *R lwn Robson* [1972] 2 All ER 699.
[23]. [1973] AIR SC 1788.

h) Isu mengenai bahan bukti elektronik yang dirakam tanpa pengetahuan dan persetujuan tertuduh.

Di dalam kes *Yusufali lwn State of Maharashtra*[24], tertuduh telah membuat bantahan terhadap keterangan yang telah diberikan kepada pihak polis yang telah dirakamkan tanpa pengetahuan dan kerelaannya. Menurut tertuduh, pihak polis telah memerangkapnya dengan menyuruhnya membuat kenyataan yang boleh mensabitkan tertuduh dengan dakwaan.

Menurut Bachawat J, dengan merujuk kepada fakta kes, sebenarnya tertuduh tidak dipaksa membuat sebarang kenyataan. Kenyataan yang telah dibuat adalah secara sukarela. Fakta yang menyatakan rakaman dibuat tanpa pegetahuan dan persetujuannya tidak akan menjejaskan ketulenan serta kesahihan rakaman tersebut. Oleh yang demikian ia adalah relevan dan boleh diterimapakai.[25]

i) Isu sama ada tertuduh berhak mendapat satu salinan bahan bukti elektronik yang dikemukan oleh pendakwa.

Merujuk kepada kenyataan yang dibuat oleh Suffian LP di dalam kes *Khoo Siew Bee lwn Ketua Polis*[26], tertuduh adalah merupakan seorang yang mempunyai kepentingan di dalam kes ini. Oleh itu, dia berhak mendapat satu salinan kenyataan beramaran (*caution statement*) dan berhak untuk memeriksa dokumen tersebut sebelum perbicaraan dimulakan. Kenyataan yang dibuat oleh mahkamah adalah berdasarkan peruntukan seksyen 76 Akta Keterangan 1950 di mana hak untuk mendapatkan satu salinan dokuman awam adalah dibenarkan (*public document*).

Andaian yang dapat dibuat ialah dokumen elektronik telah diklasifikasikan sebagai dokumen di bawah takrifan seksyen 3 Akta Keterangan 1950. Oleh

---

[24]. [1968] AIR SC 147.

[25]. Lihat *R lwn Khan* [1996] All ER 289 (HL). Keterangan yang dikemukakan terhadap tertuduh adalah berdasarkan rakaman pita litar tertutup yang menyalahi hak persendirian. Prinsip asas undang-undang keterangan mengenai keterangan yang diperolehi secara tidak sah adalah ia boleh diterimapakai selagi ia relevan kepada persoalan pokok kes tersebut.

[26]. [1979] 2 MLJ 49.

yang demikian tidak sewajarnya, dari segi prinsip perundangan ia dibezakan dengan dokumen yang berbentuk tulisan, tambahan pula sekiranya dokumen elektronik tersebut melibatkan pengakuan tertuduh terhadap kesalahan jenayah.

Cadangan Untuk Menangani Masalah dan Cabaran terhadap kedudukan barang bukti elektronik dan digital dalam keterangan.

Dewasa ini, dalam era pembangunan elektronik dan digital, kepentingan penggunaan komputer tidak dapat disangkal lagi. Hakikat ini difahami oleh kebanyakan pengamal undang-undang di mana penggunaan dokumen bertulis tidaklah begitu mencukupi dalam membantu menangani serta menyelesaikan kes-kes yang tertangguh di mahkamah. Dalam membantu pengamal undang-undang mempercepatkan urusan mereka mengendalikan kes-kes yang tertangguh di mahkamah, ingin disarankan beberapa cadangan yang dirasakan wajar diambilkira untuk menyelesaikan cabaran dan masalah semasa. Di antaranya adalah seperti berikut:

a) Pengetahuan asas mengenai sistem informasi maklumat adalah perlu diketahui oleh para pengamal undang-undang. Para pengamal undang-undang sepatutnya mengambil inisiatif untuk mendalami bidang ini.[27]

b) Para pengamal undang-undang harus bekerjasama serta berhubung rapat dengan pakar forensik komputer. Bidang teknologi maklumat adalah gabungan di antara bidang sains dan sastera. Kepakaran dalam bidang forensik komputer melibatkan proses-proses penyiasatan dan penapisan data berasaskan komputer dan ini memerlukan kepakaran yang khusus di dalam bidang tersebut. Oleh yang demikian dalam hal ini adalah perlu bagi para pengamal undang-undang bekerjasama dengan pakar forensik komputer untuk membantu mereka mendapatkan pandangan pakar (*expert opinion*). [28]

c) Sebagaimana bahan bukti yang lain, bahan bukti elektronik dan digital harus memiliki elemen-elemen asas yang kukuh supaya ia dapat dikategorikan sebagai keterangan yang relevan. Mahkamah pada

---

[27]. Sillis Cummis, *Basic Computer Knowledge is Crucial*, New Jersey Law Journal, Law Office Technology, September 13, 2004 vol. CLXXVII No. 11 Index 958

[28]. Jiyun Cameron, *Working with Computer Experts*; http://www.technolawyer.com

kebiasaannya akan melihat kepada nilai relevansi (*relevancy*) dan kesahihan (*reliability*) sebelum sesuatu bahan bukti itu diterimapakai. Laporan undang-undang Amerika telah mencadangkan beberapa cara untuk menentukan asas penerimaan sesuatu bahan bukti. Di antaranya dicadangkan supaya menilai mutu alat elektronik tersebut, melihat kepada sistem pengurusan serta ciri-ciri penggunaan alat elektronik tersebut, kesahihan keputusan yang dihasilkan oleh alat tersebut, melihat kepada cara penyimpanan data yang dilakukan melalui alat tersebut, langkah-langkah keselamatan yang diambil untuk mencegah kehilangan maklumat/data dan langkah-langkah yang diambil dalam memastikan ketepatan yang dihasilkan daripada alat elektronik tersebut.[29]

Kesimpulan

Isu berhubung bahan bukti elektronik dan digital adalah merupakan isu hangat yang sering diperbincangkan di dada akhbar dan sering kali isu-isu mengenainya timbul di mahkamah sivil dan jenayah. Persoalan pokok di dalam menangani masalah bahan bukti elektronik dan digital ialah sejauhmanakah ia relevan serta dapat diterimapakai di mahkamah. Dengan merujuk kepada perbincangan di atas dapatlah dirumuskan bahawa status barang bukti (exhibit) elektronik dan digital sebagai keterangan adalah setaraf dengan bahan bukti yang lain apabila seksyen 3 Akta Keterangan 1950 telah memberi pengiktirafan yang sewajarnya.

Penjilidan pita rakaman dan fail-fail di dalam komputer umpamanya, dapat memudahkan urusan pengesanan semula data. Memandangkan bahawa bukti elektronik dan digital boleh diterimapakai di mahkamah, tidak timbul persoalan adakah ia diklasifikasikan sebagai bahan bukti dokumentari atau fizikal kerana apa yang dititikberatkan oleh mahkamah ialah kerelevanan sesuatu bukti itu. Tambahan pula ia dapat dikoroborasikan dengan bukti lain berdasarkan fakta sesuatu kes. Bahan bukti elektronik harus diterimapakai dengan berhati-hati sekiranya terdapat unsur-unsur manipulasi serta elemen-elemen yang mencurigakan kesahihannya. Proses perbicaraan dalam perbicaraan adalah

[29]. Casey E., *Error, Uncertainty and Loss in Digital Evidence*, International Journal on Digital Evidence, Summer 2002 1:1

tidak perlu dalam menentukan kesahihan bahan bukti elektronik jika dilihat dari aspek amalan praktikal (*rule of practice*).

Bibliografi

1. Akta Keterangan 1950
2. Pooley & Shaw, "The Emerging Law of Computer Networks – Finding Out What's There: Technical and Legal Aspects of Discovery" (1996).
3. Vacca J, "Digital Forensics – Computer Crime Scene Investigation", Charles River Media 2002.
4. S. Augustine Paul, Electronically Recorded Evidence [1992] 2 CLJ xxi.
5. M.R.Overly, "Effective Discovery of Electronic Evidence", Orange Country Lawyer Magazine (Jan. 1997).
6. Chester, "Must Litigators Use Computers or Face Malpractice?" Winning With Computers, Trial & Practice in the 21st Century (Tredennick & Eidelman eds., 1991) .
7. Prosise C., Mandia K, Pepe M., "Incident Response and Digital Forensics", McGraw-Hill (2003) 89.
8. Hosmer C., "Proving the Integrity of Digital Evidence with Time", International Journal on Digital Evidence, Summer 2002 vol 1: 2.
9. Sybil Sharpe, *Electronically Recorded Evidence* (2002) 18.
10. Sillis Cummis, Basic Computer Knowledge is Crucial, New Jersey Law Journal, Law Office Technology, September 13, 2004 vol. CLXXVII No. 11 Index 958
11. Jiyun Cameron, Working with Computer Experts; http://www.technolawyer.com
12. Casey E., "Error, Uncertainty and Loss in Digital Evidence", International Journal on Digital Evidence, Summer 2002 1:1

Free Speech and Journalism: Australia Joints the Race to Tighten Up

by
Joseph M Fernandez

> "*:a free speech principle means that expression should often be tolerated, even when conduct which produces comparable offence or harmful effects might properly be proscribed. And that must be because speech is particularly valuable, or perhaps because we have special reason to mistrust its regulation.*"[1]

Introduction

[The author thanks Mr Mah Weng Kwai, advocate and solicitor (Malaysia) and Mr Jack Herman, Executive Secretary, Australian Press Council for their useful comments on an earlier draft of this article. This article is an expanded version of a paper delivered by the author at the "Media and Identity" international conference held in Miri, Sarawak, 15-16 February 2006].

In the aftermath of the September 11, 2001 attacks in the United States the 'free speech' discourse has experienced an accentuated tension between the competing public interests in the freedom of speech on the one hand, and on the other, curbs on that freedom invoking defence and security concerns. This paper examines this tension in the context of the law governing journalism in Australia and Malaysia. It argues that while the legal mechanisms impacting on free speech in Malaysia have long been considered inimical to a healthy democracy, Australian legislators – invoking the 'anti-terrorism' mantra – have joined the fray by making significant additions to their reservoir of laws that offend established freedom of speech principles and practices. The following discussion is confined to the area encompassed by: (a) the period since

[1]Barendt, E., *Freedom of Speech* 2nd Edition, Oxford: Oxford University Press, 2005, at 7.

September 11; (b) two law in two jurisdictions – Malaysia and Australia and (c) the impact – actual and perceived – of the law on the media, and with a particular focus on laws with a "terrorism nexus". To do justice to the question the following discussion must embrace, as far as is practicable, every terrorism-related pinprick upon free speech. Thus, while it may be convenient to merely consider post-September 11 legislative measures having a clear anti-terrorism focus, it is useful not to ignore the existence of other relevant law for dealing with the terrorism threat. For instance, it has been argued that pre-existing laws of freedom of information, trespass, and confidentiality are being more strictly applied in post-September 11. But first, a rudimentary question needs answering – what is *terrorism*?[2]

Terrorism and the search for a definition:

The term 'terrorism' has gained arguably the greatest public profile internationally since the *September 11* attacks, and arguably too, the meaning of the word has confounded the world. As the United Nations Office on Drugs and crime has noted:

> The question of a definition has haunted the debate among states for decades.[3]

---

[2] Space constraints prevent the explication of another key term – *free speech*. The term is complex and permits examination on a number of fronts: see, for instance, Fish, S., *There's no such thing as free speech…and it's a good thing too*, New York: Oxford University Press, 1994, at 102:

> 'Free speech' is just the name we give to verbal behaviour that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviours *that* name when we can, when we have the power to do so, because in the rhetoric of American life, the label 'free speech' is the one you want your favourites to wear. Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes.

Furthermore, *free speech* arguably encompasses more than the right of the speaker – it embraces also the right of the recipient/audience to receive the message. On this point see: (a) Alexander, L., *Is There a Right of Freedom of Expression?*, Cambridge: Cambridge University Press, 2005, at 8; and (b) Gillooly, M., *The Third Man: Reform of the Australasian Defamation Defences*, Sydney: Federation Press, 2004, Chapter 2.

[3] United Nations Office on Drugs and Crime, 17 September 2005, "Definitions of terrorism" http://www.unodc.org/unodc/terrorism_definitions.html (sighted 14 November 2005).

The attacks in New York and Washington, DC in September 2001 have forced a new worldview on terrorism.[4] The UN has "wrestled with the definition since the 1972 attack at the Munich Olympic Games."[5] Thirty years later there are 12 international conventions relating to terrorism but an explicit definition is still missing.[6] Since 1983 the United States has used the following 'basic' definition:

> …an act of terrorism is a premeditated, politically motivated act of violence perpetrated against non-combatant targets by a sub-national group or clandestine agent, usually to influence an audience.[7]

It is suggested that 'terrorism' has the following key elements, most of which require the commission of an 'act': (a) it is premeditated; (b) the reasons for such acts are idiosyncratic, criminal or political (on the latter count it is aimed at changing the existing political order); (c) it is aimed at civilian targets where the direct targets of violence are not the main targets and these immediate victims are generally chosen randomly (targets of opportunity) or selectively (they represent the real targets or the targets are symbolic); (d) it is carried out by groups who are not the army of a country (such groups include clandestine individual, group or state actors).[8] Williams makes a useful distinction – terrorism

---

[4] United Nations ODCCP Update, "United Nations action against terrorism", December 2001: http://www.unodc.org/unodc/newsletter_2001-12-01_1_page006.html (sighted 14 November 2005).

[5] United Nations ODCCP Update, above fn 4.

[6] United Nations ODCCP Update, above fn 4. See also Williams, C., *Terrorism explained: The facts about terrorism and terrorist groups*, Sydney: New Holland, 2004, at 10.

[7] Black, C., Ambassador/Coordinator for Counterterrorism, *The Prevention and Combating of Terrorism in Africa* (Remarks at 2nd Intergovernmental High-Level Meeting on the Prevention and Combating of terrorism in Africa, Algiers, Algeria, 13 October 2004: http:www.state.gov/s/ct/rls/rm/2004/37230.htm (sighted 14 November 2005).

[8] Pillar, P., Council on Foreign Relations, Terrorism – Questions and Answers: http://www.terrorismanswers.org/terrorism/introduction.html (sighted 14 November 2005). The US Central Intelligence Agency (CIA) is guided by the definition of terrorism contained in Title 22 of the US Code, Section 2656f(d):

> The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience: CIA, "Terrorism FAQs": http://www.cia.gov/terrorism/faqs.html (sighted 14 Nov 2005).

For another useful collection of definitions see Thackrah, J.R., *Dictionary of Terrorism*, 2nd Edn, London: Routledge, 2004, at 66-71.

is *politically* but not *criminally* motivated violence.[9] It is noteworthy also that terrorism may be motivated by *religious* considerations although this is not widely recognised in the range of definitions surveyed.[10] Mah describes the difficulty for governments seeking to outlaw terrorism under domestic law:

> In order to overcome the unpredictability of the terrorist acts, governments are tempted into enacting imprecise and sweeping definitions of terrorism. Of course, it does not help that there is no definitive definition at the international level for governments to be

---

[9] Williams, above fn 6, at 7 defines *politically* as "a catch-all to include pretty much everything that is not criminally motivated" but he does not adequately explain *criminally motivated violence* (ibid, at 7-11). Whittaker provides a more helpful distinction between the two – "the fundamental aim of the terrorist's violence is ultimately to change 'the system' – about which the ordinary criminal, of course, couldn't care less…[the criminal] is acting primarily for selfish, personal motivations (usually material gain)": Whittaker, D.J., *The Terrorism Reader*, London: Routledge, 2001, at 9.

[10] On this point see Thackrah, above fn 8, at 71:

Religious terrorism assumes a transcendental dimension, and its perpetrators are consequently unconstrained by the political, moral or practical constraints that may affect other terrorists (Hoffman, 2001 quoted in Williams 2002).

- In Australia, Section 100(1) of the Australian *Criminal Code Act 1995* refers to "terrorist act" which is defined as an "action or threat of an action" which has a certain set of "intentions" – to advance a political, religious or ideological cause; and to coerce or influence the government or the public or a section of the public by intimidation, *and* the action causes physical harm to a person or to property or endangers others' lives or seriously interferes with an electronic system (section 100(2)). Certain actions, however, are excluded – where the action amounts to advocacy, protest, dissent or industrial action; and is not intended to cause physical harm to others (section 100(3)). The provision was discussed in *R v Mallah* [2005] NSWSC 358 (11 Feb 2005): available at http://www.austlii.edu.au, see Para 69ff.
- In Malaysia After *September 11*, the Malaysian government moved to amend the *Penal Code* to expressly criminalise terrorism. The *Penal Code (Amendment) Act 2003* (*PCCA*) received Royal Assent on 17 December 2004 and was published in the Gazette on 25 December 2004: Mah, W.K., "Government response to terrorism" (Conference Paper), XIX Biennial LAWASIA Conference, *Lawasia Downunder 2005*, 20-24 March 2005, Queensland, at 6. However, to date, the *PCAA* has not yet come into force5. The Malaysian definition of "terrorism" in the Penal Code amendment is as follows: *terrorist*: any person who commits, or attempts to commit any terrorist act; or participates in or facilitates the commission of any terrorist act (Section 130B); *terrorist act* means a long list of things and they include: an act or threat of an action within or beyond Malaysia that: (a) involves serious bodily injury to a person; (b) involves serious damage to property; (c) endangers a person's life; (d) creates a serious risk to the health or the safety of the public or a section of the public; (e) involves the use of firearms, explosives or other lethal devices; (f) involves releasing into the environment any dangerous substance; (g) is designed or intended to disrupt the provision of any services directly related to communications infrastructure, banking or financial services etc; (h) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services; (i)

> guided by. However…vague definitions and catch-all clauses are an avenue for abuse and are a compromise on civil liberties.[11]

A further complication arises from what is illustrated by the United Nations *Model Legislative Provisions on Measures to Combat Terrorism* in which "terrorist act" is defined.[12] The *Model Legislative Provisions* presents alternative ways of defining a terrorist act, one requiring a motive and the other not requiring a motive.[13] The challenge to define *terrorism* is compounded by the following undercurrent – the ascription of the term terrorism appears to hinge on:

> …one's point of view. Use of the term implies a moral judgment; and if one party can successfully attach the label *terrorist* to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.[14]

The position in Malaysia post-September 11

The Malaysian legislative framework countenanced the threat of terrorism, inspired primarily by a communist insurgency, decades before the September 11 phenomenon.[15] Accordingly, Malaysia or its precursor, Malaya, responded

---

involves prejudice to national security or public safety – where the act or threat is intended or may be reasonably regarded as being intended to: (aa) intimidate the public or a section of the public; or (bb) influence the federal government or any state government of Malaysia to do or refrain from doing any act. For a critique of these provisions see Mah, above, at 7. Mah cites the following example: If Mr X crashes a large party or meeting and menaces those present with vulgarities and violence it is possible that this may constitute a terrorist act.

[11] Mah, above fn 10, at 3.

[12] United Nations Office on Drugs and Crime (UNODC), *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, New York, 2003, at Para 20. The *Legislative Guide* provides drafting resources. It is periodically updated and is posted on the UNODC web site: www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf (sighted 7 December 2005).

[13] The *Model Legislative Provisions*, option 1 defines the offence as not requiring a political, ideological or religious motivation in addition to the intent to intimidate by killing, damaging or threatening to do so, while option 2 requires such a motive: see *Legislative Guide to the Anti-Terrorism Conventions and Protocols*, above fn 12, at Para 20.

[14] See Whittaker, above fn 9, at 8.

[15] See, for instance, Mah, above fn 10, at 3:

Terrorism is no stranger to Malaysia. As a British Colony, we faced communist inspired terrorism until our independence in 1957. Even then, spates of communist activities continued until 1989. While the communists were always kept at bay and never posed a real danger of installing a

with various legislative measures. Over time, Malaysia has developed a flotilla of laws, some under the broader rubric of national security, which have "added up to a considerable impediment to media freedom and effectiveness".[16] Malaysia has many "statutes which restrict the right of freedom of speech and expression and many of them are extensive in their terms."[17] Of these laws, only a selection of those directly relevant to the present discussion – particularly those that impact on free speech and the media – are discussed here.[18] The laws that remain in the fore as a reckoning force in the media landscape are: (a) *Internal Security Act 1960*; (b) *Printing Presses and Publications Act 1984*; *Sedition Act 1948*; and *Official Secrets Act 1972*.[19]

---

communist regime, they intermittently employed terrorist tactics aimed at disrupting the government and instilling fear into our society. For example, in 1975 the communists shot a number of senior police officers including the Inspector General of Police. They also partially destroyed the National Monument, which was erected to commemorate our victory against the communists during the Emergency from 1948 to 1960.

[16] Rodan, G., *Transparency and Authoritarian Rule in Southeast Asia: Singapore and Malaysia*, London: RoutledgeCurzon, 2004, at 25.

[17] Harding, A., *Law, Government and the Constitution in Malaysia*, Kuala Lumpur: Malayan Law Journal, 1996, at 191. See also Southeast Asian Press Alliance, "Journalism under threat", 3 May 2002: http:www.seapabkk.org/alerts/2002/200205033.html (sighted 30 November 2005).

[18] Other laws which potentially impinge on free speech include: the *Prevention of Crime Act 1959 (Revised 1983)*; *Emergency (Public Order and Prevention of Crime) Ordinance 1969*; *Essential (Security Cases) Regulations 1975*; *Universities and University Colleges Act 1971* and *Discipline of Staff Rules* made under it; *Societies Act 1966 (Revised 1987) Act*; *Trade Unions Act 1959*; sections 121–130A of the Penal Code which deal with Offences Against the State; and contempt of court proceedings.

[19] These laws are commonly cited as the main obstacles to press freedom in Malaysia. They have, for instance, been the subject of complaints received by the Human Rights Commission of Malaysia: see Human Rights Commission of Malaysia (Report) 2003: "A Case for Media Freedom: Report of Suhakam's Workshop on Freedom of the Media", at Para 1.5: see http://www.suhakam.org.my/en/document_resource/details.asp?id=32 (sighted 11 Jan 2006). The same report quotes *malaysiakini* chief editor, Stephen Gan, as stating that 35 laws in Malaysia directly impinge on press freedom (Appendix 6). Gan, on a subsequent occasion, is quoted as saying: "We must obtain the repeal of 20 laws that tend to control the media and replace them by a single freedom of information law" (Reporters Without Borders, *Malaysia – 2004 Annual Report*, 3 May 2004, see http://www.rsf.org/article.php3?id_article=10201 (sighted 9 February 2006). See also, Zainon Ahmad, Country Report (Malaysia), Commonwealth Press Union, 24 February 2003: http://www.cpu.org.uk/forum_2003/cr_mal1.html (sighted 9 February 2006). Zainon singles out the *Printing Presses and Publications Act 1984*, *Official Secrets Act*, *Internal Security Act*, and the *Sedition Act* as laws "which limits (sic) press freedom".

Internal Security Act

Pre-eminent features of this act, originally aimed at safeguarding national security, are its provisions for indefinite detention without trial[20] and the prohibition of judicial review of the Home Minister's discretionary decisions. Other sections enable the imposition of conditions on the detainee, for example, on their political activities and travel abroad.[21] The tentacles of this Act reach into printing presses and publications giving the Minister special powers relating to "subversive publications"[22] and to activity at educational institutions. In respect of the former, the Minister is empowered to prohibit or impose restrictions on the printing, publication, circulation or possession of publications that incite violence, counsel disobedience to the law; lead to a breach of the peace; or are prejudicial to the national interest, public order or security of the country.[23] In respect of educational institutions the Minister may order the closure of an educational institution for up to six months if the Minister deems that the institution is being used contrary to national or public interest.[24] The Act has been applied often and with considerable breadth and force over the years.[25] Its most extensive application in a single instance occurred in *Operasi Lalang*

---

[20] The Minister may order a person to be detained for up to two years to prevent that person from threatening the country's security: section 8(1); and the Minister may extend the period of detention for further periods of up to two years at a time: section 8(7). Section 73 allows any police officer to arrest and detain without warrant, pending inquiries, any person suspected of a breach of section 8. This Act is one of three major statutes that provide for detention without trial in Malaysia: the others are the *Emergency (Public Order and Prevention of Crime) Ordinance 1960*; and the *Dangerous Drugs (Special Prevention Measures) Act 1985* (see Human Rights Commission of Malaysia Annual Report, 2000, at 12). A Malaysian human rights NGO, Suaram, has claimed that some detainees have been held for as long as 16 years: see Kua, K.S. "The ISA is an instrument of state terror" (Media Statement, 25 October 2001), http://www.suaram.org/isa/statement20011025.htm (sighted 28 November 2005).

[21] Section 8(5).

[22] Section 22 empowers the Minister responsible for printing presses and publications to prohibit either absolutely or subject to conditions the printing, publication, sale, issue, circulation or possession or publication of any document that incites violence; counsels disobedience to the law; leads to a breach of the peace; promotes hostility between the races or classes of people; or is prejudicial to the national interest, public order or security of the country. Section 28 makes it an offence to disseminate false reports or make false statements likely to cause public alarm, whether orally or in any printed publication.

[23] Section 22.

[24] Section 41B.

[25] The tally of ISA arrests and detentions in the mid-1990s, according to government figures, was put at 9500: see Kua, K.S., *445 Days Under Operation Lalang*, Kuala Lumpur: Oriengroup, 2000, at 178.

in October 1987 when a total of 106 persons were arrested and detained for varying periods and four newspapers lost their publishing permits (see below). In the post-September 11 period:

> …the Government has repeatedly used the ISA to detain 'terror suspects'. As at February 2005, a total of 102 people were held in detention without trial under the ISA.[26]

A notable former detainee and former parliamentarian, Dr Kua Kia Soong, has described the Act as "an instrument of state terror"[27] whose "specific purpose is to terrorise social activists [and] dissidents",[28] while another former detainee Raja Petra Raja Kamaruddin has written that more Malaysians "oppose the ISA with gusto as never before."[29] It is worth noting, at this point, that at the time of the *Operasi Lalang* crackdown 105 Australian parliamentarians, in a letter to the Malaysian Prime Minister, described the laws under which the arrests were made were:

> …unworthy of a democratic state [and] a gross violation of human rights.[30]

In its 2000 Annual Report the Human Rights Commission of Malaysia (Suhakam) said it was examining laws that provide for detention without trial and would "recommend…their repeal or amendments to restrict their scope".[31]

---

[26] Mah, above fn 10, at 4. More than 80 of those held were suspected Islamic militants, many allegedly linked to the regional Jemaah Islamiah (JI) terrorist group and the local Kumpulan Militan Malaysia (KKM) group.

[27] Kua, K.S., *Malaysian Critical Issues*, Petaling Jaya, Malaysia: Strategic Information Research Development, 2002, at 7.

[28] See Kua Media Statement, above fn 20.

[29] Raja Petra Raja Kamaruddin, *All in the Game*, Kuala Lumpur: Seloka Gelora, 2001, *Prologue*, at (ii). This work contains the accounts of various former ISA detainees. For other accounts of experiences under detention see: S.Husin Ali, *Two faces: Detention without trial*, Kuala Lumpur: Insan, 1996; Dr. Tan Seng Giaw, *The first 60 days: The 27 October ISA arrests*, Petaling Jaya, Malaysia: Democratic Action Party, 1989; Kassim Ahmad, *University Kedua: Kisah Tahanan di bawah ISA* (*The Second University: Account of detention under the ISA*), Petaling Jaya, Malaysia: Media Intellek, 1983; James Wong Kim Min, *The Price of Loyalty*, Singapore: Summer Times Publishing, 1983; Abdul Aziz Ishak, *Special guest: The detention in Malaysia of an Ex-Cabinet Minister*, Singapore: Oxford University Press, 1977.

[30] Kua (2000), above fn 25, at 187.

[31] Human Rights Commission of Malaysia Annual Report 2000, at 13. Detention without trial contravenes Articles 3, 9, and 10 of the Universal Declaration of Human Rights. See also Article 9 of the International Covenant on Civil and Political Rights. The ICCPR, however, appears to

Suhakam subsequently recommended that the ISA "be repealed and for a new comprehensive legislation dealing with subversion" to be introduced.[32] The Commission said that the two main provisions of the ISA, sections 8 and 73, relating to detention without trial:

> …have given rise to grave concerns that they infringe human rights principles and that citizens and non-citizens have been subjected to arbitrary detention and inhuman or degrading treatment whilst in detention…the balance between national security and human rights is currently disproportionately weighted in favour of national security and there are inadequate safeguards against misuse or abuse of the detention provisions of the ISA.[33]

The Commission's recommendations were followed by a number of "positive" developments and evoked an optimistic outlook in 2003.[34] The Commission's response in 2004, however, was more mixed, noting that "numerous developments, negative and positive" occurred in relation to the ISA over the year.[35] The number of ISA detentions increased to 113 (97 the previous year) "in contrast with (sic) the apparent greater restraint in the use of the ISA" noted by the Commission in 2003. The Commission was concerned that detentions were being made in cases "that could be administered under the normal penal system".[36]

Concern also lingers concerning various aspects of the new provisions.[37] As Mah notes, the global trend, post-September 11 has been towards preventive

---

absolve parties to the covenant from covenant obligations in time of "public emergency": Article 4(1).

[32] Human Rights Commission of Malaysia (Suhakam) Annual Report (2003), at 18. The recommendation was made in a report entitled *Report on the Review of the ISA*, at 84.

[33] Human Rights Commission of Malaysia, Press Statement, 9 April 2003, Appendix III in Annual Report (2003), above fn 32.

[34] Human Rights Commission of Malaysia Annual Report (2003), above fn 32, at 18. This included: (a) the passing of the *Penal Code (Amendment) Act 2003* to "expressly criminalise terrorism"; (b) the Malaysian Government's announcement that it will make the ISA more humane; and (c) evidence of greater restraint in the use of the ISA: see also Mah, above fn 10, at 6; and Human Rights Commission of Malaysia Annual Report 2003, above fn 32, at 83ff.

[35] Human Rights Commission of Malaysia Annual Report (2004), at 151.

[36] Annual Report (2004), above fn 35, at 151.

[37] These include: (a) the broadness of the definition of 'terrorist act' so that offences that would not ordinarily be considered terrorism might be caught; and (b) the ease with which the element

detention:

> …September 11 has changed many attitudes…many countries have or are in the process of enacting preventive detention legislation, implicitly endorsing the ISA."[38]

In the USA the *Patriot Act* reflects this. In England a recent attempt to give police powers to detain terror suspects for 90 days without charge was voted down, although parliament allowed a new limit of 28 days detention without trial – double the duration sought under an Australian proposal.[39] Australia recently made similar moves (discussed below). Against this backdrop, the Malaysian's Human Rights Commission's moves to dilute the scope of the ISA is commendable although a repeal of the Act appears remote at this time.

Printing Presses and Publications Act

This Act imposes a licence requirement on printing presses.[40] The provisions of this Act stand in contrast to the Australian approach where there is no mechanism for the revocation of a publishers registration for failure to comply with any rules regarding the publication of material.[41] The Act further imposes a permit requirement on the printing, importing, publishing, sale, circulation or distribution of newspapers.[42] The power and the discretion to grant a permit rests entirely with the Minister concerned.[43] The Act makes it an offence to publish "any false news"[44] and empowers the Minister to refuse the importation or withhold delivery of any publication that is likely to prejudice "public order,

---

of 'intention' to commit a terrorist act may be satisfied; (c) the potential for the authorities to use these provisions to curb legitimate political dissent: see Mah, above fn 10, at 7.

[38] Mah, above fn 10, at 5-6.

[39] Wilson, P., "Labour MPs cost Blair win on terror", *The Australian*, 11 November 2005, at 10. Human Rights Professor, Conor Gearty, commenting on the outcome, said:

The police have been reminded that an arrest should come towards the end rather than at the start of an investigative process: "Can Human Rights Survive? – The Crisis of Authority", Hamlyn Lectures 2005, 12 November 2005, at 1 (http:www.lse.ac/uk/Depts/human-rights/Lectures/Hamlyn_crisis_of_authority.htm – sighted 17 November 2005).

[40] Section 3(1): see also Harding, above fn 17, at 197.

[41] Walker, S., *Media Law: Commentary and Materials*, Pyrmont, NSW: LBC Information Services, 2000, at 975.

[42] Section 5(1).

[43] Section 6.

[44] Section 8A.

morality, security" or which is "likely to alarm public opinion".[45] Licences are valid for 12 months unless withdrawn sooner.[46] Breaches of the PPPA provide for substantial fines and prison terms.[47] Critics of the government have been charged under Section 8A(1) of the Act for "malicious publication of false news".[48] One noteworthy invocation of the Act occurred during *Operasi Lalang*, when four newspapers had their printing licences revoked.[49] More recently the *PPPA* was invoked against newspapers said to have published offensive caricatures arising from the Danish Prophet Muhammad cartoon controversy. On that occasion, suspensions were imposed on two newspapers – one, an indefinite suspension, and the other a two-week suspension following the publication of material containing caricatures of Prophet Muhammad.[50]

---

[45] Section 9. See also Section 7, which regulates "undesirable publications". (Section 7 was invoked in the recent *Sarawak Tribune* case, discussed below). Publications such as *Time*, *Newsweek*, and *The Economist* have previously had their distributions delayed – *Newsweek*, for a report saying Malaysia was a launch pad for the *September 11* attacks: see Author Unknown, "Distribution of three magazines delayed", *The Star* (online), 28 February 2002.

[46] Section 12.

[47] In respect of newspapers, for instance, offenders are liable to up to three years imprisonment or 20,000 ringgit in fines, or to both: Section 5(2).

[48] Human Rights Commission of Malaysia Annual Report (2000), above fn 31, at 13.

[49] A Government White Paper in 1988 explained that the licences were revoked because the newspapers concerned "deliberately projected sensitive issues including those relating to education, language, religion and the rights of each races…without regard to racial harmony, public order and national security": Government White Paper, *Towards Preserving National Security*, quoted in a National News Agency (Bernama) report, in *Daily Express*, 22 March 1988, at 7. Milne et al note that one of the newspapers, *The Star*, "was required to make editorial rearrangements": Milne, R.S. and Mauzy, D.K., *Malaysian Politics Under Mahathir*, London: Routledge, 1999. at 113. More recently it was reported that the Internal Security Ministry has banned 40 titles in English, for breaching the *PPPA*: see Author Unknown, "Ministry bans 40 books and magazines", *New Sunday Times* (Bernama), 28 November 2004, at 7.

[50] Two newspapers were suspended after they published material considered offensive under the Act while a third drew a 'show cause' notice from the Internal Security Ministry. The first case involved a publication in the *Sarawak Tribune*, in its 4 February 2006 edition. The newspaper subsequently expressed "profound regret over the unauthorised publication of a news extract from a foreign newspaper containing a caricature" (Author Unknown, "Further notification of apology", *Sarawak Tribune*, 7 February 2006, at 1). The permit of the newspaper's publisher, The Sarawak Press Sdn Bhd, was suspended indefinitely (see Author Unknown, "Sarawak Tribune suspended with immediate effect", *The Star Online*, 9 February 2006). The Internal Security Ministry, in a statement, said the suspension was made under the Section 6(2) of the *PPPA*. It said the publisher had committed an offence and breached the conditions of the permit issued under Section 6(1). The Ministry also imposed a ban on the offending material under Section 7(1) of the Act. The second case involved the *Guang Ming Daily*, which was suspended for a similar reason, for two weeks from 16 February 2006 (Author Unknown, "Ministry suspends daily for two weeks", *The Star Online*, 15 February 2006). In the third case, the *New*

Legal academic Professor Dr Shad Faruqi has described the Act as "the most important restriction on the print media".[51] And there have been many calls for the Act's repeal.[52] Former Prime Minister's Datuk Seri Dr Mahathir Mohamad's musings about the need to tighten the *PPPA* citing it as "an example of a weakness in the law which must be addressed to curb the spread of lies in the high-tech information world",[53] thankfully has not eventuated. The Act's role in the recent cartoon controversy, however, is likely to have tempered opposition to it, even if fleetingly.

Sedition Act

The Malaysian *Sedition Act* is similar to sedition laws in other common law

---

Straits Times, had a close shave when it too was asked to 'show cause' over its publication of material related to the caricature controversy. Although the publication did not directly contain any banned images, the newspaper was asked to explain why action should not be taken against it for contravening the *PPPA* (see Author Unknown, "The government says: Show cause", *New Straits Times*, 23 February 2006, at 1). Following the newspaper's publication of an apology (Author Unknown, "We apologise", *New Straits Times*, 24 February 2006, at 1) the government announced that no action would be taken against the newspaper because it did not publish the controversial caricatures that sparked the international outcry and because the newspaper had apologised (Author Unknown, "No action against NST", *New Straits Times*, 25 February 2006, at 1).

[51] Shad Faruqui, "The press as servant, not master", *The Star* (online), 24 February 2002. The *PPPA* requirement for a publication licence does not apply to online publications but this, as the chief editor of Malaysia's foremost online news service *malaysiakini* noted recently does not mean that the Internet is completely free:

> While we need not apply for a publication licence, *malaysiakini* has to abide by many other restrictive laws that keep the traditional media in check (Gan, S. (Presentation), Media, Entertainment and Arts Alliance/International Federation of Journalists Conference, "Free Media in a Democratic Society", Sydney, 30 November-1 December 2005).

[52] The Human Rights Commission of Malaysia (Report) 2003: *A Case for Media Freedom*…(Report), above fn 19, at Para 3.2 recommended "repealing provisions which impose excessive restriction on Freedom of the Press" including sections 12(1); 13; 13A; and 13B (these sections pertain to the validity of a permit; its revocation and suspension; the finality of the minister's decision; and the exclusion of the right to be heard, respectively). Note also petitions against the Act addressed to the government signed by 951 journalists: see Inisiatif Wartawan, "Journalists call for Press freedom" (Media Statement), *Aliran Monthly*: http:www.malaysia.net/aliran/monthly/2002/4h.html (sighted 25 September 2003);Wong, C.W., "Need for a wider scope of views, *The Star*, 9 May 1999, at 21; and the same author, "Media rules must change in Info Age", *The Star*, 2 April 2000, at 25.

[53] Loong, M.Y., "Media laws may be tightened", *The Star*, 17 April 2001, at 2.

countries[54] and makes it an offence to utter or publish words having a seditious tendency – these words include those forbidden under sweeping amendments introduced in 1970 that seek to prevent the discussion of 'sensitive issues'.[55] The offence may be committed by the printer, publisher, speaker or writer[56] or one who imports,[57] or possesses seditious matter.[58] The courts are empowered on conviction to suspend a newspaper publishing seditious matter, order seizure of its press, and prohibit an offender from publishing, editing or writing a newspaper for one year after conviction.[59] The Act also provides broad arrest powers.[60] Described as the "statute *par excellence*"[61] that regulates the expression of political views, a long line of often distinguished persons have been snared by the Act's tentacles.[62] It is noted, however:

> The Judges have not embraced the concept of sedition with great enthusiasm…Nonetheless, they have not been disposed to render the Act a nullity by restrictive interpretation, and have clearly

---

[54] In England the offence of sedition was used "extensively and ruthlessly by the Tudor monarchs, who were sensitive to criticism of their governments…and may be traced to the infamous Court of the Star Chamber": see Butler, D. and Rodrick, S., *Australian Media Law*, 2nd Edition, Pyrmont, NSW: Lawbook Co, 2004, at 401. In Australia, there have only been three successful prosecutions for sedition in the past 50 years and "they should not be divorced from the [prevailing] political climate" (ibid, at 403).

[55] Sections 3 describes 'seditious tendency' as, inter alia, a tendency to: (a) bring a Ruler or the Government into hatred or contempt; (b) raise discontent among citizens or to promote feelings of ill-will and hostility between different races or classes of people; and (c) to question any right, status, position, privilege or prerogative protected by the 'sensitive issues' provisions in the Constitution: see Harding, fn 17, at 192. On occasion, however, it would appear that such 'sensitive issues' may be discussed, and the matter forbidden from discussion therein, even spoken of critically: see Agence France-Presse report, "PM declares war on Malay privileges", *The West Australian*, 24 September 2004, at 34, reporting on the Malaysian Prime Minister's first speech as party president at the party's annual congress.

[56] Section 4(1)(c).

[57] Section 4(1)(d).

[58] Section 4(2).

[59] Section 9.

[60] Section 11 permits arrest without warrant of any person committing or attempting to commit an offence under the Act.

[61] Harding, above fn 17, at 192. The claim by Milne et al that it is the "principal instrument used" to curb free speech is, however, debateable: see Milne et al, above fn 49, at 113.

[62] Not all of them, however, were eventually convicted. The targets of sedition actions have included politicians, publishers and lawyers: see Harding, above fn 17, 192-196; Associated Press report, "Malaysians urge King to pardon opposition MP jailed for sedition", *The West Australian*, 1 March 2004, at 22 concerning Mr Lim Guan Eng who was disqualified from contesting in a general election after being convicted of sedition.

> endorsed the conceptual departure from the common-law norm which the 1970 ['sensitive issues'] amendments represent, distasteful as it is to proponents of parliamentary democracy, and, clearly, to some judges too.[63]

In 2003, the Government amended the election law to make it an offence for a candidate to "promote feelings of ill-will, discontent, or hostility."[64] Violators could be disqualified from running for office, and during the March national elections, both the Elections Commission Chairman and the Prime Minister warned candidates not to violate the amended law, but no one was charged under the provision.[65] In 2003, government officials warned that political parties that raised sensitive issues and threatened national stability would be charged under the Sedition Act.[66] In 2003, the editor of the opposition paper *Harakah* was fined 5,000 ringgit for publishing an allegedly seditious article in 1999 regarding the court trial of former deputy prime minister, Anwar Ibrahim, and the year before, opposition leader Lim Kit Siang and a number of his colleagues were arrested for distributing leaflets that criticized then Prime Minister Mahathir's declaration that the country was an Islamic state.[67] Perhaps the most significant Sedition action instituted against the media in recent years was the police raid on the offices of Malaysia's foremost online news service *malaysiakini* resulting in the seizure of several computers and police interviews with the *malaysiakini* editor Stephen Gan and his journalists.[68] A notable instance of an attempt to invoke the Sedition Act, albeit pre-September 11, occurred in 2000 in the case of a prominent lawyer and opposition member of parliament who was charged with sedition. The charge was dropped in 2002. It has been said that "[i]n the history of the Commonwealth, this is the only

---

[63] Harding, above fn 17, at 195.
[64] Country Reports on Human Rights Practices – 2004, Bureau of Democracy, Human Rights, and Labor, US Department of State, 28 February 2005: http://www.state.gov/g/drl/rls/hrrpt/2004/41649.htm (sighted 30 Nov 2005).
[65] ibid.
[66] ibid.
[67] ibid.
[68] See Balmain, A., "Fragile freedom to publish", *The West Australian*, 25 January 2003, at 24. See also Aliran Executive Committee, "Hands off *malaysiakini*! Abolish Sedition Act" (Media Statement), 20 January 2003: http://www.malaysia.net/aliran/ms/2003/0120.html (sighted 15 April 2004).

known instance" of a sedition charge against a lawyer "for remarks made in open court in the defence of a client".[69]

Official Secrets Act

Most countries have legislation preventing the disclosure of material, which could prejudice national security or defence,[70] and to that extent the existence of such an Act in Malaysia is unremarkable.[71] The Malaysian Official Secrets Act, however, possesses certain unusual, if not draconian, features. It provides for a mandatory imprisonment of not less than one year for the unauthorised possession or communication of an official secret;[72] it makes the classification of a matter as secret relatively easy and conclusive, that is, it cannot be questioned in any court of law;[73] and the presumptions operate against the defendant who carries the burden of proof that their conduct did not breach the Act.[74] Human Rights Commission of Malaysia (Suhakam) commissioner Mehrun Siraj is quoted as saying:

> Although the OSA was intended to protect official secrets, the indiscriminate classifying of documents as 'secret' has prevented the public from gaining access to materials such as bills that are being drafted to be tabled before Parliament.[75]

Prominent examples of the invocation of the ISA include the conviction of two local journalists for reporting on matters contained in a military document

---

[69] Dlab, D., "Canadian lawyers defend the independence of the Bar in Malaysia", *The Advocate* Vol. 60 Part 2, March 2002, at 227: http://www.lrwc.org/pub2.php?sid=5 (sighted 2 December 2005). Then Malaysian Prime Minister Dr Mahathir Mohamad is quoted as saying that he "would like very much to hang the lawyers" who "go all out and say things which are nasty…But of course, this is just a wish": Wilhelmson, M. *Lawyers Weekly*, Vol 21 No 47, 19 April 2002, at 8: http://www.lrwc.org/pub2.php?sid=4 (sighted 2 December 2005).

[70] See Walker, (2000), above fn 41, at 790.

[71] There is no *Official Secrets Act* in Australia, although random provisions in Federal and State statutes deal with official secrets. The Australian Press Council has said it "opposes absolutely any proposal to introduce an *Official Secrets Act* in Australia": see *Australian Press Council News*, "Security Sensitive Information", Vol 16 No 1 February 2004, at 8.

[72] Section 8.

[73] Section 16A.

[74] Section 16.

[75] Ng. E. and Begum, F., "Freedom of Info Act needed", *The Star*, 14 September 2001, at 13.

deemed 'secret';[76] and the jailing of Ezam Mohamad Noor, Youth Leader of KeADILan (and a key ally of former deputy prime minister, Anwar Ibrahim) for two years for leaking state secrets.[77] The drastic nature of the OSA, aided by the absence of legislative protection or facilitation for the flow of information such as through Freedom of Information legislation (as Australia has), impedes informed publication. The Malaysian Human Rights Commission has called for a review of the OSA, so as "to confine the ambit of documents liable to be classified as official secrets, and to allow for judicial review of decisions pertaining to the classification of documents as official secrets."[78] More importantly, the mandatory imprisonment provision ought to be removed.

The position in Australia

Two of Australia's media voices at the forefront of vigilance against laws that impede free speech conveniently sum up Australia's post-September 11 free speech climate. The peak journalism entity, the Media, Entertainment and Arts Alliance (MEAA) noted that in the post-September 11 period, Australia has passed a raft of counter-terrorism legislation, which "threaten journalistic independence".[79]

In the post September 11 environment, Australia has seen the most significant tightening of laws restricting coverage in peace time, particularly regarding

---

[76] Zaharom Nain, "State, Media and the Reconstruction of a Fragile Consensus in Malaysia" (Paper) *Empire, Media and Political Regimes in Asia*, Conference, Murdoch University, 26-27 August 2004, Perth, Western Australia, at 3.

[77] Associated Press, "Anwar ally jailed", *The West Australian*, 8 August 2002, at 22.

[78] Human Rights Commission of Malaysia (Report) 2003: "A Case for Media Freedom…", above fn 19, at Para 3.3. The sections singled out for mention are sections 2; 2A; 2B; and 8.

[79] Media, Entertainment and Arts Alliance (MEAA), *Turning Up The Heat: The Decline of Press Freedom in Australia 2001-2005* (Report), 2005, at 6. Walker and Roney in a Memorandum of legal opinion addressed to ABC Television's Legal Department and published on *Media Watch* (http://www.abc.net.au/mediawatch/transcripts/s1499125.htm – sighted 8 December 2005), provide a useful summary of the broader pattern revealed by the new laws – (a) they expand Executive power and discretion outside the judicial process; (b) priority is given to national security imperatives; (c) limits are placed on independent legal advice; and (d) long-espoused ideals of presumptions of innocence, trial by jury, and freedom of association are diluted or abandoned (see Walker, B. and Roney, P., *Memorandum of advice: Re The Anti-Terrorism Bill 2005 & the proposed amendments to the laws of sedition*, 24 October 2005, at 3). To this list we might add that the new laws undermine existing free speech limits.

matters of national security.[80]

The Australian Press Council, the peak body representing Australian newspaper publishers, notes:

> Since 2001 the secretive tendency of governments has been given momentum by the fear of terrorism. Much of the new anti-terrorism legislation, particularly at the federal level, constitutes a significant impediment to free speech.[81]

The MEAA's Federal Secretary, Chris Warren, in his introduction to a document examining press freedom in Australia 2001-2005[82] makes the following key points: (a) some of the strengthened 'anti-terrorism' laws effectively limit free speech and civil liberties; (b) journalists face renewed pressure to reveal the identities of their sources; (c) journalists face increased restrictions in reporting on matters of national security; (d) the balance has become skewed too heavily in favour of security investigators and law enforcers; (e) the new laws governing the peak security agency, the Australian Security and Intelligence Organisation (ASIO), insulates that body from public scrutiny;[83] (f) existing laws, trespass laws for example, are being abused and journalists are being threatened with arrest – in short – "there has been a steady deterioration of freedom of the press since 2001".[84] It may be noted from this list that the concern for journalists arises, not necessarily from new legislation tailor-made to deal with perceived terrorism threats, but also from existing legislation applied unfavourably to the media. They include: (a) Freedom of Information legislation that exists at Federal and State levels;[85] pursuit of journalists' confidential sources[86] and continued

---

[80] MEAA Report, above fn 79, at 5. The Report adds:
[Since September 11] Australian governments, particularly the Federal Government, have taken a harder line on message management, treating information as a commodity to be guarded at all cost…" (at 9).

[81] Australian Press Council, Annual Report No 29, 30 June 2005, at 13.

[82] MEAA Report, above fn 79, at 4.

[83] The expanded ASIO powers and powers to demand documents are discussed in the Senate Legal and Constitutional Legislation Committee Report Nov 2005, at Ch 6.

[84] MEAA Report, above fn 79, at 4.

[85] One account shows that charges notified by the Government in response to FOI requests leapt from $308,689 in 1998-99, to $552,038 in 1999-2000, $1,099,380 in 2000-01 and $825,779 in 2001-02: Herman, J. R. (2004) *The urgent need for reform of Freedom of Information in Australia,* Australian Press Council: http://www.presscouncil.org.au/pcsite/fop/foi.html. Herman

or increased pursuit of leaks of official information to the media[87] (although, in a move that defies the general trend, the government is reportedly planning to introduce legislation giving journalists' sources a right to confidentiality);[88] resort

---

also observes that "agencies which quoted higher amounts tended to have high numbers of applications being withdrawn". In a 2:1 decision the full bench of the Federal Court, dismissed an action by *The Australian* to obtain Treasury documents through FOI legislation. The Treasury was able to withhold 40 reports from the Australian Taxation Office and the Treasury that had been requested by the newspaper's FOI editor, Michael McKinnon: see *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 (2 August 2005). It has been suggested that "[e]ffectively, the decision gives government ministers seeking to protect politically damaging documents a get-out-of-FOI-free card": Author Unknown, "FoI appeal dismissed" *The Walkley Magazine*, Issue 35 October/November 2005, at 5. See also Day, M.. "Walkleys show challenges in a climate of suppression", *The Australian (Media)*, 8 December 2005, at 22, where the author refers to "efforts to roll back accepted freedoms."

[86] For example, Melbourne *Herald Sun* journalists, Gerard McManus and Michael Harvey have been charged with contempt of court for failing to reveal the source of a leaked federal government memorandum: see Robinson, N., "Reporters charged over leaks", *The Australian*, 14 October 2005, 4. The journalists have since challenged the charges in the Victorian Supreme Court: Robinson, N., "Journalist pair challenge charges in Supreme Court", *The Australian*, 10 November 2005, 3.

[87] See MEAA Report, above fn 79, at 9–11. These include: (a) the leaking of a Senate committee's report to a journalist for *The Age*; (b) a raid on the *National Indigenous Times* to seize two Cabinet documents; and (c) a raid on Melbourne radio station 3CR to seize a record of an interview with a lawyer for a terrorist suspect. The Federal Minister for Justice and Customs Senator Chris Ellison told the Senate on 3 August 2004 – in answer to the question, how many investigations has the Australian Federal Police conducted into suspected leaks of information in respect of federal government departments and agencies – that there were 41 investigations from 2001-2003, whereas there were 45 investigations for the three years before that. Notwithstanding a slight drop it illustrates the significance of this issue to the media. The Minister also said 26,507 Australian Federal Police staff hours were expended on investigations between 2001 and Aug-2004: Senate Official Hansard, No 9, 2004, 3 August 2004, Commonwealth of Australia Parliamentary Debates,
http://parlinfoweb.aph.gov.au/piweb/Repository/Chamber/Hansards/Linked/3554-2.pdf (sighted 16 November 2005).

[88] Robinson, N., 10 November 2005, above fn 86, citing government argument in the Harvey and McManus case that it would "soon amend commonwealth legislation giving journalists' sources a right to confidentiality." It is instructive to note that a "professional confidential relationship privilege" created in the *Evidence Act 1995 (NSW) Evidence Amendment (Confidential Communications) Act 1997* (NSW), which introduced a new Division 1A into Part 3.10 of the *Evidence Act 1995* (NSW) although not expressly aimed at journalists and their confidential sources, holds promise after *NRMA v John Fairfax* [2002] NSWSC 563 regarded journalism as 'a profession' (see case on austlii, at Paras 149 and 152). The Australian state, Victoria, has announced that it would introduce law to provide legal protection for journalists facing prosecution for refusing to reveal the identity of a source: see Attorney-General, Victoria (Media Release), "Hulls takes lead on national journalist law reform", 4 November 2005.

to trespass law;[89] tighter controls over photojournalists;[90] and "significantly increased" restrictions on the reporting of immigration issues.[91] The following discussion considers the position in Australia in more detail. It begins with an overview of ostensibly 'anti-terrorism' legislation and then considers particular legislative measures.

An overview of post-September 11 legislative measures

Following on the heels of the September 11 events the Australian government moved to introduce a package of "seven major legislative initiatives" in March 2002.[92] A central part of those initiatives was the *Security Legislation Amendment (Terrorism) Act 2002*.[93] Another key aspect of the amendment package was the enactment of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the *ASIO Act*)[94] which permitted detention under warrant for up to seven days, and allowed interrogation for up to 24 hours of persons who may have information relating to a terrorism offence.[95] The *ASIO Act* also had other provisions of particular concern to journalists. It set out two offences for those who disclose 'operational

[89] According to the MEAA Report, above fn 79, at 13, a "first" in this context occurred with the charging of a journalist with the offence of trespass on Commonwealth land, during coverage of a crisis at the Woomera detention centre in South Australia on 26 January 2002. The charges were later dropped. In another development, an award-winning documentary maker and former ABC producer, Anne Delaney, was found guilty of breaching Queensland's *Corrective Services Act* (section 100) when she illegally interviewed a prisoner: see Hart, C., "Filmmaker guilty of jail interview", *The Australian*, 23 December 2005, at 3. The action against Delaney was described as "part of a growing trend of government secrecy": see Mistilis, E., "The dangers of Queensland's jails", *The Walkley Magazine*, Issue No 36, December 2005/January 2006, at 5.

[90] Stricter rules were introduced through the National Visits Media Card accreditation system in August 2003, making it "easier for police and security officers to corral and control media to designated areas, limit media representation and in some case, prevent photos being taken: see MEAA Report, above fn 79, at 13.

[91] MEAA Report, above fn 79, at 18.

[92] Walker and Roney, above fn 79, at 2.

[93] Ibid. The Act defined the concept of a terrorist act, created categories of terrorism offences, introduced the means for the Executive to determine what would be a terrorist organization, and established the existence of crimes relating to association by way of connections with a terrorist organisations (ibid).

[94] It introduced changes to the *ASIO Act 1979*, Division 3 – Special powers relating to terrorism offences.

[95] Walker and Roney, above fn 79, at 2-3.

information' concerning the enforcement of an ASIO warrant. These two offences "raise the greatest alarm among journalists".[96] They are: (a) the secrecy provisions relating to warrants and questioning (Section 34VAA(1)); and (b) an extension of the former, making it an offence to disclose any 'operational information' that ASIO has relating to a warrant for two years after the warrant's expiry (Section 34VAA(2)). The first of the Section 34VAA offences, in practice, "stops those who have been questioned by ASIO and/or their lawyers from talking to the media".[97] The second, allows that for a period of two years after the expiry of the warrant, it remains an offence for anyone to disclose any 'operational information' that ASIO has or had relating to this warrant.[98] The Act also implies that any journalistic disclosure of ASIO 'operational information' is punishable by up to five years jail.[99] In a submission to a joint parliamentary committee in April 2005, the Australian Press Council said the provisions have "a significant potential to obstruct" the media's ability to ensure that government agencies are held to public account and urged that the provisions be allowed to lapse in accordance with the sunset clause (Section 34Y).[100] The Press Council in its submission to a parliamentary committee said that if the division was extended it wanted certain changes.[101] Following the parliamentary joint committee report[102] the Division was extended for another

---

[96] MEAA Report, above fn 79, at 5.

[97] MEAA Report, above fn 79, at 5:

Despite the possibility that the subject of the warrant might have been arbitrarily arrested and despite and maltreatment he/she may have received at the hands of ASIO officials, there can be no disclosure to anyone for 28 days (ibid).

[98] MEAA Report, above fn 79, at 5

[99] 'Operational information' is broadly defined (section 34VAA(5)) and it "effectively gags any debate about ASIO's activities when a warrant has been issued": MEAA Report, above fn 79, at 6.

[100] *Australian Press Council News*, "ASIO Review", Vol 17 No 2 May 2005, at 5.

[101] Ibid. Among the recommendations made by the Press Council to the Parliamentary Joint Committee were the following: (a) that Section 34G of the ASIO Act be amended so as to place the upon the prosecution the onus of proving that the defendant has the information sought; (b) a removal of the strict liability provisions in Sections 34G and 34VAA; (c) a narrowing of the definition of 'operational information'; (d) limiting the imposition of a penalty only where disclosure threatens national security; and (e) permitting disclosure where the public interest in disclosure outweighs any threat to national security (see also Australian Press Council, Annual Report No 29, above fn 81,at 14-15).

[102] On 30 November 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD tabled its report on the inquiry into the Review of Division 3 of Part III of the ASIO Act 1979: see Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention*

five years "with only minimal changes to the sections seen as threatening to the press."[103] Other legislative measures post-September 11 of concern to the media have included: (a) the *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* amending the *Telecommunications (Interception) Act 1979*, which allows for the Government to obtain a warrant to access stored communications, including sms, multimedia messages, email and voicemail messages posing "a serious threat to the anonymity of journalists' sources";[104] and (b) amendments to Freedom of Information legislation that increased the 'exemption categories' to coincide with confidentiality requirements outlined in the *ASIO Act 2001* and the *Migration Act 1958*.[105]

***Anti-Terrorism Act (No 2) 2005*:**

The media has expressed "grave concerns for the future of free speech in Australia arising from the Federal Government's proposed new anti-terror laws" contained in the *Anti-Terrorism Bill (No 2) 2005*.[106] The Bill subsequently

---

Powers – Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979, Canberra, November 2005.

[103] Communication to author from Australian Press Council Executive Secretary Jack Herman, dated 20 December 2005. In a further communication to author, the Australian Press Council Policy Officer Inez Ryan, dated 19 January 2006, stated:

…the recommendations of [the Parliamentary Joint Committee on ASIO, ASIS and DSD] make little more than a token effort to respond to the APC's expressed concerns regarding the impact of the legislation on the freedom of the press.

[104] MEAA Report, above fn 79, at 6. For a detailed examination of the legislation and its surrounding events see Electronic Frontiers Australia, "Telecommunications (Interception) Amendment (Stored Communications) Bill 2004: http://www.efa.org.au/Issues/Privacy/tia-bill2004-sc.html (sighted 6 January 2005).

[105] MEAA Report, above fn 79, at 8. FOI legislation is founded primarily on the principle of open and accountable government and, briefly stated, entitles applicants to seek the release of information held by government (see, for instance, *Freedom of Information Act 1982 (Commonwealth)*, section 3). The 'exemption categories' refers to matters identified in the respective FOI legislation that are deemed matters concerning which information is not available for release to FOI applicants. Such information traditionally included Cabinet documents; documents affecting national security, defence or international relations (see Act, Part IV). The MEAA Report notes:

The culminating effect of the [FOI] Act's flaws renders the law useless for journalists. It undermines the very foundations upon which it was based – to eradicate secrecy and improve decision-making (at 8).

[106] See, for example: Sinclair-Jones, M., "Laws of Terror – A Public Forum to Discuss Federal and State Anti-Terror Legislation" (Speech), University of Western Australia, 4 November 2005.

passed into law becoming the *Anti-Terrorism Act (No 2) 2005*.[107] It contains a range of provisions that attracted widespread criticism and a flood of submissions,[108] including from a coalition of sixteen leading publishers[109] that included the Australian Press Council.[110] Briefly stated, the new provisions: (a) substantially tighten existing sedition laws; (b) criminalise the reporting of detentions under the anti-terror provisions; (c) do not preclude the detention of journalists so as to preserve evidence relating to a terrorist act; and (d) do not safeguard journalists' confidential sources; and (e) empowers the Federal Police to obtain any documents that they believe relate to the investigation of a 'serious offence'.[111] Of these, the proposed sedition amendments,[112] which attracted considerable concern among free speech advocates, will be considered in more detail.

Sedition Amendments

The amendments of 2005 repeal the existing sedition offences in the *Crimes Act* 1914 (C'wealth) and inserts five new sedition offences into the Criminal Code by adding a new section 80.2 to the existing offence of treason (section 80.1).[113] The publishers' coalition in their submission to a Senate committee described the proposed sedition laws as:

---

[107] Although the Bill went through a review process and 74 amendments were agreed to most of its core contentious provisions were passed into law in early December 2005: see http://www.aph.gov.au/parlinfo/billsnet/billslst.pdf (sighted 10 January 2006).

[108] The Senate Legal and Constitutional Committee received 294 submissions: see Senate Legal and Constitutional Legislation Committee (Report), above fn 83, at Para 1.4.

[109] Merritt, C., "Warning against sedition strictures", *The Australian (Media)*, 24 November 2005, at 15.

[110] For the Press Council submission see: http://www.presscouncil.org.au/pcsite/fop/fop_subs/antiterror.html (sighted 8 December 2005).

[111] *Australian Press Council News*, "Anti-Terrorism Legislation", Vol 17 No 4 November 2005, at 5. The MEAA also voiced similar concerns in its submission to the Senate Legal and Constitutional Legislation Committee: see MEAA (Submission) to Senate Legal and Constitutional References and Legislation Committee, *Inquiry into the Provisions of the Anti-Terrorism (No 2) Bill 2005*, November 2005. The MEAA said it was "most concerned about the impact the provisions covering Preventative Detention Orders (Division 105) will have on journalists."
The MEAA has also cited two recent cases that "demonstrate inappropriate use of the AFP [Australian Federal Police] and criminal law to intimidate people from telling the truth": see Author Unknown "Jailing the Aussie press", *The Walkley Magazine*, Issue 35 October/November 2005, at 5.

[112] Introduced through Schedule 7 of the *Anti-Terrorism Act (No 2) 2005*.

[113] Walker and Roney, above fn 79, at 1.

> …the gravest threat to publication imposed by the government in the history of the Commonwealth.[114]

It has been suggested that the new sedition law would outlaw comments such as those made recently by author John Pilger who, in 2004, agreed that Australian troops in Iraq were "legitimate targets" in Iraq because they were occupying forces.[115] According to legal advice prepared for self-styled media watchdog *Media Watch* such comments would be caught under the new sedition provisions.[116] The advice, further, is that:

> No genuine commentator, religious or ethnic group leader wishing to participate, in legitimate debate on the topic of "terrorism" could be certain that his or her conduct would necessarily fall outside the ambit of the offences in this Bill.[117]

A Senate Committee established to examine the proposed *Anti-Terrorism Bill (No 2) 2005* made 52 recommendations following a lengthy report.[118] The Committee was not persuaded by government reassurances and said it was:

> …troubled by evidence of the potential for 'self-censorship' by a community cautious of the potential breadth of the provisions.[119]

---

[114] Merritt (24 November), above fn 109. Australian Press Council chairman, Professor Ken McKinnon stated:
Even without the threat of such a power Australian editors have already experienced heavy-handed police intrusion into newsrooms seeking non-publication, and the surrender, of documents, unrelated to terrorism, that they think might be embarrassing if published (see *Australian Press Council News*, Vol 17 No 4 November 2005, at 6).
McKinnon cited clause 3ZQO of the Bill which he described as "very threatening in that it will allow an [Australian Federal Police] person to go into any office and seize any document in pursuit of an undefined serious crime": see oral submission, Senate Legal and Constitutional Legislation Committee (Hansard), *Reference: Anti-Terrorism Bill (No 2) 2005*, Sydney, 17 November 2005, at L&C 7. McKinnon also described the existing sedition provisions as "completely anachronistic" and the proposed seditions laws as going "further than is required": *Australian Press Council News*, Vol 17 No 4, above fn 111, at 5.

[115] *Media Watch*, ABC TV, 24 October 2005 (Transcript): http://www.abc.net.au/mediawatch/transcripts/s1489465.htm (sighted 6 November 2005).

[116] Walker and Roney, above fn 79.

[117] Walker and Roney, above fn 79, at 19.

[118] Senate Legal and Constitutional Legislation Committee (Report), above fn 83.

[119] Senate Legal and Constitutional Legislation Committee Report, above fn 83, at Para 5.169.

In one submission to the Senate committee, a legal commentator said re-awakening dormant sedition laws in the name of anti-terrorism "will make these laws available for the broader inhibition of free speech and repression of the normal democratic process".[120] Another legal commentator states that at the very least the increased uncertainty about the scope of the new offences and the potential severity of the punishment for them "would inevitably tend to stifle, or to drive underground, the free expression of opinion and of creative or artistic responses to public and governmental affairs."[121] The amended law, however, is not without some redeeming features – it, for instance, avoids "vague and oppressive concepts in the existing law".[122] As recent events attest, Butler et al were correct in their observation well before the events of *September 11*, that the offence of sedition "cannot be dismissed as a relic of a bygone era".[123] A puzzling aspect of the sedition amendments is the government's haste in enacting the provisions, despite conceding that its flaws should be left to subsequent amendment.[124] It begs the question: "Then, why not wait and get it right the first go?"[125] The Attorney-General Philip Ruddock has argued that the new sedition provisions have been misunderstood and that "commentators have selectively quoted sections of the proposed laws to make their case."[126] At the time of passage into law the sedition provisions were

---

[120] Connolly, C., *Proposed Offences for Sedition in the Anti-Terrorism Bill 2005: Submission to the Senate Legal and Constitutional Committee*, 27 October 2005, at 16.

[121] Gray, P. (Legal Opinion for Peter Garrett MP), *Re The Anti-Terrorism Bill 2005, Sedition and Creative and Artistic Expression*, 28 October 2005, at 6.

[122] Saul, B., Gilbert & Tobin Centre of Public Law, "Briefing on sedition offences in the *Anti-Terrorism Bill 2005*", 1 November 2005, at 3. The author states:

The new sedition offences avoid the vague and oppressive concepts in the existing law of exciting 'disaffection', promoting feelings of 'ill-will', or 'contempt' of the Sovereign [but] the new offences raise important concerns. Old-fashioned security offences are little used because they are widely regarded as discredited in a modern democracy which values free speech. Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more frequently, since they are considered more legitimate (ibid).

[123] Butler, D., and Rodrick, S., *Australian Media Law*, 1st Edition, Pyrmont, NSW: LBC Information Services, 1999, at 336.

[124] The Commonwealth Attorney-General "has committed to reviewing the sedition (and advo cacy) provisions of the Bill next year": Senate Legal and Constitutional Legislation Committee Report, above fn 83, at Para 5.170. The Committee noted:

In that light, the Committee agrees…that it is inappropriate to enact legislation which is considered to be in need of review (ibid).

[125] "Censorship is wrong" (Editorial), *The Weekend Australian*, 19-20 November 2005, at 18.

[126] Ruddock, P., "Sedition laws won't curb the right to criticise Queen and country", *The Australian (Media)*, 8 December 2005, at 17. In this article he makes the following points: (a) an

amended so as to "protect the publication of news reports or commentaries about matters of public interest".[127] More recently it was reported that Ruddock has instructed the Australian Law Reform Commission to review the sedition law.[128]

Conclusion:

"Terrorism", as the UN Secretary General Kofi Annan noted, "strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability."[129] While nations the world over grapple with strategies to confront this threat, they do so against a confusing tide of public support, reticence and scepticism and amidst concern that the way the war on terrorism is being waged "is itself a threat to human security."[130] The following conclusions may be drawn about the post-September 11 legislative changes impacting on free speech in Malaysia and Australia.

(a) Malaysia: The Malaysian free speech climate has been restrictive well before the onset of *September 11*.[131] In the post-September 11 era, Malaysia

---

offence is committed only if the person urges another to overthrow the government, constitution etc "by force or violence"; (b) there is no penalty for 'seditious intention'; and (c) no offence is committed if comments are made "in good faith" with a view to reforming defects.

[127] See also Australian Associated Press, "Anti-terror laws passed", *The Age*, 6 December 2005 (http://www.theage.com.au/articles/2005/12/06/1133829593355.html – sighted 7 December 2005). The amended sedition provisions were noted by Opposition justice spokesman Joe Ludwig as having been greatly improved since the first "extreme" draft was leaked to the public by the Australian Capital Territory Chief Minister Jon Stanhope (ibid). The "public interest" protection is contained in Section 80.3.

[128] Author Unknown, "Review may see terror law revamp", *The Sunday Times*, 5 March 2006, at 22. The ALRC president is quoted in this report as saying that the commission could look to strengthen the 'good faith' provisions to protect journalists, artists and government critics while the term 'sedition' could be replaced with terms such as 'urging force' or 'urging violence'.

[129] *International Instruments Related to the Prevention and Suppression of International Terrorism* (Preface), UN Publication, Sales No E.01.V.3, cited in *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, above fn 12, at Para 5.

[130] Hoffman, P., "Human Rights and Terrorism", (2004) Vol 26 *Human Rights Quarterly* 932, at 933.

[131] See Harding, above fn 17, at 199:

> It is not a satisfactory situation, because the restrictions are considerable enough, even without taking account of the ubiquitous Internal Security Act, to make any politician, journalist, academic, publisher or indeed any citizen, to think twice before placing any controversial views in the public domain…That is not to say that democracy does not

too "has joined the war on terror by enacting anti-terrorism legislation."[132] As Mah notes:

> In Malaysia, our civil rights and our fundamental liberties have been further compromised by the anti-terrorism amendments. We need more effective human rights safeguards for a happy balance to be struck between our security and our liberties.[133]

The existence, and the regular application, of the pre-September 11 arsenal of legislative instruments in Malaysia has, however, obviated Malaysia's need to pursue new legislative initiatives with the same fervour that nations such as the USA, UK and Australia have deemed necessary in recent years. Malaysia's restrictive media regulation framework notwithstanding, the Malaysian media environment, one former editor of the *New Straits Times* notes, "is changing into a more assertive and less malleable one."[134] This perception may be contrasted with that expressed in 1993 that "Malaysia's journalists would be among those most personally damaged by the Mahathir years."[135] Any perceived loosening of the shackles of control over the media may be ascribed to the change in the country's leadership from Mahathir Mohamad to Abdullah Badawi. The view that the hardline approach taken by Mahathir has abated under Abdulllah's watch is illustrated by the reaction to the quashing of the sodomy conviction of former deputy prime minister Anwar Ibrahim[136] and by

---

exist; a considerable degree of freedom remains in spite of legislative attempts to curb it. But the reduction of political space which the law increasingly presents is worrisome…"

[132] Mah, above 10, at 12.

[133] Ibid.

[134] Munir Majid, "Malaysia's dismal rights record?", *New Straits Times*, 18 June 2005: http://www.nst.com.my/Current_News/NST/Saturday/Columns/20050618075436/Article/indexb_html (sighted 18 June 2005). See also Pereira, B., "The Press got it wrong. Dead wrong…", *New Straits Times*, 14 December 2005, at 8 where the writer refers to "the greater leeway given to the media since Datuk Seri Abdullah Ahmad Badawi became Prime Minister in October 2003."

[135] Rehman Rashid, *A Malaysian Journey*, Kuala Lumpur: Rehman Rashid, 1993, at 188-189. Another commentator has noted that the decade since 1987 "has been the most tumultuous period so far for the Malaysian media": Kean Wong, "Malaysia: In the grip of the government" (Chapter) in Williams, L, and Rich, R. (eds), *Losing Control: Freedom of the Press in Asia*, Canberra: Asia Pacific Press, 2000, at 115.

[136] See Lyall, K., "Abdullah ends up the winner", *The Australian*, 3 September 2004, at 9; Sheridan, G., "Ruling shows how much has changed since Mahathir left", *The Australian*, 3 September 2004, at 9, Author Unknown, "Anwar's release shows Malaysia's new road"

what the Malaysian Human Rights Commission has described as the government's professed amenability to make the ISA "'friendlier' and more 'transparent'".[137] But has Abdullah really changed the 'freedom' landscape in Malaysia? Both, hope[138] and caution[139] have been expressed.

It would be more accurate to suggest that the transition from Mahathir to Abdullah Badawi marked a change in personalities…it looks as though, new prime minister or old, it is business as usual in Malaysia.[140]

A good reflection of any loosening of press freedom shackles is the near absence of any progress on recommendations made by the Malaysian Human Rights Commission (Suhakam) in 2003.[141] Abdullah's rule, however, is clearly not characterrised by the tumultuousness of the Mahathir era, nor does Abdullah exude Mahathir's characteristic disdain of the press.[142] On the contrary the Malaysian media is displaying greater robustness in coverage while parliament too is experiencing healthier debate and a greater diversity of views.

(b) Australia: In Australia, one view concerning the recent legislative responses has been that they:

(Editorial), *The Australian*, 3 September 2004, at 14; Netto, A., "Anwar's release ushers in a new era for Malaysia", *Herald*, 12 September 2004, at 2.

[137] Human Rights Commission of Malaysia Annual Report (2004), above fn 35, at 152.

[138] Anwar Ibrahim (former Malaysian deputy prime minister), "Life better after Mahathir, but we've a long way to go", *The Australian*, 1 November 2004, at 13. More recently Abdullah expressed his hope that the new "openness in our Parliament would result in greater recognition for our elected representatives and our system of government": see Firdaus Abdullah, "The freedom to debate", *New Sunday Times*, 19 February 2006, at 4.

[139] See Zaharom Nain, above fn 76, at 9:

…when Malaysiakini was raided by the police in 2003, Abdullah Badawi was heading the Home Ministry (the same ministry that oversees the police, the PPPA, and the Internal Security Act). He was the minister in charge when he was given signed petitions from more than 900 Malaysian journalists on World Press Freedom Day urging for the repeal of the PPPA (and he has done nothing about it). Third, since becoming prime minister, Abdullah Badawi has stated that a publishing permit will not be given to Malaysiakini for fear that it (Malaysiakini) could constitute a threat to national security.

[140] Zaharom, above fn 76, at 10.

[141] See Report on workshop, above fn 19, Chapter 3. These recommendations included the introduction of a Freedom of Information Act; review of the *Printing Presses and Publications Act*, *Official Secrets Act*, and national security laws. "

[142] Milne et al, above fn 49, observed in 1999, at 113: "Mahathir is not enamoured of the press."

> …have no relationship with justice but rather with a perceived fear of the unknown that has been used to frighten the populace into thinking that they are necessary.[143]

For the media, the array of legislation impacting on media practice has grown significantly in recent years imposing greater burdens on them to keep abreast of legislative change often couched in convoluted language that fosters uncertainty. One of the likely but unquantifiable consequences of the above legal scenario is the chilling effect it will have on free speech.[144] Some aspects of this chilling effect may be more obvious or direct, but of concern also are those aspects that are not all that obvious – the *structural chilling effect*.[145] Both manifestations of the *chilling effect* are worrying.

---

[143] Nicholson, A. (former Chief Justice of the Family Court of Australia), "Transgressions – Intersections of Culture, Crime and Social Control" (Speech to the Post-graduate Criminology Society, Melbourne University", 4 November 2005, at 5 (http:margokingston.typepad.com/harry_version_2/2005/11/alastair_nichol.html#more – sighted 12 November 2005). Prof. Nicholson also observed:

> …the fact that the laws are unnecessary, or that it has not been demonstrated that they are necessary, seems to have been completely ignored by their proponents…We are expected to trust undisclosed security briefings delivered to a select few. Trust becomes extremely difficult following the Tampa, the Siev X, the 'children overboard', and the 'weapons of mass destruction' (ibid, at 5-6; he was alluding to various instances in which the government was seen to have misled the public).

[144] Walker and Roney, above fn 79, at 16, state that in the context of the proposed sedition amendments:

> …the inevitable consequence is that, because of the high degree of uncertainty about whether such comments are now seditious or not, the tendency will be to stifle the making of those statements, or even the reporting or repetition of them by others legitimately involved in public debate on such issues.

[145] The term *structural* chilling effect was used by Barendt, E., Laurence, L., Norrie, K., and Stephenson, H., *Libel and the Media: The Chilling Effect*, Oxford: Oxford University Press, 1997, at 192. There the authors refer to the chilling effect in the context of libel law and they identified:

> …another deeper, and subtler way in which libel inhibits media publication. This may be called the *structural* chilling effect. It is not manifest through alteration or cancellation of a specific article, programme or book. Rather it functions in a preventive manner: preventing the creation of certain material. Particular organizations and individuals are considered taboo because of the…risk; certain subjects are treated as off-limits, minefields into which it is too dangerous to stray. Nothing is edited to lessen…the risk because nothing is written in the first place.

Other indirect forms of chilling effect are manifested in the following examples: (a) Fairfax newspapers complied with a police request to withhold news about suspected terrorism while News Limited newspapers appeared to have defied the request or not given any undertaking (see Author Unknown, "How Fairfax tried to be good and missed the terror boat", 15 November 2005, *Crikey*, Item 1: see crikey.com.au); and (b) where the media appears subservient to the official line as illustrated in the following statement in a senior journalist's column – "We now have our police and intelligence services *confirming* that some among us would murder big numbers of fellow Australians to make a political statement" (emphasis mine). (Murray, P., "Make a compact with Muslims", *The West Australian*, 12 November 2005, at 19). Another leading columnist notes the media reliance on "impropaganda" supplied to the media during the November 2005 raids on terror suspects in Melbourne and Sydney:

> …the police media units gave us vivid armchair views…No need to get the crews from Nine, Ten, Seven, the ABC and SBS [Australian media channels] up so early in the morning. No time to arrange embedding. And no matter. The police would provide…such stylish, well-edited footage…(Adams, P., "Raiders and the lost plot", *The Australian*, 15 November 2005, at 14).

A National Land Code?

by
Seah Choon Chye

The preamble to the National Land Code (Act 56 of 1965) reads:-

An act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur, and for purposes connected therewith.

Whereas it is desired to introduce in the form of a National Land Code a uniform land system within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur:

And whereas provision has been made by the National Land Code (Penang and Malacca Titles) Act, 1963, for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the provisions of the National Land Code, and for matters incidental thereto:

And whereas it is now expedient for the purpose only of ensuring uniformity of law and policy to make a law with respect to land tenure, registration of titles relating to land, transfer of land, leases and charges in respect of land, and easements and other rights and interests in land:

Given the never-ending problems at the various land registries and land offices it is hereby submitted the objectives referred to above remain but a utopian dream despite the fact the Code has been in force since 1st January 1966.

The reason for such pessimism is well-known to all conveyancing practitioners (and other affected parties) who have undergone the stress and frustration of presenting dealings and other applications at the land registries or the land offices.

In the early years of the Code the so-called recurring problems were non-issues with the officers and staff at the land registries and land offices as they had been properly trained and clearly understood the fundamental principles of the Torrens System, in particular those relating to dealings by trustees or executors and the correct usage of the prescribed forms.

Alas, officers and staff of such calibre are now extinct and consequently the so-called problems continue to cause undue delay in the registration of dealings at the land registries and the expeditious disposal of miscellaneous applications at the land offices and have seriously undermined public confidence in the administration of land ownership under the Code.

It is not an exaggeration to say that many of our land registries and land offices are currently manned by officers and staff who do not have even a basic understanding of Torrens principles of title registration thereby resulting in erroneous suspension or rejection of instruments of dealing or applications pertaining to land by the self-appointed 'expert' of the Code i.e. the Registrar of Titles (*Pendaftar Hakmilik*) or the Land Administrator (*Pentadbir Tanah*), as the case may be.

While it is not denied that one can appeal to the High Court for relief under s 418 of the Code, the appeal process itself is often slow, cumbersome and will incur additional cost and expense for the aggrieved party.

The reluctance of aggrieved parties to seek relief under s 418 may have indirectly contributed to the increasing arrogance on the part of the '*expert*' at the land registry (an expression which not only includes the *Pendaftar* or the *Pentadbir* but extends also his clerical staff) who refuses to observe the relevant provisions of the Code and enacts '*special*' guidelines rules and procedure applicable only to his own land registry, thereby defeating the aforesaid

stated objective of the Code, that of ensuring uniformity in the law pertaining to the registration of dealings and the approval of other applications relating to land.

For example, an instrument of dealing that may be deemed to be fit for registration at land registries in other states (*or even at other land registries in the same state*) may be suspended or rejected at a particular land registry unless the '*special*' guidelines, rules and procedure promulgated by the *Pendaftar* or *Pentadbir* (or his clerical staff) are strictly complied with, in apparent contradiction of the old saying "*what is sauce for the goose is sauce for the gander*".

In the face of such blatant disrespect for the law and the Code, it is not unreasonable for one to question whether there really is a *national* land code pertaining to dealings in Peninsular Malaysia or whether the registration process and the approval of other applications depends entirely on the discretion (or rather on the whims and fancies) of the *Pendaftar* or *Pentadbir* of that particular land registry or land office.

It is not possible in this article to highlight all the unusual practices and procedures at the various land registries and land offices, save and except, for example, those below that have become so notorious that one is expected to have '*judicial notice*' thereof.

1. (a) Presentation of Dealings at the Shah Alam Registry.

The irregular (and illegal) practice of requiring the issue document of title to accompany the presentation of any instrument of dealing has been in force at the *Pendaftar Hakmilik* Selangor in Shah Alam, for many years.

This '*requirement*' is quite absurd and unfair given the fact the issue document of title often cannot accompany the instrument of dealing on presentation simply because *it is already with the Registry*, awaiting completion of the registration formalities of a previous dealing, one presented *months earlier*.

While it is usual for an instrument of dealing to be accompanied by the relevant issue document of title when presenting an instrument of dealing, it is *not strictly required* under ss 292, 293 and 294 of the Code as it is expressly provided by *s 294(4) that "the fact any instrument is not accompanied by the documents required under this section shall not be a bar to its entry in the Presentation Book"*.

And this is further corroborated by *s 299(1)* of the Code which imposes a statutory duty on the *Pendaftar/ Pentadbir* (where any instrument is fit for registration) to make enquiries with respect to the '*missing*' document (in this case, the issue document of title).

With respect, it is hereby submitted that the *Pendaftar* (or *Pentadbir*) is only permitted under *s 293(1)* of the Code to refuse to accept an instrument of dealing for presentation only if it is not accompanied by the *prescribed registration fee* (including any delayed registration fee, if applicable) and cannot decline to accept presentation of an instrument of dealing merely because it is not accompanied by the issue document of title, in view of the express provisions of *s 294(4)* and *s 299(1)* aforesaid.

It would appear that in enforcing this '*requirement*' the *Pendaftar Hakmilik*, Selangor, has undoubtedly acted in excess of his statutory powers under the Code.

Needless to say, this arbitrary action on the part of the *Pendaftar* has caused much inconvenience and financial loss to innocent parties who are unable to complete the sale of their properties because their titles are still at the *same* Registry awaiting registration of another dealing e.g. a *discharge of charge presented months earlier.*

Further, it has often been erroneously assumed that the *Pendaftar* (or *Pentadbir*) has the power to *suspend or reject* under *s 298* of the Code any instrument of dealing *which is otherwise fit for registration* on the ground the issue document of title did not accompany the instrument of dealing on presentation thereof.

Upon a proper reading of the provisions of *s 298*, it is submitted an instrument *of dealing (which is otherwise fit for registration)* may only be *suspended* under *s 298(2)* on the following grounds:-

(a) formal defect or clerical error in the instrument;
(b) being a lease, sub-lease or charge, it has not been accompanied by a duplicate thereof as required by s 294(1)(b);
(c) in the case of an instrument of dealing executed by an attorney, for non-compliance with s 294(3)(a) read together with s 309;
(d) in the case of an instrument of dealing executed by a management corporation, for non-compliance with s 294(3)(b) read together with s 47(3)(c) of the Strata Titles Act 1985.

It is submitted that the appropriate provision to be applied in the event the '*missing*' document is the issue document of title should be *s 299(1)* which requires the *Pendaftar* (or *Pentadbir*) to "*make such enquiries with respect to the missing document and take such action for securing its production*".

In the case of presentation of dealings at the *Pendaftar Hakmilik* Selangor in Shah Alam, since the '*missing document*' is already in his custody in connection with the registration of a dealing presented earlier, the *Pendaftar* is obviously under a statutory duty to exercise his discretion under *s 299(1)(a)* to dispense with the production of the issue document of title and register the instrument *AFTER* the earlier dealing has been duly registered in accordance with the priority system of registration laid down in *s 300(1)(a) and (b) of the Code*.

With due respect, the *Pendaftar Hakmilik* Selangor should realise and acknowledge that he is in breach of his own *Registry's Client Charter* by failing to complete the registration formalities speedily and should be held accountable for the injustice caused to aggrieved proprietors who cannot sell their properties on account of this abnormal practice *not authorised* under the Code.

It is an accepted and indisputable principle of law that a person should not be permitted to benefit from his own default.

(b) Need to produce assessment rates receipt.

With respect to the *Pendaftar* (or the *Pentadbir* at other land offices in Selangor) while it is not denied that evidence of payment of *quit rent* is statutorily required under *s 301A*, there is *no* provision under s 301A or anywhere in the Code whereby production of the relevant *assessment* receipt is necessary to determine whether the instrument is fit for registration under the conditions set out in *s 301*.

Matters concerning assessment rates are under the jurisdiction of the relevant local authority as provided under the Local Government Act 1976 and the Pendaftar/ Pentadbir should not usurp the functions of the local authority unless he is statutorily empowered to do so under the provisions of the Local Government Act 1976 or the Code.

It would appear therefore the *Pendaftar/ Pentadbir* has again *acted in excess* of his statutory powers in this regard.

2. Presentation of Dealings at the Kuala Lumpur ('KL') Land Registry

The *Pendaftar/ Pentadbir* of the KL land registry has recently introduced a '*special*' ruling i.e. that no memorandum of transfer (*Borang 14A*) may be accepted for presentation under s 292 of the Code unless it is a form printed under *s 376 ("the Government Printer's form")* or if reproduced by the legal firms themselves (as permissible under *paragraph 3* of the Tenth Schedule), the *Borang 14A* must follow the exact format of the Government Printer's form.

With due respect to the *Pendaftar/ Pentadbir* concerned, there is *no* provision anywhere in the Code that requires the reproduced form to be an *exact duplicate or replica of the Government Printer's form.*

It is submitted it would be foolish and nonsensical to follow the exact format of the Government Printer's form, which itself has been printed haphazardly and contains the following defects or deficiencies:-

(i) the space allocated for completing the *transferor's* particulars as required under s 208 and s 436A is *inadequate* if there are *several* proprietors involved in the same transfer;

(ii) Likewise, the space provided for completing the transferee's particulars as required under s 208 and s 436A aforesaid (including their signatures) is clearly insufficient in the event more than two transferees intend to accept the transfer;

(iii) it is unnecessary and wasteful to reserve the whole of page 3 of the Form for the transferee attestation clause when only one-half of page 2 is deemed sufficient for the transferor attestation clause;

(iv) it is irrational to allocate the whole of page 4 of the Form for completing the particulars of the land given that the majority of land transactions involves one or two titles only.

It would be far more practical and sensible when reproducing the prescribed form (*Borang 14A*) to provide for and ensure there is sufficient space therein for completing the particulars of the parties including their signatures.

It should be emphasised that there is no provision in the Code or the Tenth Schedule thereto governing the spacing of a prescribed form save and except for the provision in paragraph 6 of the Tenth Schedule requiring the prescribed form to be in A3 size (i.e. a width of 420 millimetres and a length of 297 millimetres).

SK Das in *The Torrens System in Malaya* (at page 397) declares:-

> *Every system of Torrens legislation contains a provision permitting the registrar some latitude in registering a document modified or altered in expression to suit the circumstances of every case and any variations from such forms respectively in any respect not being a matter of substance.*

The views of the learned author has been duly corroborated by the following provisions of the law:-

(i) the proviso to *s 207(1)* of the Code which provides that "*the form so specified for any dealing may, so long as the variation is not in a*

matter of substance, be used in any particular case with such adaptations alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case".

(ii) *Section 62 of the Interpretation Acts 1948 & 1967 which states that "any law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead".*

The provisions of s 62 aforesaid has been duly affirmed by the Federal Court in *Jacob v Oversea-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 wherein the Court held it is permissible to make variations to a statutory form (in this case, Borang 16E of the Code) in accordance with the provisions of s 62 aforesaid.

The arbitrary, irregular and improper practice of the *Pendaftar/ Pentadbir* of the KL land registry in regard to the memorandum of transfer Borang 14A has caused grave injustice and much inconvenience to innocent parties and has given rise to the perception that the registration of dealings at the KL land registry is not governed by the Code but by '*special*' provisions laid down by the *Pendaftar/ Pentadbir* concerned which in effect would nullify the provisions of the Code enacted by Parliament in 1965.

The *Pendaftar/ Pentadbir* of the KL land registry should come to his senses and heed the advice of the learned author SK Das in *The Torrens System in Malaya* expressed, at page 398: -

> *Forms are good servants but bad masters.* Since an instrument dealing with land is inoperative until registration, the effect of refusing registration would entail serious consequences. *The task of the proper registering officer is to facilitate, not to hamper dealing in land.*

In addition to the misconceived ruling on the prescribed form of dealing, there are other special '*requirements*' imposed by the same *Pendaftar/ Pentadbir*, e.g.:

(a) Need to produce photostat copies of the identity cards of the parties to the dealing duly certified by the attesting solicitor.
The *Pendaftar/ Pentadbir* has again exceeded his statutory duties by stipulating this '*requirement*' as nothing contained in s 436A(1) and (2) requires the production of copies of the identity cards other than stating (in the prescribed form) the number of the identity card and the name of the party as appears in his identity card issued under the National Registration Act 1959;

(b) Need for the transferor to present himself at the land registry to sign a document to satisfy the *Pendaftar/ Pentadbir* that he is the person referred to as the transferor in the *Borang 14A*.
This '*requirement*' is absurd given the identity of the transferor has been duly verified by the attesting solicitor (in the attestation clause) who would in any event be liable for professional negligence and/ or breach of an implied warranty of authority in the event the transferor should turn out to be an imposter. (as in *Lau Tek Sen @ Lau Beng Chong & 3 ors v SK Song* [1995] 2 CLJ 425).

Would the Prime Minister and his Cabinet Ministers be amused if they were required to appear personally for this purpose at the KL land registry in the event they are selling or transferring their properties?

This '*requirement*' is another example of bureaucratic incompetence and ignorance.

The *Pendaftar/ Pentadbir* does not appear to understand that "*it is not his duty to require proof negativing fraud or improper dealing where there is nothing on the face of the document submitted to suggest it, nor to inquire into unregistered interests*" (SK Das, The Torrens System in Malaya, at page 330).

It would appear that by acting in the manner aforesaid, he may have *unwittingly deprived himself* of the *statutory protection* conferred under *s 22* of the Code which reads as follows:-

> *No officer appointed under this part shall be liable to be sued in any civil court for an act or matter done, or ordered to be done, by him in good faith and in the intended exercise of any power, or the performance of any duty, conferred or imposed on him by or under this Act.*

It is hereby argued that the said *Pendaftar/ Pentadbir* at the KL Registry is not entitled to be protected under *s 22* for the following reasons:-

(i) he cannot assert that he has acted *in good faith* as by insisting that the transferor must be personally present at the Registry to confirm that he/ she is the transferor named in the transfer Form 14A and did execute the said instrument, he (the *Pendaftar/ Pentadbir*) suspects either the signature of the transferor may be a forgery or the transferor did not understand the nature and contents of the instrument executed by him/ her as certified by the attesting solicitor in the attestation clause;

(ii) he cannot claim to have acted "*in the intended exercise of any power or performance of any duty, conferred or imposed on him by or under this Act*" as his action is not authorised or empowered under the Code because the responsibility of ensuring that the proprietor/ transferor is not an imposter or did understand the nature and contents of the instrument, rests *entirely on the attesting solicitor* who has affixed his signature in the attestation clause.

(iii) Since the said '*requirement*' by the *Pendaftar/ Pentadbir* is not authorised or empowered under the Code, the attesting solicitor may have a prima facie case of *defamation* against the *Pendaftar/ Pentadbir* and his employers could be vicariously liable since the said action by the *Pendaftar/ Pentadbir* was committed in the course of his employment.

(*It may be pertinent to point out that the identity card particulars of a transferor may be readily verified by the Pendaftar/ Pentadbir from the previous memorandum of transfer in favour of the transferor registered and kept by him pursuant to s 375 of the Code and it is therefore submitted that the requirement of producing a copy of the identity card is superfluous and unnecessary*).

3. Dealings by Trustees and Executors

Dealings by trustees and executors were non-issues when the Code first came into force on 1st January 1966.

This is due to the fact that the officers and staff at the land registries then were fully conversant with the fundamental principles and objectives of the Torrens System under the preceding Land Code (Cap 138) one of which is *to keep trusts off the register.*

This has been clearly set out under *s 161* of the preceding *Land Code (Cap 138)* which read as follows:-

> The proper registering authority shall not make any memorial of the particulars of any trust, nor shall any instrument be registered under this Enactment which declares or contains trusts relating to land, but any such instrument or a duplicate or certified copy thereof may be deposited with the proper registering authority for safe custody and reference: provided that nothing herein contained shall prevent the registration of any instrument otherwise in itself fit for registration in which a reference may be made to such deposited instrument, nor shall such reference operate as notice of the particulars of the trusts declared or contained in such deposited instrument, but *in the absence of caveat the proprietor shall for the purpose of transfer, charge or lease be taken and deemed to be the absolute proprietor of such land freed from the said trusts.*

The provisions of s 161 have been endorsed by the learned author SK Das in *The Torrens System in Malaya*, at page 288.

In other words, the fact that a proprietor has been described as a trustee in the title does not affect his capacity and power as a proprietor to transfer the land, unless a caveat has been lodged before presentation of the transfer.

This fundamental principle and objective of the Torrens System may best be explained by reference to a passage of the judgment of the Court in *Wolfson v*

Registrar-General (1934) 51 CLR 300 page 308 per Rich and Evatt JJ citing the words of Richmond J in *George v Australian Mutual Provident Society* (1885) 4 NZLR SC 165, 171-2 that "*I am not here at present concerned to see to the administration of the trust, nor are the purchasers*" (see SK Das, *The Torrens System in Malaya*, at page 289).

The provisions of *s 161* of the preceding *Land Code (Cap 138)* have been adopted and incorporated under the following provisions of the present Code:-

(i) *Section 301(d);*

(ii) *Section 344(1) (2) and (3).*

The provisions of *s 301(d)* and *s 344* have also been mentioned in the following manuals published by the relevant authorities i.e. *Manual for Land Administration* published by the *Federal Lands and Mines Department 1980* (at page 158 in the English version) and reproduced at page 220 of *A Manual on the National Land Code* published by *Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad 2002* which read as follows: -

> 24. Instrument executed by trustee/ trustees.
>
> 24.1 *Section 301(d)* of the NLC provides that an instrument of dealing should not declare or except as permitted by s 344, disclose the existence of any trust. This means that if Abu transfers his land to Hassan as trustee for his son, Ismail, the words "for Ismail" cannot be added after the words "Hassan as trustee" in the instrument.
>
> 24.2 *Under s 303(d)* of the NLC, in respect of a dealing by a person/ body registered as trustee, the RT/ LA *should not be concerned* to enquire whether the dealing is inconsistent or not with the trust by which the land or interest in question is affected or contrary or not to any prohibition or limitation in the instrument creating the trust.

Notwithstanding such directives from their own department, as published in the aforesaid Manuals, the *Pendaftar/ Pentadbir* at many land registries continue to *suspend or reject* instrument of dealings executed by *trustees* for

the following 'reasons':-

(i) the trustees' failure to obtain the written consent of the beneficiaries; or

(ii) the trustees' failure to first transfer the land to the beneficiaries who should simultaneously execute another transfer in favour of the transferee/ purchaser (i.e. double transfers); or

(iii) the trustees' failure to obtain an order from the High Court before they can sell the land.

This blatant disregard for the fundamental objective of the Torrens System and the directives of their own department only goes to confirm the arrogance and ignorance of the *Pendaftar/ Pentadbir* concerned, who should be transferred to another department before his misconceived ideas cause irreparable loss and damage to the interests of investors in real estate (foreign as well as local) in this country.

Likewise transfers executed by *executors* are frequently subjected to suspension or rejection at many land registries for similar '*reasons*'.

While it is not disputed that an administrator (*'pentadbir'*) is not competent to transfer the land unless an order of court has been obtained as stipulated under s 60(4) of the Probate and Administration Act 1959 ('the Probate Act'), the position of an executor (*'wasi'*) is quite different.

Under s 60(3) of the Probate Act, an executor

> … *may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject any* <u>*restriction*</u> *which may be imposed in this behalf by the Will of the deceased*, and subject to this section:
>
> Provided that an executor may dispose of any property <u>*notwithstanding*</u> any restriction so imposed if he does so in accordance with an order of the Court.

In view thereof, the *Pendaftar/ Pentadbir* has erred in requiring an *executor*:-

(i) to first transfer the property to the beneficiaries and then for the beneficiaries to execute another transfer pursuant to the sale purchase

agreement entered into between the executor of the one part and the transferee of the other part; or

(ii) to obtain the written consent of the beneficiary/ beneficiaries for the transfer in favour of the transferee; or

(iii) to obtain an order of the Court to transfer the property to the transferee/ purchaser.

Or as SK Das puts it succinctly in *The Torrens System in Malaya*, at *page 464, "He [the executor] has powers to sell or charge unless the Will forbids it"*.

It should also be noted that *s 303(d)* of the Code also bars the *Pendaftar/ Pentadbir* from enquiring into whether the dealing by a person registered as *trustee or representative (e.g. an executor)* is consistent with the trusts by which the land or interest in question is affected or contrary to any prohibition or limitation in the instrument creating the trusts (e.g. the will).

The powers of an executor to sell without first obtaining a court order, any immovable property vested in him (*in the absence of a restriction in the will*) has been affirmed by the High Court in the following cases:-

(i) *Khoo Cheong Puay v OCBC* [1935] MLJ 93

(ii) *Re: Estate of Teoh Cheow Choon* [1994] 4 CLJ 575.

Notwithstanding the aforesaid authorities, the provisions of the Code and the law, the *Pendaftar/ Pentadbir* at many land registries seem to be still unable to distinguish between the powers of an executor ('wasi') from that of an administrator ('*pentadbir*') and continue to query, suspend or reject dealings executed by an executor causing much inconvenience and undue delay in the registration process.

4. Execution of Dealings by Corporations

The provisions relating to the execution of an instrument of dealing by a corporation are set out in s 210(3) of the Code which read as follows:-

The execution of any such instrument by a corporation

(whether aggregate or sole) shall be effected in such manner as is authorised by its constitution, or by any law for the time being in force:

Provided that, without prejudice to the power of corporations aggregate to adopt any other manner of execution authorised as aforesaid, any such instrument bearing –

(i) the *seal* of such corporation, and

(ii) a *statement*, signed by the *secretary* or other permanent officer thereof, or his deputy, and by a *member of the board of directors*, council or other governing body, to the effect that the seal was affixed thereto in their presence,

shall, in favour of any purchaser, be deemed conclusively to have been duly executed by that corporation.

The effect of the proviso to *s 210(3)* is that if a limited company (corporation aggregate) executes in favour of a purchaser an instrument of dealing (e.g. transfer in Form 14A) under its common seal *endorsed* with a statement signed by the *secretary* and a *director* that the seal was affixed in their presence, it is not necessary for the *Pendaftar/ Pentadbir* to demand additional documents (e.g. a copy of the resolution of the company) to ascertain whether the instrument has been executed in accordance with the constitution of the company.

This has been affirmed by the High Court in *Island & Peninsular Development Ltd. & Anor v Registrar of Titles, Kedah* [1973] 2 MLJ 69.

The learned judge observed that "*the seal of the Company and the statement duly signed by the secretary and the director are sufficient in the circumstances to indicate by reasonable inference that the transfer [by the Company] are in accordance with the constitution of the Company" and added further in his judgment that "the filing of any certificate or document not required under the Code would not, in my view, affect the fitness for registration of an instrument as long as the conditions under s 301 are complied with and the registrar is satisfied that such instrument is fit for registration*".

Accordingly, the practice at many land registries in insisting on the production of various documents (e.g. M&A, resolution, Forms 24 & 49), notwithstanding the fact that the instrument of dealing executed by the Company complies with the proviso to s 210(3), is irregular and should be discontinued as it contradicts and undermines the express provisions of s 210(3).

However, in the event a company incorporated locally under the Companies Act 1965 is the *transferee* under the Form 14A, it is conceded that the *Pendaftar/ Pentadbir* is entitled under the provisions of *s 302(1)* of the Code to verify (by requiring the production of the Form 24 issued by the Registrar of Companies) whether the transferee company is a '*foreign company*' within the definition of s 433A.

Save and except as aforesaid, it is therefore submitted that a *transferor* company which has complied with s 210(3) of the Code should not be required by the *Pendaftar/ Pentadbir* to submit the various documents referred to above as such documents are unnecessary and superfluous *in view of the conclusive presumption proviso in favour of the purchaser under s 210(3).*

5. Transfer subject to Lease/ Charge

The transfer of property subject to an existing lease or charge is often suspended by the *Pendaftar/ Pentadbir* on the ground it is not fit for registration unless the written consent of the lessee or chargee has been obtained.

It is submitted the *Pendaftar/ Pentadbir* has erred in this regard.

There is no provision in the Code prohibiting the registration of such dealing without the consent of the lessee or chargee.

In point of fact, it is expressly provided under *s 215(3)(a)* of the Code that upon registration of the transfer, the transferee shall hold the land subject to "*any lease, charge or other registered interest subsisting in respect thereof at the time the transfer is registered*".

While it is not denied that the land registry may suspend the transfer under s 298(2)(a) of the Code for "*formal defect or clerical error*" should the particulars of any existing lease or charge be omitted in the Schedule to the transfer (Form 14A), it is further submitted that, in the event the land registry had inadvertently overlook this "*formal defect or clerical error*" and registered the transfer, the interest of the lessee or chargee remains *unimpaired by virtue of s 215(3)(a) aforesaid*.

It would appear the *Pendaftar/ Pentadbir* may be confused between the registration of *a transfer* (*Form 14A*) with that of a lease (*Form 15A*).

It is expressly provided under *s 226(1)* that the *consent of the existing chargee* is required before the *lease* may be granted and such consent has in fact been incorporated in the lease Form 15A itself.

On the other hand it should be noted that *no such consent* has ever been incorporated in the transfer Form 14A nor is there any provision in the Code stipulating that such consent is necessary, either from an existing lessee or chargee on account of the express provisions of *s 215(3)(a)* aforesaid.

If in doubt, the *Pendaftar/ Pentadbir* should refer to *s 215(3)(a)* and refrain from making hasty decisions that would have the effect of delaying the registration process by requiring unnecessary letters of consent which would contradict or undermine the express provisions of *s 215(3)(a)* aforesaid.

6. Creation of Additional Charges

The *Pendaftar/ Pentadbir* often queries, suspends or rejects the creation of a second or subsequent charge in favour of a *different* chargee, on the ground that the consent of the existing chargee is required.

Such '*requirement*' is totally misconceived and contradicts the powers conferred on a proprietor to create second or subsequent charges conferred by s 241(2) of the Code.

There is no provision in the Code restricting the right of a proprietor to create second or subsequent charges in favour of other chargee(s) unless the first or prior chargee has given its consent nor has any consent clause (*as in lease Form 15A*) ever been incorporated in *charge Form 16A* prescribed under the First Schedule.

If the second or subsequent charges are fit for registration under the conditions set out in s 301 (and s 301A) of the Code *and accompanied by the issue document of title*, there is a statutory duty on the part of the *Pendaftar/ Pentadbir* to complete the registration formalities and the consent of the first chargee (who has legal custody of the title under s 244(1) of the Code) may be presumed by the release of the issue document of title to the solicitors concerned for the purpose of creating the subsequent charge(s).

In any event the interest of a first chargee would not be impaired by the creation of the second or subsequent charge as he has priority over any second or subsequent chargee in the distribution of the proceeds of sale under s 268 in an action initiated by the first chargee pursuant to the default of the proprietor/ chargor.

7. Inclusion of Relevant Particulars in Forms of Dealing

It is provided under *s 208(1)(a)* of the Code that every instrument effecting any dealing shall specify "the full name and address, and (*where appropriate*) the occupation or conjugal status, of *every person or body claiming thereunder*".

In addition, s 436A also states: -

> (1) *In making any application under this Act, or in completing any Form in the First Schedule or under any subsidiary legislation made under this Act, which requires the name of a person to be inserted, there shall be included, in the case of a natural individual a description of his citizenship, and the number of the identity card issued to him under the National Registration Act 1959, or where no such*

identity card has been issued to him, the description and number of his passport, or other official document of identity, and the case of a company, corporation, society, association or other body a statement as to its identity, the law under which it is constituted and whether or not it is a foreign company as defined in s 433A:
Provided that this section shall not apply in respect of the name of a public officer acting in his capacity as a public officer.

(2) *The name of any natural individual to be inserted in any Form in the First Schedule or under any subsidiary legislation made under this Act shall be the name appearing on such person's identity card issued under the National Registration Act 1959 or, where no such identity card has been issued to him, the name appearing in his passport or any other official document of identity.*

It is noted with regret that at certain registries (e.g. the *Pendaftar Hakmilik* Johor) the provisions of s 208(1)(a) have been misconstrued and consequently an instrument of dealing e.g. Memorandum of Transfer Form 14A which does not specify the *occupation or conjugal status of a transferee* in the form (including the relevant attestation clause) may be suspended under s 298(2)(b) on account of a "*formal defect or clerical error*".

With respect, it is submitted the said land registry has erred in this regard.

Upon a proper reading of *s 208(1)(a)* it is submitted it is *not* mandatory to state the occupation or conjugal status of a transferee as it is not necessary for the determination of the fitness of an instrument of dealing under s 301.

There is no provision in the Code or in the law that a person (who has attained the age of majority) need to have an occupation or should be single, married or divorced before he or she is deemed to be competent to accept the transfer of alienated land.

Accordingly, the practice of the land registry concerned of requiring the occupation or conjugal status of the transferee to be specified in the Form 14A is wholly misconceived and not authorised under the Code or in law.

It is also noted with dismay that the *Pendaftar/ Pentadbir* at certain land registries has also misconstrued the provisions of *s 436A* by requiring the *identity card and citizenship particulars* to be specified in the *attestation clause (i.e. Form 13B)*, failing which the instrument of dealing may be suspended under s 298(2)(a).

While the attestation clause Form 13B may be a prescribed form under the First Schedule it should be pointed out that it *cannot* be presented for registration under s 292 *separately* as it is merely a part of the *principal form i.e. Form 14A*.

As the particulars of the parties to the Form 14A (i.e. *transferor and transferee*) have already been stated therein it should not be necessary to repeat the identity card and/ or the citizenship particulars in the attestation clause Form 13B on account of the wordings therein i.e. "*I……..…..…..... hereby testify that the above signature/ thumbprint……..…..…..…..*" i.e. the attesting witness is obviously referring to the transferor/ transferee whose relevant particulars e.g. name, identity card and citizenship particulars are stated in the Form 14A *immediately before* the attestation clause.

Requiring the identity card or citizenship particulars of a party or his occupation or conjugal status to be *repeated* in the attestation clause is a typical example of *excessive red-tape* and *petty bureaucracy* frequently encountered at many land registries, thereby making the registration process unnecessarily complicated and cumbersome. (It should be noted that in its present format, the attesting witness is also required to certify in the attestation clause whether or not the transferor/ transferee is a Malaysian citizen).

If s 436A were to be strictly applied to *any* Form in the First Schedule the *Pendaftar/ Pentadbir* should also be required to state in every statutory form issued by them (e.g. Forms 5A to F or Form 6A) the identity card and citizenship

particulars of every proprietor, chargor/ chargee or lessor or lessee mentioned therein, otherwise the said form could itself be deemed to be *defective* and ineffective in law, since it does not *strictly* comply with the provisions of *s 436A.*

8. Change/ Correction of Name

The practice of the *Pendaftar/ Pentadbir* of requiring a *formal* application to effect a change of name under *s 378* or a correction of name under *s 380* is misconceived and should be discontinued.

Upon a proper reading of *s 378* it is submitted that all that is required to satisfy the *Pendaftar/ Pentadbir* there is a change in the name of a proprietor etc is to furnish evidence, "*whether in the form of a deed poll, official certificate, statutory declaration or otherwise*" and the *Pendaftar/ Pentadbir* may then make a memorial of the change in the relevant register and issue document of title.

For example, if a limited company changes its name, the production of a copy of the *Form 13* issued by the Registrar of Companies should suffice without the need for a formal application as the Form 13 may be filed as a miscellaneous document subject to payment of the prescribed fee.

Similarly, under *s 380* it is submitted that in the event a clerical error in the name of a party is discovered after registration of the relevant instrument of dealing due to a typographical error in the instrument, the submission of a *statutory declaration* to that effect by the relevant party or his solicitor should be sufficient to satisfy the *Pendaftar/ Pentadbir* that such error does exist to enable the *Pendaftar/ Pentadbir* to act accordingly, as such correction would not affect the indefeasibility of title or interest conferred under s 340 on the proprietor or any person or body having a registered interest therein (e.g. chargee or lessee). Such statutory declaration may likewise be filed as a miscellaneous document subject to payment of the prescribed fee.

However, it is conceded that a formal application may be required under the following provisions:-

(a) *Section 344(2)* where a proprietor may *apply* to the Registrar to be registered '*as trustee*';
(b) *Section 346* where an administrator or executor of a deceased proprietor's estate may *apply* to the Registrar to be registered '*as representative*';
(c) *Section 349* where the Official Assignee may *apply* to the Registrar for the registration in his name of any land share or interest in land belonging to a bankrupt.

A simple comparison of the provisions of ss 344(2), 346 and 349 with the provisions of ss 378/ 380 would confirm there is *no mention* of the words "*application*" or "*apply*" in *ss 378/ 380*.

It is hoped the *Pendaftar/ Pentadbir* would take note accordingly and should not insist on a *formal* application when there is no provision in the Code requiring such applications as this would only have the effect of creating additional red-tape and unnecessarily delay the registration process.

Ideally, where a *formal application* is required under the Code, the authorities concerned should *prescribe* a form in the First Schedule to ensure *uniformity* of law as intended in the preamble to the Code instead of allowing each State Authority to prescribe its own format and adding to the current confusion at the land registries.

9. 'Proprietor'

'*Proprietor*' under *s 5* of the Code means "any person or body for the time being *registered* as the proprietor of any alienated land".

Under s 43, it is provided that the State Authority may alienate land only to the following persons or bodies:-

(a) *natural* persons other than minors;
(b) corporations having power under their constitutions to hold land;
(c) sovereigns, governments, organisations and other persons authorised to hold land under the provisions of the Diplomatic and Consular Privileges

Ordinance 1957;

(d) bodies expressly empowered to hold land under other written law.

It is therefore surprising to discover that at certain land offices, the *Pentadbir* appears to be unable to understand that a person registered as a trustee, administrator or executor, *being a natural person under s 43(a), is a 'proprietor'* of alienated land within the definition of s 5.

Consequently, an *application for sub-division partition or amalgamation* of alienated land submitted by a *trustee, administrator or executor* may be *queried, suspended or rejected* by the *Pentadbir* on the grounds that: -

(a) the consent of the beneficiaries be obtained before the application can be processed; or

(b) an order of court sanctioning such application is necessary before the application can be approved.

Needless to say, the rights conferred upon a proprietor of alienated land under *s 92(2)(a)* and *Part Nine* of the Code to apply for sub-division, (*Chapter 1 – ss 135 to 139*) partition (*Chapter 2 – ss 140 to 145*) and amalgamation (*Chapter 3 – ss 146 to 150*) (also for surrender and alienation under *s 204B*) have been seriously undermined by the *Pentadbir* who does not appreciate that *trustees* and *personal representatives* are also '*proprietors*' of the land within the definition of s 5 and are therefore empowered and competent to submit applications for sub-division, partition and amalgamation (including surrender and re-alienation) by virtue of the powers conferred on a proprietor under the aforesaid provisions of the Code.

It must be emphasised that there is *no* provision under the Code requiring proprietors registered as trustees or representatives to apply for the sanction of the Court or to obtain the consent of the beneficiaries before submitting such applications.

With due respect, the *Pentadbir* concerned seems to be utterly confused between the powers conferred on a '*proprietor*' under *Division III Part Nine* of the Code i.e. to apply for sub-division, partition or amalgamation and

the powers conferred on a '*proprietor*' to effect *dealings* under *Division IV Part Thirteen (s 205)* e.g.

(a) Transfer (Part Fourteen – ss 214 to 220)
(b) Leases & Tenancies (Part Fifteen – ss 221 to 240)
(c) Charges & Liens (Part Sixteen – ss 241 to 281)
(d) Easements (Part Seventeen – ss 282 to 291)

In regard to the powers conferred on a '*proprietor*' under *Division III Part Nine*, the only concern of the *Pentadbir* would be to verify from the Certificate of Official Search whether the trustee, executor or administrator has been *duly registered* in the document of title as a '*proprietor*' within the definition of s 5 and if so verified, he should process the application for sub-division etc and should not equate such application as if it were a '*dealing*' under *Division IV Parts Fourteen to Seventeen aforesaid.*

Conclusion

There is no doubt that unless the authorities concerned act immediately by ensuring that officers and staff assigned to the land registries and the land offices are *adequately* trained to carry out their statutory duties and fully comprehend the *fundamental principles* of the *Torrens System* and the relevant provisions of the Code, the problems discussed herein will become increasingly difficult to solve.

According to SK Das in *The Torrens System in Malaya*, at page 106, the most important requisite for a successful and smooth working of the (Torrens) System is

> *an adequate and highly efficient staff in the registry so that presentation of an instrument for registration is immediately noted in the presentation book and a memorial thereof made with the least possible delay. The possibility of any error in effecting a memorial must be avoided and, in that context, noting in the presentation book of the date and the exact time of presentation of instruments for registration becomes highly significant, for priority is thereby preserved and indefeasibility of title assured.*

Judging from the current mindset and calibre of the officers and staff at the land registries and land offices "*the successful and smooth working*" of the Torrens System under the Code appears to be highly unlikely.

One other disturbing observation of the behaviour and attitude of the officers and staff at the land registries and land offices pertains to their reluctance or refusal even to *consult* their colleagues at other land registries or land offices (*or even their superiors at their own Ministry*) for their views and advice on problems encountered in the course of registering dealings or processing other applications under the Code.

Or even "*to seek legal advice whenever necessary from the State Legal Advisor*" as mentioned in the closing passage of the judgment of the Federal Court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 55.

Organising seminars for land officers and staff at which the briefings on the relevant provisions of the Code are given by officers who are not conversant with the Torrens System would only serve to perpetuate the current problems.

Such seminars should only be conducted by *retired* land officers who have had *experience* in land matters prior to or just after the inception of the Code *as only such officers are fully conversant with the Torrens System* (which was implemented in this country more than a century ago).

With due respect, the present crop of land officers appear to be completely baffled by the Torrens principles embodied in the Code and, consequently, matters concerning dealings by trustees and executors continue to be a recurring issue despite the express provisions of *s 303(d)* of the Code.

Another regrettable policy of the authorities concerned is their reluctance to seek the advice and views of the Bar Council on matters concerning the registration of dealings and applications under the Code or other matters relating thereto.

This has resulted in the issue of the occasional misleading circulars to the land registries and land offices, one of which concerned the attestation of applications for caveats affecting Malay Reservation lands i.e. *Circular KPTG Bil. 2/ 92 (see Infoline January/ February 2004* page 42 vide Article entitled *Caveat – A Dealing under the Code?*)

The refusal of the said authorities to concede that a bureaucratic blunder has been made in the said Circular, as pointed out in the said article, coupled with their unwillingness to provide the Bar Council (for circulation to its members involved in conveyancing work) copies of all relevant circulars issued to the land registries and land offices on matters concerning the registration process and other relevant matters, serves to reinforce the commonly held view that bureaucrats will never admit or learn from their errors or take remedial action concerning such errors, preferring to do nothing, in the hope the problem will soon be forgotten or disappear under an ever increasing pile of bureaucratic red-tape.

Without appearing to be unduly pessimistic, it is submitted that if the authorities concerned continue to drag their feet and refrain from implementing appropriate measures to clean up the mess at the land registries and land offices, irreparable damage will be done to the Torrens System under the Code and the objective of ensuring *uniformity of law* in the registration of dealings and other land matters under the Code can never be fulfilled, thereby confirming the views of many conveyancing practitioners that there is in actual fact no *national* (or rational) land code governing the administration of land in Peninsular Malaysia notwithstanding the declarations expressed in the preamble to the Code, *e.g. whether an instrument of dealing is deemed fit for registration depends entirely on the (misguided) views of the Pendaftar/ Pentadbir and is not determined by the express provisions the Code* – a fair and accurate description of the bureaucratic incompetence prevailing at many land registries and land offices in Peninsular Malaysia *forty (40) years* after the passing of the National Land Code 1965.

Inquest: Guidelines from The English Coroners Rules 1984[1]

by
Amer Hamzah Arshad[2]

Introduction

Inquest is a process of investigation where the coroner is required to investigate the deceased's cause of death. Unlike the trials that we are accustomed to which are adversarial in nature with opposing parties, an inquest is inquisitorial in nature. This means that the coroner would investigate the cause of death by calling witnesses and requiring them to give either oral or documentary evidence that would assist in establishing the cause of death. Technically, there are no parties, no formal allegations or charges, no prosecution or defence in an inquest.

See:-

> ***R v South London Coroner, ex parte Thompson (1982) 126 S.J 625 D.C:***
> *"an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for [the accusatorial process] are unsuitable for [inquisitorial process]. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."*

Therefore, the objective of an inquest is to ascertain the following matters:

---

[1] This is the revised version of the writer's paper which was presented at the Workshop on "Inquests into Deaths in Police Custody", organized by the Bar Council which was held on 1st April 2006.
[2] Advocate & Solicitor of the High Court of Malaya.

(i) when, where, how the deceased came by his death; and
(ii) whether the deceased death resulted from any unlawful act or omission of any person.[3]

Further, the coroner must not be content with the *apparent* cause of death, but also investigate the manner of deceased's death.[4]

In Malaysia, the governing provisions for inquest can be found under Part VII, Chapter XXXII, namely Sections 328 to 341A of the Criminal Procedure Code (CPC). The provisions under the said Chapter explain the circumstances in which an inquest by a coroner can be carried out, for example when a person dies while in the custody of the police or prison or in a mental hospital.[5]

However, the provisions in the CPC are not comprehensive because they do not deal with various issues which are pertinent in an inquest. This results in a *lacunae*. Recently, our local courts have filled this gap by way of reference to the law relating to current criminal procedure in the United Kingdom.

This is made possible pursuant to Section 5 of the CPC[6] which was used in the case of ***Sara Lily & Anor v PP*** **[2004] 7 CLJ 335** where the following was held:

> "Di dalam hujah-hujah di hadapan saya bahawa berdasarkan kepada kedudukan Common Law, seperti yang dibenarkan di bawah s. 5 Kanun Acara Jenayah, dua kategori hak menyoal saksi-saksi di dalam inkues:
> (i) Parent, child, spouse and any personal representative of the deceased.
> (ii) Any other person who in the opinion of the coroner is a properly interested person.

[3] Section 337 of the Criminal Procedure Code.
[4] Section 328 of the Criminal Procedure Code.
[5] Section 334 of the Criminal Procedure Code. See also Section 333(1) and (2) of the Criminal Procedure Code.
[6] Section 5 of the Criminal Procedure Code allows reference to be made to English law whenever there is a *lacunae*. However, the English law has to be applied in such a manner so as not to conflict or be inconsistent with the Criminal Procedure Code. See also the case of *Re Derek Selby Decd, [1971] 2 MLJ 277* at ph 279.

Nota: Dua kategori ini didapati di bawah Peraturan 20(2)(a) dan (h) Coroners Rules 1984."

2. The English position

The relevant legislations are the Coroners Act 1988 and the Coroners Rules 1984 (English Coroners Rules). The former legislation deals with substantive matters such as the appointment of coroners, the qualification of coroners, the duty and scope of the coroners whilst the latter deals with procedural matters at an inquest.

3. The Applicability of the English Coroners Rules 1984 in Malaysia

The High Court in the case of ***Sara Lily & Anor v PP [2004] 7 CLJ 335*** in dealing with the issue as to who has the right to participate in an inquest invoked Section 5 of the CPC, and applied the English Coroners Rules, in particular Rule 20 of the Coroners Rule. This case has therefore shown that our local courts can take guidance from the English Coroners Rules in refining the inquests procedures in our country.

4. Common issues arising in the Coroner's Court

Since inquest proceedings are different in nature from the usual trial process, this means that the problems that exist for these proceedings are peculiar to it. Below are the common issues that usually arise or have arisen in some of the previous inquest proceedings locally. In discussing the common problems faced at our inquest proceedings, reference will be made to certain relevant provisions from the English Coroners Rules as well as to the English common laws as a guide or solution to those encountered problems.

4.1 Post-mortem

When a person dies in suspicious or unnatural circumstances, it is common for family members to be curious as to the cause of death. In such cases a post-

mortem must be conducted pursuant to Section 331 of the CPC. However, this provision is silent as to whether the bereaved family members of the deceased, could be present during the post-mortem examination.

Rule 7(2) of the English Coroners Rule, permits family members of the deceased to attend, or be represented, at the post-mortem examination provided the coroner has been notified in the first place.

4.2 Time of inquest

Section 333 of the Criminal Procedure Code (CPC) provides that upon receipt of the Sudden Death Report (SDR), the Magistrate is supposed to study the SDR, if the Magistrate is satisfied as to the cause of death and is able to give a verdict without an inquest, then the Magistrate shall proceed to report to the Public Prosecutor as to the cause of death as ascertained to his satisfaction together with his reasons for being so satisfied. At the same time he will transmit to the Public Prosecutor all reports and documents in his possession connected with the matter. However, if the Magistrate is not satisfied with the cause of death or feels that an inquest is necessary, he shall then proceed to hold an inquest **as soon as may be**.

In the United Kingdom, there is no specific provision regarding the time within which an inquest must be held. However, in cases where there is a violation of **'the right to life'** (e.g. death in custody or where a person was killed by State's agents), then the **inquest must be commenced promptly and pursued with reasonable expedition**.

See:

Jordan v United Kingdom (2001) 11 B.H.R.C.1

4.3 Death in Custody

Section 334 of the CPC expressly states that when any person dies while in the custody of the police or in a psychiatric hospital or prison, the officer who had the custody of that person or was in charge of that psychiatric hospital or

prison, as the case may be, shall immediately give intimation of such death to the nearest magistrate, and the magistrate or some other magistrate **shall, in the case of a death in the custody of the police**, and in **other cases may**, if he thinks expedient, **hold an inquiry into the cause of death**.

Even though the provision does require the officer who had the custody of deceased to immediately notify the magistrate pertaining to the death, it does not stipulate the time frame as to when should the inquest be commenced.

In the case of ***Regina v Her Majesty's Coroner for the Western District of Somerset (Respondent) and other (Appellant) ex parte Middleton [2004] UKHL 10***, the House of Lords held that when there is a death in custody, there is an obligation on part of the State to immediately investigate the matter. This obligation stems from the principle of 'right to life' which is enshrined in Article 2 of the European Convention on Human Rights (ECHR).

The right to life under Article 2 of the ECHR imposes two distinct but complementary obligations on the State. The first is a **substantive obligation** not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.

See:

i) ***LCB v United Kingdom (1998) 27 EHRR 212***, para 36.
ii) ***Osman v United Kingdom (1998) 29 EHRR 245***.
iii) ***Keenan v United Kingdom (2001) 33 EHRR 913***, paras 88-90.
iv) ***Edwards v United Kingdom (2002) 35 EHRR 487***, para 54.

The second is a **procedural obligation** to initiate an **effective public investigation** by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.

In ***Regina v Her Majesty's Coroner for the Western District of Somerset***

(Respondent) and other (Appellant) ex parte Middleton [2004] UKHL 10, it was held that:-

> *"**In the absence of full criminal proceedings**, and unless otherwise notified, a coroner should assume that his **inquest is the means by which the state will discharge its procedural investigative obligation under article 2 (of the ECHR)**."*

See:-

> ***McCann v United Kingdom (1995) 21 EHRR 97.***
> *"**The obligation to protect the right to life** under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", **requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State**".*

In the local context, since the 'right to life' in Article 2 of the ECHR could also be found in our Article 5(1) of the Federal Constitution, it could be argued that Article 5(1) should and in fact must impose the same substantive and procedural obligations as discussed above.

4.4 Notification of Inquest

In Malaysia, the family members and next of kin of the deceased are usually left in the dark about whether an inquest would be held. Except in cases where there is intervention by Non-Governmental Organisations, families or other interested parties, or the case attracts a great deal of publicity, they would not be notified of the holding of the inquest. Under the CPC, there is no provision which requires the coroner to notify the next of kin of the holding of an inquest.

Rule 19 of the English Coroners Rules requires the coroner to notify the family members and the next of kin of the deceased, or any interested parties of the

date, hour and place of an inquest.[7] This is important as it may enable relevant parties or witnesses to be aware of such inquest and if possible to assist the coroner and/or to give evidence in the inquest, for example, the medical history of the deceased etc.

4.5 Matters to be ascertained

In ***Sara Lily & Anor v PP [2004] 7 CLJ 335***, one of the main issues surrounding the inquest proceedings was the identity of the deceased. At the Magistrate's Court, the Deputy Public Prosecutor who was assisting the magistrate (who was sitting as the coroner) had at the outset notified the coroner that the inquest is in relation to a 'body' found in the Klang River on 23.5.2004. The identity of the deceased was not known. Despite that fact, Sara Lily who was present in court, through her counsel informed the coroner that based on a physical identification of the deceased as well as other circumstantial evidence; there was a strong probability that the deceased was the son of Sara Lily, Francis Udayappan.

Although this issue appears almost trivial in nature, it actually had a direct bearing on the issue of whether Sara Lily's counsel could participate in the inquest proceedings as an interested party, instead of merely holding a watching brief of the proceedings. If Sara Lily's counsel was only allowed to hold a watching brief, then he would not be able to examine the witnesses as of right.

The coroner after hearing submissions ruled that though the primary purpose of an inquest was to ascertain the cause of death, the identity of the deceased was nevertheless an important issue that has to be dealt with. However, Sara Lily's application to participate and examine the witnesses was not allowed

---

[7] Rule 19 of the Coroners Rules 1984

"The coroner shall notify the date, hour and place of an inquest to—

(a) the spouse or a near relative or personal representative of the deceased whose name and address are known to the coroner; and

(b) any other person who—

(i) in the opinion of the coroner is within Rule 20(2); and

(ii) has asked the coroner to notify him of the aforesaid particulars of the inquest; and

(iii) has supplied the coroner with a telephone number or address for the purpose of so notifying him."

until the deceased's identity was discovered.

The coroner's decision was laudable especially since the identity of the deceased is one of the issues that should be dealt with despite the fact that Section 337 of the CPC is silent about this. Section 337 of the CPC merely requires the coroner to inquire into when, where, how and after what manner did the deceased come by his death. The identity of the deceased is therefore a vital issue to be ascertained at the beginning because it will assist the coroner in deciding as to who may participate and examine witnesses (this topic will be dealt with later).

Under Rule 36 of the English Coroners Rule, one of the main thing that should be determined by the coroner is the identity of the deceased.[8]

4.6 Examination of witnesses.

In an ordinary civil/criminal trial, the plaintiff/prosecution is the party who is responsible to conduct and navigate the course of the proceedings. Since the inquest is inquisitorial in nature, the general rule is that the coroner shall have the control of the proceedings. It is the coroner who would first examine the witness. This may be followed by others who have the right to participate in the inquest. Clearly in such proceedings examinations-in-chief, cross-examinations and re-examinations should not be applicable.

In Malaysia however, due to our trenchant adversarial system mentality and the lack of understanding of the inquisitorial nature of an inquest, the major players at the inquest proceedings tend to conduct the inquest in a manner which is akin to a criminal trial. The common practice which is prevalent is that the Deputy Public Prosecutor, who assists the coroner, will call the witnesses

---

[8] Rule 36 of the Coroners Rules 1984

"(1) The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely-
  (a) who the deceased was;
  (b) how, when and where the deceased came by his death;
  (c) the particulars for the time being required by the Registration Acts to be registered concerning the death.

(2) Neither the coroner nor the jury shall express any opinion on any other matters."

and proceed to examine them. Then the lawyer who is holding a 'watching brief' for the family of the deceased (if any) will seek permission to 'cross-examine' the witnesses, and to be followed by re-examination of the witness by the Deputy Public Prosecutor.

This practice is wrong simply because an inquest is not a trial. It is merely an investigative process where the coroner's primary function is not to apportion guilt, but rather to discover the cause of death through documentary evidence and testimonies of witnesses.

It is for these reasons that a coroner should be at the forefront and lead the inquest. The presence of the Deputy Public Prosecutor if at all is necessary and other interested parties, is for assisting the coroner and not to determine the course or direction of the inquest. Even though cross-examination of witnesses akin to that in ordinary trials should not be permitted, **probing questions with the ultimate aim of ascertaining the truth surrounding the death of the deceased should be permitted and encouraged**.

In ***R v Hammersmith Coroner, ex p. Peach [1980] QB 211***, it was held:

> "It is quite true that the coroner must allow interested parties to examine witness called by the coroner. But that must be for the purpose of assisting in establishing the matters which the inquest is directed to determine. It is not intended by rule 16 [now rule 20] to widen the coroner's inquest into adversarial fields of conflict."

In fact, Sir Richard Scott VC, in his paper titled ***'Procedures at Inquiries-the Duty to be fair (1995) 111 LQR 596***, has said:

> "In an inquisitorial Inquiry, the questioning of the witness by the Inquiry is not an examination-in-chief, nor is it a cross-examination. Hearsay evidence may be sought. Opinions, whether or not expert, may be sought. Questions to which the questioner does not know the answer will frequently be asked – and, indeed, will be asked because the questioner does not know the answer. The techniques of questioning witnesses in adversarial litigation can be set aside. The questioning process is, or should be, a part of a thorough

investigation to determine the truth. It is not designated either to promote or to demolish a 'case'."

Since the CPC does not provide a procedure for inquest (unlike criminal trial where it is governed by Section 173), we should be guided by Rule 21 of the English Coroners Rule.[9]

4.7 Entitlement to examine witnesses.

At inquests there are no "parties", only "interested persons". These "interested persons" are persons who have a recognized interest that go beyond the interest of ordinary members of the public. They should therefore be given greater rights of participation than an ordinary member of the public, and be entitled to examine any witness at an inquest, either in person or by counsel.

In the case of Sara Lily, this issue came up before the coroner and again before the High Court on revision. There were two applications before the coroner for the right to examine the witnesses; one by Madam Sara Lily herself, and the other by the Bar Council. Both parties submitted that the provisions relating to inquests in the CPC are not exhaustive in respect of procedure, including the question of representation of "parties" in an inquest and the attendant right to examine witnesses. Section 5 of the CPC was invoked and reliance was placed on Rule 20 of the English Coroners Rules.[10]

---

[9] Rule 21 of the Coroners Rules 1984

"Unless the coroner otherwise determines, a witness at an inquest shall be examined first by the coroner and, if the witness is represented at the inquest, lastly by his representative."

[10] Rule 20 of the Coroners Rules 1984

"(1) Without prejudice to any enactment with regard to the examination of witnesses at an inquest, any person who satisfies the coroner that he is within paragraph (2) shall be entitled to examine any witness at an inquest either in person or by [an authorised advocate as defined by section 119(1) of the Courts and Legal Services Act 1990]:
Provided that-
(a) the chief officer of police, unless interested otherwise than in that capacity, shall only be entitled to examine a witness by [such an advocate];
(b) the coroner shall disallow any question which in his opinion is not relevant or is otherwise not a proper question.

(2) Each of the following persons shall have the rights conferred by paragraph (1):-
(a) a parent, child, spouse and any personal representative of the deceased;
(b) any beneficiary under a policy of insurance issued on the life of the deceased;

Under the English laws, interested person or persons who are entitled to examine witnesses at an inquest include, but not limited to, the following:

(a) parent, child, spouse and any personal representative of the deceased;
(b) any other person who in the oipinion of the coroner is a properly interested person.

[These 2 categories are found respectively in Rules 20(2)(a) and (h) of the English Coroners Rules]

On behalf of Sara Lily, it was argued that since all the testimonies and exhibits tendered have direct reference and/or relevance to her son, i.e. Francis Udayyapan, she should not be precluded from examining the witnesses and denied access to the exhibits. Counsel for Sara Lily relied on Rules 20(2)(a) and (h) of the English Coroners Rules.

The Bar Council argued that the Malaysian Bar has statutory duty to uphold the cause of justice without fear or favour under Section 42(1)(a) of the Legal Profession Act 1976. The Malaysian Bar is obliged to uphold the rights that are enshrined in the Federal Constitution, in particular Article 5(1) and more so in cases where death occurred while under police custody. It is within this framework that the Malaysian Bar through its Council would like to participate in the inquest by relying on Rule 20(2)(h) of the English Coroners Rules.

At the High Court on revision, the learned Judicial Commissioner allowed the application by Sara Lily but held that the Bar Council could only hold a watching brief.

It is submitted that the word "interested" should not be confined to a proprietary

---

(c) the insurer who issued such a policy of insurance;
(d) any person whose act or omission or that of his agent or servant may in the opinion of the coroner have caused, or contributed to, the death of the deceased;
(e) any person appointed by a trade union to which the deceased at the time of his death belonged, if the death of the deceased may have been caused by an injury received in the course of his employment or by an industrial disease;
(f) an inspector appointed by, or a representative of, an enforcing authority, or any person appointed by a government department to attend the inquest;
(g) the chief officer of police;
(h) any other person who, in the opinion of the coroner, is a properly interested person."

right of a financial interest in the estate of the deceased. The word "interested" can cover a variety of concerns about or resulting from the circumstances in which the death occurred. Furthermore, the word "properly" imports not only the notion that the **interest must be reasonable and substantial** and not trivial or contrived, but that the Coroner may need to be satisfied that **the concern of the person involved is genuinely directed to the scope of an inquest**.

See:-

i) ***R v Coroner for the Southern District of Greater London; ex parte Driscoll [1993] 159 J.P. 45, DC.***

ii) ***Sara Lily & Anor v PP [2004] 7 CLJ 335.***

4.8 Disclosure

In adversarial proceedings, the parties to the proceedings have disclosure duties that are regulated by the rules and case laws (nb: the right to disclosure in local criminal proceedings is currently very limited and restricted, as opposed to civil proceedings). In an inquest however, since there are no parties, one may argue that the duty to disclose may not arise.

Under the English Coroners Rules, if documentary evidence is proposed to be admitted at an inquest, persons falling within Rule 20(2) are entitled to see a copy by virtue of Rule 37(3)(d)[11]. Additionally, such an interested party may

[11] Rule 37 of the Coroners Rules 1984

(1) Subject to the provisions of paragraphs (2) to (4), the coroner may admit at an inquest documentary evidence relevant to the purposes of the inquest from any living person which in his opinion is unlikely to be disputed, unless a person who in the opinion of the coroner is within Rule 20(2) objects to the documentary evidence being admitted.

(2) Documentary evidence so objected to may be admitted if in the opinion of the coroner the maker of the document is unable to give oral evidence within a reasonable period.

(3) Subject to paragraph (4), before admitting such documentary evidence the coroner shall at the beginning of the inquest announce publicly—

  (a) that the documentary evidence may be admitted, and

  (b)

    (i) the full name of the maker of the document to be admitted in evidence, and

    (ii) a brief account of such document, and

  (c) that any person who in the opinion of the coroner is within Rule 20(2) may object to the admission of any such documentary evidence, and

also apply to the coroner for the inspection and supply of certain documents under Rule 57.[12] These provisions however are silent as to whether such documents can be supplied in advance prior to the hearing of the inquest.

It is submitted that without advance disclosure, interested parties to an inquest may be placed at a significant disadvantage. It is clear that persons falling within Rule 20 have a role to play in the procedure. As such, the requirement fairness should reflect that role. It may well mean that in some cases there is less of a need for advance disclosure, or that advance disclosure need not be so extensive. But it does not follow that there is no such need, in the interests of fairness, for any advance disclosure.

In recent years, the common law duty of coroners to provide advance disclosure to interested parties has developed so as to ensure that the inquest is conducted in a fair manner. In the case of ***R (on the application of Bentley) v HM Coroner District of Avon [2001] EWHC ADMIN 170***, it was held that:

> "Whilst it is true that an inquest is an inquisitorial, and not an adversarial procedure, the Rules clearly envisage that persons falling within rule 20(2) [interested parties] have a role to play in

---

(d) that any person who in the opinion of the coroner is within Rule 20(2) is entitled to see a copy of any such documentary evidence if he so wishes.

(4) If during the course of an inquest it appears that there is available at the inquest documentary evidence which in the opinion of the coroner is relevant to the purposes of the inquest but the maker of the document is not present and in the opinion of the coroner the content of the documentary evidence is unlikely to be disputed, the coroner shall at the earliest opportunity during the course of the inquest comply with the provisions of paragraph (3).

(5) A coroner may admit as evidence at an inquest any document made by a deceased person if he is of the opinion that the contents of the document are relevant to the purposes of the inquest.

(6) Any documentary evidence admitted under this Rule shall, unless the coroner otherwise directs, be read aloud at the inquest.

[12] Rule 57 of the Coroners Rules 1984

"(1) A coroner shall, on application and on payment of the prescribed fee (if any), supply to any person who, in the opinion of the coroner, is a properly interested person a copy of any report of a post-mortem examination (including one made under [section 19 of the 1988 Act] or special examination, or of any notes of evidence, or of any document put in evidence at an inquest.

(2) A coroner may, on application and without charge, permit any person who, in the opinion of the coroner, is a properly interested person to inspect such report, notes of evidence, or document."

> the investigation. They are entitled to examine witnesses, subject to the coroner's right to disallow irrelevant or improper questions.
>
> The [interested party's] request for advance disclosure was, on the face of it, a perfectly reasonable one. Certainly, no reason has been advanced by the Coroner as to why it should have been refused. The fact that the Rules do not require advance disclosure is not a sufficient answer. There is an overriding obligation to conduct the inquest in a fair manner. The requirements of natural justice, or fairness, are not immutable. What was considered a fair procedure 20 years ago may well be regarded as unfair by today's standards. By way of example, the view that fairness very often requires the giving of reasons for a decision has been steadily gaining ground over recent years."

In ***R v Criminal Injuries Compensation Board, ex parte Leatherland and others*** **(unreported, transcript dated 2nd July 2000)**, it was held that:

> "Any practice which leads to the withholding of material until the day of any judicial or quasi-judicial hearing is calculated to be to the significant disadvantage of the party from whom they have been withheld ... The argument that any injustice can be cured by the grant of an adjournment is nothing to the point. An adjournment may, or may not be granted, and even if granted will involve a represented appellant in extra costs and delay before final resolution of his appeal ... When the straightforward step can be taken of making available to a party to the appeal material which, it is conceded, he will be entitled to receive in any event, it makes no sense at all to say that he must wait and take his chance with obtaining an adjournment of his appeal from the Panel."

4.9 The law of evidence

Should the law of evidence be strictly applied in inquest proceedings? In ***Re Loh Kah Kheng (deceased)*** **[1990] 2 MLJ 126**, Mohamed Dzaiddin J (as His Lordship then was) when reviewing an inquiry had in crystal clear terms remarked:

> "I am, therefore of the opinion that so long as the learned magistrate was satisfied that there was evidence, in whatever form or manner elicited and whether admissible or not, which could assist her in establishing the cause of death of the deceased, she was perfectly entitled to know and take cognizance of it (emphasis mine)."

It was also held that:

> *"The function of a magistrate in holding an inquiry of death is to inquire, inter alia, whether any person is criminally concerned in the cause of death. The inquiry is to be held by examining witnesses on oath and the magistrate may admit any evidence which he thinks fit, especially hearsay evidence. His duty is to ascertain the cause of death and he is not bound to follow usual procedure (emphasis mine)."*

In ***R v South London Coroner, ex parte Thompson (1982) 126 S.J 625 D.C***, it was held that he procedure and rules of evidence which are suitable for the adversarial process are unsuitable for inquisitorial process.

4.10 Right against self-incrimination

Since an inquest is in truth merely a fact finding exercise and not about apportioning guilt, there should be some kind of protection for the witnesses (especially those who may potentially be prosecuted in the criminal court in relation to the matter) from self-incrimination. The current provisions in the CPC vis-à-vis the coronial process does not deal with this issue. There is no express provision akin to Section 112(2) of the CPC.

In the absence of such provision, recourse should be had to Rule 22 of the English Coroners Rules[13], which expressly provides immunity against self-incrimination.

---

[13] [Rule 22 Self-incrimination

(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself.

(2) Where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer.]

5. Summary

The existing provisions are inadequate and do not deal with various issues which could facilitate and expedite the hearing and conduct of inquest proceedings. The present system and process based on the existing structure has limited effectiveness and leaves a lot to be desired. The call for the setting up a proper coroner's court by the Minister recently (as reported in The Star, 27th March, 2006) is a small step in the right direction. Major changes to the existing provisions in the CPC vis-à-vis the coronial process and the structure of our coronial process have to be undertaken. The coroner tasked to carry out the inquest proceedings should also be properly qualified, trained and experienced.

Even though any change or amendment to the existing framework may not take place in the near future, as discussed above, an interim solution would be to adopt the attitude as shown in ***Sara Lily & Anor v PP [2004] 7 CLJ 335*** and seek guidance from the English experience. This case is a good illustration of judicial initiative which serves to complement the existing provisions in the CPC through legal means, and without usurping the function of the legislature.

In light of the above, the guidelines which are laid out below may be worth considering in order ensuring the smooth running of any inquest.

5.1 Proposed Guidelines

i) Post Mortem

Family members of the deceased should be permitted to attend, or be represented, at the post-mortem examination provided that the coroner has been notified in the first place.

ii) Time of inquest

In cases where there is a **violation of 'the right to life'** (e.g. death in custody or where a person was killed by State's agents), then the **inquest must be commenced promptly and pursued with reasonable expedition**.

iii) Death in custody

When there is death in custody, there is an obligation under Article 5(1) of the Federal Constitution to initiate an **effective public investigation** into the death.

iv) Matters to be ascertained at inquest

The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely-

(a) **who the deceased was**;

(b) how, when and where the deceased came by his death;

(c) the **particulars for the time being required by the Registration Acts to be registered concerning the death**.

v) Notice of an inquest

The coroner should arrange to notify the family members, next of kin regarding the holding of an inquest. A minimum period of two weeks notice should be given.

vi) Protocols for examining witnesses

Inquest is an inquisitorial process, it is the coroner who shall have the control of the proceedings, and therefore, it is the coroner who should examine first the witness, to be followed by others who have the right to participate in the inquest. **Probing questions with the ultimate aim of ascertaining the truth surrounding the death of the deceased should be permitted and encouraged**.

vii) Entitlement to examine witnesses

There are no "parties" to an inquest as there are in accusatorial or adversarial proceedings such as a trial. Instead there are only "interested persons". Rule 20 of the English Coroners Rules has listed out the categories of persons who have the right to examine witnesses, and the coroner has the right to determine whether or not a person fall within one of the permissible categories under Rule 20.

viii) Disclosure: Coroner's discretion for the release of documents before inquest

The coroner should have discretion with regard to the release of documents prior to an inquest. This discretion should in general be exercised in favour of release.

ix) Procedure and rules of evidence not be strictly applied

The procedure and rules of evidence which are suitable for the accusatorial process are unsuitable for inquisitorial process.

x) Self-incrimination

No witness at an inquest shall be obliged to answer any question tending to incriminate himself.

Female Genital Mutilation and Human Rights

by
Edmund Bon

Abstract

In the context of the practice of female genital mutilation, this essay seeks to explore the tension between international human rights principles (such as those enshrined in the Universal Declaration of Human Rights) which attempt to assign universal values to all human beings and the resistance to such universality by critics who resort to the argument of "cultural relativism" that certain values entrenched in the cultures of societies ought not be disturbed by the imposition of rights values.

I. Introduction

Female circumcision or female genital mutilation[1] ("FGM") is the practice of removing or cutting away all or part of the female genital organs. It is prevalent in at least 26 African countries, parts of Asia and South America. It is estimated that at least 2 million girls are subjected to FGM every year, a practice which is about 6000 years old[2].

There are various forms of FGM which are summarized as follows[3]:

---

[1] "Mutilate" is defined by *The Concise Oxford Dictionary of Current English* (4th ed) as to "(d)eprive (person etc.) of limb or organ; cut off, destroy the use of (limb etc.); render (book etc.) imperfect by excision etc".

[2] For a comprehensive historical and medical account of FGM, see Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation* in Jonathan M. Mann, Sofia Gruskin, Michael A. Grodin and George J. Annas (eds.), *Health and Human Rights: A Reader* (1999) p. 336.

[3] See Halima Embarek Warzazi, *Final Report on the Situation regarding the Elimination of Traditional Practices affecting the Health of Women and the Girl Child*, UN Doc. E/CN.4/Sub.2/2005/36 and *A Traditional Practice that Threatens Health – Female Circumcision*, 40 World Health Organization Chronicle 31 (1986) cited in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) p. 409.

a. *Circumcision proper*[4]

This is the mildest form of FGM and involves the removal only of the clitoral prepuce.

b. *Excision*

This is the most common of the procedures and involves the removal of the whole clitoris and all or part of the labia minora. All of the external genitalia may at times be removed.

c. *Infibulation*

This is the most destructive form of FGM. The clitoris, labia minora and parts of the labia majora are removed. The two sides of the vulva are then stitched over the vagina making intercourse impossible[5]. A tiny opening is preserved for urine and menstrual blood. The girl's legs are tied together until the wound is healed.

FGM is usually justified on embedded cultural or religious grounds, and is practiced on babies and girls aged from one week to 14 years. Such young subjects have no choice or the ability and power to resist the procedure. Warzazi stresses however that the practice of FGM can "in no way be construed as a desire of the part of parents, the family or the community to harm the girls concerned. It is merely the re-enactment of an age-old practice that is deeply entrenched in the lives of the groups concerned"[6]. The reasons for this practice are varied but mainly center around the notion, often mistaken, of female sexuality and control over women - to diminish the sexual desire of women, to preserve virginity before marriage, to increase male sexual pleasure, to initiate girls into womanhood, to increase a woman's fertility and to remove external genitalia as some societies consider the same dirty and ugly. In certain communities, FGM legitimizes social acceptance of women; and those who are not circumcised are viewed as social outcasts who are not fit to be married.

Depending on the extent of the mutilation, the medical risks of FGM are severe

[4] Also known as "sunna circumcision" in Muslim societies.
[5] Before intercourse, the husband would have to cut open the infibulated vagina with a razor or by using his fingers.
[6] Warzazi, *supra* n. 3 p. 10.

and affect the subject for the rest of her life[7]. During the procedure, the subject experiences pain and shock, sometimes death because of infection, septicemia or hemorrhaging; and in the long-term, pain and difficulty during sexual penetration and childbirth. Her quality of life by way of sexual pleasure is drastically reduced as she is unable or finds it extremely difficult to experience an orgasm.

II. Universalism v relativism

Given the medical disincentives of FGM, it is still widely practiced and the human rights community found it necessary to act. Much of the impetus in the challenge to reduce or eradicate FGM is found in key UN instruments, which were derived from the founding UN Charter 1945 and Universal Declaration of Human Rights 1948 ("UDHR")[8], such as the Convention on the Elimination of All Forms of Discrimination against Women 1981 ("CEDAW") and Convention on the Rights of the Child 1990 ("CRC").

The Charter and UDHR emphasizes the dignity and worth of the human person, the equal rights of men and women and the exercise of all rights and freedoms without distinction of any kind based on sex, race or religion.

The Declaration on the Elimination of Violence against Women 1993 regards FGM as a form of violence perpetuated against women[9], and calls on States not to invoke any "custom, tradition or religious consideration to avoid their obligations with respect to its elimination"[10]. The Declaration also sets out broad measures to be taken by States to eliminate violence against women, whether perpetrated by the State or private persons, such as exercising due diligence to prevent and punish acts of violence against women, developing penal sanctions in domestic legislation and training law enforcement officers in sensitization towards the needs of women[11].

[7] Annas, *supra* n. 2 p. 338.
[8] FGM violates both articles 3 and 5 UDHR.
[9] Article 2.
[10] Article 4.
[11] See also Radhika Coomaraswamy, *Report on Violence against Women, its causes and consequences: Cultural Practices in the Family that are Violent towards Women,* UN Doc. E/CN.4/2002/83 and CEDAW Committee General Recommendation 14 (19th Session, 1990), *Female Circumcision,* UN Doc. HRI\Gen\1\Rev.1 at 79 (1994).

The jurisprudence of international human rights law as the basis of the campaign against FGM rests on four main grounds[12]:

a. *Right to dignity, life and bodily integrity*[13]

These are core rights where no derogation is permitted, and the same are engaged when FGM threaten these rights based on medical evidence and opinion.

b. *Right to health*

The highest attainable standard of physical and mental health is to be secured for every human being[14]. FGM violates this protection when subjects of FGM are compelled to undergo the harmful procedure, and further, are unable to exercise fully informed and independent judgments on matters affecting their own bodies and health.

c. *Right to be equal and free from gender discrimination*

FGM is a form of power over and control of women based on gender. Subjects of FGM are victims of sexual and gender discrimination. Article 5(a) CEDAW is engaged in that it calls on State parties to modify "social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

d. *Children's rights*

A child, under the CRC, is defined as one below the age of 18 years[15] and is endowed with certain fundamental rights under the CRC. Subjects of forced FGM are usually children. Article 24 CRC is engaged in that State parties are required to recognize the "right of the child to the enjoyment of the highest attainable standard of health" and "to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of

[12] See also Anika Rahman and Nahid Toubia (eds.), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (2000).
[13] Articles 6 and 7 International Covenant on Civil and Political Rights 1976.
[14] Article 12 International Covenant on Economic, Social and Cultural Rights 1976.
[15] Article 1.

children"[16].

FGM brings into sharp focus the "universalism v relativism" debate. The conflict arises this way. Critics of human rights raise cultural differences of FGM-adherent societies as an excuse to justify such practices, and avoid adopting rights norms:

(1) Human rights is a Western concept not applicable to non-Western societies where communitarian interests take precedence. To impose individual rights norms would amount to an attempt to colonize "receiving States", and cultural relativism is a defence against imperialism[17].

(2) Cultural relativism requires universal respect for differences in various cultures, and any theory of rights which attempts to make certain principles uniform violates respect for cultural differences.

(3) Civil and political rights are "first-generation rights" whereas economic, social and cultural rights are "second-generation rights". Developing, underdeveloped and Third World countries particularly in Africa and Asia require economic growth and stability[18] before they are able to secure first-generation rights for their citizens.

It is submitted that the concept of relativism is in itself already an accepted norm in rights discourse and has been recognized as part of the universal protection framework[19]. Thus, it would appear that this debate is a false one. Notwithstanding this, relativism does not provide a sufficient dissent to human rights universalism as the following discourse will show:

(1) It is acknowledged that the theory and fundamentals of human rights leading up to the UDHR and beyond was not formulated in a linear fashion. It came about as a result of various factors such as politics, ideology, pragmatic consensus and the critical intent to stop future

---

[16] Protection under articles 19 and 37(a) CRC are also engaged.
[17] In simple terms, "who are you to decide for me?".
[18] Ie, second-generation rights.
[19] Respect for cultural differences are enshrined in *inter alia* article 27 UDHR, article 30 CRC and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992.

atrocities committed against humankind after the Second World War.

(2) It is impossible to decipher a singular philosophy which led to the "human rights" concept. History[20] clarifies the development of thought from the time of ancient cultures such as the right to property implicit in the commandment that one shall not steal – Greek methodology aimed at protecting individuals from abuse of power by governments – the Roman articulation of the concept of *jus gentium*[21] – natural law theorists who argued that everyone under the law of nature had the right to preserve oneself – Locke who said that rational individuals agreed to live under a government which came under a duty to protect the natural rights of all through the rule of law – the period of Enlightenment which saw an emphasis on freedom through the application of human reason – the American Declaration of Independence in 1776 which proclaimed that all men are created equal and are endowed with certain unalienable rights followed by the French Declaration of the Rights of Man and of the Citizen in 1789 – Bentham's critique of natural rights as being "nonsense upon stilts" whilst introducing utilitarianism as a moral code – Hegel's "world spirit" and Marx's class struggle in unifying the masses and leading the establishment of human rights as an international agenda together with US President Wilson's "Fourteen Points" in 1918. The period of totalitarianism and the Holocaust in 1945 then conclusively directed political will towards drafting of minimum standards to protect humanity which was to be enforced by a united body of nations. The UDHR was released in 1945.

(3) Whilst the above synopsis appears to be driven by the Western world with strong Judeo-Christian flavour, it has been argued that various cultures, religions and philosophies of the world have their own concept of individual human rights albeit expressed in different terms[22]. It is

[20] For an excellent summary, see Michael Freeman, *Human Rights: An Interdisciplinary Approach* (2002) and Carol Devine, Carol Rae Hansen and Ralph Wilde, *Human Rights: The Essential Reference* (1999).

[21] Ie, the law of nations.

[22] See Chun Lin, *Human Rights and Democracy: the Case for Decoupling*, International Journal of Human Rights 5(3) (2001) p. 19 and United Nations Educational, Scientific and Cultural Organization (ed.), *Human Rights: Comments and Interpretations* (1949).

nevertheless quite misleading to argue that the UDHR was a purely Western venture. The UDHR itself emerged from a culturally diverse General Assembly including delegates from India, Philippines, China, Lebanon, Egypt and Chile. 14 members of the 56-state Assembly were Asian, 4 were African and 20 were from Latin America. Articles 22-27 support underdeveloped countries' interests in the area of economic, social and cultural rights, much of these based on communitarian values. There were very few cultural divides, other than over the rights to marry and change religion[23].

(4) In any case, the UDHR merely set minimum standards to be met within the context of society. Actions over and above these standards which do not frustrate core rights are not restricted. Both communitarian and cultural interests have been acknowledged as needed to achieve a balance of interests. Article 29 is explicit that individuals have duties to the community, and individual rights may have to give way to the larger interests of society under certain conditions. The family unit is the "natural and fundamental group unit of society"[24] and cultural diversity is respected and encouraged[25]. The conservatism of non-Western values are apparent.

(5) Yet, the strength of the UDHR which legitimizes its universalism is distinguished by its moral content, expressed by way of the "lowest common denominator" – human dignity and acting towards one another in a spirit of brotherhood. The potency of recognizing moral worth in each individual, though expressed in terms of "rights", should not be denied on any basis of cultural divergences[26]. The language of rights is used as an expression of human dignity and the UDHR implies that human nature is knowable through the application of the universal function

---

[23] Geoffrey Robertson, *Crimes Against Humanity* (2002) p. 33. Nevertheless, only Saudi Arabia abstained from voting whilst Muslim nations like Syria, Iran and Pakistan did not.

[24] Article 16(3).

[25] Article 27(1). The International Covenant on Economic, Social and Cultural Rights 1976 expands on this.

[26] Even for one moment it is accepted that no concept is *per se* universal because each concept is valid only where it is conceived and therefore the concept of human rights *is* not universal, the relativist would be hard-pressed to argue why human rights *ought* not become so.

of the deductive mind, called "reason"[27]. Given this, it is difficult to envisage States today – with rational, reasoned argument and good conscience – credibly denying the core content of the UDHR by displacing the concept of human dignity and moral worth of human beings[28].

(6) It can therefore be outlined that universalism of human rights is seen on two levels:

i. that the values of those rights apply in all cultures despite their diversity, such as the right to life, liberty and security; and,

ii. that certain universal principles may require diverse interpretations or applications in different social contexts, such as the right to fair trial may not be identical in its implementation in all countries[29].

The first deals with what *ought* to be done and the second with *how* it should be done. The latter necessarily encompasses the former as the basis for action. There have been few arguments how relativism can appropriately deny the content of i. above[30]. In reality, the growing number of important human rights treaties today testify to greater consensus on rights issues. It is accepted however that relativism is formidable in relation to ii., and strategies for application must be broad-based and multi-pronged as discussed below.

(7) Freeman has concluded that cultural relativism as a defence or justification is tautologous and does not make sense:

---

[27] It is arguable that the UDHR adopted Kant's "categorical imperative" which dictates that all humankind should act only in accordance with that maxim through which that action becomes a universal law and to act so that humanity is always an end and never merely as means to an end: see Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785).

[28] The Vienna Declaration and Programme of Action 1993 put beyond question the universal nature of rights and freedoms under the UDHR with the *caveat* that in its implementation, various historical, cultural and religious backgrounds must be borne in mind.

[29] Freeman, *supra* n. 20 p. 104.

[30] Attempts have been made to justify human rights in various forms to make it more acceptable in all societies. Martha Nussbaum in *Women and Human Development: The Capabilities Approach* (2000) combined the use of basic needs and dignity in the language of the "theory of capabilities" to cut across perceived cultural and philosophical divergences.

> "The principle that we should respect *all* cultures is self-contradictory, because some cultures do not respect all cultures. The principle of respect for persons does not entail that we ought to respect all cultures, and therefore cultures that endorse the violation of human rights cannot demand our respect simply because they are cultures."[31]
>
> There may be situations where certain cultural practices do not conform with rights norms, and therefore cannot be condoned. The truth is that relativism is often raised by States to linguistically cater a justification for their oppressive actions and authoritarian regimes by sweeping rights violations under the carpet of purported or pseudo-traditional or cultural practices. By so doing, they block effective external scrutiny of their actions.

Relativism is useful to highlight and explain problematic areas of human suffering and rights violations, and cannot be discounted swiftly. It is therefore necessary at all times to harness relativism from all spheres and examine the details of its arguments in relation to each problem presented. Broad declarations of cultural relativism as a shield detract from the real issues at hand and, whether consciously or otherwise, misleads.

III. What is to be done in implementation of rights in the face of cultural diversity?

Rights were never meant to be exercised in isolation by individuals. The concept of rights was devised to be exercised within society to augment the autonomy and freedom of the individual. It arises from society to protect the individual and promote his well-being, and at the same time, to enable a climate of peaceful co-existence when those rights are exercised by others.

To be effective, the application of rights protection vis-à-vis cultural practices must be seen in the context of a particular "ethical community" in which they

[31] Freeman, *supra* n. 20 p. 108.

are to exercised[32]. Human rights cannot only be superimposed from the outside as an alien culture. It must primarily work within the affected community on a horizontal or intra-cultural basis[33].

The following exercise is necessary, in every situation of alleged rights violation, to dissect the conflict raised by a cultural relativist:

a. Examine the possible rights engaged.

b. Cultural practices that do not appear to conform with the engaged rights are to be addressed as follows:
   i. firstly, understand the differences within the community setting;
   ii secondly, examine the basis and reasons for the practice (eg, how it originated – is it part of culture, tradition or power structure – pseudo, invented or otherwise);
   iii. thirdly, investigate the extent of the practice (eg, sanctions for non-compliance of the practice);
   iv. fourthly, attempt to reconcile the practice with the engaged rights;
   v. fifthly, if no reconciliation is possible, decide on measures to be taken to protect the engaged rights (eg, education, awareness campaigns or legislation).

c. Cultural practices that appear to be consistent or do not substantially derogate from the engaged rights are protected from interference by upholding the right to cultural differences.

---

[32] See Chris Brown, *Universal Human Rights: A Critique* in Tim Dunne and Nicholas J. Wheeler (eds.), *Human Rights in Global Politics* (1999) p. 103.

[33] See Raimundo Pannikar, *Is the notion of human rights a Western concept?*, 120 Diogenes 75 (1982) cited in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) p. 383 and Abdullah Ahmed An-Na'im, *Human Rights in the Muslim World*, 3 Harv. Hum. Rts. J. 13 (1990) cited in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) p. 389.

It is readily accepted that strategies for implementation of rights norms are diverse and need to be carefully thought through given the differences in the way societies respond to interventions. For example, penal sanctions in respect of cultural practices which are deeply entrenched in an isolated society with a zero literacy level and where no attempt is made at educating them may cause them to cling on to their practices with greater vigour.

With regard to FGM, the following measures may be taken to reduce or eradicate the practice[34]:

a. *Awareness and education campaigns*

It is important that the collection of data and dissemination of information takes place to create awareness about FGM and its harmful effects. There should be education and rights campaigns about FGM, the human body and reproductive organs to dispel fallacies and myths surrounding the necessity for FGM in the community. The language of human rights may not be useful in communities which have a low literacy level. Rather, campaigns should draw upon local cultural notions of health, common sense and dignity in explaining FGM.

b. *Promotion of equality of the sexes*

Through law reform, changing mindsets and behaviour as well as modifying social structures, girls and women must no longer be treated as subservient members of society. All forms of discrimination against women should be dismantled and women should be encouraged to hold leadership positions in local communities. There should be affirmative empowerement of women through capacity-building, equal opportunities and pay. This broad strategy is necessary to redress power imbalances in societies, and complements the elimination of stereotypes regarding women which are one of the driving forces behind FGM.

c. *Alternatives to FGM*

Alternatives rites or ceremonies which do not involve circumcision could be offered and practiced. The community celebrates the girls' rites of passage with gifts and food. For the circumcisors, there should be education and training

[34] See Rahman and Toubia, *supra* n. 12.

programmes to assist them in finding alternative sources of income. This will reduce the incentives to continue their work.

d. *Regulatory measures*

Health professionals should be clear that the practice of FGM on non-consenting women or children violate medical ethics which may be the subject of disciplinary proceedings. Governments should also seek to increase access to health and medical information, as well as to reproductive health services for girls and women. This provides the opportunity for them to make fully informed choices about medical procedures in respect of their own bodies.

e. *Criminalization of FGM*

This should be the last resort after all non-coercive measures have failed. Before the law is passed, there must be adequate public information and a lapse of time to notify affected communities that FGM would become illegal. There should then be a clear definition of FGM with available defences such as consent, and alternatives to imprisonment with the aim of rehabilitating or reforming the offender as opposed to purely punishing him/her.

The campaign against FGM must always be led by those aggrieved, "positive deviants", community leaders, religious elders and healthcare professionals. NGOs and rights activists who are not part of the affected community should lend encouragement and support from the outside but cannot lead. Intra-cultural dialogues are important methods of communication and understanding, and role models within the affected community should be picked to guide these and share their experiences. Working within the local culture is not only more effective but it also reduces allegations of misgivings about the particular culture.

It is submitted that human rights today originated from a historical culture of consequences from the evil of mankind, and the belief that a certain set of international rules is necessary to regulate conduct and resolve human conflict in the promotion of human dignity. International human rights law attempts to protect subjects or victims of FGM and provide them with choice. Cultural relativism does not.

REFORMING THE LAW OF CONTEMPT OF COURT

by
*Abdul Majid Bin Nabi Baksh**
and
*Margaret Liddle***

Introduction

The origins of the offence of contempt of court or, *contemptus curiae* in Latin, can be traced to the twelfth century[1]. A person found guilty of contempt of court is termed a "contemnor".

The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice[2]. It exists to eliminate and deter acts that could interfere with the due administration of justice by the courts.

The true nature of the court's power to punish contempt was clarified a long time ago as follows:

> The phrase "Contempt of Court" does not in the least describe the true nature of the class of offences with which we are concerned here concerned…. It is not the dignity of the court which is offended – a petty and misleading view of the issue involved – it is the fundamental supremacy of the law which is challenged. That is why conduct of this kind is properly treated as deserving of criminal punishment; it is intolerable in any civilized and well-ordered society.[3]

---

* BA (Hons), MA (Malaya), PhD(Toledo), LLB (Hons) (London), MCL (IIU), CLP (Malaya), Advocate and Solicitor (Malaya), *Visiting Fellow (Business and Commercial Laws), School of Accounting and Finance,The Hong Kong Polytechnic University*
** BA (Hons)(Southbank), LLM (Vrije), M.Ed (HK PolyU), Barrister -at-Law (United Kingdom and Hong Kong), *Assistant Professor (Business and Commercial Laws), School of Accounting and Finance, The Hong Kong Polytechnic University*
[1] John C Fox, *The History of Contempt* of Court:*The Form of Trial and the Mode of Punishment* (Professional Books Ltd, 1972; first published 1927, p.1.
[2] *Johnson v Grant* (1923) SC 789 at 790 per Lord President Clyde.
[3] *Johnson v Grant* (1923) SC 789 at 790-791 per Lord President Clyde.

In Malaysia the Court of Appeal has said[4]:

> Proceedings for contempt – it has been said often enough – are there to protect and defend the integrity of justice itself. It is not to protect the self-righteousness of individual judges or their personal pride.

In Malaysia, both Article 126 of the *Federal Constitution* and s 13 of the *Courts of Judicature Act 1964* provide that "The Federal Court, the Court of Appeal and the High Court shall have the power to punish any contempt of itself." Article 10(2) of the Federal Constitution authorizes Parliament to legislate contempt of court. To date, no special law on contempt of court has been enacted under Article 10(2) of the *Federal Constitution*. Given the absence of any written law on the matter, contempt of court as recognized in Malaysia is that defined by the English common law[5]. The reception of the English common law in Malaysia is authorized by s 3 of the *Civil Law Act 1956.* The proviso to s 3 of the *Civil Law Act 1956* enjoins the courts to apply the common law subject to such qualifications as local circumstances render necessary. In invoking the common law notion of contempt of court, Malaysian courts have asserted that they are mindful of local conditions. That, however, has prompted the courts "to take a stricter view … of matters pertaining to the dignity of the court"…[6] .

In this paper we seek to clarify the nature of the specie of contempt of court known as contempt in the face of the court before proceeding to argue for two reforms in the law of contempt of court. First, we argue that the act of lodging a complaint about a judge should cease to be contempt of court if the complaint is communicated to a proper authority. Second, we argue that it should no longer be a contempt of court to publicly comment upon or discuss a case that has been concluded at a court of first instance.

---

[4] *Lee Chan Leong v Jurutera Konsultant (SEA)* Bhd. [2002] 3 MLJ 718 at 727 per Gopal Sri Ram JCA.

[5] *Attorney General, Malaysia v Manjeet Singh Dillon* [1991] 1 MLJ 167 at 173 per Harun Hashim SCJ.

[6] *Attorney General, Malaysia v Manjeet Singh Dillon* [1991] 1 MLJ 167 at 180 per Mohamed Yusof SCJ.

Contempt in the face of the court

Contempt can be broadly categorized into either actions, which interfere with the administration of justice and are thereby deemed to be criminal in nature, or those which constitute disobedience to the court, and generally invoke civil action. Although discrete categories in themselves they do on occasion intermingle.[7] The former, known as criminal contempt can be further sub-divided. One of the forms of criminal contempt is known as 'contempt in the face of the court' or in Latin, *in facie curiae.*

Contempt in the face of the court seems to refer to acts in open court which disrupt judicial proceedings. It is because this form of contempt of court occurs while the court is in session and before the court that it is termed "contempt in the face of the court" or "contempt in the face" for short. However, contempt in the face is not to be taken literally; the judge does not actually have to see it so long as it is committed within the precincts of the court or relates to a case currently before the court[8]. That is to say, contempt in the face of the court constitutes interference with the administration of justice in particular proceedings (as distinguished from interference with the course of justice as a process.) The *locus classicus* on contempt in the face of the court is a case that occurred in the year 1631. In that case, following his conviction, the prisoner threw a missile at the judge which narrowly missed hitting its target. The prisoner's right hand was cut off and fixed to the gibbet, upon which he was also immediately hanged in the presence of the court[9].

Contempt in the face of the court is a direct interference with the administration of justice, as it is being administered or dispensed in the courtroom. Anyone present in the court has the potential to commit contempt *in facie curiae.* This includes the parties, counsel, witnesses, jurors, court officers and members of the press and the public. Examples of contempt in the face of the court include:

---

[7] See for example, *A-G v Newspaper Publishing plc* [1988] Ch 333, [1987] 3 All ER 276, *A-G v Newspaper Publishing plc* (1989) *Times*, 9 May; on appeal (1990) Times, 28 February; and, *A-G v Newspaper Publishing plc* [1992] 1 AC 191, [1991] 2 All ER 398.

[8] See *Balogh v Crown Court at St Albans* [1974] 3 All ER 283 at 287-288 and the authorities cited therein.

[9] *Oswald's Contempt of Court : Committal, Attachment, and Arrest Upon Civil Process* ed by George Stuart Robertson (Calcutta: Hindustan Law Book Company, Reprint 1993), p. 42

assaulting or threatening judges; insulting the court; disrupting court proceedings; disrespectful behavior in court; taking photographs or making sketches in court; and, clandestinely using tape recorders in court.

The *nemo judex in sau causa* rule says that a complainant cannot be a judge in his own cause. As a result, an alleged contemnor is normally tried by some court other than the one which accuses him of contempt. This is to prevent the court from becoming both prosecutor and judge. Where contempt of court proceedings are to be heard by other than the judge before whom the acts alleged to constitute occurred, there are two possibilities. First, the matter may be referred to the Attorney General to institute criminal proceedings. The other is for proceedings to be brought under Order 52 of the *Rules of the High Court 1980*. In either case, when an alleged contemnor is produced before another court, he is met with a duly formulated charge or a document specifying the words or actions which constitute the alleged contempt. This accords with the principle that to defend himself, anybody charged with an offence should know precisely what it is that he is alleged to have done. The failure to furnish the alleged contemnor with the charge can, as it should, be fatal to the success of the contempt proceedings.

However, there are situations in which a court can proceed against an alleged contemnor on its own motion (*suo motu*) and after hearing him, if the contempt is proved to its satisfaction, impose a punishment immediately or summarily. This summary power is used when contempt is committed in the face of the court and calls for swift decisive action to vindicate the dignity and majesty of the administration of justice. When the court proceeds *suo moto* for a contempt in *facie curiae*, it does so immediately upon the commission of the alleged infraction. That being so, the details of the conduct that prompts the judge to act are known to the alleged contemnor and there is no need for the alleged contemnor to be furnished with a charge. Contempt *in facie curiae* is thus conduct that demands immediate action by the court. It would seem to be contradiction in terms for a court to haul up a person up for committing a contempt in the face of the court and then adjourn the hearing.

The distinction between contempt in the face and other indirect contempt of court is important because of the disadvantages inherent in the former being

susceptible to summarily disposal by the judge before whom it allegedly committed. To begin with, it allows the complainant to be the judge in his own cause. Also, summary proceedings deprive the alleged contemnor of a charge and of the opportunity *inter alia* to cross examine the complainant and witnesses, if any. More importantly, punishment being meted out on the spot usually precludes the alleged contemnor from seeking legal advice or representation. The lack of legal representation is all the more critical because contempt in the face is punishable by imprisonment. The foregoing explains why distinguished jurists have warned against the use of the summary jurisdiction in contempt.

In the United Kingdom, Australia, New Zealand and Canada it is now common practice of the courts to exercise this power to punish instantaneously only as a last resort, in extreme circumstances where adjourning proceedings following removal of the offender from the court is deemed inappropriate. In such circumstances it may be said that the need to ensure public justice weighs more heavily on the judiciary than considerations of individual freedom and justice. Such tilting of the scales of justice should be used cautiously. Lord Goddard in *Parashuram Detaram Shamdasani v King-Emperor* gave the following admonition[10]*:*

> Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which the court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.

This summary power is to be used sparingly and only when absolutely necessary. In *Balogh v Crown Court at St Albans* Lord Denning said[11]:

> … a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take on himself to move. He should leave it to the Attorney- General or to the party aggrieved to make a motion in accordance with the

[10] [1945] AC 264 at 270
[11] [1974] 3 All ER 383 at 288.

> rules in RSC Ord 52. The reason is that he should not appear to be both prosecutor and judge; for that is a role that does not become him well.

Stephenson LJ, in the same case, was more direct. His Lordship asked and answered the question[12]:

> … if the appellant was in contempt, could or should his contempt have been immediately punished…? Again, my answer is No, and my reasons can be even more shortly stated in two sentences. The procedure is one to which judges should resort in exceptional cases where a contempt is clearly proved and cannot wait to be punished. Here the facts were alleged to constitute contempt were admitted, but there was no need for immediate punishment.

As contempt in the face of the court and summary proceedings go together, courts should be slow to declare facts that are alleged to constitute contempt of court to be contempt in the face of the court.

In *Balogh v Crown Court at St Albans* Lord Denning reviewed the authorities on contempt in the face of the court and concluded[13]:

> So 'contempt in the face of the court' is the same thing as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognizance of the court'.

Having said that Lord Denning cautioned against the use of the summary jurisdiction unless the contempt was gross and it was urgent and imperative that the contemnor be punished immediately.

In *Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong* [14], the court instituted proceedings for contempt in the face of the court on its own motion against a legal firm and its client for writing letters about a matter pending before the court. The defence submitted that as the letters by the legal firm

[12] [1974] 3 All ER 283 at 290.
[13] [1974] 3 All ER 283 at 287.
[14] [1999] 6 MLJ 38.

were written not with regard to something occurring in the face of the court, they did not amount to contempt in the face of the court and accordingly, should not be the subject of summary proceedings. Zulkefli J (as his Lordship then was) disagreed. His Lordship held that the letters written by the alleged contemnors[15]:

> … in respect of matters arising from …(the pending case)… constituted a contempt in the face of the court. It is a contempt in the cognizance of the court because the conduct took place during a pending proceeding and when the case had not been finally disposed off by the court. Hence it is contempt which the court can punish on its own motion.
>
> I am also of the view that the circumstances and categories of facts which may arise and which may constitute contempt in the face of the court I n a particular case are never closed. …

His Lordship went on to hold[16]:

> … to constitute contempt in the face of the court, it appears unnecessary that the act of contempt should, take place wholly or in part in a court room itself nor does it seem necessary that all the circumstances of contempt should be within the personal knowledge of the judicial officer dealing with the contempt.

In defining contempt in the face of the court with reference to acts of which the court would take cognizance and as a contempt that the court can punish on its own motion, it would appear Zulkefli J was drawing on the line of authority reviewed and summarized by Lord Denning in *Balogh v Crown Court at St Albans* (*supra*)

On the applicability of the summary procedure his Lordship focused on whether the alleged contemnors had been given the opportunity of being heard before they were punished and that the elements of contempt were fully set out for them to show cause.

---

[15] [1999] 6 M.L.J 38 at 55.
[16] *Ibid.*

With respect, the real issue in *Koperasi Sebaguna TaipingBarat Bhd* is not whether the acts complained of come within the definition of contempt in the face of the court as set out by the learned judge. The crucial issue – and it respectfully submitted that this is what constitutes contempt in the face of the court and justifies its summary punishment – is whether the alleged contempt was so gross as to merit immediate punishment. A brief chronology of the events leading to the contempt proceedings will clarify the issue. Two of the three letters alleged to constitute the contempt of court were written sometime in the middle of December 1997 and the third was undated. By 17 February 1998, the court hearing an application in a pending case had all three letters before it. The hearing of the application was adjourned to 6 April 1998. During the adjournment the court formed the view that the three letters constituted a *prima facie* case of contempt. Accordingly, the court caused letters to be issued to the alleged contemnors to show cause why they should not be cited for contempt. The show cause hearing was fixed as 17 March 1998 but seems to have commenced on 6 April 1998. The published judgment of the court bears the date 16 July 1998. The fact that a show cause letter could be issued and that the hearing thereof be fixed at a future date indicates that the alleged contempt was not one that justified the use of the summary power. With respect, it is submitted that regardless of whether the act alleged to constitute contempt was in relation to on-going proceedings – which it was — or whether it was an act of which the court took cognizance — which the court did – the act was not one which merited immediate punishment. It was not, from this point of view, a contempt in the face of the court.

In *Joseph Griffin*,[17] the accused in criminal proceedings approached the complainant in that case and another witness to dissuade them from giving evidence at his trial. The last occasion he had attempted this was on the very morning of the trial. The trial judge adopted the summary procedure to convict him of contempt of court and sentenced him to three months imprisonment. The appellant appealed. Delivering the judgment of the English Court of Appeal on the issue of contempt in the face of the court, Mustill LJ said[18]:

> We should add that certain dicta (for example, in *Balogh*) may be

[17] (1989) 88 Cr. App. R. 63.
[18] (1989) 88 Cr. App. R. 63 at 69.

> read as suggesting that the court has no jurisdiction to adopt the summary process unless the matter is urgent. We doubt whether this is strictly accurate. *In our opinion the question of urgency or no is material*, not to the existence of the jurisdiction but *as to whether the jurisdiction should be exercised in preference to some more measured form of process*.
>
> As to the question of jurisdiction to adopt the summary process, we consider it did exist in the present case. …

The real question in our view is whether the judge was right to exerciser these (summary) powers, or at least to exercise them in the way he did Ultimately, the Court of Appeal quashed the conviction and allowed the appeal because of an inappropriate choice of procedure by the court.

The English Court of Appeal drew a very nice distinction between whether the court had the jurisdiction to punish contempt summarily and whether the court should exercise the summary powers where the matter was not urgent enough to merit immediate punishment. Read this way, the *Joseph Griffin* is not and cannot be an authority for the proposition that the urgency of matter is not a condition precedent for the exercise of the jurisdiction to punish contempt of court or contempt in the face summarily. This seems to buttressed by the words of Woolf LJ in *Director of Public Prosecutions v Channel Four Television Co Ltd and another*[19]:

> … a judge should only act on his own motion in a matter of contempt if (a) the contempt is clear, (b) the contempt affects a trial in progress or about to start, (c) it is urgent and imperative to act immediately in order to prevent justice being obstructed or undermined and to preserve the integrity of the trial and (d) no other procedure will do if the ends of justice are to be met.

Clearly, a judge should act of his own motion against an alleged contempt of court only if the matter is urgent.

[19] [1993] 2 All ER 517 at 521.

It is our respectful conclusion that the summary procedure and the concept of contempt in the face of the court which is used to invoke it should be used sparingly and only in the most urgent of cases. While mankind can be expected to find novel ways to disrupt court proceedings, the courts should be slow to extend the parameters of the concept of contempt in the face to encompass acts better dealt with as "ordinary" contempt of court.

Complaining about a judge

It has long been accepted that it is contempt of court, without reasonable grounds, to say of a judge that he is biased or lacking in impartiality or competence[20]. It has been said that to impute injustice to a judge "is to insult him in respect of the very title he wears; it is like imputing blindness to a bishop"[21]. It is also well established that a lawyer who lodges a complaint about a judge – whether on account of bias or competence or any other ground – to a third party commits contempt of court. That this has been the law for centuries is illustrated by a case decided in 1344, known as *John de Northampton's Case*. In that case, John, an attorney, was found guilty of contempt of court for complaining about the King's Bench to a member of the King's Council [22].

This raises the question as to what course of action is open to a person who perceives a judge to be less than impartial or unbiased. The conventional answer would be that if the perception is formed in the course of proceedings, an application should be made to the judge to recuse himself. If that does not bring satisfaction, then the point should be raised on appeal[23]. In other words, the

[20] Given the Malaysian court's sensitivity to matters pertaining to the dignity of the court, a counsel would have to be very sure of his grounds if he is to assert that a judge is biased or incompetent. In the High Court of Australia, however, Griffths CJ said in *R v Nicholls* (1911) 12 CLR 280 at 286 that "an imputation of want of impartiality to a Judge is not necessarily a contempt of Court".

[21] *Reece v McKenna, ex p. Reece* [1953] Q.S.R. 258 at 264.

[22] John C Fox, *The History of Contempt of Court*:*The Form of Trial and the Mode of Punishment* (Professional Books Ltd, 1972; first published 1927, pp. 23-24.

[23] As indicated by "The decision or order made by a court of competent jurisdiction must be accepted and respected by all parties until such order or decision is set aside. Whether such a decision or order was decided correctly or not it must be duly accepted and respected by all parties especially so when the order granted is temporary in nature and given ex parte as in the present case. Any party who dissatisfied with such an order or decision may appeal against such order or decision to the Court of Appeal." These are the words of Zulkefli J (as his Lordship then was) in *Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong* [1999] 6 MLJ 38 at 63.

only avenue available to a person wishing to complain about a judge is within the judicial system itself.

Various reasons have been advanced to explain why it is a contempt of court for a lawyer to complain about the in-court conduct of a judge, other than in the course of the proceedings in which the conduct occurs or on appeal. The first is that such a complaint interferes with the due administration of justice. The interference arises from the pressure that the complaint itself imposes upon a trial judge. The second is that a complaint to a third party brings external pressure to bear on the judge. Linked to the latter is that the complaint interferes with the independence of the judge to decide the case according to the evidence and the law. All these are traditionally accepted reasons for not permitting a lawyer to complain about a judge to a third party.

In Malaysia, however, the situation seems to have changed since 1994 in that lodging a complaint about a judge to a "proper authority" would appear to be no longer a contempt of court. In 1994, Article 125 of the *Federal Constitution* was amended by the insertion of a new clause after the existing Clause 3. This was Clause (3A) which provided:

> (3A) The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the president of the Court of Appeal and the Chief Judges of the High Courts may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court.

The *Judges' Code of Ethics 1994* made pursuant to the said Clause (3A) of Article 125 was published in the Federal *Government Gazette* dated 22 December 1994 ("the Code")[24]. For completeness it has to be noted that the Code was amended in 2000 by the *Judges' Code of Ethics (Amendment) 2000* but the 2000 amendments do not concern us[25]. The Code currently in force is reproduced in the Appendix.

What is Lordship has to say of orders and decisions would apply with equal force to complaints about the judge.

[24] P.U. (B) 600

[25] P.U. (B) 182

Attention is drawn to Clause (9) of Article 125 of the *Federal Constitution* which reads, "This Article shall apply to a judge of the Court of Appeal and to a judge of a High Court as it applies to a judge of the Federal Court…". Thus the Code applies to all judges of the High Court and the Court of Appeal just as it applies to judges of the Federal Court.

The Code provides, *inter alia*, that a judge may not be lacking in industry or efficiency or that he may not conduct himself in a manner that brings the judiciary into disrepute or to bring discredit thereto. The foregoing and other provisions of the Code presuppose that there is an authority that can decide on whether a judge has breached the Code. Assuming that there is such an authority – that issue and the identity of that authority is dealt with later in this section – the question that arises is, "How will the said authority come to know if a judge has breached the Code by being, let us say, inefficient?" One of the ways in which the said authority would acquire such knowledge would have to be through complaints lodged against the judge by parties aggrieved by his breach of a particular provision of the Code. It is submitted that the Code necessarily, albeit silently, empowers parties aggrieved by the unjudicial conduct of a judge to bring their grievances, their complaints against such judge and such conduct to the attention of the said authority. In short, the Code authorizes the lodging of complaints against a judge!

The parties empowered by the Code to lodge complaints about what they perceive to be the unjudicial conduct of a judge would be a whole array of people including those who have appeared before that judge as litigants. Lawyers representing litigants would be another class of citizens who should be able to lodge complaints against judges. (Otherwise, lawyers will be placed in the invidious position of having to tell clients that they themselves cannot complain but they could draft a complaint for the clients to sign and deliver to the said authority). It is arguable that there is even a public policy interest in holding that the Code empowers members of the public at large to complain about the unjudicial conduct of those that society entrusts with the administration of the law.

To hold that the Code does not permit members of the public to lodge complaints

against judges to the proper authority (however defined) would be to reduce the Code to nothing more than window dressing. That cannot be the intent of the *Federal Constitution* or of the Code.

Who or what is the "proper authority" to receive complaints about breaches of the Code and to administer it? Until December 2005, neither the *Federal Constitution* nor the Code answered this question in terms. However, implicit in the fact that each of the superior courts has an administrative head is the notion that the proper authority for this purpose would be the administrative head of each of the courts. That would be the Chief Justice in relation to judges of the Federal Court, the President of the Court of Appeal for the members of the Court of Appeal and the Chief Judge of each of the two High Courts for the judges of the High Court. A complaint that the President of the Court of Appeal or either of the Chief Judges of the two High Courts has breached the Code would have to be made to the Chief Justice because Article 125(10) of the *Federal Constitution* makes these two judicial officers responsible to the Chief Justice. A complaint against the Chief Justice would presumably have to go to the Minister of Justice (if there is one), or the Prime Minister.

What is implicit in the Code has been rendered explicit by a recent amendment to Article 125 of the *Federal Constitution*. The amendment, effected by Act A1260 entitled *Constitution (Amendment Act) (No. 2) Act 2005*, received the royal assent on 30 December 2005 and was gazetted on 31 December 2005. Paragraph 5 of Act A1260 replaced the existing clause (3A) of Article 125 with a new clause (3A) as well as new clauses (3B) and (3C). The three new clauses in Article 125 read:

> (3A) Where a judge has committed a breach of any provisions of the code of ethics prescribed under Clause (3B) but the Chief Justice is of the opinion that the breach does not warrant the judge being to a tribunal appointed under Clause (4), the Chief Justice may refer the judge to a body constituted under Federal law to deal with such breach.
>
> (3B) The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief

> Judges of the High Court may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall also include provisions on the procedure to be followed and sanctions which can be imposed other than the removal of a judge from office under Clause (3), in relation to a breach of any provision of the code of ethics.
>
> (3C) The code of ethics prescribed under Clause (3B) shall be observed by every judge of the Federal Court and every judicial commissioner;

The date of the coming into force of the three clauses has yet to be gazetted.

By making the Chief Justice the authority to decide first, whether or not a judge has breached a provision of the Code and next, whether the infraction merits removal from office or not, Clause (3A) of Article 125 clearly envisages the Chief Justice as the "Administrator" of the Code. Does Clause (3A) quoted above require that all complaints about a judge allegedly breaching the Code must be made to the Chief Justice? The answer has to be "not necessarily" because the High Court judges have their administrative heads in the Chief Judges and the Court of Appeal judges have the President of the Court of Appeal as their head. Logically, complaints against judges alleged to have breached the code must go, in the first instance, to their administrative heads. Only if the administrative heads are unable to deal with a problem or if they fail to give satisfaction would the matter reach the Chief Justice. The administrative heads of the High Courts and the Court of Appeal are thus the "local" administrators of the Code. This has the effect of making the Chief Justice the "Chief Administrator" of the Code.

On the other hand, Clause (3A) of Article 125 may be interpreted restrictively to mean that any and all allegations about a breach of the Code by a judge must be lodged solely and only with the Chief Justice. Such an interpretation would make the Chief Justice the only administrator of the Code. It is submitted that the interpretation making the Chief Justice the Chief Administrator supported by "local" administrators is to be preferred.

The position of the Chief Justice as the "Chief Administrator" of the Code also answers another question. This is whether a person who alleges a breach of the Code by a High Court or a Court of Appeal judge to that judge's administrative head commits a contempt of court if he extends a copy of his allegation to the Chief Justice. It is submitted that the act of extending a copy of such an allegation would not be a contempt of court because as the "Chief Administrator" of the Code, the Chief Justice is entitled to be kept aware of any alleged breaches of the Code.

If, however, the Chief Justice is the only administrator of the Code would a citizen be committing contempt of court either by lodging an allegation of a breach of the Code by a High Court judge or a Court of Appeal judge to that judge's administrative head or by furnishing the Chief Justice with a copy of such an allegation? This is something which may have to be decided in the future if the new Code to be issued under the latest version of Clause (3B) does not provide for this issue[26].

Must a complainant be able to substantiate his grievance to the satisfaction of the administrator on pains of facing punishment if he fails to do so? The answer has to be no. What should be required should be the complainant's honest belief that the judge has breached the Code. If honest belief is established, the complainant should fear no punishment.

May a complainant specify (as does a litigant in a writ action) the relief or remedy he desires or is the complainant restricted to particularizing of the conduct of which he complains? Neither logic nor principle justifies preventing a complainant from spelling out the remedy that he desires. After all, it is for the said authority to decide on the appropriateness of the remedy sought by the complainant.

Complainants, be they lay persons or lawyers, will be writing in a state of heightened emotion. The language of the complaint may be more vigorous

[26] It has to be remembered that the *Judges' Code of Ethics 1994* is made under Clause (3A) of Article 125 (as amended in 1994).

than that employed in court documents and proceedings and normally, should not itself be the subject of contempt proceedings against the complainant.

If complaints to the proper authority as suggested above are allowed, the complaints could be investigated with the complainant being heard publicly. If the investigation reveals the complaint to be unfounded, that would vindicate the judge especially if the complainant were to be suitably admonished. And, justice would have been served in a transparent manner. On the other hand, if the complaint is upheld, justice would again be served. In either case, the winner would be justice itself. In both instances justice, would have been done and would been seen to have been done. The transparency of the administration of justice dispensed by the court in both instances refutes those who would argue in favour of such complaints being held in camera.

In *Majlis Peguam Malaysia & 2 Ors v Raja Segaran a/l S. Krishnan*, the Court of Appeal, in an unreported judgment, ruled that under Article 127 read together with Article 125(2) and (3) of the *Federal Constitution*, it is only Parliament that is authorized to discuss the conduct of judges. A differently constituted Court of Appeal seems to have endorsed this ruling in *Majlis Peguam Malaysia & 2 Ors v Raja Segaran a/l Krishnan*[27].

This calls for a comment on the meaning of Article 127 of the *Federal Constitution* which reads:

> **127 Restriction of Parliamentary discussion of conduct of judge**
>
> The conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that house, and shall not be discussed in the Legislative Assembly of any State.

The operative word in Article 127 is "discuss". A complaint about the unjudicial conduct of a judge which is restricted to the administrative heads of the different

[27] [2005] 1 MLJ 15 at 38 (para 58).

courts, is by no stretch of the imagination, a "discussion" as envisaged by Article 127. That by itself should be a sufficient answer to any argument that Article 127 of the Federal Constitution bars a complaint about a judge. However, Article 127 still merits explication, on its own and in relation to Article 125.

It is submitted that all that Article 127 of the Federal Constitution does is two things. First, it bars the Legislative Assembly of a State from discussing the conduct of a judge in the Legislative Assembly of a State. That is as it should be for judges are appointed for the whole of the Federation and not just a State; their conduct should not be the subject of comment in a legislative chamber that has no constitutional or other control over them. Second, Article 127 prevents individual members of Parliament from discussing the conduct of a judge at will. Instead, a member of Parliament wishing to discuss the conduct of a judge must secure the consent of not less than a quarter of the total numbers of the members of that House to give notice of a motion in that behalf. This is meant to ensure that if the conduct of a judge is to be discussed, at least a quarter of the members of the House must be exercised by it. The constitutional provision is meant to prevent judges from being criticized by individual members who, perhaps, disagree with particular rulings of a judge. The provision imposes constitutional safeguards which must be complied with to enable either House to discuss the conduct of a judge.

The Article sets out to prevent members of either House from raising the conduct of a judge in either House according to their whims and fancies or in respect of trivial matters. It should not be given the unduly narrow and constrictive interpretation that complaints concerning judicial conduct can only be raised Parliament. It is submitted that the constitution itself gives lie to such an interpretation in the wording of Article 125(3) as amended since 1994 by the addition of Clause (3A). As we have seen, Article 125(3A) in its 1994 form as well as its 2005 version together with the new Clauses (3B) and (3C) enables a complaint to be lodged against a judge on the grounds that the judge has breached the Code. Article 127 should therefore be read in conjunction with Article 125(3) as amended (in 1994 and 2005).

In holding that Article 127 allowed only Parliament to discuss the conduct of a judge, the Court of Appeal relied on the interpretation by Indian courts of

provisions in the Indian Constitution similar to Article 127 of the Malaysian *Federal Constitution*. In so doing our courts seem to have overlooked the clauses in Article 125 of the *Federal Constitution* providing for the Code. These clauses reflect Parliament's attempt to craft constitutional provisions to deal with conditions peculiar to Malaysia. The clauses are unique to the *Federal Constitution*. Just as unique is the Code that they engender to cope with the Malaysian condition. Malaysian courts must recognize and give effect to the change, express and implied and no matter how radical, that the constitutional provisions and the Code have wrought on the law of contempt in Malaysia.

Commenting on matters *sub judice*

The Latin phrase *sub judice* simply means "under judgment". When it is used in respect of a particular legal case it means that the case is still before the court and is currently under deliberation by a judge or the court. It would appear that a trial remains *sub-judice* until the expiry of the time allowed for appeal or in the event of an appeal until the conclusion of the appeal[28]. It is contempt of court for a newspaper or for any individual to comment on the proceedings of an ongoing trial, to predict the outcome of a trial or to publish anything that might have the tendency to influence the outcome of the proceedings. This specie of contempt may be termed "*sub judice* contempt".

Sub judice contempt emerged to meet the needs of a trial by jury. At a jury trial, the jurors are supposed to decide the issues before them solely on the evidence presented to them in court. Jurors are not allowed to take into account any matter not presented to them in the court. The prohibition against extraneous matter is so rigorous as to bar jurors from supplementing the evidence presented in court with their own professional knowledge to decide the matter before them. *Sub-judice* contempt is also meant to prevent witnesses as well as parties from being influenced by public discussion of the matters to be ventilated in court. The fear is that parties as well as witnesses might tailor their testimony because of public discussion.

In Malaysia, trial by jury has been totally abolished since 1st January 1995. This

[28] *PP v The Straits Times Press Ltd* (1949) MLJ 81 at 83 following *Rex v Davies* (1945) 1 KB 435.

abolition means that there are no jurors to be influenced or pressured by public discussion of cases making their way through the courts. Thus one of the bases for *sub judice* contempt is gone. However, the potential of the public discussion of matters pending before the courts to influence parties and witnesses would appear to justify the retention of *sub judice* contempt. Once a trial court has entered judgment or verdict, public discussion can no longer influence witnesses as well as the litigants. Therefore, the second bases for the existence of *sub judice* contempt from the conclusion of a trial ceases to exist. Accordingly, it is submitted that the time has come in Malaysia for the law of contempt to be updated by abrogating *sub judice* contempt from the conclusion of a trial.

What, it will be asked, about appeals and re-hearings? Won't the parties and witnesses have to testify anew at appeals and at a rehearing, if one is ordered? It is extremely rare for witnesses to be allowed to testify at appellate proceedings. And, re-hearings are just as rare. The rarity of testimony at appeals and the rarity of re-hearings has to be balanced against the constitutional right to free expression. It is submitted that the right to free expression must prevail over the potential ill effects of post-trial discussions on the testimony of witnesses and parties at the rare appellate proceedings and re-hearings. On balance, this basis of *sub judice* contempt must be rejected.

It has been said that newspapers and other should refrain from commenting on legal proceedings before they are finally disposed of by the apex courts because the judges before whom appeals and re-hearings are conducted also read newspapers and may be influenced by what they read. It should be noted that on appeal judges consider points of law not facts. It is consequently extremely rare for an appeal court to allow new facts to be introduced at the appeal stage of a case. Therefore, media reporting of the facts of a case will usually not impinge on the task of the judge. Even if it does, the judge is in a very different position to jurors, witnesses or litigants and the likelihood of a judge being so influenced is highly unlikely by dint of his station and training, which enables him to put of his mind matters which are not evidence in the case before him[29].

[29] *R v Duffy* [1960] 2 All ER 891 at 895 per Lord Parker CJ.

In this context, it has to be noted that more than four decades ago Lord Reid remarked, "For one thing it is scarcely possible to imagine a case where comments would influence judges in the Court of Appeal.…"[30] After all, judges regularly assert they cannot be influenced by extraneous matters when they reject applications to recuse themselves[31]. Another judge has perhaps hit the nail on the head when he says that such commentary merely makes the life of the judge concerned a bit more difficult without actually making it impossible for him to discharge his judicial office[32]. The occasional difficulty that may be visited on a handful of judges at the appellate level hardly justifies the continuance of *sub judice* contempt after a trial at first instance is concluded.

Conclusion

The court's power to punish for contempt of court is a necessary tool to protect the dignity and authority of the judge and the integrity of the judicial process itself. The common law has recognized specific forms of contempt including the two discussed here. The forms of contempt emerged in response to the societal conditions and values prevailing at the material times. Society and its values have developed since that time but the forms of contempt have not. Instead, they seemed to have acquired an existence independent of the circumstances which gave rise to them. Indeed, in their divorce from the social conditions and values extant today, they continue to operate largely as the strait jacket of tradition or even judicial precedent. Our highest courts have the power to review and update the old forms of contempt. It is hoped that the courts will do this in respect of complaints about judges and *sub judice* contempt.

---

[30] *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54 at 65. A little earlier in the same case, at p. 63, Lord Reid had also noted the minds of witnesses, members of the jury or lay magistrates might be influenced by public discussions of pending or on-going proceedings and continued, "But it can be assumed that it would not affect the mind of a professional judge". In Malaysia, judges of the superior courts would be professional judges.

[31] *Tan Kim Hor v Tan Chong & Sons Motor Company Sdn Bhd* [2003] 2 MLJ 278. See also the typescript of the judgment of the Court of Appeal in *Tan Kim Hor v Tan Chong & Sons Motor Company Sdn Bhd* (Rayuan No W-02-891-2002), para 4.

[32] See the portion of the judgment of Humphrey J in *Delbert-Evans v Davies and Watson* [1945] 2 All ER 167 quoted in *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 at 342.

APPENDIX

JUDGES' CODE OF ETHICS 1994

In exercise of the powers conferred by Clause (3A) of Article 125 of the Federal Constitution, the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, and after consulting the Prime Minister, prescribe the following code of ethics:

1 Citation

This code of ethics may be cited as the **Judges' Code of Ethics 1994.**

1. Application

(1) This Code of Ethics shall apply to a judge throughout the period of his service.

(2) The breach of any provision of this Code of Ethics may constitute a ground for the removal of a judge from office.

2. Code of Ethics

(1) A judge shall not –

(a) subordinate his judicial duties to his private interests;

(b) conduct himself in such manner as is likely to bring his private interests into conflict with his judicial duties;

(c) conduct himself in any manner likely to cause a reasonable suspicion that-

(i) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or

(ii) he has used his judicial position for his personal advantage;

(d) conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto;

(e) lack efficiency or industry;

(f) inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgment;

(g) refuse to obey a proper administrative order or refuse to comply with any statutory direction;

(h) absent himself from his court during office hours without reasonable excuse or without prior permission of the Chief Justice, the President of the Court of Appeal or the Chief Judge, as the case may be; and

(i) be a member of any political party or participate in any political activity.

(2) For the purpose of paragraph (1)(*h*) "office hours" means the normal office hours (which do not include staggered working hours) applicable to the Federal Government officers in the State or in Wilayah Persekutuan where the Judge is stationed.

(3) A judge shall, on his appointment, or at any time thereafter as may be required by the Chief Justice, declare in writing all his assets to the Chief Justice.

4 Judge ceases to have any connection with his practicing firm on appointment.

A judge shall, on his appointment, cease to have any connection with the firm where he was practising as an advocate and solicitor prior to his appointment. For this purpose, the judge shall take the following steps:

(a) to ensure that his name is removed from the firm's name;

(b) to ensure that his name does not appear in the firm's letter heads; and

(c) to ensure that he has no dealing with the firm or any member of the firm.

Migrants And Rights In Malaysia
More Important Than Rights is the Access to Justice

by
Charles Hector

Migrants are human beings not commodities. Migrants are father, mother, brother, sister, husband ,wife , son, daughter and uncle to other human persons. Migrant workers are workers entitled to equal treatment and all rights accorded to any worker. Migrant workers come to Malaysia, leaving their families and homes behind, to earn a living to support themselves and many a time their families back home. Many migrants do not have much of a choice, for the means of earning a living is scarce in their home country.

Today, there are about 1.8 million registered (or documented) migrant workers in Malaysia[1]. 15 countries now supply workers in various employment sectors in Malaysia with the largest number coming from Indonesia (1.2 million) followed by Nepal which provides 170,000 workers.[2] Other sending countries include India, Sri Lanka, Bangladesh, Pakistan, Burma, Thailand, Vietnam, Timor Leste and the Philippines

According to government estimates[3], there is an equivalent number of unregistered (or undocumented) migrant workers in Malaysia, and today that means 1.8 million undocumented workers. It is my opinion that the actual figure of unregistered (or undocumented) migrant workers in Malaysia is about 5 million.[4] This estimate is supported by the fact that In 2004, based on official

[1] Vietnam News Agency (VNA), 22/9/2005 **"**Malaysia calls for regional cooperation against illegal migrant workers" stated the figure to be 1.7 million,

[2] Bernama Report, 6/3/2006 "Malaysia Ready To Accept More Indonesian Housemaids" By Mohd Nasir Yusoff

[3] According to a report by Amnesty International, government statistics indicate that through 1 June 2004, there were at least 1.3 million documented migrant workers working in Malaysia (an increase of about 500,000 since 2003) and between 700,000 to 1.2 million undocumented migrant workers.

[4] (Star 27/9/2005), Records show that 15,452,112 foreign nationals entered Malaysia in 2004 but only 9,599,125 people left the country during the year – meaning that there were about 5,852,997 or 38% of the total arrivals overstaying.

entry-exit records, there were about 5,852,997 persons or 38% of the total arrivals overstaying. Now undocumented migrants can enter Malaysia easily by sea and land, avoiding immigration and customs authorities and that is the manner of entry employed by the majority of undocumented migrants.

Malaysian labour force for the 3rd quarter of 2005 according to the Malaysian Department of Statistics was 10,498,600[5] and that means that number of migrant workers (both documented and undocumented) is about 30% to 50% of the total Malaysian labour force. This fact of the growing number of migrant workers in Malaysia also tally with the figures of persons in the Malaysian prisons, where it was disclosed that 25% of the prison community were foreigners in 2003, and in 2004 it was stated that the number of foreigners exceed the number of local Malaysian in prisons.[6] A recent report also did state that out of Malaysia's 10.5 million strong labour force, 2.6 million are foreign workers.[7]

Migrants in Malaysia are from a variety of countries, and this also include countries like Iran, Cambodia, Namibia, South Africa, China, Singapore, Nigeria, Peru, France, Taiwan, Columbia, Congo, Argentina and Uzbekistan.[8]

Statistics obtained by the Bar Council Legal Aid Center (Kuala Lumpur) showed that migrant nationality breakdown in 2004 at the Sungai Buloh prison was Indonesia(174), India(75), Burma(67), Bangladeshi (47), Pakistani (24) and

[5] Statistics obtained from the Department of Statistics, Malaysia website , http://www.statistics.gov.my

[6] In 2003, the Deputy Home Minister stated that over 25% of prisoners on Malaysian jails were foreigners, while by June 2004 there were now more foreign prisoners than Malaysians in jails. Now, it must be factored in that many a time foreigners either are not offered bail and/or cannot afford bail – and it is also not certain whether the figures include remand prisons, being where persons not yet convicted are held.

[7] Malaysiakini(an AFP Report), 30/3/2006 "June Signing of Pact for Indon Maids"

[8] Statistics obtained by the Bar Council Legal Aid Centre (Kuala Lumpur) showed that migrant breakdown in 2004 at the Sungai Buloh prison was: Indonesia(174), India(75), Burma(67), Bangladeshi (47), Pakistani (24) and Others (41). Others include migrants from Iran, Cambodia, Namibia, South Africa, China, Singapore, Vietnam, Sri Lanka, Nepal, Thailand, Nigeria, Peru and France. Statistics obtained showed that migrant breakdown in the Kajang Women Prison prison was: Indonesia(167), China(70), Philippines(57), Thailand (45), Vietnam(27), Taiwan(18), Burma(17), Cambodia (17) and Others(50). Others were migrants from Bangladesh, Columbia, Congo, Argentina, Uzbekistan and Sri Lanka.

others (41). Others included those from Iran, Cambodia, Namibia, South Africa, China, Singapore, Vietnam, Sri Lanka, Nepal, Thailand, Nigeria, Peru and even France. Statistics obtained about migrant nationality breakdown in yet another prison, the Kajang Women Prison was: Indonesia(167), China(70), Philippines(57), Thailand (45), Vietnam(27), Taiwan(18), Burma(17), Cambodia (17) and Others(50). Others were from Bangladesh, Columbia, Congo, Argentina, Uzbekistan and Sri Lanka.

Whilst the majority are economic migrants, there is also a significant number of political migrants and/or refugees, and this would include the Acehnese, Burmese, Thais and also Filipinos.

Migrant workers are employed primarily in the construction, plantation, manufacturing and service sectors. There is also 320,000 registered foreign housemaids in Malaysia, of which 308,000 or about 96 percent are Indonesians.[9] There is also a large number of foreign sex workers in Malaysia where it is estimated that about 142,000 women involved in sex work. It was recently reported that in 2005, a total of 6,446 alleged sex workers were arrested, an increase of 12 percent from the previous year. Topping the list of foreigners arrested were Chinese citizens, who numbered some 2,824. Indonesians arrested was 1,606, Thais at 910, while the number of Filipinos arrested was 742. Other foreign nationals arrested for prostitution in 2005 included Vietnamese, Uzbeks, Indians and Cambodians.[10]

MIGRANTS AND THEIR RIGHTS UNDER MALAYSIAN LAW

Article 8 of the Federal Constitution of Malaysia provides that "All Persons are equal before the law and is entitled to equal protection of the law" and by the use of term "person" as opposed to 'citizen' makes it most clear that this guarantee of rights extends also to all persons, including migrant workers, be they documented or undocumented. 6 out of the 13 Articles under Part II of the Federal Constitution entitled 'Fundamental Liberties' uses the word

[9] Bernama Report, 6/3/2006 "Malaysia Ready To Accept More Indonesian Housemaids" By Mohd Nasir Yusoff

[10] Malaysiakini, 22/3/2006 – "More foreign sex workers arrested last year"

"persons" as opposed to : "citizens".[11]

Arrest and Detention

Generally when a person is arrested in Malaysia, he/she must be brought before a Magistrate within 24 hours if the police wants to further detain him/her for purposes of investigation, and the police can with remand orders obtained from the magistrate detain a person up to a maximum of 14 days only.

However, when it comes "…to a person, other than a citizen, who is arrested or detained under the law relating to immigration…", the police can arrest and detain him/her for a period of up to fourteen days before being compelled by law to produce the person before the Magistrate. Many migrant workers, when arrested, are held by the police for more than 24 hours in reliance of this provision. What is not clear is how long can persons under this category be remanded for?

Although, there is no provision that allows the police to resort to torture in the conduct of their investigation, there has been many reported incidence of torture in police custody. In February 2005, it was revealed that from 1990 until September 2004, there was a total of 1,583 deaths amongst prisoners recorded in the 28 prisons nationwide, with the highest number being in 2003 when 279 inmates died. During the same period 150 detainees died in police lock-ups or custody.[12]

It must be pointed out that till this day in Malaysia there is no right to one phone

[11] Article 5 (Liberty of the Person), Article 6(Slavery and Forced Labour Prohibited), Art.7 (Prohibition against retrospective criminal laws and repeated trials), Art. 8(Equality), Art. 11(Freedom of Religion) and Article 13 (Right to Property) are amongst the 8 Articles under Part II (Fundamental Liberties) of the Federal Constitution that applies to all persons. Art. 9(prohibition from Banishmjent and Freedom of Movement), Art.10(Freedom of Speech, Assembly and Association), Art.12 (Rights in Respect of Education) uses the word "citizen" and not "persons".

[12] Malaysiakini, 7/2/2005 - In Malaysia "...from 1990 till September last year[2004], a total of 1,583 deaths among prisoners were recorded in 28 prisons nationwide, with the highest number in 2003 when 279 inmates died. During the same period, 150 detainees died in police lock-ups or custody" (statistics from a 49-page parliamentary written reply by Prime Minister Abdullah Ahmad Badawi)

call after being arrested and no right to immediate access to a lawyer (let alone friends, family and/or employer) in Malaysia.

Bail

The migrant has a right to be released on bail just like any other citizen. The disadvantage the migrant faces is the fact that he is a possible flight risk, and as such courts, even when they do grant bail generally imposes an additional conditions when it comes to foreigners like requiring their travel documents to be deposited in court. The other condition that is usually imposed is the requirement that the surety must be a Malaysian citizen.

In Malaysia, after being charged and one is allowed bail, money has to be deposited in court and the surety will have no access to this monies until the trial ends. When it comes to a foreigner, many a Malaysian worry about the fact that accused may abscond and if and when that happens the bail money could be lost forever – and as such it is indeed a difficulty task for migrants to find local persons to stand as sureties. The result is that many end up in the remand prisons languishing for months (even years) as they wait for their day in court .

In the past, it was a popular perception that it was near impossible for a migrant worker charged with a criminal offence to be released on bail pending his trial and sadly many did not even apply, let alone try to apply for bail.

In a case, that I personally handled some years ago, which involved 6 foreign nationals[13], the court in the first instance refused bail. But persistence, which included an application to the High Court for a revision finally resulted in the Magistrate allowing bail for these foreigners. In this case, the foreign nationals came to Malaysia on a social visit pass, which had expired during their detention, but even this did not stop the court from allowing the said accused persons to be released on bail. The Magistrate in this case even went further to direct the

[13] Kuala Lumpur Magistrate Court (2) Criminal Case No: NO: D83-1427-99, D83-1428-99, D83-1429 -99, D83-1430-99, D83-1431-99 and D83-1432-99, Charles Hector & Amin Hafiz acted for the 6 persons from Uzbekistan

Immigration Department to issue Special Passes so that these foreigners could remain in Malaysia legally whilst waited for their day in court. The Court also did issue the necessary letters to the Immigration Department to facilitate in the application for Special Passes for these persons.

MIGRANTS AND THE EMPLOYMENT LAWS

In Malaysia, migrant workers have access to the Labour Court[14] and the Industrial Courts[15] just like the local worker. The problem is that when Migrants come to the country, their very presence and their ability to work legally is linked to a work permit, which stipulates a particular employer. And when a migrant worker wants to refer his rightful claim to the Labour Court and/or the Industrial Relations Department, the usual thing that happens is that the employer immediately terminates his work permit and cease giving him employment, wages and board. Without a valid work permit, a migrant worker cannot legally work and earn a living in Malaysia. As such although a migrants has a right in law, the claiming of this right is practically impossible.

The case of Rajakannu Boopathy & 39 Others (The Gopis Construction Case) – at the Labour Court

In the case of Rajakannu Boopathy & 39 other Indian nationals, donations had to be sought to pay for food and board of these migrant workers whilst they pursued their claim against their employer, one Gopis Construction (Malaysia) Sdn Bhd, at the Seremban Labour Court. The minimum cost of maintaining one of this migrant was about RM5-00 per day, and that did not include money

[14] Employees who generally have a monetary claim against their employer can make a complaint and the Labour Department, and if there is no resolution, then the Labour Court will convened and this will be chaired by a Labour Officer. Complaints of non-payment of wages, wrongful holding back of part wages,etc can be referred to the Labour Court.

[15] If an employee is wrongfully and/or constructively dismissed by her employee, she has to make a complaint at the Industrial Relations Department(IRD) within 60 days days from the date of dismissal. The IRD will then call for a conciliation meeting between the Employer and the employee. If conciliation fails, the matter is referred to the Minister, who then refers or does not refer the matter to the Industrial Court. If referred to the Industrial Court, then the case goes to trial. Now, if the Minister does not refer the matter, then the employee has a right to apply for a Judicial Review (but here legal charges and cost is involved), so generally the matter ends here for the employee. In the Industrial Court, the employee's claim is for re-instatement but at the end of the trial, the Court is at liberty to also award damages in lieu of reinstatement.

required for rental, utility bills and travel cost to and from the court.

At all times during their struggle for justice, these migrant workers ran the risk of being arrested and detained for not having proper travel documents and/or visa to allow them to continue to stay in Malaysia. They could legally not work and earn a living and had to rely on donations and goodwill of others. The Immigration Department finally agreed to issue Special Passes to allow them to stay legally in Malaysia, but not to work. RM100-00 was needed for a one-month special pass for each worker

Their claim was for wages of 3 to 6 months that their employer did not pay, and for the balance of wages based on their initially agreed wages right from the first day they started working in Malaysia until the day they filed their action in the Labour Court.

In this case the employer had gone to India, conducted interviews and skills test and thereafter made each worker a definite offer which included salary. Thereafter, in accordance to the requirements of Indian Law, they signed the standard form employment agreement which very clearly stipulates the wages they will receive, as well as their other employment rights. The workers signed the employment agreement before an authorized agent of Indian Protector of Emigrants (POE), and thereafter the employer signed the agreement before a designated officer of the Indian High Commission in Kuala Lumpur. Unfortunately original copies of the agreement were not given to the worker, and finally only a photocopy of this agreement was obtained from their agent in India.

After this POE employment agreement was executed, to comply with the requirements of the Malaysian Immigration Department, the employer that required the duly executed employment agreement to be submitted together with the application of a work permit, the employer rather than submitting the POE agreement did prepare another agreement, whereby in this agreement was far less than the sum stated in the POE Employment Agreement.

Before departure, the workers had to sign a whole lot of documents, whereby the workers unknowingly were made to sign yet another simple employment

agreement, and this was on an official stamp paper (i.e. a document equivalent to a Statutory Declaration which had to be affirmed before a Judge and/or a Commissioner of Oaths). The employer left the space where the wages per month should have written in blank, and thereafter kept the originals of this stamped agreement with him.

It must be stated that the workers were generally unaware that they had in fact signed 2 other employment agreements, and thet only knew and believed that was only one agreement being the POE Employment Agreement.

When it came to the labour court trial, objections were made about the admissibility of the photocopied POE Employment Agreement, and as such we had to try and get an original copy of the said POE Agreement, which should have been kept by the POE in India and/or the Indian High Commission in Kuala Lumpur. To our dismay, both these parties did not have any copy of the original POE Agreements, let alone a photocopy of the said agreements in their possession.

The Immigration Department of Malaysia also did not have an original copy of the employment agreement submitted to them during the work permit application, and all they had was the copy of the agreement that was scanned into the computer record of the individual migrant worker.

On the other hand, the employer had in his possession the original copy of the stamped agreement.

As such, given the fact of available admissible evidence, the fact that the employer Company was financially unstable and was then on the verge of insolvency and the fact that the migrant workers had been successful in another court action at the Kuala Lumpur High Court in changing their employer and getting the right to live and work in Malaysia for at least a further 2-3 years with a Social Visit (Temporary Employment) Pass[16], the migrant workers made

[16] The 40 Indian workers came into Malaysia as migrant workers under an Employment Pass (Rule 9 Immigration Regulations 1963), and with regard to this employment pass, the law stipulated that the minimum wages should be RM1,200-00 per month. This is in fact the one and only provision in Malaysian Laws that stipulate a minimum wage. The majority of the

the decision to settle the case and take the minimal sum offered by their ex-employer, where the figures was based on the wages as stipulated in the Employer's stamped paper Employment Agreement.

The Rajakannu Case – Right to Change Employer and the Right to Live and Work in Malaysia whilst they pursue their rights in law

After the filing of the case against their employer, one Gopies Construction, their employer thereafter did not provide work, wages and/or board to these migrant workers. The workers survived on the kindness of many persons but this was and could only be a very short term solution. To continue to remain in Malaysia after the expiry of the Employment Pass, they relied on RM100-00 monthly Special Pass (which only allows them to stay BUT not work

The workers, after commencing their action in the Labour Court, then applied to the Director General of Immigration to allow them to continue to live and work in Malaysia with another employer (or alternatively on their own) to enable to pursue their rights under the Malaysian labour laws.

The Immigration Department responded by calling the workers in for various interviews. The workers also identified a potential Employer and furnished the Immigration Department with Employment Agreements signed with the potential employer company, which would become effective once the Immigration Department issued the requisite Work Permits. The first application to the Immigration Department for a variation of the terms and conditions of their work permit was made on 10/10/1999.

After about 10 months had lapsed, the workers had still not received any reply with regard their applications, and finally 36 of these migrant workers[17] files an

migrant workers in Malaysia only have a Social Visit (Temporary Employment) Pass (Rule 11(1)(ii) Immigration Regulations 1963) and here there is no stipulation of any minimum wage.

[17] When this matter started there were 40 workers, but 4 just could not take the stress and chose to return home and in the Kuala Lumpur High Court case (Usul Pemula No: R2-25-76 Tahun 2000)

action in the Kuala Lumpur High Court where the Director General of Immigration and the Immigration Department of Malaysia were named as Respondents. What was sort in this case was a court order to compel the Respondents to provide a reply to the migrant workers' application.

Being an extraordinary applications, the battle in court was intense and finally just before the court handed down a judgment, the Respondents conceded and proposed the recording of a consent judgment which stated that the Director General of Immigration shall cause to issue Social Visit (Temporary Employment) Pass to all the applicants to enable them to live in Malaysia and work with Syarikat Central Generative Sdn Bhd (being the new employer). The consent judgment was recorded on 6/12/2000.[18] As such there was no judgment of the court, and there was nothing that others could use to further advance migrant rights in Malaysia.

The Rajakannu Case – Contempt proceedings against the Director General of Immigrations.

Following the recording of the consent order, despite the submission of the required application forms and the payment of levy by the new employer, the DG of Immigration delayed several months before issuing the work permits. When the permits were finally issued on 19-4-2001, it was discovered that the permits were for 1 year, beginning from the date their last permits had expired and as such the majority of the workers received lapsed permits, and others got permits that would expire in a couple of months thereafter.

Various letters were sent to the DG of Immigration asking him comply with the court order and issue new valid permits but no response was forthcoming from the DG of Immigration.

[18] It was sad that the High Court did not hand down a Judgment on this case, for if that was done it would have been a precedent that other migrant workers could rely on in the struggle for migrant rights. One significant point would have been the right for the migrant worker to apply for a variation of his work permit, including the change of employer. Before this and still today, it is believed that only the employer has the right to apply for work permits and/or variation of the said permits. To date, it seems that there has been no other similar cases in the Malaysian Courts.

Again, the workers had to go to court and this time it was to commence committal proceedings against the DG of Immigration. Leave was obtained on 24/7/2001 and committal proceedings were initiated. Again after lengthy arguments, just before the court handed down the judgment, the DG of Immigration send a letter admitting his mistake.

In a contempt proceedings, the court can order arrest and detention, fine or cost if and when a person is found to be guilty of contempt. The Court was of the opinion that when a case involving a Public Officer carrying out his public duty , then arrest and/or fine may not be available. If fine, it will the government taking out money from one pocket and putting it into the other. The only realistic punishment would be cost, and this would be punitive cost.

In light of the DG of Immigration written admission of his mistake, the agreement that the Respondent to pay the Applicants cost of the whole action and the fact that the DG of Immigration had finally issued new work permits, the court yet again recorded another consent Judgment on 10/4/2002 stating also that cost be taxed and that the DG of Immigration shall not impede an application for an extension of the work permits by these migrant workers as and when their current permits expired.

The taxing officer taxed the cost at RM10,000-00 to be paid to all the 36 applicants, and this works out to slightly more than RM250-00 per person, and this was gross injustice done to these migrants, who had no work or wages by reason of the action/omission of the Respondents for almost 30 months. The applicants applied for a review of the cost awarded by the taxing officer and until this date the matter is still at the review stage.

The Rajakannu Case – Claim for Damages & Compensation against the DG of Immigration and others

On 30/4/2001, 31 of the workers commenced a civil action claiming for loss of wages from October 1999 until a date to be determined, being a sum of about RM640,000 plus damages. This was done in light of the outcome of the earlier action and the acknowledgement of mistake by the DG of Immigration. It was then not possible to go for a claim of damages and compensation in the earlier

action[19] On the first hearing date, the Honourable Judge dismissed all the technical preliminary objections raised by the Federal Counsel and proceeded to record judgment in favour of the migrant workers. The Judge could not complete his judgment as he wanted the actual agreed salary for each individual worker. He adjourned the case and fixed another date so that this information could be provided to the court.

But on the next date, the Judge had a change of mind and asked the Federal Counsel to submit on his technical objections[20], both of which were minor objections that could have been cured, and normally court would have asked the Plaintiffs to do the necessary to remedy these irregularities but this Judge stating that it was finally his discretion allowed the government's lawyer's objections and struck off the migrant workers suit with cost on 12/8/2002. The workers have since appealed to the Court of Appeal and this appeal is yet to be heard.[21] All we can hope for is that these migrants workers ultimately gets justice.

RIGHT TO LOVE, MARRY AND HAVE A FAMILY

Many migrant workers were having relationship with Malaysians, some even had children with locals, and some were even getting married to their local partner, and the Malaysian government reacted by allegedly[22] imposing a

[19] At that time, it was no possible to include a claim for damages in the 1st court action but today the Rules of the High Court has been amended and a claim of damages could be included in the 1st action.

[20] One of the objections was that the Government of Malaysia was not named as a party. It is still believed that there is no need to specifically name the Government of Malaysia as a party, more so since the DG of Immigration and the Immigration Department of Malaysia were already named as parties.

[21] The lawyer was threatened with arrest under the Internal Security Act if we went further after the High Court dismissed the suit. In fact these threats, and other threats, were directly and indirectly made at the earlier stage in the first suit. One senior Minister also tried to get the workers to withdraw their suit. This is only what the lawyer understood by the words and actions. There was nothing in writing – only verbal communications to the lawyer alone.

[22] Allegedly – because to date the author has not seen any such condition in the written form. This could be one of those many unwritten policies that the Malaysian government is famous for. The policy is relied on when the Government wants to use it, and many other policies are denied when others want to rely on it. This is the problem with unwritten policies. For certainty, Malaysia must start having written policies that can be accessed by the public, and better still if these policies are gazetted.

condition on work permits prohibiting marriage.

In one case, the marriage had occurred before the policy was made known and there were children of the marriage but before the matter could be taken to court the migrant husband unfortunately abandoned the wife and the family and left the country. Hence, we have to wait for another time when this matter could be brought before the court for a determination.

The fact that Malaysia today has ratified/acceded the UN Convention on the Rights of the Child would have a bearing in such cases since Article 3(1) is most clear that now the "..best interests of the child shall be a primary consideration".

The fact that there exist children of migrants in Malaysia has just recently been acknowledged by the Malaysian government. In Sabah, one of the 13 States of Malaysia, where it was recently reported that there are about 36,000 children of migrants. It is good to note that special schools will be set up to cater for these children. What exactly is the number of children of migrants is still a mystery? What about children of a migrant with a Malaysian? Would the Migrant Parent be allowed to stay on in Malaysia with their children or would they be forced to return home? Will they be given multiple entry visas to enable them to have frequent visits to be able to spend adequate time with their children? Maybe, in the Maruly Azis case, the court will finally provide some answers to many of these questions.

MARULY AZIS CASE – THE RELEVANCE OF THE CRC.

In this case, the father, an Indonesian came to Malaysia in 1978. He applied and got an Entry Permit, and was then issued a National Registration Identity Card (NRIC) with a permanent resident status. He went back to Indonesia, married one Romita Hasibuan (an Indonesian national) and brought her back to Malaysia. Romita was able to stay in Malaysia by virtue of a "spouse visa", which was a 6-month visa that had to be applied for by her husband. The marriage had resulted in 4 children, and by virtue of Malaysian law, all these children were Malaysian citizens. All the children were born in Malaysia, lived their lives in Malaysia and also was in Malaysian schools. On 23-3-2005, Abdul

Mutalib went with his son, Maruly Azis, to the National Registration Department to apply for his son's identity card (as he had reached the age of 12[23]). Abdul Mutalib was then wrongly arrested, wrongly detained and thereafter wrongly deported back to Indonesia. The government claimed that he was a prohibited immigrant and he could not remain in Malaysia. Romita, the wife, being an Indonesian national also would not be able to stay on in Malaysia when her "spouse visa" expired. A campaign was initiated with the call to allow Romita and her family to be able to continue to live in Malaysia as one family.[24]

As time of the expiry of the "spouse visa" drew near, a court action[25] had to be filed, and an application was made to enable Romita to continue to stay with her 4 children on 23/9/2006. On 26/9/2003, the applicants managed to get an ex-parte ad-interim order allowing Romita to stay until this application was heard and disposed off inter-parte. At the inter-parte hearing, the Federal Counsel proposed that a consent order be recorded to the effect that Romita could continue to stay with the children until the end of this case, and that the immigration Department would issue her a gratuitious special pass, whereby she would not have to make any payment until the whole suit is heard and disposed of. This order was recorded on 28/11/2005. Again, there will be no judgment recorded in this matter where there was reliance on the Child Rights Convention[26]. This case is still pending, and the Immigration Department has

---

[23] In Malaysia, when a child attains the age of 12, he needs to apply for his National Registration Identity Card (NRIC).

[24] The matter was taken to the Human Rights Commission, the Bar Council and even to Parliament. A signature campaign was initiated, which collected over 6,000 signatures, An urgent appeal was also initiated by the Migrant Forum in Asia. MFA and many other organizations also wrote in support for the re-unification of the family of Abdul Mutalib, Romita, Maruly Azis Bin Abd Mutalib (12 +), Sarah Nor Varah Hanim Binti Abd Mutalib(11+), Yonatan Adam Fauzi Bin Abd Mutalib(9+) and Ismael Syah Putra Bin Abd Mutalib(6+)

[25] Kuala Lumpur High Court Suit No: S4-21-239- 2005

[26] In the case of Mohamad Ezam -v- Ketua Polis Negara (2002) 4 CLJ 309, a Federal Court case, it was stated in the judgment"In the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law". Now in 1995, Malaysia ratified/acceded the UN Convention on the Rights of the Child, and there is NO reservation with regard to Article 3(1), which states "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideratoion". Further, unlike the United Kingdom, Malaysia did not have any reservation as to the application of the CRC to "...matters of immigration and citizenship law"

issued the Special Pass to Romita.

For the sake of completion, Abdul Mutalib and Puan Romita also did file another suit against the Home Minister & 2 Ors, and this is also pending at the time of writing.

MIGRANT DOMESTIC WORKERS

There are today 320,000 registered foreign housemaids in Malaysia, and out of this 96 per cent or 308,000 are Indonesian migrant workers. There is very little of no protection for domestic workers in Malaysia's employment laws at the moment.

"Domestic servant" is mentioned in the Employment Act 1955, and it means" a person employed in connection with work of a private dwelling-house and not in connection with any trade, business, profession carried on by the employer in such dwelling house and includes a cook, house servant, butler, child's nurse, valet, footman, gardener, washerman or washerwoman, watchman, groom and driver or cleaner of any vehicle licensed for private use." In Malaysia, save for driving, a migrant domestic worker normally ends up doing all of these different jobs.

With regard the domestic servant, it is clearly stated that the following sections and/or Parts of the Employment Act are not applicable to them, being:-

- Sec. 12 (Notice of termination of Contract)
- Sec.14 (Termination of Contract for Special Reasons)
- 16 (Employees on Estates to be provided with minimum number of days' work in each month)
- 22 (Limitation on advances to employees)
- 61 (Employers Duty to Keep Register)
- 64 ((Employers Duty to display notice boards)
- IX (Maternity Protection)
- XII (Rest Days, Hours of Work, Holidays And Other Conditions of Service)
- XIIA (Termination, Lay-Off And Retirement Benefits

In short, there is no protection for domestic workers under the Malaysian employment laws. Jordan has legislations to provide some rights and protections to domestic workers. In Taiwan, an Household Services Act is before their Parliament. In Malaysia, with over 320,000 domestic workers, it is time for some legislation to protect the rights of these domestic workers.

Although, the Malaysian Immigration Department "policy" or "guidelines of employment" do stipulate that a domestic worker is entitled to one day off – but in practice save for the Filipino worker, none of the other domestic workers seem to be getting any day off, let alone any time off. They are treated more like "property" than human beings. More like slaves than workers. Many do not even have the liberty to make phone calls to their families back home. Some are even given just 2 basic meals a day.

There has also many cases of abuse of domestic workers that have come to light – but alas without the freedom to leave the home (or their employers watchful eye), many may be suffering abuses in silence. Employer also hold on to passports and other travel documents of migrants, all with the alleged reason that they are afraid that the maid may run away (oh yes – run away maybe with their property or children.) Hence, there is very little opportunity for victims of abuse to even escape the abuser – let alone complain to their embassies, the Human Resource Ministry and/or the police. It comes as no surprise when the Deputy Human Resources Minister recently disclosed that only about 110 such cases mistreatment of Indonesian housemaids[27] and other workers by their Malaysian employers were reported annually to the ministry since 2002[28]

It must also be noted that many Malaysian employers of migrant workers, other than domestic workers, also do hold on to travel documents, wages and do deprive their employees freedom of movement and access to communication.

---

[27] Malaysiakini 22/5/2004; "Housewife Charged for Horrific Maid Abuse" "…three charges of voluntarily causing grievous hurt to Nirmala Bonat (from West Timor), 19, with dangerous weapon - an iron and hot water - at her house at 33B-25-6, Villa Putera, Jalan Tun Ismail here in January, March and April this year.She is also charged with voluntarily causing grievous hurt to Nirmala with a metal cup at the same place at 3pm on May 17 this year…"

[28] Bernama, 6/3/2006 "Malaysia Ready To Accept More Indonesian Housemaids"

In one shop, a Nepali worker, I spoke to recently, who has been in Malaysia several months have not even been allowed to step out of the shop – all he has seen and knows about Malaysia is what he sees from the shop entrance.

UNDOCUMENTED MIGRANT WORKERS

Some of these are really refugees from Aceh, Southern Thailand, Southern Philippines[29] and Burma, and of course they cannot come to Malaysia with the blessings of the sending country.

Some others come across the border because they just cannot afford the payments that they have to fork out to pay the agents and/or the various government authorities, and the fact that it is so easy and cheaper to just sail over or cross the border and find jobs here.

But alas being undocumented makes them vulnerable to abuse by the authorities, police and even "employers".[30]

MIGRANTS ARE HUMAN NOT SAINTS

Migrants are human beings and not saints. Of course, there will migrant workers who abuse their employer, steal, commit murder, traffic in drugs and involve themselves in criminal activity. But what is sad is that for whatever reason, their crimes are highlighted more than others. There is no study to show conclusively that the percentage of migrants in the country involved in crime (or alleged to have committed crime) is higher than the percentage of local Malaysians involved in criminal activities. Some say the highlighting of crime committed by migrants is a strategy to get a better deal when the MOUs are

[29] Malaysiakini 2/3/2005 "At least 100 Filipinos arrested in Immigration crackdown: official" "…Up to half a million Filipinos live in Malaysia, many of them families of refugees who fled a separatist rebellion on the Mindanao region of the southern Philippines in the 1970s…"

[30] Malaysiakini,28/2/2005 '100.000 Indon illegal workers 'not paid wages' "…About 100,000 Indonesian illegal migrant workers who have not been paid wages are refusing to return home even in the face of an imminent crackdown, claimed Indonesia's Labour and Transmigration Minister Fahmi Idris today…"

signed between sending countries and receiving countries. Whatever the reason is, this perspective of migrants has resulted in prejudice against migrants.

DISCRIMINATION OF MIGRANTS BASED ON NATIONALITY

For the same work done, Indonesian migrants get the least remuneration compared with those from other countries.[31] When it comes to Filipinos, they are the highest paid of all migrants.[32] The cause could be that some government are more determined to protect their citizens than other government.

A BLEAK FUTURE UNLESS…

There are many other aspects of migrants and human rights that should be looked at but have not been done in this paper. Work Conditions, Exploitation by the Middle Man, Detention Conditions, Local Reaction to Migrants, Migrants and the Worker Unions and Crackdowns by the State are just some of the areas that could not be covered here.

What has been touched on is maybe just chapter one of a many chaptered book on migrant workers. Being human persons there is so many different aspects and facets of existence that need to be analyzed and discussed, and this paper only deals with a few.

There is definitely a need for legislation to protect labour rights and other rights of migrants. The 300,000 over domestic workers especially need legislation to protect their rights, There must also be a development of a mechanisms and procedures to ensure that there is real access to justice.

---

[31] Malaysiakini(an AFP Report), 30/3/2006 "June Signing of Pact for Indon Maids"

[32] Malaysiakini, 13/2/2006 "Minister: No perks for Indonesian Maids" – "…The live-in maids often receive a salary averaging RM380 a month, far less than counterparts from the Philippines…" "..Home Affairs Minister Azmi Khalid said that allowing Indonesian maids to be hired under the country's labour law - which would provide for annual and sick leave, days off and overtime payment - would complicate matters for employers, said the *New Straits Times*" "..foreign maids in Malaysia are prey to physical, psychological and sexual abuse because of flawed government policies and typically work 16 to 18 hour days..."

With the ratification/accession of the UN Convention on the Rights of the Child (CRC) and the CEDAW, there is great possibility that rights of migrants provided directly and indirectly in these conventions could be relied upon for greater recognition and protection of migrant rights.

Malaysia, with its 26 million population, has the largest disparity between the rich and the poor in Southeast Asia[33]. Malaysia's top 10 percent of the population is 22.1 times richer than the poorest 10 percent. There is also growing unemployment within the local population. One of the reasons is the fact that Malaysian government, companies and institutions have been working towards becoming more efficient to be able to compete with the foreign companies, institutions and banks when the doors are open to free trade in compliance with the obligations of Malaysia under the World Trade Organisation (WTO) Agreements, the Asean Free Trade Agreement (AFTA) and the various other Free Trade Agreements it has entered into. In this drive to become more efficient, it is labour that is sacrificed and more persons are becoming unemployed. Jobs, especially permanent jobs, are getting more and more difficult to come by. With the recent 40 cent increase of petrol price, the cost of living will also further increase. Bleak times are ahead for Malaysians, and this would also affect migrants/refugees in Malaysia.

---

[33] Malaysiakini, 2/2/2006 'M'sia has worst income disparity in SEA, gov't flayed"